Case No. 14-35608

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SPEED'S AUTO SERVICES GROUP, INC., an Oregon Corporation, d/b/a Towncar.com; FIESTA ENTERPRISES LLC, an Oregon Limited Liability Company, d/b/a Fiesta Limousine,

Plaintiffs-Appellants,

v.

CITY OF PORTLAND, OREGON,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Oregon at Portland

The Honorable John V. Acosta
United States Magistrate Judge
Case No. 3:12-cv-00738-AC

APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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Plaintiff-Appellants Speed's Auto Services, Inc. and Fiesta Enterprises LLC petition for panel rehearing and rehearing en banc. As shown below, the petition should be granted because the panel decision (1) conflicts with prior decisions of the Supreme Court; (2) conflicts with a prior panel decision; and (3) affects two issues of exceptional importance over which there is a Circuit split. *See* Fed. R. App. P. 35(a)(1)–(2); 40(a)(2).

INTRODUCTION

In *Merrifield v. Lockyer*, this Court held that "mere economic protectionism" is not a legitimate governmental interest under the rational basis test, joining the Fifth and Sixth Circuits on one side of a split that now includes the Second and Tenth Circuits on the other side. 547 F.3d 978, 991 n.15 (9th Cir. 2008). In this case, the panel paid lip service to *Merrifield*, but announced an exception that would swallow this Circuit's rule against "mere economic protectionism." The panel concluded that protectionism is justified, *as a matter of law*, when the government seeks to maintain a "healthy and well-functioning" market or the "economic[] viab[ility]" of existing businesses. Accordingly, the panel considered none of the evidence showing that protectionism is the true purpose of the laws at issue—Portland's minimum fares and one-hour minimum wait time for sedans.

Rehearing is warranted for three reasons. First, the panel's decision conflicts with *Merrifield*. It cannot be true that economic protectionism is

illegitimate (as *Merrifield* held) and simultaneously true that protectionist justifications—such as ensuring taxi companies are "economically viable"—will always justify a law (as the panel held). Second, *Merrifield* is consistent with two closely analogous Supreme Court decisions—*Nebbia v. New York* and *Metropolitan Life Insurance Company v. Ward*—which, like *Merrifield*, evaluated evidence to determine whether a law's purpose was merely protectionist. Third, the panel decision clouds this Court's otherwise clear position on an inter-Circuit split. *Merrifield* correctly rejected the law of the Tenth Circuit (and now the Second Circuit), under which economic protectionism is legitimate and no evidence can overcome an assertion that a law furthers non-protectionist ends. The panel's decision undermines that authority.

For these reasons, this is the rare case in which rehearing is justified.

BACKGROUND

In 2011, the Appellants were operating for-hire sedan companies in Portland, Oregon, in the midst of an economic downturn. *See* Appellants' Opening Brief ("Br.") at 6–9. Eager to attract new customers, they offered discounted fares on the "daily deal" website Groupon.com. *Id.* at 7–8. Their promotions offered one-time travel for $32—substantially less than the ordinary rate of more than $50. *Id.* In this way, customers could experience luxury service without paying luxury prices, and the companies hoped some purchasers would become regular

customers. *Id.* The deals were popular: Within a few hours, Speed's sold 636 and Fiesta sold 260. *Id.* at 8–9.

The same day the deals went online, however, the City of Portland ordered the companies to cancel them. *Id.* at 9–11. If the companies did not comply, the City threatened revocation of their operating permits and fines of $635,500 for Speed's and $259,500 for Fiesta. *Id.* The city relied on two ordinances that, at the time, required sedans to charge *at least* 135% of what a taxi would charge for the same trip and *at least* $50 between downtown Portland and the airport. *Id.* at 4–5. The companies acquiesced, refunded their customers, and initiated this lawsuit, *id.* at 12–13, challenging the constitutionality of the two minimum fares and a third law, which required them to wait *at least* one hour between a customer's request for service and the time of pick up, *id.* at 4–5.[1]

