Docket No. 19-16439

In the

United States Court of Appeals

for the

Ninth Circuit

SAN FRANCISCO TAXI COALITION, et al
Plaintiff-Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO, et al
Defendant-Appellee.

Appeal from a Decision of the United States District Court for the Northern District of California, Case No. 3:19-cv-01972-WHA Honorable Judge William Alsup

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT
(FRAP 26.1)

Appellant San Francisco Taxi Coalition ("Coalition") is a 501(C)(6) nonprofit corporation that promotes the interests of the San Francisco taxi community. The Coalition is composed of entities and individuals who hold various types of permits (medallions, dispatches, color schemes, A-Cards) issued by the City of San Francisco. The Coalition does not have a parent corporation, nor has it issued any stock or equity ownership of any kind. Plaintiff Alliance Cab is a private corporation but does not have a parent corporation that holds more than 10% of its stock. Plaintiff SF Town Taxi Inc. was a private corporation but due to the City's recent actions limiting pick-ups at SFO, the company has been driven out of business and is no longer operating. The remaining Appellants are individuals and hence, there is no issue regarding stock holdings or parent corporations.

Dated: November 27, 2019

Respectfully submitted,

/s/ Gregory A. Rougeau
Gregory A. Rougeau

BRUNETTI ROUGEAU LLP
Counsel for Plaintiffs-Appellants

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JURISDICTIONAL STATEMENT

Jurisdiction in this action is appropriate in the District Court for the Northern District of California pursuant to 28 U.S.C. § 1331 in that Plaintiffs and Appellants asserted claims for denial of due process and equal protection under the United States Constitution and 42 U.S.C. §1983 (Complaint, ¶¶ 65-67). The underlying lawsuit was originally filed by Plaintiffs-Appellants ("Plaintiffs") in the Superior Court of California, County of San Francisco, but was removed by Defendant City and County of San Francisco on April 12, 2019, pursuant to 28 U.S.C. § 1441(a) (Case No. 3:19-CV-01972-WHA, Dkt. 1), which Plaintiffs did not oppose.

The District Court issued an order granting judgment on the pleadings in favor of Defendants on June 20, 2019 (Dist. Ct. Dkt. 43). Also, on June 20, 2019, the District Court issued a judgment dismissing the underlying case (Dist. Ct. Dkt. 44). Appellants timely filed a Notice of Appeal to the Ninth Circuit on 7/19/2019 (Dist. Ct. Dkt. 46). FRAP 3(a)(1); 3(c); 4(1)(A). Because all parties are located in the City and County of San Francisco, the Northern District of California, San Francisco division was the appropriate forum for the underlying District Court case and the Ninth Circuit is the appropriate Circuit for this appeal to be taken. Pursuant to an order issued on 10/22/2019 in response to a streamlined request by Appellants for an extension of time to file their opening brief, the Court set a

deadline of 11/27/2019 for Appellants to file their opening brief. Appellants' Opening Brief is therefore timely filed.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in dismissing Plaintiffs' respective due process and equal protection rights under the California Constitution (California Constitution, Article I, Sec. 7(a)) and the Fourteenth Amendment of the United States Constitution, and their corresponding claims for injunctive relief and damages under 42 U.S.C. § 1983 against the City of San Francisco (the "City") and its transportation agency, the San Francisco Municipal Transit Agency ("SFMTA").
2. Whether the District Court erred in dismissing Plaintiffs' claims against the City and the SFMTA under California Government Code § 11135(a) for age discrimination as a result of Defendants' arbitrary decision to deny access to San Francisco International Airport to pick up passengers to holders of permits issued prior to the passage of Proposition K in the City in 1978.
3. Whether the District Court erred in dismissing Plaintiffs' CEQA claims under California Code of Regulations ("CCR") section 15378 on the grounds that the SFMTA's enactment of its policy restricting or eliminating certain categories of permit holders from picking up passengers at SFO does not constitute a "project" requiring CEQA review under CCR section 15378.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case is about whether the District Court erroneously and prematurely ruled in favor of dismissing all claims asserted in Plaintiffs' complaint based on the pleadings, without allowing any discovery to be taken and without allowing any of the claims to be addressed on the factual merits.

Factual History

The City issues permits (referred to as medallions) to persons to operate taxicabs in San Francisco and San Francisco International Airport ("SFO"). Prior to 1978, those seeking medallions from the City would have to purchase them at prices in the range of $15,000 to $17,000 per medallion, which, at the time was in the range of as the purchase price of a single-family home in the City. Individuals and companies were permitted to purchase medallions and medallions were freely transferable to other companies or individuals, meaning they were sold on the open market.

In 1978, the voters of the City passed Proposition K ("Prop K"), which overhauled the taxi medallion system. Applicants for new medallions were no longer required to pay for them, but there were a considerable number of applicants and a long waiting list to obtain a new permit from the City. Also, in a significant change, the new permits issued after the passage of Prop K were non-transferable. In addition, there were other requirements and restrictions placed on

the medallions issued after the passage of Prop K ("Post-K medallions"), including (i) only individuals could hold Post-K medallions, not companies and (ii) medallions were limited to one per individual. Later on, the City imposed a driving requirement of a minimum of 800 hours per year for those individuals who held Post-K medallions. Holders of medallions issued prior to the passage of Prop K ("Pre-K medallions") were not subject to these requirements, although unlike Post-K medallion holders, Pre-K medallion holders had paid for their medallions.

For more than 30 years, the City's taxicab industry operated in the post Prop K environment and were generally regulated by the provisions of Prop K and subsequent legislation and regulations issued by the City, as set forth in Article 1100 of the City's Transportation Code. Both Pre-K and Post-K medallion holders, when they were not driving themselves, typically leased their medallions to taxicab companies, also referred to as "color schemes," which companies would then lease their cars (holding the leased medallions) to other taxicab drivers. The taxi companies would pay the medallion holders a lease fee and taxicab drivers would pay taxi companies a per-shift "gate fee" and keep all passenger fares. As a practical matter, the infirmities of age precluded all but a handful of Pre-K medallion holders, most of whom were in their seventies or older as of 2010, from driving. These Pre-K medallion holders lease out their medallions to the taxi

companies and rely on the lease payments to pay their living expenses in their elderly years.

In 2007, City voters passed Proposition A, a Charter amendment, which led to the transfer of all regulatory power over taxicabs and medallion holders from the Taxi Commission and Board of Supervisors to the SFMTA. Beginning in 2010, in an effort to generate tens of millions of dollars in new revenue, the SFMTA developed a Taxi Medallion Transfer Program (the "Program"). Under the Program, taxi drivers could purchase a medallion from an existing holder for $250,000, of which $200,000 of that went to the seller and $50,000 went to the SFMTA. Both Pre-K and Post-K medallions could be sold under the Program. In addition to overseeing the purchase of existing medallions, the SFMTA itself sold hundreds of "new" medallions to drivers on the then waiting list. The price was $250,000, and the entire amount went to the SFMTA, generating at least $63 million for the City. (All medallions sold under the Program, including Pre-K, Post-K and new medallions sold by the SFMTA are referred to as "Purchased Medallions.")

Given the modest means of taxi drivers, the medallion purchase Program authorized qualified lenders to loan buyers up to 95% of the full price of a medallion. In turn, lenders were granted a security interest in the medallion. One lender, the San Francisco Federal Credit Union ("Credit Union") financed almost

the entirety of loans under the Program to the tune of more than $150 million. At the first the Program appeared to be successful but with the onset of ride-sharing companies such as Uber and Lyft, the taxicab business in San Francisco began suffering severely beginning in 2016. As a result, with significantly less demand for taxi service, the per-shift gate fees paid by taxi companies has plummeted and the taxi companies themselves have suffered from a severe decline in business. In short, the entire taxicab business in the City has suffered a severe financial decline.

Not surprisingly, as a result of the fall in the industry, many of the medallion holders who paid $250,000 to buy a Purchased Medallion have defaulted on their loans. The Credit Union has foreclosed on a significant number of medallions. The Credit Union eventually sued the City in a lawsuit file in San Francisco Superior Court on March 27, 2018, claiming damages of at least $28 million.

In the fall of 2018, after being sued by the Credit Union, the SFMTA issued a resolution allowing the director of the agency to unilaterally impose restrictions and limitations on passenger pick-ups at SFO. In December 2018, the director did just that. Under his new directive, taxis using Pre-K medallions are no longer permitted to pick up any passengers at SFO. Further, taxis using Post-K medallions are restricted in that they must sit idle in a back-up lot waiting for their turn to pick up passengers, while taxicabs using Purchased medallions are given first priority for pick-ups. Although the City claims that there are three Purchased medallion

pick-ups for every one Post-K medallion pick-up, the facts show that as many as eight Purchased medallion taxicabs are allowed pick-ups for every one Post-K taxicab, causing taxicabs with Post-K medallions considerable waiting time of up to several hours in the airport holding lot, which obviously results in significant lost revenue for the drivers.

