No. 18-

IN THE
SUPREME COURT OF THE UNITED STATES

CLASSIC CAB COMPANY,

Petitioner,

vs.

DISTRICT OF COLUMBIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Chesseley Robinson
Counsel of Record for Petitioner
2516 Australia Drive
Raleigh, NC 27610
chesseley@chesseleycares.com

OUESTION PRESENTED FOR REVIEW

I. Is the use of illegal emergency rulemakings in the absence of any objectively cognizable emergency resulting in the complete elimination of an industry, and thus, the complete and utter destruction of a companies ability to do business and comply a with preexisting contracts and obligations when the eliminated industry was statutorily required at the time of the illegal emergency rulemaking an illegal regulatory taking in violation of the 5th and 14th amendments of the United States Constitution?

II. Is the explicit exclusion by the state of the use of a foreign product either identical to or superior to a domestic product by a state regulated industry a violation of the Dormant Commerce Clause where the product in question is required by the state and members f the state related industry already have preexisting contracts with foreign providers of similar or identical products?

III. Is the dismissal of a non-defective civil claim through plain misapplication of the rules of res judicata and mootness where there has been no answer of any kind to several claims within the complaint a violation of the Plaintiff's rights under the Seventh amendment of the United States Constitution?

PARTIES IN COURT BELOW

Other than Petitioner and Respondent, the other parties are as follows:

1. Mustaq Gilani is the primary owner of Classic Cab. He is domiciled and is a resident of Virginia.

2. The Department of For Hire Vehicles (DFHV) is a state agency within the District of Columbia. The Respondent owns, operates, manages, directs, and controls the DFHV

3. Muriel Bowser (Mayor) is and was at all times relevant to this matter the mayor of the District of Columbia. She was sued in her official capacity.

4. Ernest Chrappah(Director is and was at all times relevant to this matter an employee of the DFHV and is presently the acting director of the DFHV. He was sued in his official capacity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

United States Constitution

U.S. const. amend. vii

U.S. const. amend. v

U.S. const. Art. I, Sec. 8, Cl. 3

United States Statutes

28 U.S.C 1257(a)

State Statutes

D.C. Code 2-505 (c)
D.C. Code 2-510
31 DCMR 602.1
31 DCMR 603.2
31 DCMR 1302.4
The Taxicab Service Improvement Amendment Act of 2012, D.C. Law 19-0184 (Oct. 27, 2013)

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

This is an appeal from an August 24, 2018, CAB 583-18 (App. A: 1.) decision of the District of Columbia Court of Appeals to deny Petitioner's request to rehear the opinion issued on June 1, 2018 18-cv-461(App. B: 1.) that affirmed the April 24, 2018 order of the Superior Court dismissing Petitioner's complaint. 18- CA-000583 B(App. C: 1.)

This Court has jurisdiction pursuant to U.S. Constitution Art. III Sec. II and Supreme Court Rule 13.

RELEVANT CONSTITIONAL PROVISIONS

The Seventh Amendment of the Constitution states the following:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Takings Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

> deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation*.

The Commerce Clause of the United States Constitution provides:

> The Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

STATEMENT OF THE CASE

State Court Proceedings

This is an appeal from an August 24, 2018 (App. A: 1.) decision of the District of Columbia Court of Appeals to deny Petitioner's request to rehear the opinion issued on June 1, 2018 (App. B: 1.) that affirmed the April 24, 2018 order of the Superior Court dismissing Petitioner's complaint. (App. C: 1.)

This matter actually originated from an action and simultaneous motion for a temporary restraining order filed before the U.S. District Court for the District of Columbia on December 31, 2017 seeking a permanent injunction from the seven consecutive emergency rulemakings initiated by DFHV. On January 24, 2018, a hearing was held where the Honorable Judge Christopher Coper denied the Petitioner's motion for a temporary restraining order. In that denial, Judge Cooper urged the Petitioner to pursue his local issues, which he indicated orally appeared cognizable, before the DC Court of Appeals; the entity charged with reviewing agency actions. After some further review, Petitioner determined that the enactment of emergency regulations did not meet the local definition of an agency action and thus

the Petitioner's filed its complaint on January 29, 2018 with the District of Columbia Superior Court claiming that the Respondent's actions were unlawful because they violated the Due Process Clause of the 5th and 14th Amendments, D.C. Code 2-505 (c), D.C. Code 2-510, the D.C. Human Rights Act, Contracts Clause of the Constitution, the takings clause of the constitution, the commerce clause of the constitution, and maliciously interfered with the contractual obligations of the petitioner.

Respondent filed a motion to dismiss Petitioner's complaint on March 30, 2018 claiming that Petitioner had failed to state federal claims under which relief could be granted and that any claims under the D.C. Administrative Procedures Act were moot. Respondent never made any response of any kind to the claim of malicious interference with contractual obligations of the Petitioner.

On April 24, 2018, The honorable Judge Hiram E. Puig-Lugo ruled that the federal claims were precluded by the rulings of Judge Christopher Cooper from the federal District Court of the District of Columbia in spite of the fact that he made no final rulings on the claims based on the takings clause of the firth amendment or the commerce clause. Additionally, Judge Puig-Lugo ruled that the local claims were moot. Judge Puig-Lugo never addressed the claim of malicious interference at all.

Petitioner filed a notice of appeal with the District of Columbia Court of Appeals on April 25, 2018. On May 11, 2018 Petitioner filed an Emergency Motion for Stay and Expedited Relief. On May 18, 2018, Respondent filed a motion for Summary Affirmance and opposition to Petitioner's motion for an emergency stay. On June 1, 2018, the D.C. Court of Appeals denied Petitioner's Motion and granted Respondent's

motion for Summary Affirmance without explanation. Petitioner filed a motion for rehearing en banc on June 15, 2018. Petitioner's motion for rehearing en banc was denied on August 24, 2018.

REASONS FOR GRANTING THE WRIT

SUPREME COURT REVIEW IS APPROPRATE TO DECIDE THE IMPORTANT QUESTION WHETHER THE USE ILLEGAL EMERGENCE RULEMAKING PROCEDURES TO ELIMINATE AN INDUSTRY, AND THUS, THE COMPLETLY AND UTTERLY DESTROY A COMPANIES ABILITY TO DO BUSINESS AND COMPLY A WITH PREEXISTING CONTRACTS AND OBLIGATIONS WHEN THE ELIMINATED INDUSTRY WAS STATUTORILY REQUIRED AT THE TIME OF THE ILLEGAL EMERGENCY RULEMAKING IS AN ILLEGAL REGULATORY TAKING IN VIOLATION OF THE 5TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION?

This Court should grant certiorari review to consider the implications of the increasingly common practice in the District of Columbia of agencies such as the DFHV using successive emergency rulemaking regulations where no actual emergency exists to effectively change an existing law without notice or a hearing for such a period of time where there is no meaningful hearing available when an actual rulemaking is proposed because the effects of the change have already been in place for years. These illegal chain-like emergency regulations often destroy contractual obligations and businesses without notice or warning and without any defined purpose other than the whims of a particular agency.

