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COURT OF APPEALS

STATE OF NEW YORK

GREATER NEW YORK TAXI
ASSOCIATION, et al.,

Appellants,

-against-

No. 120

THE NEW YORK CITY TAXI AND
LIMOUSINE COMMISSION, et al.,

Respondents,

and

NISSAN TAXI MARKETING,
N.A., LLC, et al.,

Intervenor-Respondents.

20 Eagle Street
Albany, New York 12207
June 03, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

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1 CHIEF JUDGE LIPPMAN: We're going to start
2 with number 120, Greater New York Taxi.

3 Counselor, you want any rebuttal time?

4 MR. BERNS: Three minutes, Your Honor.

5 CHIEF JUDGE LIPPMAN: Three minutes. You
6 have it. Go for it. Go ahead. You're on.

7 MR. BERNS: Your Honor, good afternoon.
8 The Taxi and Limousine Commission here jumped out of
9 its regulatory skin.

10 CHIEF JUDGE LIPPMAN: Counsel, what's - - -
11 what's - - - what is the problem with what they did?
12 You have - - - let's set it - - - let's focus on
13 exactly what they did. You have the Nissan vehicle,
14 right, and now you can have these other vehicles, one
15 of a number of different kinds of cars that might
16 satisfy the wheelchair accessible, and what's wrong
17 with that? Isn't there some choice now - - -

18 MR. BERNS: There - - -

19 CHIEF JUDGE LIPPMAN: - - - in what they've
20 presented?

21 MR. BERNS: There isn't really, Your Honor.

22 CHIEF JUDGE LIPPMAN: Why - - - why is
23 there no choice?

24 MR. BERNS: There is no choice because they
25 created a ten-year monopoly. The - - - the key

1 difference here between what they're in business to
2 do, which the statute says which is to - - - to set
3 standards - - -

4 CHIEF JUDGE LIPPMAN: No, they set
5 standards. If they - - -

6 MR. BERNS: They set standards.

7 CHIEF JUDGE LIPPMAN: If they - - - let me
8 just ask. If you don't - - - hypothetically - - -

9 MR. BERNS: Um-hum.

10 CHIEF JUDGE LIPPMAN: - - - if you don't
11 pick just one car and say you must buy this car at
12 this price, assume, for the sake of what we're
13 looking at now, that you can do the Nissan and you
14 can do the six or seven others that might fit the
15 other category of the wheelchair accessible, is - - -
16 is that - - - why isn't that just a general - - - all
17 these years, you've had cars, generally, in the fleet
18 that looked the same. Remember the old Checkers cars
19 - - -

20 MR. BERNS: Um-hum.

21 CHIEF JUDGE LIPPMAN: - - - and then you
22 had the Crown Victoria. What's different about this,
23 and even here, within the context of what's being
24 challenged, they have a number of different vehicles
25 that one could choose. So what's wrong?

1 MR. BERNS: Well, the factual premise, I
2 believe, is not quite accurate, Your Honor.

3 JUDGE READ: You're saying there aren't a
4 number of vehicles now, or that - - - I guess - - -

5 MR. BERNS: There won't be.

6 JUDGE READ: There won't be?

7 MR. BERNS: There won't be.

8 CHIEF JUDGE LIPPMAN: Why not? Why not?

9 MR. BERNS: Because the rule says once the
10 program goes into - - -

11 CHIEF JUDGE LIPPMAN: Right.

12 MR. BERNS: - - - into action, you can only
13 buy the gas Nissan - - -

14 CHIEF JUDGE LIPPMAN: Yes.

15 MR. BERNS: - - - or - - -

16 CHIEF JUDGE LIPPMAN: The hybrid.

17 MR. BERNS: - - - a range of hybrids - - -

18 CHIEF JUDGE LIPPMAN: Right.

19 MR. BERNS: - - - until Nissan has a
20 hybrid.

21 CHIEF JUDGE LIPPMAN: Isn't it generally
22 accepted that we don't even know if Nissan's going to
23 have a hybrid in this particular car?

24 MR. BERNS: In the record, Your Honor - - -
25 in the record, they committed to the courts below

1 they're going to have a - - - a hybrid this year.

2 CHIEF JUDGE LIPPMAN: So your argument
3 comes down to - - - or not comes down to, but one of
4 the thrusts of your artic - - - your argument is that
5 there's not really a choice, even though there
6 appears to be a choice?

7 MR. BERNS: There is no choice, Your Honor.

8 JUDGE FAHEY: Can I ask, what's the
9 percentage between hybrids and nonhybrids?

10 MR. BERNS: Right now I believe there's
11 several thousand hybrids on the road. You've got
12 something like 13,000 total taxis. So it's a
13 significant - - -

14 JUDGE FAHEY: 13,000 medallions, right?

15 MR. BERNS: It's a significant portion.
16 Whether that will stay the same or go down, I can't
17 tell, Your Honor.

18 JUDGE FAHEY: All right. So hybrids is 13
19 - - - is about - - - out of the 13,000, you're saying
20 how many, 2- or 3,000 are hybrids?

21 MR. BERNS: Several thousand; I don't know
22 the exact number.

23 JUDGE FAHEY: Okay. Several thousand. All
24 right. So that means the majority are nonhybrids.

25 MR. BERNS: Yes.

1 JUDGE FAHEY: So then you go to your - - -
2 your contractual argument, which is they're forcing
3 us to contract for one car and we don't have any say
4 in this at all.

5 MR. BERNS: Your Honor, the hybrid option
6 is an illusion.

7 CHIEF JUDGE LIPPMAN: But why is it an
8 illusion, if today, if it goes into effect, and you
9 could choose between seven hybrids and the gas model,
10 what - - - what's the problem?

11 MR. BERNS: Because the minute they come
12 out with their own hybrid, the monopoly is there.

13 JUDGE RIVERA: Okay, so - - -

14 JUDGE ABDUS-SALAAM: Hybrids - - -

15 MR. BERNS: They have - - - the ru - - -

16 JUDGE ABDUS-SALAAM: There won't be any
17 other hybrids - - -

18 MR. BERNS: Excuse me.

19 JUDGE ABDUS-SALAAM: - - - that you could
20 get either?

21 MR. BERNS: That's right.

22 JUDGE ABDUS-SALAAM: They'll sell only gas
23 - - -

24 MR. BERNS: The - - -

25 JUDGE ABDUS-SALAAM: - - - the only gas

1 model and the only hybrid model?

2 MR. BERNS: The Taxi and Limousine
3 Commission rules in effect now say that the minute
4 they come out with a qualifying hybrid, you've got to
5 buy that. Now, in the City's brief, they say, well,
6 in December, we got in a room with Nissan and Nissan
7 agreed to give up hybrid exclusivity.

8 JUDGE READ: So they could revise the rules
9 and put that in the rules?

10 MR. BERNS: They could, but the whole
11 exercise of getting in a room and playing with the
12 rules, between - - -

13 CHIEF JUDGE LIPPMAN: But - - -

14 MR. BERNS: - - - Nissan - - -

15 CHIEF JUDGE LIPPMAN: But why couldn't - -
16 -

17 MR. BERNS: - - - and the City is that - -
18 -

19 CHIEF JUDGE LIPPMAN: Why couldn't you
20 challenge it - - - let's say that they are going to
21 come out with a hybrid at some time in the future.
22 Why couldn't you challenge - - - at this point, if it
23 went into effect now, you agree you have whatever it
24 is, seven, eight different choices. So if, at a
25 later time, if lo and behold you do have a hybrid

1 version of this, then - - -

2 MR. BERNS: Your Honor - - -

3 CHIEF JUDGE LIPPMAN: - - - then - - - then
4 maybe it becomes exclusive, then you challenge it;
5 what's wrong with that?

6 MR. BERNS: Your Honor, the rules on the
7 books - - -

8 CHIEF JUDGE LIPPMAN: It's not a rhetorical
9 question; tell me what's wrong with it.

10 MR. BERNS: What's wrong with it is that
11 you're still forcing the majority of the market into
12 one car.

13 JUDGE READ: Well, could they - - -

14 MR. BERNS: Yep.

15 JUDGE READ: Could they put in the rules
16 the specs for that one car and do the same thing?

17 MR. BERNS: It's a different - - - they
18 could create - - -

19 JUDGE READ: That would be beyond - - -

20 MR. BERNS: - - - a type - - -

21 JUDGE READ: That would be - - - would that
22 be beyond their authority, to put the specs for the
23 same car, the Nissan, in the rules, and say everybody
24 must buy a car that meets the - - - meets these
25 specs?

1 MR. BERNS: They can create a tight spec.
2 They can put out a list that even has one car in the
3 spec. The thing they cannot do is say, here's the
4 one car that meets it and we're closing the approval
5 window for ten years. That's the one difference.

6 JUDGE STEIN: Why not? Why is that - - -
7 why is that such a choice in policy goals under
8 Boreali, versus just weighing the costs and benefits?
9 I mean, what they did here was they - - - they went
10 and they - - - they put out for bid, and the - - -
11 the purpose was to get the best car for the value
12 that benefited everybody, the taxi medallion owners,
13 the - - - the - - - the people that ride in the cars,
14 everything. Why - - - why is that not just a
15 balancing of costs and benefits, as opposed to a
16 policy issue that - - - that they're not entitled to
17 make?

18 MR. BERNS: Judge, I don't think this is
19 really a Boreali issue. This is a question of what
20 the statute says the legisl - - - what the
21 legislature directed the Taxi and Limousine
22 Commission to do.

23 JUDGE READ: But if you accept the fact
24 that they could write tight specs to do the same
25 thing, why isn't, as - as - as Judge Stein indicated,

1 this just a more efficient way of doing that that
2 benefits everybody?