The result of the City's actions has had a devastating effect on the taxicab industry in San Francisco. Without the ability to pick up passengers at SFO, a large number of taxicab drivers have refused to lease out medallions other than Purchased medallions. As a result, taxi companies are no longer able to lease out Pre-K medallions and few drivers are interested in leasing Post-K medallions. The subsequent effect is that the market for Pre-K medallions has disappeared, meaning that taxi companies are no longer interested on leasing any Pre-K medallions. Therefore, the owners of Pre-K medallions are no longer receiving any income from their medallions, which they had relied on for living expenses in their elderly years. The market for Post-K medallions also has declined precipitously, resulting in a large decline in income for holders of these medallions. The taxi companies are also suffering severely, as they can no longer lease out Pre-K or Post-K medallions and, as a result, have cars sitting in their lots and not being driven. Several taxi companies have gone out of business since February 2019 when the

City's new rules went into effect, including SF Town Taxi, one of the plaintiffs in this very case.

Procedural History

On March 13, 2019 Plaintiffs filed their complaint in San Francisco Superior Court against the City, the SFMTA and its then director Edward D. Reiskin, asserting claims for declaratory relief, denial of substantive due process and equal protection under both the California and U.S. Constitutions, claims for preliminary and permanent injunctive relief, violation of California CEQA laws, and discriminatory treatment of the elderly in violation of California Government Code Sec. 11135 (SF Superior Case No. CGC-19-574503). On March 21, 2019, Plaintiffs filed a motion for preliminary injunction in the Superior Court against the City and all defendants prohibiting them from enforcing their new taxicab rules restricting and limiting certain classes of taxicab medallion holders from making taxicab pick-ups at SFO, along with all of Plaintiffs' supporting papers.

On April 5, 2019, Defendants filed their opposition to Plaintiffs' motion for a preliminary injunction, in the Superior Court, along with their supporting papers. On April 9, 2019, Defendants filed their answer to Plaintiffs' complaint in the Superior Court. On April 11, 2019, Plaintiffs filed a reply brief to their motion for a preliminary injunction along with additional supporting papers. The hearing in

the Superior Court on Plaintiffs' motion for a preliminary junction was scheduled to be heard on April 18, 2019.

On April 12, 2019, the City and all Defendants, without notice to Plaintiffs, filed a notice of removal to the District Court. On April 22, 2019, the District Court was reassigned to Hon. Judge Alsup. On May 9, 2019, the City and all defendants filed their Motion for Judgment on the Pleadings ("Motion") (Dist. Ct. Dkt. 12) along with their supporting papers. Plaintiffs filed their opposition to the Motion on May 29, 2019 (Dist. Ct. Dkt. 34). Defendants filed their reply to the in support of the Motion on June 6, 2019 (Dkt. 39). Also, on June 6, 2019, the District Court entered an order denying Plaintiffs' motion for preliminary injunction, which had been re-filed with the District Court (Dist. Ct. Dkt. 40), although that motion is not pertinent to the present Motion.

After a hearing held on June 20, 2019, the District Court granted the Motion. The Court entered an Order granting the Motion (Dist. Ct. Dkt. 43) and a Judgment dismissing Plaintiffs' case (Dist. Ct. Dkt. 44), both on June 20, 2019. Plaintiffs timely filed their Notice of Appeal on July 19, 2019 (Dist. Ct. Dkt. 46).

STATEMENT OF THE FACTS

The City issues medallions to operate taxicabs on City streets and to and from SFO. *See San Francisco Transportation Code ("Trans. Code"), §§1101-*

1103 (Plaintiffs' Excerpts of Record ("ER") at 59-70.[1] Prior to June 1978, the City issued medallions to individuals and corporations, and one person or entity could hold multiple permits. ER at 000086. Subject to Police Department approval, medallion holders, at the time, were allowed to sell their medallions. *Id*.

In 1978, City voters passed Prop K, which significantly changed the City's taxicab laws. Under Prop K (i) all existing medallions were to be surrendered and reissued, (ii) medallions no longer were transferable, (iii) only individuals could hold new medallions, not corporations, and (iv) medallions were limited to one per person. ER at 000101-104. *C*. Prop K also required that individuals who held Pre-K medallions could exchange their medallions for new ones, which could be held until surrendered or the permit holder died but could not be sold or transferred. ER 000103.

For more than 30 years, taxi medallions were governed by Prop K and various implementing laws. For example, the City enacted a law requiring post-K permit holders to personally drive a taxicab for a minimum of 800 hours per year. ER 000107. Pre-K permit holders were not subject to this active driving requirement. *Id*. In any event, both Pre-K and Post-K medallion holders, when

[1] For clarity, pages from Plaintiffs' Excerpts of the Record are numbered in the lower right-hand corner of each page in the format ER000001, etc. Other page numbers that appear on the documents are either the original page numbers of the documents or the numbering used in the request for judicial notice filed in either the Superior Court or District Court and should be disregarded. All citations in this brief will be to the ER numbering system.

they were not driving, typically leased their medallions to taxicab companies, termed "color schemes," Trans. Code §§1102, 1106, ER 00061, 74-78, which in turn would lease their cars to other taxicab drivers. The color schemes would pay the medallion holders a lease fee and drivers would pay the color schemes a per-shift gate fee and keep all passenger fares. ER 000219; ER 000217; ER 000242.

As of 2018, out of a total of 1442 medallions issued by the City, approximately 260 were held by pre-K permit holders. ER 000088-89. Almost all individual pre-K medallion holders are now in their seventies or older. ER 000220; ER 000230; ER 000241-242. The infirmities of age preclude all but a handful of them from safely driving a cab anymore. ER 000220; ER 000217. Instead, most pre-K medallion holders now rely exclusively on lease payments from color schemes for their income. ER 000217; ER 000231; ER 000220. To be clear, just like Purchased medallion holders, individual pre-K medallion holders purchased their medallions from the City. They typically paid in excess of $15,000 per medallion in Seventies dollars. ER 000230; ER 000230. This was a substantial amount of money, as the average family income in San Francisco was $13,500, and the price of an average home was $15,000. ER 000242. In contrast, the City did not charge for post-K medallions, other than a nominal application fee.

Purchased Medallions And The Credit Union

In 2007, City voters passed Proposition A, a Charter amendment, which led to the transfer of all regulatory power over taxicabs from the Taxi Commission and the Board of Supervisors to the SFMTA. ER 000106. Beginning in 2010, in an effort to generate tens of millions of dollars in new revenue, the SFMTA developed a Taxi Medallion Transfer Program (the "Program"), *See Trans. Code §§1116, et seq.*, ER 00079-83; ER 000086-100; ER 000221. Under the Program, taxi drivers could purchase a medallion from an existing holder for $250,000, of which $200,000 of that went to the seller and $50,000 went to the SFMTA. *See* ER 000087. These "Purchased medallions" were then transferrable, subject to SFMTA approval. *Id*. In addition to overseeing the purchase of existing medallions, the SFMTA itself sold hundreds of "new" medallions to drivers on the then waiting list. The price was $250,000, and the entire amount went to the SFMTA, generating at least $63 million for the City. ER 000094-95.

Given the modest means of taxi drivers, the medallion purchase Program authorized qualified lenders to loan buyers up to 95% of the full price of a medallion. In turn, lenders were granted a security interest in the medallion. *See* Trans. Code §1116, ER 000079—83. One lender, the San Francisco Federal Credit Union (the "Credit Union"), financed almost all of the medallion purchases under the Program. From the Program's inception in 2010, the Credit Union financed

hundreds of medallion sales, extending loans of more than $150 million. ER 000223.

Prior to 2016, taxi business at SFO was robust. According to Yellow Cab's CEO, Chris Sweis, taxis had approximately 75% of the SFO business before 2016. ER 000223. By 2016, however, the San Francisco taxicab industry was reeling, largely due to the expansion of Transportation Network Companies ("TNCs") such as Uber and Lyft. ER 000087-88. As of October 2018, TNCs had 78.8 % of the for-hire ridership business at SFO, with the taxis' share declining to 8.8%. ER 000222-223. There were also thousands of TNC vehicles plying City streets, swamping the taxi fleet.[2] ER 000087-88. Simply put, demand for taxis in the City and from SFO has plummeted. *Id*; ER 000222-223.

