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COURT OF APPEALS

STATE OF NEW YORK

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GREATER NEW YORK TAXI ASSOCIATION, ET AL.,

Respondents,

-against-

No. 98

THE STATE OF NEW YORK,

Appellant.

-----  
TAXICAB SERVICE ASSOCIATION, ET AL.,

Respondents,

-against-

No. 99

THE STATE OF NEW YORK,

Appellant.

-----  
METROPOLITAN TAXICAB BOARD OF TRADE, ET AL.,

Respondents,

-against-

No. 100

MICHAEL R. BLOOMBERG, ET AL.,

Appellants.

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20 Eagle Street  
Albany, New York 12207  
April 24, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA

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David Rutt  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 98, 99, 100.

2 Okay, counselor, you want any rebuttal time?

3 MR. DEARING: Two minutes, Your Honor.

4 CHIEF JUDGE LIPPMAN: Two of your eleven  
5 minutes. Go ahead, counselor.

6 MR. DEARING: Thank you.

7 May it please the court, I'm Richard Dearing for  
8 the State.

9 There's really no dispute here that there are  
10 significant deficiencies and inequities in access to  
11 street hail transportation in New York City. That's  
12 especially true in the outer boroughs, especially true as  
13 to persons with disabilities, and these affect residents,  
14 commuters, and visitors to - - -

15 CHIEF JUDGE LIPPMAN: Yeah, but where - - -  
16 where is it your responsibility rather than the city? How  
17 did - - - how did this play together with legitimate state  
18 interest? What about the history of this? Where - - -  
19 where is it that the - - - that - - - that the State's  
20 interest prevails here over the - - - what seemed to be  
21 the pattern previously - - -

22 MR. DEARING: It's - - -

23 CHIEF JUDGE LIPPMAN: - - - of these home rule  
24 messages?

25 MR. DEARING: Well, a couple questions in order

1 - - - in order.

2 CHIEF JUDGE LIPPMAN: Go ahead.

3 MR. DEARING: It's not a question of - - - of  
4 whose interest prevails. This goes back to Judge Cardozo  
5 in Adler v. Deegan. There are zones of concurrent  
6 authority between the State and the City. The question  
7 is, is there a substantial state interest? As long as - -  
8 -

9 CHIEF JUDGE LIPPMAN: Does that - - - does that  
10 trump everything if there's a substantial state interest?

11 MR. DEARING: If there is a substantial state  
12 interest, the State - - - you've said this many times, the  
13 State legislature may freely legislate.

14 JUDGE GRAFFEO: Even if the legislature's  
15 delegated an area to a locality?

16 MR. DEARING: Well, that's - - - especially  
17 there, and that - - - that's a critical point. The  
18 legislature has delegated by ordinary statute - - -  
19 General Municipal Law 181 - - - to localities the ability  
20 to regulate, license, and limit the supply of taxicabs.

21 JUDGE GRAFFEO: Right. So how do - - - how do  
22 we deal with that delegation?

23 MR. DEARING: The - - - the delegation is  
24 subject always - - - because of the reservation of power  
25 expressed in Article 9, Section 3 - - - subject always to

1 action directly by the State legislature.

2 CHIEF JUDGE LIPPMAN: They can always supersede  
3 even when there's legislation delegating?

4 MR. DEARING: Exactly. A power delegated to  
5 localities by ordinary legislation is not a power that  
6 that locality has even - - -

7 JUDGE SMITH: When - - - when can the State not  
8 supersede?

9 MR. DEARING: In - - - in - - - you mean any  
10 power or power that's delegated by statute?

11 JUDGE SMITH: I'll take either one.

12 MR. DEARING: You - - - you cannot supersede as  
13 to pow - - - as to powers that affect the property,  
14 affairs or government - - -

15 JUDGE SMITH: That's - - - I see.

16 MR. DEARING: - - - of a local government as - -  
17 - if there's no substantial state interest that the  
18 legislature - - -

19 JUDGE RIVERA: Okay. But what's the substantial  
20 state interest on whether or not someone on the streets of  
21 the Bronx can hail a cab?

22 MR. DEARING: The - - - it's two things. It is  
23 transportation access which is - - - which is one of the -  
24 - - the longest standing state interests that is  
25 recognized in this court's cases going back a century,

1 even in - - - in most of the cases that the plaintiffs  
2 rely on, Osborn and - - - and the dissenting opinion of  
3 Judge Breitel in Hotel Dorset, always say transportation  
4 is a matter of substantial State concern.

5 CHIEF JUDGE LIPPMAN: Is this - - - does it make  
6 no difference that you have private owners and private  
7 people - - - individuals that they pick up versus, let's  
8 say, a railroad or a subway? What's the - - - what are  
9 the distinctions or aren't there any?

10 MR. DEARING: There aren't. From the standpoint  
11 of the State, this is - - - this is the important  
12 question, is the mobility of people into, out of, around  
13 and through the largest city in this state.

14 CHIEF JUDGE LIPPMAN: But does it matter if it's  
15 private operator or not?

16 MR. DEARING: It doesn't. The subways were - -  
17 - were largely privately owned for many decades in - - -  
18 when the State power was - - - was found to exist. Buses  
19 - - -

20 JUDGE GRAFFEO: If you didn't have the disabled  
21 access piece here, would you still be making the same  
22 argument?

23 MR. DEARING: I'd be making exactly the same  
24 argument. The disabled access piece is the second  
25 dimension of State concern that I - - - I was going to

1 reach which is - - - which is the particular concern and  
2 then sharing equity and ability to fully participate in  
3 activities for disabled persons, a State concern that is  
4 reflected in a statute we cite in our - - -

5 JUDGE SMITH: You - - - you have a significant -  
6 - - you have a - - - an argument here. Is it - - - does  
7 it matter whether it's realistic? I mean, is the - - - is  
8 there anything in this record that indicates that anyone  
9 outside the City of New York ever cared about this  
10 legislation?

11 MR. DEARING: The - - - the fact that the  
12 legislature overwhelmingly voted to pass it - - -

13 JUDGE SMITH: Okay. But I mean - - - and how  
14 many - - - and how many upstate legislatures - - -  
15 legislators took part in the debate?

16 MR. DEARING: I'm not certain how many upstate  
17 legislators took part in the debate, but they considered  
18 the act and they voted on it. And there's no record or  
19 history in this court's decisions, nor would it be a wise  
20 thing - - -

21 JUDGE SMITH: And - - - and there was no - - -  
22 there was no statewide controversy, as far as the record  
23 shows, until - - - until Mayor Bloomberg decided that he  
24 better go to Albany because it wasn't working at City  
25 Hall.

1                   MR. DEARING: I - - - I don't think that's  
2 factually correct, but - - - but the premise of the  
3 question is flawed. It doesn't have to be a matter of  
4 statewide controversy; it has to be a matter of State  
5 concern, and this court - - -

6                   CHIEF JUDGE LIPPMAN: Counselor, we just accept  
7 - - - are we duty - - - duty bound to accept the state  
8 legislature's description of the state interest? How do  
9 we view what they say? Is that basically presumptively -  
10 - - it's state interest because they say it is?

11                   MR. DEARING: The - - - I think that - - - that  
12 the - - - you accept the fact that the legislature enacted  
13 the law to further the purposes that the legislature has  
14 said they enacted the law to further. That is set forth  
15 expressly in Section 1 of this act.

16                   JUDGE SMITH: Do we accept that we - - - do we -  
17 - - are we supposed to accept that even if we're convinced  
18 it's not true?

19                   MR. DEARING: Your Honor, this court has said  
20 again and again that they're not - - - that you will not  
21 look behind the - - -

22                   JUDGE SMITH: Well, that - - - that's a yes.

23                   MR. DEARING: - - - expressly stated purposes.  
24 That is a yes. I just - - - I do want to - - - to address  
25 a little bit your factual description here of Mayor



1 Bloomberg going to Albany when things broke down in the  
2 city council, because what's wrong about the plaintiffs'  
3 theory of this case - - - the plaintiffs say the  
4 legislature rubberstamped Mayor Bloomberg here. I think  
5 anyone who - - - who observes state politics knows that  
6 that's probably not true; it doesn't happen; it's not the  
7 way it works.

8 But let me tell you what really happened. When  
9 - - - when Mayor Bloomberg came to New York, the taxi  
10 medallion industry supported that plan. This is a - - -  
11 an advertisement that was run in the Daily News in late  
12 May 2011 by the Metropolitan Taxi Board of Trade. They  
13 said, tell Albany lawmakers to support the mayor's plan.  
14 This is in the record - - - taxicab service record at page  
15 1,459. Tell Albany lawmakers to support the mayor's plan,  
16 and here's what they said about it.

17 JUDGE SMITH: Of course, that was a plan other  
18 than the one that ultimately got adopted.

19 MR. DEARING: That's precisely my point, that -  
20 - - that this is not about the legislature rubberstamping  
21 a Bloomberg plan.

22 JUDGE SMITH: Okay. I - - - I don't think I  
23 said rubberstamping, but wasn't this an in - - - wasn't  
24 this a - - - basically a three-cornered controversy with  
25 the mayor and the livery drivers and the metered taxi

1 drivers pulling each other's hair out and driving each  
2 other nuts and the city council, too, and the mayor found  
3 himself where he wasn't getting anywhere, even though he  
4 thought he - - - he thought he had a taxi owners' support,  
5 now he doesn't have it. He says, I know where I'm going  
6 to go, I'm going to go to the legislature.

7 MR. DEARING: That is how the legislative  
8 process works, Your Honor, and the question is whether the  
9 state legislature had the power to enact the law.

10 CHIEF JUDGE LIPPMAN: But what do we - - -

11 JUDGE READ: Let's - - - let's say they - - -

12 CHIEF JUDGE LIPPMAN: Go ahead. I'm sorry.

13 JUDGE READ: Let's - - - let's say we get beyond  
14 the substantial interest. Is that all you have to show?

15 MR. DEARING: It's to show that this - - -

16 JUDGE READ: Don't you have to show a means/end  
17 fit?

18 MR. DEARING: The statute must - - - must  
19 rationally serve that interest.

20 JUDGE READ: Yeah. And in this - - - this one -  
21 - - this one, beyond the licensing scheme, really altered  
22 the structure of city power over - - - over the - - - over  
23 this medallions and the hail licenses. I mean, how - - -  
24 how does that - - - how is there a means/end fit there? I  
25 mean, it gave something the city council had been

1 responsible for to the mayor.

2 MR. DEARING: It didn't do that, and that's  
3 really the fundamental misconception behind the  
4 plaintiffs' argument here.