3 MR. BERNS: It's the difference between
4 being a regulator and being an industry partner.

5 CHIEF JUDGE LIPPMAN: Yeah, but why isn't
6 this - - -

7 MR. BERNS: That is a - - -

8 CHIEF JUDGE LIPPMAN: Why - - -

9 MR. BERNS: - - - big distinction.

10 CHIEF JUDGE LIPPMAN: Why isn't this, in
11 effect, just doing specs, because you have eight cars
12 that could meet the specs? Why - - - why - - - why -
13 - - why isn't that okay?

14 MR. BERNS: A regulator issues standards.
15 A partner has contra - - - a contractual
16 relationship. The Taxi and Limousine Commission was
17 not established to have a deal with a particular
18 manufacturer.

19 CHIEF JUDGE LIPPMAN: Yeah, but isn't there
20 a virtue? When you're talking about standards and
21 the different things, and all of these multiple
22 things that they oversee, the Taxi and Limousine
23 Commission, is it a good thing, basically, to have
24 uniformity in the fleet? We've had that - - - as I
25 indicated before, haven't we had a version of that

1 this whole time?

2 What's bad if you have a basic uniformity,
3 but yet within that uniformity you have eight
4 different cars that you could choose from? And in
5 effect, what's the difference between saying, here's
6 specs - - - the hypothetical that Judge Read just
7 gave you - - - here's specs; anyone can meet them.
8 Isn't that what they're, in effect, doing, saying
9 here's specs; eight cars will meet these specs.
10 What's wrong with that?

11 MR. BERNS: The prob - - - it may be a good
12 idea or a bad idea to let a regulator become a
13 contracting party.

14 JUDGE STEIN: Well, they didn't - - -

15 MR. BERNS: But maybe - - -

16 JUDGE STEIN: - - - sign the contract.

17 MR. BERNS: - - - that's a - - -

18 JUDGE STEIN: They didn't sign the
19 contract; the City signed the contract.

20 MR. BERNS: The City - - -

21 JUDGE STEIN: Doesn't that indicate
22 something?

23 MR. BERNS: The DCAS signed the contract,
24 the Department of City Administrative Services, and
25 if you look at what the DCAS is in business - - -

1 JUDGE RIVERA: Let's go to the law, since
2 you wanted to talk about the law. So - - -

3 MR. BERNS: Excuse me?

4 JUDGE RIVERA: I want to talk about the
5 law, since you said let's talk about the law
6 specifically. So: "There shall be a New York City
7 Taxi and Limo Commission, the purposes of which shall
8 be the continuance, further development and
9 improvement of taxi and limo service in the City of
10 New York. It shall be the further purpose of the
11 Commission, consonant with the promotion and
12 protection of the public comfort and convenience, to
13 adopt and establish an overall public transportation
14 policy."

15 So why doesn't that make policy the
16 overarching principle, and the standards are set to
17 the policy, but it - - - it is not - - - you are
18 correct; they are a regulator. I'm not debating that
19 with you. But this seems, to me, a different
20 directive than what you seem to be cabining their
21 authority into.

22 MR. BERNS: You stopped in the middle of
23 the section, Your Honor.

24 JUDGE RIVERA: Well, I'm happy to read the
25 rest of it, but I didn't want to take up all your

1 time.

2 MR. BERNS: It's all about standards. Nine
3 - - - Your Honor - - -

4 JUDGE RIVERA: I understand, but those
5 standards are - - -

6 MR. BERNS: - - - standards - - -

7 JUDGE RIVERA: - - - are for the purposes
8 of adopting and establishing the overall policy.

9 MR. BERNS: The - - -

10 JUDGE RIVERA: Why could the policy not be
11 about streamlining and protection of - - -

12 MR. BERNS: It could be.

13 JUDGE RIVERA: - - - of the public, and so
14 forth, and pursuant to that policy, you determine
15 that one vehicle is the way to fit the bill?

16 MR. BERNS: You could do that as a policy
17 matter. I'm not arguing - - -

18 CHIEF JUDGE LIPPMAN: What about rule-
19 making?

20 MR. BERNS: This - - - entering into an
21 exclusive deal with someone for ten years, and
22 getting into that relationship - - -

23 JUDGE RIVERA: Well, how else - - -

24 MR. BERNS: - - - the legislature could
25 authorize that.

1 JUDGE RIVERA: But counselor, if you've
2 just agreed that you could - - - you could end up, as
3 a policy choice, set these standards, whereby, as you
4 responded to Judge Read and me a second ago, you're
5 choosing the one vehicle, why - - - why isn't that in
6 compliance with Section 2300 - - -

7 MR. BERNS: Because the - - -

8 JUDGE RIVERA: - - - to say I'm going to
9 enter this contract to ensure that we've got the
10 vehicle we need?

11 MR. BERNS: There's nothing in this statute
12 that says that this agency is supposed to do anything
13 but be a traditional regulator.

14 JUDGE PIGOTT: Does this hurt you?

15 MR. BERNS: Excuse me.

16 JUDGE PIGOTT: What - -what - - What's your
17 complaint about this? Why - Why- Why does this hurt
18 you?

19 MR. BERNS: Because it - - - it requires us
20 to buy this car - - -

21 CHIEF JUDGE LIPPMAN: But it doesn't - - -

22 MR. BERNS: - - - for ten years - - -

23 CHIEF JUDGE LIPPMAN: But let's not - - -

24 MR. BERNS: It creates a monopoly.

25 CHIEF JUDGE LIPPMAN: But counsel - - -

1 MR. BERNS: It creates a monopoly - - -

2 CHIEF JUDGE LIPPMAN: Counsel - - -

3 MR. BERNS: - - - all the problems of a
4 monopoly.

5 CHIEF JUDGE LIPPMAN: Counsel, let's - - -
6 let's - - - in actuality, you have a choice of eight
7 cars, right, you acknowledge that?

8 MR. BERNS: Now.

9 CHIEF JUDGE LIPPMAN: So why - - - yeah.
10 So what's the problem? You're not - - you're not
11 doing one car exclusively. Let's assume, for the
12 sake of argument, that's no good; for the sake of
13 argument, that you can't just say one car. You don't
14 have one car; you have eight cars.

15 MR. BERNS: It's going to be one car.

16 CHIEF JUDGE LIPPMAN: Why is that wrong?

17 MR. BERNS: It's going to be one car.

18 JUDGE PIGOTT: Let's assume that, though.
19 I mean, let's assume - - - you know, the lingo quite
20 often uses sole source on anything.

21 MR. BERNS: Sure.

22 JUDGE PIGOTT: So they can buy street
23 sweepers or whatever, and they say this is going to
24 be the sole source for this. How does that hurt you?
25 How does that hurt your client?

1 MR. BERNS: It has all the benefits and
2 detractions of a monopoly.

3 JUDGE PIGOTT: I'm looking for the
4 detractions. I understand monopoly. I understand -
5 - -

6 MR. BERNS: Price contr - - -

7 JUDGE PIGOTT: Sometimes monopolies are
8 very good.

9 MR. BERNS: Price control - - -

10 JUDGE PIGOTT: What - - -

11 MR. BERNS: - - - and lack of innovation.

12 JUDGE PIGOTT: What price are we
13 controlling?

14 MR. BERNS: I'll give you an example. In
15 this contract, for ten years, Nissan has the ticket.
16 If anybody wants to come in with a better car, they
17 not only have to match the car, they've got to beat
18 Nissan's price by ten percent, and then Nissan has
19 nine months to match. Now, who's going to come in
20 the market with that kind of a first-option
21 advantage?

22 JUDGE PIGOTT: You're saying that this
23 monopoly's going to prevent anyone from coming in
24 with a cheaper vehicle?

25 MR. BERNS: It likely will. Yes, that's

1 what monopolies do. That's what government - - -

2 JUDGE RIVERA: But they had the chance to
3 bid, did they not?

4 MR. BERNS: They had a cha - - -

5 JUDGE RIVERA: It's not quite the same as a
6 monopoly, in the sense that there's only one entity;
7 you didn't satisfy all the requirements there. The -
8 - - the - - the - - the - - the capitalist system
9 is given an opportunity to throw their hat in the
10 ring. And several did; it's not just Nissan,
11 correct?

12 MR. BERNS: This is - - - if the City wants
13 to authorize - - -

14 JUDGE RIVERA: It wasn't just Nissan,
15 correct?

16 MR. BERNS: If the City wants to authorize
17 - - -

18 JUDGE RIVERA: Was it just Nissan - - -

19 MR. BERNS: No, no - - -

20 JUDGE RIVERA: - - - who put their hat in
21 the ring?

22 MR. BERNS: - - - no, there was - - - there
23 were several bidders.

24 JUDGE RIVERA: No, so there was - - -

25 MR. BERNS: Yes, yes.

1 JUDGE RIVERA: - - - a process.

2 MR. BERNS: Yes. There was a process, and
3 I'm not arguing with the process. What I'm saying is
4 if the City wants public-private partnerships - - -

5 JUDGE RIVERA: Let me ask. What if they
6 entered - - -

7 MR. BERNS: - - - they have to authorize
8 it.

9 JUDGE RIVERA: - - - a two-year contract?

10 MR. BERNS: Excuse me?

11 JUDGE RIVERA: If they entered a two-year
12 instead of a ten-year contract.

13 MR. BERNS: Less of a problem.

14 JUDGE RIVERA: So it's the duration - - -

15 MR. BERNS: But you've got a - - -

16 JUDGE RIVERA: - - - that bothers you.

17 MR. BERNS: Ten years is a long time. It's
18 not an experiment.

19 JUDGE RIVERA: It's the duration?

20 MR. BERNS: It's not a pilot. This is not
21 the pilot. There's authorization for pilots. If you
22 get within the pilot, you're okay. This is not
23 limited duration, limit - - - this is the whole
24 market for ten years.

25 JUDGE ABDUS-SALAAM: Are you saying - - -

1 counsel, are you saying if it were less a period of
2 time, two years or eighteen months or a three-year
3 pilot, you wouldn't be here; you would wait to see
4 what happened?