The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend V. The purpose of the Takings Clause is to prevent the government from "forcing some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522, 118 S.Ct. 2131, 2146, 141

L.Ed.2d 451 (1998) (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960)). The taking in this matter arose from an economic regulation, meaning an action that the DFHV alleges is a "public program adjusting the benefits and burdens of economic life to promote the common good." *Id., citing Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124* (1978). The inquiry into a challenged regulation's constitutionality involves an evaluation of the "justice and fairness" of the government action. *Id.* at 523, 118 S.Ct. 2131. Although this inquiry involves no set formula and is necessarily *ad hoc* and fact intensive, the Supreme Court has identified three factors of "particular significance" to a regulatory takings clause analysis: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with reasonable investment-backed expectations; and (3) the character of the government action. *Id.* at 523, 524, 98 S.Ct. 2646, citing *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25, 106 S.Ct. 1018, 1026, 89 L.Ed.2d 166 (1986).

In 2013 the plaintiff, Classic Cab, entered into a seven-year contract with CMT ***to provide installation and maintenance*** of CMT's taximeter or MTS and PSP into all of Classic Cab's vehicles. This is a common industry based contract that is typical around the country.

The current regulations in the District of Columbia until after the filing of the complaint in question, which was based upon the law enacted at the time Petitioner entered into this contract, is that all taxicabs are required to have an MTS taximeter

system and are additionally prohibited from operating without one. See 31 DCMR 602.1 and 603.2.

A taximeter is a mechanical or electronic device installed in taxicabs that calculates passenger fares based on a combination of distance travelled and waiting time. Its shortened form, "taxi", is also a metonym for the hired cars that use them. That is, a taximeter is a physical device placed inside of a taxicab, it may be manual or electronic or both. The MTS taximeters are digital taximeters insofar as they contain computer software, chips, intel and they provide a digital readout. In said traditional taximeter, the taxi fare is calculated by a mechanical, analog means (rotation of the vehicle's transmission components or the vehicle's wheels). The MTS taximeters being phased out by DFHV have been approved for accuracy by the U.S. Department of Commerce, National Institute of Standard and Technology. Even though said taximeters are actually digital meters the DFHV refers to them as MTS or legacy non-digital meters. In 2016 Classic Cab had approximately 1,700 taxicabs in its fleet. Classic Cab installed CMT's taximeter and PSP into all the vehicles in its fleet. Pursuant to the aforementioned contract, Classic Cab earned .25% on each credit card transaction, 10 cents per credit card swipe, and a $5 monthly maintenance fee for each driver in its fleet. Classic Cab made $300,000 annually from *maintenance fees* from the taximeter and $20,000 per month from the contract. As a direct result of DFHV's emergency orders the Plaintiff's business and profits have been dramatically diminished.

On September 16, 2016 the DFHV declared that residents of the District of Columbia were facing an immediate emergency because of declining profits. In the first emergency rulemaking the DFHV announced, "The Department finds that rulemaking must be enacted as emergency rulemaking because there is an immediate need to preserve and promote the safety and welfare of District residents, in order to directly and indirectly alleviate the rapidly-deteriorating competitive position of taxicabs in the District's vehicle-for-hire industry, and to accomplish other lawful objectives within the jurisdiction of the Department." To avoid this faux "immediate," "danger" to the safety and welfare of residents, the DFHV created an emergency regulation to replace existing taximeters in taxicabs with a computer application based taximeter that did not exist at that time. The emergency rulemaking referred to the new system as a "digital taxicab solutions" or DTS. The emergency rulemaking said that after August 31, 2017, MTS taximeters will be replaced with digital taxicab solutions or DTS, by the end of the current MTS licensing period" (August 31, 2017). After the first rulemaking on September 13, 2016 the DFHV has enacted 6 (six) successive emergency rulemaking orders for the same emergency using the exact same emergency and containing the exact same or substantially similar language. All seven rulemakings cite to one another (each citing the previous rulemaking) in a successive chain. All the rulemakings were unpublished. Specifically, each emergency rulemaking was adopted on and during the following successive periods of time.

1) *September 13, 2016 to expire on January 11, 2017*
2) *January 11, 2017 to expire on May 11, 2017*
3) *May 11, 2017 to expire on September 8, 2017 (interrupted, expired June 28, 2017)*

4) *June 28, 2017 to expire on October 26, 2017 (interrupted, expired August 11, 2017)*
5) *August 11, 2017 to expire on December 9, 2017 (interrupted, expired August 28, 2017)*
6) *August 28, 2017 to expire on December 26, 2017 (interrupted, expired October 27, 2017)*
7) October 27, 2017 which is set to expire on February 24, 2018.

On June 28, 2017, in the 5th emergency rulemaking the DFHV declared that on October 31, 2017 it would be unlawful to use MTS taximeters in any taxicab. The use of the DTS computer App would be mandatory beginning September 1, 2017.

Subsequently, in the 6th emergency rulemaking the DFHV extended the MTS taximeter expiration deadline to said expiration date to October 31, 2017 – prohibiting their use after said date. It stated, "*the Department believes that this rulemaking must be enacted on an emergency basis rulemaking because there is an immediate need to preserve and promote the safety and welfare of District residents by extending the DTS implementation date from August 31, 2017, to October 31, 2017 to provide allow taxicab companies, associations, independent owners, and rental drivers additional time to choose from among the solutions offered by the approved DTS providers.*" There is absolutely no evidence that this statement is correct.

The 7th emergency rulemaking extended the MTS taximeter expiration deadline again to December 31, 2017 – banning their use and requiring their removal from all taxicabs after that date. The devices were to be replaced with a DFHV approved DTS application no later than January 1, 2018. Thereafter, the DFHV has prohibited the use of a MTS taximeter in any taxicab – that is, no taxicab may be operated in D.C.

without the new computer application based DTS. None the emergency rulemaking were published and filed in the D.C. Register. None of the emergency rulemaking has been reviewed by the voting public at large.

Since June 28, 2017, Classic Cab lost 1300 drivers and correspondingly taken 1300 vehicles out of service. Accordingly, the Defendant's illegally enacted regulations have been and are causing an additional $50,000 per month in lost profits since July of 2017. Plaintiff currently has lost so much of his business that DFHV no longer recognizes Classic Cab as a company because they have less than 30 taxicabs available for service. The taximeter ban also rendered Petitioner's contract with CMT meaningless and potentially subject Classic Cab to a lawsuit for breach of their agreement.

