No. 10-20381

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GREATER HOUSTON SMALL TAXICAB
COMPANY OWNERS ASSOCIATION,

Plaintiff-Appellant,

v.

CITY OF HOUSTON, TEXAS,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division

BRIEF FOR APPELLANT GREATER HOUSTON SMALL TAXICAB COMPANY OWNERS ASSOCIATION

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Statement Regarding Oral Argument

Plaintiff-Appellant Greater Houston Small Taxicab Company Owners Association respectfully requests oral argument. This case involves the constitutionality of an ordinance of the City of Houston allotting 211 new taxicab permits. It affects 137 taxi companies and their drivers and other employees, as well as innumerable passengers in Houston. Appellant Association alone represents 60 taxicab companies, the livelihoods of which will be significantly affected by the outcome of this case.

More importantly, the Association believes argument will be helpful to the Court in its resolution of the appeal. The constitutional question involved is far from commonplace, and the other legal and factual issues are complex. Argument can help to clarify the points that divide the parties and will be central to the Court's decision.

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JURISDICTIONAL STATEMENT

Plaintiff alleges a violation of its members' rights under the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983. R 288.[1] The district court therefore had subject matter jurisdiction over plaintiff's claims pursuant to 28 U.S.C. § 1331. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 because this appeal is taken from the district court's final judgment, entered on April 26, 2010, disposing of the entire action and all of plaintiff's claims. R.E. 4, R. 363. Plaintiff's timely notice of appeal was filed on May 25, 2010. R.E. 2, R. 364-65.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether a city ordinance denying new taxi permits to one group of taxi companies and granting them to another violates the Fourteenth Amendment's Equal Protection Clause when there is no difference in how the two groups serve passengers or any other public purpose served by the unequal treatment.

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[1] Citation to "R. __" is to the specified page in the record. Citation to "R.E.__" is to the tab at which the cited document appears in the Record Excerpts.

STATEMENT OF THE CASE

Plaintiff-Appellant Greater Houston Small Taxicab Company Owners Association ("the Association") filed suit against the City of Houston on May 29, 2008 seeking to permanently enjoin the distribution of new taxicab permits as authorized in Ordinance No. 2007-1419 ("the Ordinance"), which was enacted by the Houston City Council. R. 9-29. The Association alleges that the way in which the City allocated the new permits violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *See id*.; R. 288 The City moved for summary judgment, R. 147-63, and the district court (Hittner, J.) referred the case to a magistrate (Froeschner, J.), R. 280, who issued a report and recommendation that the court grant the City's motion on the ground that there is no factual dispute as to the Ordinance's constitutionality. R.E. 5, R. 338-49. The district court adopted the report and recommendation and dismissed the case by final judgment issued on April 26, 2010. R.E. 3-4, R. 361-63. This appeal followed.

INTRODUCTION

This case features a challenge to the decision of the City of Houston to award dozens of new permits for taxicabs to a small handful of preferred taxi companies while denying new permits to 101 of their competitors – companies that provide the same kind and quality of service to passengers. Because this grossly unequal treatment completely prevents these 101 companies from expanding their businesses, and exacts this price without serving any public purpose, it violates the Fourteenth Amendment's Equal Protection Clause and should be invalidated. At the least, there is a factual question as to the decision's constitutionality precluding summary judgment.

In 2007, the City decided to award 211 new taxi permits. It allocated 108 for the 4 largest companies with 89 to 1,419 existing permits and a history of providing what the City calls "full service," meaning 24-hour dispatch and on-site taxi repair. It reserved 76 for two classes of "midsize" companies: 4 "large midsize" companies with 26-36 existing permits, each to get 10 new permits; and 12 "small midsize" companies with 4-20 existing permits, each to get 3 new permits. By contrast, it allocated no new permits at all for 101 of 117 "small" companies with 1-3 existing permits.

The City has guaranteed the growth of the 16 midsize companies while precluding that of 101 small companies despite the fact that no

company in either category provides "full service." Virtually all are exactly alike in that they rely on cell phones and mostly make trips to and from the airports. The City's stated goal is to enlarge the midsize companies so they might one day provide full service, but there is no evidence or reason to believe the relatively small number of new permits they would receive under the City's plan can come close to enabling them to do so, now or in the future. The City's goal is particularly misapplied to the small midsize companies, most of which would have fewer than ten permits and would therefore still be nowhere near the size or capability of their large, full service counterparts. Yet these 12 small midsize companies are assured of profitable expansion while the City stunts the growth of 101 of their similarly situated competitors.

The Supreme Court held long ago "that no impediments should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition." *Yick Wo v. Hopkins* 118 U.S. 356, 367 (1886). The City's arbitrary preference of one group of taxi companies and punishment of another, though they serve passengers identically, violates this ancient command and must be set aside.

STATEMENT OF FACTS

I. Adoption of the Ordinance and Distribution Proposal

The Houston Code of Ordinances ("the Code") requires possession of a permit issued by the City as a condition for operation of a taxicab on city streets. R. 199 (HOU. CODE OF ORDINANCES § 46-62). Every three years, the Code requires the City to determine whether to issue new permits based on a particular formula. R. 165, 197-99 (HOU. CODE OF ORDINANCES §§ 46-61 – 46-63). The City issued new permits and thereby increased the number of taxis in use in 2001 but did not do so in 2004, having concluded according to the formula that expanding the citywide fleet was not mandated. R.E. 6, R. 165. In 2007, the City again applied the formula and found that it required issuance of 211 new permits. *See id.*

Objections about various aspects of the 2007 permit process led the Houston City Council to delay issuance of the new permits for one year, until May 1, 2008, and to refer the matter to the City's Finance and Administration Department ("the Department") for review and recommendation of necessary changes. R.E. 6, R. 165-66. The Department, in turn, formed "a Taxicab Working Group" consisting of some taxi companies and others to assist in its reconsideration of the permit process. R.E. 7, R. 106. However, members of the Association, which represents 60

companies with 1-3 existing permits, R. 288-89, complained to the City Council that they were given "no chance to be heard" in the Department's revision process, which was dominated by the larger taxi companies.[2] As the Association alleged in its complaint, its members "were given little notice of the meeting and had little to no input in the creation of the Distribution list," that is, the plan allocating the 211 new permits. R. 290.

The City Council adopted the Ordinance on December 12, 2007. R.E. 6, R. 164. The Ordinance amends several provisions of the Code governing taxi service, such as those regulating drivers who refuse service to passengers, the number of wheelchair-accessible taxis, and driver training and insurance. R.E. 6, R 167-68. It also codified the Department's plan to allocate the 211 new permits, called the "Stakeholder Distribution Proposal" ("the Distribution Proposal"). R.E. 6, R. 322.[3]

The Distribution Proposal is "Exhibit A" to the Ordinance and provides for issuing 200 of the 211 new permits to companies that currently hold taxi permits, with 11 reserved for new operators. *See id*. The number

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[2] *See* Hou. City Council Minutes, at 7 (December 11, 2007), *available at* www.houstontx.gov/city/sec/agendas/20071211.pdf (quoting Association President Gary Ocbayohannes). Association Treasurer Joseph Kefmariam similarly told the Council that that he did not receive promised notice of working group meetings. *See id*. at 8.