5 MR. BERNS: I - - - I believe if you have
6 something that qualifies as a pilot, it's authorized
7 under 2303 Section - - - I think it's (b)(9).

8 CHIEF JUDGE LIPPMAN: Counsel, what if
9 there were two cars? Forget the - - - that - - - the
10 eight argument. Let's say there were two cars over
11 two years, okay?

12 MR. BERNS: Different manufacturers?

13 CHIEF JUDGE LIPPMAN: Yeah.

14 MR. BERNS: You might have more
15 competition. I think you'd have a tougher case.

16 CHIEF JUDGE LIPPMAN: So then what's the
17 differen - - -

18 MR. BERNS: You don't have that case, Your
19 Honor.

20 CHIEF JUDGE LIPPMAN: Then what's the
21 difference between the two and the eight?

22 MR. BERNS: The difference is it's - - -
23 you need to go - - - the legislature needs to make
24 this judgment as to whether - - -

25 CHIEF JUDGE LIPPMAN: No, no - - -

1 MR. BERNS: - - - they want this - - -

2 CHIEF JUDGE LIPPMAN: - - - but right now -

3 - -

4 MR. BERNS: - - - monopoly.

5 CHIEF JUDGE LIPPMAN: - - - they have a

6 choice - - - you have a choice of eight different

7 cars. What's the problem?

8 MR. BERNS: Only until the hy - - - they've

9 said they're going to have a hybrid this year, Your

10 Honor. You - - -

11 JUDGE RIVERA: Counselor, do you - - -

12 MR. BERNS: You - - -

13 JUDGE RIVERA: I'm sorry.

14 MR. BERNS: Oh, I'm sorry.

15 JUDGE RIVERA: I'm sorry. Please finish

16 your answer to the Chief.

17 MR. BERNS: Yes, I - - - if - - -

18 CHIEF JUDGE LIPPMAN: You don't - - -

19 bottom line; let's cut to the chase.

20 MR. BERNS: Yes.

21 CHIEF JUDGE LIPPMAN: You don't think it

22 gets them off the hook by allowing the seven other

23 hybrid cars - - -

24 MR. BERNS: No.

25 CHIEF JUDGE LIPPMAN: - - - to be chosen?

1 MR. BERNS: No, Your Honor. There is a - -
2 - if you look at the contract, the less-restrictive
3 alternative that satisfies Nissan's needs, and
4 satisfies the City, is right in the contract. It
5 says, if your - - - this court strikes down this
6 exclusivity - - - because that's what we're going
7 after, the ten-year exclusivity - - - they have to
8 write a tight standard. That's clearly within their
9 power to do, and it gets them everything they need.
10 You don't need to imply this power. It's a
11 legislative choice, not a - - -

12 CHIEF JUDGE LIPPMAN: Okay.

13 JUDGE RIVERA: Okay.

14 MR. BERNS: - - - administrative choice.

15 CHIEF JUDGE LIPPMAN: Judge Rivera, last
16 question.

17 JUDGE RIVERA: Yeah, I just want to - - -

18 CHIEF JUDGE LIPPMAN: Then you'll have
19 rebuttal.

20 JUDGE RIVERA: - - - go through this - - -

21 MR. BERNS: Okay.

22 JUDGE RIVERA: - - - issue about the - - -

23 CHIEF JUDGE LIPPMAN: Go ahead.

24 JUDGE RIVERA: - - - 2303(b)(9) that you
25 mentioned, about the innovation and the shorter - - -

1 MR. BERNS: Um-hum.

2 JUDGE RIVERA: - - - duration. So what
3 would be the point of the innovation - - -

4 MR. BERNS: The innovation is to - - -

5 JUDGE RIVERA: - - - if you're locking them
6 into a duration? Yes, but then they do that
7 innovation and then they decide, okay, we believe
8 choosing one vehicle, this standard, that's what we
9 need to do, and now we're going to enter the ten-year
10 contract.

11 MR. BERNS: Now you need the City charter,
12 you need that - - - at that point, the Council has to
13 pass a one-line statute that says, let them do a
14 sole-source deed.

15 JUDGE RIVERA: Where does the provision - -
16 where does the provision require that that innovation
17 subsequently be approved by a Council vote?

18 MR. BERNS: No, what - - - I'm not
19 suggesting that. What I'm saying, Your Honor, is the
20 authority in the existing statute is not broad enough
21 to let this regulator do sole sourcing.

22 JUDGE RIVERA: Okay.

23 CHIEF JUDGE LIPPMAN: Okay, counselor. Let
24 - - - you'll have rebuttal. Let's hear from the
25 respondents.

1 MS. FREEDMAN: Good afternoon, Your Honors.
2 May it please the court. My name is Elizabeth
3 Freedman, and I am appearing for the respondents, New
4 York City Taxi and Limousine Commission.

5 CHIEF JUDGE LIPPMAN: Counsel?

6 MS. FREEDMAN: Yes, Your Honor.

7 CHIEF JUDGE LIPPMAN: Can you make a
8 particularized contract with one vendor and say every
9 taxi has to buy that one car - - -

10 MS. FREEDMAN: Yes, Your Honor.

11 CHIEF JUDGE LIPPMAN: - - - at that one
12 price?

13 MS. FREEDMAN: Yes, Your Honor. All one
14 has to do is look at the enabling legislation, and
15 that's under the City Charter, Section 2300, which
16 provides for a overall - - - an overall public
17 transportation policy - - -

18 CHIEF JUDGE LIPPMAN: Yeah, yeah - - -

19 MS. FREEDMAN: - - - governing taxis.

20 CHIEF JUDGE LIPPMAN: - - - but this is a
21 particular contract with one vendor.

22 MS. FREEDMAN: It is a particular - - -

23 CHIEF JUDGE LIPPMAN: Why does that
24 represent - - -

25 MS. FREEDMAN: - - - after - - -

1 CHIEF JUDGE LIPPMAN: - - - an overall
2 policy?

3 MS. FREEDMAN: It represents an overall
4 policy because after the Ford - - - the Stretch Ford
5 Victoria was being discontinued, as well as one other
6 vehicle that was being discontinued - - -

7 CHIEF JUDGE LIPPMAN: Yeah, but you
8 weren't, at that time, saying you had to use a Crown
9 Vic, right?

10 MS. FREEDMAN: At that time, the
11 specifications were written so narrowly that ninety
12 percent of the fleet in 2005 was a - - -

13 CHIEF JUDGE LIPPMAN: But you didn't say -
14 - -

15 MS. FREEDMAN: - - - Stretch Ford Crown
16 Victoria.

17 CHIEF JUDGE LIPPMAN: - - - you have to use
18 a Crown Victoria?

19 MS. FREEDMAN: But actually, Your Honor, in
20 fact, the TLC consulted with Ford, and Ford came up
21 with the Stretch Crown Victoria for larger - - - a
22 larger capacity, larger leg room. And in fact, the
23 specifications, in effect, dictated that the Ford
24 Stretch Crown Victoria would be the only taxi in the
25 fleet that would meet those specifications.

1 JUDGE PIGOTT: Why wouldn't you - - why
2 wouldn't you do your specs and - and - and - and say
3 "or the equivalent", just add that to your - - -
4 because you're talking ten years. No one knows how
5 much gasoline's going to be. No one knows whether or
6 not there's going to be, you know, better, newer,
7 faster, cheaper ways of - - - of manufacturing cars
8 or - - - or making them easier. And you've kind of
9 boxed yourself in. You're - - - you're stuck with
10 Nissan for twenty years, if the price of gas goes to
11 twenty-five bucks a gallon, and they're going to have
12 to buy it. And so I think their point is, you know,
13 by - - - by tying yourself in, you're tying them in.
14 Is there - - - is that a bad argument?

15 MS. FREEDMAN: Actually, Your Honor, under
16 the contract, it lasts for ten years, but after five
17 years, in 2018, if a manufacturer or somebody else
18 comes up with a better alternative, and shows that
19 this is a superior vehicle, then Nissan has an
20 opportunity to match that, and that then Nissan can
21 then come up with a better vehicle, and if not, then
22 all bets are off - - -

23 JUDGE STEIN: You're saying that - - -

24 MS. FREEDMAN: - - - and the deal is over.

25 JUDGE STEIN: - - - you could - - -

1 MS. FREEDMAN: So it's actually not really
2 the ten year; somebody could match it within five
3 years.

4 JUDGE RIVERA: You're saying you're locked
5 to five.

6 MS. FREEDMAN: Well - - -

7 JUDGE RIVERA: And if, at that period of
8 time, a competitor comes forward and says, I can do
9 it better, this is what I've got, and Nissan cannot
10 compete with that - - -

11 MS. FREEDMAN: If they can - - -

12 JUDGE RIVERA: - - - then you can get out
13 of this contract?

14 MS. FREEDMAN: Yes, that's right, Your
15 Honor.

16 JUDGE STEIN: And this could - - -

17 MS. FREEDMAN: And another vehicle could
18 come along and be the - - - the official taxicab
19 vehicle - - -

20 JUDGE STEIN: And you're saying that you
21 couldn't - - -

22 MS. FREEDMAN: - - - or be adopted.

23 JUDGE STEIN: - - - get a manufacturer to
24 put in the time, effort and - - - and investment into
25 creating this vehicle unless you gave them a period

1 of time in which they would know that they would have
2 the right of exclusivity?

3 MS. FREEDMAN: Absolutely, Your Honor.

4 CHIEF JUDGE LIPPMAN: Counsel, but in
5 response to the question that Judge Pigott asked you,
6 is it your position that by allowing these seven
7 hybrids that that's the equivalent of saying "or the
8 equivalent"?