Prior to the onslaught of TNCs, in 2013, the SFMTA commissioned Hara Associates to do a study of the San Francisco taxi industry. *See*, *generally*, ER 000114-116 (excerpts from Hara report). Among other things, the Hara report concluded as follows:

> **Quantity matters**. The taxi industry's issues will not be solved by changes to the rate structure alone. [An earlier report] found that a significant shortage of taxis has led to poor taxi dispatch service in San Francisco, and . . . provides fertile ground for the emergence of competing services. A survey of San Francisco residents indicated that what most individuals using these services really want is reliable and easily available taxi service. A large increase in the number of taxis

[2] The SFMTA's own staff reports that there may be as many as 45,000 Uber and Lyft drivers operating in San Francisco compared to only 1800 authorized medallion holders. Staff Report, *RJN Ex. B at 3-4*.

> was recommended over the period 2013 to 2015 . . . An expanded taxi fleet is part of an overall strategy to better serve the public and improve the health of the industry. . .

ER 000115-116.

Today, with significantly less demand for taxis, the per-shift gate fees paid by taxi drivers to taxi companies has plummeted, meaning color scheme revenues have also plunged. Some color schemes have gone out of business, while others merged with competitors. ER 000222. The downturn also has significantly reduced the lease fees being paid to all medallion holders, as the color schemes are not going to pay the same lease fees for medallions when they have cars sitting on their lots going unused. The SFMTA's new rules only exacerbate the situation, as driver demand for pre-K medallions has virtually disappeared and the demand for Post-K medallions has sharply declined. ER 000223-224; ER 000234.

With their declining income, many Purchased medallion holders have defaulted on their Credit Union loans. The Credit Union has foreclosed on at least 150 medallions, if not more. ER 000095; ER 000223. Moreover, due to the economic stress being experienced by the taxi industry as a whole, by 2016 the market for Purchased medallions had collapsed. The SFMTA has not sold a single medallion since April 2016. ER 000089. In 2018, the Credit Union had enough and sued the SFMTA, (San Francisco Sup. Ct. Case No. CGC-18-565325), seeking damages of at least $28 million. The Credit Union alleged, among other things,

that the SFMTA breached its obligation to foster and maintain a vibrant taxicab industry, breached the lender agreements between it and the SFMTA, and engaged in serial misrepresentations.

2018 Reforms

Following the collapse of the Program and the economic distress reported by virtually all medallion holders, the SFMTA retained PFM Group Consulting/Schaller Consulting ("Schaller") to review the state of the San Francisco taxi industry and make recommendations for improving its health. Schaller issued its report in May 2018. ER 000118-157 (excerpts from Schaller report). Schaller confirmed that revenues realized by drivers, medallion holders and color schemes had dropped precipitously as a result of the incursion of the TNCs, among other factors. Schaller confirmed that many taxi shifts were going unfilled and many taxis were not being used due to a shortage of drivers. ER 000133. Moreover, Schaller observed that taxis have virtually lost the previously vibrant night business in the City. Schaller estimated there are 12 times more TNC trips than taxi trips per day in San Francisco. ER 000129.

Yet, remarkably, Schaller's report recommended that the SFMTA turn 180 degrees from what the Hara report had recommended and *reduce* the number of taxis in the City. Schaller proposed that the SFMTA retire all pre-K permits and all "unused" post-K permits. *Id*. at 28, 33. According to the Schaller report, the City

needs to "right-size" its taxi fleet and thereby increase the income of the surviving medallion holders and, in particular, the holders of Purchased medallions. ER 000145.

Following the issuance of the Schaller report, SFMTA staff proposed a number of taxi industry reforms, including (a) allowing only Purchased medallion holders to pick up fares at SFO and (b) not renewing any pre-K medallions at the end of the fiscal year. ER 000085, 000093-94. In urging "non-renewal" of pre-K medallions, staff embarked on some unsubstantiated, homegrown wealth redistribution theories. First, a statement with no support in either history or law was offered:

> "It is staff's belief that Pre-K and Corporate medallions were intended to transition to Post-K medallions in short order, after the passage of Proposition K. These classes of medallions have continued to operate until today, and extract value from the taxi industry."

ER 000108.

Then, in order to make terminating the income of pre-K permit holders a little more palatable, staff commented:

> "Staff estimates that over their lifetime, . . . Pre-K medallions have earned approximately $1.6 million, per medallion . . . Because these medallions are generally not held by working drivers, this is passive income."

Id. At the same time, staff also recommended changes relieving Purchased medallion holders of active driving requirements, which directly contradicts their

"passive income" criticism of holders of pre-K medallions. ER 000096, 000100. Indeed, the principal rationale offered in support of the staff-generated reforms was to increase the income of Purchased medallion holders by relieving them of certain competitive pressures. ER 000085, 93, 98. Staff did not suggest ways to enlarge the taxi market but instead proposed that Purchased medallions cannibalize the existing taxi market. Clearly, the SFMTA favored the Purchased medallion holders to the detriment of all other medallion holders.

The SFMTA Board approved many of Staff's reform proposals through Resolution 181016-143, passed on October 16, 2018, which eliminated the active driving requirement for Purchased medallion holders and gave the Director the authority to impose restrictions on SFO passenger pick-ups. ER 000159-160. On December 27, 2018, the SFMTA issued a directive to the taxi industry, through Director Edward Reiskin announcing the SFMTA's new restrictions on passenger pick-ups at SFO, effective February 1, 2019. ER 000162-169. Under the new rules, taxis using pre-K medallions are not allowed to pick up fares at SFO. Taxi using Purchased medallions are given priority SFO passenger pick-ups. They are directed to an expedited line and given priority at a ratio of at least three to one over taxis with post-K medallions, and sometimes up to eight to one priority, depending on the dispatcher working at the time. *Id*. at 3; ER 000221; ER 000238-239.

The result of barring pre-K medallions from picking up fares at SFO is that the utility and value of pre-K medallions has virtually disappeared. ER 000223-225. The vast majority of taxi drivers believe that the ability to pick up fares originating at SFO is essential to the profitability of operating a taxi. *Id*.; ER 000228; ER 000234. Accordingly, drivers have informed the color schemes that they no longer want to lease pre-K medallions, rendering their value worthless. ER 000223-224; ER 000228-229; ER 000234. Even post-K medallions have significantly declined in value. ER 000223-224; ER 000228-229; ER 000234-235. Considering that Purchased medallions afforded super priority for SFO pick-ups at a ratio of at least 3 to 1. ER 000221, and sometimes a much greater preference, ER 000239, many drivers insist on leasing only Purchased medallions. With an already existing shortage of drivers willing to drive taxis, due to the presence of TNCs, this will result in even more post-K permits being "parked" by color schemes and revenue to permit holders will be reduced even further. ER 221-224. Color scheme companies are suffering because they no longer can lease out pre-K and post-K medallions, resulting in a dramatic reduction in the size of their fleets. Taxi drivers are giving up driving altogether and leaving the industry. ER 000223-234, 239.

SUMMARY OF ARGUMENT

The District Court erred in its Order granting Judgment on the Pleadings. Rule 12(c) of the Federal Rules of Civil Procedure requires only that Plaintiffs'

Complaint provide a short and plain statement that provides Defendants with notice of the claim being asserted, and supply enough factual matter, taken as true, to suggest a violation. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-55 (2007). The Supreme Court explained in *Twombly* that a complaint is "not require[d] [to include] heightened fact pleading of specifics, but only enough facts to state a claim to relief that is *plausible* on its face." *Id*. at 570 (emphasis added). In other words, the allegations must allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ascroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937; 173 L. Ed. 2d 868 (2009); see also *Twombly*, 550 U.S. at 570 (the plaintiff must allege enough by way of factual content to "nudge" its claim "across the line from conceivable to plausible"). That is precisely what Plaintiffs' Complaint did, prior it being dismissed in its entirety by the District Court.