[3] Because the quality of the copy of the Distribution Proposal appended to the Ordinance is poor, *see* R.E. 6, R. 181, a second, higher quality copy appearing in the record at R. 322 has been included after the text of the Ordinance at R.E. 6.

of new permits to be awarded to each current permit holder depends entirely on the number of permits each already has. *See id*. The Distribution Proposal categorizes current permit holders into four classes: (1) "large companies," defined as those currently holding 80 or more permits; (2) "large midsize companies," defined as those currently holding 25-79 permits; (3) "small midsize companies," defined as those currently holding 4-24 permits; and (4) "small companies," defined as those currently holding 1-3 permits. *See id.* The following table summarizes how the Distribution Proposal allocates the 200 new permits among these four categories:

Taxi Company Categories:	**Permits Awarded by Distribution Proposal:**
Large Companies 4 companies with 89 to 1,419 existing permits	27 new permits per company 108 total new permits awarded to this category
Large Midsize Companies 4 companies with 26-36 existing permits	10 new permits per company 40 total new permits awarded to this category
Small Midsize Companies 12 companies with 4-20 existing permits	3 new permits per company 36 total new permits awarded to this category
Small Companies 117 companies with 1-3 existing permits	No guaranteed new permits; companies can enter drawing in which only 16 can win one new permit each

Id.

Thus, under the Distribution Proposal, only 16 of the 117 companies in the small company category are allowed to expand by winning a drawing planned by the City – and even these lucky 16 would only receive a single additional permit. *See id.* The remaining 101 small companies would receive no new permits. *See id.*

On the other hand, the 20 companies in the other three categories are guaranteed to receive new permits and expand their businesses, most by a large margin. *See id.* The four largest companies would each receive 27 new permits, with the smallest growing by 30%. *See id.* The four large midsize companies are each slated to receive 10 new permits and would each enjoy growth from 27% to 38%. *See id.* The small midsize companies would each get three new permits. *See id.* Nine of these companies now have only four to six permits and would therefore expand by 50% to 75% under the Distribution Proposal. *See id.* The other three companies in this category have 10, 14 and 20 existing permits and therefore stand to grow by 15% to 30%. *See id*.

Although implementation of the Distribution Proposal would not significantly change the market share of each company, it would grant substantial new value to the 20 recipients of new permits while denying that

benefit to the 101 non-recipients. *See id*. Obviously, companies with new permits can earn the additional income derived from the fares brought in by their new taxis. In addition, the permits can be sold or leased five years after issuance, R.E. 7, R. 110, and the City estimates each permit to be worth $15,000 to $40,000 on the open market. R. 410.

Under the Distribution Proposal, the City would issue the 184 new permits reserved for the 20 companies in the large, large midsize, and small midsize classes over four years rather than the previously mandated three years between new permit determinations. R.E. 6, R. 322. The 16 permits set aside for the 117 companies in the small company category would be issued during the first year of this four-year period. *See id*. There is no assurance that application of the formula governing whether new permits should be issued will result in the awarding of new permits when the four-year period has ended. As the City explained in its brief to the district court: "none of the taxicab companies holding permits have any guarantee that in the future there will be a distribution, and even if there were to be a distribution, how many their group will be allotted." R. 318.

II. Differences Between and Similarities Among the Taxi Companies

The Department described the companies in each of the four categories in a memorandum prepared for the City Council explaining the

Ordinance. R.E. 7, R. 108-09.[4] The four companies in the large company category "are *full-service* taxicab companies offering, among other things, full 24-hour radio dispatch services and complete on-site repair facilities for their vehicles." R.E. 7, R. 108 (emphasis added). The four companies in the large midsize class include "some" with "limited radio dispatch services" and some with some level of on-site repair capability. *Id*. The Department's memorandum states that the 12 companies in the small midsize company category and the 117 companies in the small company group function identically in how they serve passengers:

> Small Mid-sized Companies – those holding between 4 and 24 permits: These companies generally communicate by cell phone and tend to operate primarily at the airports.
>
> * * *
>
> Small Companies – these hold 3 or fewer permits – these companies generally operate by cell phone, primarily at the airports. There are over 100 of these companies, 67 of which have only one permit.

R.E. 7, R. 109. No companies in the midsize or small categories offer what the Ordinance and the Department's memorandum refer to as "full-service," that is, 24-hour dispatch and complete on-site repair capabilities. R.E. 6, R. 166; R.E. 7, R. 108.

[4] The Department's memorandum is also available online at www.houstontx.gov/citysec/backup/2007/121107.pdf, and was described as constituting the "legislative history" of the Ordinance. R. 97.

Nor is there any indication in the Ordinance's findings or the Department's memorandum that the midsize companies could come close to providing "full service" with the addition of three permits (small midsize company group) or ten permits (large midsize company group). Indeed, the smallest company in the large, full-service company category currently holds 89 permits – roughly double what the largest company in the large midsize category would have after the planned distribution, more than triple what the largest small midsize company would have after the distribution, and at least nine times what most companies in the small midsize category would have after the distribution. R.E. 6, R. 322.

III. The City's Rationale for the Distribution Proposal

The City's only stated reason for allocating the 200 permits designated for existing permit holders according to the scheme set forth in the Distribution Proposal is its desire to shepherd the growth of the 16 companies in the midsize categories into full service enterprises. The Ordinance states that one reason for the reevaluation of the permit process during 2007 was the City Council's "expressed concern that the distribution methodology in the [original] ordinance might not adequately allow mid-sized taxicab companies to grow into full-service companies that would be better able to meet the needs of the local community by offering dispatch

capabilities and 24-hour service." R.E. 6, R. 166. Similarly, in its only clause explaining why the Department recommended allocating the new permits as provided for in the Distribution Proposal, the Ordinance states:

> WHEREAS, the Finance and Administration Department also recommends that the 211 taxicab permits originally calculated to be distributed during the 2007 permit year be distributed pursuant to the recommendations of the stakeholder working group, with allocations of permits to be distributed by category to allow for a greater distribution to the mid-sized and small taxicab companies than would have occurred under the codified distribution methodology, to better allow these companies to grow into full-service companies to better meet the needs of the riding public.

Id. The Department's memorandum likewise states that an "advantage" of the Distribution Proposal is that it will help the companies in the small midsize sub-group grow and "ultimately becom[e] full-service operators." R.E. 7, R. 109-10. And the City repeatedly emphasized this purpose in its briefing to the district court. R. 160, 316.

IV. Proceedings in the District Court and the Magistrate's Report and Recommendation

The Association filed suit against the City on May 29, 2008 alleging that the Distribution Proposal violates the Fourteenth Amendment's guarantee of equal protection. R. 9-29. The Association also moved for a temporary restraining order. R. 58-83. On June 11, 2008, the district court heard the Association's motion and entered a temporary restraining order

enjoining the City from issuing the permits as authorized by the Ordinance. R. 85-88, 384-430.

Following the City's answer and the parties' exchange of initial disclosures, the City moved for summary judgment, but the district court denied the motion by order dated May 7, 2009. R. 147-208, 242. The district court then referred the case to the magistrate, who later issued a report and recommendation requesting approval "to revisit the possible merits of the City's Motion for Summary Judgment." R. 304-05. After the district court adopted this recommendation and the parties submitted further briefing, the magistrate issued a report and recommendation that the district court grant the City's motion. R.E. 5, R. 338-49.

In his report and recommendation, the magistrate reviewed the Ordinance and identified various "stated reasons for [its] changes," including changes other than the Distribution Proposal, such as new rules governing disability accessible and low emission taxis. R.E. 5, R. 345. Turning specifically to the allotment of new permits, the magistrate determined in a single, cursory sentence: "Although Plaintiff argues that the Ordinance unfairly provides the smallest companies the least amount of permits, the Court concludes that the City could reasonably decide that small taxicab businesses were less likely to have operations which were capable of

providing adequate service to the general public on a 24 hour, 7 days a week basis." *Id*.

Having recommended upholding the Distribution Proposal on this ground, the magistrate next cited a provision in the Code permitting companies to petition the City Council for additional new permits beyond those issued in the regular course, and approved of providing the 16 permits allotted to the small companies through a drawing in the first year – an aspect of the Distribution Proposal not challenged by the Association. R.E. 5, R. 346. He concluded by distinguishing authority cited by the Association and noting that a legislature need not articulate its reasoning in order for a law to survive equal protection review. R.E. 5, R. 348-49.