9 MS. FREEDMAN: It's actually three approved
10 hybrids - - -

11 CHIEF JUDGE LIPPMAN: Whatever it is.

12 MS. FREEDMAN: - - - so right now there are
13 three approved hybrids.

14 CHIEF JUDGE LIPPMAN: Is it your view that
15 that basically is like saying "or the equivalent"?

16 MS. FREEDMAN: In the contract or in the
17 rules?

18 CHIEF JUDGE LIPPMAN: In allowing them to
19 buy these other cars that would meet your
20 specifications, is that equal to "or the equivalent"?
21 In your mind, is that one of the arguments you're
22 making, that you're saying buy this car - - -

23 MS. FREEDMAN: Or - - -

24 CHIEF JUDGE LIPPMAN: - - - or the
25 equivalent, which are these three or seven - - -

1 MS. FREEDMAN: I - - -

2 CHIEF JUDGE LIPPMAN: - - - or six others.

3 MS. FREEDMAN: Just to - - -

4 CHIEF JUDGE LIPPMAN: Is that an argument
5 that you're making?

6 MS. FREEDMAN: To give the rider the most -
7 - - in the hybrids, the most - - - the same
8 experience as riding in the official taxicab - - -

9 CHIEF JUDGE LIPPMAN: Okay. So, but I'm -
10 - -

11 MS. FREEDMAN: - - - the Nissan NV200.

12 CHIEF JUDGE LIPPMAN: - - - I'm trying to
13 get what your argument is. Is it that you're not
14 really saying - - - and don't let me put words in
15 your mouth; I want to know your answer - - - you're
16 not really saying you must pick this car; you're
17 saying you must pick this car or these others that
18 will be - - - will do just as well?

19 MS. FREEDMAN: Yes. Yeah, you - - -

20 CHIEF JUDGE LIPPMAN: So that's what - - -

21 MS. FREEDMAN: - - - have a choice.

22 CHIEF JUDGE LIPPMAN: - - - your - - -

23 MS. FREEDMAN: Yes.

24 CHIEF JUDGE LIPPMAN: Okay.

25 MS. FREEDMAN: You have a choice of the

1 Nissan NV200 taxi or any one of the three approved
2 hybrid vehicles.

3 JUDGE PIGOTT: Wait, there's hy - - -

4 JUDGE ABDUS-SALAAM: That's now. I'm
5 sorry.

6 JUDGE PIGOTT: No, I was going to say
7 there's hybrids and then there's the nonhybrids,
8 right?

9 MS. FREEDMAN: And nonhybrids are not an
10 option except as to the wheelchair accessible
11 vehicles. So there is an exception for wheelchair
12 accessible vehicles.

13 JUDGE PIGOTT: So in the nonhybrids, you're
14 stuck - - - I shouldn't say stuck, but you buy the
15 Nissan or you don't - - - or you don't be - - you
16 don't have a taxi.

17 MS. FREEDMAN: Well, there are - - - you
18 can buy - - - right, exactly. You can buy the NV200
19 taxi as a nonhybrid. You can buy a wheelchair
20 accessible vehicle; up to a certain number can be a
21 non-Nissan.

22 JUDGE PIGOTT: I'm just kind of looking at
23 the vanilla taxi.

24 MS. FREEDMAN: And - - -

25 JUDGE PIGOTT: You're saying the only

1 vanilla taxi we've got is the Nissan; buy it or
2 you're not a taxi driver anymore.

3 MS. FREEDMAN: Without - - - without being
4 - - - without getting the hybrid vehicle, that's
5 right.

6 JUDGE FAHEY: And that's - - -

7 MS. FREEDMAN: So you do - - -

8 JUDGE FAHEY: - - - almost 11,000 of the
9 13,000 medallions, roughly, right?

10 MS. FREEDMAN: That's right. That's - - -

11 JUDGE FAHEY: So that's the vast majority.

12 MS. FREEDMAN: Of the - - - the gasoline
13 vehicles. Well, actually, the hybrids are very
14 popular, and there can be any number of hybrids that
15 are bought. It depends upon what the medallion owner
16 - - -

17 JUDGE ABDUS-SALAAM: But that's now. Your
18 adversary says when Nissan develops a hybrid, then
19 they - - - then you have to go to Nissan for the
20 hybrid as well as the gas.

21 MS. FREEDMAN: Well, pursuant to a contract
22 provision, in December - - - there was an amendment
23 to the vehicle supply agreement, in December 2014,
24 and in that vehicle supply agreement, Nissan has
25 waived exclusivity with respect to the hybrid

1 vehicles. And I believe the reason is that it's not
2 clear that - - -

3 JUDGE PIGOTT: Let's get away from - - -

4 MS. FREEDMAN: - - - Nissan now will - - -

5 JUDGE PIGOTT: Judge - - -

6 MS. FREEDMAN: - - - build a hybrid.

7 JUDGE PIGOTT: Judge Fahey points out that
8 that's a minor part of this whole thing, and we're
9 talking - - - I forget what his number was, but
10 thousands and thousands of gas - - - gas vehicles.
11 And you're saying they're all going to look alike.
12 Every single one of them's going to be this Nissan
13 200.

14 MS. FREEDMAN: Or an approved hybrid
15 vehicle.

16 JUDGE PIGOTT: Forget the hybrids.

17 MS. FREEDMAN: Okay.

18 JUDGE PIGOTT: And so these gas vehicles
19 are all going to be the same, and you've made that
20 decision. And I think what the argument here is that
21 - - - that, A, you shouldn't be buying them; you
22 should be regulating. And that's why I thought if
23 you had an "or the equivalent" so that if a - - - if
24 a taxi driver came in and said guess what, you know,
25 I just - - - just new on the market is a vehicle

1 that's better, you know, gets better gas mileage,
2 more comfortable, and I want to - - - I want to use
3 that as my taxi, you're going to say it's against the
4 law to do that.

5 MS. FREEDMAN: Well, they can do that in
6 2018. They can come forward with a better vehicle.
7 But the problem with - - -

8 JUDGE PIGOTT: No, no, no; I'm talking
9 about a taxi driver today - - -

10 MS. FREEDMAN: Today.

11 JUDGE PIGOTT: - - - who says, you know,
12 they want to charge me - - - I forget what you're
13 charging for these things, but they can get a newer,
14 better, cheaper, faster cab, and they're saying this
15 is what I need; I need - - - you know, I need this -
16 - - it gives me more money. And you're saying you
17 are ill - - - it is illegal for you; you will be
18 breaking the law if you exercise free enterprise when
19 it comes to buying a taxi in the City of New York.

20 MS. FREEDMAN: Well, it's true that if you
21 want to buy a nonhybrid vehicle, when the Taxi of
22 Tomorrow rule is the official taxicab vehicle is the
23 official vehicle - - -

24 JUDGE PIGOTT: You're saying - - -

25 MS. FREEDMAN: - - - for a gasoline vehicle

1 - - -

2 JUDGE PIGOTT: You're saying that - - -

3 MS. FREEDMAN: - - - you are saying - - -

4 JUDGE PIGOTT: - - - but please stick with
5 me.

6 MS. FREEDMAN: Okay.

7 JUDGE PIGOTT: Let's forget the hybrids.
8 Let's pretend they're not even here; we blew them up.

9 MS. FREEDMAN: Okay.

10 JUDGE PIGOTT: All right? Now you've got
11 10,000 gas ones. They're all going to be the same,
12 and no matter what anyone says about getting a better
13 car, a faster car, a cheaper car, a more comfortable
14 car, a self-driving car, a car that works with Uber -
15 what - - whatever they want to do, they cannot do it
16 because you've said this is the car; you want to go
17 out and take a look at it? It's identical to every
18 single other one.

19 MS. FREEDMAN: Because pursuant to the
20 vehicle supply agreement, yes, this is the agreement
21 that Nissan - - -

22 CHIEF JUDGE LIPPMAN: So - - -

23 MS. FREEDMAN: And in order to effectuate
24 this broad public transportation policy, which is
25 presumably - - -

1 CHIEF JUDGE LIPPMAN: Well, what are you -
2 - - pursuant to what are you doing this? Is this
3 rule-making? Is this policy-making? Do you have the
4 specific authority from the legislature?

5 MS. FREEDMAN: Absolutely, Your Honor. And
6 all one has to do is look to the City Charter. It's
7 Section - - -

8 CHIEF JUDGE LIPPMAN: So policy-making - -
9 -

10 MS. FREEDMAN: Here's - - -

11 CHIEF JUDGE LIPPMAN: - - - the broad
12 policy-making - - -

13 MS. FREEDMAN: Yes.

14 CHIEF JUDGE LIPPMAN: - - - function means
15 you can make a contract with one vendor and say
16 everyone has to meet it at one price.

17 MS. FREEDMAN: Well, what it is is that,
18 yes, the - - - that policy, and it's a very broad
19 policy; it's under Section - - -

20 JUDGE ABDUS-SALAAM: Well, how broad is it,
21 counsel?

22 MS. FREEDMAN: - - - 2303 of the Charter -
23 - -

24 JUDGE ABDUS-SALAAM: I'm concerned - - -

25 MS. FREEDMAN: - - - very broad policy-

1 making - - -

2 JUDGE ABDUS-SALAAM: - - - about how broad

3 - - -

4 MS. FREEDMAN: - - - which was delegated by
5 the City Council.

6 I'm sorry, Your Honor.

7 JUDGE ABDUS-SALAAM: I'm concerned about
8 how broad. How broad is the po - - - there are no
9 limits at all?

10 MS. FREEDMAN: It's very broad. In fact,
11 the taxi industry has been historically regulated
12 down to the inch, down to the color of the car, down
13 to where the medallions are placed.

14 JUDGE RIVERA: But - but - but the
15 policy - - - I think Judge Abdus-Salaam is asking
16 you, in terms of the statute, is there's a delegation
17 of authority here with respect to the policy-making
18 power of this entity. And I think my colleague is
19 asking about within the statute, right?

