IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM SLONE, MICHAEL MERRITHEW, Plaintiffs/Appellants, vs. TAXI COMMISSION, CITY AND COUNTY OF SAN FRANCISCO, HEIDI MACHEN, Executive Director, CITY AND COUNTY OF SAN FRANCISCO, a California public entity, Defendants/Appellees.	No. 08-16726 (U.S. District Court No. 07-cv-03335-JSW)

ANSWERING BRIEF OF APPELLEES

On Appeal from the United States District Court
for the Northern District of California

The Honorable Jeffrey S. White

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PRELIMINARY STATEMENT

The City and County of San Francisco ("the City") has taken an innovative approach to the licensing of taxicabs. This approach was first adopted by the voters in 1978, with the passage of Proposition K. Under Proposition K, taxi permits ("medallions") are public property owned by the City and issued to individual working drivers. Proposition K was designed to shift the City's taxi permitting process from a system that allowed nondrivers (both companies and individuals) to hold medallions as private property to be bought and sold for large sums of money, to a system in which medallions belong to the City and may only be issued to individual drivers for a nominal processing fee. Towards that end, 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. This mandate is known as the "driving requirement." In practice, it requires that medallion holders drive either 156 four-hour shifts or 800 hours per year.

The driving requirement is a longstanding, core feature of the City's taxi medallion system. It effectuates the program's central purpose of ensuring that medallions are held by working drivers, not merely leased out for profit by companies or nondrivers. It serves to promote equity in the cab industry by avoiding the creation of separate classes of owners and drivers, and providing drivers with entrepreneurial opportunity. It also serves to improve the quality of taxi service by increasing the professionalism, experience and stability of the driver workforce. And it promotes greater cleanliness, comfort, and safety of vehicles, because the permitholder must drive the taxicab frequently and thus has a personal incentive to ensure that the vehicle is clean, comfortable, and safe. ER 263-64.

The essential nature of the driving requirement is made clear in the plain language of Proposition K (Sections 2 and 3), as well as its legislative history. Indeed, the California Court of Appeal has recognized that Proposition K contains a "strong policy" requiring medallion holders to drive their cabs. *San Francisco Taxi Permitholders & Drivers Ass'n. v. San Francisco*, 2002 WL 1485354 at *5 (Cal. Ct. App. 2002) (unpublished) ("*Permitholders*"). The City's consistent legislative and administrative implementation of the taxi medallion program demonstrates that the driving requirement has always been a key element of the program. And the voters of San Francisco agree. A quarter-century after adopting Proposition K, the voters again spoke emphatically to the issue in 2003 by rejecting Proposition N, a ballot measure which, if adopted, would have eliminated the driving requirement for disabled medallion holders.

Appellants William Slone and Michael Merrithew argue that Title II of the Americans With Disabilities Act, 42 U.S.C. § 12132 ("ADA"), requires the City to waive entirely the driving requirement for medallion holders who become unable to drive due to a disability. In their view, the ADA requires the City to allow medallion holders to keep their City-owned medallions for years on end even though they no longer drive, and reap profits by leasing their cab out to be driven by others. Slone and Merrithew thus seek to transform the City's taxi medallion program into precisely what the voters sought to prevent it from being – a source of passive income that is a lifetime entitlement for nondriving medallion holders. Their proposal would be particularly destructive of the program because the City issues a finite number of taxi medallions, and every medallion held by a nondriver necessarily would be at the expense of a working cab driver on the waiting list for a medallion.

The Supreme Court has made clear that while the ADA obligates a public entity to provide a "reasonable modification" to make a program accessible to the disabled, the public entity is not required to waive an essential eligibility requirement of the program, because doing so would fundamentally alter the nature of the program. *See, e.g., Tennessee v. Lane*, 541 U.S. 509, 532 (2004) (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 …"); *PGA Tours Inc. v. Martin*, 532 U.S. 661, 689 (2001) ("[W]aiver of an essential rule ... for anyone would fundamentally alter" a program). Here, driving is clearly an essential eligibility requirement. The ADA thus does not require the City to waive it. And that entitles the City to summary judgment.

Slone and Merrithew attempt to distract the Court from this inquiry. They latch on to the district court's allegedly erroneous reading of a provision in Proposition K – Section 4's "continuous operation" requirement – that is irrelevant to whether driving is an essential eligibility requirement. As noted above, the driving requirement does not require medallion holders to drive their taxicabs full-time; the maximum time a medallion holder may be forced to drive is 800 hours per year. Accordingly, Section 4 serves primarily to ensure that taxicabs remain in operation even when they are not being driven by medallion holders. The district court dutifully applied state law (the 2002 *Permitholders* decision) to conclude that the driving requirement, in addition to being embodied in Sections 2 and 3, is also embodied in Section 4. But even if that conclusion were incorrect, it would not change the outcome of this case. Sections 2 and 3 of Proposition K still contain the driving requirement, and decades of legislative and administrative implementation of the City's medallion program further demonstrate the centrality of that feature of

the program. Beyond relying on the red herring of Section 4, Slone and Merrithew advance no other reason why the driving requirement is not an essential eligibility requirement of the program. Nor do they explain how the core purposes of the City's program are furthered by Section 4's operation requirement, which, if implemented without the driving requirement, would allow medallion holders to be absentees who lease out their medallions, reap profits and never personally drive, thereby defeating the program's central goals of workforce equity and clean, professional and safe taxi service.

To be sure, the City could have chosen to adopt a taxi permitting system that countenanced absentee medallion holders. But that is not the system the City has adopted; indeed, the City has deliberately and repeatedly *rejected* that approach. And courts will not substitute their own concept of the proper purposes of a public program for those embodied in the eligibility requirements adopted by the legislative branch or the voters. *See, e.g., Aughe v. Shalala*, 885 F. Supp. 1428, 1433 (W.D. Wash. 1995). By creating a class of absentee medallion holders, Slone and Merrithew's proposed alteration would subvert a key purpose of the City's taxi medallion program and "create a program that the [City] never envisioned when it enacted" Proposition K and the Police Code. *Easley v. Snider*, 36 F.3d 297, 305 (3rd Cir. 1994). Such a radical alteration of the medallion program is not a "reasonable modification" required by the ADA. 28 C.F.R. § 35.130(b)(7). The Court should affirm the decision below.

JURISDICTIONAL STATEMENT

The City agrees with the statement of jurisdiction in Appellants' opening brief.

STATEMENT OF THE ISSUE

Whether Title II of the ADA requires the City to waive its voter-created, statutory driving requirement for taxi medallion holders who are permanently or indefinitely unable to drive due to disability?

STATEMENT OF FACTS

A. San Francisco's Taxi Medallion Program

1. Proposition K[1]

Before 1978, taxi medallions in San Francisco were treated as private property of corporations and individuals, and were bought and sold to the highest bidder. ER 179. Medallion holders could simply lease out their medallions for lucrative fees, while never having to do any driving. And they had little incentive to ensure that their cabs were kept clean and safe, because they were not required to drive those cabs; they were simply collecting checks.

In 1978, the City's voters adopted Proposition K, an initiative ordinance that reformed, and indeed radically changed, this system. *See* ER 174, 179. Under Proposition K, medallions issued after 1978 are public assets owned by the City, and are issued to individual drivers for a nominal processing fee. Medallions are not issued to companies, and a person may not hold more than one medallion. Further, the medallion holder may not sell or transfer his medallion to another person. ER 174. Individual drivers are issued a medallion by the City after reaching the top of a lengthy waiting list. The waiting list is currently over 3,000

[1] Proposition K is located in Appendix 6 of the City's Administrative Code, where all voter-approved ordinances may be found. ER 174. As explained below, the Board of Supervisors went on to implement the City's taxi medallion program in the Police Code, which is the main repository of the City's taxi laws. ER 182. The driving requirement thus resides in two separate City codes.

persons long and the wait to receive a medallion is 13 to 14 years. ER 129. The system created by Proposition K thus stands in sharp contrast to systems like New York City's, in which medallion holders actually own their medallions (purchasing them for several hundred thousand dollars), and, rather than being required to drive their cabs, can simply lease them out and reap a portion of the profits of the drivers' work.