The Association objected to the magistrate's report and recommendation, but the district court adopted it and entered final judgment for the City on April 26, 2010. R.E. 3-4, R. 361-63. To date, the City has refrained from issuing any new permits.

SUMMARY OF ARGUMENT

While deferential, the rational basis standard is not toothless. It entails meaningful review to make sure the government treats similarly situated parties alike. In fact, numerous laws and rules violating this principle have been struck down by federal courts in recent years. To be

upheld, a law must seek to further some legitimate governmental purpose, but the desire to advance or protect isolated private interests without achieving some corresponding public benefit is not a legitimate goal. In this case, if the Distribution Proposal will do nothing other than further some but not other companies' individual interests in expanding their businesses, it should be invalidated. *See* Points II and III(A), *infra*.

A law must also rationally further the government's purpose in order to pass muster under the Equal Protection Clause, but the Distribution Proposal flunks this test. There is no evidence or even reason to surmise it will increase the provision of "full service" to passengers because the number of additional permits granted the 16 midsize companies cannot remotely enlarge them to the point where, like the large companies with 89 to 1,419 taxis, they might be willing or able to offer full service. The City has also conceded that there is no guarantee of future distributions in later years or of how new permits, if any, might be allocated then, so it cannot claim that later distributions might eventually fulfill its goal even if this one will not. The City's decision to eschew far more obvious and direct means to increase full taxi service – such as simply requiring 24-hour dispatch capability in exchange for some or all new permits, for instance – casts further doubt on the Distribution Proposal. Nor does the Distribution

Proposal advance any other goal mentioned by the magistrate or the City. At the least, there is a factual question as to whether the Distribution Proposal rationally serves a legitimate end of government that should have compelled denial of the City's motion. *See* Point III(B), *infra*

In reality, all the Distribution Proposal would achieve is the expansion and increased profitability of one set of taxi companies at the expense of their similarly situated competitors. Because this sort of plainly unequal treatment serves no discernible public interest, this Court should not allow it to stand but should remand this case for entry of a permanent injunction against the City or a trial on the merits. *See* Point III(B), *infra.*

ARGUMENT

I. Standard of Review

This Court "review[s] a grant of summary judgment *de novo*, applying the same standard as the district court." *QBE Ins. Corp. v. Brown & Mitchell, Inc.*, 591 F.3d 439, 442 (5th Cir. 2009). It should view the evidence in the light most favorable to the Association, as the non-moving party, while the City has the burden of establishing that summary judgment is appropriate. *See id.* Summary judgment should be denied unless there is no genuine issue of material fact and the City deserves judgment as a matter of law. *See id.*

II. The Equal Protection Clause Requires the City to Treat Similarly Situated Taxi Companies Alike

The Association claims that the Distribution Proposal violates its members' right to equal protection under the Fourteenth Amendment. R. 288. "The Equal Protection Clause directs that all persons similarly circumstanced shall be treated alike." *Plyler v. Doe,* 457 U.S. 202, 216 (1982) (quotation omitted); *accord Vacco v. Quill*, 521 U.S. 793, 799 (1997). As the Supreme Court elaborated in *Reed v. Reed*:

> [T]he Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways… The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

404 U.S. 71, 75-76 (1971) (*quoting in part F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)); *accord Davis v. Weir*, 497 F.2d 139, 144 (5th Cir. 1974).

Because Association members do not constitute a protected class and the Ordinance does not impinge on fundamental rights, this Court should review the Association's equal protection challenge according to the rational basis test. *See City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439-

40 (1985); *A.M ex rel. McAllum v. Cash*, 585 F.3d 214, 226 (5th Cir. 2009). Under this standard, challenged classifications will be upheld "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993); *accord McAllum*, 585 F.3d at 226. Classifications that are "clearly irrelevant" to the purposes of the law will be struck down. *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973); *accord Heller*, 509 U.S. at 324.

Of course, rational basis review is broadly deferential to the government. Laws will be sustained as long as there is "any reasonably conceivable state of facts" supporting the differential treatment they mandate. *Heller*, 509 U.S. at 320. The government need not offer evidence supporting the classification at issue, which can be upheld for reasons that may not have actually motivated legislators. *See id*.

Still, rational basis review is not the same as no review. *See Congregation Kol Ami v. Abington Township*, 309 F.3d 120, 135 (3d Cir. 2002) ("That local zoning ordinances are subject to such deferential review, however, does not mean that they are subject to no meaningful review"). Judge Posner, for example, surveying numerous Supreme Court decisions overturning legislation tested for rationality in recent decades, observed that the analysis "is no longer so toothless as it once seemed." *Bell v.*

Duperrault, 367 F.3d 703, 710 (7th Cir. 2004) (Posner, J. concurring); *accord Schweiker v. Wilson*, 450 U.S. 221, 234 (1981) (the "rational-basis standard is not a toothless one"). As the Third Circuit observed:

> An undercurrent to our dissenting colleague's argument is that under rational basis review, the government always wins. That, quite simply, cannot be so. In fact, were that the case, our review of issues under this standard would be equivalent to no review at all. A necessary corollary to and implication of rationality as a test is that there will be situations where proffered reasons are not rational. That precise situation is graphically presented here.

Doe v. Pa. Bd. of Prob. and Parole, 513 F.3d 95, 112 n. 9 (3rd Cir. 2008).

Contrary to the notion that "the government always wins" rational basis cases, *id.*, federal courts at all levels, including this one, have invalidated laws, regulations and governmental action under that test in equal protection cases in nearly every sphere, including zoning ordinances and decisions,[5] tax laws and enforcement,[6] laws providing public assistance

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[5] *See, e.g., City of Cleburne*, 473 U.S. at 447-50 (invalidating ordinance differentially treating home for mentally disabled); *Burstyn v. City of Miami Beach*, 663 F. Supp. 528, 533-37 (S.D. Fl. 1987) (invalidating rules governing facilities for elderly).

[6] *See, e.g., Alleghany Pittsburgh Coal Co. v. Cty Comm. of Webster Cty.*, 488 U.S. 336, 343-46 (1989) (invalidating property tax assessment based on recent purchase price given different treatment of property not recently conveyed); *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612, 619-24 (1985) (invalidating tax exemption afforded only in-state residents); *Met. Life Ins. Co. v. Ward*, 470 U.S. 869, 876-83 (1985) (invalidating higher taxation of out-of-state insurance company).

and other government benefits,[7] probation rules,[8] traffic ordinances,[9] regulation of natural resources,[10] land-use rules,[11] adoption laws,[12] statutes governing trusts,[13] immigration decisions,[14] recreation provisions,[15] firearms restrictions,[16] utility rules,[17] limitations on local office-holding,[18] and others.

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[7] *See, e.g., Zobel v. Williams*, 457 U.S. 55, 61-64 (1982) (invalidating Alaska law distributing funds from natural resources to citizens based on length of residency); *Moreno*, 413 U.S. 528, 533-38 (1973) (invalidating law denying food stamps to people living with unrelated housemates); *Ranschburg v. Toan*, 709 F.2d 1207, 1209-12 (8th Cir. 1983) (invalidating grant of home heating aid to some but not other disabled persons).

[8] *See, e.g., Doe*, 513 F.3d at 107-12 (invalidating law requiring different treatment of in-state and out-of-state parolee sex offenders).

[9] *See, e.g., Sauby v. City of Fargo*, 2008 WL 3823720 at * 4 (D.N.D. 2008) (invalidating city ordinance imposing traffic fines higher than allowed by state law).