The complaint plausibly alleged that each of these laws was enacted *solely* to protect taxi companies from competition. *Id.* at 14 (citing ER 394 ¶¶ 1, 5; ER 397–98 ¶¶ 22–30; ER 403 ¶ 70). It alleged that Portland's taxi companies prompted the laws, when they complained about the impact sedans were having on taxi profits. *Id.* at 14–15 (citing ER 397–98 ¶¶ 23–24). It alleged, as Portland later

[1] All three laws have since been repealed, as explained in the parties' letters of February 9–10, 2016. However, this case continues based on Appellants' claim for $1 in damages. *See C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 983–84 (9th Cir. 2011) (collecting cases holding that a claim for nominal damages under 42 U.S.C. § 1983 prevents mootness when a government defendant voluntarily changes its conduct).

conceded, that there are no health, safety, or moral reasons for the laws. *See* ER 394 ¶ 5; ER 398 ¶¶ 26–30; ER 403 ¶ 70; ER 365–67.

Yet the district court dismissed the companies' equal-protection challenge on the face of the complaint, holding that sedans are not similarly situated to taxis and therefore cannot complain of unequal treatment. ER at 33–34.

After discovery, Portland moved for summary judgment on the remaining substantive-due-process claim. The companies did not cross-move because there remain material disputes of fact that should have precluded summary judgment. Their brief in opposition pointed to evidence showing the following:

- The minimum fares and wait time were specifically designed to protect taxi companies from competition. *See* ER 420 (ECF Docket No. 69 at 6–8).

- All three policies were introduced by the Taxicab Board of Review—a now-defunct agency that set policy for all of Portland's for-hire transportation services—which was composed of voting taxi representatives, but no voting sedan representatives. *Id.* at 6.

- In 1995, Portland's taxi companies recommended the Taxicab Board adopt a minimum price for luxury transportation, which became the predecessor to the minimum fares. *See* ER 119–20.

- The 135% minimum fare only increased consumer confusion because no one—not even city officials—understood how to calculate the minimum rate. ER 420 (ECF Docket No. 69 at 9).

- The "prevailing taxicab rate," on which the 135% minimum fare relies, cannot be determined in advance because taxi prices change based on the distance and time of each trip. *Id.* at 9–10.

- Portland's principal regulator agrees that no one who purchased discounted sedan fares would be harmed—only "the industry" would be harmed. *Id.* at 10–11.

- No one has ever complained to the city about being charged too little for sedan service, although people do complain about being charged too much in taxis. *Id.* at 11.

- Portland conducted no fewer than 13 discrete studies of its transportation marketplace over a 23-year period, not one of which discussed the need for, or utility of, the minimum fares or wait time. *Id.* at 7–8.

- Portland's taxi companies are sustainable without the minimum fares and wait time—in fact, Portland has never decreased the number of taxis, no taxi service has ever gone out of business, and Portland recently added new taxi permits. *Id.* at 12–13.

- Profits for taxi drivers are greater today than they have ever been and taxis today make more trips than they ever have. *Id.* at 13.

- At the same time, the number of sedan permits has only decreased and there is a moratorium on new sedan permits. *Id.* at 13–14.

- There are approximately 450 taxis in Portland and substantially fewer than 129 sedans. *Id.*

Without evaluating any of this evidence (or any other evidence), the district court granted Portland summary judgment, holding that the companies could not establish a substantive-due-process violation because the challenged laws did not "completely prohibit" them from operating. The district court reasoned that because the companies remained in business, while complying with the three laws, they could not satisfy this Court's "complete prohibition" standard. ER at 13–17.

The companies appealed, addressing the two threshold issues on which the district court ruled. Br. at 3. In an unpublished decision, the panel "assum[ed] without deciding" that the companies were "complete[ly] prohibited" for substantive-due-process purposes and similarly situated for equal-protection purposes. Ex. 1: Slip Op. at 2–3. Instead, the panel decided the merits (which the district court did not address) and held there was no substantive-due-process or equal-protection violation because the three laws are rationally related to a legitimate governmental objective. *Id.* at 2–5. Specifically, the panel held that Portland's desire to maintain a "healthy and well-functioning market" and the "economic[] viab[ility]" of existing businesses provides a rational basis for its laws, *id.* at 2–5, as does the desire to "confer[] certain benefits on the taxi industry" in exchange for other regulatory burdens that Portland places on taxis, *id.* at 4.