In accordance with the principle that medallions should be held by actual, working drivers, not companies or absentee owners, Section 2(b) of Proposition K requires every applicant for a medallion to declare under penalty of perjury that he or she intends to "actively and personally" drive his/her cab "for at least four hours during any 24-hour period on at least 75 percent of the business days during the calendar year." ER 175. And Section 3(d) states that the Taxi Commission, in determining whether to issue a permit, must consider whether the applicant "will be a full-time driver" as defined in Section 2. ER 175.

Although the driving requirement is sometimes referred to as the "full-time" driving requirement, it does not call for a medallion holder to drive 40 hours per week. Rather, it requires medallion holders to drive a substantial amount each year as measured by the quantitative formulas in the Police Code and Proposition K. In practice, the City interprets Proposition K's driving requirement to require medallion holders to drive a total of 156 four-hour shifts per year. ER 129.

The driving requirement reflects the voters' choice that the persons doing the day-to-day work of driving – not corporations and nondrivers – should be rewarded with medallions. The driving requirement also aims to promote more clean, comfortable and safe taxicabs, because medallion holders have a personal incentive to keep the vehicle in good condition if they must drive it frequently. In addition, the driving requirement encourages professionalism, stability and

experience in the driver workforce by giving drivers an incentive to stay in the industry for lengthy periods of time, and ensuring that cabs are driven by persons who drive a substantial period each year. The driving requirement thus seeks to assure, in the words of Proposition K, "prompt, courteous and honest service to the riding public." ER 174.

In addition, Section 4(a) of Proposition K requires medallion holders to keep their medallions in "continuous operation." ER 175. To do so, they must "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 …." ER 175. When a medallion holder is not personally driving, he or she may "operate" the medallion by leasing it out, typically to a cab company, which in turn leases it out to drivers who do not hold medallions. ER 201-202. Such leasing fees garner approximately $1,900 per month. ER 129.

2. Board of Supervisors' Implementation of the Taxi Medallion Program

In 1988, the Board of Supervisors adopted legislation fleshing out in greater detail the City's taxi permitting system. Because Article 16 of the Police Code was the main repository of taxi laws, the Board also codified Proposition K's requirements there. *See supra* note 1. The Board placed Proposition K's driving requirement in three separate parts of the Police Code:

- First, Section 1076(o) defined the phrase "full-time driver" as a "driver actually engaged in the mechanical operation and having physical charge

or custody of a motor vehicle for hire" for the set number of shifts per calendar year required by Section 2(b) of Proposition K. SER 6.[2]

- Second, Section 1081(b) required applicants to make the same full-time driving pledge under penalty of perjury as required by Section 2(b) of Proposition K. In addition, Section 1081(b) required that every post-Proposition K medallion holder "drive his or her taxicab for at least the amount of time set forth herein …." SER 15.
- Finally, Section 1090(a)(i) defined "good cause" for the suspension or revocation of a permit to include that "[t]he permittee ceased to be a full-time driver." SER 23.

In 2004, the Board of Supervisors re-codified the driving requirement in the Police Code. ER 218. The 2004 amendments revised the definition of full-time driver in Section 1076(o) to allow 800 hours per year as an alternative means of meeting the driving requirement, and relocated the full-time driving requirement from Section 1081(b) to a new Section 1081(f). ER 224, 226-227. A medallion holder can thus satisfy the driving requirement by personally driving either 156 four-hour shifts or 800 hours in a year. ER 129.

3. 2002 California Court of Appeal *Permitholders* Decision

In an unpublished decision issued in 2002, the California Court of Appeal affirmed the fact that the driving requirement is central to the medallion program. *See Permitholders*, 2002 WL 1485354 at *5. The plaintiffs in that case had challenged the "existence and application" of the driving requirement. *Id*. at *1. The appellate court held that Proposition K contained a driving requirement. *Id*. at

[2] Appellees' Supplemental Excerpts of Record are referred to herein as "SER."

*4-*7. It also upheld the 1988 Police Code provisions as "clearly within the City's legislative power to implement the provisions of Proposition K." *Id*. at *6. In response to the plaintiffs' claim that the City should adopt a "flexible interpretation" of the driving requirement to accommodate medallion holders who have become unable to drive, the Court of Appeal held that Proposition K

> … 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 *5 (emphasis added). The court's interpretation thus opened the door for the City to make some allowance in Proposition K's quantitative formula for measuring full-time driving, while noting that any such allowance must be "limited" in scope.[3]

4. The Voters' 2003 Rejection of Proposition N

In November 2003, the voters squarely addressed whether disabled medallion holders should be exempted from the driving requirement. Proposition N, a one-sentence ballot measure, stated: "Shall the City be prohibited from taking away a taxi permit if the permit hold is unable, because of a disability, to drive the taxi the required minimum number of hours or shifts per year?" ER 266. The Ballot Simplification Committee's digest in the voter information pamphlet explained: "If you vote 'No,' you do not want to prevent the City from taking away a taxi permit if the permit holder is unable to meet the minimum driving

[3] In *Permitholders*, the court was not presented with, and did not address, the issue in this case, namely, whether the driving requirement is consistent with the ADA.

requirement because of a disability." ER 266. The voters rejected Proposition N by a margin of 72% to 28%. ER 277.

5. Taxi Commission Regulations and Resolutions

In April 1999, shortly after it was formed, the newly created Taxi Commission adopted "Rules and Regulations for Taxicabs."[4] SER 26, 27. These regulations included the following provision implementing the driving requirement: "[A]ll Medallion Holders must drive their own medallion number taxicab when complying with the full-time driving requirement provision of [] Sec. 2(B) of [Proposition K]." SER 33.

In 2002, the Taxi Commission adopted Resolution 2002-93, affirming the importance of the driving requirement and describing it as an essential eligibility requirement of the taxi medallion program. ER 263-264. The Resolution recognized "the importance" Proposition K "places on permitholders driving on a continuous basis," and stated that "a basic principle central to Proposition K is that permitholders be full-time drivers rather than absentees." ER 263. The Resolution also enumerated the many purposes served by the driving requirement:

> • 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;

[4] Proposition K originally gave the Police Commission authority over taxi permitting. ER 174. In 1998, the voters passed a ballot measure transferring that authority to a newly created Taxi Commission. ER 167, 247.

> • 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; …

ER 263-64. The Resolution affirmed that the driving requirement is an "essential eligibility requirement" of the City's program and "that exempting a permitholder from that requirement would fundamentally alter the nature" of the program. ER 264.

Finally, in 2006, the Taxi Commission adopted Resolution 2006-28, which again confirmed the importance of Proposition K's driving requirement. ER 279. The Resolution set forth limited modifications of the driving requirement for medallion holders who become temporarily unable to drive due to a disability. Under this Resolution, medallion holders may seek either (1) a one-year exemption from the driving requirement for a catastrophic recoverable illness, or (2) 120 days leave per year from the driving requirement for up to three consecutive years. ER 279. The Resolution's purpose was to help medallion holders who needed time to recover from a short-term medical problem, such as a heart attack or broken shoulder, so that they could heal and return to driving full-time.[5] *See* SER 65.