5 JUDGE READ: All right. Clear that one up for  
6 me, then.

7 MR. DEARING: I'll - - - I'll do it. What had  
8 happen - - - what the - - - what the city charter says is  
9 that the TLC cannot issue additional licenses except by  
10 passage of a local law providing therefor, meaning there  
11 must be a legislative authorization for additional  
12 licenses. All that happened here is that the legislative  
13 authorization came from the state. The state - - -  
14 previously the city had done it as a matter of city power.  
15 This time it came from the state. And what is - - - what  
16 is - - - what - - -

17 JUDGE SMITH: How - - - how is that reasonably  
18 related to the purpose of the legislation?

19 MR. DEARING: How is the authorization to issue  
20 additional medallions?

21 JUDGE SMITH: Yeah, yeah, by the mayor alone,  
22 yeah.

23 MR. DEARING: By the mayor alone, because the  
24 mayor - - - because it was - - - because the legislature  
25 wanted additional medallions to be issued that would be -

1 - -

2 JUDGE SMITH: Because they - - - they thought  
3 the mayor would do it and the council wouldn't?

4 MR. DEARING: I - - - I think there - - - there  
5 is something to that. The thing that's unusual about this  
6 are - - -

7 CHIEF JUDGE LIPPMAN: But wait. Follow up - - -  
8 what do you mean there's something to that?

9 MR. DEARING: Well - - - well, the plaintiffs  
10 themselves say - - -

11 CHIEF JUDGE LIPPMAN: Isn't it - - - is it just  
12 an implementation issue - - -

13 MR. DEARING: It - - -

14 CHIEF JUDGE LIPPMAN: - - - or is it that the  
15 policy is set and it doesn't matter, for all practical  
16 purposes, who does it or does it matter - - -

17 MR. DEARING: I - - - I - - -

18 CHIEF JUDGE LIPPMAN: - - - whether it's the  
19 mayor or the city council?

20 MR. DEARING: It is an implementation issue.  
21 The first point - - -

22 CHIEF JUDGE LIPPMAN: But - - - yeah.

23 MR. DEARING: The first point I - - -

24 JUDGE READ: Yet it doesn't matter - - - then it  
25 doesn't matter?

1 MR. DEARING: Does it matter?

2 JUDGE READ: Then it doesn't matter if it's just  
3 an - - - it's an implementation to the issue?

4 MR. DEARING: I think if it's a rational choice  
5 as to implementation, it comports with this court's  
6 precedence.

7 JUDGE READ: And the mayor is just as rational a  
8 choice as the city council?

9 MR. DEARING: The mayor is a - - - is a more  
10 understandable choice because - - -

11 CHIEF JUDGE LIPPMAN: But is that because they  
12 are setting the policy - - - is your argument because  
13 they've set the policy and really beyond that it's going  
14 to happen and it doesn't really - - -

15 MR. DEARING: That's - - - that's precisely  
16 right. It's - - - this is exactly analogous to what  
17 happened previously, except that you substitute a state  
18 legislative act in place of what was previously a council  
19 legislative act. Previously, the council authorized an  
20 executive body to issue medallions up to a cap number.  
21 Here, what happened is the state legislature authorized an  
22 executive body to issue medallions up to a cap number.

23 CHIEF JUDGE LIPPMAN: It said there was  
24 something to the fact that they gave it to the mayor  
25 rather than the council because the mayor wa - - - wanted

1 to do it, or what were you about to say?

2 MR. DEARING: I'm about to get to that point.

3 There's - - -

4 CHIEF JUDGE LIPPMAN: Well, get to it soon - - -

5 MR. DEARING: I'll get to it right now.

6 CHIEF JUDGE LIPPMAN: - - - because the red  
7 light's on. Go ahead.

8 MR. DEARING: Absolutely. The - - - the  
9 plaintiffs have said again and again that the - - - that  
10 the city council disagreed with this policy choice. Now,  
11 if the State had con - - - had legislative power to act in  
12 this area, as we contend they did, it has to be true that  
13 they didn't have to give over a - - - a veto power of that  
14 legislation to the city council, and that's true whether  
15 they did agree with - - - with - - - whether they had been  
16 open about disagreeing, the city council had said nothing  
17 about it.

18 CHIEF JUDGE LIPPMAN: Okay, counselor. Okay.

19 MR. DEARING: Thank you, Your Honor.

20 CHIEF JUDGE LIPPMAN: Counselor.

21 Counselor, you want any rebuttal time?

22 MR. SHORR: Yes. I'd like to reserve three  
23 minutes for rebuttal, please.

24 CHIEF JUDGE LIPPMAN: Sure. Go ahead.

25 MR. SHORR: My name is Scott Shorr. I represent

1 the City of New York. May it please the court, this court  
2 should vacate Supreme court's judgments and declare the  
3 street hail livery law constitutional.

4 Let me address the substantial state interest  
5 question. This court does not need to defer to a simple  
6 statement from the legislature that it has a substantial  
7 state interest in this area. The purpose of the law is  
8 what is important under this court's precedent and the  
9 legislative history. And the purpose and the legislative  
10 history here are - - - are aligned because the act in  
11 Section 1 and the introducer's memoranda both say quite  
12 clearly that the act's purpose is to improve the  
13 availability of sa - - - safe and reliable for-hire  
14 transportation for disabled and nondisabled state  
15 residents, commuters, and visitors traveling to, from, and  
16 within the City of New York. And that is a legitimate and  
17 substantial state interest. We know this not simply  
18 because the State said so, but because it's consistent  
19 with this court's precedent dating back to Care, and I  
20 could venture - - -

21 CHIEF JUDGE LIPPMAN: Doesn't matter what  
22 happened previously - - - the way it was handled  
23 previously as long as there's a state interest?

24 MR. SHORR: And I - - - let me get to that, but  
25 I just wanted to mention - - -

1 CHIEF JUDGE LIPPMAN: Get to it now. Get to it

2 - - -

3 MR. SHORR: Pre - - - previous legislative  
4 declarations are consistent and also previous state laws.

5 CHIEF JUDGE LIPPMAN: How are they consistent  
6 when previously it was done by home rule method?

7 MR. SHORR: Because - - - all right. Be - - -  
8 it's consistent because the state has previously declared  
9 a substantial interest in the same area or related areas,  
10 and the state has - - -

11 CHIEF JUDGE LIPPMAN: But not in this precise  
12 area, right?

13 MR. SHORR: - - - legislated an area, but not  
14 in this precise taxi area, so let me - - -

15 CHIEF JUDGE LIPPMAN: So - - - so is this - - -

16 MR. SHORR: So - - -

17 CHIEF JUDGE LIPPMAN: Is this the same as  
18 railroads and subways, et cetera?

19 MR. SHORR: It's - - - it's part of New York  
20 City's transportation system.

21 CHIEF JUDGE LIPPMAN: But they're private  
22 carriers, though, right?

23 MR. SHORR: They are private carriers. That  
24 doesn't make any difference. Chart - - -

25 CHIEF JUDGE LIPPMAN: Why not?



1 MR. SHORR: Charter section - - -

2 CHIEF JUDGE LIPPMAN: Why not?

3 MR. SHORR: I'll tell you, Your Honor, and I'd  
4 like to talk about the history of local regulation, as  
5 well.

6 CHIEF JUDGE LIPPMAN: Tell - - - tell us why it  
7 doesn't make a difference.

8 MR. SHORR: Right. Charter Section 2300, which  
9 plaintiffs like to cite, says quite clearly that taxis are  
10 part of New York City's overall public transportation  
11 network even though they are private. And this court has  
12 upheld special laws that - - - that interfere with and  
13 regulate private property. In Wombat, it was a special  
14 law regulating private land within the Adirondack Park  
15 region. In MTA v. Nassau, the statute authorized the MTA  
16 to acquire what was then a privately owned railroad, the  
17 Long Island Railroad. And in Adler, the classic Adler  
18 case everybody cites, this court upheld the state law  
19 regulating privately owned multiple dwellings in New York  
20 City. So the privately owned nature of taxicabs is  
21 irrelevant to whether the state has a substantial  
22 interest.

23 Let me talk about the history of city  
24 regulation. This court, in its most recent home rule  
25 cases, rejected home rule challenges to state laws that

1 ended New York City's thirty-three-year-old tax on  
2 nonresident commuters and, by coincidence, its thirty-  
3 three-year-old procedures for resolving collective  
4 bargaining impasses. Interestingly, in both of those  
5 cases, the commuter tax case and PBA II, the city had been  
6 exercising powers delegated to the city by the state. But  
7 as those cases show, the mere delegation of regulatory  
8 authority to localities, as we have in GML 181, does not  
9 bar special laws in the same field that bear a reasonable  
10 relationship to a substantial state interest.

11 JUDGE SMITH: Why were - - - why were home rule  
12 messages thought - - - sought all those years every time  
13 they wanted to issue new medallions?

14 MR. SHORR: Well, it's - - - it's interesting  
15 about - - - the interesting point there is who's doing the  
16 seeking. The city did the seeking, and the city did the  
17 seeking because under Article 16, Section 1, the city did  
18 not have its own constitutional authority to sell those  
19 medallions above cost.

20 JUDGE SMITH: Because of the tax problem.

21 MR. SHORR: Because of the tax problem. So this  
22 - - -

23 JUDGE SMITH: But - - - but was the home rule  
24 message necessary? Could the legislature have acted on  
25 those requests without home rule messages?

1 MR. SHORR: The - - - the city made the request.  
2 That was - - - that was a home rule request.

3 JUDGE SMITH: But what's the answer to my  
4 question? Was a home rule message necessary?

5 MR. SHORR: It's not, and that was the city  
6 requesting - - -

7 JUDGE SMITH: Well, why did they - - - why did  
8 they waste all their time typing it up?

9 MR. SHORR: The city was requesting the power to  
10 do it itself. The city needed authorization from the  
11 legislature so - - -

12 CHIEF JUDGE LIPPMAN: But could the legislature  
13 just, without the home rule message, have said - - -  
14 passed a bill that says increase the number of - - -

15 MR. SHORR: The legislature - - -

16 CHIEF JUDGE LIPPMAN: - - - of medallions?

17 MR. SHORR: The legislature could do what it did  
18 here; they passed - - -

19 CHIEF JUDGE LIPPMAN: So your answer was it's  
20 just - - - it doesn't matter, the earlier home rule  
21 message?

22 MR. SHORR: The fact that - - - that's right.  
23 The fact that the city - - -

24 JUDGE SMITH: Are you saying it was excess of  
25 caution to send a home rule message?

1 MR. SHORR: It - - - it wasn't - - - that, I  
2 think, mis - - - mischaracterizes what happened before.  
3 The state needed - - - I'm sorry. The city needed state  
4 authorization.

5 JUDGE SMITH: I - - - I understand the city  
6 needed state approval, but you're saying that state  
7 approval could have been given without a home rule  
8 message.

9 MR. SHORR: Yes, that's correct, Your Honor.

10 JUDGE SMITH: Yeah. So the - - - so - - - so  
11 the ho - - - so throwing in the home rule message was, oh,  
12 it's - - - it can't hurt, throw in a home rule message?

13 MR. SHORR: No, Your Honor, the state didn't act  
14 on those previous medallion instances until the city  
15 requested a law authorizing city council - - -

16 JUDGE SMITH: I understand that.

17 MR. SHORR: - - - to enact a law. So - - -

18 JUDGE SMITH: I understand that, but the - - -  
19 but the home - - - but you're not saying that the home  
20 rule provisions required that?

21 MR. SHORR: The - - - for the - - - for the city  
22 to do it, the city needed to - - - to make the home rule  
23 requ- - - I - - - I understand, Your Honor. No - - -

24 CHIEF JUDGE LIPPMAN: But couldn't the - - -

25 MR. SHORR: - - - the - - - the legislature - -

1 -

2 CHIEF JUDGE LIPPMAN: - - - couldn't the - - -

3 MR. SHORR: - - - could have said on its own - -

4 -

5 CHIEF JUDGE LIPPMAN: - - - couldn't the mayor

6 have just called the leaders of the legislature - - -

7 according to the premise that you're giving, couldn't the

8 mayor just call the leaders of the state legislature and

9 say, you know what, we need more medallions, would you

10 please pass a law saying that we can have them?

