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' OPENING BRIEF

Wesley Hottot
INSTITUTE FOR JUSTICE
10500 NE 8th Street, Suite 1760
Bellevue, WA 98004-4309
Phone: (425) 646-9300
Fax: (425) 990-6500
whottot@ij.org

Justin Pearson
INSTITUTE FOR JUSTICE
999 Brickell Avenue, Suite 720
Miami, FL 33131
Phone: (305) 721-1600
Fax: (305) 721-1601
jpearson@ij.org

Attorneys for Appellants

CORPORATE DISCLOSURE STATEMENT

Speed's Auto Services Group, Inc., d/b/a Towncar.com has no parent corporation and no publicly held company holds a 10 percent or greater ownership interest.

Fiesta Enterprises LLC d/b/a Fiesta Limousine has no parent corporation and no publicly held company holds a 10 percent or greater ownership interest.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES & ORDINANCES

RULES

INTRODUCTION

This case began when Appellants Towncar.com and Fiesta Limousine, two sedan companies in Portland, Oregon ("the Companies"), ran promotional deals on Groupon.com. Both promotions offered $32 one-way sedan rides. City officials ordered the Companies to cancel the promotions based on two Portland laws that require sedans to charge more than $32—specifically, sedans must charge no less than 135 percent of the taxi fare for the same trip and no less than $50 between downtown and the airport. The city instructed the Companies to refund their customers or face immediate suspension of their licenses. If they refused, the city promised to impose bankrupting fines—$635,500 for Towncar.com and $259,500 for Fiesta—based on the deals they had already sold.

Faced with immediate shutdown, the Companies acquiesced. They then filed this lawsuit challenging the constitutionality of Portland's laws. These laws are unconstitutional because they serve no rational governmental purpose; they only serve to protect Portland's taxi companies from honest competition, which is an impermissible purpose under existing Ninth Circuit precedent. The district court did not reach this constitutional question, however.

This brief shows that the district court was wrong to dismiss the Companies' two constitutional claims without reaching the merits. First, in order to bring a substantive due process claim, Towncar.com and Fiesta were not required to break

Portland's laws and actually go out of business, nor to prove that they could not stay in business while complying with those laws. Rather, it is sufficient that non-compliance with the laws surely would put the companies out of business. Second, the Companies plausibly alleged that sedan companies and taxi companies are similarly situated for equal protection purposes. For these reasons, discussed more fully below, this Court should now reverse and remand for further proceedings.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343, 2201-2202 and 42 U.S.C. § 1983. The parties consented to the jurisdiction of Magistrate Judge John V. Acosta. Excerpts of Record ("ER") 41-44; *see also* 28 U.S.C. § 636(c)(1). The district court rejected the Companies' legal theories in two opinions and orders. The first order dismissed the Companies' equal protection and privileges or immunities claims[1] under Fed. R. Civ. P. 12(b)(6). ER 25-40 (April 30, 2013). The second order granted summary judgment to the city on the substantive due process claim. ER 6-24 (June 20, 2014). The district court's final judgment dismissed all claims with prejudice. ER 4-5 (June 20, 2014).

Towncar.com and Fiesta timely filed a notice of appeal. ER 1-3 (July 18, 2014); *see* Fed. R. App. P. 4(a)(1)(A). This Court now has jurisdiction under 28 U.S.C. § 1291.

[1] The Companies are not appealing the dismissal of their claim under the Fourteenth Amendment's Privileges or Immunities Clause.

STATEMENT OF THE ISSUES

1. Was the district court correct to reject Towncar.com and Fiesta's substantive due process claim at summary judgment on the ground that Portland has not "completely prohibited" the Companies from pursuing their sedan businesses?

2. Regardless of the outcome on the first issue, was the district court correct to dismiss Towncar.com and Fiesta's equal protection claim on the ground that sedans and taxis cannot plausibly be viewed as similarly situated businesses under Portland's laws?

STATEMENT OF THE CASE

Towncar.com and Fiesta filed their complaint in April 2012. ER 393-409. The district court granted the city's motion to dismiss in part—dismissing the Companies' equal protection and privileges or immunities claims—and denied it in part—allowing their substantive due process claim to proceed. ER 25-40. The city later moved for summary judgment on the surviving due process claim, renewing an argument that it advanced unsuccessfully at the motion-to-dismiss stage—that there can be no "complete barrier," and thus no substantive due process claim, because the Companies are still in business. *See* ER 13. This time, the district court agreed and dismissed the claim, holding that there is no evidence of a

"complete bar" and therefore no protected liberty interest at stake in the case. ER 20-21. The city was awarded final summary judgment on this basis. ER 4-5.

STATEMENT OF FACTS

Appellants Speed's Auto Services Group, Inc. and Fiesta Enterprises LLC operate two independent sedan services in Portland, Oregon—Towncar.com and Fiesta Limousine ("the Companies"). Both are properly licensed and boast sterling records of compliance with Portland's laws, with one exception: They offered promotional fares online and the city threatened to shut them down for doing so. ER 129, 151, 254, 256-57. As a result of this experience, the Companies brought this case challenging the constitutionality of three ordinances that govern the operation of sedan services[2] in Portland:

(1) A citywide requirement that limousines and sedans charge no less than 135 percent of "prevailing taxicab rates" for the same trip. Portland City Code § 16.40.480(B) (ER 314); *see also* ER 202-03 (explaining this rate is calculated by estimating what a taxi would charge).[3]

---

[2] Like the district court, the Companies use the term "sedans" to refer to their operations as a whole, although they include a few other vehicle types. ER 145 ¶ 8 (Towncar.com has seven sedans, two sport-utility vehicles, and one bus); ER 125 ¶ 3 (Fiesta has one sedan and three buses). The definition of "executive sedan" includes a sport-utility vehicle. ER 267.

[3] The City Council recently passed housekeeping amendments to Portland's for-hire transportation laws, which moved the 135 percent minimum fare from
[*cont. next page*]

(2) A $50 minimum fare for limousine and sedan trips between downtown and Portland International Airport. Portland City Code § 16.40.480(A) (ER 314); Private-For-Hire Admin. Rule 16.40.480-01 (ER 354); *see also* ER 204-06 (explaining "downtown" includes the commercial core of Portland along both banks of the Willamette River).

And (3) a minimum one-hour wait time for limousines and sedans measured from the time a customer requests service to the time the customer is picked up. Portland City Code § 16.40.460(A) (ER 312); Private-For-Hire Admin. Rule 16.40.460-01 (ER 354); *see also* ER 207-09 (explaining measurement).

The constitutionality of these three regulations is not before the Court. Instead, this appeal asks whether Towncar.com and Fiesta are the sort of people allowed under the case law to bring this sort of case. The facts below show that they are. The Companies can bring a due process claim because there is more than a scintilla of evidence that Portland has "completely prohibited" them from pursuing their sedan businesses. And they can bring an equal protection claim because the complaint plausibly alleges that sedans and taxis are similarly situated under the three laws at issue.

---

subsection "C" to subsection "B" without any substantive change. ER 154-55. The parties have stipulated that all references to former subsection "C" in depositions should be read as references to subsection "B" in the current regulations. *Id.*

I. The Summary Judgment Evidence Shows Portland Will Put Appellants Out of Business.

At summary judgment, the district court faulted Towncar.com and Fiesta for offering no evidence that Portland's laws have put them out of business or would put them out of business in the future. *See* ER 17. But the record shows more than enough evidence that they are "completely prohibited"—certainly more than the mere scintilla required to survive summary judgment.