These illegal regulations plainly render Plaintiff's ability to install and maintain MTS-PSP based taxi meters "commercially impracticable." (See *Keystone Bituminous*, 480 U.S. at 496) as the use of such taximeters is now banned pursuant to the Defendant's illegal regulations. This is particularly true where the Respondent additionally failed to respond to Plaintiff's reasonable requests for guidance regarding applying for a license to operate as a DTS provider until after the deadline for submission had passed. This should be coupled with the Defendant's current communication with the Plaintiff that he does not qualify as a cab company because he no longer has the required amount of cabs.[1] Given the convenient timing of this communication (immediately

[1] While Plaintiff disputes this particular characterization and conclusion, This clearly establishes Defendant's knowledge of the diminution of Plaintiff's value as they are indicating the Classic Cab no longer meet is the minimum requirements to be a cab company. This is further concerning as a cab association cannot acquire a license to be a DTS operator. It is

after the filing of this complaint) and Defendant's misrepresentation to the Federal District Court and the Superior Court that it had no intention of enforcing this illegal regulation " for the foreseeable future" while at that moment giving out warning tickets which they must have known would have a chilling effect of cab drivers use of MTS-PSP taximeters, it must have been clear that the intent of the regulation was, inter alia, to destroy Petitioner's ability to comply with his currently existing contract.

Furthermore, "[i]n determining whether a reasonable investment-backed expectation exists, one relevant consideration is the extent of government regulation within an industry." *Ascom Hasler Mailing Systems, Inc. v. U.S. Postal Serv.*, 885 F. Supp. 2d 156, 195 (D.D.C. 2012). The Taxicab Service Improvement Amendment Act of 2012, D.C. Law 19-0184 (Oct. 27, 2013) required the use of MTS-PSP taximeters five years ago." Since the "emergency" from the Respondent had remained identical for over 2 years, the initial illegal emergency regulation actually banning the MTS-PSP taximeters should have expired as required by the DC Administrative Procedures Act, and chain emergency rule-making has already been found to be illegal in the District of Columbia[2], Plaintiff should be able to expect that the District will actually comply with the last appropriately enacted regulation that they, themselves, cite in their response. Moreover, the U.S. Congress prohibited the "chain hanky-panky" of

interesting that Defendant only informed Plaintiff of this position after the filing of this complaint.

[2] D.C. Code 2-505 (c) states: "Notwithstanding any other provision of this section, if, in an emergency, as determined by the Mayor or an independent agency, the adoption of a rule is necessary for the immediate preservation of the public peace, health, safety, welfare, or morals, the Mayor or such independent agency may adopt such rules as may be necessary in the circumstances, and such rule may become effective immediately. Any such emergency rule shall forthwith be published and filed in the manner prescribed in subchapter III of this chapter. No such rule shall remain in effect longer than 120 days after the date of its adoption."

substantially identical successive emergency legislation by the City Council. Such "chain hanky-panky" is done to circumvent the official process of lawmaking and is potentially unlimited. *District of Columbia v. Washington Home,* 415 A.2d 1349, 1355 (DC, 1980). Congress saw the danger of and refused to tolerate an unlimited number of consecutive, substantially identical emergency acts by the Council. *Id* at 1358 and see *Atchison* at 156. Thus, while Plaintiffs' businesses are subject to regulation by either DFHV or another agency, such as the Department of Motor Vehicles, it is not foreseeable that Defendant would illegally enact chain-emergency regulations for the exact same non-emergency and fail to actually comply with the regulations that they, themselves, enacted for over 500 days after the initial emergency regulation expired.

Finally, the third factor in deciding a takings clause case is whether the nature of the governmental action fits within the category of actions "adjusting the benefits and burdens of economic life to promote the common good." (*Penn Central*, 438 U.S. at 124; see also *Perry Capital, LLC v. Lew*, 70 F. Supp. 3d 208, 245 (D.D.C. 2014)) Courts look for a "valid public purpose" when examining the third Penn Central factor. *Hilton Wash. Corp. v. District of Columbia*, 777 F.2d 47, 49 (D.C. Cir. 1985). It is inconceivable that illegal obfuscating the appropriate legislative process by illegally creating chain emergency regulations to force the cab industry to use a device that will not save the citizens of the District of Columbia one red cent, are not even accessible to the visually impaired, and is destroying a viable MTS-PSP industry in the District of Columbia serves a valid purpose. In fact, repeated illegal emergency regulations, coupled with increase fares for cabs, and an obligation for cabs to use a device that cannot serve the visually impaired not only serves no valid purpose to promote the

viability of the cab industry but in fact hinders the industry by causing constant confusion and putting it in a distinct disadvantage with digital dispatch companies such as Uber and Lyft.

SUPREME COURT REVIEW IS APPROPRATE TO DECIDE THE IMPORTANT QUESTION WHETHER THE EXPLICIT EXCLUSION BY THE STATE OF THE USE OF A FOREIGN PRODUCT EITHER IDENTICAL TO OR SUPERIOR TO A DOMESTIC PRODUCT BY A STATE REGULATED INDUSTRY A VIOLATION OF THE DORMANT COMMERCE CLAUSE WHERE THE PRODUCT IN QUESTION IS REQUIRED BY THE STATE AND MEMBERS OF THE STATE RELATED INDUSTRY ALREADY HAVE PREEXISTING CONTRACTS WITH FOREIGN PROVIDERS OF SIMILAR OR IDENTICAL PRODUCTS?

The Commerce Clause of the United States Constitution states that "The Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" "[I]n all but the narrowest circumstances, state laws violate the [Dormant] Commerce Clause if they mandate `differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Granholm v. Heald,* 544 U.S. 460, 472 (2005) (quoting *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994)). Thus, in general, states "cannot require an out-of-state firm `to become a resident in order to compete on equal terms.'" *Heald,* 544 U.S. at 475 (quoting *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64, 72 (1963)). State laws that directly discriminate against out-of-state entities can survive only if the state "demonstrate[s] both that the statute `serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)). This rule reflects the Framers' concern "that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations

among the Colonies and later among the States under the Articles of Confederation." *Hughes*, 441 U.S. at 325.

DFHV requires cab companies to only use a particular application from the District of Columbia by effectively eliminating the ability to use an application provided by a foreign competitor. This limitation of foreign competition is plainly in violation of the Commerce clause.

SUPREME COURT REVIEW IS APPROPRATE TO DECIDE THE IMPORTANT QUESTION WHETHER THE DISMISSAL OF A NON-DEFECTIVE CIVIL CLAIM THROUGH THE APPARENT FACTUAL FINDINGS OF THE COURT, PLAIN MISAPPLICATION OF THE RULES OF BOTH RES JUDICATA AND MOOTNESS WHERE THERE HAS BEEN NO ANSWER OF ANY KIND TO SEVERAL CLAIMS WITHIN THE COMPLAINT A VIOLATION OF THE PLAINTIFF'S RIGHTS UNDER THE SEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

The Seventh Amendment governs only courts that sit under the authority of the United States,16 including courts in the territories (See *Webster v. Reid, 52 U.S. (11 How.)* 437, 460 (1851); *Kennon v. Gilmer,* 131 U.S. 22, 28 (1889)) and the District of Columbia (See *Capital Traction Co. v. Hof,* 174 U.S. 1, 5 (1899)). In fact, it is the position of many that the Seventh Amendment is a fundamental right that applies to all of the states as well. (See *Gonzalez-Oyarzun v. Caribbean City Builders, Inc.,* 27 F. Supp. 3d 265, 272-277 (D. Puerto Rico 2014) citing *Parklane Hosiery v. Shore, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979)(J. Rehnquist dissenting)).*