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[5] Relying on an unadopted plan of the Taxi Commission's Executive Director, Slone and Merrithew allege that by adopting Resolution 2006-28, the Commission "repudiated their prior informal policy." Op. Br. at 19. But Appellants mislead the Court, because no such prior "policy" existed. As Slone and Merrithew concede, the Executive Director's proposal from 2003 was never adopted by the Commission as a policy. ER 121. And that proposal was not itself a Commission policy. Under the City Charter, the only administrative entity that is authorized to set "policy" for the regulation of taxis in the City is the Taxi

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B. The Lawsuit

On June 26, 2007, Slone and Merrithew filed a putative class action suit in the United States District Court for the Northern District of California, seeking declaratory and injunctive relief on the theory that the ADA requires the City to waive the driving requirement for taxi medallion holders who are unable to drive due to a disability. In the Complaint, Slone and Merrithew allege that they are each "unable to operate his taxicab vehicle personally" due to a physical disability. ER 334. Slone and Merrithew sought to represent a class of over 150 medallion holders "who now, or in the future will" suffer from physical or mental disabilities. ER 333.

The Complaint contends that the City should "modify or waive" the driving requirement for disabled drivers, "subject to annual review," "until their disabilities have medically resolved." ER 334-335, 348-349. Slone and Merrithew claim that they should be allowed to keep their City-owned medallions without driving so long as they continue to "operate" their permits by keeping their vehicles on the street and leasing them out to other drivers for a profit. ER 334-335.

On February 15, 2008, before the question of class certification was presented to the district court, the City moved for summary judgment on the ground that the ADA does not require the City to exempt disabled individuals from its statutory, voter-mandated driving requirement. ER 288. The City argued that driving is an essential eligibility requirement of the City's program, waiver of

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(footnote continued from previous page)
Commission. ER 247-48; SER 63. The Executive Director has no authority to set policy. The Charter authorizes the Executive Director only to administer policies that are adopted by the Commission. *See* SER 63.

which would fundamentally alter the program. On February 29, 2008, Slone and Merrithew opposed the City's motion, and cross moved for summary judgment. They asserted that City law does not actually contain a driving requirement, and that all a medallion holder need do is arrange for the regular and daily operation of his taxicab. In their opposition, Slone and Merrithew did not assert that any factual issues precluded summary judgment. ER 96-122.

On June 30, 2008, the district court granted the City's motion for summary judgment and denied Slone and Merrithew's cross motion for summary judgment. ER 1-10. The court ruled that City law imposes a driving requirement on medallion holders, that the driving requirement is an essential eligibility requirement of the City's medallion program, and that Slone and Merrithew's requested waiver of that requirement is therefore not a "reasonable modification" required by the ADA. ER 7-10. In considering Slone and Merrithew's claim that Proposition K does not require medallion holders to actually drive, the court held that the "plain meaning of sections 2 and 3" makes clear that applicants must actually comply with the full-time driving pledge once they receive a permit:

> The plain meaning of sections 2 and 3 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. Plaintiffs contend that the specific language of section 2 and 3 of the Ordinance refer merely to applicants for permits, not to the permit holders themselves. In other words, Plaintiffs contend, the full-time driver requirement only applies upon the application process, but not to the permittees. The Court finds this argument unpersuasive. The pledge to be a full-time driver after the applicant has received the permit would otherwise be an empty promise without abiding by the terms of the pledge. The 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.

ER 7-8. In so holding, the court rejected Appellants' argument that the only requirement that applies to medallion holders is Section 4's "continuous operation" requirement. ER 8. The court also observed that the official ballot argument for Proposition K demonstrates voters' intent that permittees be full-time drivers. ER 8-9.

SUMMARY OF THE ARGUMENT

The City's duty under Title II of the ADA to provide a "reasonable modification" does not extend to waiving or compromising an essential eligibility requirement of the program. *See Tennessee v. Lane*, 541 U.S. 509, 531-32 (2004). Indeed, waiver of an essential eligibility requirement constitutes a per se fundamental alteration of a program. *See Martin*, 532 U.S. at 689 (observing that "waiver of an essential rule of competition for anyone would fundamentally alter the nature" of professional golf tournaments).

Here, it is undisputed that Slone and Merrithew cannot drive. It is also undisputed that they seek a complete waiver of the driving requirement. There is no "accommodation" short of waiver that would allow them to meet the driving requirement. Accordingly, this Court need only determine whether driving is an essential eligibility requirement of the City's taxi medallion program. If it is, then Slone and Merrithew's requested waiver of that requirement is unreasonable and, as a matter of law, is not required by the ADA. *See Martin*, 532 U.S. at 683 n.38 ("In routine cases, the fundamental alteration inquiry may end with the question whether a rule is essential.").

The driving requirement is a longstanding, core element of the City's taxi medallion program, existing at all times since the voters adopted Proposition K in 1978. The essential nature of the driving requirement is made clear not only by the text of Proposition K, but also by its legislative history, and by the City's

implementation of the driving requirement over decades. The California Court of Appeal has also recognized the driving requirement as a "strong policy" of Proposition K. And as recently as 2003, San Francisco voters affirmed the importance of the driving requirement to the City's taxi medallion program, by rejecting Proposition N, a ballot measure that would have eliminated the driving requirement for disabled medallion holders.

As this history makes clear, Slone and Merrithew's attempt to depict the driving requirement as a mere "administrative selection device" or "regulatory afterthought" is entirely without merit. To conclude that Proposition K imposes nothing more than a driving "pledge," with which medallion holders need not comply, and which is not essential to the program, ignores the core purposes of the medallion program: (1) to allow working drivers to own their cab businesses rather than working for absentee owners who can afford to purchase medallions for hundreds of thousands of dollars; and (2) to promote cleanliness, professionalism, and safety within San Francisco's taxicab industry. Equally unavailing is Appellants' attempt to distract this Court with a lengthy and confusing discussion of the "continuous operation" requirement in Section 4 of Proposition K. Regardless of whether the driving requirement is embodied in section 4 of Proposition K *as well as* in sections 2 and 3, there is a driving requirement, and it is, in fact, essential.

In addition to their untenable reading of Proposition K, Slone and Merrithew raise three new arguments for the first time on appeal. Because they did not raise any of these arguments on summary judgment before the district court, this Court should decline to consider them. *See BankAmerica Pension Plan v. McMath*, 206 F.3d 821, 825 (9th Cir. 2000) ("The parties cannot raise new issues on appeal to secure a reversal of the lower court's summary judgment determination."). In any

event, none has merit. The City's driving requirement is not facially discriminatory, it is "necessary" to the program under 28 C.F.R. § 35.130(b)(8), and there are no disputed issues of material fact that preclude summary judgment.

ARGUMENT

I. THE ADA DOES NOT REQUIRE GOVERNMENTAL ENTITIES TO WAIVE ESSENTIAL ELIGIBILITY REQUIREMENTS FOR PUBLIC PROGRAMS

Title II of the ADA prohibits a public entity from discriminating against "qualified individuals" with disabilities in its public services, programs, or activities. 42 U.S.C. § 12132. This prohibition on discrimination is limited to those who are "qualified individuals." The ADA defines a "qualified individual" as one who "*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, meets the *essential eligibility requirements* for the receipt of services or the participation in programs or activities provided by a public entity."[6] 42 U.S.C. § 12131(2) (emphasis added).

Title II is intended to prohibit "irrational disability discrimination." *Lane*, 541 U.S. at 522; *see also Townsend v. Quasim*, 328 F.3d 511, 515-16 (9th Cir. 2003) (Title II's purpose was to eliminate "unjustified segregation and isolation of disabled persons"). Accordingly, under Title II, a public entity must make

[6] To establish a prima facie case of discrimination based on disability in violation of Title II, Slone and Merrithew must produce evidence that: (1) they are "disabled" within the meaning of the ADA; (2) they are "otherwise qualified" to be medallion holders, (3) they were denied benefits solely because of their disability; and (4) the City is a public entity. *See Wong v. Regents of the Univ. of Cal.*, 192 F.3d 807, 816 (9th Cir. 1999). For purposes of the summary judgment motion only, the City disputes only the second prong of this test.