20 MS. FREEDMAN: Yes.

21 JUDGE RIVERA: And within the statute, it
22 is, as your adversary suggests, about particular
23 standards.

24 MS. FREEDMAN: It is about standards, and
25 those standards were set so - - - in conjunction with

1 Nissan, to create the best possible taxicab vehicle.

2 CHIEF JUDGE LIPPMAN: How does this differ
3 from some our cases, like the sugary soda business,
4 the smoking? How - - - how is this different, what
5 you're doing? Why is it okay, while - - - while in
6 some of those other cases it was not okay and akin to
7 - - - was found to be akin to the legislative policy-
8 making role?

9 MS. FREEDMAN: Well, Your Honor, in those
10 cases, in the Boreali v. Axelrod and the New York
11 Statewide Coalition - - -

12 CHIEF JUDGE LIPPMAN: Sure.

13 MS. FREEDMAN: - - - of Hispanic Chambers
14 of Commerce - - -

15 CHIEF JUDGE LIPPMAN: Right.

16 MS. FREEDMAN: - - - those cases involved
17 complex balancing of public health considerations and
18 goals and matters of personal autonomy and social
19 life choices.

20 JUDGE ABDUS-SALAAM: So for that reason - -
21 -

22 MS. FREEDMAN: So one was smoking and one
23 was drinking sugary drinks.

24 JUDGE ABDUS-SALAAM: So for that reason,
25 counsel, the Department of Health could not have said

1 you can only buy Coke Zero?

2 MS. FREEDMAN: They could not - - - that
3 was basically the - - - the - - - and there was no
4 enabling legislation in those cases either, so there
5 was no broad mandate, like you have here, for the
6 Taxi and Limousine Commission - - -

7 JUDGE RIVERA: So there's policy - - -

8 MS. FREEDMAN: - - - so that's right.

9 JUDGE RIVERA: - - - and there's policy.
10 And this policy is related - - -

11 MS. FREEDMAN: The spec is specifically
12 set.

13 JUDGE RIVERA: - - - to particular types of
14 standards.

15 MS. FREEDMAN: Yes, specifically set in the
16 New York City Charter. And as this court said in
17 Hispanic Chambers of Commerce, there's no rigid
18 marching orders that the legislature has to proclaim
19 for this - - - for the Agency to promulgate its
20 rules.

21 JUDGE FAHEY: But New York - - -

22 MS. FREEDMAN: Here the rule - - -

23 JUDGE FAHEY: New York City Council can
24 tell a private person who they must contract with to
25 meet their specifications?

1 MS. FREEDMAN: It's not a contract, because
2 the contract was between DCAS - - - the contract was
3 between DCAS and Nissan. So the only thing that
4 binds the medallion owners - - -

5 JUDGE FAHEY: So they buy - - -

6 MS. FREEDMAN: - - - are the rules.

7 JUDGE FAHEY: Let me finish.

8 MS. FREEDMAN: Yes.

9 JUDGE FAHEY: So they buy the vehicles, and
10 then they tell the taxi medallion owner he must buy
11 the vehicle, correct?

12 MS. FREEDMAN: Yes.

13 JUDGE FAHEY: All right. So then you're
14 telling him what contract he should enter into.

15 MS. FREEDMAN: Yes, because this is not
16 private enterprise; this is a public - - -

17 JUDGE FAHEY: Well, slow down.

18 MS. FREEDMAN: - - - for-hire - - -

19 JUDGE FAHEY: Slow down. Slow - - -

20 MS. FREEDMAN: - - - vehicle.

21 JUDGE FAHEY: Slow down. I just want to
22 get the framework straight in my head. So you're
23 saying that that is not a restriction on his right to
24 contract; that this is a proper restriction in the
25 exercise of your regulatory functions?

1 MS. FREEDMAN: It is a proper exercise of
2 regulatory functions, pursuant - - -

3 JUDGE FAHEY: And going back to Judge - - -

4 MS. FREEDMAN: - - - to the mandate in the
5 City Charter.

6 JUDGE FAHEY: I'm sorry; I don't mean to be
7 rude.

8 MS. FREEDMAN: I'm sorry. But pursuant to
9 the broad mandate and the public purpose, and the
10 public purpose of the taxi industry, which has been
11 so highly regulated for years, without any indication
12 from the City Council that the industry has been not
13 regulated in the manner that the City Council would
14 like. And that's another distinguishing feature of
15 the Boreali case - - -

16 CHIEF JUDGE LIPPMAN: Okay, counsel.

17 MS. FREEDMAN: - - - and Hispanic Chambers
18 of Commerce.

19 CHIEF JUDGE LIPPMAN: Let's get - - -

20 MS. FREEDMAN: Thank you, Your Honor.

21 CHIEF JUDGE LIPPMAN: - - - to your
22 colleague. Thank you.

23 MR. BRENNAN: Good afternoon. Peter
24 Brennan on behalf of the Nissan entities.

25 CHIEF JUDGE LIPPMAN: Counsel, do you have

1 a monopoly here? Do you have a monopoly?

2 MR. BRENNAN: We do not have a monopoly,
3 because - - -

4 CHIEF JUDGE LIPPMAN: Why not? Why not?

5 MR. BRENNAN: Because there's the issue
6 that they could have the hybrids. But if we did have
7 - - -

8 CHIEF JUDGE LIPPMAN: If they couldn't have
9 the hybrids, you'd have a monopoly?

10 MR. BRENNAN: If - - -

11 CHIEF JUDGE LIPPMAN: And would that be
12 okay or not okay?

13 MR. BRENNAN: It would be absolutely okay
14 to have the monopoly, and here's - - - here's why.

15 JUDGE FAHEY: So in the largest city in the
16 United States of America, a government-imposed
17 monopoly that tells one person - - - tells all
18 private businesses what vehicle they have to use - -
19 - not what specifications they have, but what vehicle
20 they must buy, you're saying that that's okay?

21 MR. BRENNAN: That's absolutely correct.
22 The Nissan NV200 never would have existed but for all
23 the actions undertaken - - -

24 JUDGE PIGOTT: Suppose it doesn't work?

25 MR. BRENNAN: - - - by the Taxi and

1 Limousine Commission.

2 JUDGE PIGOTT: Suppose it doesn't work?

3 MR. BRENNAN: It does work, and - - -

4 JUDGE PIGOTT: I understand that, but what
5 I'm suggesting is for ten years now, you're going to
6 - - - you're going to be making the same damn car,
7 and times are going to change, people are going to
8 change, all kinds of things are going to change, and
9 maybe the cabbies are going to say, I don't like this
10 car, for any number of reasons. And she's going to
11 say, tough, you're going to - - - you're going to
12 work with this car for the next eight-and-a-half
13 years, pal, so get used to it.

14 MR. BRENNAN: That could be true with any
15 specifications that you put - - -

16 JUDGE PIGOTT: Unless - - -

17 MR. BRENNAN: - - - that you put on - - -

18 JUDGE PIGOTT: Unless there are oth - - -

19 MR. BRENNAN: - - - that you put on any
20 vehicle. And in fact, on this one - - -

21 JUDGE PIGOTT: Can I finish?

22 MR. BRENNAN: Yes, of course.

23 JUDGE PIGOTT: Unless there are options,
24 right?

25 MR. BRENNAN: There are options. First of

1 all, there are options that five years in, if it
2 doesn't work, they - - - they can adjust as well.
3 There have also been adjustments that have been made
4 - - - even, for example, allowing the hybrids in,
5 which were not - - -

6 CHIEF JUDGE LIPPMAN: What about - - -

7 MR. BRENNAN: - - - which were not
8 originally envisioned.

9 CHIEF JUDGE LIPPMAN: What about the issue
10 of the Nissan hybrid? One of - - - one of the things
11 that could be argued makes this okay is that there
12 are choices. Assuming that it's not okay to pick the
13 one car for the ten years, or whatever it is, another
14 argument is there are choices; you have these
15 different hybrids that could be chosen. What about
16 this question that's been raised about what Nissan is
17 doing with the hybrid that matches the gas car. Are
18 you developing that? Have you given up developing
19 that? Have you signed - - - you've signed something
20 that says we - - - we don't need to have a monopoly
21 on the hybrid?

22 MR. BRENNAN: We - - -

23 CHIEF JUDGE LIPPMAN: What's the status of
24 that?

25 MR. BRENNAN: We have definitely signed

1 something that says, one, we don't need to build a
2 hybrid, and two, if we do build a hybrid, we will not
3 have a monopoly. So both of those things - - - both
4 of those things are true.

5 JUDGE READ: That was what, an amendment to
6 the contract?

7 JUDGE FAHEY: Is that the waiver of
8 exclusiv - - -

9 JUDGE READ: I'm sorry.

10 CHIEF JUDGE LIPPMAN: Judge Read, then
11 Judge Fahey. Go - - -

12 JUDGE READ: That was an amendment to the
13 contract?

14 MR. BRENNAN: That was an amendment to the
15 contract, correct.

16 JUDGE READ: This is the December 14th?

17 MR. BRENNAN: Correct. I believe that's
18 the date, yes.

19 CHIEF JUDGE LIPPMAN: Okay. Judge Fahey?

20 JUDGE FAHEY: No, that's okay; Judge
21 straightened it out.

22 CHIEF JUDGE LIPPMAN: Okay. So it's an
23 amendment to the contract, so it means you consider
24 yourself bound by that and the City is bound that it
25 doesn't matter, we're not going to insist upon our

1 hybrid; we understand people may buy other hybrids.

2 MR. BRENNAN: We absolutely understand.

3 CHIEF JUDGE LIPPMAN: I mean, that's the
4 effect of it?

5 MR. BRENNAN: Absolutely. We understand
6 other people may buy hybrids - - -

7 JUDGE RIVERA: But - - -

8 MR. BRENNAN: - - - and they understand
9 that we - - - we are not committing to build a
10 hybrid.

11 JUDGE RIVERA: But to clarify. I believe
12 where you started with is the - - - the monopoly's
13 okay, it's not really a monopoly. But I - - - I
14 thought your point was also what you have developed
15 is responsive to what Taxi and Limo came up with, so
16 they have set the standards.