As shown below, there is no dispute that the Companies violated the minimum fares. There is no dispute that Portland would shut the Companies down for violating the minimum fares again or for violating the one-hour wait time. The only reason they are still in business is because they bowed to the city's demands. As a result, the Companies have lost hundreds of customers who purchased sedan services, but were prohibited from using them, and they have lost untold revenue and opportunities which they might have otherwise realized.

A. Towncar.com and Fiesta violated Portland's minimum fares by offering discounted fares online.

In 2011, Towncar.com was struggling in the midst of the recent economic downturn. ER 131-32, 138-40, 145-48. For most of its nine years, the company's main clientele has consisted of business travelers. ER 131, 145. As corporate travel budgets shrank, Towncar.com experienced a corresponding decrease in revenue. ER 131-32, 145-48. This led to cutbacks in employees, vehicles, and

administrative staff. ER 131-32, 145-46. In an effort to broaden its customer base, Towncar.com went looking for a cost-effective means of advertising to the general public. ER 132, 139, 148. Its managers turned to "daily deal" websites. ER 131-32, 138-40, 145-48.

Online promotions seemed ideal because they would allow Towncar.com to bring in new customers and show them sedan service at less than full price. ER 132, 140, 142. "Daily deal" websites like Groupon.com and LivingSocial.com facilitate this sort of "pull" advertising—promoting a business through the customer's own experiences—because the websites encourage users to pay up front for services that they might not otherwise try. *See* ER 138-40. Towncar.com aimed to win over some of these "daily deal" customers and see them return to pay normal rates—for example, $60 from downtown to the airport. ER 138-40, 148.

Fiesta has a longer history of using "daily deal" websites. Traditional advertising is expensive, but online promotions work for Fiesta because they make some money and put real people, with real interest in its services, inside its vehicles, where the quality of service can promote the company more effectively than traditional advertising. *See* ER 126. At first, Fiesta used LivingSocial.com and Groupon.com to offer discounted wine tours in its buses.[4] *See* ER 125-27.

[4] The minimum fares only apply to limousines and sedans, *see* pp. 4-5 *above*, not buses. *See* ER 267 (defining "limousine" and "executive sedan"); *see also* ER 346-47 (noting that the city later decided Fiesta's wine tours were allowable).

When these promotions worked well, the company felt comfortable using the websites to promote its core sedan business. ER 126-27.

After seeing one of Fiesta's wine-tour offerings, Towncar.com ran a sedan promotion on LivingSocial.com in May 2011, selling 572 deals for discount trips to the airport. ER 148-49. Conscious of the $50 minimum airport fare (but unaware of the 135 percent minimum fare), Towncar.com ran the terms of this deal by the city's transportation administrator, Frank Dufay. ER 148, 158-59. Dufay believed that the deal was allowable, as long as no discounted trips began or ended downtown. ER 148, 340-41. Accordingly, Towncar.com excluded downtown from its service area and went through with the deal. ER 148. At the time, no one seems to have noticed that this deal likely violated Portland's 135 percent minimum fare, which applies city-wide regardless of where a trip begins or ends. ER 148-49, 161, 202.

A few months later, in September 2011, Towncar.com posted a second promotion—this one on Groupon.com—for $32 one-way sedan service anywhere in the city. ER 149, 153, 241-42. The Groupon promotion was an even bigger success than the LivingSocial promotion had been. By 11 a.m. the same morning that it posted, 636 people had purchased the Groupon deal. *See* ER 148-49, 187-88.

Shortly thereafter, Fiesta also ran a promotion on Groupon offering $32 one-way service to or from the airport. ER 127, 257. One of the company's co-owners set up the deal. *Id.* He meant to exclude downtown from its service area, but mistakenly included one downtown zip code. *Id.* Fiesta sold 260 deals the first morning the deal ran. ER 128. Although this promotion was scheduled to continue for two more days, it did not work out as planned. *Id.*

B. Portland threatened to shut down the Companies because they violated the minimum fares, and it would shut them down for violating the one-hour wait time, too.

The city moved swiftly to stop both Groupon promotions. Frank Dufay or someone on his staff saw Towncar.com's September deal post on Groupon.com because people in the office use the website. ER 158-59, 173. The same morning the deal posted, Dufay contacted Towncar.com, ordered the deal cancelled, and issued a penalty letter assessing $635,500 in fines ($500 for the first violation and $1,000 for the rest). ER 172, 186-88, 191-93, 243-44, 256-57. This letter gave the company a stark choice: Cancel the Groupon promotion and refund all of the 636 purchasers, or Towncar.com's company and vehicle permits would be immediately suspended. ER 243-45, 257. The letter also informed the company that its permits would be automatically cancelled in three days' time, unless it voluntarily came into compliance before then. ER 244.

Fiesta received the same basic treatment. *See* ER 126-28. Dufay called the company the morning its Groupon deal posted and ordered it canceled. ER 127. In this case, the city contacted Groupon to tell it that Fiesta's deal violated Portland's laws. ER 257-58; *see also* ER 191-92 (Dufay may have contacted Groupon in Towncar.com's case, too). Groupon promptly cancelled the deal and Fiesta refunded those customers it had not already served. ER 127-28. Following up in a penalty letter, Dufay threatened to suspend Fiesta's company and vehicle permits and to impose a civil penalty of $259,500 based on the 260 deals sold.[5] ER 251-52, 257-58.

The city stands by Dufay's threats. Portland's regulatory manager, Kathleen Butler, reiterated them shortly after Dufay's initial communications with Towncar.com. ER 245 ("First penalty is $500.00, second is $1000.00, third is $1000.00 and also includes suspension of permits. Failure to pay the penalties results in revocation of the permits."). The city does not contest that Dufay's communications were threats from the city itself. *See* ER 256-57. It admits that other companies have been penalized for violating the minimum fares and admits that three penalties can trigger a company's suspension. ER 258-59.

[5] While the city's penalty letter to Fiesta relies on the 135 percent minimum fare, not the $50 airport minimum, the terms of Fiesta's deal (and other evidence) suggest that Fiesta's promotion violated both minimum fares. *See* ER 99-102, 123, 127-28, 215-17.

The Companies would receive similar treatment if they violated the minimum one-hour customer wait time. Penalties add up at the rate of $500 for the first offense, $1,000 for the second, and $2,500 for the third. Portland City Code § 16.40.540(A) (ER 317-18). A second offense can result in suspension of a company's operating permit and a third can result in its revocation. *Id.* (ER 317). And, if monetary penalties are not paid within two months, suspension of a permit automatically becomes a revocation. Portland City Code § 16.40.550(H) (ER 321). The manager of Towncar.com testified that, every day, she receives between three and five requests for immediate service that would violate the wait time. ER 358-59. Fiesta's co-owner also knows that he has lost customers to the wait time, although he cannot say how often. ER 345. But the consequences for violating the wait time are, like those for violating the minimum fares, crystal clear: Towncar.com and Fiesta would no longer be allowed to operate.

C. Because of Portland's enforcement efforts, the Companies lost needed customers and revenue and they continue to lose customers and revenue to this day.