"reasonable modifications" in policies, practices or procedures to avoid discriminating on the basis of disability, unless the public entity can demonstrate that making the modification would "fundamentally alter" the nature of the service, program, or activity. 28 C.F.R. § 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 seeking modification is otherwise eligible for the service." *Lane*, 541 U.S. at 532 (citing 42 U.S.C. § 12131(2)); *see also Townsend*, 328 F.3d at 518 (public entities "are required only to make reasonable changes in existing policies in order to accommodate individuals' disabilities").

Accordingly, "[i]n routine cases, the fundamental alteration inquiry may end with the question whether a rule is essential." *Martin*, 532 U.S. at 683 n.38. That is because "the waiver of an essential rule of [a program] for *anyone* would fundamentally alter the nature of [the program]." *Id.* at 689 (emphasis added); *see also Cole v. NCAA*, 120 F. Supp. 2d 1060, 1071 (N.D. Ga. 2000) ("Abandoning the eligibility requirements altogether for this or *any athlete* is unreasonable as a matter of law and is not required by the ADA.") (emphasis added). By contrast, where a rule is deemed not essential, but rather is "at best peripheral to the nature of" a program, "it might be waived in individual cases without working a fundamental alteration." *Martin*, 532 U.S. at 689.

In determining whether an eligibility requirement is "essential" under the ADA, courts look to "the importance of the requirement to the … program." *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d. 926, 930 (8th Cir. 1994). For example, in determining whether a high school sports association's under-nineteen age limitation was an essential eligibility requirement under the

ADA, both the Sixth and Eighth Circuits examined the purposes advanced by the age restriction. The courts observed that the age restriction served several important purposes, such as "protect[ing] younger athletes from harm," "discourag[ing] student athletes from delaying their education to gain athletic maturity," and preventing "any unfair competitive advantage that older and larger participants might provide." *Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1034, 1035 (6th Cir. 1995); *Pottgen*, 40 F.3d. at 929; *see also Easley*, 36 F.3d at 304 (examining the "purposes sought to be accomplished by the legislature" in enacting the program).

The question of whether a program's requirement is an essential eligibility requirement, and therefore need not be waived under the ADA, is appropriate for summary judgment where, as here, there is no disputed factual issue. *See, e.g., Young v. Claremore*, 411 F. Supp. 2d 1295, 1310 (N.D. Okla. 2005); *Jacobsen v. Tillmann*, 17 F. Supp. 2d 1018, 1025-26 (D. Minn. 1998); *Ellis v. Morehouse Sch. of Med.*, 925 F. Supp. 1529, 1549 (N.D. Ga. 1996); *Aughe*, 885 F. Supp. at 1432-33.

Because Slone and Merrithew seek a waiver of the driving requirement, the only issue this Court need determine is whether the driving requirement is an essential eligibility requirement. The answer to that question is "yes."

II. DRIVING IS AN ESSENTIAL ELIGIBILITY REQUIREMENT OF THE CITY'S TAXI MEDALLION PROGRAM

The voters, the Board of Supervisors, the Taxi Commission, and the California Court of Appeal have all made clear that the driving requirement "is an essential dimension without which the objectives of the [taxi] program cannot be realized." *Easley*, 36 F.3d at 303.

A. Proposition K

This Court must begin by interpreting Proposition K. The California Supreme Court has set forth the standards to be applied to the interpretation of local voter initiatives like Proposition K:

> In interpreting a voter initiative, we apply the same principles that govern our construction of a statute. We turn first to the statutory language, giving the words their ordinary meaning. If the statutory language is not ambiguous, then the plain meaning of the language governs. If, however, the statutory language lacks clarity, we may resort to extrinsic sources, including the analyses and arguments contained in the official ballot pamphlet, and the ostensible objects to be achieved.

People v. Lopez, 34 Cal. 4th 1002, 1006 (2005) (internal citations omitted). In construing the plain meaning Proposition K, this court should "select the construction that comports most closely with the apparent intent of the [voters]," and avoid an interpretation "that would lead to absurd consequences," or "render particular provisions superfluous or unnecessary." *People v. Sinohui*, 28 Cal. 4th 205, 212 (2002); *Dix v. Superior Court*, 53 Cal. 3d 442, 459 (1991).

1. The Text of Proposition K

Section 2(b) of Proposition K states in relevant part:

> No [taxi] permit shall be issued unless the person applying for the permit *shall declare under penalty of perjury his or her intention actively and personally to engage as permittee driver* under any permit issued to him or her for at least four hours during any 24 hour period on at least 75 percent of the business days during the calendar year.

ER 175 (emphasis added).

In addition, Section 3(d) of Proposition K states that the Taxi Commission, "in determining whether or not public convenience and necessity exist for the issuance of a permit, may consider such facts as it deems pertinent, but must consider whether … (d) "[t]he applicant *will be a fulltime driver*, within the meaning of Section 2(b)." ER 175 (emphasis added).

Slone and Merrithew characterize the driving requirement in Sections 2 and 3 as a mere "administrative selection device" or "regulatory afterthought." *See* Op. Br. at 3, 20. But in the same breath, they concede that the district court "plausibly" interpreted Sections 2 and 3 as containing a driving requirement with which medallion holders must actually comply upon issuance of the permit. Op. Br. at 26-27. This rhetorical straddle is the inevitable result of their untenable attempt to evade the plain meaning of Sections 2 and 3.

The text of Proposition K makes clear that the voters of San Francisco placed central importance on medallion holders actually driving their cabs a substantial period of time each year. By requiring each applicant for a medallion to swear that he or she intends to drive full-time, Section 2(b) necessarily excludes from the applicant pool any person who is unwilling or unable to drive the taxi for any reason. And by submitting the sworn statement of intent, an applicant acknowledges that he or she is aware of the City's driving requirement and has made a legal commitment to honor it. As a measure of the importance of Section 2(b), it is the only provision in Proposition K that requires medallion applicants to make a pledge under penalty of perjury. Section 2(b) thus makes clear that the City's program requires medallion holders to be drivers, not mere absentees.

The voters' intent to require driving is further evidenced by the specificity with which Section 2(b) defines "full-time driving." Its detailed definition of driving – "four hours during any 24 hour period on at least 75 percent of the business days during the calendar year" – is designed to allow the City to monitor each medallion holder's actual driving on an annual basis. The quantitative specification illustrates that Section 2(b)'s purpose is to set a legally enforceable standard that the City can use to enforce the driving requirement.

Section 3 further demonstrates that the sworn statement required by Section 2(b) is not an empty pledge. Rather, it is a promise that the City expects to be fulfilled through medallion holders' actual future conduct. Section 3(d) is phrased in terms of how the applicant will actually perform, if granted the medallion. Had the voters meant to limit the Commission's inquiry to an assessment of the applicant's state of mind at the time of application, they would not have phrased Section 3(d) in terms of whether the applicant actually "will be" a full-time driver. *See Hughes v. Bd. of Architectural Exam'rs*, 17 Cal. 4th 763, 776 (1998) ("In construing statutes, the use of verb tense by the Legislature is considered significant."). As a measure of the importance of Section 3(d), this determination is one of only four determinations that Proposition K requires the Commission to make when deciding whether to issue a medallion. *See* ER 175.

Slone and Merrithew's reading of Sections 2 and 3 as embodying nothing more than an applicant's pledge, rather than a core program requirement, "would lead to absurd results the [voters] could not have intended." *People v. Birkett*, 21 Cal. 4th 226, 231 (1999). It defies common sense to suggest that the voters would have defined full-time driving in Section 2 with such specificity, and threatened applicants with perjury for misstating their intent to drive full-time, but did not intend to require medallion holders to actually drive once they got a medallion. Indeed, it makes no sense to say that driving is not a central requirement of the City's program when the City's application process is designed to screen out persons who for any reason would be nondriving medallion holders. As the district court concluded, "[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." ER 7-8.