[10] *See, e.g., Del. River Basin Comm'n v. Bucks Cty. Water & Sewer Auth*., 641 F.2d 1087 (3d Cir. 1981) (invalidating assessment of certain charges for water use).

[11] *See, e.g., Mikeska v. City of Galveston,* 451 F.3d 376, 380-82 (5th Cir. 2006) (invalidating city's denial of request to reconnect beach homes to utility service, in supposed interest of protecting beach, despite reconnection of similar homes); *Khodara Envtl., Inc. v. Beckman*, 91 F. Supp. 2d 827, 850-60 (W.D. Pa. 1999) (invalidating law barring certain landfills near airports), *vacated as moot*, 237 F.3d 186 (3d Cir. 2001).

[12] *See, e.g., E.C. v. Sherman*, 2006 WL 6358376 at ** 36-40 (W.D. Mo. 2006) (enjoining withdrawal of assistance to adoptive parents of foster children based on biological parents' income).

[13] *See, e.g., Am. Trust Co. v. S.C. St. Bd. of Bank Control*, 381 F. Supp. 313, 319-24 (D.S.C. 1974) (three-judge court) (invalidating statute prohibiting banks owned by out-of-state companies from serving as testamentary trustee).

[14] *See, e.g., Cordes v. Gonzales*, 421 F.3d 889, 896-99 (9th Cir. 2005) (invalidating alien's removal based on past convictions when more serious offenders obtained relief from removal), *vacated as moot*, 517 U.S. 1094 (9th Cir. 2008).

[15] *See, e.g., Colonial Springs Club v. Westchester Cty.*, 840 F. Supp. 19, 21-22 (S.D.N.Y. 1993) (invalidating law requiring lifeguards at swimming pools maintained by leaseholders but not homeowners).

Closer to the case at bar, courts have struck down laws regulating the practice of particular occupations as well as rules in the transportation field, especially when it appeared they accomplished little beyond enriching one class of company or worker at the expense of competitors. Thus, laws irrationally limiting the people able to obtain professional licenses or work in certain occupations have been invalidated repeatedly under the Equal Protection Clause and its rational basis test. *See, e.g., Merrifield v. Lockyer*, 547 F.3d 978, 984-92 (9th Cir. 2008) (invalidating law exempting certain non-pesticide animal controllers from licensing regime but not others); *Craigmiles v. Giles*, 312 F.2d 220, 224-29 (6th Cir. 2002) (invalidating prohibition on sale of caskets without funeral director's license); *Kirk v. N.Y. State Dept. of Educ.*, 562 F. Supp. 2d 405, 411-13 (W.D.N.Y. 2008) (invalidating law barring alien visa-holders from veterinary licensure); *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434, 440-41 (S.D. Miss. 2000) (same as *Craigmiles*); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101,

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[16] *See, e.g., Hetherton v. Sears Roebuck & Co.*, 652 F.2d 1152, 1158-59 (3d Cir. 1981) (invalidating law differentially treating homeowners and renters in gun purchases).

[17] *Davis*, 497 F.2d at 144-46 (invalidating rule restricting water service based on outstanding debts of prior customers at same address); *Long Island Lighting Co. v. Cuomo*, 666 F. Supp. 370, 422-23 (N.D.N.Y. 1987) (invalidating law intended to prohibit new nuclear power plant while permitting similarly situated utilities to operate existing ones), *vacated as moot*, 888 F.2d 230 (2d Cir. 1989).

[18] *Deibler v. City of Rehoboth Beach*, 790 F.2d 328, 334-37 (3d Cir. 1986) (invalidating prohibition on tax debtors from running for city office).

1106-18 (S.D. Cal. 1999) (invalidating cosmetology licensure requirement for hair-braiders); *La. Seafood Mgmt. Council, Inc. v. Foster*, 917 F. Supp. 439, 446 (E.D. La. 1996) (invalidating rule that rod-and-reel fisherman obtain gill net license); *Massey v. Appollonio*, 387 F. Supp. 373, 376-77 (D. Maine 1974) (three-judge court) (invalidating limit on lobster fishing to those present in Maine eight months per year for three years).

Laws differentially treating similarly situated taxi and transport companies and drivers, including more than one Houston ordinance, have also been struck down as violations of the Equal Protection Clause. In *Miller v. Carter*, the Seventh Circuit invalidated restrictions on particular classes of applicants for taxi licenses with criminal records because other drivers with comparable histories were permitted to drive. *See* 547 F.2d 1314, 1315-17 (7th Cir. 1977), *aff'd* 434 U.S. 356 (1978); *see also Eastman v. Yellow Cab Co.,* 173 F.2d 874, 881-82 (7th Cir. 1949) (plaintiffs alleging established taxi companies received licenses on better terms than independent drivers stated equal protection claim; city's contracts with established companies "is no reason why the licenses which have been and are issued to others engaged in the same business should be limited by restrictions and conditions which are different and alleged to be discriminatory").

Similarly, a Houston ordinance banning jitneys – vans carrying fewer than 15 passengers along preset routes – was overturned on equal protection grounds. *See Santos v. City of Houston*, 852 F. Supp. 601, 608-09 (S.D. Tex. 1994). Because other similar vans operated throughout the city, and jitneys caused no different or greater safety threat or traffic congestion, the city's attempt to "'classify' jitneys out of business" flunked the rational basis test. *See id*. And in *Park 'N Fly of Tex., Inc. v. City of Houston*, the court invalidated a Houston ordinance categorizing parking and rental car companies' shuttles in such a way as to limit their access to certain areas of the airport while granting access to the City's own similarly situated shuttle. *See* 327 F. Supp. 910, 922-26 (S.D. Tex. 1971). [19]

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[19] The magistrate cited several decisions upholding classifications governing taxi and other transportation companies. RE 5, R. 347 n. 3. Whether a particular law is grounded in rationality depends on the individual facts of each case, however, not subject matter categories or "magic words" employed to "insulate [governmental]… decisions from scrutiny under federal law." *Cruz v. Town of Cicero*, 275 F.3d 579, 587 (7th Cir. 2001). The Association has cited equal protection decisions involving taxi companies and other parties in this section, not because it believes their facts are so analogous as to compel reversal, but only to illustrate that rational basis challenges have often succeeded despite the wide deference afforded the government under the standard.

Moreover, the particular decisions the magistrate cited are factually distinguishable. Most arose in the unique setting of regulating vehicles at airports, where plain differences between taxis, busses, limousines and shuttles were held to justify differential treatment. *See, e.g., Allright Colorado, Inc. v. City and Cty. of Denver*, 937 F.2d 1502, 1513 (10th Cir.) (different types of airport transport services and different benefits derived from airport justify higher access fee), *cert. denied*, 502 U.S. 983 (1991); *Pontarelli Limousine, Inc. v. City of Chicago*, 929 F.2d 339, 342-43 (7th Cir. 1991) (upholding rule banning city-based liveries from waiting at dispatch booths because most customers who used them were suburb-bound); *Alamo Rent-a-Car, Inc. v. Sarasota-Manatee Airport Auth*., 825 F.2d 367, 372-73 (11th Cir. 1987) (upholding higher airport

In sum, rational basis review, while deferential, entails meaningful scrutiny to ensure that government treats similarly situated parties alike.