It is clear that the Seventh amendment preserves the notion that "…in the absence of express or implied consent to the contrary, issues of law are resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court." *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935); *Walker v. New Mexico & So. Pac. R.R.,* 165 U.S. 593, 596 (1897); *Gasoline Products Co. v. Champlin Ref. Co.,* 283 U.S. 494, 497–99 (1931); *Dimick v. Schiedt,* 293 U.S. 474, 476, 485–86 (1935)

Petitioner filed a complaint for malicious interference with a contract alleging, *inter alia*, the following facts:

- As stated, Classic Cab is a D.C. licensed a taximeter installation company. Pursuant to DCMR 31-1302, Classic Cab is licensed to install and maintain taximeters in D.C. taxicabs. Classic Cab installs and maintains MTS taximeters in its own taxicabs and installs and maintains taximeters for other taxicab companies and taxicab drivers. Taximeter licenses expire after 2 years and are renewable to qualified, eligible license holders. DCMR 31-1302.4.

- As a result of DFHV's emergency rulemaking, all taximeter MTS licenses have been terminated and are not renewable.

- In 2013 the plaintiff, Classic Cab entered into seven year contract with Creative Mobile Technology (CMT) to provide installation and maintenance of CMT's taximeter or MTS and PSP (payment service provider or credit card payment processor) into all of Classic Cab's vehicles. From 1/2016 to 7/2017 Classic Cab installed and provided weekly service to 1,713 taxicabs. That is, Classic Cab installed CMT's taximeter and PSP into 1713 vehicles and provided regular maintenance to said devices. Pursuant to their agreement Classic Cab earned .25% on each credit card transaction and 10 cents per credit card swipe and a $5 monthly maintenance fee for each driver in its fleet. Classic Cab made $300,000 annually from maintenance fees from the taximeter and $20,000 per month from the contract.

- Classic Cab then entered into individual contracts with taxicab drivers to provide taximeter installation, maintenance and servicing.

- The DFHV knew of the contract between Classic Cab (then Icon Taxicab) and CMT. DFHV knew of the contracts between Classic Cab and individual taxicab drivers. DFHV maintains a list of all taxicab drivers that use the MTS taximeter installed by plaintiffs.

- From 1/2016 to 1/2018 Classic Cab employed 6 persons in its office and garage.

- As a direct result of DFHV's emergency orders the plaintiffs business and profits have been dramatically diminished. Since the 5th emergency rulemaking on June 28, 2017, Classic Cab has lost over 1300 drivers that it serviced and

> correspondingly taken 1300 taximeters out of service. With each passing week since June 28, 2017 Classic Cab has lost more and more drivers and vehicles that it services. The DFHV emergency orders to permanently ban the taximeter has caused and is causing immediate irreparable harm. The DFHV's actions have resulted in $50,000 per month in lost profits since July. If the taximeter ban takes place plaintiffs will lose it's entire taximeter within the next 5 days. The taximeter ban also will render meaningless plaintiff's contract with CMT and potentially subject Classic Cab to a lawsuit for breach of their agreement.

- Mr. Mushtaq Gilani, an owner of Classic Cab, has explained that due to the DFHV emergency regulations, on January 24, 2018 Classic Cab laid off three (3) of its employees. He has also explained that the emergency regulation may cause Classic Cab to completely shut down all of its operations.

- DFHV has also specifically targeted Classic Cab taxicab drivers and targeted all vehicles (from other taxicab companies) that Classic Cab has serviced with unlawful traffic stops of said drivers. DFHV hack inspectors have engaged in unlawful, unconstitutional traffic stops of plaintiff's taxicabs and issued warning tickets regarding the use of the taximeter. See attachment. In fact the DFHV has created a list (by license plate) specifically targeting plaintiff's drivers and all the taxicabs it services.

Respondent never made any answer, response, or pleading regarding this claim. The Court never explicitly addressed this claim in any manner. The only point ever made to address this claim at all is that the Court indicated at its February 23, 2018 oral ruling denying Petitioner's motion for preliminary injunction that the Petitioner's harm was the result of a "bad business decision" without taking one scintilla of evidence regarding the reasonableness of the contract that the Petitioner entered into with CMT. Thus, it appears that the Court made factual conclusions, without evidence to support or reject such a claim, prior to dismissing the matter *sua sponte* without ever empaneling a jury. The fact that the court dismissed the matter without ever receiving a motion to dismiss the claim, without the presentation of any evidence, without an answer to the allegation, and without and discovery or empaneling a jury

as the trier of fact; coupled with the Court of Appeals refusal to reconsider their affirmance of the dismissal in spite of these facts, appears to be a clear deprivation of the Petitioner's right to a jury trial under the Seventh amendment of the constitution.

Additionally, the Court misused the rules of mootness and res judicata in a manner so flagrant that it must also be considered a deprivation of the Petitioner's right to a trial by jury in a civil matter.

a. Misapplication of the rules of mootness resulted in the deprivation of the Petitioner's Seventh amendment right to a jury trial

The Court below ruled that Petitioner's DCAPA claim relates to "an emergency rule"[3] that [was] no longer in effect was moot and must be dismissed for failure to state a claim upon which relief may be granted as the only remedies Petitioner's requested as a result of the alleged violations were equitable in nature and there was no longer an emergency rule for this Court to grant an equitable remedy. Of course this is plainly erroneous because the plaintiff not only requested a preliminary injunction and equitable relief but plainly requested "monetary judgment against the defendant, punitive damages … plus costs and attorney's fees." The Court's ruling is in direct conflict with the D.C. precedent set in *Tyler v. US*, 705 A.2d 270, 273 (D.C. 1997) which plainly states that "A case is considered to be moot if "there is no reasonable expectation that the alleged violation will recur and ... interim relief or events have completely and irrevocably eradicated the effects of the violation." See Tyler at 273 citing *In re*

[3] As opposed to the seven successive emergency rule makings over a 500 plus day period of time.

Morris, 482 A.2d 369, 371 (D.C.1984)(quoting County of Los Angeles v. Davis, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979)) The Court additionally explains that "…we do not apply a strict rule of mootness to dismiss a case because it no longer affects the particular appellant, if it presents a matter of importance that is likely to recur, yet evade review with respect to others similarly situated." See Tyler at 273 citing *Lynch v. United States, 557 A.2d 580, 582 (D.C.1989); contra, Murphy v. Hunt, 455 U.S. 478, 482, 102 S.Ct. 1181, 1183-84, 71 L.Ed.2d 353 (1982).*

The crux of this case is that the District of Columbia plainly used illegal emergency rulemaking to create the conditions where there would be no public response to its rulemaking. These illegal rulemakings caused damage to the Plaintiff of which he has not recovered. Additionally, without judicial action, the District of Columbia could continue to maliciously create illegal emergency rulemakings in the absence of any emergency to manipulate the rulemaking process effectively removing input from the citizens.