As a result of Portland's enforcement efforts, the Companies faced a stark lose/lose decision: Either go through with their plans to offer discounted fares and prompt pickups, in which case the city would revoke their permits and impose bankrupting fines, or comply, in which case they would lose promotional revenue, disappoint customers who purchased their services, and lose the opportunity to

build long-term relationships with those people. The Companies chose compliance. ER 127-28, 149. There really was no alternative: The city's fines alone would have bankrupted either one of them (ER 128, 136, 143, 150), while the suspension or revocation of their operating permits would have instantly put them out of business. ER 129, 136, 143, 150. These are small businesses on tight margins. ER 128, 133, 145, 148. They cannot afford to stop operations for any length of time. *See id.*

Still, compliance has had its own negative consequences. The Companies lost 896 real customers—636 in Towncar.com's case, ER 149, and 260 in Fiesta's case, ER 128—who purchased their services on Groupon.com. The whole idea of the online promotions was to give these people (and many other people) a chance to learn about the Companies' services and to see what makes them special. *See* ER 339-40, 344. But even if every one of these customers never again used a sedan, still, Towncar.com lost $10,176 when it refunded their money, ER 149 (explaining Groupon would keep half of the proceeds), and Fiesta lost about $5,800. *See* ER 344-45 (explaining Groupon would keep 30 percent). It is reasonable to assume these figures would be substantially larger if the Companies' deals had been permitted to stay online for longer than a few hours.

Additionally, at least some of the 896 people who purchased Groupon deals would have in all likelihood returned to purchase full-price services. ER 132-33,

141-42, 150. For example, Fiesta had one customer who became aware of its existence through the Groupon promotion and then rode with the company for a year and a half afterward. ER 128. If more customers had been allowed to experience its services, Fiesta probably would have won over more customers. *Id.* It is also true that purchasers of promotional deals sometimes do not use them, so some purchases were likely to result in revenue without expenses—*i.e.*, pure profit. ER 150. These deprivations—of discount customers, promotional revenue, and long-term customers—continue to this day. They are also compounded at least twice a year, when the Companies would run similar promotions, if they could. *See* ER 126-27, 150.

II. The Complaint Shows That, But For Portland's Laws, Taxis and Sedans Would Charge Similar Prices and Have Similar Wait Times.

At the motion-to-dismiss stage, the district court concluded that it was implausible to believe Towncar.com and Fiesta are similarly situated to taxicab companies and that, therefore, the Companies have no equal protection claim. ER 32-35. The district court believed the Companies cannot really complain about the minimum fares and minimum wait time, which apply only to sedans, because other laws apply only to taxis. *Id.* But the complaint plausibly alleges that the *relevant* differential treatment—setting minimum prices and wait times—prevents sedans from competing with taxis where they otherwise would.

The complaint alleges what is plain on the face of Portland's laws: They were designed to shield taxi companies from competition by sedan companies. ER 394 ¶¶ 1, 5; ER 397-98 ¶¶ 22-30; ER 403 ¶ 70. Accordingly, Portland requires sedans, but not taxis, to charge minimum fares.[6] ER 403 ¶ 71; ER 405 ¶¶ 79-80. And it requires sedans, but not taxis, to wait at least an hour before picking up their customers. ER 405 ¶ 81. But for these regulations, Towncar.com and Fiesta would offer cheaper fares and more scheduling flexibility to their customers. ER 400-02 ¶¶ 40-43, 54-57. Instead, the minimum fares force Portlanders to pay more than they otherwise would for both sedan *and* taxi service. ER 398 ¶ 25; ER 403 ¶ 64. And the minimum wait time forces consumers to wait longer for sedan pickups than they otherwise would. ER 400 ¶¶ 43-45; ER 402 ¶¶ 57-59.

Thus, Portland's laws prevent sedan companies from offering prompt, efficient, and affordable point-to-point transportation, while giving taxis the exclusive right to provide those same services. ER 394 ¶ 5; ER 397 ¶ 22; ER 402 ¶ 61. This is by design. Portland's taxi companies complained to the city about the negative impact that affordable and prompt sedan services were having on taxi profits. ER 397 ¶ 23. The taxi companies pushed these regulations, which were not designed to guarantee public safety, but to guarantee that more money would

[6] The district court suggested that taxis are required to charge a minimum fare, ER 33, but this is not true. The court must be referring to the *maximum* fare for taxi service. *See* Portland City Code § 16.40.290(A) (ER 297); ER 166. Taxis have no *minimum* fare. ER 203, 403 ¶ 71; ER 405 ¶¶ 79-80.

flow to taxi companies at the expense of sedan companies. ER 397-98 ¶¶ 23-24. Indeed, the city conceded to the district court that its regulations do nothing to protect public health, safety, or morals. ER 365-67. And rightly so. The minimum fares and minimum wait time were designed to do one thing—protect taxi businesses from competition. Put differently, the equal protection problem in this case is this: Both taxis and sedans provide point-to-point transportation. Taxis are allowed to do so promptly and at affordable rates. Sedans are not.

SUMMARY OF ARGUMENT

Two of the district court's decisions were legally and factually incorrect. First, Towncar.com and Fiesta's substantive due process claim should have survived summary judgment because the Companies offered more than a scintilla of evidence that Portland's laws "completely prohibit" them from engaging in the sedan business. *See* pp. 6-13 *above*. The district court believed that, in order to bring a due process challenge, Towncar.com and Fiesta were required to either go out of business or prove that they would be forced out of business by Portland's laws. To the contrary, Supreme Court case law, Ninth Circuit case law, and every relevant case from every other circuit shows there is a sufficiently "complete prohibition" where, as here, participation in a particular job or industry is conditioned on compliance with the regulations under review. *See* pp. 18-33 *below*. Because the Companies have to comply with Portland's laws or go out of

business, they are "completely prohibited" under any tenable reading of the cases. *See id.* The district court embraced an untenable reading of the cases and created a new test. This test would require a fact-intensive review of the consequences of compliance, but would ignore the consequences of non-compliance. *See* pp. 33-35 *below*. It would allow even laws that violate established constitutional rights to escape judicial review, including Portland's laws. *See* pp. 35-38 *below*. Stated differently, the district court invented a test where there is only a phrase. The Companies in this case are "completely prohibited" and, therefore, their due process claim should be remanded for further proceedings.

Second, the Companies' equal protection claim was viable and should have survived a motion to dismiss. The allegations in the complaint show that sedans and taxis are similarly situated under the three laws at issue. *See* pp. 13-15 *above*. The district court got this wrong because it compared sedans and taxis under all of Portland's laws, when whether groups are similarly situated is determined by looking at how the groups are treated under the relevant laws, not all laws. *See* pp. 38-43 *below*. The equal protection claim should have proceeded to discovery and should, therefore, be remanded for further proceedings.

STANDARD OF REVIEW

This Court reviews the district court's summary judgment order *de novo*. *Albino v. Baca*, 747 F.3d 1162, 1168 (9th Cir. 2014) (en banc). "A grant of

summary judgment is appropriate when 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)). Summary judgment is therefore inappropriate "[w]here contrary inferences may be drawn from the evidence as to material issues." *Easter v. Am. W. Fin.*, 381 F.3d 948, 957 (9th Cir. 2004). The evidence is viewed in the light most favorable to the non-movant—in this case, Towncar.com and Fiesta. *See id.* The Companies' only burden was to offer more than a "mere scintilla" of evidence that a factual dispute remains for trial. *Int'l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1068 (9th Cir. 2011) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

This Court also reviews the district court's dismissal of the equal protection claim *de novo*. *Narayanan v. British Airways*, 747 F.3d 1125, 1127 (9th Cir. 2014). However, in this review, all factual allegations in the complaint must be taken as true and construed in the light most favorable to Towncar.com and Fiesta. *See id.* The Companies' only burden was to state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Weighing whether this standard has been met is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

ARGUMENT

I. Towncar.com and Fiesta Can Bring a Substantive Due Process Challenge Because Portland's Laws "Completely Prohibit" Them From Pursuing Their Chosen Occupation.