The Complaint, together with the entirety of the record in this case, amply demonstrate that judgment at this early stage of the litigation was not warranted. In their Complaint, Plaintiffs alleged facts sufficient to support the plausibility of their claims that the SFMTA's regulations governing taxi pickups at SFO were not rationally related to any legitimate governmental purpose, and appear to be designed to assist the City in reducing its damages in its lawsuit with the Credit Union. There is a serious issue regarding whether the City's actions violate

Plaintiffs' state and federal constitutional rights to equal protection. As noted above, the regulations constitute rank economic protectionism for the holders of Purchased medallions to the detriment of those medallion holders who paid for their medallions prior to 1978 or those medallion holders who waited years in line to receive their medallions prior to 2010 -- precisely the type of regulation the Sixth Circuit Court of Appeals, in an opinion adopted by the Ninth Circuit, has described as having "the force of a five-week-old, unrefrigerated dead fish …, a level of pungence almost required to invalidate a statute under rational basis review." *Craigmiles v. Giles*, 312 F.3d 220, 225 (6th Cir. 2002). Plaintiffs' Complaint also state plausible, proper claims that the subject regulations violate the California Environmental Quality Act ("CEQA"), and that the regulations violate Section 11135 of the California Government Code.

The City's actions are a violation of Plaintiffs' equal protection rights under both the State and U.S. Constitutions. It is pretty clear based on the evidentiary record the City's main motivation in imposing the 2018 changes limiting and restricting Pre-K and Post-K medallion holders from picking up passengers at SFO is to prop up the value of the Purchased medallions thereby reducing the City's potential damages in its lawsuit with the Credit Union and attempting to avoid potential lawsuits from holders of Purchased medallions. Indeed, the City has admitted that one of its primary motivations in making the 2018 taxicab rule

changes was to help out the holders of Purchased medallions, akin to economic protectionism, which is not proper even under the flexible "rational basis" test for equal protection, which is applicable here. The Ninth Circuit, in *Merrifield v. Lockyer*, 547 F.3d. 978, 991 n.15 (9th Cir. 2008), has held, unequivocally, that "mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review."

In addition to their violations of Plaintiffs' equal protection rights, the City's actions violate the rights of elderly medallion holder plaintiffs under California Government Code Section 11135(a), which prohibits discrimination in connection with any program that receives state funding. It is unquestionable that the City's taxicab program receives state funding for its paratransit program. The net effect of the City's new rule changes has resulted in clear discrimination of an elderly group of citizens, not only those hold Pre-K medallions but many who hold Posk-K medallions and are into their seventies. These people have been deprived of income that is absolutely necessary to their livelihood. While the District Court rationalized its decision dismissing Plaintiffs' claim under Govt. Code § 11135(a) on the grounds that the City's motivation for its new regulations was not based on age discrimination, that fact is that the net effect of the new rules has in fact had a seriously negative and financially devastating impact on elderly persons who hold Pre-K medallions. The discriminatory impact is itself a violation of Govt. Code §

11135(a), regardless of the City's motivations in enacting the new regulations and the District Court simply ignored this concept. Put another way, the City's motivations are not relevant to whether there has been age discrimination in violation of the statute.

Finally, the City's actions in making the changes to the taxicab industry violate California CEQA laws. Clearly, the City's actions qualify as a "project" under CCR 15378 and were therefore subject to CEQA review, which the City failed to undertake. The City merely dismissed its role in analyzing whether the net effect of its new rules were subject to CEQA review when a staff member of the SFMTA summarily concluded that the new rules did not constitute a "project" and therefore was not subject to CEQA review without any analysis whatsoever.

ARGUMENT

I. STANDARDS APPLICABLE TO MOTIONS FOR JUDGMENT ON THE PLEADINGS, UNDER FRCP 12(c).

Rule 12(c) of the Federal Rules of Civil Procedure provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." In evaluating a Rule 12(c) motion, a court may consider the complaint, the answer, matters of public record whose authenticity is not in dispute, and exhibits attached to the complaint or answer so long as they are "integral to the complaint and authentic." *Massey v. Ojaniit*, 759 F.3d 343, 347 (4th Cir. 2014). A Rule 12(c) motion tests only the sufficiency of the

complaint and does not resolve the merits of a plaintiff's claims or any factual disputes. *Id*., 759 F.3d at 353.

The legal standards governing Rules 12(c) and 12(b)(6) are "functionally identical," *Cafasso, U.S. ex rel. v. General Dynamics C4 Sys., Inc*., 637 F.3d 1047, 1054 n. 4 (9th Cir.2011), as both permit challenges directed at the legal sufficiency of the parties' allegations. Thus, the standard articulated in *Twombly* and *Iqbal, supra*, with regard to Rule 12(b)(6) motions applies equally to a motion for judgment on the pleadings. *San Francisco Apartment Ass'n v. City & Cty. of San Francisco*, 142 F. Supp. 3d 910, 919 (N.D. Cal. 2015), *aff'd*, 881 F.3d 1169 (9th Cir. 2018).

Under that standard, a complaint must provide a short and plain statement that provides the defendant with notice of the claim being asserted, and supply enough factual matter, taken as true, to suggest a violation. *Twombly*, 550 U.S. at 554-55. The Supreme Court explained in *Twombly* that a complaint is "not require[d] [to include] heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id*. at 570. A claim has "facial plausibility" if it allows the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570 (the plaintiff must allege enough by way of factual content to "nudge" her claim "across the line from conceivable to plausible").

To prevail on a motion for judgment on the pleadings under Rule 12(c), the moving party must demonstrate that- accepting all the allegations in the pleadings as true and construing them in the light most favorable to the nonmoving party- no material fact is in dispute and that it is entitled to judgment as a matter of law. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). "[U]nlike a Rule 12(b)(6) motion," which focuses merely on the sufficiency of the complaint, "a Rule 12(c) motion asks the court to render a judgment on the merits . . . by looking at the substance of the pleadings and any judicially noted facts." *Murphy v. Dep't of Air Force*, 326 F.R.D. 47, 49 (D.D.C. 2018) (internal quotation marks omitted). "[T]he Rule 12(c) burden is substantial." *Id*.

II. IN GRANTING DEFENDANTS' MOTION TO DISMISS ON THE PLEADINGS THE DISTRICT COURT ERRED BECAUSE PLAINTIFFS ALLEGED SUFFICIENT FACTS TO STATE PLAUSIBLE CLAIMS THAT THE DECEMBER 2018 REGULATIONS VIOLATE EQUAL PROTECTION AND DUE PROCESS.

A. The Rational Basis Standard.

The parties are in agreement that the rational basis test is the applicable standard for evaluating whether the MTA's December 2018 Regulations deprived Plaintiffs of equal protection, as the test is the same for both types of claims. See *Munoz v. Sullivan*, 930 F.2d 1400, 1404–05 & n. 10 (9th Cir.1991).

Under the rational basis test, governmental action is rationally related to a legitimate goal unless the action is "clearly arbitrary and unreasonable, having no

substantial relation to the public health, safety, morals, or general welfare." *San Francisco Apartment Ass'n v. City & Cty. Of San Francisco*, *supra*, 142 F. Supp. 3d at 931 (citing *Lebbos v. Judges of Sup. Ct., Santa Clara Cnty.*, 883 F.2d 810, 818 (9th Cir.1989)). While this standard of review accords a strong presumption of validity to legislative enactments, *Heller v. Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993), it is not "toothless." *Mathews v. De Castro*, 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). "[E]ven in the ordinary equal protection case calling for the most deferential of standards, [courts] insist on knowing the relation between the classification adopted and the object to be attained." *Dragovich v. U.S. Dep't of the Treasury*, 848 F. Supp. 2d 1091, 1099–100 (N.D. Cal. 2012). Stated differently, "the term "rational" … includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." *City of Cleburne, Tex. V. Cleburne Living Ctr.*, 473 U.S. 432, 452, 105 S. Ct. 3249, 3260–61, 87 L. Ed. 2d 313 (1985) (Stevens, concurring). The term "includes elements of *legitimacy* and *neutrality* that must always characterize the performance of the sovereign's duty to govern impartially." *Id.* (Stevens, J., concurring) (emphasis added). Here, the City's arbitrary restrictions and limitations on passenger pick-ups at SFO target two groups (one severely) – Pre-K and Post-K medallion holders – to financially prop

up a third group – Purchased medallion holders – in an effort to aid not only the latter but also the City in its lawsuit with the Credit Union.

To determine whether the MTA's December 2018 Regulations can survive rational basis review in connection with Plaintiffs' equal protection claims, the Court must apply a two-tiered inquiry. First, the Court must determine whether the challenged regulation has a legitimate purpose. See *Jackson Water Works, Inc. v. Pub. Util. Comm'n of Cal*., 793 F.2d 1090, 1094 (9th Cir. 1986). Second, the Court must consider whether the challenged regulation promotes that purpose. *Id*. (citing *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 668, 101 S.Ct. 2070, 2083, 68 L.Ed.2d 514 (1981)). Even under the deferential standard applicable in rational basis review, the SFMTA's December 2018 Regulations fail miserably under this test.