11 MR. SHORR: It's not clear that would have been

12 effective, but the legislature could do it on its own and

13 - - - and - - -

14 JUDGE PIGOTT: Well, the simple fact of the

15 matter is, if I could interrupt you more a minute - - -

16 MR. SHORR: Yes.

17 JUDGE PIGOTT: - - - I mean, it's a lot that

18 goes on in - - - in the homes in Buffalo and mine or

19 Syracuse or the big city that nobody else knows about. So

20 - - - so if the City of Buffalo said, we want to do this,

21 they go and they'll - - - they'll ask for - - - they'll -

22 - - they'll do a home rule message down saying this is

23 what we want to do, and legislature, now being alerted to

24 it for the first time, says yes or no depending on what

25 the fiscal impacts and everything else is. That's one way

1 of doing it.

2 On the other hand, if - - - if the city or the  
3 state decided that what Buffalo was doing up there is not  
4 letting the New York Jets come and play, I mean, they  
5 could pass a - - - and we'd like to do that, that we could  
6 pass a law saying that the Bills cannot prevent the Jets  
7 from coming to play and they have that authority because  
8 we're all creatures of the state.

9 MR. SHORR: The state does have that authority,  
10 and this court's even - - - even said in one of its most  
11 recent home rule cases, the - - - the commuter tax case,  
12 that a history of requesting home rule messages does not  
13 mean that a home rule message is constitutionally  
14 required.

15 I just wanted to mention a couple of the cases  
16 that the plaintiffs cite for their local history argument.  
17 PBA I and Osborn. In those cases, the problem was that  
18 the State law interfered with a local power - - - things  
19 that were local matters without the state law articulating  
20 any substantial state interest that motivated the act or  
21 that would be served by the act and - - -

22 JUDGE SMITH: Are those - - - are those the only  
23 two cases that have ever been decided against the State on  
24 the exclusionary aspect of home rule?

25 MR. SHORR: The only two cases decided against

1 the State on the ex - - -

2 JUDGE SMITH: That is - - - that is where the  
3 issue is where the state is excluded by the - - - by the  
4 home rule clause from acting.

5 JUDGE PIGOTT: It's ultravirus (ph.).

6 MR. SHORR: I - - - I - - - I'll try to respond  
7 to that when I come back, Your Honor. I can't think of it  
8 offhand; I'm sorry. But I also wanted to mention the  
9 Wambat case.

10 CHIEF JUDGE LIPPMAN: Go ahead; quickly,  
11 counselor.

12 MR. SHORR: Thank you. In Wambat, another case  
13 the plaintiffs rely on, this court said that a history of  
14 state regulation shows a substantial state interest, and  
15 there's language to similar effect in Adler, but that  
16 certainly doesn't mean the opposite, that a history of  
17 city regulation can somehow displace a substantial state  
18 interest.

19 CHIEF JUDGE LIPPMAN: Okay, counselor. Thanks,  
20 counselor.

21 MR. SHORR: Thank you.

22 CHIEF JUDGE LIPPMAN: Counselor, you want to use  
23 any of your minutes for rebuttal?

24 MR. SAXL: No, thank you, Your Honor. I only  
25 have a few minutes.

1 CHIEF JUDGE LIPPMAN: Sure. Go ahead,  
2 counselor.

3 MR. SAXL: Good afternoon. May it please the  
4 court, Stephen Saxl for intervenor-defendants-appellants  
5 Livery Base Owners and the Excellent Car Service.

6 The 9,000 livery drivers and 125 neighborhood  
7 livery companies for whom my clients speak, serve the  
8 millions of people who live in or visit the outer boroughs  
9 in northern Manhattan, including many minority and  
10 working-class communities, people the legislature found -  
11 - -

12 JUDGE SMITH: Any - - - any idea how many of  
13 them are non-New York City residents?

14 MR. SAXL: How many of the people who use our  
15 services?

16 JUDGE SMITH: The people - - - the people you  
17 serve, the people your clients serve.

18 MR. SAXL: We do not keep records of that.  
19 There certainly are visitors; moreover, the record  
20 reflects that our livery cars take millions of trips each  
21 year outside of New York City lines, which adds a whole  
22 additional dimension. While this court has found a  
23 substantial interest in subways, as we know, subways can't  
24 physically leave New York City; taxis and livery cars do.  
25 They're very mobile, and they routinely leave New York



1 City.

2 CHIEF JUDGE LIPPMAN: Does it matter?

3 MR. SAXL: It - - - it's gravy; it's on top of  
4 all the other substantial state interests here.

5 CHIEF JUDGE LIPPMAN: But you don't - - - but  
6 you wouldn't have to - - - if there was a - - - a law that  
7 said that you couldn't leave New York City, would it  
8 matter to the case we have today?

9 MR. SAXL: We'd still have a - - - we'd still  
10 prevail and - - -

11 CHIEF JUDGE LIPPMAN: Because?

12 MR. SAXL: Because - - - I was going to talk  
13 about how vital the substantial state interest here is  
14 because our people, as the record - - - we have, in the  
15 record at T1446 through T1475, affidavits establishing  
16 that our clients routinely take people to jobs, to doctors  
17 and hospitals, to school, shopping, for - - - on business.

18 Currently, they're only permitted to do so by  
19 pre-arrangement, but many of the people in these  
20 communities have no cars; they do not live near subways or  
21 buses. This is vital stuff. And when you compare it to  
22 other cases in which this court has found a substantial  
23 state interest, including things like museums in Hotel  
24 Dorset, collective bargaining disputes, tenement housing -  
25 - -

1 CHIEF JUDGE LIPPMAN: Well, you're saying it's  
2 good policy to do it. Is that the same as - - -  
3 synonymous with state interest?

4 MR. SAXL: It's - - - it's in addition here.  
5 The legislature found it's good policy, and I recognize  
6 that's not for this court to determine, but this confirms  
7 the legislature's statement that there is a substantial  
8 state interest.

9 CHIEF JUDGE LIPPMAN: Because it's good policy?

10 MR. SAXL: No, because how - - - of how vital  
11 these activities are. Indeed, this court has stated that  
12 it will rely on the legislature's statement of substantial  
13 state interest; it's stated that repeatedly, including  
14 recently in the PBA II and City of New York - - -

15 CHIEF JUDGE LIPPMAN: Well, if it's flawed, we  
16 don't have to rely on it though, right?

17 MR. SAXL: If it's - - - if it's irrational, the  
18 court wouldn't rely on it, but here, there's a wealth of  
19 support for it, and - - - and there can be no question.  
20 There's also no reasonable question that the law here  
21 furthers the state interest, because the solution - - -  
22 it's - - - it's a - - - it's a wonderful policy solution  
23 here that creates 2,000 accessible taxis for people in  
24 wheelchairs who are underserved, adds to the additional  
25 number of yellow taxis and - - -

1                   JUDGE PIGOTT: Can you tell me because I'm not  
2 from there. What do you mean by underserved? I mean, are  
3 you saying that, like, in Staten Island you can't get a  
4 cab?

5                   MR. SAXL: That's correct, Your Honor. What - -  
6 - what I'm - - - the record - - - undisputed record shows  
7 that ninety-five percent of yellow taxi street hail  
8 pickups are in central Manhattan or the airports. So  
9 millions of people in the outer boroughs and northern  
10 Manhattan simply cannot get a yellow cab. And there's no  
11 dispute about that here. And - - - and as counsel pointed  
12 out earlier, the MTBOT and all the plaintiffs, in fact,  
13 supported a plan. They recognized this problem. They  
14 supported a plan for street hail in the other boroughs as  
15 long as they were the beneficiaries of it. The - - -

16                   JUDGE RIVERA: And the - - - and the car service  
17 industry, the small cars - - - small business car service  
18 industry does not address this problem?

19                   MR. SAXL: Right. It's - - - it's the same - -  
20 - it's the same cars that - - - that they are not legally  
21 permitted to pick up street hails. So people on the  
22 streets cannot get a - - - get a street hail; they're  
23 limited to prearrangement.

24                   JUDGE RIVERA: You have to call the car service.  
25 You've got to arrange - - -

1 MR. SAXL: That's right.

2 JUDGE RIVERA: - - - the pickup.

3 MR. SAXL: And that serves some needs.

4 JUDGE RIVERA: You've got to wait until the  
5 pickup comes.

6 MR. SAXL: That serves some needs, but not all.

7 JUDGE SMITH: And actually, they - - - even  
8 though they're not supposed to, they do pick them up quite  
9 often, correct?

10 MR. SAXL: Well, there's no question that there  
11 are illegal pickups, and I think that just points out the  
12 problem here, and that's what's so beautiful about this  
13 law because it recognizes that people need a solution; the  
14 people are underserved. And that's why good people are  
15 picking up good people illegally, and this is a  
16 legislative solution.

17 CHIEF JUDGE LIPPMAN: Okay, counselor.

18 MR. SAXL: Thank you.

19 CHIEF JUDGE LIPPMAN: All right, counselor.  
20 Counselor.

21 MR. MASTRO: Thank you, Your Honors. Randy  
22 Mastro for the appellees. I will also be sharing our time  
23 with co-counsel, Richard Emery, who will address  
24 separation of powers issues as well as double enactment  
25 and exclusive privilege to the extent the court has

1 questions about that, and Steve Mintz, co-counsel, will  
2 conclude for us.

3 Now, Your Honors, you know, I - - - I stand here  
4 today, and with all due respect to my old friend  
5 purporting to represent the City, and I look at a long  
6 line of cases, and as a former deputy mayor, I think  
7 someone has to speak for the City because this is a local  
8 private industry. And every one of the cases we're  
9 talking about here, going back to Adler and Osborn and PBA  
10 I and II, and City of New York were all cases where the  
11 City was here arguing, sometimes successfully, that its  
12 autonomy and municipal home rule should be respected, but  
13 no one is here to speak to - - -

14 CHIEF JUDGE LIPPMAN: Can there be a local  
15 private industry that is a substantial state interest and  
16 that can warrant the kind of legislation that was passed  
17 here?

18 MR. MASTRO: Well, Your Honor, one could  
19 conceive of situations like Adirondack which involved a  
20 regional entity that had been involved in state  
21 regulations.

22 CHIEF JUDGE LIPPMAN: But what about - - - what  
23 about an industry that does 240 million rides? What - - -  
24 could that be a substantial state interest even though  
25 it's a private industry?

1 MR. MASTRO: And here's the fundamental reason  
2 why.

3 CHIEF JUDGE LIPPMAN: Yeah.

4 MR. MASTRO: Under - - - going back to Adler,  
5 which says you look at history and tradition, and Osborn  
6 which says, just because they say they want to improve  
7 services in the city, that's not enough, and that's all I  
8 heard him say.

9 JUDGE PIGOTT: Well, what about the - - - what  
10 about - - - I'm going to say five or six million New  
11 Yorkers who don't live in the - - - in the Yellow - - -  
12 Yellow area, all the people from Europe, Pennsylvania, the  
13 surrounding states and everything else, that - - - that  
14 have an interest in your city? You have - - - I mean, you  
15 have big hotels, you got a lot of stuff - - -

16 MR. MASTRO: If - - -

17 JUDGE PIGOTT: - - - and isn't there an interest  
18 in the state in - - - in making sure that all those  
19 businesses and everybody's running smoothly?