The district court misunderstood the "complete prohibition" case law and, as a result, incorrectly dismissed Towncar.com and Fiesta's substantive due process claim. This Court has stated that, although the precise contours of the protected liberty interest in the "pursuit of an occupation" are "largely undefined," there is no doubt that a plaintiff will have identified a protected liberty interest if he can show that a challenged law imposes, as a sanction for non-compliance, a "complete prohibition of the right to engage in a calling." *Dittman v. California*, 191 F.3d 1020, 1029 (9th Cir. 1999) (internal quotation marks omitted). In this context, "complete prohibition" does not mean that a plaintiff must choose between going out of business and challenging a law that surely will put the plaintiff out of business unless he complies. Rather, as demonstrated below, a "complete prohibition" is present when working in the plaintiff's chosen job or industry requires compliance with the challenged law. This is true here because Portland requires sedan companies to comply with its minimum fares and minimum wait time or else to forfeit their licenses and face bankrupting fines.

The district court's contrary "complete prohibition" standard cannot be squared with the one Supreme Court case, the Ninth Circuit cases, and the six other

cases from every other circuit ever to address what "complete prohibition" means. *See* pp. 18-33 *below*. Contrary to all of these cases, the district court invented a new test. This test requires an in-depth factual inquiry into whether the costs of *complying* with the challenged law will entirely destroy a plaintiff's business, but it takes no account of the consequences of *non-compliance*. *See* pp. 33-35 *below*. If this test were the law, even demonstrably unconstitutional policies—like Portland's minimum fares and minimum wait time—would be unchallengeable in the absence of conclusive evidence that the policy had already, or would soon, put the plaintiff out of business. *See* pp. 35-38 *below*. But this test is not the law. As shown below, a "complete prohibition" is present when the government makes a person do something as a condition of getting into, or staying in, a chosen line of work.

A. The "complete prohibition" standard is satisfied where, as here, participation in a job or industry requires compliance with the challenged laws.

As the phrase "complete prohibition" is used in all of the controlling cases, it does not mean that a plaintiff is required to go out of business before bringing a due process claim. Rather, a law is a sufficiently "complete prohibition" when the plaintiff has to comply with the law as a condition of participating in a particular job or industry. That is the case here. Towncar.com and Fiesta are prohibited from operating sedan businesses in Portland unless they comply with the city's

unconstitutional regulations. There is no dispute that they must either comply or shut down. Nothing more is required if, indeed, any evidentiary showing is required to establish a constitutionally protected liberty interest.

The district court got this wrong because it misunderstood the three principal cases on "complete prohibition"—*Conn v. Gabbert*, 526 U.S. 286 (1999), *Dittman v. California*, 191 F.3d 1020 (9th Cir. 1999), and *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56 (9th Cir. 1994). *See* ER 13-17. None of these cases support the district court's conclusion that Portland's laws are anything less than "complete prohibitions." Just the opposite: These cases (and other cases) demonstrate that the Companies can bring their due process challenge.

i. The Supreme Court cases show there is a "complete prohibition" in this case.

The Supreme Court coined the phrase "complete prohibition" in *Conn v. Gabbert*, 526 U.S. at 292. Applying the Supreme Court's reasoning in that case, the Companies in this case made more than a sufficient showing that they are "completely prohibited."

In *Conn*, prosecutors had a defense lawyer searched for evidence when the lawyer arrived for his client's appearance before a grand jury. *Id.* at 288-89. The lawyer sued, arguing that the search violated his Fourth Amendment rights and his substantive due process right to pursue his chosen occupation—*i.e.*, practicing law. *Id.* at 289.

The Supreme Court recognized that the Fourteenth Amendment guarantees the substantive due process right to pursue one's chosen occupation, *id.* at 291-92, but held that the lawyer's right to be a lawyer could not be violated by the "brief interruption" of being searched for evidence, *id.* at 292. This makes sense. One's ability to practice is perhaps delayed, but not denied, by a quick search for evidence. The Supreme Court specifically relied on the short-term nature of the interruption in reaching its conclusion. *See id.* (observing that a person's liberty interest "is simply not infringed by the inevitable interruptions of our daily routine as a result of legal process, which all of us may experience from time to time"). The Court invoked the phrase "complete prohibition" for the first (and only) time to state the obvious: On these facts, there just wasn't one. *See id.*

Conn did not announce any new threshold requirements for substantive due process claims; it simply held that the lawyer's claim was meritless. *See id.* at 293 ("We hold that the Fourteenth Amendment right to practice one's calling is not violated by the execution of a search warrant . . . ."); *see also PDK Labs Inc. v. Ashcroft*, 338 F. Supp. 2d 1, 9 & n.12 (D.D.C. 2004) ("*Conn* did not purport to articulate a higher standard to prove a deprivation of a liberty interest. Rather, the case narrowly held that the plaintiff's particular, and peculiar, claim lacked merit."). The plaintiff in *Conn* lost because he had a doomed legal theory, not because he failed to meet any special evidentiary burden for due process claims.

One member of the Court did note the exceptionally thin evidence of injury in *Conn*. *See* 526 U.S. at 293 (Stevens, J., concurring in the judgment) (noting the absence of any evidence that the lawyer's "income, reputation, clientele, or professional qualifications were adversely affected by the search"). But all nine justices agreed that the lawyer's claims were doomed without applying (or announcing) any test.

The Supreme Court simply used the phrase "complete prohibition" to distinguish the lawyer's outlandish claim—that a quick search deprived him of his right to pursue his occupation—from the claims in three earlier cases that involved the same right. *See id.* at 292 (citing *Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232 (1957); *Truax v. Raich*, 239 U.S. 33 (1915); and *Dent v. West Virginia*, 129 U.S. 114 (1889)). Taken together, these three cases show that, in *Conn*, the Supreme Court considered a plaintiff to be "completely prohibited" whenever the plaintiff had been forced to comply with a government rule or policy in order to get into, or stay in, a particular job or industry.

Schware and *Dent* both involved substantive due process challenges to licensing requirements. In *Schware*, a candidate for the New Mexico bar was not allowed to take the exam based on events from his past, including his former membership in the Communist Party. 353 U.S. at 238-41. *Dent* involved a doctor who was denied a medical license because West Virginia deemed the medical

school he graduated from as less than "reputable." 129 U.S. at 124-25. The Supreme Court found a constitutional violation in *Schware*. 353 U.S. at 246-47 (holding the would-be lawyer's right to pursue his chosen occupation was violated because it was irrational to believe he lacked "good moral character"). It upheld the educational standards in *Dent*. 129 U.S. at 124-25, 128 (holding doctor's right to practice was not violated by requiring medical training only from certain schools). But the plaintiffs in both cases were "completely prohibited" because they were required to comply with the government policies they challenged, or else they had to find other work.