Slone and Merrithew's reading would also render Sections 2 and 3 of Proposition K "superfluous or unnecessary." *Dix*, 53 Cal. 3d at 459. Section 2(b)'s pledge requirement would be hollow if medallion holders were not expected to actually abide by their sworn statements. Likewise, the Commission's finding in Section 3(d) that a medallion applicant "will be" a full-time driver would be completely unnecessary.

In sum, Slone and Merrithew's reading of Proposition K would render Sections 2 and 3 "nonsensical, subvert the purpose of the statute, and make surplusage of the [pledge] … contained in that provision." *People v. Poslof*, 126 Cal. App. 4th 92, 103 (Cal. App. 4th Dist. 2005). For Proposition K to treat driving as so imperative, yet not require medallion holders to actually drive upon issuance of the permit, would be to impart to the voters a degree of statutory schizophrenia that is not plausible. And for Proposition K to require driving, but treat that requirement as tangential or trivial, would be plausible only if the text clearly made that distinction, which it does not. Accordingly, this Court need look no further than Sections 2 and 3 – which highlight the importance the voters placed on medallion holders driving – to conclude that driving is an essential eligibility requirement of the Proposition K medallion system.

2. Proposition K's Legislative History

Proposition K's legislative history, set forth in the official ballot pamphlet, shows that the driving requirement was a key selling point for Proposition K. The legislative history thus confirms that driving is an essential requirement of the taxi medallion program.

a. Official Ballot Argument In Favor of Proposition K

The official ballot argument in favor of Proposition K stated that the taxicab system "must be reformed" to "prevent[] a favored few from making big profits on

taxi permits" and to curb abuses by "favored taxicab companies and individuals." ER 180. The argument three times refers to medallions going to those who will personally drive their own cabs:

- First, it states: "Under this initiative, individuals … who obtain permits with the sole purpose of reselling them for an enormous profit could not do so. 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*." ER 180 (emphasis added).
- 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." ER 180 (emphasis added).
- 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." ER 180 (emphasis added).

These multiple references to "drivers" and "driving" make clear that Proposition K contemplated that medallions would be held by real taxi drivers, not by absentees. They also demonstrate that the driving requirement is not merely a "pledge" or "administrative selection device," but that the voters intended medallion holders to actually drive once they obtained a medallion.

b. Official Argument Against Proposition K

The official ballot argument against the measure also demonstrates the voters' intent to require driving by medallion holders. That argument warns that "Proposition K would limit cabs to operation by *driver* owners who would furnish service when and where they wanted to with no consideration for the public need." ER 180 (emphasis added). By describing those persons who would receive

medallions under Proposition K as "driver owners," the measure's opponents warned voters that nondrivers would not be allowed to hold medallions. The fact that the voters adopted the measure in the face of that argument shows that they intended to do just that. *See Legislature v. Eu*, 54 Cal. 3d 492, 505 (1991) (looking to agreement between the ballot pamphlet arguments and rebuttals in construing ballot initiative).

B. The Police Code

The Board of Supervisors' implementation of the driving requirement in sections 1076, 1081 and 1090 of the Police Code – first in 1988, and again in 2004 – demonstrates its centrality to the City's taxi program. *See* SER 6, 15, 23; ER 218, 224, 226-227, 238.

Slone and Merrithew attempt to minimize the Police Code provisions by describing them as "later implementing legislation" and suggesting that the Board's adoption of these provisions constituted an improper expansion or amendment of Proposition K. Op. Br. at 28 n.8, 33.

This argument is unavailing and has been squarely rejected by the California Court of Appeal. In the face of Proposition K's "strong policy" favoring driving by medallion holders, the Board of Supervisors' implementation of the driving requirement in the Police Code in 1988 was a proper exercise of its legislative power to implement and administer Proposition K's provisions. *Permitholders*, 2002 WL 1485354 at *5, *6; *see Creighton v. City of Santa Monica*, 160 Cal. App. 3d 1011, 1022 (Cal. App. 2d Dist. 1984) (upholding City Council's implementing ordinances as consistent with "basic policies" of voter initiative). By stating that medallion holders must comply with their sworn statements to drive full-time, and must act in conformity with the Taxi Commission's finding upon issuing the medallion that the application "will be" a full-time driver, the Board's legislation

properly effectuated the intent of the voters who adopted Proposition K. *See Flavell v. City of Albany*, 19 Cal. App. 4th 1846, 1852 (Cal. App. 1st Dist. 1993) (upholding legislation adopted by city council as "in accordance with the voters' mandate"). Indeed, as discussed *supra* p.8, the California Court of Appeal in *Permitholders* upheld the 1988 Police Code provisions as consistent with Proposition K and "clearly within the City's legislative power to implement the provisions of Proposition K." 2002 WL 1485354 at *6.

Furthermore, even if one could somehow conclude that Proposition K does not make the driving requirement a core feature of the City's taxi medallion program, the requirement has unquestionably been codified for more than twenty years in the Police Code. There is no reasonable argument that the Police Code provisions implementing the driving requirement are invalid. Through the Police Code provisions, the Board of Supervisors implemented the taxi program created by Proposition K, and as the California Court of Appeal held, these provisions are legitimate interpretations that further Proposition K's policies. *See Permitholders*, 2002 WL 1485354 at *6-7.

Thus, the Police Code not only confirms the essential nature of Proposition K's driving requirement, it provides an independent statutory basis for the Court to conclude that driving is a basic, central requirement of the City's taxi medallion program, and thus is an essential eligibility requirement of that program.[7]

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[7] Slone and Merrithew also contend that the driving requirement has not been a core feature of the City's program since 1988 because of a 2000 City Attorney opinion which stated that the Taxi Commission "could decide" driving is an essential requirement. *See* Op. Br. at 28 n.8. Appellants apparently find significance in the fact that the 1988 Police Code provisions did not label the driving requirement as an essential eligibility requirement. But the ADA did not

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C. Administrative Regulations and Resolutions

Like the Board of Supervisors, the Taxi Commission has consistently recognized driving as a central feature of Proposition K.[8] When the Commission was first created in 1999, it adopted regulations requiring medallion holders to meet the full-time driving requirement provision of Section 2(b) of Proposition K. SER 26, 33. The regulations also contained numerous rules and procedures for administering the driving requirement, the validity of which were affirmed in *Permitholders*. *See Permitholders*, 2002 WL 1485354 at *10-11. As the regulations make clear, the Commission understood the driving requirement in Section 2(b) of Proposition K to apply to medallion *holders*, not just applicants.

Resolution 2002-93, adopted in 2002, further confirms the centrality of the driving requirement. ER 263-64. Resolution 2002-93 explains how the driving requirement serves to increase the professionalism of drivers and the quality of taxi services, promote stability in the workforce, and promote equity in the cab industry

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even exist in 1988. Moreover, it is not necessary for a statute to expressly label a requirement as "essential" for it to be essential within the meaning of the ADA. *See infra* note 9. The City Attorney opinion in 2000 addressed the ADA's requirements, which, up until then, the City had not had reason to expressly consider. The opinion simply advised the Commission that the ADA does not require the City to fundamentally alter its program by waiving an essential eligibility requirement. It did not "amend" or "expand" Proposition K, as Appellants contend.

[8] The construction of a statute by the administrative agency charged with its enforcement is entitled to great weight. *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal. 3d 1379, 1388 (1987). The Taxi Commission is the agency charged with the enforcement and interpretation of Proposition K and the provisions regulating taxicabs in Article 16 of the Police Code. *See* ER 247-48.

by avoiding the creation of separate classes of owners and workers. *See supra* p.10-11. It also states that Proposition K's "main purpose" of ensuring medallions are held by "only bona fide drivers" would be compromised if nondrivers were allowed to hold medallions. For these reasons, the Commission explained, the driving requirement is an "essential eligibility requirement."[9] ER 264.