III. The Distribution Proposal Violates the Equal Protection Clause By Irrationally Favoring Some Taxi Companies That Do Not Provide Full Service While Punishing Others

A. Advancing the Interests of Some Taxi Companies at the Expense of Similarly Situated Competitors Is Not a Legitimate Governmental Purpose

A law must seek to further some legitimate purpose of government in order to survive equal protection review. *See Heller*, 509 U.S. at 320. But the wish to prefer or anoint one company or class of business over similarly situated competitors is not, by itself, a legitimate goal of government. To the extent the Distribution Proposal will merely grow certain taxi companies

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user fee to on-site rental car companies than hotel and off-site shuttles, given greater benefits enjoyed by on-site companies), *cert. denied*, 484 U.S. 1063 (1988); *Exec. Town & Country Servs., Inc. v. City of Atlanta*, 789 F.2d 1523, 1528 (11th Cir. 1986) (upholding fee increase to limousines to and from airports given distinctive, luxurious nature of limousines and need to preserve different niches for different services); *PA. Coach Lines, Inc. v. Port Auth. of Allegheny Cty*. 874 F. Supp. 666, 672 (W.D. Pa. 1994) (exclusivity given one bus service at airport justified by need to settle lawsuit brought by that company); *Am. V.I.P. Limousines, Inc. v. Dade Cty Bd. of Cmn'rs*., 757 F. Supp. 1382, 1395-96 (S.D. Fl. 1991) (differences between taxis and limousines justified different treatment at airport); *Mustfov v. Super. of Chicago Police Dept*., 733 F. Supp. 283, 293-94 (N.D. Ill. 1990) (same; livery and bus service).

Other cases are equally inapposite. *U.S.A. Express Cab, LLC v. City of San Jose* is off-point because the plaintiffs alleged but lacked proof of racial discrimination. *See* 2007 WL 4612926 (N.D. Cal. 2007) at ** 5-7. The rules in *S. Fl. Taxicab Ass'n v. Miami-Dade Cty.* required medallion owners to drive their taxis and distinguished between taxis and limousines, factors not present here. *See* 2004 WL 958073 at ** 7-13 (S.D. Fl. 2004). In *Jackson v. W. Indian Co., Ltd.*, limits on taxis at a cruise ship dock were justified by the need to discourage fights and efficiently serve disembarking tourists – also not a rationale invoked by the City here. *See* 944 F. Supp. 423, 432 (D.V.I. 1996).

while preventing others from expanding without more generally benefiting the public, it violates the Equal Protection Clause.

The Association agrees that providing better taxi service to the public in various ways is a legitimate governmental purpose. Many of the sorts of goals of the Ordinance *as a whole* listed by the Magistrate – promoting competition in the industry, increasing the number of disabled access vehicles, encouraging low emission taxis, increasing the prevalence of 24-hour service – are thus unquestionably valid objectives. R.E. 5, R. 345.

But simply conferring a privilege on one company instead of another with no resulting public benefit does not reflect a legitimate governmental purpose. Several decisions have held that this sort of bare favoritism does not pass muster under the Equal Protection Clause. In *Craigmiles*, the Sixth Circuit held that Tennessee legislators crossed the line by requiring casket sellers to obtain funeral directors' licenses despite the fact that they do not perform the sorts of funeral oversight functions that gave rise to the license requirement and which were tested on the licensing exam. *See* 312 F.3d at 222-29. The court concluded that the law simply aimed to benefit funeral homes by insulating them from competition, and that such a rationale was illegitimate. "Courts have repeatedly recognized that protecting a discrete

interest group from economic competition is not a legitimate public purpose." *Id*. at 224.

The Ninth Circuit recently agreed, striking down a California law that forced some animal controllers to obtain licenses but not others, and holding that "mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review." *Merrifield*, 547 F.3d at 991 n. 15. Other courts have reached the same conclusion. *See, e.g*., *Ranschburg*, 709 F.2d at 1211 ("it is untenable to suggest that a state's decision to favor one group of recipients over another by itself qualifies as a legitimate state interest"); *Del. River Basin Comm'n*, 641 F.2d at 1095-96 (grandfather clauses suspect as devices for potential economic favoritism); *Santos*, 852 F. Supp. at 608 ("the purpose of the statute was economic protectionism in its most glaring form, and this goal was not legitimate"); *Am. Trust Co*., 381 F. Supp. at 321 ("the equal protection clause deprives a state the power to arbitrarily favor one domestic corporation over a competitor," though competition can be curbed "when the public interest will be served"); *Park 'N Fly of Tex*., 327 F. Supp. at 926 ("secur[ing] economic advantage over competitors" not a purpose "legitimately within [city's] power" when drawing classifications regulating airport shuttle service); *but see Powers v. Harris*, 379 F.3d 1208, 1218-23

(10th Cir. 2004) (decision to favor particular business or industry is legitimate governmental purpose), *cert. denied*, 544 U.S. 920 (2005).

This insistence that legislation be devised to aid the public and not simply a chosen private interest stems from the Fourteenth Amendment's role in sheltering those who lose out in the democratic process from overly arbitrary treatment by government. As Professor Cass Sunstein writes, "[a]lthough the rationality test is highly deferential, its function is to ensure that classifications rest on something other than a naked preference for one person or group over another… The Court has made clear in rationality cases that the government must be able to invoke some public value that the classification at issue can be said to serve." Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1713 (1984). This requirement "captures a significant theme in the original intent":

> The framers' hostility toward naked preferences was rooted in the fear that government power would be usurped solely to distribute wealth or opportunities to one group or person at the expense of another. The constitutional requirement that something other than a naked preference be shown to justify differential treatment provides a means, admittedly imperfect, of ensuring that government action results from a legitimate effort to promote the public good rather than from a factional takeover.

Id. at 1690. Judge Posner voiced the same idea in *Milner v. Apfel*, 148 F.3d 812 (7th Cir. 1998), *cert. denied*, 525 U.S. 1024 (1998). "Rational," he wrote

in describing the rational basis test, must signify "more than democratic preference… if the concept of equal protection is to operate, in accordance with its modern interpretations, as a check on majoritarianism." *Id*. at 817.

To the degree, then, that the Distribution Proposal rationally furthers some purpose that benefits the public, it is constitutional. But if, as discussed below, it does nothing more than elevate the private interests of a select few taxi operators over their commercial rivals, it should be set aside.

B. The Distribution Proposal Does Not Rationally Serve Any Legitimate Governmental Interest

1. The Distribution Proposal Does Not Further the Goal of Expanding Full Taxi Service

"The rational basis test requires not only a legitimate state interest, but also that the government action is rationally related to furthering that interest." *Mikeska*, 451 F.3d at 380. Although the Distribution Proposal apparently aims to increase the provision of "full service" taxi operations, there is no reason to believe it will further that legitimate goal – or at least there is a factual dispute on the subject. Instead, it will simply end up serving the invalid purpose of conferring a windfall on certain companies at the expense of their similarly situated competitors. It therefore violates the Equal Protection Clause.

The Ordinance and the Department's memo indicate that the City's purpose in devising the Distribution Proposal was to enlarge the midsize operators in the hope they will eventually become what the Ordinance and Department refer to as "full service" companies – those with 24-hour dispatch service and complete on-site repair capacity. *See* pp. 11-12 *supra*. Conversely, the magistrate upheld the Distribution Proposal because he concluded – in one sentence devoid of factual support or even reasoned speculation – that "the City could reasonably decide that small taxicab businesses were less likely to have operations which were capable of providing adequate service to the general public on a 24 hour, 7 days a week basis." R.E. 5, R. 345.

The four companies in the large company category already provide full service. R.E. 7, R. 108. Only "some" of the four companies in the large midsize class offer "limited" versions of these services, however, and none in the two lower tiers – the small midsize and small categories – does. *See id*.

There is no evidence or reason to suppose that awarding three new permits to each of the 12 companies in the small midsize category will cause them to begin offering 24-hour dispatch service or build complete on-site repair facilities, with the assumed benefits those features provide to the

public. These companies are now indistinguishable from those in the small company class in how they serve passengers; they all communicate by cell phone and operate mostly to and from the airports. *See* R.E. 7, R. 109. Why does the City suppose that adding three taxis to their existing fleets will transform them into full service companies or even move them anywhere close to that status? Nothing in the record answers the question.