20 MR. MASTRO: In seventy-five years, seventy-five  
21 years, we have never had the state pass a single piece of  
22 legislation that attempted to target the for-hire private  
23 taxi industry in New York City, and for good reason.

24 JUDGE PIGOTT: No, but let me ask you this:  
25 let's suppose their four or five million people outside of

1 New York and there's a suburban - - - the - - - the other  
2 states and they have an interest in your city and your  
3 city has an interest in them, and for some reason, the - -  
4 - the mayor or whoever wants to have legislation that's  
5 going to do what this apparently is going to do. I mean,  
6 I have an interest in that. I would think that the whole  
7 state would have an interest in it.

8 MR. MASTRO: But, Your Honor, if that were to be  
9 the standard, Osborn would have to have come out  
10 differently because those same five to six million people  
11 you're talking about come to the city, visit the city, and  
12 firefighter services may well be relevant to them while  
13 they're in the city. That is obviously not the standard.

14 What - - - what Adler and Osborn and PBA I tell  
15 us is the following, and what the City told the Second  
16 Circuit just a few months ago in the Noel case, when  
17 ironically the City was trying to prevent the ADA and  
18 succeeded in preventing the ADA applied to the City's  
19 regulation of taxis, the City told the Second Circuit that  
20 that's a private industry, that that is a private  
21 industry, the TLC's control over which does not make that  
22 private taxi industry the activity of a public entity.

23 CHIEF JUDGE LIPPMAN: Counselor - - -

24 JUDGE RIVERA: Okay, but the - - -

25 CHIEF JUDGE LIPPMAN: - - - is it dispositive

1 that it's never been done before?

2 MR. MASTRO: Your Honor, what is dispositive - -  
3 -

4 CHIEF JUDGE LIPPMAN: Assuming that's the case,  
5 is that dispositive?

6 MR. MASTRO: What is - - -

7 JUDGE RIVERA: If it's a - - - if there's a  
8 substantial state interest, the fact that, which is the  
9 chief judge's point, that they have not done it before,  
10 are you suggesting that somehow now they don't have the  
11 authority?

12 MR. MASTRO: You - - - you are to look at the  
13 custom, practice, tradition and history. That's what  
14 Adler and Osborn tell us. And what it tells us is, and I  
15 will go briefly through it, seventy-five years of state  
16 total deference to this private local industry - - - the  
17 Haas Act passed in 1938. Every time since - - -

18 JUDGE READ: So your answer is yes, if it hasn't  
19 been done for a substantial period of time it can't ever  
20 be done?

21 MR. MASTRO: It's a recognition on the State's  
22 part that this is seeded to local - - -

23 JUDGE RIVERA: Well, maybe it worked - - -

24 MR. MASTRO: - - - and by - - -

25 JUDGE RIVERA: Maybe they were satisfied with



1 what you did for all that time, but now today - - -

2 MR. MASTRO: But, Your Honor - - -

3 JUDGE RIVERA: - - - they were - - - or when  
4 they passed it - - -

5 MR. MASTRO: But, Your Honor - - -

6 JUDGE RIVERA: - - - they decided, I'm sorry,  
7 this is now not good enough, we have a substantial  
8 interest, we've got people who have disabilities who don't  
9 have access to the service, we have millions of people who  
10 don't have access to the service inside and outside of the  
11 state, we have people in the outside boroughs who cannot  
12 go about, as counsel already described, very serious parts  
13 of their lives without having to call a car service, and  
14 that's - - - it's not practical for them.

15 MR. MASTRO: Your Honor, 1956, state legislation  
16 passed that recognizes this is the primacy of the  
17 locality. Every single medallion sale ever only approved  
18 after a home rule message.

19 CHIEF JUDGE LIPPMAN: But why the fact that - -  
20 - but let's talk about that.

21 MR. MASTRO: Please.

22 CHIEF JUDGE LIPPMAN: We asked your adversary  
23 the same issue.

24 MR. MASTRO: Yes.

25 CHIEF JUDGE LIPPMAN: Does the fact that - - -

1 that it was done by a home rule message before mean that  
2 that's the only way it can be done? Why can't - - - why  
3 couldn't the mayor of the City of New York call up the  
4 legislature - - - and this is sort of what happened - - -  
5 and say, hey, this has been done by home rule message  
6 before, I'm asking you to pass legislation? What's wrong  
7 with that? What - - - the fact that it was done before,  
8 is that binding? I mean - - - or is it - - - is it custom  
9 and usage - - -

10 MR. MASTRO: Yes.

11 CHIEF JUDGE LIPPMAN: - - - and then you have to  
12 keep it?

13 MR. MASTRO: Your Honor - - -

14 CHIEF JUDGE LIPPMAN: That's the question.

15 MR. MASTRO: Your Honor, yes, it's a recognition  
16 that Mayor Koch, Mayor Dinkins, Mayor Giuliani, and even  
17 Mayor Bloomberg before this always recognized you had to  
18 go to the state legislature. TLC Commissioner Yassky, in  
19 this instance, when this proposal was made, said publicly  
20 repeatedly, we have to go through the city council.  
21 Everyone recognized this, and everybody recognizes what  
22 really happened here, which was Mayor Bloomberg did an  
23 end-run around his own city council because they didn't  
24 bow to his wishes - - -

25 JUDGE PIGOTT: Well, wait a minute.

1 MR. MASTRO: - - - and now they tell this court

2 - - -

3 JUDGE PIGOTT: Wait a minute, wait.

4 MR. MASTRO: - - - that you have to bow.

5 JUDGE PIGOTT: Let me interrupt - - -

6 MR. MASTRO: - - - to their wishes.

7 JUDGE PIGOTT: Let me interrupt you with your  
8 bowing.

9 MR. MASTRO: Please.

10 JUDGE PIGOTT: I think that's a little harsh.

11 MR. MASTRO: It was their word - - - it was  
12 their word, Your Honor, in their brief.

13 JUDGE PIGOTT: It's a little harsh. But let's  
14 assume the mayor says, I can't get this council to do what  
15 has to get - - - be done that's in the best interest of  
16 this city, so I'm going to go up to Albany and I'm going  
17 to tell them what's in the best interest of the city is  
18 this legislation, pass it. And as long as there's a state  
19 interest in it, I would think that they can do that. He -  
20 - - he can go around his council, can't he?

21 MR. MASTRO: Well, let - - - let's talk about  
22 whether there is a substantial state interest.

23 JUDGE PIGOTT: No, no, no. Can he - - - can he  
24 go around the council like that - - -

25 MR. MASTRO: I don't - - -

1 JUDGE PIGOTT: - - - assuming there's a state  
2 interest?

3 MR. MASTRO: I - - - I don't - - - in - - - he  
4 could if there were a substantial state interest, but  
5 there is not a substantial state interest in private, for-  
6 hire vehicles in New York City.

7 CHIEF JUDGE LIPPMAN: But they say there is - -  
8 - but the legislature says there is. What - - - what does  
9 that mean to us? Do we look behind what they said?

10 MR. MASTRO: I think PBA - - -

11 CHIEF JUDGE LIPPMAN: They said quite clearly  
12 for two specific reasons: the mass transit and the  
13 disability. They say this is a - - - this is a state  
14 interest.

15 MR. MASTRO: And let me say - - -

16 CHIEF JUDGE LIPPMAN: What do we do with that?  
17 How do we view what they say?

18 MR. MASTRO: Your Honors have the look at the -  
19 - - the precise circumstances. The mayor, after a very  
20 short period where the council was considering compromises  
21 but wanted to make some changes, decides my way or the  
22 highway, I'm going to go to the state legislature.

23 JUDGE SMITH: But - - - but is - - -

24 MR. MASTRO: You are allowed - - - you are  
25 allowed, Your Honors - - - and this is when PBA won

1 councils. You - - - this court "eschews" reliance on  
2 pretextual justifications. The mayor wanted medallions to  
3 close a budget gap - - -

4 JUDGE SMITH: But if - - - but if - - -

5 MR. MASTRO: - - - and he ran to Albany to get  
6 it.

7 JUDGE SMITH: But if there - - - but if there is  
8 a substan- - - I mean, Judge Piggott's point that you  
9 acquiesce - - - if you find a substantial state interest,  
10 the fact that the mayor might have his own motives for  
11 asking the state to act wouldn't do it. Suppose - - -  
12 suppose these - - - suppose this legislation applied to  
13 the airports, surely there's a substantial state interest  
14 in having taxis at the airports?

15 MR. MASTRO: Your - - - Your Honors, the - - - I  
16 - - - I believe the airports would be a distinguishable  
17 circumstance because it involves - - -

18 JUDGE SMITH: I understand that it would be  
19 distinguishable - - -

20 MR. MASTRO: - - - it involves regional - - -

21 JUDGE SMITH: - - - but not - - - but - - -

22 MR. MASTRO: - - - and people come traveling  
23 from outside, but the taxis - - -

24 JUDGE SMITH: But still it's the same private  
25 industry that you're talking about, isn't it?

1 MR. MASTRO: Well, but - - - well, actually,  
2 Your Honors, those are actually public lands, publicly  
3 owned lands. The City actually has the leases for the  
4 airports. But Your Honor, the record, undisputed in this  
5 record was that you can't make a pickup for a taxicab in  
6 New York City other than within the five boroughs of New  
7 York City, and less than two percent of drop-offs - - -  
8 this is what the Justice Engoron found - - -

9 JUDGE SMITH: Two percent is a pretty big number  
10 though with all those rides.

11 MR. MASTRO: Very small, very small number, Your  
12 Honor, less than two percent of drop-offs ever occur - - -

13 JUDGE SMITH: Two percent of what - - - what's -  
14 - -

15 MR. MASTRO: - - - outside the city.

16 JUDGE SMITH: - - - what's the denominator?

17 JUDGE RIVERA: Well, maybe that's because you  
18 don't go there.

19 MR. MASTRO: 2159. That's not - - -

20 JUDGE RIVERA: Isn't because you don't go there?

21 MR. MASTRO: That's not true, Your Honor. And  
22 the fact of the matter is this is a local private  
23 industry. Seventy-five years of tradition recognizes  
24 that. And let's look at the circumstances of the  
25 legislation, Your Honors, which you have a right to do.

1           You eschew pretextual justifications after the fact by the  
2           State and the City to try and prop this law up.

3                       What really happened, Bloomberg goes to Albany  
4           and says, I want this done. Bill is introduced on June  
5           18th, 2011, three days later - - - no hearings, no  
6           discussion, you never heard a word in Albany about any  
7           concerns about taxi pickups in New York City or the  
8           disabled in New York City being able to get a taxi. Three  
9           days later, the Assembly pushes that out in record time.  
10          Three days later, the State Senate pushes it out in record  
11          time. No hearings, no discussion ever in the history of  
12          state legislature did they ever have a hearing on the New  
13          York City taxi industry. Meanwhile, in New York City, we  
14          had been regulating. We had - - -

15                       CHIEF JUDGE LIPPMAN: So are you saying - - -

16                       MR. MASTRO: - - - made medallions - - -

17                       CHIEF JUDGE LIPPMAN: Counsel - - -

18                       MR. MASTRO: - - - require disability access - -

19                       -

20                       CHIEF JUDGE LIPPMAN: Counsel, are you saying -

21                       - -

22                       MR. MASTRO: And we had new laws to require - -

23                       -

24                       CHIEF JUDGE LIPPMAN: Counselor, but are you

25                       saying - - -

1 MR. MASTRO: - - - that they pick up people in  
2 all boroughs.

3 CHIEF JUDGE LIPPMAN: Are you saying that they  
4 acted so quickly, that means that there - - - there was no  
5 legitimate state interest in - - - what I mean is - - -

6 MR. MASTRO: I am saying that.

7 CHIEF JUDGE LIPPMAN: - - - are you saying that  
8 the speed in which it happened and the way it happened  
9 undercuts their stated state interest? Is that your  
10 argument?