The Supreme Court's third example in *Conn* suggests an even more flexible meaning for "complete prohibition." In *Truax v. Raich*, a cook was about to lose his job after Arizona passed a law requiring businesses with more than five workers to employ no less than 80 percent qualified voters or native-born citizens. 239 U.S. at 35. The cook had been born in Austria and was not qualified to vote. *Id.* at 36. The owner of his restaurant told the cook he would be fired when the law went into effect, so the cook sued, arguing that the law violated the Fourteenth Amendment. *Id.* The Supreme Court allowed the cook to challenge the law because, if it was constitutional, the state was going to force his boss to fire him or to fire other employees to keep the cook. *Id.* at 38-39 (observing that "[t]he employe[e] has [a] manifest interest in the freedom of the employer to exercise his

judgment without illegal interference or compulsion"). The Supreme Court struck down the law on equal protection grounds. *Id.* at 43.

The cook in *Truax* (according to the Supreme Court in *Conn*) was facing a "complete prohibition," 526 U.S. at 292, even though he was still working at the same restaurant and could, in fact, continue working there if more native-born workers were added to the staff, 239 U.S. at 35-36. Had the cook been fired, he could have continued working as a cook somewhere else in Arizona—for example, another restaurant with more native-born workers or one with fewer than five employees. All that mattered for constitutional purposes was that the law forced the cook's employer to choose between compliance (in which case the cook or someone else would be fired) and non-compliance (in which case the employer would be punished and the cook would still be fired). *Truax* therefore illustrates a key flaw in the outcome of this case below.

The Supreme Court's decision in *Truax*, and its reliance on that decision in *Conn*, show that the test applied by the district court in this case was incorrect. The cook in *Truax* was "completely prohibited" despite the fact that he (and his boss) could comply with the law and keep working. But like the would-be lawyer in *Schware* and the doctor in *Dent*, who needed licenses to work in their professions, the cook in *Truax* (and his boss) faced serious consequences for non-compliance. By contrast, the lawyer in *Conn* only faced a brief interruption of his

work and, in any event, had meritless claims. Thus, the principle of *Conn* is not that the plaintiff must be entirely excluded from his profession before he can sue—far from it—the Supreme Court believed a "complete prohibition" is present when either compliance or non-compliance with a law has serious, rather than temporary, consequences for the plaintiff's job.

The principle of *Conn* is easily satisfied in this case. There is no dispute that Towncar.com and Fiesta would immediately lose their licenses and be forced to shut down if they again violated the laws they are challenging. Those laws are not temporary restrictions. No further showing is required under *Conn* if, indeed, *Conn* requires any affirmative showing of any kind. Even so, the Companies offered evidence on every one of the points that Justice Stevens emphasized were lacking in *Conn* in his concurrence in that case (526 U.S. at 293): They showed lost income, reputation, and clientele, and that their professional qualifications—*i.e.*, their licenses—would be taken away. *See* pp. 6-13 *above*. Applying the Supreme Court's reasoning in *Conn*, the Companies in this case have made more than a sufficient showing that they are "completely prohibited."

ii. The Ninth Circuit cases show there is a "complete prohibition" in this case.

This Court relied on the Supreme Court's "complete prohibition" language for the first time in *Dittman v. California*, 191 F.3d 1020 (9th Cir. 1999). *Dittman* involved a licensed acupuncturist who refused to disclose his Social Security

number despite a new law requiring its disclosure to renew his license. *Id.* at 1024. The acupuncturist brought a substantive due process challenge to this requirement, and the district court granted summary judgment to the state. *Id.* at 1030. This Court affirmed on the merits, but specifically held that requiring the disclosure of a Social Security number is the kind of "complete prohibition" that will support a due process challenge. *Id.* at 1029-30 (observing that minimum education and testing requirements also meet the standard). The Court reasoned that failing to disclose a Social Security number would automatically result in losing the right to practice acupuncture, not in the kind of brief interruption that was at issue in *Conn*. *Id.* at 1029. Therefore, the acupuncturist in *Dittman* had a liberty interest at stake for the same reason the plaintiffs in *Schware*, *Dent*, and *Truax* did—he was not temporarily inconvenienced, but was going to lose his job if he did not comply with the law he was challenging. *See id.* Of course, the acupuncturist could have divulged his Social Security number and continued practicing acupuncture (indeed, the government had already obtained his number by other means, *id.* at 1025), but this Court nonetheless found a "complete prohibition."

The district court in this case relied primarily on *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56 (9th Cir. 1994)—a case decided before both *Dittman* and *Conn*. *See* ER 14-16. Like *Conn*, *Wedges/Ledges* involved a brief interruption. The manufacturer of an arcade game called "The

Challenger," which was a type of "crane" amusement game, brought a substantive due process challenge to a city's blanket ban on licenses for crane games while officials investigated whether such games were illegal "games of chance" or legal "games of skill." 24 F.3d at 59-60. The ban lasted only four and a half months, after which the city decided that the legality of crane games would have to be assessed on a case-by-case basis. *Id.* at 60. The Court concluded that the manufacturer had no substantive due process claim because it lacked a real liberty interest. *Id.* at 65 (noting "the fact that the City temporarily banned one particular type of amusement game does not in itself establish that the City unduly interfered with either the game operators' or manufacturers' ability to pursue their livelihood in the amusement game industry"). This conclusion is consistent with the reasoning in *Conn* that temporary impediments will not support a substantive due process claim. *See* 526 U.S. at 292. But it has no application in a case, like this one, where the law is not a temporary impediment but a permanent restriction.[7]

Indeed, all of this Court's "complete prohibition" cases since *Dittman* fall into three categories: those involving temporary impediments; those involving

[7] The Court in *Wedges/Ledges* went on to assume that the manufacturer was prevented from pursuing its business, but held that the substantive due process claim nevertheless failed on the merits. 24 F.3d at 65-66. This was possible because the district court in *Wedges/Ledges* decided the merits on cross-motions for summary judgment. *Id.* at 60-61. Here, only Portland moved for summary judgment and the district court did not reach the merits. Therefore, in this case, the Court cannot bypass the "complete prohibition" analysis and decide the merits.

actions unrelated to the plaintiff's ability to work; and those in which the plaintiff asserted a right to a particular type of government job. One case involved a temporary impediment. *Guzman v. Shewry*, 552 F.3d 941, 954-55 (9th Cir. 2009) (holding doctor's temporary suspension from a state Medicaid program while facing criminal charges for Medicaid fraud did not "completely prohibit" the doctor from pursuing his occupation because his medical license was not revoked or suspended). Three cases—one published case and two unpublished—involved government action that was unrelated to the plaintiff's ability to stay in business. *Lowry v. Barnhart*, 329 F.3d 1019, 1023 (9th Cir. 2003) (lawyer was not "completely prohibited" from practicing law by an ALJ who consistently ruled against him because the ALJ did not prevent the lawyer from retaining clients or appearing at hearings); *Paul v. City of Sunnyside*, 405 Fed. Appx. 203, 205 (9th Cir. 2010) (unpublished) (building contractor was not "completely prohibited" by the revocation of a conditional use permit for one site); *Willoughby Dev. Corp. v. Ravalli County*, 338 Fed. Appx. 581, 583 (9th Cir. 2009) (unpublished) (land developers were not "completely prohibited" by zoning regulations that required changes to their subdivision plan). The rest of the cases address an asserted right to public employment. *See, e.g.*, *Llamas v. Butte Cmty. Coll. Dist.*, 238 F.3d 1123, 1128 (9th Cir. 2001) (community college janitor was not "completely prohibited" by ban on future employment with a particular public school because he could still

work as a janitor elsewhere); *Tillotson v. Dumanis*, 567 Fed. Appx. 482, 483 (9th Cir. 2014) (unpublished) (police officer was not "completely prohibited" by his inclusion on a list of dishonest cops because he was rejected from police jobs both before and after he was added to the list).