Finally, in Resolution 2006-28, the Taxi Commission again recognized the central importance the voters placed on the driving requirement. Pursuant to the *Permitholders* decision discussed *supra* p.9, the Commission provided for limited modifications of the driving requirement for persons suffering from a short-term, recoverable illness. But in doing so, the Commission expressly affirmed in the Resolution that it is an "essential eligibility requirement."[10] *See* ER 279.

Thus, since its inception in 1999, the agency responsible for implementing Proposition K has consistently considered the driving requirement essential to the City's program.

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[9] The fact that Resolution 2002-93 was the first time that the City used the precise phrase "essential eligibility requirement" to describe the driving requirement is immaterial to the legal question of whether that requirement is an essential eligibility requirement. In determining whether an eligibility requirement is "essential" within the meaning of the ADA, courts look to "the importance of the requirement to the … program." *Pottgen*, 40 F.3d. at 930. Courts do not look to whether a public entity has explicitly labeled the requirement an "essential eligibility requirement."

[10] The short-term relief allowed for by Resolution 2006-28 does not somehow render the driving requirement no longer "essential" to the City's program. The fact that a requirement is an essential eligibility requirement cannot possibly mean that a public entity has no leeway to provide short-term assistance to persons who have become temporarily unable to meet that requirement, but will be able to do so again in the near future. To conclude otherwise would punish public entities for treating medallion holders reasonably.

D. Proposition N

The essential nature of the driving requirement was, in effect, put to the voters in November 2003, with Proposition N, a measure which, if adopted, would have prevented the City from revoking a medallion if the medallion holder was unable to meet the driving requirement because of a disability. ER 266. Rejecting Proposition N by an overwhelming margin of 72% to 28%, the voters of San Francisco resoundingly affirmed that the driving requirement is a core feature of the City's program. ER 277.

E. The California Court of Appeal's *Permitholders* Decision

The California Court of Appeal has confirmed that the driving requirement is a core component of Proposition K. In *Permitholders*, the California Court of Appeal held that "Proposition K imposes a full-time driving requirement even if the permit holder's ability to drive full time changes." 2002 WL 1485354 at *4. In so holding, the court observed "the importance given to the full-time driving standard of section 2, subdivision (b)," and that Proposition K has a "*strong policy*" favoring full-time driving by permit holders. *Id*. at *5, *6 (emphasis added).

The California Court of Appeal's finding that the driving requirement is a core component of Proposition K "is a datum for ascertaining state law which [this Court] may not omit unless [it] [is] convinced by other persuasive data that the highest court of the state would decide otherwise."[11] *Johnson v. Riverside*

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[11] As Slone and Merrithew concede, Op. Br. at 25-26, in interpreting a local statute like Proposition K, this Court must follow the decisions of the state's highest court. Where, as in this case, the state's highest court has not spoken on an issue, this Court examines state appellate court opinions. *Johnson v. Riverside Healthcare System, LP*, 534 F.3d 1116, 1125 (9th Cir. 2008); *see also West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940) ("[A] federal court is not free to reject the state rule merely because it has not received the sanction of the highest

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Healthcare Sys., LP, 534 F.3d 1116, 1125 (9th Cir. 2008) (internal quotation marks and citation omitted). There is no reason the California Supreme Court would not agree with the Court of Appeal's resolution of the basic issues in *Permitholders*. Thus this Court should defer to the *Permitholders* decision's finding that the driving requirement is an essential feature of the City's program.

F. Section 4's "Continuous Operation" Requirement Is Irrelevant To Whether Driving Is An Essential Eligibility Requirement

Against all this – Proposition K's text and history, the Police Code provisions implementing the driving requirement, administrative interpretations and resolutions on the driving requirement, the defeat of Proposition N, and the *Permitholders* decision – Slone and Merrithew focus their response on a statement in the district court's opinion that the driving requirement is contained not only in Sections 2 and 3 of Proposition K, but also in Section 4. They allege that the court erroneously "conflated" Section 4's "continuous operation" requirement with the entirely "distinct" and "separate" driving requirement in Sections 2 and 3. According to Slone and Merrithew, "operation" does not include personally driving, but can be accomplished by a medallion holder simply by leasing out his vehicle to be driven by others. They claim that because of this alleged error in the district court's reading of Section 4, they should prevail in this case.

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state court...."). That the appellate court's decision in *Permitholders* is unpublished does not entitle this Court to disregard it. In *McSherry v. Block*, 880 F.2d 1049 (9th Cir. 1989), this Court held that it was bound by a state court's construction of a state statute, notwithstanding that the decision was unpublished. *See id.* at 1053 n.2 (holding that federal court may not disregard state court's construction "merely on the basis that its construction was rendered in an unpublished opinion").

This argument is nothing but a distraction. As discussed below, the district court did not err in its reading of Section 4. But even if it did, the fact remains that driving is an essential eligibility requirement of the City's taxi medallion program for all of the reasons previously stated. With respect to Proposition K, as explained above, Sections 2 and 3, on their own, establish the driving requirement. Indeed, the district court looked to the "plain meaning of sections 2 and 3" alone to conclude that Proposition K requires medallion holders to drive. *See* ER 7. The district court's conclusion that Section 2 is not an "empty promise," but a requirement with which medallion holders must actually comply, in no way rested on the scope or meaning of Section 4. ER 7-8.

Moreover, Slone and Merrithew's attempt to depict Section 4's operation requirement as the singular part of Proposition K that advances the measure's "core purposes" of "prompt, courteous and honest service to the riding public" is nonsensical. Op. Br. at 20. A regime in which absentee medallion holders merely "operate" their medallion by leasing it out to others, reaping profits, and never personally driving, would undermine Proposition K's core purposes. Slone and Merrithew ignore the fact that one of Proposition K's central goals was to put taxi medallions in the hands of working *drivers*. As the Taxi Commission explained in Resolution 2002-93, the driving requirement is essential to Proposition K's "central purpose" of creating a taxi system "in which only bona fide drivers would hold permits." ER 263. The City has also reasonably concluded that the driving requirement furthers passenger service goals because it "promote[s] 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." ER 263. It also promotes a more stable driving work force by giving drivers incentive to stay in the industry for lengthy

periods of time, and "promote[s] 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." ER 263. Having a stable work force of experienced drivers, who have a personal stake in the taxis they drive, benefits the riding public. None of these objectives is furthered by the operation requirement, which, if implemented without any driving requirement, would greatly diminish these incentives. Slone and Merrithew's claim that the core purposes of Proposition K could be fully advanced by the operation requirement alone, with no driving requirement, is wildly off the mark.

In any event, in light of the California Court of Appeal's holding in *Permitholders*, the district court reasonably concluded that Section 4 included the driving requirement. In *Permitholders*, the court held that Section 4(a)'s operation requirement "reflects" the quantitative driving standard in Sections 2 and 3. 2002 WL 1485354 at *5. Slone and Merrithew selectively quote part of a sentence from the *Permitholders* decision to suggest the court's holding was limited to the conclusion that Section 4 establishes "a distinct standard" from Sections 2 and 3. Op. Br. at 28. But that sentence in its entirety states that Section 4's standard "is not necessarily a less stringent one" than Section 2 and 3. *Permitholders*, 2002 WL 1485354 at *9. As the court explained,

> [A]lthough section 4, subdivision (a), does not incorporate the exact language of section 2, subdivision (b), our analysis does not indicate that the standard set forth in section 4, subdivision (a) is always or usually less stringent than the standard of section 2, subdivision (b). The City may reasonably construe section 4 as incorporating the *identical standard* as section 2, subdivision (b), in a broad range of cases.

Id. at *6 (emphasis added). The district court's interpretation of Section 4's continuous operation requirement as encompassing or "reflecting" the driving requirement is thus entirely consistent with the Court of Appeal's reading in

Permitholders.[12] It is also a reasonable interpretation. Accepting arguendo the linguistic distinction between driving a taxi and operating a taxi "business," in light of Sections 2 and 3 of Proposition K and its legislative history, it is reasonable to conclude that one aspect of operating a taxicab business is that the medallion holder personally drive the taxi that constitutes the business. Slone and Merrithew are correct that "operation" consists of all of the tasks of running a taxi business, which includes leasing out the medallion when a medallion holder is not personally driving. *See* ER 201-02. But the fact that the "operation" requirement covers a broader swath of duties beyond just personal driving does not somehow eliminate the driving requirement.