B. The December 2018 Regulations Do Not Have A Legitimate Purpose.

The facts alleged in Plaintiffs' Complaint demonstrate that no set of facts may be reasonably conceived to justify the Regulations' disparate, discriminatory treatment of Plaintiffs who hold Pre-K or even Post-K medallions, compared to holders of Purchased Medallions.

In their Motion, Defendants assert that the December 2018 Regulations serve the following legitimate governmental objectives: (1) to allocate "more revenue from airport trips to Purchased medallion holders; (2) to provide

"additional taxi supply to San Francisco proper"; and (3) to reduce "taxi congestion at SFO." (Motion, Dist. Dkt. 12, p. 12).

Upon closer examination of the record in this case, these feigned "legitimate" objectives are either not legitimate under prevailing law, not rationally related to the December 2018 Regulations (or, for that matter, related at all), or are simply unsupported by the record in this case.

1. Allocation of Revenue to Purchased Medallion Holders is Not A Legitimate Government Purpose.

"The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affect two or more *similarly situated* groups in an unequal manner." *Cooley v. Superior Court*, 29 Cal.4th 228, 253 (2002) (quoting *In re Eric J.*, 25 Cal.3d 522, 530 (1979). Any evaluation of whether Plaintiffs have been deprived of their equal protection rights therefore must begin with whether Plaintiffs "are similarly situated for purposes of the law challenged." *Id.* (quoting *People v. Gibson*, 204 Cal.App.3d 1425, 1436 (1988).

Defendants assert that the manifest purpose of the Regulations- steering revenue to Purchased medallion holders- is warranted due to the "critical differences among the classes of medallion holders." That argument is a canard, as the challenged Regulations themselves created the "critical differences" between the medallion holders.

As noted in the Complaint, the individual plaintiffs who hold Pre-K or even Post-K medallions are similarly situated to the holders of Purchased Medallions. They all have medallions authorizing them to operate taxis in the City and, prior to February 1, 2019, they all were permitted to pick up passengers at SFO. Many of these individuals personally drive taxis and many of them lease out their medallions to the color schemes, which in turn allows other qualified drivers to drive taxis using these same medallions under the management of the color schemes. The only real difference between the medallion holders is the dates on which they obtained their medallions; essentially, their age. With respect to riders of taxicabs in San Francisco, it makes absolutely no difference what type of medallion the taxicab is using, which highlights the utter arbitrariness of the City's differential distinction between medallion holders.

Notwithstanding the foregoing, the City admits in its Motion that the Regulations nakedly favor the Purchased medallion holders. The reason, according to the MTA's staff: holders of pre-K medallions have made enough money. Staff frequently has mentioned that Post-K medallion holders did not purchase their medallions. However, that is misleading. First, to be clear, Pre-K medallion holders did purchase their medallions for an amount that, relatively speaking far exceeds the prices paid by Purchased medallion holders, given that the price they paid in the Seventies and earlier was the same as the average single family home in

San Francisco (which now is in excess of $1 million).

Second, following the passage of Prop K, medallion holders had to wait years in line to obtain a medallion, which was not the case with holders of Purchased medallions. Moreover, Prop-K disallowed the purchase of medallions. It is manifestly unfair to punish holders of Post-K medallions, as well as the taxicab companies who lease these medallions, decades later, after they followed all the rules in place at the time. In proposing the Regulations, the SFMTA favored the Purchased medallion holders to the detriment of all other medallion holders. The Defendants apparently see little problem with that. They contend that "it is rational for SFMTA to account for the economic hardship Purchased medallion holders are suffering in allocating taxi pickups, even if such allocation results in adverse side effects for other medallion holders." (Motion, p. 14-15). The problem, of course, is that Defendants cannot explain how it is rational to favor one class of medallion holders over others; the Regulations are simply irrational.[3]

The Ninth Circuit's decision in *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008), is precisely on point here. In that case, the operator of a non-pesticide pest control business brought suit under section 1983 against the State of

[3] While Defendants repeatedly argue that holders of Purchased medallions are financially disadvantaged in that they paid $250,00 for their medallions, Pre-K medallion holders paid the price of an average single family home when they purchased their medallions in the Seventies or earlier, which is a far greater price, relatively speaking, than $250,000. The fact that they have paid off their debt should not be used against them in favor of the holders of Purchased medallions.

California alleging that the State's interpretation and enforcement of its licensing scheme against pest controllers violated plaintiff's equal protection rights. Merrifield, the plaintiff, operated a non-pesticide animal damage prevention and bird control business, which installed spikes, screens and other devices on structures so as to remove and deter animals such as skunks, raccoons, squirrels, rats, pigeons, starlings and bats. *547 F.3d at 980*.

The *Merrifield* plaintiff objected to having to be subject to the State's licensing requirements because the company was not a traditional pest control business, which used pesticides. In particular, the plaintiff objected because the State interpreted its rules to exempt certain operators from licensing requirements, including those removing "vertebrate pests" from a structure without the use of pesticides, but did not exempt the plaintiff's business. The State interpreted the exemption language in the statute to exempt those operators removing bats, raccoons, skunks and squirrels, but not to exempt operators removing mice, rats or pigeons. *Id.* at 981-82. The plaintiff alleged that the arbitrary reading of the statute's exemption language violated its equal protection rights.

Applying the rational basis test, the Ninth Circuit agreed. The Court reasoned that while the legislature's decision to exempt certain non-pesticide operators was a "rational and quintessentially legislative decision," *Id.* at 990-91, it found that it was irrational to exempt non-pesticide operators removing less

common pests (bats, raccoons, skunks and squirrels) but not to exempt non-pesticide operators treating more common pests (mice, rats and pigeons). The Court found that the State's licensing scheme specifically targeted a category of operators like Merrifield, as not qualified under the exemption from the state's licensing requirements, without any rational basis.

> [T]his type of singling out, in connection with a rationale so weak that it undercuts the principle of non-contradiction, fails to meet the relatively easy standard of rational basis.

Id. at 991. The Court found that the State "undercut its own rational basis for the licensing scheme by excluding Merrifield from the exemption" and ruled that the license exemption language, to the extent it did not include mice, rats or pigeons, is unconstitutional. *Id.* at 992.[4] The *Merrifield* court, in reaching its decision, also concluded:

> . . . mere economic protectionism for the sake of protectionism is irrational with respect to determining if a classification survives rational basis review. . . . economic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest.

Id. at 991 n. 15 (agreeing with Sixth Circuit in *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) in concluding that economic protectionism for its own sake is irrational). See also *Plyler v. Doe*, 457 U.S. 202, 227, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982), and *Rinaldi v. Yeager*, 384 U.S. 305, 308–09, 86 S.Ct. 1497, 16

[4] *See also*, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013) (overturning state law that required intrastate sales of caskets can only be made by state licensed funeral homes under equal protection grounds.

L.Ed.2d 577 (1966) (a law cannot satisfy the rational basis standard of review based on a mere cost-saving rationale).

The District Court in its Order stated that Plaintiffs were relying on a single footnote for the quote above as its basis for its argument against the Motion but that is not the case. The substance of the *Merrifield* decision holds that the State's regulations were irrational because they economically favored one similarly situated class over another and therefore could not survive even under the broad rational basis test and therefore was unconstitutional.

Indeed, the record highlights that the irrational singling out of three types of vertebrate pests from all other vertebrate animals was designed to favor economically certain constituents at the expense of others similarly situated, such as Merrifield. 547 F.3d at 991.

As in *Merrifield*, the SFMTA's decision to prohibit Pre-K medallion holders from picking up passengers at SFO and to give Purchased medallion holders significant priority over Post-K medallion holders, which the City admits was designed to economically favor Purchased medallion holders, reflects an irrational singling out of one class of similarly situated classes of medallion holders and therefore violates the Pre-K and Post-K equal protection rights.

In addition to the City's candid admissions throughout its Motion that it sought to financially aid the Purchased medallion holders, the evidence that the

SFMTA's main motivation in making its rule changes was to prop up the value of the Purchased medallions is overwhelming. In his memorandum to the industry, Mr. Reiskin said the goals of the new rules were to "Support Purchased medallions by prioritizing their pick-ups at SFO." ER 000162. In Staff's December 21, 2018 memo to the SFMTA Board, Director of Taxis, Kate Toran, reveals that the MTA simply thinks pre-K medallion holders have made too much money over the years, and that the medallion holders' ability to make pickups at the Airport should be cut off as a result. ER 000106-108.