In the event of a reasonably understandable misapplication of the law, it may not rise to the level of depriving the Petitioner of his seventh amendment rights. However, in this matter, where there is a gross misapplication of the law resulting in the elimination of a trial by jury, it must be that the misapplication of the law resulted in the deprivation of the Petitioner's rights.

b. Misapplication of the rules of res judicata resulted in the deprivation of the Petitioner's Seventh amendment right to a jury trial

The DC Superior Court ruled that in this case, Judge Cooper of the U.S. District Court of the District of Columbia issued an order and accompanying memorandum opinion dismissing all of Plaintiffs' claims on the merits pursuant to Federal Rule of Civil Procedure 12(b)(6) on April 11, 2018 that res judicata applies and the issues, at least as it relates to the federal constitutional provisions, are precluded. However, even if they were not precluded, this Court adopts the findings of Judge Cooper and dismisses all of Plaintiffs' claims for the reasons and conclusions stated in his order as it relates to the alleged violations of federal constitutional provisions.

Judge Puig Lugo stated the rules of res judicata in his opinion, stating that "Res judicata "precludes relitigation in a subsequent proceeding of all issues arising out of the same cause of action between the same parties or their privies. Harnett v. Washington Harbour Condominium Unit Owners 'Ass 'n, 54 A.3d 1165, 1173 (D.C. 2012). However, the doctrine of res judicata only applies if there has been a final judgment on the merits in the first proceeding. See Shin v. Portals Confederation Corp., 728 A.2d 615, 618 (D.C. 1999) ("the crucial element of res judicata is a final judgment on the merits"); Patton v. Klein, 746 A.2d 866, 869 (D.C. 1999)"

In the decision cited by the lower court, Judge Cooper plainly states that "In its previous decision, the Court evaluated the plaintiffs' likelihood of succeeding under the Takings Clause of the Fifth Amendment and under the Dormant Commerce Clause. It did so because the plaintiffs raised these theories in their motion for a temporary restraining order. But as the District points out, these claims appear nowhere in the complaint, and thus are not properly before the Court at this stage of the proceedings." See *Classic Cab vs DC*, 310 F.Supp.3d 1, fn 1, (DDC 2018) Accordingly, there was no final ruling on the merits of the Takings Clause or the Dormant Commerce Clause from the federal court. Moreover, Petitioner's complaint before the DC Superior Court contained 28 additional facts making the complaint significantly different than the complaint before the federal district court. Thus, the ruling of the Lower Court is plainly erroneous as there was no final ruling to apply res judicata upon and no findings from the April 11, 2018 ruling to male a decision upon. Thus, the Lower Court simply applied illusory facts to the matter to make a determination.

Again, where there is a reasonably understandable misapplication of the law, it may not rise to the level of depriving the Petitioner of his seventh amendment rights. However, as is the case with the Lower Courts mootness decision, where there is a gross misapplication of the law resulting in the elimination of a trial by jury, it must be that the misapplication of the law resulted in the deprivation of the Petitioner's rights.

SUPREME COURT REVIEW IS APPROPRATE TO CLARIFY A DISPUTE BETWEEN THE VARIOUS FEDERAL COURTS AND STATE COURTS REGARDING THE CONSTITUTIONALITY OF THE USE OF SUCCESSIVE EMERGENCY RULEMAKINGS?

This Court should grant certiorari review to consider the implications of the increasingly common practice of using successive emergency rulemakings to circumvent the established rulemaking process and the opposing positions between the various multiple federal court circuits and between states and federal courts including a distinct difference between the federal courts of the District of Columbia and the state courts for the District of Columbia.

a. Overview of the DC Court of Appeals rulings on Successive Emergency Rulemakings

The D.C. Court of Appeals has reviewed the validity of emergency acts in two situations — when the legislation is claimed to be the functional equivalent of (and hence used to circumvent the requirements for) permanent legislation, and when the authenticity of the emergency declaration is questioned. *Atchison v. District of Columbia*, 585 A.2d 150, 156 (1991).

For the sake of comparison, in the context of emergency legislation enacted by the City Council – *a representative body, elected by and accountable to D.C. voters* – pursuant to D.C. Code 1–204.12, the Council may enact emergency legislation, however, "such act shall be effective for a period … not to exceed 90 days." *Id*. At the end of such time, the legislation can either go through the official process or it lapses and is void. The U.S. Congress prohibited the "chain hanky-panky" of substantially identical successive emergency legislation by the City Council. Such "chain hanky-panky" is

done to circumvent the official process of lawmaking and is potentially unlimited. *District of Columbia v. Washington Home,* 415 A.2d 1349, 1355 (DC, 1980). Congress saw the danger of and refused to tolerate an unlimited number of consecutive, substantially identical emergency acts by the Council. *Id* at 1358 and see *Atchison* at 156.

i. Successive Emergencies are Unlawful in the District of Columbia

D.C. Code 2-505 (c) states: "Notwithstanding any other provision of this section, if, in an emergency, as determined by the Mayor or an independent agency, the adoption of a rule is necessary for the immediate preservation of the public peace, health, safety, welfare, or morals, the Mayor or such independent agency may adopt such rules as may be necessary in the circumstances, and such rule may become effective immediately. Any such emergency rule shall forthwith be published and filed in the manner prescribed in subchapter III of this chapter. ***No such rule shall remain in effect longer than 120 days after the date of its adoption."*** Accordingly, D.C. Code 2-505 (c) explicitly limits emergency rulemaking by agencies to a period of 120 days (one emergency rulemaking for one emergency, nothing more.) At or before the conclusion of the emergency period, the agency must submit the rule to be published and at the same time submit the proposed rule to the City Council. Otherwise, the emergency rule lapses and is void.

The D.C. Court of Appeals has ruled that substantially identical measures aimed at the same emergency unlawfully violate the Home Rule Act *and* the D.C. Code explaining that "an emergency prerogative and procedure is extraordinary and should not be substituted freely for the regular procedure." *D.C. v. Washington Home*, 415 A2d 1349, 1354 (DC 1980). 'The Council's emergency power is an exception to the fundamental legislative process and is not an alternative legislative track to be used repeatedly whenever an ongoing emergency is perceived.' *Id* at 1359.

Additionally, a court may 'hold unlawful and set aside any action embodied in an administrative order found to be without observance of procedure required by law, including any Applicable procedure provided by the D.C. Administrative Procedure Act.' *Washington Gas Energy v. Public Service*, 893 A.2d 981, 987 (DC, 2006) and See D.C. Code § 2-510(a)(3)(D). See also *Abadie v. District of Columbia Contract* Application. Bd., 843 A.2d 738, 741 (D.C. 2004) (indicating that de novo standard of review Applies to interpretation of the DCAPA and other statutes).

Checks on agency power are procedural safeguards created to protect representative government, curb agency overreach, and promote agency transparency. 'In typical rulemaking, so many people could be affected that general notice, a *meaningful* opportunity to be heard, and review are necessary.' *Washington Gas Energy v. Public Service,* 893 A.2d 981, 988 (DC 2006). Accordingly, it also stands to reason that limitations on emergency rulemaking must be strictly enforced.