Like the district court, the panel ruled as a matter of law, without evaluating either side's evidence. *Id.* Like the district court, the panel also ignored the companies' as-applied claim—that even if Portland's laws are generally rational, they are irrational when applied to the one-time discounts at issue in this case. *See* ER 405–08 ¶¶ 79–81, 87–89, 98(A)–(C).

The companies timely filed this petition for rehearing.

ARGUMENT

I. The Panel Decision Conflicts with Ninth Circuit and Supreme Court Authority Holding that Economic Protectionism Is Not a Legitimate Basis for Government Regulation.

Ignoring all of the evidence and plausible allegations offered by the companies, the panel held that it is constitutional for the government to "confer[] certain benefits" on taxis in order to maintain a "healthy and well-functioning" market and ensure that current operators remain "economically viable." This holding was only possible because the panel misread the rational basis case law. The panel envisioned a toothless test under which protectionism will always be legitimate when the government merely *asserts* that favoring one business is necessary, and under which no facts can overcome that assertion. This is not the real rational basis test.

In *Merrifield v. Lockyer*, this Court held that mere economic protectionism is *never* a legitimate purpose for a law, weighed the parties' evidence, and concluded that protectionism was the true purpose of the law at issue. 547 F.3d 978, 989–91 & n.15 (9th Cir. 2008). Accordingly, this Court struck down California's structural-pest-control license on rational basis grounds because its careful review of the evidence revealed that pest-controller licensing only served to protect licensed individuals from unlicensed competition. *Id.* at 991–92. Even though the Court acknowledged some conceivable reasons for licensure—for example, it

would ensure that all pest controllers were familiar with dangerous substances they might encounter—the plaintiff in *Merrifield* won because he was given an opportunity to refute the government's evidence of rationality with evidence of the law's irrational effect in the real world. *See id.* at 989–92.

Merrifield is consistent with Supreme Court precedent, which has emphasized that, while deferential, the rational basis test is not "toothless." *Mathews v. Lucas*, 427 U.S. 495, 510 (1976); *see also Heller v. Doe*, 509 U.S. 312, 321 (1993) ("even the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation"). Although the Supreme Court has been admittedly inconsistent in addressing just how far courts may go in crediting the government's after-the-fact justifications for a law, it has clearly held that courts need not "accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975). This Court has followed the Supreme Court's guidance: "We are not bound by the purposes counsel advances when it is clear that they were not the *actual purposes* of the governmental policy." *Christian Sci. Reading Room Jointly Maintained v. City & Cnty. of S.F.*, 784 F.2d 1010, 1013 (9th Cir. 1986) (emphasis added).

These principles are illustrated by two closely analogous Supreme Court cases. In *Nebbia v. New York*, the Supreme Court upheld a law that set minimum and maximum retail prices for milk based on an evaluation of the *actual* purposes of the law. 291 U.S. 502, 515, 539 (1934). The Court reviewed an extensive trial record, including evidence about the importance of milk to a healthy diet, about wild fluctuations in the wholesale price during the Depression, about how those price fluctuations made milk unaffordable (and sometimes unavailable) at the retail level, and about the effectiveness of setting prices in the milk market. *Id.* at 516–18. Thus, *Nebbia* involved evidence of a public health and safety justification, as well as evidence of the real-world need for price setting, and both of those things were proven by the government at trial. Because protectionism for its own sake is illegitimate, the Supreme Court looked for (and found) other, non-protectionist purposes for the law based on record evidence. *See id.* at 539 (noting the Fourteenth Amendment prohibits government price setting when it is "arbitrary, discriminatory, or *demonstrably* irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty") (emphasis added).[2]

[2] This is why the Oregon Supreme Court was able to rely on *Nebbia* to reach the opposite conclusion and strike down a minimum price for barbering services under the Fourteenth Amendment. *Christian v. La Forge*, 242 P.2d 797, 801, 805–09 (Or. 1952).