* * *

In sum, the driving requirement is necessary to ensure that a central purpose of Proposition K is achieved – that medallions are held by working drivers, and not simply leased out for profit by absentees. The voters, the Board of Supervisors and the Taxi Commission have consistently recognized the existence of the driving requirement and its importance to the City's program, and with good reason.

And that is the end of the case. Because personal driving is not only a statutory requirement, but an essential eligibility requirement of the City's taxi medallion program, the ADA does not require the City to waive that requirement. Public entities are required to make "reasonable" modifications only, and are not required to make modifications that would "fundamentally alter" public programs.

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[12] It bears repeating that the district court addressed Section 4 in its opinion only after it had completed its analysis of Sections 2 and 3, and only for the purpose of responding to Slone and Merrithew's argument that Proposition K requires medallion holders to "operate" their vehicles, but not to drive. ER 8.

See 28 C.F.R. § 35.130(b)(7). As the Supreme Court has made clear, and as the district court properly concluded in this case, waiver of an essential eligibility requirement is not a "reasonable accommodation" under § 35.130(b)(7) as a matter of law. *See Martin*, 532 U.S. at 689 (waiver of an essential rule for anyone would fundamentally alter the nature of the program); *Lane*, 541 U.S. at 532 (states are not required to compromise their essential eligibility criteria for public programs).[13] Because Slone and Merrithew seek the waiver of a core requirement of the City's taxi medallion program, not of a "peripheral rule," this Court's "fundamental alteration inquiry may end with the question whether a rule is essential." *Martin*, 532 U.S. at 683 n.38.

III. SLONE AND MERRITHEW'S OTHER ARGUMENTS ARE WITHOUT MERIT

Slone and Merrithew attempt to evade this unavoidable reality by raising three new arguments on appeal. The first two of these arguments were likely waived. *See In re Am. W. Airlines, Inc.*, 217 F.3d 1161, 1165 (9th Cir. 2000) (this court "generally will not consider arguments raised for the first time on appeal"). And the third argument was clearly waived. *See BankAmerica*, 206 F.3d at 825 (holding appellant waived factual dispute that was never raised on summary judgment before the district court). Nevertheless, we address the three arguments in the event the Court considers them. None of these new arguments has merit.

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[13] *See also Pottgen*, 40 F.3d at 930 ("Waiving an essential eligibility standard would constitute a fundamental alteration"); *Jones v. Monroe*, 341 F.3d 474, 480 (6th Cir. 2003) (waiver of essential time limit would fundamentally alter City's parking program); *Aughe*, 885 F. Supp. at 1433 (waiver of essential requirement of state program not reasonable modification).

A. The City's Taxi Law Is Not Facially Discriminatory

Slone and Merrithew allege that the fundamental alteration test of 28 C.F.R. § 35.130(b)(7) does not apply to this case because the City's law facially discriminates against the disabled. The City's law is not facially discriminatory.

The City's law is concerned only with whether medallion holders can, will, and actually do drive the required number of hours or shifts per year.[14] It does not impose an "able-bodied" requirement. Indeed, there are able-bodied persons who cannot meet the driving requirement – for example, because they do not have a driver's license or live hundreds of miles from San Francisco – and who therefore are not eligible for a medallion. By the same token, a disabled person who can drive 800 hours per year is eligible for a medallion. Indeed, a disabled person who cannot drive for more than a four-hour stretch at time (say, due to a chronic back condition) would still be eligible, given that the driving requirement can be satisfied by driving four-hour shifts. So too would a disabled person who can meet the driving requirement with an accommodation such as special seating equipment or an exemption from carrying luggage. ER 168, 252-55. The City's law does not categorically exclude disabled persons.

As such, this case is distinguishable from the three cases Slone and Merrithew cite in support of this claim. In *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch* ("*BAART*"), 179 F.3d 725 (9th Cir. 1999), the Antioch City Council enacted an ordinance expressly prohibiting methadone

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[14] The Police Code requires "[e]very permittee ... shall be a full-time driver," ER 188, and Proposition K requires every medallion applicant to make a full-time driving pledge and the Taxi Commission to find "[t]he applicant will be a full-time driver." ER 175.

clinics from being located within 500 feet of residential property. *Id*. at 729. This court held that where the statute "discriminates against qualified individuals on its face rather than in its application," § 35.130(b)(7)'s fundamental alteration test makes little sense, and therefore the test did not apply to facially discriminatory laws like the methadone prohibition ordinance. *Id*. at 734. At the same time, this court affirmed that the fundamental alteration test *does* apply to neutral laws that may have a disparate impact on the disabled. *Id*.

Similarly in *Lovell v. Chandler*, 303 F.3d 1039 (9th Cir. 2002), a Hawaii law categorically excluded on its face "the aged, blind, and disabled" ("ABD") from access to a state health insurance program. *Id*. at 1045. Applying the holding in *BAART*, the *Lovell* court found that because the statute's categorical exclusion of the ABD population "facially discriminates against the disabled," the fundamental alteration defense did not apply. *Id*. at 1054.

Finally, in *Townsend*, Washington state's Medicaid program offered community-based long term care services to "categorically needy" persons – i.e., low-income persons – but expressly excluded "medically needy" disabled persons. 328 F.3d at 514. Because the appellants in that case did not challenge the applicability of the fundamental alteration test, this Court assumed it applied. *Id*. at 518. In dicta, however, this court observed that "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...." *Id*. at 518 n.2.

These cases have no bearing on this appeal. Unlike the ordinances in *BAART*, *Lovell*, or *Townsend*, the City's driving requirement is not facially discriminatory. Accordingly, the district court properly applied § 35.130(b)(7)'s fundamental alteration test. *See BAART*, 179 F.3d at 734 (the fundamental

alteration test does apply to neutral laws that may have a disparate impact on the disabled).

B. The Driving Requirement Does Not Violate § 35.130(b)(8)

Slone and Merrithew allege that the City's law violates 28 C.F.R. § 35.130(b)(8) because it "screens out" disabled individuals. Op. Br. at 38. Section 35.130(b)(8) 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 a disability 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.

(emphasis added).[15]

In determining whether eligibility criteria are "necessary" under § 35.130(b)(8), courts employ the same inquiry as used to determine essential eligibility requirements. *See Pottgen*, 40 F.3d at 930 (using "necessary" and "essential" interchangeably in qualification analysis). For example, in *Bauer v. Muscular Dystrophy Ass'n, Inc*., 427 F.3d 1326 (10th Cir. 2005), plaintiffs alleged that by requiring that volunteer counselors be able to "lift and care" for campers, the defendant had imposed eligibility criteria that would screen out or tend to screen out individuals with disabilities in violation of Title III. *Id*. at 1329. The court held that the "lift and care" rule was "necessary" for the safe operation of the camp and "to provide the privileges and advantages of the camp to the intended

[15] By its plain terms, § 35.130(b)(8) refers to the "screening out" of persons at the outset or during the application process. Interestingly, in this lawsuit, Slone and Merrithew do not challenge the application of the driving requirement to *applicants* on the City's medallion waiting list. They are concerned only with its application to persons who have already been issued a City medallion.

beneficiaries of the camp." *Id*. at 1332. Because "being able to lift and care for campers was an *essential function* for volunteer counselors," the criteria did not run afoul of the ADA. *Id*. (emphasis added); *see also Pottgen*, 40 F.3d at 931 n.6 (because age limit was "essential eligibility requirement" it was also "necessary" under § 35.130(b)(8); *Easley*, 36 F.3d at 301-304 (finding no violation of § 35.130(b)(8) because requirement is "essential" and "necessary" for program); *Jacobsen*, 17 F. Supp. 2d at 1025 (finding no violation of § 35.130(b)(8) because test was an essential eligibility requirement).