Finally, in D.C. the power to legislate resides in the City Council. DFHV's power to enact binding rules springs from the delegation doctrine of legislative power. Pursuant to D.C. Code 1-204.04, "The Council shall have authority to create, abolish, or organize any office, agency, department, or instrumentality of the government of the District and to define the powers, duties, and responsibilities of any such office, agency, department, or instrumentality."

ii. Definition of an Actual Emergency in the District of Columbia

The D.C. Court of Appeals considers a situation to be an emergency when immediate legislative action is required for "preservation of the public peace, health, safety and general welfare" *Washington Home* at 1352. D.C. Code 2-505(c) clearly explains that the adoption of the rule must be necessary for the immediate preservation of the ***public peace, health, safety, welfare or morals*** of D.C. residents. In fact, true

"Emergency circumstances by definition **cannot** last very long." *Atchison* at 157 quoting *American Federation of Gov. Emp. v. Barry*, 459 A.2d 1045, 1050 (DC, 1983).

iii. Rulemaking Process and Review in the District of Columbia

In the normal course of rulemaking the D.C. Administrative Procedure Act requires the DFHV to publish proposed rules in the D.C. Register, "notice of the intended action so as to afford interested persons opportunity to submit data and views either orally or in writing, as may be specified in such notice." D.C. Code 2-505 and *Junghans v. Dep't Human Resources,* 289 A.2d 17, 23 (D.C.1972) (agency order implementing reduction of public assistance payment levels invalid for failure to follow rule-making notice requirements).

iv. Other Jurisdictions that agree with the District of Columbia Court of Appeals

Other courts have explained that there should be a "substantial basis" for emergency rulemaking by an administrative agency. *Melton v. Rowe*, 619 A2d 483, 486 (Conn Super 1992). The emergency order for rulemaking should contain specific facts and reasons for finding an immediate danger to the public and document the unusual conditions giving rise to the emergency. Such a statement must be factually explicit and persuasive concerning the existence of a genuine emergency. *Florida Home Builders Ass'n v. Division of Labor*, 355 So.2d 1245, 1246 (Fla. Application. 1 Dist., 1978). At any rate, an emergency rule must be narrowly drafted to only include what is necessary to prevent or avoid the danger.

Courts have similarly found that if a government agency " were given a free pass to derogate from the APA, it would have no incentive to comply with proper rulemaking procedures which would frustrate Congress' intent to have criteria," *Rayford v. Bowen*, 715 F.Supp. 1347, 1357 (W.D. La. 1989), *Occupy Nashville v. Haslem*, 949 F.Supp.2d

777, 806 (M.D. Tenn 2013) ("In choosing to adopt and implement new regulations by fiat without seeking necessary approval from the Attorney General, they made an unreasonable choice that violated the plaintiffs' constitutional rights in multiple respects") Similarly, even in cases where a true fatal emergency exists, arbitrary rulemakings without adequate due process procedures have been invalidated. See generally *Southern California Aerial Advertisers'Ass'n v. FAA*, 881 F. 2d 672 (9th Cir 1999)

An agency's assumption of emergency powers in the absence of a bona-fide emergency violates basic rights of due process and constitutes a usurpation of power. *Melton at* 485 (Conn Super 1992). Emergency rulemaking must be carefully scrutinized because, if unwarrantably made, it may lead to improper denial of public hearings or comment on regulations, to evasion of the salutary purposes of a public process and possibly to other serious abuse. *Pioneer Liquor Mart, Inc. v. Alcoholic Beverages Control Commission*, 212 N.E.2d 549, 555 (Mass. 1965).

The importance of judicial scrutiny of emergency administrative actions cannot be overemphasized. *Senn Park Nursing Center v. Miller*, 455 N.E.2d 162, 170 (Ill. Application. 1 Dist.,1983).

v. Jurisdictions that would allow unlimited successive emergency regulations if the meet superficial procedural guidelines

Despite the logical conclusion that successive emergency regulations where no actual emergency exists used to circumvent the typical legislative process are antithetical to the protections of the constitution, several jurisdictions have found that so long as these actions superficially meet their own procedural guidelines, they could indefinitely create emergency regulations and indefinitely circumvent the normal legislative process, and thus due process for the voter and citizen.

The D.C. Circuit Court of Appeals and the U.S. District Court for the District of Columbia have, unfortunately, avoided the issue by indicating that even where there is a "finding [of] violations of the notice and comment requirements of the D.C. APA and the consultation provisions of the Advisory Neighborhood Commissions Act… we would prefer not to muddy the waters of local administrative law by unnecessarily deciding issues in a case where we can fashion no adequate remedy." See *Spivey v. Barry*, 665 F.2d 1222, 1235 (D.C. Cir 1981), See generally also *Lightfoot v. District of Columbia,* 448 F. 3d 392 (D.C. Cir 2006), *LeFande v. District of Columbia* 613 F. 3d 1155 (D.C. Cir 2010), *Act Now to Stop War & End Racism Coalition v. District of Columbia* 589 F. 3d 433 (D.C. Cir. 2009), *2910 Georgia Ave. LLC v. Dist. of Columbia* 983 F. Supp. 2d 127 (D.D.C. 2013).

Other jurisdictions have more specifically addressed the issue. For instance, some courts have found that emergency rulemakings "…do not require specific factual support. It is enough if the reasoning process that leads to the rule's adoption is defensible" because the rule does not need to be supported by specific, objective data. See *Citizens for Free Enterprise v. Department of Revenue,* 649 P.2d 1054, 1064 (Colo.1982). Moreover, some courts have indicated that if an emergency regulation meets the requirements of state law it is therefore valid. See generally *Wexler v. Lapore*, 342 F.Supp.2d 1097 (S.D. Fla 2004)[4]

[4] It is noteworthy the cited matter "The Court believed that if the Emergency Rule failed to comport with Florida law, that fact alone could have led to a decision in the Plaintiffs' favor." In the current case, it is clear that the successive emergency regulations were not in compliance with local law.

Accordingly, thee appears to be a conflict between the 5th, 6th and 9th circuits as opposed to the 10th and 11th circuits. Accordingly, it is appropriate for this Court to clarify the constitutionality of successive emergency regulations where no objective emergency exists that effectively aoid the typical and legal legislative process.

-

CONCLUSION

For the above reasons, Petitioner Classic Cab respectfully requests that this Court grant a writ of certiorari to review the decision of the District of Columbia Court of Appeals.

Dated this 21st day of November, 2018.

Respectfully submitted,

_____

Chesseley Robinson
Counsel of Record for Petitioner
2516 Australia Drive
Raleigh, NC 27610
chesseley@chesseleycares.com

APPENDIX A

District of Columbia
Court of Appeals

No. 18-CV-461

CLASSIC CAB, INC., *et al.*,

Appellants,

v.