None of these cases bear on the facts of this case. Portland's laws are not temporary restrictions like those at issue in *Wedges/Ledges* and *Guzman*; they are, like the disclosure requirement in *Dittman*, permanent rules that the Companies must comply with every day they are in business. Unlike the relatively minor problems faced by the plaintiffs in *Lowry*, *Paul*, and *Willoughby*, Portland's laws require compliance if the Companies wish to stay in business, just like the disclosure requirement in *Dittman* required compliance for the acupuncturist to stay in business. And, finally, as the Court recognized in *Guzman*, public employment cases use a different standard than the one applied to private employment. 552 F.3d at 954-55. Thus, in public employment, the right to pursue one's occupation is only implicated in extreme cases, as when the government blacklists a person, because the government as employer has broader powers than the government does as lawmaker. *Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 997-98 (9th Cir. 2007) (comparing the act of blacklisting a person from public employment to the act of yanking a person's license in an occupation that requires

licensure), *aff'd on other grounds*, 553 U.S. 591, 598-99 (2008) (describing the government's powers in these two capacities).

At the same time, this Court has decided cases that *do* bear on the facts of this case without performing any "complete prohibition" analysis. For example, in *Merrifield v. Lockyer*, the Court struck down California's "structural pest control" license on rational basis grounds because it appeared calculated to achieve nothing other than the constitutionally impermissible purpose of economic protectionism. 547 F.3d 978, 991-92 & n.15 (9th Cir. 2008). The plaintiff in that case—Alan Merrifield—was in the business of installing spikes and screens on buildings to keep pests like raccoons, squirrels, rats, pigeons, and bats away. *Id.* at 980. California's definition of "structural pest control" covered this kind of work—requiring Merrifield to get a license—but it exempted people who worked with mice, rats, and pigeons. *Id.* at 981-82. The Court struck down the law because, in light of these exemptions for people doing essentially the same work, it was irrational to make Merrifield get a license. *Id.* at 991-92. It did not matter that he could have carried on with the part of his business that involved rats and pigeons. *See id.* at 980. Even so, Merrifield not only survived summary judgment, he won. *Id.* at 982, 992. Merrifield (like the Companies in this case) was still in business when he sued, *see id.* at 980; Merrifield (like the Companies in this case) had been warned to come into compliance, but not actually punished, *id.* at 980-81; and

Merrifield (like the Companies in this case) could have carried on with other aspects of his business regardless of the law.[8] Accordingly, the Companies in this case are entitled to a ruling on the merits, just as Merrifield was entitled to a ruling on the merits.

Under *Dittman* and *Merrifield*, the Companies are "completely prohibited" for the straightforward reason that they will be locked out of their industry unless they comply. None of this Court's cases suggest that the Companies had to make an additional showing, or actually shut down, before challenging Portland's laws.

iii. Most of the other circuits do not use the "complete prohibition" standard; those that do would find it satisfied in this case.

Eight of the other twelve circuits have not applied the "complete prohibition" standard. Appellants have identified just six cases in any other Court of Appeals addressing the standard in a substantive due process case decided since *Conn*, and these six fit the same three categories as this Court's cases.[9] The First,

---

[8] Merrifield invoked the precise substantive due process right at issue in this case—the right to pursue one's chosen occupation (547 F.3d at 984-86)—and, still, the Court did not engage in any form of "complete prohibition" analysis, although it analyzed Merrifield's due process claim in depth before ruling for the government on the merits of that claim. *See id.* at 985-88. The court went on to strike the law down on equal protection grounds. *Id.* at 991-92.

[9] (1) Two involved temporary impediments. *Flowers v. City of Minneapolis*, 478 F.3d 869, 871-72, 874 (8th Cir. 2007) (dismissing childcare business owner's due process claim because he only showed a temporary slowdown due to police

[*cont. next page*]

Third, Fourth, Fifth, Seventh, Tenth, District of Columbia, and Federal Circuits have no "complete prohibition" cases.

At the same time, the Fifth and Sixth Circuits have—in cases similar to *Merrifield*—actually ruled for the plaintiff on the merits of a substantive due process claim without performing any kind of "complete prohibition" analysis. *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 217, 221-27 (5th Cir. 2013) (affirming victory for rational-basis plaintiffs on substantive due process grounds, carefully weighing evidence at trial, and, still, not engaging in any form of

---

activity—a single customer withdrew her child, but reenrolled him a year later); *Grider v. Abramson*, 180 F.3d 739, 745-46, 752 n.17 (6th Cir. 1999) (affirming summary judgment against lawyers inconvenienced one Saturday because their office was within the security zone for a KKK rally).

(2) Two involved actions unrelated to the plaintiff's ability to stay in business. *Doe v. Fla. Bar*, 630 F.3d 1336, 1344-45 (11th Cir. 2011) (stating in dicta that denying a lawyer recertification in a legal specialization likely does not implicate her due process right to practice law); *Schultz v. Vill. of Bellport*, 479 Fed. Appx. 358, 360 (2d Cir. 2012) (unpublished) (affirming summary judgment against coffee shop owner because negative publicity resulting from municipal officials' alleged harassment of the owner did not prevent him from operating his coffee shop); *see also Schultz v. Vill. of Bellport*, No. 08-CV-0930, 2010 U.S. Dist. LEXIS 104804, at *5-11, 2010 WL 3924751, at *1-3 (E.D.N.Y. Sept. 30, 2010) (discussing facts of the previous case).

(3) Two involved public employment. *Singleton v. Cecil*, 176 F.3d 419, 426 n.8 (8th Cir. 1999) (en banc) (holding police officer had no due process right to at-will government employment because he could work as a police officer elsewhere); *Ming Wei Liu v. Bd. of Trs. of the Univ. of Ala.*, 330 Fed. Appx. 775, 780-81 (11th Cir. 2009) (affirming summary judgment for a public employer on a doctor's due process claim because the doctor complained that the employer interfered with his ability to obtain staff privileges, when he had obtained privileges anyway).

"complete prohibition" analysis); *Craigmiles v. Giles*, 312 F.3d 220, 222, 224-29 (6th Cir. 2002) (same). If the plaintiffs in these cases can win on the merits without making any "complete prohibition" showing, then the plaintiffs in this case should have, at least, survived summary judgment.

Under all of these cases, in every other circuit, the Companies in this case would have survived summary judgment, just as they would have survived under *Conn* and under this Court's precedents. *See* pp. 25-31 *above*.

B. The district court invented a new "complete prohibition" test that ignores the consequences of non-compliance.

Under the existing case law, the "complete prohibition" question is simple: Towncar.com and Fiesta will lose permission to operate in Portland unless they obey the city's command to comply with the minimum fares and minimum wait time, and therefore, the Companies can bring a substantive due process challenge to that command. *See* Part I-A *above*. The district court did not apply this case law correctly. Instead, the district court invented a new test that requires an in-depth factual inquiry into whether the costs of *complying* with the government's commands will destroy a plaintiff's business. This test ignores the consequences of *non-compliance*, no matter how severe.