Similarly, in *Metropolitan Life Insurance Company v. Ward*, the Supreme Court struck down a law that taxed in-state insurance companies at a lower rate than out-of-state companies. 470 U.S. 869 (1985). The Court specifically held that protecting in-state businesses from competition is illegitimate under the rational basis test. *Id*. at 882–83. In so holding, the Court rejected two justifications offered by the state—namely, that differential taxation encouraged the formation of new in-state insurance businesses and encouraged capital investments in those businesses. *Id*. at 876–83. The Court noted that crediting these arguments would "eviscerate the Equal Protection Clause." *Id.* at 882. Accordingly, it held that such facially protectionist justifications are illegitimate. *Id.* at 883. After all, if protectionist justifications for a law were determinative of its constitutionality, even nakedly protectionist legislation would "stand or fall depending primarily on how a State framed its purpose." *Id.*

While the holding in *Merrifield* is consistent with *Nebbia* and *Ward*, the panel's holding is inconsistent with all three decisions. Just as Portland has asserted that its laws are publicly spirited, the government in each of these cases asserted that its law was publicly spirited. Yet, unlike the panel in this case, the courts in *Merrifield*, *Ward*, and *Nebbia* carefully weighed the evidence to determine whether protectionism was the government's *true* purpose and, in *Merrifield* and *Ward*, struck down the laws because they served no purpose other

than protectionism. By contrast, the panel ignored the ample evidence of pretext offered by the Appellants in opposition to Portland's summary judgment motion. *See* pp. 4–5 *above*. Instead, the panel simply credited Portland's assertions and upheld the regulations as a matter of law.

If the panel were correct, and the government can "confer[] certain benefits" based on an asserted desire to maintain a "healthy and well-functioning" market and the "economic[] viab[ility]" of favored businesses, then *Merrifield* and *Ward* should have come out differently. The same justifications could have easily supported the pest-control license in *Merrifield* or the differential taxation in *Ward*. And, if the panel were correct, *Nebbia* needed no discussion of record evidence and the real-world effect of setting prices for milk. But the panel is incorrect. Even if Portland had identified persuasive, public-spirited justifications for its minimum fares and minimum wait time (and it has not), still, under *Merrifield*, *Ward*, and *Nebbia*, those justifications must be based on record evidence; courts do not determine the constitutionality of protectionist policies based on assertions. Accordingly, the companies should have been given an opportunity to prove their case to a fact-finder, just like the plaintiffs in all of the relevant cases.[3]

[3] The panel believed that the rationality of an economic law is determined based solely on any conceivable basis that might support it, not based on evidence. *See* Slip Op. at 2–3 (citing *Dittman v. California*, 191 F.3d 1020 (9th Cir. 1999) & *Engquist v. Or. Dep't of Agric.*, 478 F.3d 985 (9th Cir. 2007)). However, the cases

[*cont. next page*]

II. The Panel Decision Conflicts with Decisions from Other Circuits and Deepens a Split Between the Fifth and Sixth Circuits (on One Side) and the Second and Tenth Circuits (on the Other) Over the Legitimacy of Economic Protectionism.

Merrifield is not only consistent with Supreme Court precedent, it is consistent with the position of two other Circuits on an issue over which there is a Circuit split. *Merrifield* recognized this split, sided with the Sixth Circuit's position, and rejected the Tenth Circuit's position, when it held that "mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review." 547 F.3d 978, 991 n.15 (9th Cir. 2008) (citing *Craigmiles v. Giles*, 312 F.3d 220, 228–29 (6th Cir. 2002) (striking down a law that limited casket sales to licensed funeral directors because it only advanced protectionist ends) and *Powers v. Harris*, 379 F.3d 1208, 1221–22 (10th Cir. 2004) (upholding a similar casket-sales law and noting that "while baseball may be the national pastime of the citizenry, dishing

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on which the panel relied did not involve allegations that the government's asserted rationales were a pretext for economic protectionism. *Dittman* involved a challenge to a law requiring acupuncturists to disclose their Social Security numbers, in order to ensure that taxes and child-support payments could be collected. 191 F.3d at 1024, 1030–31. *Engquist* involved a challenge to the government's decision to lay off a public employee, 478 F.3d at 990–92, and it specifically did "not decide the issue" of whether evidence of pretext matters in a substantive-due-process challenge, *id.* at 999 n.8. Subsequently, *Merrifield* weighed the parties' evidence to determine a substantive-due-process challenge to an allegedly pretextual law, 547 F.3d at 986–88, relied on that evidence to reject "at least one conceivable purpose" for the law, and ruled in favor of the plaintiff on his equal-protection challenge, *id.* at 989–91. Indeed, if evidence never matters, no plaintiff could ever show pretext.