CAB583-18

DISTRICT OF COLUMBIA, *et al.*,

Appellees,

BEFORE: Blackburne-Rigsby, Chief Judge; Glickman, Fisher, Thompson, Beckwith, Easterly, and McLeese, Associate Judges.

ORDER

On consideration of appellant's petition for rehearing *en banc*; and it appearing that no judge of this court has called for a vote on the petition for rehearing *en banc*, it is

ORDERED that the petition for rehearing *en banc* is denied.

PER CURIAM

Copies to:

Honorable Hiram E. Puig-Lugo

Director, Civil Division
Quality Review Branch

Copies e-served to:

Sean N. Riley, Esquire
601 Pennsylvania Avenue, NW
Suite 900 South Building
Washington, DC 20004

No. 18-CV-461

Copies e-served to:

Loren L. AliKhan, Esquire
Solicitor General for DC

bep

APPENDIX B

District of Columbia
Court of Appeals

No. 18-CV-461

CLASSIC CAB, INC., *et al.*

Appellant,

v. **2018 CAB 583**

DISTRICT OF COLUMBIA, *et al.*,

Appellees.

BEFORE: Fisher and Beckwith, Associate Judges, and Farrell, Senior Judge.

J U D G M E N T

On consideration of the notice of appeal seeking review of the Superior Court's April 24, 2018, order dismissing the underlying complaint and denying appellants' motion for an extension of time to appeal the oral ruling denying their motion for a preliminary injunction; appellants' emergency motion for stay; and appellees' opposition to the motion for stay wherein they also move for summary affirmance; it is

ORDERED that appellants' emergency motion for stay is denied. *See Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987) ("To prevail on a motion for stay, a movant must show that he or she is likely to succeed on the merits, that irreparable injury will result if the stay is denied, that opposing parties will not be harmed by a stay, and that the public interest favors the granting of a stay.") (citing *In re Antioch Univ.*, 418 A.2d 105, 109 (D.C. 1980)). It is

FURTHER ORDERED that appellees' request for summary affirmance is granted. *See Oliver T. Carr Mgmt., Inc. v. Nat'l Delicatessen, Inc.*, 397 A.2d 914, 915 (D.C. 1979). The emergency rulemaking implementing the mandatory use of a Digital Taxi Solution is no longer in effect and a permanent rule is now in effect. *See* 31 DCMR § 602. Nothing indicates appellants lacked either notice of the proposed rule or a fair opportunity to comment. Accordingly, any challenge to 31 DCMR § 602 based on the emergency rulemaking is moot, and this court need not consider appellants' arguments that the claimed emergency was not genuine. *See Capital Auto Sales, Inc. v. District of Columbia*, 1 A.3d 377, 380 (D.C. 2010) (holding a challenge to an emergency rulemaking moot and finding it unnecessary

to consider an argument that the claimed emergency was not genuine "because notice of the intent to adopt a permanent rule was given simultaneously and that rule was adopted before the emergency rule was ever enforced"); *Capital Auto*, 1 A.3d at 381 ("Emergency and final rules must meet different demands to take effect, and so long as the requirements for the latter—essentially notice and fair opportunity to comment—are satisfied, no reason exists why the one notice is tainted by its inclusion in the same document as the other."). Accordingly, the trial court did not err in dismissing appellant's claim of a violation of the District's Administrative Procedures Act. Additionally, the trial court correctly found appellants' alleged violations of the Due Process and Takings Clauses of the Fifth Amendment and the Contract and Commerce Clause of Article 1 of the Constitution were barred by the doctrine of res judicata. *See Calomiris v. Calomiris*, 3 A.3d 1186, 1190 (D.C. 2010) ("The doctrine operates to bar in the second action not only claims which were actually raised in the first, but also those arising out of the same transaction which could have been raised.") (quoting *Patton v. Klein*, 746 A.2d 866, 870 (D.C. 1999)). Therefore, this court need not decide whether the trial court abused its discretion in denying appellants' motion for an extension of time to appeal the oral order denying their request for a preliminary injunction. *See Settlemire v. District of Columbia Office of Emp. Appeals*, 898 A.2d 902, 905 (D.C. 2006) (stating an appeal is moot if an event renders relief impossible or unnecessary). It is

FURTHER ORDERED and ADJUDGED that the order on appeal be and hereby is affirmed.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

No. 18-CV-461

Copies to:

Honorable Hiram Puig-Lugo

QRB – Civil Division
Moultrie Bldg., Room 5000

Copy e-served to:

Sean N. Riley, Esquire

Loren AliKhan, Esquire
Solicitor General for DC

cml

APPENDIX C

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

CLASSIC CAB, INC., ET AL., Plaintiffs,	:	Judge Hiram Puig-Lugo
v.	:	Case No. 2018 CA 000583 B
DISTRICT OF COLUMBIA, ET AL., Defendants.	:	

ORDER

This matter comes before the Court upon consideration of Defendants' Motion to Dismiss ("Defs. Mot."), filed on March 30, 2018, Plaintiffs' Opposition ("Pls. Opp'n"), filed on April 14, 2018, and Defendants' reply, filed April 23, 2018. Plaintiffs also filed a Request to Late File a Notice of Appeal, filed on March 26, 2018. The Court has considered the motions, the relevant law, and the entire record. For the following reasons, the Court grants Defendants' Motion to Dismiss and denies Plaintiffs' Request to Late File.

PROCEDURAL HISTORY

Plaintiffs filed their complaint in the Superior Court of the District of Columbia on January 29, 2018, and in the District Court of the District of Columbia on December 29, 2017. *See generally*, *Classic Cab, Inc., et al. v District of Columbia, et al.*, No. 17-cv-2820 (D.D.C. January 24, 2018) (Order denying motion for preliminary injunction). The complaints in both courts are similar, if not the same, in respect to the counts and requests for relief. *Id.* Indeed, at the preliminary injunction hearing in this Court, the findings and conclusions of the memorandum order denying the request for preliminary injunction by Judge Cooper in the District Court were adopted in Plaintiffs' request for a preliminary injunction here.

Defendants bring the instant Motion to Dismiss at relatively the same time as they filed their Motion to Dismiss in District Court. Plaintiffs' opposition seems unchanged from its

opposition in the District Court given that the standard for dismissal contains only cites to federal case law. Judge Cooper granted the motion and dismissed all counts of Plaintiffs complaint. See *Classic Cab, Inc., et al. v District of Columbia, et al.*, No. 17-cv-2820 (D.D.C. April 11, 2018) (Order granting motion to dismiss).

LEGAL STANDARD

To survive a Motion to Dismiss, a Complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *See Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 543-44 (D.C. 2011); *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). Dismissal of a Complaint for failure to state a claim upon which relief can be granted should only be awarded if "it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See* Super. Ct. Civ. R. 12(b)(6); *Fingerhut v. Children's Nat'l Med. Ctr.*, 738 A.2d 799, 803 (D.C. 1999).