Clearly the SFMTA's changes are favoring the Purchased medallion holders to the detriment of all the other medallion holders. This not only results in a direct economic benefit to the Purchased medallion holders, but potentially reduces the City's liability in its lawsuit with the Credit Union. This constitutes economic favoritism on its face, is thus irrational on its face, and cannot possibly be in furtherance of a legitimate governmental interest. *Merrifield*, 547 F.3d at 991 n. 15.

2. The Regulations Are Not Rationally Related to Driving "Additional Taxi Supply to San Francisco Proper."

In their Motion, Defendants argued strenuously about what they believe is an alternative conceivable rationale for the Regulations: forcing Pre-K and Post-K holders to drive more taxicabs in San Francisco proper, an argument the District Court did not address. In any event, the Defendants seem to assert that Plaintiffs

admit in their Complaint that "driving" taxi supply to San Francisco is both legitimate, and rationally related to the Regulations. Not so.

As stated in the Complaint, the Regulations were premised upon Schaller's recommendations for improving the health of the taxi industry in San Francisco. (ER 000029, Compl. ¶ 18). Schaller issued its report in May 2018. (ER 000029, Compl. ¶ 19; ER 000118). As Schaller found, revenues realized by drivers, medallion holders and color schemes had dropped precipitously as a result of the incursion of the TNCs, among other factors. (ER 00029, Compl. ¶ 19). Schaller confirmed that many taxi shifts were going unfilled and many taxis were not being used due to a shortage of drivers, and that taxis have virtually lost the previously vibrant night business in the City.

Schaller's recommendation that the SFMTA *reduce* the number of taxis in the City, by retiring all pre-K permits and all "unused" post-K permits was motivated, as plainly stated in the Schaller report, to increase the income of the surviving medallion holders and, in particular, the holders of Purchased medallions. (ER 00029, Compl. ¶ 19). The subsequent findings of the MTA's staff, and the Regulations themselves, only confirm that the purpose of the Regulations was economic protectionism, nothing more.

Notably, in the Motion, Defendants completely fail to show how reducing the fleet of taxis is related to the contrived purpose of "driving" taxi supply to San

Francisco. Defendants' failure to articulate how reducing San Francisco fleet of taxis could conceivably serve the purpose of increasing taxis serving the city proper is not a coincidence. Schaller, the SFMTA staff, and the Regulations all provide evidence that the rule changes cannot possibly increase taxi flow in the City. Instead the effect of the changes is to give taxicabs using Purchased medallions a strong incentive to work exclusively at SFO while at the same time eliminating or greatly reducing the use of Pre-K or even Post-K medallion, which reduces the net number of taxicabs driving in the City.

Moreover, the actual results fly in the face of the City's presumption that taxi service would increase in the City. Based on the City's own analysis, ***"taxi trips in San Francisco Proper have declined by 16%"*** since the City implemented its new taxicab pick-up rules on February 1, 2019, ER 000210, demonstrating that there are fewer taxicabs driving in the City and that the SFMTA's presumptions about increasing service in the City were pretextual. The main motivation was to prop up the value of the Purchased medallions.

Whatever presumption of rationality is enjoyed by the Regulations, that presumption has been overcome here. Plaintiffs have sustained their burden of showing that the Regulations are arbitrary and irrational. Not only are the Regulations motivated solely by rank economic protectionism, they cannot conceivably be related (much less rationally related) to driving more taxis to

service San Francisco.

3. The Regulations Are Not Designed To Reduce Congestion At SFO.

The District Court also erred when it seemingly relied on the City's other stated purpose for implementing its new regulations to dismiss Plaintiffs' claims, namely, "to decrease congestion at the airport." ER 000017. That conclusion also is unsupported by the record.

In support of their argument that the subject Regulations serve the purpose of reducing congestion at the Airport, Defendants relied on the same October 2018 SFMTA staff findings that made it apparent that the Regulations were nothing more than impermissible economic protectionism. Defendants claimed (without any evidentiary support) that SFO has "struggled to manage taxi congestion stemming from an oversupply of taxis at the airport." (Motion, p. 12). The alleged congestion, so the argument goes, "leaves an inadequate number of taxis to service customers in the City." (Id., p. 13). Again, though, Defendants' argument fails, for a couple of distinct reasons.

First, reducing San Francisco's taxi fleet by preferring Purchased medallion holders to Pre-K and Post-K medallion holders is not conceivably related to reducing supposed congestion at SFO. As the MTA staff's own report indicates, the congestion is attributable to the advent of TNCs, not because airport runs are equally available to all medallion holders. As stated *supra*, before 2016, taxis had

approximately 75% of the SFO business, and now have 8.8% of that business. Defendants cannot seriously assert that propping up the value of Purchased medallions by restricting airport access pursuant to the Regulations will somehow ameliorate the problem the advent of the TNCs has caused; the number of pre-K and corporate medallion holders that are being denied access to SFO (253) is far less than the number of Post-K medallions (559) and Purchased medallions (625), which are allowed to pick up passengers at SFO under the Regulations. Eliminating the access of pre-K and corporate medallion holders to the airport, and severely restricting the Post-K medallion holders' ability to pick up passengers at the airport, by forcing them to sit in holding lots for hours, cannot conceivably relieve airport congestion. The Regulations will only further deplete the supply of available cabs, with the concomitant effect that an even larger percentage of the remaining fleet will remain at the Airport, and not service customers in the City. Congestion at the Airport will be ameliorated not one iota by the Regulations.

Second, Defendants cannot demonstrate that the Regulations rationally relate to the legitimate government purpose of reducing congestions at the Airport, when none of the Defendants has responsibility for managing, supervising and operating airport property, including the terminals, parking lots and roadways at SFO. Pursuant to Sections 21690.5 through 21690.10 of the California Public Utilities Code, and Section 4.115 of the San Francisco Charter, that responsibility

is vested in the Airport Commission ("the Commission"). Defendants' assertion that the Regulations serve their interest in relieving congestion on property they have no authority to manage is irrational.

4. Plaintiffs Have Demonstrated Pretext.

A plaintiff may overcome a defendant's alleged rational basis by demonstrating pretext. "[A]cts that are malicious, irrational, or plainly arbitrary do not have a rational basis." *Engquist v. Oregon Dep't of Agric.*, 478 F.3d 985, 993 (9th Cir. 2007), aff'd sub nom. *Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008). "[I]n an equal protection claim based on selective enforcement of the law, a plaintiff can show that a defendant's alleged rational basis for his acts is a pretext for an impermissible motive." *Id*. An equal protection plaintiff may show pretext by showing that "(1) the proffered rational basis was objectively false; or (2) the defendant actually acted based on an improper motive." *Prime Healthcare Servs., Inc. v. Harris*, 216 F. Supp. 3d 1096, 1119 (S.D. Cal. 2016).

Plaintiffs submit that they have shown that "driving" taxis to serve San Francisco proper, and reducing airport congestion as underlying rationales for the Regulations, are mere pretexts for the more clearly stated, improper rationale- propping up the value of the Purchased medallions. Protecting a discrete interest group- here, the holders of Purchased medallions- from economic competition is

simply not a legitimate governmental purpose. *Craigmiles v. Giles*, *supra*, 312 F.3d at 224.

The Supreme Court, employing rational basis review, has been suspicious of a legislature's circuitous path to legitimate ends when a direct path is available. In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), the Supreme Court invalidated under rational basis review a local zoning ordinance barring the construction of a home for the mentally disabled in a certain neighborhood. The Court successively discounted the city's offered justifications, noting in several cases that if the city were really concerned about the ills that it claimed (overcrowded dwellings), it could have passed better-tailored regulations without the suspicious side-effect of keeping the mentally disabled out of neighborhoods (zoning regulations regarding the number of residents that were generally applicable). *Id.* at 439, 105 S.Ct. 3249.

Here, if the SFMTA really wanted to "drive" taxi traffic to San Francisco, or wanted to reduce airport congestion, far better-tailored regulations that do not privilege Purchased medallion holders at the expense of other medallion holders could be passed. But to do so would gut the real, irrational, illegitimate purpose to which the December 2018 Regulations are well tailored: propping up the value of Purchased medallions, to the detriment of other medallions holders. Permitting

these Regulations to stand, then, would render rational basis review truly "toothless."[5] Rank economic protectionism is simply not rational.

III. PLAINTIFFS HAVE ALLEGED FACTS SUFFCIENT TO STATE A CLAIM UNDER CEQA.

The District Court also denied Plaintiffs' CEQA claim, concluding, without analysis, that the promulgation of the SFMTA's new taxicab regulations did not constitute a "project" under CCR 15378. This in and of itself was error. Further, the SFMTA violated CEQA by failing to undertake any environmental whatsoever, as required under CEQA.