11 MR. MASTRO: Absolutely correct, Your Honors.  
12 You can eschew pretextual justifications. Look at the  
13 surrounding circumstances and know what happened here.  
14 This isn't state legislation that was passed in  
15 furtherance of substantial state interest or in all those  
16 particulars - - - I mean, they required every detail and  
17 turned it all over to the mayor to do, cutting out the  
18 city council completely. This wasn't the state  
19 legislature making any record. There was no legislative  
20 history. There was no hearing, no debate. It never came  
21 up. This was Bloomberg's bill that the state legislature  
22 rubberstamped in record time and then they came up with  
23 pretextual justifications afterwards.

24 If they get away with this, this is such an  
25 affront to home rule and what New York City deserves, and



1 it deserves to be defended here and its rights, and it's  
2 an affront to what the State should do to a city when  
3 seventy-five years of history tell you that the State has  
4 no role in the local taxi industry in New York City just  
5 as it should have no role in local taxi industry in  
6 Buffalo. And if they cared about disabilities and  
7 pickups, why wasn't this made a rule of general  
8 application so that you have to have disability pickups in  
9 Buffalo - - -

10 CHIEF JUDGE LIPPMAN: Counselor, what - - -

11 MR. MASTRO: - - - and you have to have them in  
12 the Bronx.

13 CHIEF JUDGE LIPPMAN: Counselor, one last  
14 question. No role or no interest? Which one, or are they  
15 synonymous?

16 MR. MASTRO: I - - - Your Honor, I think it is  
17 clear, and under your precedents, PBA I and Osborn, you  
18 have a right to look at the surrounding circumstances and  
19 the history and tradition and the way this bill got  
20 passed, and it stinks, and determine that it's pretextual  
21 justifications now for something that was done solely at  
22 the mayor's behest to raise money, not for all these nice  
23 things that they're saying after the fact.

24 But even if you did consider there to be some  
25 kind of substantial state interest, even though the State

1 has never expressed the position that it had any  
2 substantial state interest in the local private for-hire  
3 taxi industry in New York City where you can't make a  
4 pickup anywhere but New York City, and all drop-offs other  
5 than less than two percent are in New York City, even if  
6 you looked at that, how on earth, and my colleagues will  
7 tell this, can the minute detail of this statute and the  
8 power shifting that went on in New York City to cut out  
9 the city council and give Bloomberg all the power, how on  
10 earth can you say that that is reasonably and directly  
11 related to what they say are the substantial state  
12 interests; it isn't.

13 And finally, Your Honors - - -

14 CHIEF JUDGE LIPPMAN: Go ahead, counselor.

15 MR. MASTRO: - - - the evidence that this is  
16 Bloomberg's bill, not being pushed by the state  
17 legislature or the governor, is that they put a poison  
18 pill in the bill. They told you, we're going this for  
19 Bloomberg, and if any piece, any one piece is no good  
20 because it's not reasonably and directly related to the  
21 substantial state interest - - - and in many respects  
22 these aren't - - - the bill dies; Bloomberg's bill dies.  
23 Don't let this mayor get away with this affront to our  
24 local democracy. Don't let the State - - -

25 JUDGE SMITH: What - - - what should we do if we

1 are convinced hypothetically that there's no substantial  
2 state interest in anything except the handicap access, how  
3 does the case come out, if we think there is a substantial  
4 state interest in the handicap access?

5 MR. MASTRO: It goes down anyway, Your Honor,  
6 because every little element of this bill isn't reasonably  
7 related to a disability access claim. And again, I can  
8 only repeat to Your Honor - - -

9 JUDGE SMITH: No, it's okay, you answered the  
10 question.

11 MR. MASTRO: - - - if that were the case, where  
12 were the hearings, where's the legislative record --

13 CHIEF JUDGE LIPPMAN: Okay, counselor.

14 MR. MASTRO: - - - and why isn't Buffalo  
15 included and why isn't Syracuse included.

16 CHIEF JUDGE LIPPMAN: Thank you, counselor.

17 MR. MASTRO: Thank you very much, Judge. Thank  
18 you for all the time. A very important case as always.  
19 Thank you.

20 CHIEF JUDGE LIPPMAN: Thank you, counselor.  
21 Counselor.

22 MR. EMERY: Thank you, Your Honors.

23 CHIEF JUDGE LIPPMAN: Proceed.

24 MR. EMERY: The one thing that there can be  
25 no debate about is that there is no legislative

1 history, no findings, and no policy that underpins  
2 the notion that the - - - that the - - - the power to  
3 issue medallions should be transferred to the mayor  
4 up to 2,000 medallions generating two billion  
5 dollars.

6 CHIEF JUDGE LIPPMAN: What's the significance of  
7 it being transferred to the mayor? Is it just an  
8 implementation thing that - - -

9 MR. EMERY: Well, you heard - - - you heard - -  
10 -

11 CHIEF JUDGE LIPPMAN: - - - that it's going to  
12 be done anyway, to accept the policy. What - - - what's  
13 the difference?

14 MR. EMERY: No, it's by no means an  
15 implementation thing. First of all, there's a - - -

16 JUDGE GRAFFEO: It's a public auction though,  
17 isn't it?

18 MR. EMERY: Well, it's a very - - - it's a  
19 discretion. It's not 2,000; it's up to 2,000. How you  
20 put that in the marketplace is a major factor. You heard  
21 counsel for the AG say that this was an important factor.  
22 He didn't just say it was implementation - - -

23 JUDGE SMITH: But - - - but what - - -

24 MR. EMERY: - - - he said it was important.

25 JUDGE SMITH: - - -but what's wrong with your

1           adversary's argument? He says, look, if you grant that  
2           there's a substantial state interest, which I know you  
3           don't, but assume there's a substantial - - -

4                   MR. EMERY: Assume it, right.

5                   JUDGE SMITH: - - - state interest, assume that  
6           the - - - assume the legislature actually wants to  
7           effectuate this program, what's - - - why is it such a bad  
8           idea to give it to the guy who's actually in favor of the  
9           program instead of against it?

10                  MR. EMERY: Because that's the essence of what  
11           violates home rule. There's no justification for it in  
12           the state legislation. It is essentially a special law  
13           because it only affects the pow - - - the powers of New  
14           York City government.

15                  JUDGE SMITH: Okay. But - - - but it is - - - I  
16           don't know whether you call it implementation or not.

17                  MR. EMERY: There - - - there may be - - -

18                  JUDGE SMITH: It - - - we - - - it's obvious  
19           that moving - - - moving the power from the council to the  
20           - - - to the mayor was a means to an end - - -

21                  MR. EMERY: Well, but - - -

22                  JUDGE SMITH: - - - isn't it?

23                  MR. EMERY: - - - but that's who home rule  
24           protects. That's tautological what you're saying.

25                  CHIEF JUDGE LIPPMAN: Counselor, if they had

1 given it to the city council, would that have been okay?

2 MR. EMERY: If it were the city council it would  
3 have been - - -

4 CHIEF JUDGE LIPPMAN: If - - - if the  
5 legislation - - - the state legislation gave the power to  
6 city council, would it have been okay?

7 MR. EMERY: That's where it has resided forever.  
8 That's where the charter carefully and thoughtfully  
9 allocated it in 1989 and 1990.

10 JUDGE GRAFFEO: Would you still - - - would you  
11 still be here - - -

12 MR. EMERY: Yes.

13 JUDGE GRAFFEO: - - - complaining there were  
14 2,000 new licenses - - -

15 MR. EMERY: I would not be here - - -

16 JUDGE GRAFFEO: - - - new medallions?

17 MR. EMERY: I would not be here complaining on  
18 the ground that I'm arguing, no, because the city council  
19 has the power and the discretion with the - - - the - - -  
20 the issues that Mr. Mastro has addressed would still be  
21 before you.

22 JUDGE GRAFFEO: No, if the - - - if the State  
23 legislation said - - -

24 MR. EMERY: Yes.

25 JUDGE GRAFFEO: - - - there's going to be 2,000

1 new medallions - - -

2 MR. EMERY: Oh - - -

3 JUDGE GRAFFEO: - - - at public auction but they  
4 gave the ability to the city council to run the auctions,  
5 would you still be here?

6 MR. EMERY: Well, that's the essence of the  
7 point, Judge Graffeo, because I wouldn't because the fact  
8 is if it's nondiscretionary, if it didn't matter, if - - -  
9 if there - - - assuming there's a state interest, which I  
10 do for purposes of answering your question, then the - - -  
11 the discretion is key. The fact is that the city council  
12 has always had discretion, and there's no reason that the  
13 city council couldn't do exactly what the mayor has been  
14 given to do - - -

15 JUDGE SMITH: Assume - - -

16 MR. EMERY: - - - because they've - - -

17 JUDGE SMITH: Assume - - -

18 MR. EMERY: - - - always done it.

19 JUDGE SMITH: Assume you've got a case - - -

20 MR. EMERY: So, yes, you're right - - -

21 JUDGE SMITH: - - - where there's - - -

22 MR. EMERY: - - - it wouldn't - - - it wouldn't  
23 be here.

24 JUDGE SMITH: Assume - - - assume you've got a  
25 case where you - - - even you would concede this, a

1 substantial state interest. Let's say there's an  
2 epidemic, a health - - - a major health problem in the  
3 city. You agree that there's pestilence in the city that  
4 might - - - that is a substantial state interest in  
5 controlling it?

6 MR. EMERY: Yes.

7 JUDGE SMITH: And suppose the legislature  
8 decides that it thinks the mayor will do a better job than  
9 the city council of implementing certain measures  
10 necessary to control pestilence, can he - - - can - - -  
11 can the legislature say only the mayor does this; the  
12 council stays out?

13 MR. EMERY: With - - - with the proper findings,  
14 and if there's some reasonable basis that the legislature  
15 makes findings to say, the city council's hamstrung by its  
16 own inaction.

17 JUDGE SMITH: Well, isn't - - - but isn't - - -  
18 do you hard - - - do you need a - - - the reason here is  
19 self-evident. The reason is the council's against the  
20 program.

21 MR. EMERY: But the - - - but the council - - -  
22 if it's - - - if it's ordered to issue up to two billion  
23 and there's a budget gap - - - and by the way, the power  
24 of the purse, which is in the council also, is the essence  
25 of Adler, and in the essence of your cases that say where



1 home rule counts the most, if the - - - if the council has  
2 always done it and always handled the dispensation to  
3 raise the money for the budget, which of course was  
4 driving this whole thing, then the council is the place -  
5 - - you have - - - in order to take that away from the  
6 council under home rule, otherwise you eviscerate home  
7 rule, you have to come up with legislative findings which  
8 are rational and make sense.

9 CHIEF JUDGE LIPPMAN: Is there - - - where does  
10 it say - - -

11 MR. EMERY: PBA I says that.

12 CHIEF JUDGE LIPPMAN: Counselor, where does it  
13 say - - -

14 MR. EMERY: Yes.

15 CHIEF JUDGE LIPPMAN: - - - you have to come up  
16 with a legislative finding? Why can't you say - - -  
17 what's wrong with the way they did it - - - putting aside  
18 the speed, they say, this is - - - this is our findings,  
19 in effect, that this is state interest for this reason,  
20 that reason, the other reason. Why do they - - - do they  
21 have to hold a hearing and make a finding? Why isn't that  
22 good enough?

