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Dear Mr. Hickman:

You asked me to evaluate the potential success of claims asserted under the Takings Clause by owners of taxicab medallions against municipal governments that allow ridesharing services to operate within their jurisdiction. As shown below, owners of taxicab medallions have no viable Takings Clause claim against municipalities that permit companies such as Uber or Lyft to operate or do not otherwise prohibit them from doing so.

Using a mobile phone application, ridesharing services such as Uber connect passengers to taxicabs and black cars as well as personal automobiles driven by their owner. The competition posed by this new technology has caused tremendous turmoil within the taxicab industry. Taxicab drivers in cities in the United States and Europe have protested – sometimes with violence – against ridesharing companies and their drivers. Taxicab companies and medallion owners have filed federal lawsuits against Uber in cities including Boston, Chicago, Seattle, and Houston. These parties have also filed lawsuits against municipalities themselves, including Boston and New York City. All of these lawsuits are about economic competition and they highlight the tension caused by innovation when it threatens preexisting businesses. These lawsuits are also highly unlikely to succeed.

Some medallion owners have argued that municipalities violate the U.S. Constitution's Takings Clause by allowing ridesharing services to operate. The Takings Clause, which is part of the Fifth Amendment, states that private property shall not be "taken for public use without just compensation."[1] These medallion owners contend that they have a property interest in city-issued medallions and that the value of this property is diminished when cities permit ridesharing services to operate without having to purchase medallions. Allowing ridesharing services to operate, these owners argue, violates their exclusive right to operate taxicabs in those cities, requiring that they receive just compensation pursuant to the Takings Clause. The plaintiffs

[1] In rulings in 1954, 1984, and 2005, the Supreme Court has construed "public use" so broadly that for all intents and purposes it has little force.

assert this argument, for example, in *Boston Taxi Owners Association, Inc., Raphael Ophir, and Joseph Pierre v. City of Boston, et al.,* Civil Action Number 15-10100-NMG, filed in the federal court in Massachusetts in January 2015. On February 5, 2015, the federal judge handling this case denied the plaintiffs' emergency motion for a preliminary injunction, finding an ultimate unlikelihood of success on the merits.

Prior to 1922, the Takings Clause applied only to physical takings but that year, the Supreme Court recognized that certain government regulations affecting the value of property could be considered a taking if the impact reached a certain level.[2] Interests in intangible property can be subject to protection under the Takings Clause.

In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the Supreme Court provided guidance as to what constituted a regulatory taking requiring compensation. After recognizing that there is no "set formula" for what are "essentially *ad hoc*, factual inquiries," the Court identified several significant relevant factors: "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[3] In this case, the Supreme Court upheld a landmark preservation law used to reject approval to build a 53-story building atop Grand Central Terminal against Penn Central's takings claim after noting that the law "has a more severe impact on some landowners than on others, but that, in itself, does not mean that the law effects a 'taking'" and that Penn Central could still make a "reasonable return" on its continued use of Grand Central Terminal as a rail station with space for offices and concessions.[4]

Several factors preclude taxicab medallion owners from prevailing on a regulatory takings claim. First, these plaintiffs would need to advance a novel argument highly unlikely to succeed: that government non-regulation – *not* requiring ridesharing services to obtain a medallion – is a taking as to medallion owners. The court explicitly rejected this theory in denying the preliminary injunction in *Boston Taxi Owners Association,* finding that to the contrary, "the government must act affirmatively to warrant the application of the Takings Clause."[5]

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[2] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (finding Pennsylvania's Kohler Act, which prohibited miners from extracting below-surface coal that supported surface- level buildings, to be a violation of the Takings Clause); *see also Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (declining to find that a city regulation violated the Takings Clause).

[3] *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978) (citations omitted).

[4] *Id.*, 438 U.S. at 133, 136.