Using this test, the district court believed that Towncar.com and Fiesta were required to actually go out of business or to make an affirmative showing that complying with Portland's laws would put them out of business. ER 17-20.

Because the Companies complied with the city's commands and still continue to operate, the logic goes, they cannot be "completely prohibited." *See id.* This reasoning is illustrated by the following passage from the court's opinion:

> There is no dispute that the City, after discovering Plaintiffs' Groupon.com promotions, which admittedly violated the Fare Regulations, informed Plaintiffs that their company and vehicle permits would be suspended and fines assessed if Plaintiffs failed to cancel the promotions and refund all the money collected. Plaintiffs did, in fact, cancel the promotions and refund the money and have continued to provide Executive Sedan services without interruption. Accordingly, Plaintiffs were not deprived of the right to pursue their chosen occupation but were merely deprived of the right to advertise or promote their businesses by offering reduced rates which violate the Fare Regulations. Plaintiffs have failed to present evidence that their inability to offer reduced-fare promotions has prevented, or will in the future prevent, them from operating Executive Sedan services.

ER 17.

As demonstrated above, this is not what the phrase "complete prohibition" means—it means, at most, that the plaintiff must comply with the challenged law as a condition of participating in a given job or industry. *See* pp. 18-33 *above*. Thus, one way that a plaintiff can show a "complete prohibition" is by demonstrating that *non-compliance* with a government policy will put him out of business. Just as the acupuncturist in *Dittman* faced a "complete prohibition" because he had to disclose his Social Security number or lose his license, 191 F.3d at 1029, the Companies in this case are "completely prohibited" because they must comply with Portland's laws or lose their licenses. *See* pp. 25-26 & 29 *above*

(discussing *Dittman*). Nothing requires the Companies to actually go out of business. *See* pp. 23-25 & 30-33 *above* (discussing *Truax*, *Merrifield*, *St. Joseph Abbey*, and *Craigmiles*).

In this case, there is no dispute that non-compliance with Portland's laws would result in Towncar.com and Fiesta losing their licenses and suffering bankrupting fines. Indeed, the district court recognized as much. *See* ER 17. Nothing more was required. The Companies were not required to make an affirmative showing that they cannot possibly remain in business while complying with Portland's laws.[10] Because undisputed facts show that a truly *complete* prohibition will immediately result from the Companies' non-compliance with Portland's commands, they can challenge those commands on substantive due process grounds without actually going out of business.

C. The district court's test would make some unconstitutional laws—like Portland's laws—unchallengeable.

If the district court's test were the law (and it is not), it would introduce impossible procedural burdens for a well-recognized substantive due process

[10] The district court believed that four facts compelled the conclusion that Towncar.com and Fiesta are not "completely prohibited": (1) the Companies continue to provide sedan services; (2) the city has overlooked minor violations of the minimum fares; (3) the Companies generally charge more than the minimum fares; and (4) they have, in the past, advertised in places other than Groupon.com. ER 18-19. All of these things are true, but they hardly matter when the consequences of *non-compliance* are that the Companies would automatically go out of business.

right—the right to pursue one's chosen occupation free from unreasonable restrictions. Plaintiffs would be required to go out of business before challenging the constitutionality of government commands that even the government agrees would put the plaintiff out of business. Any plaintiff who (like the Companies in this case) made the responsible decision to comply with the government's commands would, thereby, lose the right to challenge those commands. Perversely, anyone who flouted the same commands would thereby earn the right to challenge them (although such an uncommonly brave plaintiff would face serious justiciability problems because his business would no longer exist). This is precisely the test that the city advanced to the district court at summary judgment, *see* ER 72-74 at 28:10-30:1,[11] and it is precisely the test that the district court adopted and applied in its summary judgment opinion, *see* ER 15-20.

Under this test, federal courts would engage in a fact-intensive inquiry at the outset of every case involving the right to occupational liberty. This inquiry would set out to decide whether the plaintiff could, in fact, remain economically viable

---

[11] THE COURT: […] just let me make sure I understand what, to me, is a necessary implication of [the city's] position, which is this: Under your view, no plaintiff could bring a substantive due process [claim] based on a lesser injury, meaning an injury that falls short of being put out of business or being barred from entering the business.

[THE CITY'S ATTORNEY]: I believe that's the state of the law.

ER 72 at 28:11-18.

while complying with the law in question. *See* ER 18-20 (weighing evidence of the Companies' viability). This test would be cumbersome and difficult to apply. And it would allow unconstitutional laws to escape judicial review.

Under the district court's test, some people would simply have to live with unconstitutional laws when, like the Companies in this case, their businesses were nearly, but not entirely destroyed. Plaintiffs who could manage to stay in business—whether through firm resolve or good fortune—would, for that reason, lose the right to challenge government action even on recognized constitutional grounds. This test compels the result that the district court reached in this case. The court believed that because Towncar.com and Fiesta continue to operate while complying with Portland's laws, it does not matter whether those laws are, on the merits, irrational and protectionist in violation of existing Ninth Circuit precedent. *See Merrifield*, 547 F.3d at 991-92 & n.15 (striking down irrational, protectionist regulation of economic activity); *see also St. Joseph Abbey*, 712 F.3d at 222 ("neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose"); *Craigmiles*, 312 at 224 (6th Cir. 2002) ("Courts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose.").

If the Companies were to attempt to meet the district court's test, they would be required to go out of business just to open the courthouse door. But, at that point, Towncar.com and Fiesta would be bankrupt, would owe the city $895,000 in penalties, and would no longer have licenses to operate in Portland. The Companies would, in other words, cease to exist. In this scenario, it is hard to imagine how the Companies would maintain standing to sue, which the district court correctly recognized the Companies currently have. ER 15.

Fortunately, none of these consequences result from applying the "complete prohibition" standard adopted by this Court's precedents. Contrary to the district court's test, the Companies in this case are "completely prohibited" simply because they must comply with Portland's commands in order to remain in business. For this reason alone, they have a protected substantive due process right at stake and are, therefore, entitled to a resolution on the merits after further proceedings below.

II. The Companies' Equal Protection Claim Should Not Have Been Dismissed Because It Is Plausible (and True) That Taxis and Sedans Are Similarly Situated In Terms of Price and Wait Time.

Even if the district court was correct to dismiss the Companies' substantive due process claim at summary judgment (and it was not, *see* Part I *above*), the Companies nevertheless pleaded a viable equal protection claim that the district court wrongly dismissed on the face of the complaint. *See* ER 32-35.

The essence of the Companies' equal protection claim is this: Both taxis and sedans provide point-to-point transportation in Portland. ER 398-99 ¶¶ 31-34; ER 400-01 ¶¶ 46-48. Taxis are allowed to do so without charging minimum rates and without making their customers wait at least one hour for service, but sedans are not. ER 396-97 ¶¶ 17-22; ER 402-03 ¶¶ 61-64, 70-71. That is the only differential treatment that Towncar.com and Fiesta are challenging in this case. *See* ER 405-06 ¶¶ 78-84.