23 MR. EMERY: They can - - - they have to make - -  
24 - have a basis. In PBA I, which is the clear - - -

25 CHIEF JUDGE LIPPMAN: Do we look behind it and

1 say it - - - on what basis do we say - - -

2 MR. EMERY: Well, I - - - I don't - - - I - - -

3 CHIEF JUDGE LIPPMAN: - - - it doesn't make  
4 sense?

5 MR. EMERY: You have to give - - -

6 CHIEF JUDGE LIPPMAN: What do we say?

7 MR. EMERY: - - - enormous deference to any  
8 findings. No findings were made with respect to why the  
9 mayor - - -

10 CHIEF JUDGE LIPPMAN: But they're telling - - -

11 MR. EMERY: - - - is opposed to this.

12 CHIEF JUDGE LIPPMAN: - - - you what they're  
13 findings are.

14 MR. EMERY: No, there aren't - - - there aren't  
15 - - - they aren't telling us what the findings are. In  
16 fact, PBA I says, the findings have to be made at the time  
17 the legislation is passed and you cannot do post hoc  
18 rationalization about the findings.

19 CHIEF JUDGE LIPPMAN: So - - - so that they  
20 didn't - - -

21 MR. EMERY: It says it very clearly.

22 CHIEF JUDGE LIPPMAN: - - - give a rationale - -  
23 -

24 MR. EMERY: Excuse me?

25 CHIEF JUDGE LIPPMAN: They didn't give a

1 rationale as to why they're giving it to the mayor - - -

2 MR. EMERY: No rationale.

3 CHIEF JUDGE LIPPMAN: - - - is that enough to  
4 sink this bill?

5 MR. EMERY: Absolutely under home rule  
6 precedent.

7 CHIEF JUDGE LIPPMAN: On that one piece?

8 MR. EMERY: On that one piece. And the reason -  
9 - - here's the - - - here's how important it is. The  
10 poison pill that the legislature put in Section 3 - - -  
11 Article 3 says one part of this thing goes, everything  
12 goes; however, if you have licenses that are issued  
13 previous to the time it's declared unconstitutional, they  
14 remain in effect. So the poison pill was an artfully  
15 drawn statute - - - was an artfully drawn section of the  
16 statute. And they didn't say anywhere - - - they  
17 obviously thought it was very important that the mayor get  
18 this power, the AG said as much. They didn't say that if  
19 - - - if the mayor - - - they didn't carve out if the  
20 mayor - - - if the mayor's power is ruled unconstitutional  
21 by this court, they didn't say that that will not be  
22 counted.

23 So they put pressure on you. They're whole  
24 thing was to put pressure on this court to have what this  
25 court, they hoped, would see as the good policy of outer

1           boroughs and of disabled and then eviscerate home rule by  
2           leveraging the home rule violation into something of good  
3           policy by using the poison pill. And that was very  
4           cynical, and it clearly is something that is putting  
5           pressure - - -

6                    JUDGE GRAFFEO: It's not - - -

7                    MR. EMERY: - - - on you - - -

8                    JUDGE GRAFFEO: It's not the first time - - -

9                    MR. EMERY: - - - which I say you shouldn't bow  
10           - - - bow to.

11                   JUDGE GRAFFEO: It's not the first time the  
12           State legislature has used a poison pill though.

13                   MR. EMERY: Oh, I - - - I - - -

14                   JUDGE GRAFFEO: It's a clearly common device.

15                   MR. EMERY: I know, but in this case it was used  
16           in a way to eviscerate fundamental home rule principles  
17           because shifting of power within the institutions of the  
18           city, of the municipalities, is the essence of what home  
19           rule protects.

20                   JUDGE READ: So that - - -

21                   MR. EMERY: It's much more than property.

22                   JUDGE READ: That can't - - - that can't be  
23           done? It's impossibly to do that? Is that what you're  
24           saying?

25                   MR. EMERY: No, no. You can do it, but you have

1 to - - - you have to have a general law. They do it with  
2 general laws all the time. The municipal law changes  
3 powers throughout the state among officials and effects  
4 separation of powers all the time. You can't focus in on  
5 one place.

6 JUDGE READ: So it had to be Buffalo,  
7 Syracuse, Albany, every place?

8 MR. EMERY: Yeah, you can't - - - that's right.

9 JUDGE READ: That's so - - -

10 MR. EMERY: That's the whole point of - - - the  
11 history of home rule, starting in 1894, 20 - - - to 1924,  
12 1938, 1963 is a whole history of the people approving  
13 through the Constitution the sacrosanct nature of local  
14 governmental separation of power - - - allocation of  
15 powers, local governmental offices. Just think of the  
16 mischief that could be done in a bill like this one. You  
17 could take away the comptroller's power to approve any of  
18 the contracts. You could - - -

19 CHIEF JUDGE LIPPMAN: What if they - - - what if  
20 they reallocated the power but they made findings, at  
21 least that they put in the bill, that said, we're giving  
22 it to the mayor because it's - - - it's easier for him to  
23 give these out or less costly or whatever they need?

24 MR. EMERY: I wouldn't be here.

25 CHIEF JUDGE LIPPMAN: That would be - - -

1 MR. EMERY: I wouldn't be here. The prob - - -

2 JUDGE READ: Why can't they do that tomorrow?

3 MR. EMERY: Well, it's a technical area. They  
4 can do it tomorrow, but in the meantime this poison pill  
5 throws out the whole thing, and they'll never pass it  
6 again; it'll never happen again. They're here desperate  
7 to hold on to this thing knowing that they violated home  
8 rule. They know that they've undercut themselves by doing  
9 this and they're trying to put the pressure on you to  
10 approve it by saying, oh, it's good policy, it's  
11 wonderful. They don't even dispute our separation of  
12 powers thing. They - - - they try and diminish it as an  
13 implementation matter, as a minor implementation matter.  
14 Well, they say themselves that it's important that the  
15 mayor has it, on the one hand. On the other hand, they  
16 say it's minor implementation.

17 Moreover, the - - - it's clear that it's serious  
18 power. It's in the charter. It's carefu - - - it's been  
19 in the charter for seventy or eighty years. It is a  
20 matter of very subtle discretion as to how you issue these  
21 medallions and how you put them in the marketplace. They  
22 can be devalued; they can be undermined terribly if it's -  
23 - - and if the mayor does it as the city - - - the city  
24 council has the history and the custom and the practice  
25 and the power of doing it and the poison pill itself, as I

1 said, shows.

2 Now, there - - - they also make - - -

3 JUDGE RIVERA: And so the State decides that  
4 there - - - they have a substantial state interest.

5 MR. EMERY: Yes.

6 JUDGE RIVERA: They think the City's not doing  
7 it right - - -

8 MR. EMERY: Um-hum.

9 JUDGE RIVERA: - - - and they step in.

10 MR. EMERY: But they can't undermine the  
11 separation of powers of the city because that is  
12 sacrosanct. That is the constitutional duty of this court  
13 to protect.

14 JUDGE READ: Well, wait a minute. I thought you  
15 said that could as long as they had hearings, that they  
16 could transfer it from the city council to the mayor.

17 MR. EMERY: If may made findings of supervening  
18 state interest that the city council was sabotaging the  
19 effort of some substantial - - -

20 JUDGE RIVERA: As to that extreme?

21 MR. EMERY: The pestilence - - - the pestilence  
22 hypothetical.

23 JUDGE RIVERA: That - - - that - - - that they  
24 would undermine the law? You mean they actually have to  
25 find?

1                   MR. EMERY: Yes. They ha - - - under PBA I,  
2                   they have to make findings - - - if you read PBA I, and  
3                   Judge Bundy Smith distinguished it on these grounds very  
4                   carefully in PBA II, and if you look at the way the Taylor  
5                   Law was handled in PBA I and PBA II with the option for  
6                   PERBs and mini-PERBs, it's very much the same as this.  
7                   There's an overall substantial state interest in the  
8                   Taylor Law, but in PBA I, they ruled that there was no  
9                   substantial state interest in - - - in prohibiting New  
10                  York City from having a mini-PERB when the - - - which the  
11                  - - - is what the legislature did.

12                  It was very much the same, and - - - and - - -  
13                  and if you look at the way that Judge Bundy Smith  
14                  submitted - - - did - - - distinguished it, you can be  
15                  very clear as to how one major shifting of power within a  
16                  statute isn't just an implementation thing, isn't just a  
17                  minor thing; it's part of a whole statutory scheme. And  
18                  the opening of the door to mischief under home rule will  
19                  do - - - do terrible things to Buffalo and Rochester and  
20                  everywhere else.

21                  Home rule is a very, very narrow doctrine. It's  
22                  very, very technical. This court has dealt with it many,  
23                  many times and narrowed it often, but it still exists, and  
24                  it means something. And the people of the New York - - -  
25                  of New York have approved it over and over again and it -



1 - - in language that has attempted to expand it,  
2 notwithstanding judicial interpretations of it narrowing.

3 CHIEF JUDGE LIPPMAN: Thank you, counselor.

4 MR. EMERY: Thank you very much.

5 CHIEF JUDGE LIPPMAN: Appreciate it.

6 Counsel. Go ahead, counsel.

7 MR. MINTZ: May it please the court, Steven  
8 Mintz on behalf of the Greater New York Taxi Association.  
9 We are the largest provider of hybrid fleets and  
10 accessible cabs in New York, and frankly, out of the 220  
11 accessible cabs, we account for 180 of them, and we are a  
12 hundred percent of all the corporate accessible cabs. So  
13 the issue of accessibility from where I stand is the tail  
14 that wags the dog that was thrown in to help try to  
15 justify - - -

16 CHIEF JUDGE LIPPMAN: But you agree that that  
17 could be a legitimate state interest?

18 MR. MINTZ: I think that could be done, as my  
19 colleague said, as a general law, and that's how it should  
20 have been done.

21 CHIEF JUDGE LIPPMAN: But would - - - but would  
22 that - - -

23 JUDGE GRAFFEO: The governor saw it. I mean, he  
24 - - - he held up enactment of the statute - - -

25 MR. MINTZ: He - - - he did.

1                   JUDGE GRAFFEO: - - - in order - - - in order to  
2                   conduct further discussion.

3                   MR. MINTZ: Sure. As we've all been talking  
4                   about, then we're back to substantial state interest. If  
5                   it was really a state concern, you do a general law and  
6                   then the cities apply it, and I don't think that would  
7                   have been a problem. The sale of 2,000 medallions of  
8                   accessible cabs by itself wouldn't have been - - -

9                   JUDGE SMITH: Well, wait a - - - but wait a  
10                  minute.

11                  MR. MINTZ: - - - a problem.

12                  JUDGE SMITH: If it's a substantial state  
13                  concern, you don't have to act by general law; you can act  
14                  by special law. That's what - - -

15                  MR. MINTZ: If - - -

16                  JUDGE SMITH: - - - Adler says.

17                  MR. MINTZ: If it's a substantial state concern  
18                  and that it's rationally done.

19                  JUDGE SMITH: Are you disputing - - - are you  
20                  disputing that handicapped access is a substantial state  
21                  concern?