out special economic benefits to certain in-state industries remains the favored pastime of state and local governments")). Additionally, since *Merrifield*, the Fifth Circuit has joined this Court and the Sixth Circuit on the correct side of the split, *see St. Joseph Abbey v. Castille*, 712 F.3d 215, 221–22 (5th Cir. 2013) (striking down casket-sales law and holding "neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose"), while the Second Circuit has joined the Tenth Circuit on the wrong side, *see Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 286 (2nd Cir. 2015) ("We join the Tenth Circuit and conclude that economic favoritism is rational for purposes of our review of state action under the Fourteenth Amendment."). Rarely is a Circuit split so sharply focused.

But the panel managed to cloud this Circuit's otherwise clear position. Although it acknowledged the holding in *Merrifield* that "mere economic protectionism" is never a legitimate governmental interest, Slip Op. at 3–4, the panel applied this precedent in a way that can only be squared with the contrary view of the Second and Tenth Circuits. Like those courts, the panel credited facially protectionist justifications—holding that "confer[ring] certain benefits" on taxis was legitimate because *other* regulatory burdens are imposed on taxis, but not sedans. *Cf. Sensational Smiles*, 793 F.3d at 287 (holding that a law prohibiting non-dentist teeth whitening could be justified either by a desire to encourage

dentists to provide other types of services or, indeed, justified by sheer favoritism); *Powers*, 379 F.3d at 1222–23 (holding that giving funeral directors the exclusive right to sell caskets was a legitimate exercise in protecting funeral directors from competition). The panel's decision thus announces an exception that will swallow this Circuit's rule against "mere economic protectionism": wherever an industry is heavily regulated, it can be "compensated" with protectionist laws. Indeed, both the pest-control and funeral-director industries are heavily regulated; so, if the panel were correct, *Merrifield*, *Craigmiles*, and *St. Joseph Abbey* should have come out differently because it would be *legitimate* for the government to compensate pest controllers and funeral directors by prohibiting others from competing with them. But that is exactly the argument this Court has rejected.

The panel also reviewed no evidence, although this Court has sided with those Circuits that review evidence in evaluating the rationality of an allegedly protectionist law. *See Merrifield*, 547 F.3d at 991 (finding the challenged license "specifically singles out pest controllers" and that "the record highlights that the irrational singling out of three types of . . . pests from all other vertebrate animals was designed to favor economically certain constituents at the expense of others similarly situated"); *St. Joseph Abbey*, 712 F.3d at 223 (holding that "although rational basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by

adducing evidence of irrationality"); *Craigmiles*, 312 F.3d at 227–29 (considering the history of the challenged law, finding that the state had "specifically amend[ed]" it to include casket retailers, and holding this was strong evidence of an economic animus with no relation to public health, morals, or safety). Like the law in *Merrifield*, the laws in this case "single[] out" sedans for unequal treatment and "favor [taxis] economically." But, unlike *Merrifield*, the panel did not consider any of the evidence showing this to be the case. Indeed, the panel ignored evidence showing the laws were "specifically amend[ed]" to increase the profits of taxi companies, ignored evidence that the laws harm consumers, *see* pp. 4–5 *above*, and ignored Portland's concession that its laws have no relation to public health, safety, or morals, *see* ER 365–67.[4]

As a result, the panel upheld a facially protectionist law—which requires sedans to charge *at least* 135% of whatever a taxi charges—and upheld two laws which the evidence shows were passed based on the "economic animus" rationale rejected by this Court and two other Circuits. In its rush to final judgment, the

[4] These facts distinguish this case from a Fifth Circuit decision on which the panel relied. *See* Slip Op. at 5 n.1 (citing *Greater Hous. Small Taxicab Co. Owners Ass'n v. City of Houston*, 660 F.3d 235 (5th Cir. 2011)). In that case, the Fifth Circuit held that "naked economic preferences are impermissible to the extent that they harm consumers" but noted that "[t]he record here provides no reason to believe that consumers will suffer harm[.]" *Id.* at 240. In this case, the evidence shows what is apparent on the face of Portland's laws: They harm consumers by mandating higher prices and longer waits for sedan service in order to make higher taxi prices possible.

panel also neglected to address the as-applied claim in this case—that even a minimum fare that is generally rational cannot be rationally applied to one-time promotional discounts.