The district court believed that this differential treatment cannot state an equal protection claim because taxi companies are required to comply with *other* laws that sedan companies do not have to follow. *See* ER 33-34. For example, taxi companies must maintain a fleet of at least 15 vehicles, must operate 24 hours a day, and must have two-thirds of their fleet in service at all times, while sedans are not required to do these things. ER 33. The district court reasoned that because Towncar.com and Fiesta do not allege that these *other* laws should apply to them, they cannot invoke the Equal Protection Clause to challenge the minimum fares and minimum customer wait time that *do* apply to them but which *do not* apply to taxis. ER 34-35. This conclusion was incorrect.

Equal protection analysis does not look at all of the government's policies to determine whether groups are similarly situated; it looks only at the relevant policies under review. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("The Equal

Protection Clause … keeps governmental decisionmakers from treating differently persons who are in all *relevant* respects alike") (emphasis added); *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1064 (9th Cir. 2014) ("The groups need not be similar in all respects, but they must be similar in those respects relevant to the Defendants' policy."). Thus, in *Arizona Dream Act Coalition*, this Court considered, and rejected, the argument that two groups of immigrants—those that had been brought to the United States illegally as children and those challenging removal orders—were not similarly situated because *other* laws classified them differently. 757 F.3d at 1064. The Court had no trouble rejecting this argument because the *relevant* law treated the two groups differently—*i.e.*, an Arizona policy that allowed immigrants facing removal to obtain driver's licenses but prohibited other types of immigrants from doing so. *Id.* It did not matter that there were other legal distinctions between the two groups. *Id.* Likewise, in this case, it does not matter that *other* laws classify sedans and taxis differently; what matters is that sedans and taxis both provide point-to-point transportation in Portland, but are treated differently under the pricing and wait-time laws at issue. ER 398-405 ¶¶ 24, 31-34, 43-48, 57-59, 61-64, 71, 79-81.

With the relevant policies in view, it becomes plain that Portland has created two classes of for-hire transportation: (1) sedans, which must charge 135 percent of the taxi fare for the same trip, must charge $50 between downtown and the

airport, and must make their customers wait at least one hour; and (2) taxis, which do not have to do any of these things. *See* ER 394 ¶¶ 3-4; ER 396-97 ¶¶ 17-18; ER 403 ¶ 71. The complaint plausibly alleges that this differential treatment was designed to do one thing: protect taxi businesses from competition that they would otherwise face. ER 394 ¶ 5; ER 397-98 ¶¶ 22-24; ER 403 ¶ 70. The summary judgment evidence supported these allegations as well, but the district court did not address the merits at summary judgment, *see* ER 23-24, and so this evidence is not currently before the Court.

The district court decided at the motion-to-dismiss stage that other laws (none of which are at issue) required a finding that sedans and taxis are situated differently in Portland's for-hire transportation market. *See* ER 33-34. But, at the summary judgment argument below, the court recognized the reality that sedans and taxis provide the same service. ER 67-69 at 23:4-25:14.[12] And, in its opinion, the court recognized the reality that Portland's laws make stark distinctions between the services that sedans and taxis can legally provide. ER 7 ("[the Companies] are subject to City regulations setting minimum fares and wait times applicable to private for-hire transport companies using Executive Sedans that are

[12] "[W]hat I haven't heard [the city] tell me is what the fundamental distinction or distinctions are between the operators of executive sedans and the operators of taxi cabs, such that they should be treated differently when one could say they are providing the same basic service: transportation to paying customers who are members of the public." ER 69 at 25:7-13.

not applicable to taxicab companies"). Thus, with the benefit of evidence that was not available at the motion-to-dismiss stage, it was clear to the district court, at the summary judgment stage, that sedans and taxis really are similarly situated with respect to the relevant laws.

It was error for the district court to decide at the motion-to-dismiss stage that sedans and taxis cannot be similarly situated as a matter of law. Indeed, all (save one) of the cases that the district court relied on to dismiss the Companies' equal protection claim were, in fact, decided with the benefit of evidence. *See* ER 34 (relying on *Jenness v. Fortson*, 403 U.S. 431, 432, 440-42 (1971) (summary judgment); *Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1132, 1140 (9th Cir. 2011) (summary judgment); *Kim v. Holder*, 603 F.3d 1100, 1104 (9th Cir. 2010) (review of Board of Immigration Appeals proceeding); *Van Susteren v. Jones*, 331 F.3d 1024, 1025-27 (9th Cir. 2003) (summary judgment); *Charles Wiper Inc. v. City of Eugene*, No. 08–6226–AA, 2011 U.S. Dist. LEXIS 43442, at * 1, *22-25; 2011 WL 1541305, at *1, *8 (D. Or. Apr. 21, 2011) (summary judgment)). It is also telling that, in the one case cited by the district court that rejected an equal protection claim prior to the introduction of evidence, the plaintiff had "fail[ed] even to allege that the State has treated her less favorably than a similarly situated citizen." *See Pimentel v. Dreyfus*, 670 F.3d 1096, 1098, 1108-10 (9th Cir. 2012) (plaintiff challenged denial of state benefits, but failed to

identify even a single individual receiving those benefits from the state). None of these cases suggests that a sedan business cannot, as a matter of law, be similarly situated to a taxi business when both provide the same service, but only one is allowed to do so affordably and promptly.

The complaint plausibly alleges that the *relevant* differential treatment—minimum pricing and wait times—prevents sedans from competing with taxis where they otherwise would. *See, e.g.*, ER 403-04 ¶¶ 64, 70-72. And the complaint plausibly alleges what is evident on the face of Portland's laws—that the minimum fares and minimum wait time that apply to sedans were designed to protect taxis from competition. ER 397-98 ¶¶ 22-30; ER 403 ¶¶ 70-71. Nothing more was required for the Companies to make out a viable equal protection claim. The district court improperly dismissed this claim on the pleadings and, therefore, regardless of the outcome on the Companies' substantive due process claim, this Court should reverse and remand for further proceedings.

CONCLUSION

Appellants Towncar.com and Fiesta ask the Court to reverse the district court's grant of summary judgment in favor of the city on their substantive due process claim, to reverse the district court's order dismissing their equal protection claim, and to remand for further proceedings.

Respectfully submitted this 24th day of October, 2014.

INSTITUTE FOR JUSTICE

By: /s/ Wesley Hottot

Wesley Hottot (WA Bar No. 47539)
Institute for Justice
10500 NE 8th Street, Suite 1760
Bellevue, WA 98004-4309
(425) 646-9300
(425) 990-6500 (fax)
whottot@ij.org

Justin Pearson (FL Bar No. 597791)
Institute for Justice
999 Brickell Avenue, Suite 720
Miami, FL 33131
(305) 721-1600
(305) 721-1601 (fax)
jpearson@ij.org

Attorneys for Appellants

STATEMENT OF RELATED CASES

Appellants are not aware of any related cases currently pending in this Court.

/s/ Wesley Hottot
Wesley Hottot

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,761 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 it has been prepared in a proportionally spaced typeface in Microsoft Word 2010 using 14-point Times New Roman.

Dated: October 24, 2014

/s/ Wesley Hottot
Wesley Hottot

CERTIFICATE OF FILING AND SERVICE

I certify that on October 24, 2014, I electronically filed the above brief and Appellants' two-volume Excerpts of Record 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:

Denis M. Vannier (OR Bar No. 044406)
Office of the City Attorney
1221 SW Fourth Avenue, Room 430
Portland, OR 97204
(503) 823-4047
(503) 823-3089 (fax)
denis.vannier@portlandoregon.gov

Attorney for Appellee

/s/ Wesley Hottot
Wesley Hottot