22                  MR. MINTZ: I - - - I think when you point it  
23                  only to New York City, then you have a problem. It's  
24                  either an interest that has to be solved, and it can be -  
25                  - -

1 JUDGE SMITH: Okay. So you're - - - so you're  
2 saying that the - - - the - - - there's no substantial  
3 interest outside New York City's borders in seeing the  
4 handicapped people in the city have enough taxicabs?

5 MR. MINTZ: Either there is or there isn't a  
6 need in the State of New York.

7 JUDGE GRAFFEO: Why - - - why isn't the issue of  
8 handicapped tourists who go to New York City a state  
9 concern?

10 MR. MINTZ: Well, now we start down the path.  
11 So I think what - - - what I'd like to do, and I think  
12 it's important for some of our colleagues up here from  
13 upstate, is to get a sense of some real New York City taxi  
14 stuff that - - -

15 CHIEF JUDGE LIPPMAN: Yeah, yeah, but what's the  
16 answer to Judge Graffeo's question?

17 MR. MINTZ: As to whether or not there's an  
18 interest in tourists having accessible cabs, I think it  
19 would be a good thing if there are more accessible cabs.

20 CHIEF JUDGE LIPPMAN: Yeah, but why isn't - - -

21 MR. MINTZ: I think the city council - - -

22 CHIEF JUDGE LIPPMAN: Why isn't - - -

23 MR. MINTZ: - - - agrees - - -

24 CHIEF JUDGE LIPPMAN: But why is it not - - -

25 MR. MINTZ: - - - that it would be a good thing

1 if there are accessible cabs.

2 CHIEF JUDGE LIPPMAN: But her question is, why  
3 isn't it a legitimate state interest - - -

4 MR. MINTZ: Well - - -

5 CHIEF JUDGE LIPPMAN: - - - as to whether  
6 tourists are able to come to New York City and have  
7 accessible cabs?

8 MR. MINTZ: I - - - I don't - - -

9 JUDGE GRAFFEO: I mean, tourism has a major  
10 effect on the state's - - -

11 MR. MINTZ: Sure.

12 JUDGE GRAFFEO: - - - economy.

13 MR. MINTZ: And - - - and once you step on the  
14 tourism in New York City, home rule's gone for New York  
15 City because everything ultimately has to do with tourism,  
16 and now we're talking about the theaters and now we're  
17 talking about pedicabs and we're talking about hot dog  
18 vendors and we're talking about hospitals that have to  
19 deal with tourists. Now we're - - - we're down the  
20 slippery slope. So if we go back and we start with - - -

21 CHIEF JUDGE LIPPMAN: Well, what if - - - what  
22 if - - -

23 MR. MINTZ: - - - Wambat and - - -

24 CHIEF JUDGE LIPPMAN: Yeah, but what about - - -  
25 but that doesn't really answer the question. What about

1 all those things you just talked about? Why aren't they  
2 legitimate state interests?

3 MR. MINTZ: Well, then there is no local  
4 interest in anything and that's why the delegation  
5 argument - - -

6 JUDGE SMITH: Well, now wait a minute.

7 MR. MINTZ: - - - proves too much.

8 JUDGE SMITH: Home - - - home rule has two  
9 aspects. The city is fr - - - no - - - no one's saying  
10 the city is not free to legislate in this area. The - - -  
11 home rule gives power to the city and it excludes the  
12 state. As I read our cases, the area from which the state  
13 has excluded is very, very narrow. It's only those areas  
14 in which the state has no substantial interest. Am I  
15 reading that correctly?

16 MR. MINTZ: Well, I - - - I don't read it the  
17 same way you do, Judge Smith. I - - - I read PBA I as  
18 setting forth some more limitations on the State's power.  
19 I think PBA I by Justice Levine actually is a good modern  
20 statement of the Cardozo concurrence, and I think he makes  
21 clear that you're going to reject presumptions of  
22 constitutionality. You're not going to apply minimum  
23 scrutiny. You're going to question whether or not there  
24 truly is a substantial state interest and it has to be  
25 directly related. And you're going to do it only if

1           there's a supervening state concern that relates to life,  
2           health, and the quality of life.

3                       And that we know, when you look at Osborn,  
4           whether firefighters were well rested and could save  
5           people in fires wasn't enough because of the history of  
6           municipalities controlling firefighters. The question was  
7           raised about does that history matter. Well, in Wambat,  
8           all but conclusive of the aspect of the issue is the  
9           constitutional and legislative history stretching over  
10          eighty years. That was to preserve the Adirondacks. Here  
11          - - -

12                      JUDGE RIVERA: So if the State says that there  
13          is an interest in access to transportation, that that has  
14          been a long time interest - - -

15                      MR. MINTZ: Mass - - -

16                      JUDGE RIVERA: - - - sounds persuasive to me.  
17          Why not?

18                      MR. MINTZ: Mass transportation. Mass  
19          transportation.

20                      JUDGE RIVERA: And you're trying to suggest city  
21          cabs - - -

22                      MR. MINTZ: I'm not accepting - - -

23                      JUDGE RIVERA: - - - are not part of mass  
24          transportation?

25                      MR. MINTZ: I'm not accepting that this - - -

1 that private taxi industry, to pick something up and bring  
2 them to another location is mass transportation. That's  
3 their argument. That is not our argument.

4 JUDGE RIVERA: Why is it not mass  
5 transportation? Because it's a couple of people in the  
6 cab?

7 MR. MINTZ: Mass transportation is to move  
8 groups of people around, not private individuals seeking a  
9 for-hire vehicle to take them somewhere.

10 One of the things that you need to get a flavor  
11 of here is in Staten Island in Richmond Terrace there  
12 aren't cabs cruising and there haven't been for a long  
13 time. Why? Supply and demand. People live in private  
14 homes, they have cars. If somebody wants to get a - - - a  
15 taxi to take them to the airport, they call. Cabs don't  
16 cruise Mill Basin in Brooklyn or Bayside Queens for the  
17 same reasons. They call the cab service. If they need  
18 it, they go. The Yellow cabs - - -

19 JUDGE PIGOTT: I hate to - - - I hate to sound  
20 like a - - - like I'm a sports nut or something, but if -  
21 - - if I want to go watch the Brooklyn Nets play - - -

22 MR. MINTZ: Yeah.

23 JUDGE PIGOTT: - - - and I'm from Buffalo - - -

24 MR. MINTZ: Take the subway.

25 JUDGE PIGOTT: - - - and I'm from Buffalo, I

1 can't even find a subway.

2 MR. MINTZ: Take the - - -

3 JUDGE READ: Get off at Atlantic Avenue.

4 JUDGE PIGOTT: Can I get a - - - can I get a  
5 Yellow cab to take me there?

6 MR. MINTZ: Yeah. So what - - - what will  
7 happen is you'll get a Yellow cab that'll take you, and  
8 then the real problem that - - -

9 JUDGE PIGOTT: Getting it.

10 MR. MINTZ: - - - has to be talked about is the  
11 big elephant in the room which is to add 18,000 cars to  
12 cruise the outer boroughs looking for street hails that  
13 don't really exist, there aren't enough people going down  
14 their driveway to ask - - -

15 JUDGE RIVERA: Maybe that's because there are no  
16 cabs out.

17 MR. MINTZ: No, I - - - I think that's a chicken  
18 and egg, and actually, I think the reason why there aren't  
19 is because there aren't enough chickens standing at the  
20 end of their driveway trying to hail a cab in a private  
21 residential neighborhood.

22 JUDGE SMITH: Does - - - does the - - -

23 JUDGE RIVERA: Well, where's the record on that?

24 MR. MINTZ: So now we have 18,000 additional  
25 vehicles who might get a fare who come into New York City,



1 and we know what's going to happen.

2 JUDGE SMITH: Couldn't - - - couldn't the - - -

3 MR. MINTZ: They're now going to pick up an  
4 illegal fare.

5 JUDGE SMITH: Couldn't the legislature - - -  
6 couldn't the legislature reasonably say, we're not going  
7 to decide, we'll let the forces of supply and demand  
8 decide what's too much cabs and too many - - - too many  
9 passengers?

10 MR. MINTZ: But they didn't do that, and that's  
11 exactly what the city council has been doing for seventy-  
12 five years, carefully dealing with supply and demand since  
13 the Haas Act in 1937 because - - -

14 JUDGE RIVERA: And is it possible - - -

15 MR. MINTZ: - - - there was Wild West - - -

16 JUDGE RIVERA: - - - the State says - - -

17 MR. MINTZ: - - - of cabs.

18 JUDGE RIVERA: - - - we're not satisfied  
19 the way you've dealt with it and we have a state  
20 interest here?

21 MR. MINTZ: And that's why double enactment  
22 can't be ignored. That was your question, Judge  
23 Piggott. Double enactment.

24 CHIEF JUDGE LIPPMAN: Okay. Counselor - -

25 -

1 MR. MINTZ: If they actually did double  
2 enactment - - -

3 CHIEF JUDGE LIPPMAN: Counselor - - -

4 MR. MINTZ: - - - this wouldn't pass.

5 CHIEF JUDGE LIPPMAN: Counselor, okay.  
6 Thank you. Appreciate it.

7 Counselor rebuttal.

8 MR. SHORR: Thank you, Your Honor. First,  
9 Judge Smith, the only other case that comes to mind  
10 is Elm Street but it was under other circumstances  
11 that the State lost that unusual case.

12 CHIEF JUDGE LIPPMAN: Counsel - - -

13 MR. SHORR: Yes.

14 CHIEF JUDGE LIPPMAN: - - - focus on this  
15 issue of private. What - - - this seems to be a - -  
16 - so much of the case of your adversary. Why isn't  
17 this a private enterprise, picks up private people?  
18 Why - - - why isn't that something that the State  
19 really doesn't have a substantial state in - - -  
20 particularly within the confines of New York City  
21 rather than throughout the state?

22 MR. SHORR: This - - - I would go back to  
23 the Rudack case, Your Honor, that this court affirmed  
24 without opinion. Special term in Rudack made clear  
25 that the taxicab industry forms a vital part of New

1           York City's transportation system. After all, we're  
2           talking about fifty-five - - -

3                    CHIEF JUDGE LIPPMAN: But it's a private  
4           vital part of it, right?

5                    MR. SHORR: It - - - yes, it is, but it's a  
6           private adjunct to the rest of the New York City  
7           transportation system. And in New York City where  
8           the - - -

9                    CHIEF JUDGE LIPPMAN: So why isn't that  
10          governed by the City as opposed to these kinds of  
11          more typically mass transit - - - what we could  
12          describe as mass transit?

13                   MR. SHORR: The City has been regulating  
14          it, and now the State has decided that the State  
15          needs to step in - - -

16                    JUDGE PIGOTT: Well - - -

17                    MR. SHORR: - - - because the State isn't  
18          satisfied.

19                    JUDGE PIGOTT: I'll give you an example. I  
20          mean, let's assume for a minute that the Yellow cabs  
21          want more medallions, and the city council and - - -  
22          agrees with them and passes - - - and the mayor keeps  
23          vetoing it. Can they go to Albany and get a special  
24          bill that says that there will be more medal - - -  
25          Yellow cab medallions in the city of New York?