In fact, the large, full service companies now have between 89 and 1,419 permits. R.E. 6, R. 322. If given three additional permits by the City, the companies in the small midsize category would have the numbers of permits set forth below:

Current	**With New Permits**	
20	23	(one company)
14	17	(one company)
10	13	(one company)
6	9	(one company)
5	8	(five companies)
4	7	(three companies)

Id. It is not rational to assume, and no evidence remotely supports the conclusion, that the relatively marginal difference to these companies represented by three additional taxis will make them able and willing to provide full service to passengers, as the large companies with 89-1,419 permits can. Nine of these companies would have nine permits or fewer after the planned distribution, making them approximately *one-ninth* the size

of the smallest full service operator and *1/149th* the size of the largest full service operator. "Even the standard of rationality… must find some footing in the realities of the subject addressed by the legislation." *Heller,* 509 U.S. at 321.

Moreover, as the City conceded below, these numbers may not change down the line. There is no "guarantee that in the future there will be a distribution, and even if there were to be a distribution, how many [any] group will be allotted." R. 318. Thus, the City cannot claim that, while the 2007 distribution may not transform non-full service operators into full service ones, some later distribution might.

Nor is it apparent why the City believes giving ten new permits to each of the four companies in the large midsize group will lead to their becoming full service operations. "Some" of these companies now use "limited radio dispatch services," and some perform some level of on-site repair, R.E. 7, R. 108, but with ten new permits even the largest of these companies will only have 46 – about half those owned by the smallest of the four large companies. R.E. 6, R. 322. Most large midsize companies will be even smaller after receiving their ten new permits. *See id*. There is no proof or even rational basis to guess that ten new taxis will suffice to convert these companies into full service operators either.

At the least, there is a factual dispute about whether the Distribution Proposal would affect the provision of full taxi service to passengers and thereby serve the City's stated goal. The City introduced no evidence on the subject below, and it is not something so obvious or intuitive that it can simply be assumed. The evidence that *is* in the record about the current size and nature of the companies appears to contradict the City's assumption. Absent certainty on the question, summary judgment should have been denied. *See, e.g., Lazy Y. Ranch, Ltd. v. Behrens*, 546 F.3d 580, 590-91 (9th Cir. 2008) (whether "challenged classification could not reasonably be viewed to further the asserted purpose" is factually disputable); *Curto v. City of Harper Woods*, 954 F.2d 1237, 1244 (6th Cir. 1992) (reversing summary judgment where factual dispute existed as to whether ordinance had "rational relationship to the actual problems which [it] is supposedly designed to correct"); *Parks v. Watson*, 716 F.2d 646, 654-55 (9th Cir. 1983) (factual disputes precluded determining city's rational basis defense on summary judgment); *Dias v. City and Cty. of Denver*, __ F. Supp. 2d __, 2010 WL 3873004 at * 7 (D. Colo., Sept. 29, 2010) (whether ban on pit bulls serve city's safety rationale a factual dispute precluding summary judgment); *S. Lyme Property Owners Ass'n., Inc. v. Town of Old Lyme*, 539

F.Supp.2d 524, 541 (D. Conn. 2008) (same); *Club Properties, Inc. v. City of Sherwood*, 2007 WL 4468690 at *6 (E.D. Ark. 2007) (same).

Rather than increase the provision of full taxi service to passengers, the only discernible result of giving 3-10 new permits to each of the midsize companies instead of treating all non-full service companies equally will be to enrich the midsize companies at the expense of their competitors in the small company category. That is exactly the outcome the Equal Protection Clause forbids. In "every equal protection case, the appropriate comparison is between those persons subject to the classification and those persons who are similarly situated but for the classification." *Maldonado v. Houstoun*, 157 F.3d 179, 187 (3d Cir. 1998), *cert. denied*, 526 U.S. 1130 (1999). Here, all taxi companies that are not full service are similarly situated for purposes of how they operate and serve passengers and would continue to serve them after distribution of the new permits. The Equal Protection Clause therefore requires that, as "like cases," they be treated "alike." *Vacco*, 521 U.S. at 799; *accord Reed*, 404 U.S. at 76.

True, there is one difference between the companies arbitrarily placed into the small company category and those assigned to the midsize categories: the former currently have fewer permits than the latter. But as noted above, this difference has no relevance to any proper inquiry into how

many new permits to award them because there is no evidence or reason to suppose that the addition of the new permits will make the difference between being a full service company and not, or even come close in the foreseeable future. Thus, "the distinction between them bears no relation to the statutory purpose" of fostering full service and cannot stand. *Williams v. Vermont*, 472 U.S. 14, 24 (1985). "[A]rbitrary selection can never be justified by calling it classification." *McLaughlin v. Florida*, 379 U.S. 184, 190 (1964) (quoting *Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150, 159 (1897)). As Justice Jackson observed, "[t]he equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free." *Ry. Exp. Agency v. People of St. of N.Y.*, 336 U.S. 106, 115 (1949) (Jackson, J., concurring). Like the question whether the Distribution Proposal rationally serves the purpose of increasing full service, whether the small and midsize companies are similarly situated is at least an open factual issue ruling out summary judgment. *See Harlen Assoc. v. Inc. Vill. of Mineola*, 273 F.3d 494, 499 n. 2 (2d Cir. 2001) (observing in equal protection case that, "[a]s a general rule, whether items are similarly situated is a factual issue that should be submitted to the jury").

In addition, case law makes clear that one sign of constitutional infirmity in a classification scheme is substantial underinclusiveness. *See, e.g., Khodara*, 91 F. Supp. 2d at 853-54; *Long Island Lighting Co*., 666 F. Supp. at 423; *Burstyn*, 663 F. Supp. at 533. If the measure taken or classification imposed will make no appreciable dent in the problem or fails meaningfully to move toward the identified goal, it lacks a rational basis. For example, in *Burstyn*, the imposition of a height limitation on certain types of living facilities for the elderly, while others were exempted, could not be found to serve the goal of fire safety:

> Fire protection is clearly a legitimate governmental interest. Where, however, the means used to carry out a legitimate goal are grossly underinclusive, the means are too attenuated to be rationally related to that goal. In this instance, the four-story height restriction for ACLFs is grossly underinclusive for the purpose of meeting the goal of promoting fire safety. No other residential use is restricted by height, including other residences housing the elderly and infirm.

663 F. Supp. at 533; *see also, e.g., Khodara*, 91 F. Supp. 2d at 852-56 (limitation of restriction to single landfill near airport could not rationally serve goal of greater aviation safety); *Long Island Lighting Co*., 666 F. Supp. at 422-23 (class of nuclear projects affected by law too narrow to affect goal of limiting utility customer charges).

The Distribution Proposal suffers from a similar defect. Companies represented by the Association have been penalized with a scheme that will

prevent the vast majority from growing while a small number of other non-full service companies will each reap the advantage of additional permits. But there is no indication the favored midsize companies – especially those in the small midsize class, most of which would only have 1-5 more permits than the small companies, R.E. 6, R. 322 – can or will use the new permits to become full service operations and thereby fulfill the purpose of the classification, instead of simply operating a few more cell-phone dependent, airport-focused taxis. As a solution to the supposed dearth of full service taxi operation, the Distribution Proposal is woefully underinclusive.

Another telltale sign of the Distribution Proposal's unconstitutionality is the ease with which the City could have met its goal of expanded full service with far simpler classifications or rules. In *Williams*, the Supreme Court noted that, while "legislative classifications are of course allowed some play in the joints," they cannot be overly "casual… particularly when a more precise and direct classification is easily drawn." 472 U.S. at 24 n. 8. "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." *Craigmiles*, 312 F.3d at 227 (*citing City of Cleburne*, 473 U.S. at 439); *accord Long Island Lighting Co*., 666 F. Supp. at 424.