III. The Legitimacy of Economic Protectionism and the Proper Approach to Evaluating Protectionist Laws Are Questions of Exceptional Importance.

Rehearing en banc is appropriate where, as here, a panel decision impacts a Circuit split. *See* Fed. R. App. P. 35(b)(1)(B) (explaining that an inter-Circuit split can present a question of exceptional importance); *Groves v. Ring Screw Works, Ferndale Fastener Div.*, 498 U.S. 168, 172 n.8 (1990) (noting that a conflict between Circuits makes en banc review appropriate).

As shown above, the panel's decision impacts a Circuit split because it erodes the rule that economic protectionism is not, without more, a legitimate reason for passing a law. The panel's analysis also contradicts the reasoning of *Merrifield* (and that of the Supreme Court and two other Circuits) that, in determining the rationality of an economic law, courts should investigate the law's true purpose and real-world effect. Effectively, the panel announced an exception that will swallow this Circuit's rule—inviting governments throughout the Ninth Circuit to pass nakedly protectionist laws cloaked by the thinnest of rationales.

Because the panel decision involves two issues of exceptional importance, it should not matter that it is unpublished. Unpublished authority is precedential.

See Fed. R. App. P. 32.1; Ninth Circuit R. 36-3(b). And this unpublished decision, if permitted to stand, will be cited in future cases as a limitation on this Court's otherwise clear injunction against protectionist legislation.

CONCLUSION

Under all of the relevant cases, the Appellants must be given a chance, which so far they have been denied, to negate Portland's asserted justifications for its laws. It may be that those laws ultimately survive rational basis review. It may not. But that question must be resolved based on evidence, not based on self-serving statements of policy. Portland has made no evidentiary showing whatsoever in its arguments to this Court and cannot, therefore, be awarded final victory without further proceedings.

Appellants therefore ask the Court to grant their petition, reverse the district court's award of summary judgment on their substantive-due-process claim, reverse the district court's dismissal of their equal-protection claim, and remand for further proceedings.

Respectfully submitted this 12th day of April, 2017,

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Form 11. Certificate of Compliance Pursuant to 9th Circuit Rules 35-4 and 40-1 for Case Number 14-35608

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the back of each copy of the petition or answer.*

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition (check applicable option):

☒ Contains 4,195 words (petitions and answers must not exceed 4,200 words), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

or

☐ Is in compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature of Attorney or Unrepresented Litigant: s/ Wesley Hottot

Date: April 12, 2017

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF FILING AND SERVICE

I certify that on April 12, 2017, I electronically filed the above brief with the Clerk of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. The following attorney, who is a registered CM/ECF user, has been served through the CM/ECF system:

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Exhibit 1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 30 2017

MOLLY C. DWYER, CLERK
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SPEED'S AUTO SERVICES GROUP, INC., DBA Towncar.com, an Oregon Corporation; FIESTA ENTERPRISES, LLC, DBA Fiesta Limousine, an Oregon Limited Liability Company,

Plaintiffs-Appellants,

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CITY OF PORTLAND, OREGON,

Defendant-Appellee.