1                   MR. SHORR: That - - - that - - - the  
2 legislature can - - - if the legislature has the  
3 power to do it, and the legislature does have the  
4 power to do it - - -

5                   JUDGE SMITH: Your answer is yes.

6                   MR. SHORR: - - - then the political - - -  
7 that's right. The political motivations or the  
8 speculation about the political motivation is  
9 irrelevant - - -

10                  JUDGE PIGOTT: But they'd have to show that  
11 there's a state interest and - - -

12                  MR. SHORR: It have - - - of course, those  
13 criteria would have to be satisfied and - - -

14                  JUDGE SMITH: Suppose - - - suppose,  
15 hypothetically - - - the question I put to your  
16 adversary. Suppose hypothetically that we decide the  
17 only substantial state interest here is the  
18 handicapped access, but it's there. Does that - - -  
19 does that suffice by its - - - all by itself to save  
20 the bill?

21                  MR. SHORR: Either one of the two aspects  
22 of this bill is enough to save it.

23                  JUDGE SMITH: So - - - so I can do anything  
24 I want as long as I throw handicap access into the  
25 bill and make it nonseverable upon the state?

1 MR. SHORR: It has to be a legitimate  
2 substantial state interest, and for all the reasons  
3 we've shown, that interest and the accessibility of  
4 the for - - - of the transportation - - -

5 JUDGE SMITH: Yeah, okay, but once I've got  
6 one substantial state interest, I can combine it  
7 anything else in the world. I can chan - - - yeah, I  
8 can - - - I can regulate parks and - - - and whatever  
9 I want.

10 MR. SHORR: Your - - - Your Honor, there - -  
11 - - of course there's a rational basis test for any  
12 legislation, and if there are arbitrary provisions,  
13 they can be struck - - - or stricken, but that  
14 doesn't mean that this court should go through this  
15 hail act or any special law provision by provision  
16 asking whether each provision satisfies some  
17 independent substantial state interest test. That's  
18 not what this court has done.

19 CHIEF JUDGE LIPPMAN: Counselor, what - - -  
20 what about - - - your adversary makes the argument  
21 that there's really no findings here that there's a -  
22 - - there's some conclusory statements about what  
23 substantial state interest is, but - - - but nobody  
24 made any findings about what this is all about.

25 MR. SHORR: Those - - - those findings

1 aren't necessary, Your Honor, and certainly not with  
2 respect to each provision and each means the  
3 legislature chooses. That's - - -

4 CHIEF JUDGE LIPPMAN: But even in general,  
5 it's - - - you'd acknowledge this - - - this happened  
6 very quickly. There's a - - - again a general  
7 statement about the state interest and that's it.  
8 Does - - - does that lead to a kind of looking behind  
9 what it says as opposed to if it had gone through a  
10 more comprehensive process with hearings, findings  
11 and a lot of detail on it - - - contrast the two  
12 situations in terms of the judicial review of - - -  
13 of what goes on here. How do we not look behind it  
14 when - - - when it would appear it's kind of shallow  
15 to some degree, just the statement?

16 MR. SHORR: Let me - - - let me try to  
17 address that.

18 CHIEF JUDGE LIPPMAN: Yes, please.

19 MR. SHORR: In - - - in Hotel Dorset, this  
20 court made clear that when the - - - when the  
21 legislature acts, it is presumed that there are facts  
22 to support what the legislature has done and this  
23 court presumes that the - - - that the state of  
24 affairs the legislature - - -

25 CHIEF JUDGE LIPPMAN: So basically, we - -

1 -

2 MR. SHORR: And there's - - -

3 CHIEF JUDGE LIPPMAN: We - - - it - - - we  
4 have to honor that - - - we defer to the - - - to the  
5 legislative branch of government - - -

6 MR. SHORR: It's - - -

7 CHIEF JUDGE LIPPMAN: - - - and its stated  
8 state interest, whatever it is.

9 MR. SHORR: But this - - - there's a lot of  
10 deference due, but this court can go further and look  
11 at the - - - the kinds of evidence that I was  
12 mentioning earlier. By the way, there's nothing in  
13 this record that overcomes that presumption. But  
14 this court can also look at its own precedent which  
15 supports the substantial state interest articulated  
16 here, previous legislative declarations dating back  
17 to 1936, all of which are consistent with the sub - -  
18 - with the substantial state interest, and previous  
19 state laws.

20 CHIEF JUDGE LIPPMAN: Okay, counselor.

21 MR. SHORR: But it's really - - - if I can  
22 make one more point, I - - - I - - - I have - - -

23 CHIEF JUDGE LIPPMAN: One more point. Go  
24 ahead.

25 MR. SHORR: I have so many, but I'd like to

1           make one.  It's really the plaintiffs' theory that is  
2           hostile to local autonomy here.  They have this use-  
3           it-or-lose-it theory of State-delegated powers.  The  
4           State can delegate it, but once it does so, if the  
5           locality acts on that delegation and regulates in a  
6           field for ten, twenty, thirty, forty - - - I don't  
7           know what their standard is - - - years, the State is  
8           done.  The State can't do it anymore.  The State's  
9           interest has dissipated.  That is really hostile to  
10          local autonomy because it would encourage the State  
11          to underdelegate and overregulate - - -

12                        CHIEF JUDGE LIPPMAN:  Okay.

13                        MR. SHORR:  - - - so that it doesn't lose  
14           its ability to regulate.

15                        CHIEF JUDGE LIPPMAN:  Okay, counselor.  
16           Thanks, counselor.

17                        MR. SHORR:  Thank you.

18                        CHIEF JUDGE LIPPMAN:  Rebuttal, counselor.  
19           Go ahead.

20                        MR. DEARING:  I agree completely with what  
21           counsel for the City just said about the idea that a  
22           delegation - - - statutory delegation ossifies into a  
23           limitation - - - a constitutional limitation on State  
24           authority over time; that is not good for localities.

25                        CHIEF JUDGE LIPPMAN:  Counselor, let me ask





1 bill. There - - - all the provisions of this bill  
2 reasonably - - -

3 JUDGE SMITH: Okay, but what's - - - what's  
4 - - -

5 MR. DEARING: - - - advance the state  
6 interest.

7 JUDGE SMITH: What's the principle?

8 MR. DEARING: I think the principle is  
9 this: what you do not do is second-guess every  
10 legislative judgment in a bill and say could it have  
11 been done - - -

12 JUDGE SMITH: What - - - what you don't do  
13 isn't a principle. Tell me what you do do.

14 MR. DEARING: What you do do is examine  
15 whether the act rationally relates to a subject  
16 matter of substantial state concern, and if it does,  
17 the legislature - - -

18 JUDGE SMITH: And what if - - - and what if  
19 an act relates to fifteen subject matters? How many  
20 - - - how many substantial state concerns do you  
21 need?

22 MR. DEARING: I think, Your Honor, that's a  
23 different case. I think you might need more than one  
24 if - - - if the act really spans different subject  
25 matters. This is all about transportation access and

1 street hails.

2 I - - - I'd really like to make a few  
3 points about the po - - - the so-called power shift  
4 because this is - - - this is important, and it's not  
5 a power shift at all.

6 If the state legislature has the power to  
7 act, it cannot be right as a constitutional principle  
8 that the only way it can do it is by also getting a  
9 legislative act at the city level. That's not how  
10 pow - - - constitutional power works. If they have a  
11 power to act, they don't need a - - - an agreement,  
12 an agreeing concurrent legislative act at the city  
13 level. That's just another way to say you need a  
14 home rule message.

15 Also, let's look at what - - - what the  
16 implications of this position are. If we had - - -

17 CHIEF JUDGE LIPPMAN: Yeah, but they're  
18 saying - - - they're saying this is not just  
19 implementation; you're totally shifting - - -

20 MR. DEARING: But, Your Honor, they - - -

21 CHIEF JUDGE LIPPMAN: - - - the power from  
22 the city.

23 MR. DEARING: The city council did exactly  
24 the same thing when it authorized new medallions in  
25 the past. It authorized an executive agency to issue

1 medallions up to a cap. That's all that's been done  
2 here. And if we had delegated this authority to the  
3 State - - -

4 CHIEF JUDGE LIPPMAN: Yeah, but they're  
5 governing their own affairs. You're - - - you're  
6 governing their affairs in this case.

7 MR. DEARING: We're -- we're not. We're  
8 delegating to a - - -

9 CHIEF JUDGE LIPPMAN: I know, but that's  
10 the contention that they're saying. Rather than them  
11 doing it, you're doing it, and that skews the whole -  
12 - - what you've done and, therefore, you should throw  
13 it out - - -

14 MR. DEARING: The only ch - - -

15 CHIEF JUDGE LIPPMAN: - - - is their  
16 argument.

17 MR. DEARING: The only change is that  
18 there's been a legislative authorization that comes  
19 from the State instead of the City. And let's look  
20 at the alternatives to this. What if we had instead  
21 delegated this power to the State Department of  
22 Transportation instead of the City at all? This  
23 argument wouldn't even apply, and that - - - so this  
24 is - - - this is an argument that it's better for  
25 cities for the state not to return power to city

1 officials but to keep it with the state.

2 They say in their own brief at page 47 that  
3 it would have been fine if the State had compelled  
4 the city council to pass a local law authorizing  
5 medallions. That's page 47 of the Board of Trade  
6 brief. So it's bett - - - better for cities if the  
7 State issues mandates to local legislative bodies  
8 instead of giving discretion. This is the vision of  
9 protecting city home rule authority the plaintiffs  
10 are articulating here.

11 CHIEF JUDGE LIPPMAN: Okay, counselor.

12 MR. DEARING: Can I make one very - - -

13 CHIEF JUDGE LIPPMAN: One - - -

14 MR. DEARING: - - - quick point?

15 CHIEF JUDGE LIPPMAN: One very quick point.

16 MR. DEARING: Mr. Mastro said the  
17 legislature had never held hearings or expressed an  
18 interest in taxicab regulation, and that's just not  
19 true. In 1936, before the Haas law was passed - - -

20 MR. MASTRO: I meant post-Haas, but go  
21 ahead.

22 MR. DEARING: You - - -

23 MR. MASTRO: Go ahead. Sorry.

24 CHIEF JUDGE LIPPMAN: Finish your thought,  
25 counselor. Go ahead.

1                   MR. DEARING: The point is this: I - - - I  
2 don't really care what he meant because the important  
3 point is this one.

4                   CHIEF JUDGE LIPPMAN: It's okay. Just  
5 finish, counselor.

6                   MR. DEARING: The legislature said in 1936,  
7 "Safe adequate taxicab operation at just and  
8 reasonable rates is an indispensable transportation  
9 service auxiliary to rapid transit and other  
10 transportation systems in large cities of the state,  
11 and it is imperative in the public interest and for  
12 the public welfare and safety of the people of this  
13 state that taxicab operation in large cities be  
14 subject to proper legislation." That is 1936. The  
15 legislature later delegated power to localities by  
16 statute.

17                   CHIEF JUDGE LIPPMAN: Okay, counselor.

18                   MR. DEARING: That power ne - - - that  
19 delegation never hardened into - - -

20                   CHIEF JUDGE LIPPMAN: Thank you, counselor.

21                   MR. DEARING: - - - a limitation on our  
22 authority.

23                   CHIEF JUDGE LIPPMAN: Thank you, all.

24                   (Court is adjourned)

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C E R T I F I C A T I O N

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of Greater New York Taxi Association, et al. v. The State of New York, No. 98; Taxicab Service Association, et al. v. The State of New York, No. 99; and Metropolitan Taxicab Board of Trade, et al. v. Michael R. Bloomberg, No. 100 were prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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