Thus, for the same reasons that the driving requirement is an "essential eligibility requirement" of the City's taxi program as set forth above, so too is it a "necessary" requirement under § 35.130(b)(8).

C. The Reasonableness of Slone and Merrithew's Requested Waiver Was Properly Decided on Summary Judgment

Finally, Slone and Merrithew argue that the reasonableness of their requested waiver is a question of fact requiring an "individualized inquiry" that should not have been decided on summary judgment. They make this argument for the first time on appeal, notwithstanding the fact that in the proceedings below, they made no assertion that a factual dispute precluded resolution of the case on summary judgment.[16] Accordingly, they have clearly waived this argument. *See BankAmerica*, 206 F.3d at 825 (holding that appellant waived argument regarding factual dispute that was never raised before the district court on summary judgment).

[16] Indeed, they concede in the first page of their opening brief to this Court that this case presents a "legal question." Op. Br. at 1.

Slone and Merrithew cite two cases to support their claim that fact questions precluded summary judgment for the City. In the first, *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996), a class of visually impaired persons who used guide dogs sought an exemption from Hawaii's imposition of a 120-day quarantine on all dogs entering the state. The plaintiffs contended that there were more effective alternatives – such as vaccines – for preventing the importation of rabies by guide dogs. *Id*. at 1482. Both parties submitted conflicting scientific evidence before the district court about the effectiveness of Hawaii's quarantine and the proposed alternatives. The Court observed that it was necessary to make additional "findings of fact regarding the nature of the rabies disease, the extent of the risk posed by the disease, and the probability that the infected animals would spread it." *Id*. at 1486. Because there was a genuine "factual dispute" as to the effectiveness of these alternatives, this Court held that the "reasonableness" of the modifications "cannot be determined as a matter of law on the record before us." *Id*. at 1485.

In the second case, *Heather K. v. City of Mallard*, 946 F. Supp. 1373 (N.D. Iowa 1996), the plaintiff argued that the City of Mallard should impose a more restrictive limit on backyard burning of residential waste in order to accommodate her respiratory condition. *Id*. at 1382. The City argued that it had already made a reasonable modification by limiting open burning to 18 days per year, but the plaintiff contended the City could go further without suffering a substantial modification of the existing program. *Id*. at 1376. The court found there was a genuine issue of material fact as to the effect and cost of the proposed alternatives. *Id*. at 1389. The court held that "[o]nly a fully developed record 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 extent to which it alters the objectives of the ordinance." *Id*. (internal quotation marks and citations omitted).

Here, unlike in *Crowder* and *Heather K*, there is no dispute of material fact as to the nature of Slone and Merrithew's disabilities or the "effectiveness" of their proposed modification. As Slone and Merrithew concede in their opening brief, the facts pertaining to their disabilities are "not in dispute." Op. Br. at 8. The Complaint states that Slone and Merrithew are each "unable to operate his taxicab vehicle personally" due to a physical disability.[17] ER 334. It is also clear from the face of the Complaint, and their submissions to the Taxi Commission, that because they simply cannot drive, Slone and Merrithew seek a complete waiver of the driving requirement. ER 151-152, 161, 163. Accordingly, there is no factual dispute as to whether "any of [their] proposed modifications is effective in light of the nature of the disability in question." *Heather K.*, 946 F. Supp. at 1389 (internal punctuation omitted). Nor is there any need for a more fully developed record. *Compare Crowder*, 81 F.3d at 1486 (holding reasonable modification inquiry required further findings of fact regarding the nature of the rabies disease, the extent of the risk posed by the disease, and the probability that the infected animals spread it), *with Young v. Claremore*, 411 F. Supp. 2d 1295, 1310 (N.D. Okla. 2005) (holding accommodation was "unreasonable as a matter of law" on summary

[17] Slone and Merrithew make a puzzling claim that the district court's summary adjudication "seems at odds" with the ADA Amendments Act of 2008, which amended the definition of "disability" to exclude transitory impairments with a duration of six months or less. Pub.L. 110-325, §§ 4(a), 8, (Sept. 25, 2008). Putting aside the fact that the Act was not before the district court, the City cannot see its relevance to the present case. As mentioned *supra* note 6, for purposes of the summary judgment motion only, the City did not contest whether Slone and Merrithew qualified as "disabled" under the ADA. And as the Complaint and their submissions to the Taxi Commission make clear, their disabilities clearly have a duration of more than six months.

judgment where plaintiff presented only one possible accommodation and there were no disputed facts); *see also Jacobsen*, 17 F. Supp. 2d at 1025-26 (granting summary judgment where there was no dispute plaintiff was "simply unable" to meet essential eligibility requirement); *Ellis*, 925 F. Supp. at 1549 (granting summary judgment because no "question of fact" whether plaintiff can meet the essential requirements or whether any reasonable accommodation would allow plaintiff to meet the essential requirements); *Aughe*, 885 F. Supp. at 1432-34 (granting summary judgment where "no genuine issues of material fact" as to whether rule is "essential" or whether waiver is reasonable). Accordingly, summary judgment was appropriate in this case.

Slone and Merrithew also claim that the district court erred in failing to conduct the "individualized inquiry" the Supreme Court references in *Martin*. In that case, the Supreme Court considered whether waiving the walking rule in a professional golf tournament for a single player would "fundamentally alter" the nature of the competition. The Court explained that a requested modification may constitute a "fundamental alteration" in two different ways: (1) it may alter "an essential aspect" of the program such that "it would be unacceptable," or (2) it may be a less significant change but still give the disabled person an unfair advantage over others. *Martin*, 532 U.S. at 682-83. The Court found that the walking rule was not "an essential attribute of the game itself," but rather "at best peripheral to the nature" of the game. *Id*. at 685, 689. Accordingly, the Court held that an individualized inquiry was necessary to determine whether waiving the walking rule in Martin's particular case would fundamentally alter the program in the second sense – by giving him an unfair advantage in the competition. *Id*. at 689.

But with regard to the first type of fundamental alteration – an essential aspect of the program – the Court explained that the same type of individualized

inquiry is *not* necessary. To the contrary, the Court observed, "[t]o be sure, the waiver of an essential rule of competition for anyone would fundamentally alter the nature of petitioner's tournaments." *Id*. at 689 (emphasis added). For that reason, "the fundamental alteration inquiry may end with the question whether a rule is essential." *Id*. at 683 n.38.

This case clearly involves the first type of fundamental alteration identified by the Supreme Court in *Martin*. Slone and Merrithew do not seek a waiver of a "peripheral rule" like the golf tournament's walking rule at issue in *Martin*. Their request here is akin to a demand that they be allowed to participate in the golf tournament without being able to play golf at all. Waiver of the driving requirement – an essential eligibility requirement – would subvert the key purposes of the City's taxi medallion program, converting it into a de facto "disability pension" or an "income entitlement" for absentee medallion holders. Such a scenario clearly is not the program that was intended by the San Francisco voters who adopted Proposition K in 1978 and rejected Proposition N in 2003. Nor is it an outcome mandated by the ADA. *See Lane*, 541 U.S. at 532 (Title II "does not require States to compromise their essential eligibility criteria").

Accordingly, the district court properly held, as a matter of law, that Slone and Merrithew's requested accommodation would fundamentally alter the program.

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CONCLUSION

The judgment of the district court should be affirmed.

DATED: January 21, 2009

Respectfully submitted,

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STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 12,459 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on January 21, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

ANSWERING BRIEF OF APPELLEES

Participants in the case who are registered CM/ECF users will be served by the appellateCM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three calendar days to the following non-CM/ECF participants:

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I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed January 21, 2009, at San Francisco, California.

/s/
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