A. The SFMTA Staff's Conclusion That The Regulations Are Not a "Project" Was Wrong.

"Ordinances passed by cities are clearly activities undertaken by a public agency and thus *potential* 'projects' under CEQA." *Union of Medical Marijuana*

[5] The City cites to other cases involving taxicab regulations to support its case, but those cases are clearly distinguishable to the case at bar. In *Greater Houston Small Taxicab Co. Owners Ass'n v. City of Houston*, 660 F.3d 235 (5th Cir. 2011), an association representing small taxicab companies asserting that regulations authorizing the issuance of new permits unfairly gave priority to larger taxi companies. The city argued that its priority scheme was based on legitimate goals of fostering competition and increasing the level and quality of taxi service in the city.

In *Kansas City Taxi Cab Drivers Ass'n, LLC v City of Kansas City Mo*., 742 F.3d 807 (8th Cir. 2013), a coalition of taxicab drivers sued the city to overturn an ordinance that imposed a reduction in the *overall* taxi permits in the city and imposed a requirement that new applicants must apply for a minimum of 10 permits. The court in that case found that the city was addressing an "insufficient demand for taxicabs," as well as the court identified other purposes: "creating incentives to invest in infrastructure and increasing quality in the taxicab industry."

The legitimate concerns described in those cases do not exist here. In San Francisco, there is no issue with the quality of the service provided by the color schemes nor is the City in any way trying to increase the quantity of cabs or the quality of taxi service. Rather, the City is simply giving an economic advantage to Purchased medallion holders as a way of increasing the value of these medallions and reducing the City's exposure to the Credit Union. That is not a legitimate purpose under the rational basis test. The City is actually reducing customer service to the public by causing the number of taxis operating in the City to decline.

Patients, Inc. v. City of San Diego, 4 Cal.App.5th 103 (2016). Nonetheless, the SFMTA staff never conducted a preliminary review to determine whether its proposed rule changes were a "project" requiring CEQA review, as it was required to do. 14 Calif. Code Regs. (CCR) §15060(c). Instead, staff made a cursory conclusion that the rule changes were not a "project" without undergoing any study to determine the effects on traffic, congestion air pollution, etc. ER 000179-180.

Section 15378 defines a "project" as "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. Staff's conclusion, in the absence of any analysis whatsoever, that the MTA's rule changes would not impact traffic and the environment, defies common sense. The 2018 regulations will almost certainly have an impact on traffic between the City and SFO and elsewhere in the surrounding areas, as taxis with Purchased medallions are likely to drive to the airport without passengers just to take advantage of the priority pick-up line. At the same time, taxis with pre-K and post-K medallions are likely to rush back to the City after dropping off passengers at SFO, empty-handed, because they either are not allowed pick-ups or do not want to wait hours for an available pickup from the secondary lot. The SFMTA should have conducted an analysis of the possible environmental effects of the new rules. In failing to do so the SFMTA clearly ran afoul of CEQA. 14 CCR § 15060(c);

Muzzy Ranch Co. v. Solano County Airport Land Use Com., 41 Cal.4th 372, 380 (2007).[6]

The cases cited by the City do not support its position that no further CEQA analysis was required. In *Union of Medical Marijuana Patients, Inc. v. City of Upland*, 245 Cal.App.4th 1265, 1275-76 (2016), the Court rejected the plaintiffs' CEQA challenge of an ordinance ban on mobile marijuana dispensaries because the plaintiffs' based their challenge on "layers of assumptions" about the number of medical marijuana patients in the city, marijuana usage rates, how many patients would drive to get the product, how many would cultivate their own and other unsupported assumptions. In short, the challenge was based on pure speculation. In *City of San Diego*, *supra*, the Court rejected a similar challenge to the City of San Diego's medical marijuana ordinance on the grounds that the challenge was based "on a fundamental assumption that is unsupported by the evidence and is unduly speculative." 4 Cal.App.5th at 12-21.

Here, in stark contrast, Plaintiffs' claims are not based on speculation. The

[6] CEQA and the guidelines issued by the State Resources Agency to implement CEQA establish a three-tiered structure. If a project falls within a category exempt by administrative regulation, or 'it can be seen with certainty that the activity in question will not have a significant effect on the environment' ..., no further agency evaluation is required. If there is a possibility that the project may have a significant effect, the agency undertakes an initial threshold study ...; if that study demonstrates that the project 'will not have a significant effect,' the agency may so declare in a brief Negative Declaration.... If the project is one 'which may have a significant effect on the environment,' an EIR is required." *E. Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified Sch. Dist.*, *supra*, 210 Cal. App. 3d at 163–64.

City has changed the rules so that taxis with Pre-K or corporate medallions cannot pick-up passengers from SFO, meaning if they get fares to the airport they will have to return to the City without passengers. Taxis holding Purchased medallions will be incentivized to go to SFO even without passengers in order to take advantage of the priority line and get the more lucrative fares. The bottom line is that there is going to be an increase in taxis without passengers driving to and from the airport, and that will both increase traffic and (despite San Francisco's efforts to reduce carbon emissions in its taxi fleet) affect the environment. That is not speculative; that is a certainty.

Simply put, the SFMTA's complete abrogation of its responsibilities to consider the environmental impact of the 2018 Regulations violated CEQA and the Court's failure to even analyze the issue was error.[7]

IV. PLAINTIFFS HAVE STATED A VALID CLAIM UNDER CAL. GOV'T CODE §11135.

Cal. Gov't Code §11135(a) provides that no person "shall, on the basis of . . . age . . . be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is . . .

[7] Further, whether a particular activity qualifies for the commonsense exemption urged here by Defendants presents an issue of fact, and the SFMTA, as the agency invoking the exemption, has the burden of demonstrating it applies. *Davidon Homes v. City of San Jose*, 54 Cal.App.4th 106. 114, 62 Cal. Rptr. 2d 612 (1997). An agency's duty to provide such factual support "is all the more important where the record shows, as it does here, that opponents of the project have raised arguments regarding possible significant environmental impacts." *Id*. at p. 117. "An agency's obligation to produce substantial evidence supporting its exemption decision is all the more important where the record shows . . . that opponents of the project have raised arguments regarding possible significant environmental impacts." *Id*.

funded directly by the state or receives financial assistance from the state."

The SFMTA has in place a Paratransit Program, which is a "program to provide transit services for people unable to independently use public transit because of a disability or disabling health condition." (Request for Judicial Notice in Motion for Preliminary Injunction, Docket No. 23, Exh. "A," Trans. Code §§1102, 1105(a)(11)). The Paratransit Program is funded in part with funds from the State. *See, e.g.*, https://mtc.ca.gov/our-work/fund-invest/sales-tax-and-gas-tax-funding. Moreover, all color schemes, medallion holders and drivers must operate subject to and in compliance with the Paratransit Program. *Id*., 1105(a)(11).

In invoking its new rules, the SFMTA is discriminating on the basis of age, as it is targeting holders of pre-K medallions, whose average age is 74 and who are almost all in their seventies or older. In denying pre-K medallion holders the right to pick up passengers at SFO, the SFMTA is rendering their medallions virtually worthless. Even if age is not the basis for the SFMTA's new rules, the rules have the effect of "unlawfully subject[ing]" these elderly Pre-K medallion holders to discrimination, under a taxi program that receives state funding. Color schemes will no longer lease pre-K medallions, meaning the elderly holders of these medallions will be denied the benefits under the SFMTA Paratransit Program. The SFMTA is compounding its discriminatory treatment by reducing the availability of taxis that offer services under the Paratransit Program. Considering that the

number of pre-K and even post-K medallions being leased will decline substantially, and there will be fewer taxis available to participate in this Program. The effect will be that there will be a reduction in services to the intended beneficiaries of the program – persons who are disabled or have a disabling health condition.

It is not necessary that the Pre-K medallion holders are the intended beneficiaries of the City's Paratransit program. The point is that the City receives state funding for its Paratransit program, which is part of the City's taxi program. Cal. Gov't Code §11135(a) provides that no person "shall, on the basis of . . . age . . . be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is . . . funded directly by the state or receives financial assistance from the state." The City's taxi licensing scheme is a "program or activity" that receives some funding from the State (for its Paratransit component). The City does not dispute that the 2018 regulations discriminate against holders of Pre-K medallions, whose average age is 74[8] and who are almost all in their seventies or older. In denying pre-K medallion holders the right to pick up passengers at SFO, the SFMTA is denying

[8] The District Court, oddly, dismisses the disparate impact argument holding that there is not a significant difference in age between the average age of 74 (Pre-K medallion holders) and 61 (all medallion holders). Plaintiffs disagree. The impact on the Pre-K medallion holders is likely to much more severe, as these people are much older and likely have little ability to make any income.

them "full and equal access to the City's taxing licensing program, which receives money from the State. This is a violation of Gov't Code §11135(a). In failing to even address the merits of this claim the District Court erred.