In this case, if the City truly believes that smaller companies should begin offering full service or that the marketplace needs greater availability of full service operation, it could simply have required 24-hour dispatch service and/or full on-site repair as conditions for some or all new permits. The Code elaborately regulates taxis, down to their permissible color scheme, the required content and size of the lettering on their doors, their lighting, cars' permissible age and mileage, how they operate at airports, rates and surcharges, license visibility, inspection of windshield wipers and 33 other items, how drivers solicit passengers, drivers' use of vulgar language and hand gestures, odors in cars, tears and stains in carpet, the condition of hubcaps, drivers' grooming and dress, permissible consecutive working hours, and the presence of cigars.[20] The Ordinance itself requires the 211 new taxis to have 4-cylinder engines, be hybrid vehicles, be wheelchair accessible, or achieve 20 miles per gallon. R.E. 6, R. 170. In other words, the City is no stranger to simply requiring companies and drivers to serve passengers in particular ways in exchange for their permits.

Alternately, the City could simply have given all permits to the companies that already provide full service, or attempted to learn how many

[20] R. 183-208 (HOU. CODE OF ORDINANCES §§ 46-20, 46-21, 46-22, 46-24, 46-26, 46-27, 46-31, 46-32, 46-37, 46-40, 46-44); HOU. CODE OF ORDINANCES §§ 46-111, 46-113, 46-118.

additional permits would succeed in actually inducing non-full service companies to offer full service, and then awarded them this amount. In short, the City's failure to employ any of several more obvious and direct means to ensure greater 24-hour dispatch service and complete on-site repair – choosing instead the unfair and "circuitous path" of punishing some but not all companies for lacking these features – calls the rationality underlying the Distribution Proposal into question. *Craigmiles*, 312 F.3d at 227.

The Distribution Proposal is further suspect because the penalty it exacts from the companies represented by the Association – the inability to grow their businesses – could become effectively permanent. As noted above, the City admits that there may be no future distributions after this one that further enlarges the midsize companies. But if there are, and if the City uses the same criterion, the disfavored small companies could be permanently locked into their present size and forever prevented from growing, while the gap between them and the midsize companies widens over time. Eternally unequal classifications should be scrutinized all the more closely. *See, e.g., Del. River Basin Comm'n*, 641 F.2d at 1098-99. Two of the decisions the magistrate cited for the proposition that taxi regulations are often approved specifically mentioned that the rules being upheld were not permanent. *See Alamo Rent-a-Car*, 825 F.2d at 373 ("The

authority thus has not created a protected class of on-airport companies with privileges permanently unavailable to other competitors"); *PA. Coach Lines*, 874 F. Supp. at 672 (exclusive agreement only "for a limited period").

In the end, the Distribution Proposal does little if anything beyond conferring a substantial benefit on 16 companies – those in the midsize categories – while stunting the growth of nearly all of the 117 small enterprises. Because the two classes of companies are not materially different with respect to the provision of full taxi service, with or without the new permits, favoring one over another will do nothing for the riding public. Profiting a discrete set of private interests without a concomitant public benefit is not a legitimate governmental purpose under the Equal Protection Clause. Nor is the Distribution Proposal's classification scheme rationally related to the goal of expanding full service taxi operation. This Court should therefore remand with instructions that the district court enjoin the Distribution Proposal as incompatible with the Fourteenth Amendment, or at least vacate the summary judgment and remand the case for trial.

2. The Distribution Proposal Does Not Further Other Goals Hypothesized by the Magistrate

The magistrate and City have offered other potential purposes for the Ordinance, but none is rationally advanced by the Distribution Proposal.

In his decision, the magistrate wrote:

> Finally, as set forth in the Ordinance itself, the Court observes that the stated reasons for the changes were to foster competition; increase the number and proportion of disabled access vehicles; encourage more efficient, lower emission taxicabs; allow mid-sized to grow into full service companies that would be better able to serve the needs of the local community by offering dispatch capabilities and 24-hour service; include greater distribution to small companies than under the previous codified distribution plan; ensure that new entrant entrepreneurs were not excluded for [*sic*] the taxicab distribution process; and enhance the needs and satisfaction of the riding public.

R.E. 5, R. 345. There is no indication these rationales, evidently culled from various portions of the Ordinance, actually motivated the Department in its formulation of the particular permit allocation scheme set forth in the Distribution Proposal. Nor did the magistrate explain in his report and recommendation how the Distribution Proposal serves these several objectives – other than his one-sentence conclusion that the City "could reasonably decide that small taxicab business [sic] were less likely to have operations which were capable of providing adequate service to the general public on a 24 hour, 7 days a week basis." R.E. 5, R. 345. Nonetheless, these other rationales mentioned by the magistrate are analyzed below.

First, the Distribution Proposal is not rationally calculated to foster competition. By preventing 101 of 117 the small companies from growing, the Distribution Proposal actually retards widespread competition and instead anoints the 16 midsize companies as winners over the small group

operators providing the same service. Generally speaking, improving the lot of a small number of market participants while weakening a large group of their competitors is thought to reduce competition, not enhance it. *See, e.g., U.S. v. Von's Grocery Co.*, 384 U.S. 270, 276-78 (1966) (Congress determined in Anti-Merger Act that preservation of many small competitors, rather than concentration in hands of fewer large companies, fosters competition); *Interstate Natural Gas Ass'n v. F.E.R.C.*, 285 F.3d 18, 46 (D.C. Cir. 2002) ("Enron relies on a simple account under which 'eliminating competitors reduces competition.' Everything else being equal, that is likely a sound assumption").

In the equal protection context, courts have frowned on preferences given to some private companies and not similarly situated others, viewing them as monopolistic rather than pro-competitive. *See, e.g., Craigmiles*, 312 F.3d at 229 (condemning attempt to protect "monopoly rents" of funeral directors from competition by casket sellers); *Massey*, 387 F. Supp. at 376 (rejecting law that "in effect creates a lobster fishing monopoly in favor of three-year residents"). Here too, the City's arbitrary preference for the midsize companies over their essentially identical if slightly smaller competitors is inherently monopolistic, not conducive to free enterprise.

The Distribution Proposal also leaves the market share of each segment more or less unchanged. R.E. 6, R. 322. To the degree it works a *de minimus* alteration in market share, it increases the power and concentration of the 16 midsize companies at the expense of the 117 small ones. *See id*. The small companies would lose .02% of market share under the Distribution Proposal, while midsize operators would gain 1.17% (large mid-size) and 1.13% (small midsize). *See id.*[21] The gap in market share between midsize and small companies is now 2.24%, but under the Distribution Proposal it would rise to 4.48%. *See id.* Because, under the Distribution Proposal, the new taxis would be spread among fewer non-full service companies than if those permits were divided among all such companies on an equal basis, passengers will have reduced choice among non-full service companies each time they call for or hail such a taxi. Again, increasing the concentration of a service in fewer hands is not generally thought to foster competition. *See, e.g., Time Warner Entm't Co., L.P. v. U.S.*, 211 F.3d 1313, 1319-20 (D.C. Cir. 2000) ("Congress drew reasonable inferences, based upon substantial evidence, that increases in the

[21] The Distribution Proposal provides on one line that the market share of the small companies after the distribution would be 6.89%, a .06% increase over the current share of 6.83%, while the line immediately below indicates that post-distribution market share would be 6.81%, representing a .02% *decrease* in market share. R.E. 6, R. 322. Although the document is unclear, the City's position is that post-distribution small company market share would be 6.81%. R. 160.

concentration of cable operators threatened diversity and competition in the cable industry"), *cert. denied*, 531 U.S. 1183 (2001).[22]

The second and third rationales mentioned by the magistrate – increasing the number and proportion of disabled access vehicles and encouraging more efficient, lower emission taxicabs, R.E. 5, R. 345 – relate to other portions of the Ordinance, not the allocation plan in the Distribution Proposal. Section 7 of the Ordinance requires each new taxi placed into service after January 1, 2008 to have a 4-cylinder engine, be a hybrid, be wheelchair accessible, or achieve 20 miles per gallon. R.E. 6, R. 170. Section 11 of the Ordinance amends § 46-64 of the Code to ensure that the percentage of wheelchair accessible taxis does not fall below 2% of the overall citywide fleet. R.E. 6, R. 175, 167. Thus, the goals of increasing wheelchair accessible and efficient, low emission taxis are addressed elsewhere in the City's enactment and have no relationship to the portion of the Ordinance at issue here.