[5] *Boston Taxi Owners Association,* Memorandum & Order dated February 5, 2015, pp. 13-14, citing *Nicholson v. United States*, 77 Fed. Cl. 605, 620 (2007) ("The Court [of Federal Claims] has consistently required that an affirmative action on the part of the [g]overnment form the basis of the alleged taking.") and *Valles v. Pima Cnty.*,

Second, owners do not have a protected property interest in the secondary market value of their medallions. The Eighth Circuit addressed this matter in 2009 in connection with a lawsuit against the City of Minneapolis, acknowledging that the city's increase in the number of medallions may diminish their market value but that "any property interest" that owners "may possess does not extend to the market value of the taxicab licenses derived through the closed nature of the City's taxicab market." The Supreme Court declined to review the Eighth Circuit's ruling.[6]

Third, medallion contracts typically do not warrant future market value, guarantee any return on investment, or contain language prohibiting the issuing city from changing their regulations and requirements. Some medallion purchase documents explicitly warn of the possibility of regulatory changes to increase the number of medallions. Purchasing a taxicab medallion does not entitle the buyer to "an unalterable monopoly" over the taxicab or overall for-hire transportation market.[7] As the Court observed in denying a preliminary injunction in *Boston Taxi Owners Association,* "Medallion owners must be cognizant of the possibility that new regulations or a decision to enforce [rules] by the City can alter the market value of a medallion."[8] A medallion allows its holder to operate a taxicab in the issuing city; it does not entitle the holder to any secondary market value on that medallion nor does it require the city to limit the number of medallions it offers.

Instead, as the Fifth Circuit noted in 2012, a taxicab medallion is a "privilege" that exists as a direct "product of a regulatory scheme that vested the [c]ity with broad discretion to alter or extinguish that interest[.]"[9] "[A] protected property interest simply cannot arise in an area voluntarily entered into . . . which, from the start, is subject to pervasive [g]overnment control, because the government's ability to regulate in the area means an individual cannot be said to possess the right to exclude.")[10] As the Federal Circuit Court of Appeals noted in 2005, "[quota holders] have no legally protected right against the government's making changes in the underlying program and no right to compensation for the loss in value resulting from those changes" because "[q]uotas are property, but they are a form of property that is subject to alteration or elimination by changes in the government program that gave them value").[11] And,

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776 F. Supp. 2d 995, 1003 (D. Ariz. 2011) (discussing plaintiffs' failure to cite to any case law that supports the proposition that government inaction can amount to a taking).

[6] *Minneapolis Taxi Owners Coal., Inc. v. City of Minneapolis*, 572 F.3d 502, 509 (8th Cir. 2009) (cert. denied, February 22, 2010); *see also Rogers Truck line, Inc. v. U.S.*, 14 Cl. Ct. 108, 109-112 (1987) (rejecting a claim by owners of special trucking licenses, after Congress lifted the limit on their number with a resulting decrease in their resale value, by holding that the owners did not have a constitutionally protected property interest in the value of those licenses on the secondary market).

[7] *Minneapolis Taxi Owners*, 572 F.3d at 508.

[8] *Boston Taxi Owners Association,* Memorandum & Order dated February 5, 2015, p. 13, citing *Maine Educ. Ass'n Benefits Trust v. Cioppa*, 695 F.3d 145, 154 (1st Cir. 2012).

[9] *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 273-74 (5th Cir. 2012).

[10] *Id.* at 272 (citations and internal quotations omitted).

[11] *Members of Peanut Quota Holders, et. al., v. U.S*, 421 F.3d 1323, 1334 (Fed. Cir. 2005).

as a corollary to that, the Supreme Court has held that there is no property interest in the continuation of a certain regulatory scheme, the new rights could be created, or old ones abolished, despite the fact that expectations may be upset.[12]