17 MR. BRENNAN: That's - - -

18 JUDGE RIVERA: You competed with a bunch of
19 other entities, for lack of - businesses, to try and
20 meet what standards they set - - -

21 MR. BRENNAN: That - - -

22 JUDGE RIVERA: - - - and you got the golden
23 ring; you met it.

24 MR. BRENNAN: That is exactly correct. In
25 fact, we took it way beyond the standards that they

1 had set.

2 JUDGE RIVERA: Okay. So then - - -

3 MR. BRENNAN: So we ultimat - - -

4 JUDGE RIVERA: My question is, then, if
5 that is, then, the way this process has unfolded, why
6 is it, once they then give you the contract, you're
7 not in that monopoly framework? Because you seem to
8 say it's really not a monopoly, but even if it was,
9 that's okay. I want to get to the first part; it's
10 really not a monopoly.

11 MR. BRENNAN: Putting aside - - - putting
12 aside the hybrid issue - - -

13 JUDGE RIVERA: The competitive bidding
14 process to get you to the monopoly.

15 MR. BRENNAN: Absolutely. And no
16 manufacturer would ever spend the time - - - and in
17 fact, probably now - - - I can be certain now never
18 will spend the time to go - - - to go through this
19 process and spend all the time developing the car - -
20 -

21 JUDGE RIVERA: It depends on what the court
22 says.

23 MR. BRENNAN: - - - and then - - - correct
24 - - - and then - - - but either way, I'm not sure it
25 will happen again, Your Honor - - - and go through

1 all the process, spend fifty-plus million dollars
2 developing a car for a market where you might sell 2-
3 or 3,000 vehicles a year.

4 JUDGE PIGOTT: You might - - - you might be
5 the wrong - - -

6 MR. BRENNAN: This is versus the United
7 States market, which is fifteen million vehicles.
8 It's a very small segment, and obviously it's being
9 done because it's in New York City and it's a more
10 highlighted area than any place else.

11 CHIEF JUDGE LIPPMAN: Judge Pigott.

12 JUDGE PIGOTT: You might be the wrong
13 person to ask this, but I understand when - - - when,
14 you know, there's - - - there's a - - - a - a request
15 for bids and there's competitive bidding and stuff
16 when the City itself is buying it. I use street
17 sweepers, buses; they're buying them. So they say
18 we're buying them. All right? Here, they're not
19 buying them. What they're doing is they're saying
20 we're going to make people buy them. And that's a
21 little bit different, don't you - - - don't you
22 think, in terms of - - - of when we talk about a
23 monopoly or we talk about freedom of contract and
24 things like that, when we're saying to, as Judge
25 Fahey said, approximately 10 or 11,000 people, who

1 make their livelihood this way, we're just
2 eliminating every single choice you've got.

3 MR. BRENNAN: What they're doing is they're
4 granting all these people, the medallion holders, a
5 monopoly. And they're saying, in turn, for you - - -
6 for - - -

7 JUDGE PIGOTT: They get the monopoly?

8 MR. BRENNAN: Absolutely.

9 JUDGE PIGOTT: So they can - - -

10 MR. BRENNAN: Because the medallion hold -
11 - -

12 JUDGE PIGOTT: So they can break the
13 monopoly, because it's theirs.

14 MR. BRENNAN: No, the medallion holders get
15 a monopoly because they - - - they are allowed to
16 drive the vehicles in Manhattan as yellow taxis.

17 JUDGE PIGOTT: That's malevolent despot - -
18 -

19 MR. BRENNAN: No, and what they're saying -
20 - -

21 JUDGE PIGOTT: That's not a monopoly.

22 MR. BRENNAN: But - - - well, that's what
23 happens. That's what they - - - that's what the - -
24 -

25 JUDGE PIGOTT: Sir, if a monopoly - - - if

1 I've got a monopoly, I can break it. I can say I'm
2 not going to have my monopoly anymore. That's not
3 what these taxi people - - -

4 JUDGE FAHEY: Actually, it's not - - -

5 MR. BRENNAN: Well, what - - -

6 JUDGE FAHEY: It's not even a monopoly.
7 Slow down. I drove a cab, probably unlike anybody
8 else in this courtroom right now. I actually drove a
9 cab in the City of Buffalo. Now, that is not the
10 same as driving a cab in New York, but nonetheless, I
11 am in competition with every other cabdriver that's
12 out there when you're driving a cab, and every
13 cabdriver in the City of New York is in competition
14 with every other cabdriver when they're out there.

15 So it's not really a monopoly. And they
16 pay them almost a million dollars for each medallion.
17 So you have to purchase the right to compete. That's
18 the way I see it. So - - - so we can't get around
19 the question that way, so we have to go back to Judge
20 Pigott's question on the freedom to contract, because
21 I think that underlies the substance of the arguments
22 here today.

23 MR. BRENNAN: The tradeoff is when - - -
24 when you're given the right to do that, you also take
25 some regulation with it. And one of the regulations

1 is if the City develops standards, as they did, for a
2 first-rate, world-class vehicle - - - and this taxi -
3 - - and I don't have, obviously, time to go through
4 all of it, but it's in the brief - - -

5 JUDGE FAHEY: But I think we would concede
6 that.

7 MR. BRENNAN: - - - all the things - - -

8 JUDGE FAHEY: I honestly - - -

9 MR. BRENNAN: It's vastly - - -

10 JUDGE FAHEY: - - - would concede it.

11 MR. BRENNAN: - - - superior to any other
12 vehicle. And when that car is developed, they can
13 then say, you know what, for all the people who are
14 going to be riding, whether they're come - - -
15 they're people who live in town, or whether people
16 coming in from out of town, or just driving - - -
17 driving around, for all those people, we want them
18 going in first-class accommodations - - -

19 CHIEF JUDGE LIPPMAN: Counsel, I get - - -

20 MR. BRENNAN: - - - and that's - - - that's
21 the tradeoff.

22 CHIEF JUDGE LIPPMAN: Counsel, I get that,
23 but let's take this scenario that we're - - - we're
24 talking about now one step further. Could you say -
25 - - could the City say, putting aside the - - - the

1 Taxi and Limousine Commission having certain powers
2 and policy making, whatever you want to call it, can
3 we say, look, if you're going to have the privilege
4 of driving in Manhattan, we're going to let you come
5 in with a car, you can only drive your car? In other
6 words, it wasn't a taxi situation; it was, you know,
7 they've got all these things, the congestion, pricing
8 and the bridge. If you're going to come into
9 Manhattan, you have to have the most gas-efficient,
10 whatever - - - you know, ergonomic, whatever
11 standards you want to set, and say you must all buy a
12 particular Nissan or Ford, or whatever it is, in
13 order to drive in Manhattan. Is that okay, in the
14 same principle? What makes this okay? Because the
15 Limousine Commission has this broad policy mandate,
16 is that what makes this okay?

17 MR. BRENNAN: Well, that is what makes this
18 okay.

19 CHIEF JUDGE LIPPMAN: No, but as opposed to
20 if we said not just taxi medallion people, but you
21 want to come in, you want to pollute our air, you
22 have to drive a certain car. That's not okay, right?

23 MR. BRENNAN: That's a totally - - totally
24 different scenario - - -

25 CHIEF JUDGE LIPPMAN: Right.

1 MR. BRENNAN: - - - that implicates all
2 sorts of other - - -

3 CHIEF JUDGE LIPPMAN: Right.

4 MR. BRENNAN: - - - documents - - -

5 CHIEF JUDGE LIPPMAN: But - - - but - - -

6 MR. BRENNAN: - - - involving interstate
7 commerce just pops to mind.

8 CHIEF JUDGE LIPPMAN: But at first blush,
9 that's not okay, right? At first blush, that's
10 probably not okay?

11 MR. BRENNAN: I - - - I can't say one way
12 or the other, but there obviously would be - - -

13 CHIEF JUDGE LIPPMAN: What - - -

14 MR. BRENNAN: - - - would be issues with
15 that. And it's not something that's - - -

16 JUDGE RIVERA: Well, it's not part of a
17 public transportation system.

18 MR. BRENNAN: I'm sorry?

19 JUDGE RIVERA: It's not part of a public
20 transportation system.

21 MR. BRENNAN: Yeah, it's - - - yeah, and
22 it's certainly not cov - - - it's certainly not
23 covered by what the Taxi and Limousine Commission
24 regulate.

25 CHIEF JUDGE LIPPMAN: So what makes this

1 okay, because one, you're saying because they have
2 the privilege of driving a taxi - - -

3 MR. BRENNAN: And - - -

4 CHIEF JUDGE LIPPMAN: - - - a medallion,
5 right?

6 MR. BRENNAN: Correct.

7 CHIEF JUDGE LIPPMAN: And two, the Taxi and
8 Limousine Commission's broad oversight role, policy,
9 experimentation, everything else, standards - - -

10 MR. BRENNAN: Correct.

11 CHIEF JUDGE LIPPMAN: - - - those are the
12 two things that make it - - -

13 MR. BRENNAN: Correct, and all the - - -
14 all the things in the statute that they're allowed to
15 do, which is to improve - - - the whole idea is to
16 improve - - -

17 CHIEF JUDGE LIPPMAN: But you - - -

18 MR. BRENNAN: - - - taxi service for all
19 the - - -

20 CHIEF JUDGE LIPPMAN: But - - - but - - -

21 MR. BRENNAN: - - - constituencies. That's
22 why the amicus - - -

23 CHIEF JUDGE LIPPMAN: I - - -

24 MR. BRENNAN: - - - for many organizations
25 - - -

1 CHIEF JUDGE LIPPMAN: I get that.

2 MR. BRENNAN: - - - have been submitted.

3 CHIEF JUDGE LIPPMAN: But putting that all
4 aside, it helps your case a lot, right, that now
5 there are other choices beyond the gas - - - the one
6 gas car? Having the hybrids makes your case better,
7 stronger?