The remaining rationales mentioned by the magistrate are similarly inapt. The magistrate cited the City's desire to effect "greater distribution to

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[22] The Distribution Proposal does decrease the market share of the four largest companies by 2.61%, R.E. 6, R. 322, but that is irrelevant to what the Association complains of and asserts is unconstitutional, namely, the unfair favoritism shown midsize companies despite their provision of the same sort of service to passengers as the small companies offer.

small companies than under the previous codified distribution plan." R.E. 5, R. 345. The Association naturally applauds this goal, but the infirmity lies in how the Distribution Proposal unequally allocates permits among the similarly situated companies that do not provide full service, not in how the small companies fare now in comparison to their treatment under the earlier plan. Similarly, the Association has raised no objection to "ensur[ing] that new entrant entrepreneurs [a]re not excluded for [*sic*] the taxicab distribution process," *id*., and has never complained that the Distribution Proposal reserves 11 new permits for new entrants. Finally, the magistrate mentioned the City's generic interest in "enhanc[ing] the needs and satisfaction of the riding public," *id*., but as discussed throughout, the midsize companies profiting so unequally from the Distribution Proposal do not provide different or higher quality service than the smaller companies penalized with stagnation. Neither the record nor any speculation offered thus far explains why favoring one group of similarly situated operators over another this way supposedly "enhance[s] the needs and satisfaction of the riding public." *Id*.

3. The Distribution Proposal Does Not Further Other Goals Hypothesized by the City

In briefing to the district court, the City pointed to § 46-66 of the Code as the source for the "Governmental interest of the City of Houston for enacting the taxicab permit distribution list." R. 159. Because the rationales

set forth in § 46-66 are not those the City considered in enacting the Distribution Proposal and, more importantly, are not served by it in any case, the City's argument is unavailing.

Initially, § 46-66 has nothing at all to do with the allocation of the 211 new permits under the Distribution Proposal. Rather, this section, which was not amended by the Ordinance, provides for a different formula by which new permits may be distributed:

> (b) For other applicants, an equal percentage of permits shall be granted to each qualified applicant based on the total number of permits reserved for other applicants in section 46-64(a) of this Code and the total number of permits requested by qualified other applicants. For example, if a total number of 100 permits is reserved for other applicants and the qualified other applicants have cumulatively requested a total number of 200 permits, then each qualified other applicant shall receive 50 percent of the permits he requested.

R.E. 8, R. 202 (quoting HOU. CODE OF ORDINANCES § 46-66(b)). The Distribution Proposal allocates new permits differently than does § 46-66(b), since under the Distribution Proposal each applicant would receive a predetermined number of new permits based solely on its quantity of existing permits – not an equal share of permits derived from the number requested in its application.

Section 46-66(d), which supplies the specific goals language relied on by the City below, provides:

> (d) In permit years in which permits are issued, a qualified other applicant who meets the criteria set forth below may petition the city council requesting that he be granted permits or additional permits in an amount not exceeding the difference between the number of permits the applicant requested in his application and the number of permits that the applicant was granted, if any, under subsection (b) above.
>
> * * * *
>
> The purpose of granting additional permits, if any, by petition under this subsection (d) are (i) to foster enhanced competition within the taxicab industry, (ii) to increase the level and quality of taxicab service available to the public for other than city airport departure trips, and (iii) to promote more efficient utilization of taxicabs, which purposes should enhance the public satisfaction and generate operating cost and fare savings.

R.E. 8, R. 202 (quoting HOU. CODE OF ORDINANCES § 46-66(d)). Thus, § 46-66(d) establishes a process by which applicants ask the City Council for some or all of the petitions they applied for but didn't get under § 46-66(b); it is completely inapplicable to the different process of receiving permits as set forth in the Distribution Proposal. The City's invocation of this entirely irrelevant section smacks of what this Court dismissed in *Mikeska* as "*ex post facto* justifications for the City's irrational treatment." 451 F.3d at 381.

In any event, the goals set forth in § 46-66 are not served by the Distribution Proposal. As discussed above, the Distribution Proposal neither "foster[s] enhanced competition within the taxicab industry" nor "increase[s] the level and quality of taxicab service." R.E. 8, R. 202. Nor does it

somehow "promote more efficient utilization of taxicabs," *id*., as the midsize companies guaranteed expansion under the Distribution Proposal operate identically to the small companies in their use of cell phones and concentration on airport trips.

Finally, leaving aside the goals articulated in § 46-66(d), the magistrate cited the section in his report and recommendation as an alternate "option" by which the small companies could obtain additional new permits. R.E. 5, R. 346. But § 46-66(d), by its own terms, only allows the City Council to grant new permits the applicant sought but failed to obtain "under subsection (b)." R.E. 8, R. 202. It does not allow an applicant to petition the City Council for permits denied under the Distribution Proposal rather than § 46-66(b). *See id*. Moreover, even if the small companies could seek additional permits under § 46-66(d), the formula set forth in the subsection disfavors them because they operate primarily to and from the airports. *See id*. Hence, there is little likelihood they could succeed in the petitioning process envisioned by § 46-66(d) in any case. Most importantly, even if small companies stood an equal chance to obtain additional permits by petitioning the City Council, this opportunity would in no way ameliorate the inequality at the heart of the Distribution Proposal, under which the small companies' similarly situated rivals would receive substantially more

new permits irrespective of the outcome of any subsequent petitioning process.

The City's rationales, imported from an unrelated portion of the Code, do not bolster the Distribution Proposal.

CONCLUSION

This case is of enormous importance to over one hundred small businesses the City has arbitrarily decreed may not grow. It touches on the vitally important constitutional right that people be treated equally by their government as they go about trying to earn their livelihoods. As the Supreme Court held 126 years ago:

> [T]he ordinary pursuits of life, forming the large mass of industrial avocations, are and ought to be free and open to all, subject only to such general regulations, applying equally to all, as the general good may demand; and the grant to a favored few of a monopoly in any of these common callings is necessarily an outrage upon the liberty of the citizen.

Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co., 111 U.S. 746, 763 (1884).

For the reasons discussed herein, this Court should reverse the district court's decision, call a halt to Houston's irrational penalty of small taxi companies, and remand this case for entry of an injunction against the City or trial on the merits.

October 27, 2010 Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 2010, seven copies of the foregoing Appellant's Brief were sent via third-party commercial carrier, overnight service, to the Clerk of the Court, and two copies were sent via First Class U.S. mail to the following:

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. Civ. P. 32(a)(7)(B) because this brief contains 11,467 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief is printed in a proportionally spaced typeface using the Microsoft Word 2004 for Mac, Version 11.5.6, program in 14 point, Times New Roman font in body text and 12 point, Times New Roman font in footnote text.

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