CONCLUSION

Based on the aforementioned arguments, the District Court erred in granting judgment on the pleadings on Plaintiffs' claims for (i) violation of their equal protection rights under the California and U.S. Constitutions, (ii) age discrimination pursuant to Cal. Gov't. Code §1135(a) and violation of CEQA requirements in failing to undertake an analysis of the possible environmental effects of its new rules. Accordingly, Plaintiffs respectfully request that this Court overrule the District Court's judgment dismissing Plaintiffs' case on all counts.

Dated: November 27, 2019

BRUNETTI ROUGEAU LLP

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COALITION, *et al.*

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number: 19-16439

I am the attorney for Plaintiffs-Appellants.

This brief contains 11732 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[X] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

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[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

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[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature */s/Gregory A. Rougeau* **Date:** November 27, 2019
Gregory A. Rougeau

STATEMENT OF RELATED CASES

Plaintiffs-Appellants are not aware of any cases pending in this Court that would be deemed related pursuant to Ninth Circuit Rule 28-2.6.

Dated: November 27, 2019

Respectfully submitted,

/s/ Gregory A. Rougeau
Gregory A. Rougeau
BRUNETTI ROUGEAU LLP
Counsel for Plaintiffs-Appellants

ADDENDUM

Print

San Francisco Transportation Code

ARTICLE 300: FINES AND FEES

SEC. 301. LATE PAYMENT; SPECIAL COLLECTIONS AND BOOT REMOVAL FEE.

Except as otherwise specified in this Code, the SFMTA may charge the following penalties and fees to persons to whom civil citations have been issued or to owners of cited vehicles for failure to either pay the citations or to contest the underlying citations by the due date affixed to the notice of violation. These fees include a DMV registration hold fee. The penalties and fees shall be as follows:

Commission		
By qualified Non-Profit or Government Agency as determined by the Film Commission*[1]	Waived	Waived

The Director of Transportation or his or her designee shall have the discretion to waive or reduce this license fee for student filming, filming by government agencies, or filming by non-profit agencies if requested by the Film Commission.

(Added by SFMTA Bd. Res. No. 14-061 , Ad. 4/15/2014, Eff. 5/16/2014, Oper. 7/1/2014; amended by SFMTA Bd. Res. No. 14-115 , Ad. 7/15/2014, Eff. 8/15/2014; SFMTA Bd. Res. No. 16-042 , Ad. 4/5/2016, Eff. 5/6/2016, Oper. 7/1/2016; SFMTA Bd. Res. No. 180403-057, Ad. 4/3/2018, Eff. 5/4/2018, Oper. 7/1/2018)

CODIFICATION NOTE

1. So in SFMTA Bd. Res. No. 180403-057.

SEC. 319. CLIPPER® CARD AND LIFELINE ID CARD REPLACEMENT FEE.

Description	FY 2019 Effective July 1, 2018	FY 2020 Effective July 1, 2019
Clipper® Card and Lifeline ID Card Replacement Fee	$5	$5

(Added by SFMTA Bd. Res. No. 14-061 , Ad. 4/15/2014, Eff. 5/16/2014, Oper. 7/1/2014; amended by SFMTA Bd. Res. No. 16-042 , Ad. 4/5/2016, Eff. 5/6/2016, Oper. 7/1/2016; SFMTA Bd. Res. No. 180403-057, Ad. 4/3/2018, Eff. 5/4/2018, Oper. 7/1/2018)

SEC. 320. TAXI PERMIT FEES.

The following is the schedule for taxi-related permit and permit renewal fees:

Permit Type*	FY 2019 Effective July 1, 2018	FY 2020 Effective July 1, 2019
Driver Permit Application**	N/A	N/A
Monthly Ramp Taxi Medallion Use Fee	N/A	N/A
Monthly Taxi Medallion Use Fee (8000 series)***	$1,000	$1,000
Dispatch Application	$7,044	$7,326
Color Scheme Change	$472	$491
Lost Medallion	$124	$129
New Color Scheme - 1 to 5 Medallions	$3,174	$3,269
New Color Scheme - 6 to 15 Medallions	$3,540	$3,646
New Color Scheme - 16 to 49 Medallions	$6,563	$6,826
New Color Scheme - 50 or more Medallions	$8,200	$8,528
Renewal Application:		
Driver Renewal	$122	$127
Medallion Holder Renewal for Pre-K Medallions and Pre-K Corporate Medallions	$1,179	$1,227

Medallion Holder Renewal for Post-K Medallions	$590	$614
Color Scheme Renewal - 1 to 5 Medallions	$1,075	$1,107
Color Scheme Renewal - 6 to 15 Medallions	$2,475	$2,549
Color Scheme Renewal - 16 to 49 Medallions	$5,616	$5,841
Color Scheme Renewal - 50 to 149 Medallions	$8,424	$8,761
Color Scheme Renewal - 150 or More Medallions	$11,232	$11,681
Dispatch Renewal	$7,782	$8,094

* In order to recover the cost of appeals, a $3.50 surcharge will be added to the above amounts except the "Monthly Taxi Medallion Use Fee (8000 series)".

** On April 15, 2014, the Board of Directors, by Resolution No. 14-060, authorized the Director of Transportation to waive the new taxi driver permit application fees until in the judgment of the Director of Transportation that the supply of drivers is adequate to fill available taxi shifts.

*** Notwithstanding the fee listed above for "Monthly Taxi Medallion Use Fee (8000 Series)," said fee shall be $1,000 until June 30, 2020, $100 of which shall be paid into the Driver Fund.

(Added by SFMTA Bd. Res. No. 14-061, Ad. 4/15/2014, Eff. 5/16/2014, Oper. 7/1/2014; amended by SFMTA Bd. Res. No. 14-142, Ad. 9/16/2014, Eff. 10/17/2014; SFMTA Bd. Res. No. 14-171, Ad. 12/2/2014, Eff. 1/2/2015; SFMTA Bd. Res. No. 15-036, Ad. 3/3/2015, Eff. 4/2/2015; SFMTA Bd. Res. No. 16-042, Ad. 4/5/2016, Eff. 5/6/2016, Oper. 7/1/2016; SFMTA Bd. Res. No. 170103-004, Ad. 1/3/2017, Eff. 2/3/2017; SFMTA Bd. Res. No. 170404-040, Ad. 4/4/2017, Eff. 5/5/2017; SFMTA Bd. Res. No. 180403-057, Ad. 4/3/2018, Eff. 5/4/2018, Oper. 7/1/2018; SFMTA Bd. Res. No. 181016-143, Ad. 10/16/2018, Eff. 11/16/2018)

SEC. 321. SFMTA VENDOR COMMISSION FEES.

Approved SFMTA vendors who sell SFMTA products shall be paid the following fee for each product sold. SFMTA vendors may deduct applicable commission fees prior to remitting payment to the SFMTA for sold SFMTA products.

Vendor Commission Fee	FY 2019 Effective July 1, 2018	FY 2020 Effective July 1, 2019
Fare media and parking products	$0.75	$0.75
SFMTA Transit and Bike Map	$1.50	$1.50

(Added by SFMTA Bd. Res. No. 16-042, Ad. 4/5/2016, Eff. 5/6/2016, Oper. 7/1/2016; amended by SFMTA Bd. Res. No. 180403-057, Ad. 4/3/2018, Eff. 5/4/2018, Oper. 7/1/2018)

(Former Sec. 321 added by SFMTA Bd. Res. No. 15-103, Ad. 7/7/2015, Eff. 8/7/2015; repealed by SFMTA Bd. Res. No. 16-006, Ad. 1/5/2016, Eff. 2/5/2016)

SEC. 322. NON-STANDARD VEHICLE PERMIT FEES.

The following is the schedule for Non-Standard Vehicle permit fees.

Description	FY 2019 Effective July 1, 2018	FY 2020 Effective July 1, 2019
Permit Application Fee*	$5,000	$5,000
Annual Fee		
1 to 5 Vehicles	$10,000	$10,000
6 to 25 Vehicles	$25,000	$25,000