8 MR. BRENNAN: Our case is strong, in my
9 view, either way. The mandate is - - - is very
10 broad. The quality of this vehicle - - -

11 JUDGE ABDUS-SALAAM: Who designed the
12 mandate?

13 MR. BRENNAN: The quality - - - the quality
14 of this vehicle is so far superior - - -

15 CHIEF JUDGE LIPPMAN: Judge - - -

16 JUDGE ABDUS-SALAAM: Counsel, who - - -

17 CHIEF JUDGE LIPPMAN: Judge Abdus-Salaam?

18 JUDGE ABDUS-SALAAM: - - - decided the
19 mandate is not as broad as the City or the TLC says
20 it is? Are these cars built already? Or would you
21 be out of this market if they - - - if it's not the,
22 quote-unquote, "monopoly"?

23 MR. BRENNAN: Yeah, the car - - - the cars
24 are completely designed, so the fifty million dollars
25 that's already been spent for, you know, going

1 through and getting suspension and all the other
2 types of things that - - - that we got, which are
3 very complicated things that have to be designed for
4 a specific car, so that's al - - - that's already
5 been spent. Cars are built. You know, the cars
6 driving around in New York City - - - I've been in
7 them a couple of times in the City, and they are - -
8 - they are great, if I may say, but they - - - they
9 do exist, and many - - - many of them are built. I
10 think there's probably four or five hundred that are
11 built right now.

12 CHIEF JUDGE LIPPMAN: Okay.

13 JUDGE ABDUS-SALAAM: So you would be able
14 to - - -

15 CHIEF JUDGE LIPPMAN: I'm sorry. Judge
16 Abdus-Salaam?

17 JUDGE ABDUS-SALAAM: You would be able to
18 sell these cars that have already been designed if
19 the TLC - - - if we said the TLC could only issue
20 specifications and standards as opposed to ensuring
21 that Nissan would be the manufacturer of the car?

22 MR. BRENNAN: Well, we'd be able to - - -
23 we'd be able to, potentially, sell the - - - sell the
24 vehicles, no matter what. We've sold - - - we've
25 sold them already, at least in New York, as long as

1 they're on the - - - on the approved list.

2 JUDGE STEIN: Well, right now, if they
3 designed specifications that only met what you have
4 now designed, you'd be in the same position, wouldn't
5 you? I mean, you've already invested the fifty
6 million; I understand that. But from today forward,
7 you would be in the same position, at least for a
8 period of time, right?

9 MR. BRENNAN: But the car would not exist,
10 and the specifications - - - it's not as simple as
11 when they were talking about the Crown Victoria, when
12 that car had already been built, and they basically
13 said, well, it has to be this length, because that
14 was an extra length car. The specifications on this
15 are much more complicated. Yes, there's some things
16 you can specify. You can specify that it has to have
17 a sky roof type thing. You can specify certain
18 things - - -

19 JUDGE STEIN: But my point is - - -

20 MR. BRENNAN: - - - an ergonomic seat. But
21 things like suspension are not so easy to just
22 specify.

23 JUDGE STEIN: My point is that if - - - if
24 we were to knock down these - - - these rules, and
25 they were to then set a series of specifications, as

1 they did in the past, which was only met for a period
2 of years by the Crown Victoria, you would be the only
3 manufacturer, at this point in time, that could meet
4 those specifications.

5 MR. BRENNAN: Yeah, that - that - that
6 could be the case. I don't think you could do enough
7 specifications that you would come close to covering
8 all the engineering in this car - - -

9 JUDGE PIGOTT: All analogies - - -

10 MR. BRENNAN: - - - because - - - because
11 it is so complicated.

12 JUDGE PIGOTT: All analogies limp, but I
13 mean, if these people were running the airports down
14 there and decided we - - - you know, we've done a
15 study and we think everything has to be a Lockheed
16 1011, so we're not letting any airport - airplanes in
17 here that don't meet the specs of Lockheed, that
18 would be a problem.

19 MR. BRENNAN: It's - - - it's not - - -
20 it's just not the same situation. Here what they did
21 is they went - - - they said we wanted the best type
22 of vehicle. They went out with various - - -

23 JUDGE PIGOTT: That's what they - - -

24 MR. BRENNAN: - - - various goals for what
25 - - -

1 JUDGE PIGOTT: That's what they did with
2 Lockheed. If you stick to my analogy, that's what
3 they did; they said we studied them all. We studied
4 Airbus, we studied Boeing, we studied them all, we
5 looked at the seats, we looked at the thing, and
6 we've said Lockheed is the one we want landing in
7 JFK.

8 MR. BRENNAN: Yeah.

9 JUDGE PIGOTT: And so if you want to fly
10 into New York, get a Lockheed. I think people would
11 be upset.

12 MR. BRENNAN: That's - - - I agree people
13 would be upset, but that's a totally different - - -
14 that's a totally different situation, because - - -

15 JUDGE PIGOTT: Because?

16 MR. BRENNAN: Because - - - yeah, because
17 in that situation, you're restricting travel in and
18 out. In this case - - -

19 JUDGE PIGOTT: No, no, no, you're
20 restricting the purchase, is what I'm talking about.

21 MR. BRENNAN: No, no - - -

22 JUDGE PIGOTT: I realize - - -

23 MR. BRENNAN: You're doing a lot more than
24 that.

25 JUDGE PIGOTT: - - - that you're flying; I

1 realize that. But what I'm sugg - - - you're missing
2 my suggestion that if you wanted to buy a Ford or a
3 Chevy or something like that, they're saying TLC says
4 you can't do that, no matter how good they are,
5 because you've got to buy a Nissan.

6 MR. BRENNAN: Yeah, TL - - - TLC is saying
7 that we've looked at the cars that are available,
8 that we know the Nissan NV200 - - -

9 JUDGE PIGOTT: You don't see my analogy?
10 Okay.

11 MR. BRENNAN: Substantia - - -

12 JUDGE FAHEY: Can I just - - - can I - - -
13 is there any other city - - -

14 CHIEF JUDGE LIPPMAN: Judge Fahey, last
15 question.

16 JUDGE FAHEY: Thank you, Judge. Is there
17 any other city that you know of in the world that has
18 done something like this?

19 MR. BRENNAN: I do - - -

20 JUDGE FAHEY: Who restricted its market to
21 one type of - - - one brand of taxicabs?

22 MR. BRENNAN: I do know, for a long time,
23 obviously, in London, they basically had sort of the
24 iconic Lond - - - London taxi.

25 JUDGE FAHEY: Well - - -

1 MR. BRENNAN: What I don't - - - what I
2 don't know is what the restr - - - what the
3 restrictions were or were not in that. But I
4 certainly know if you went to London, for a long
5 time, there was basically one - - - one choice in
6 taxis.

7 CHIEF JUDGE LIPPMAN: Okay.

8 MR. BRENNAN: I do know, in markets, when I
9 was a little kid - - - and I grew up - - - although I
10 lived in New York for several years, when I was a
11 little kid in Chicago, you only saw the checkered tad
12 - - - cab.

13 CHIEF JUDGE LIPPMAN: Okay, counselor.

14 MR. BRENNAN: There was no other cab
15 available.

16 CHIEF JUDGE LIPPMAN: Counsel, thank you.

17 MR. BRENNAN: Okay. Thank you, Your Honor.

18 CHIEF JUDGE LIPPMAN: You're the rebuttal.

19 Counsel, what's the significance of your
20 adversary saying that you get the privilege of buying
21 the medallion, and therefore you have to, you know,
22 follow these rules that you're going to have the
23 medallion, then you're going to drive this kind of
24 car or one of a few kinds of cars. What - - - is
25 that significant?

1 MR. BERNS: If New York City wanted to do
2 that, the Council could do that.

3 CHIEF JUDGE LIPPMAN: Could do what?

4 MR. BERNS: But it hasn't.

5 CHIEF JUDGE LIPPMAN: Could do what?

6 MR. BERNS: Could authorize the TLC to
7 require all cabbies to use one cab.

8 JUDGE READ: Well, they also - - -

9 MR. BERNS: They could do that.

10 JUDGE READ: The Council could also do
11 something to restrict them from doing what they've
12 done too, right?

13 MR. BERNS: Sure.

14 JUDGE READ: Like they did in 2005.

15 MR. BERNS: They could, or they could - - -

16 JUDGE READ: But they haven't done that
17 either.

18 MR. BERNS: And nor have they passed a one-
19 line bill that says we love the NV200; let it go.

20 CHIEF JUDGE LIPPMAN: No, no, but - - -

21 MR. BERNS: They haven't done that either.

22 CHIEF JUDGE LIPPMAN: But you would agree
23 they have broad - - -

24 MR. BERNS: Policies.

25 CHIEF JUDGE LIPPMAN: - - - powers, so the

1 question is their broad powers, as - - - as Judge
2 Read says, the City Council hasn't said they can't do
3 it. If it fits within the broad powers, you are - -
4 - again, you're able to get these medallions to drive
5 in the City. They set standards. I understand
6 you're disagreeing whether they can say, here are the
7 standards and this is the only car that can meet it,
8 or we're authorizing the purchase of these cars. But
9 does it have, again, any importance that you choose
10 to get a medallion and to drive a car - - - a cab in
11 New York?