Fourth, even if medallion owners could make a successful regulatory takings claim on its face, the Supreme Court has set a very high standard as to when compensation is appropriate: the property owner must be deprived of all beneficial use of the property, unless that owner's proposed use was prohibited by principles of property or nuisance law in existence at the time of acquisition.[13] Here, taxicab medallion owners can and will still make a "reasonable return" on their investment, even if the secondary market value of their medallions is drastically diminished due to the competition by ridesharing services such as Uber and even if the profits from taking street hails diminishes due to that competition as well. The Supreme Court noted in 1987, in rejecting a regulatory takings claim where property owners could continue to engage profitably in their business, "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."[14] Pursuant to *Penn Central Transportation*, the analysis is performed on a case-by-case basis, but the Supreme Court has long required a very high standard of loss. In 1915, the Supreme Court rejected a property owner's argument that a city regulation resulting in an approximately 90% loss of value violated the Takings Clause. While a 2001 Supreme Court case indicates a willingness to consider whether a property owner left with a token of value in his or her property can assert a total regulatory taking, the Court declined to expand on the statement for procedural reasons.[15] The very high standard of *Penn Central Transportation*, *Lucas*, and other cases holds that total or very-near total loss must take place in order to receive compensation for a regulatory taking. By permitting ridesharing services to operate, cities are not revoking medallions nor are they causing owners to discontinue their use – and the right to profit by operating taxicabs.

Finally, allowing competition within an industry is not a taking even if doing so completely eliminates the value of a property owner. This doctrine dates back to an 1837 Supreme Court precedent that favors Uber and municipalities in the various lawsuits against them. In 1792, the state legislature of Massachusetts chartered a company to operate a toll bridge across the Charles River in Boston until 1856, generating a large profit for its owners. In 1828, however, the state legislature granted a charter to the Warren Bridge Company to erect another toll bridge less than 90 yards from the Charles River Bridge on one bank and less than 300 yards from it on the other

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[12] *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 88 n.32 (1978) ("The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,' *Silver v. Silver*, 280 U.S. 117, 122 (1929), despite the fact that 'otherwise settled expectations' may be upset thereby. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976).").

[13] *Lucas v. South Carolina Coastal Council*, 112 Ct. 2886, 2895 (1992).

[14] *Penn Central Transportation Co.*, 438 U.S. at 136; *Keystone Bituminous Coal Assn. v. De Benedictis*, 480 U.S. 470, 494-96 (1987).

[15] *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001).

bank. According to the charter, after six years, the owners of the Warren Bridge would relinquish it to the state and it would become toll-free.

The Charles River Bridge's owners hired a legal team that included Daniel Webster and sought to stop the Warren Bridge. Their lawyers argued to the Massachusetts Supreme Judicial Court that the state had infringed the 1792 charter by granting a charter to a competing company. The proprietors of the Charles River Bridge argued that Massachusetts thus violated the federal Constitution's prohibition that states could not pass any law which impaired the obligation of contract. They lost and appealed to the Supreme Court where Chief Justice Roger Taney wrote the majority opinion in *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837).

Taney understood the case's implications for economic development: If granting a charter to one company meant the government could not charter competing companies, technological advancement would cease. Turnpike companies would awake "from their sleep," Taney cautioned, and sue railroads and canals, throwing society "back to the improvements of the last century" instead of permitting it to benefit from "modern science[.]" The Supreme Court held that a charter did not protect a company against competition or being rendered obsolete in the course of progress.[16]

Thus, while some local governments will probably impose more robust regulations on ridesharing vehicles in their jurisdictions, it seems nearly impossible to imagine a court shutting down a new and popular method of for-hire transportation because it competes with the taxicab industry. Doing so would adopt the long-discredited theory of the Charles River Bridge's owners and reject the capitalist ethos of competition and innovation. Moreover, the Charles River Bridge case likely precludes taxicab medallion owners from succeeding in lawsuits against municipalities.

Very truly yours,

Christian G. Samito, Ph.D.

[16] *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 423 (1837).

About Christian G. Samito, Ph.D.

Christian G. Samito practices law in Boston and teaches legal and constitutional history at Boston University School of Law. He is the author of *Lincoln and the Thirteenth Amendment* (forthcoming, Southern Illinois University Press, 2015), *Becoming American under Fire: Irish Americans, African Americans, and the Politics of Citizenship during the Civil War Era* (Cornell University Press, 2009), and the editor of *Changes in Law and Society during the Civil War and Reconstruction: A Legal History Documentary Reader* (Southern Illinois University Press, 2009) and two Civil War letter collections. His writing has been featured in *The Wall Street Journal* and *Forbes.com* and he holds a J.D. from Harvard Law School and a Ph.D. in American history from Boston College.