When considering a Motion to Dismiss, a Court must "construe the facts on the face of the Complaint in the light most favorable to the non-moving party, and accept as true the allegations in the Complaint." *Fred Ezra Co. v. Pedas*, 682 A.2d 173, 174 (D.C. 1996). A Court should not dismiss a Complaint merely because it "doubts that a Plaintiff will prevail on a claim." *See Duncan v. Children's Nat'l Med. Ctr.*, 702 A.2d 207, 210 (D.C. 1997). However, the Court need not accept inferences if such inferences are unsupported by the facts set out in the Complaint. *See Kowal v. MCI Comm. Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). Nor must the Court accept legal conclusions cast in the form of factual allegations. *Id.*

A pleading must contain a "short and plain statement of the claim showing that the pleading is entitled to relief." *See* Super. Ct. Civ. R. 8(a); *Ashcroft v. Iqbal*, 556 U.S. 662, 677-

78 (2009). To survive a Motion to Dismiss under Super. Ct. Civ. R. 12(b)(6), a Plaintiff must provide "enough facts to state a claim to relief that is plausible on its face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face "when the Plaintiff pleads factual content that allows the Court to draw the reasonable inference that the Defendant is liable for the misconduct alleged." *Id.*

ANALYSIS

A. Plaintiffs' claims for violation of federal constitutional provisions

Res judicata "precludes relitigation in a subsequent proceeding of all issues arising out of the same cause of action between the same parties or their privies . . . ." *Harnett v. Washington Harbour Condominium Unit Owners' Ass'n*, 54 A.3d 1165, 1173 (D.C. 2012). However, the doctrine of *res judicata* only applies if there has been a final judgment on the merits in the first proceeding. *See Shin v. Portals Confederation Corp.*, 728 A.2d 615, 618 (D.C. 1999) ("the crucial element of *res judicata* is a final judgment on the merits"); *Patton v. Klein*, 746 A.2d 866, 869 (D.C. 1999) ("Under the doctrine of *res judicata*, a final judgment on the merits of a claim bars relitigation of the same claim . . .").

In this case, as noted above, Judge Cooper issued an order and accompanying memorandum opinion dismissing all of Plaintiffs' claims on the merits pursuant to Federal Rule of Civil Procedure 12(b)(6). *Classic Cab, Inc., et al. v District of Columbia, et al.*, No. 17-cv-2820 (D.D.C. April 11, 2018) (Order granting motion to dismiss). Therefore, *res judicata* applies and the issues, at least as it relates to the federal constitutional provisions, are precluded. However, even if they were not precluded, this Court adopts the findings of Judge Cooper and

dismisses all of Plaintiffs' claims for the reasons and conclusions stated in his order as it relates to the alleged violations of federal constitutional provisions.[1]

B. Plaintiffs' D.C. Administrative Procedure Act (DCAPA) claim

Plaintiffs' DCAPA claim relates to an emergency rule that is no longer in effect.[2] Indeed, the only remedies Plaintiffs request as a result of the alleged violations are equitable in nature. See Compl. at ¶10(a) – 10(d). As there is no longer an emergency rule for this Court to grant an equitable remedy, the claim is moot and must be dismissed for failure to state a claim upon which relief may be granted. See Super. Ct. Civ. R. 12 (b)(6). Indeed, it appears Plaintiffs' remedy lies with the City Council or the Department of For-Hire Vehicles.

C. Plaintiffs' Request to Late File

Plaintiffs filed a motion to late file a notice of appeal subsequent to this Courts order denying the motion for preliminary injunction. In its motion, Plaintiffs state that, while following the instructions of a clerk from the District of Columbia Court of Appeals, it had to file its notice of appeal late due to the Superior Courts policy that all filings by attorneys must be made by electronic filing. This policy decision was made by Administrative Order 06-17 with an effective date of February 5, 2007.

D.C. Ct. App. Rule (4)(a)(5)(A) states that "[t]he Superior Court may extend the time for filing the notice of appeal if: (i) a party files the notice of appeal no later than 30 days after the time prescribed by Rule 4(a) expires; and (ii) that party shows excusable neglect or good cause."

Here, Plaintiffs have failed to show excusable neglect or good cause for filing a two-page notice one day late after having a 30-day notice of the date to file. Relying on a clerk to assist an attorney on interpreting the rules of the court, instead of exercising their professional judgment,

---

[1] The District Court declined to exercise supplemental jurisdiction over the APA claim. *Id.*
[2] Plaintiffs do not argue this fact in their opposition. See generally, Pls. Opp'n.

does not qualify as either excusable neglect or good cause. As such, the motion to late file is denied.

CONCLUSION

Accordingly, it is on this 24th day of April, 2018, hereby

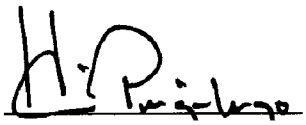
ORDERED that Defendants' Motion to Dismiss is **GRANTED**; it is further

ORDERED that Plaintiffs' Complaint is **DISMISSED WITH PREJUDICE**; it is further

ORDERED that Plaintiffs' Request to Late File is **DENIED**; and it is further

ORDERED that this case is **CLOSED**.

SO ORDERED.



Honorable Hiram Puig-Lugo
Associate Judge
Signed in Chambers

Copies to:

Sean Riley, Esq.
Chesseley Robinson, Esq.
Counsel for Plaintiffs

Gregory Cumming, Esq.
Amanda Montee, Esq.
Counsel for Defendants

No. 18-

IN THE SUPREME COURT OF THE UNITED STATES

CLASSIC CAB COMPANY,

Petitioner,

vs.

DISTRICT OF COLUMBIA,

Respondent.

CERTIFICATE OF SERVICE REGARDING THIS PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Petitioner, through counsel, certifies and affirms that the aforementioned Petition for Writ of Certiorari as served by first class mail on the following parties;

Mushtaq Gilani
8109 Bluebonnett Drive
Lorton, VA 22079

District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue NW
Washington DC 20004

Muriel Bowser, Mayor of D.C.
John A. Wilson Building
1350 Pennsylvania Avenue
NW Washington, DC 20004

Ernest Chrappah, Director
Department of For-Hire Vehicles
Executive Offices Suite 3001
2235 Shannon Place SE
Washington, DC 20020

Department of For-Hire Vehicles
Executive Offices Suite 3001
2235 Shannon Place SE
Washington, DC 20020

.

So Certified,

_____

Chesseley Robinson
Counsel of Record for Petitioner
2516 Australia Drive
Raleigh, NC 27610
chesseley@chesseleycares.com

No. 18-

IN THE
SUPREME COURT OF THE INITED STATES

CLASSIC CAB COMPANY,

Petitioner,

vs.

DISTRICT OF COLUMBIA,

Respondent.

CERTIFICATE OF COMPLIANCE WITH THE RULE 33 WORD COUNT REQUIREMENTS REGARDING THIS PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Petitioner, through counsel, certifies and affirms that the aforementioned Petition for Writ of Certiorari contains no more than 8,722 words (less than 9,000).

So Certified,

Chesseley Robinson
Counsel of Record for Petitioner
2516 Australia Drive
Raleigh, NC 27610
chesseley@chesseleycares.com