12 MR. BERNES: Your Honor, I think it comes
13 down to statutory authority. Our argument - - -

14 CHIEF JUDGE LIPPMAN: The bottom - - -

15 MR. BERNES: - - - begins and ends with the
16 statute.

17 CHIEF JUDGE LIPPMAN: Your bottom line is
18 their power is not broad enough to do that?

19 MR. BERNES: Policy power - - - the statute
20 says you have broad policy-making power, but here's
21 how we want you to implement. We want you to act
22 like a regulator, to set standards. Now - - -

23 JUDGE STEIN: So you don't oppose the
24 monopoly, you just oppose it being done without City
25 Council legislative authorization.

1 MR. BERNS: This is a pure question of
2 statutory authorization, Your Honor.

3 I would like to make one other point.

4 CHIEF JUDGE LIPPMAN: Let me get back to
5 one point, before you make one other point.

6 MR. BERNS: Sure.

7 CHIEF JUDGE LIPPMAN: Come back to the
8 issue that we discussed, that's sticking in my mind,
9 which is this idea of the other cars that they can -
10 - - that can be purchased, and your adversary says
11 that there's an assigned amendment to the agreement
12 that says don't worry about that, we're - - - we're
13 not holding anybody to that. The City is saying
14 we're not holding anybody to that. How do you get
15 around that? And I understand the argument where
16 there's more of the gas than the hybrid, but you
17 don't have one choice; you have four choices or seven
18 choices. How do you get around that?

19 MR. BERNS: Your Honor, that's not in the
20 regulations. Tomorrow they could change the contract
21 again. That's a private deal - - -

22 CHIEF JUDGE LIPPMAN: So the contract
23 amendment doesn't mean anything?

24 MR. BERNS: The contract amendment
25 demonstrates the point that - - -

1 CHIEF JUDGE LIPPMAN: But it bind - - -

2 MR. BERNS: - - - they're jumping into a
3 new role.

4 CHIEF JUDGE LIPPMAN: But does it bind - -
5 -

6 MR. BERNS: It's not authorized.

7 CHIEF JUDGE LIPPMAN: - - - bind the two of
8 them?

9 MR. BERNS: Until tomorrow when they change
10 it.

11 CHIEF JUDGE LIPPMAN: Yeah, but we're
12 dealing with today what exists.

13 MR. BERNS: What exists today in your
14 record is the hybrid option stops when there's - - -
15 there's a Nissan hybrid. And you did not get an
16 answer to your question as to when that's going to
17 happen.

18 JUDGE PIGOTT: So you're saying - - -

19 MR. BERNS: You did not get an answer to
20 that question.

21 JUDGE PIGOTT: You're not saying this is a
22 good deal or a bad deal; you're just saying they
23 can't make this deal.

24 MR. BERNS: That's the idea. And whatever
25 this court does, this car is not going away. It

1 could be a great car. I take Mr. Brennan at his
2 word. It could be a terrific car. If so, it'll do
3 fine in the market. This is a global taxi designed
4 to a New York standard. You know what their motto
5 is? It's right in the record; pure Frank Sinatra:
6 if it can make it here, it can make it anywhere.
7 This car's not going away, and if it's as great as he
8 says - - -

9 JUDGE RIVERA: So since it's not - - -

10 MR. BERNS: - - - it's going to be sold
11 whatever you do.

12 JUDGE RIVERA: Okay.

13 MR. BERNS: The question here is - - -

14 JUDGE RIVERA: Okay. Counsel - - -

15 MR. BERNS: - - - is is it - - - is it - -

16 -

17 JUDGE RIVERA: Counsel - - -

18 MR. BERNS: Excuse me.

19 CHIEF JUDGE LIPPMAN: Judge Rivera.

20 JUDGE RIVERA: Counsel - - -

21 MR. BERNS: I'm sorry.

22 JUDGE RIVERA: - - - just clarify again,
23 because I'm still - - - I understand their argument;
24 I'm not understanding yours. You agree that they
25 have broad authority to develop a policy on

1 standards; you do not object to this. You concede
2 this?

3 MR. BERNS: Fully.

4 JUDGE RIVERA: Okay. So why is that choice
5 of having one particular model, with particular
6 specs, not a standard that's pursuant to this policy?

7 MR. BERNS: Because they put out a list
8 saying, this car meets our spec, and then they closed
9 the window for ten years. That's the big difference.

10 JUDGE RIVERA: Okay. But that's like
11 saying I set a standard for the brakes being X, Y,
12 and Z, and that's the standard until I change it.

13 MR. BERNS: No, no, no.

14 JUDGE RIVERA: And I might not change it
15 for three decades.

16 MR. BERNS: I'm not saying change the
17 standard; I'm saying they - - - they're not - - - I'm
18 not talking about changing the standard. I'm saying
19 - - -

20 JUDGE RIVERA: No, they've chosen their
21 standard.

22 MR. BERNS: Right.

23 JUDGE RIVERA: They say - - - they are
24 arguing - - - let's see where we go. They are
25 arguing the point of that standard is pursuant to

1 setting a policy for public transportation.

2 MR. BERNS: If you're saying - - -

3 JUDGE RIVERA: Why is it not meet the
4 framework of 2300?

5 MR. BERNS: Because if you're saying they
6 can set a standard that says our standard is this car
7 - - - that is, let's say they set a spec, so - - -

8 JUDGE RIVERA: Our standard are these
9 specs.

10 MR. BERNS: I - - -

11 JUDGE RIVERA: We bid out.

12 MR. BERNS: I - - - my argument is - - -

13 JUDGE RIVERA: This is who won and met the
14 specs.

15 MR. BERNS: Right.

16 JUDGE RIVERA: All of you, who are
17 fortunate enough to have a million dollars to have a
18 medallion, can go and get this cab and drive and make
19 a lot of money on the road.

20 MR. BERNS: My argument is if they set a
21 standard that has various engineering dimensions, all
22 that, and they say also, in our standard, it has to
23 have a Nissan nameplate, that's arbitrary. And if
24 they get around this - - -

25 JUDGE RIVERA: Is that what concerns you,

1 the Nissan nameplate?

2 MR. BERNS: No. No, what I'm saying, Your
3 Honor, is at some point, stan - - -

4 JUDGE STEIN: Are you saying the City
5 Council could do that - - -

6 MR. BERNS: City Council - - -

7 JUDGE STEIN: - - - say that you have to
8 have - - -

9 MR. BERNS: - - - could - - -

10 JUDGE STEIN: - - - a Nissan nameplate?

11 MR. BERNS: If City Council wants a
12 public-private partnership here, they could do that.

13 CHIEF JUDGE LIPPMAN: But could the City
14 Council give them the right to say - - -

15 JUDGE RIVERA: Haven't they delegated that
16 authority?

17 CHIEF JUDGE LIPPMAN: - - - you've got a
18 Nissan nameplate - - -

19 MR. BERNS: Yes, it could. They haven't;
20 that's the point.

21 JUDGE RIVERA: But then what is this
22 language about policy setting of standards?

23 MR. BERNS: Poli - - - the City Council has
24 also said how you're supposed to implement your
25 policy. It's very restrictive as to how you're

1 supposed to implement policy.

2 CHIEF JUDGE LIPPMAN: Yeah, but come back
3 to the question before that this is a very highly
4 publicized program. City Council knows exactly what
5 they're doing. By any standard, they have a broad
6 mandate. You're saying the mandate is not broad
7 enough to allow them to say put the Nissan nameplate
8 on it. Why is the City Council just doing nothing
9 about it if they didn't think they had given them the
10 authority?

11 MR. BERNS: Your Honor, it's always
12 extremely hard to read tea leaves into what a
13 legislature does or does not do.

14 CHIEF JUDGE LIPPMAN: I give you that.

15 MR. BERNS: What you have is a sta - - -

16 CHIEF JUDGE LIPPMAN: Go ahead.

17 MR. BERNS: What you have is - - - what you
18 have is the statutory language. Whether or not the
19 City Council or a City councilman has come into court
20 saying, you know, I think this is a good idea or bad
21 idea, that's - - - you - - - you will be chasing your
22 tail if you go after that. You have to - - - the
23 only thing you really have is, what did the
24 collective body do? What the collective body did is
25 it passed a statute. And there's a reason we - - -

1 we pay attention to - - -

2 JUDGE READ: And the statute has broad
3 wording in it, and the only thing the City Council
4 has ever constrained them from doing, without its
5 approval, is increasing the number of medallions.

6 MR. BERNS: They've never tried to sole
7 source before. They've never tried to sole source
8 for ten years, Your Honor. This court has paid a lot
9 of attention - - -

10 JUDGE READ: So the City Council would have
11 to give specific authority, in addition to the broad
12 authority that the TLC already has, to say, yes, you
13 can enter into a sole-source contract?

14 MR. BERNS: Yes, you can act other than a
15 regula - - - as a traditional regulator.

16 CHIEF JUDGE LIPPMAN: That would not be
17 micromanaging - - -

18 MR. BERNS: No, Your Honor.

19 CHIEF JUDGE LIPPMAN: - - - a regulator
20 who's given this broad authority over what - - -

21 MR. BERNS: Go - - -

22 CHIEF JUDGE LIPPMAN: - - - they setting
23 standards - - -

24 MR. BERNS: Go - - -

25 CHIEF JUDGE LIPPMAN: - - - all the other

1 things that they've done.

2 MR. BERNS: Look at what sole sourcing
3 involves; it's a whole different kettle of fish than
4 acting as a traditional regulator that sets rules at
5 arm's distance and regulates parties. This is a
6 partnership. It's putting them in - - - in the same
7 arrangement for ten years with a partner. They're
8 here together.

9 CHIEF JUDGE LIPPMAN: Okay, counselor.

10 MR. BERNS: That's the issue.

11 CHIEF JUDGE LIPPMAN: We understand all of
12 your arguments. Thank you so much.

13 MR. BERNS: Thank you.

14 CHIEF JUDGE LIPPMAN: Thank you all.
15 Appreciate it.

16 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of Greater New York Taxi Association v. New York City Taxi and Limousine Commission, No. 120, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

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