No. 14-35608

D.C. No. 3:12-cv-00738-AC

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
John V. Acosta, Magistrate Judge, Presiding

Argued and Submitted March 6, 2017
Portland, Oregon

Before: FISHER and FRIEDLAND, Circuit Judges, and MAHAN, District Judge.**

*This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

**The Honorable James C. Mahan, United States District Judge for the District of Nevada, sitting by designation.

Speed's Auto Services Group and Fiesta Enterprises appeal the district court's entry of judgment for the City of Portland on their substantive due process and equal protection claims challenging certain wait time and minimum fare regulations imposed by the City. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. Assuming without deciding the challenged regulations qualify as a "complete prohibition" under *Dittman v. California*, 191 F.3d 1020, 1029 (9th Cir. 1999), the plaintiffs' substantive due process claim fails because the City has offered a "conceivable basis" for the wait time and fare rules. *Id.* at 1031 (quoting *Lupert v. Cal. State Bar*, 761 F.2d 1325, 1328 (9th Cir. 1985)). The City's conceivable rationales include the need to maintain a healthy transportation market and to ensure the operators of each type of for-hire transportation remain economically viable.

The plaintiffs contend these rationales are a pretext for the regulations' true purpose of pure economic protectionism, but "[i]n our substantive due process decisions regarding occupational liberty, we [have] not question[ed] whether the government's proffered justification was a pretext." *Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 999 n.8 (9th Cir. 2007), *aff'd*, 553 U.S. 591 (2008). We "merely look to see whether the government *could* have had a legitimate reason for

acting as it did." *Dittman*, 191 F.3d at 1031 (quoting *Halverson v. Skagit County*, 42 F.3d 1257, 1262 (9th Cir. 1995)). Because the City has offered conceivable, legitimate reasons for the regulations, the plaintiffs' substantive due process claim fails.

2. The plaintiffs' equal protection challenge to the minimum fare and wait time regulations also fails, because even assuming taxis and sedans are similarly situated for equal protection purposes, the regulations survive rational basis scrutiny. "[T]he classification at issue [here] does not involve fundamental rights or suspect classes, [so] it must be upheld 'if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.'" *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) (quoting *Heller v. Doe*, 509 U.S. 312, 319-20 (1993)). The plaintiffs bear the "'burden[, as] the one[s] attacking the legislative arrangement[,] to negative *every* conceivable basis which might support it.'" *Id.* at 1280 (emphasis added) (quoting *Heller*, 509 U.S. at 320).

Here, although the plaintiffs are correct that "mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review," they have not adequately alleged that the wait time and fare rules, in fact, constituted "mere economic protectionism."

Merrifield v. Lockyer, 547 F.3d 978, 991 n.15 (9th Cir. 2008); *cf. Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 946 (9th Cir. 2004) ("[A]n equal protection plaintiff may [pursue an equal protection claim] by creating a triable issue of fact that either: (1) the proffered rational basis was objectively false; or (2) the defendant actually acted based on an improper motive."), *overruled on other grounds by Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). To the contrary, the regulations formed part of a complex regulatory framework that conferred certain benefits on the taxi industry but also imposed significant burdens – burdens not borne by other point-to-point transportation operators. Thus, viewed in context, the City's differential treatment of sedans and taxis here was not a "naked attempt to raise a fortress protecting [one subsection of an industry at the expense of another]." *Merrifield*, 547 F.3d at 992 (alteration in original) (quoting *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002)). Instead, it was rationally

related to the City's legitimate interest in maintaining a healthy and well-functioning transportation market.[1] The equal protection claim therefore fails.

AFFIRMED.

[1] Several other circuits have rejected similar equal protection challenges on comparable reasoning. *See, e.g.*, *Greater Hous. Small Taxicab Co. Owners Ass'n v. City of Houston, Tex.*, 660 F.3d 235, 240 (5th Cir. 2011) (upholding regulations that allegedly favored "full-service" taxi companies over companies providing more limited services because "there is no real dispute that promoting full-service taxi operations is a legitimate government purpose under the rational basis test"); *Exec. Town & Country Servs. v. City of Atlanta*, 789 F.3d 1523, 1527 n.8, 1528 (11th Cir. 1986) (upholding regulations that allegedly favored taxis over sedans because they were conceivably designed to maintain a healthy transportation market); *see also Kan. City Taxi Cab Drivers Ass'n, LLC v. City of Kansas City, Mo.*, 742 F.3d 807, 809-11 (8th Cir. 2013) (upholding laws that favored existing taxi companies over newly formed ones because they served the city's legitimate interests in maintaining a high quality taxi industry).