

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

4
5 August Term, 2011

6
7
8 (Argued: April 19, 2012 Decided: June 28, 2012)

9
10 Docket No. 12-41-cv

11
12 - - - - -x

13
14 CHRISTOPHER NOEL; SIMI LINTON; UNITED SPINAL, a
15 nonprofit organization; TAXIS FOR ALL CAMPAIGN,
16 a nonprofit organization; 504 DEMOCRATIC CLUB,
17 a nonprofit organization; DISABLED IN ACTION, a
18 nonprofit organization,

19
20 PLAINTIFFS-APPELLEES,

21
22 -v.-

23
24 NEW YORK CITY TAXI AND LIMOUSINE COMMISSION, a
25 charter mandated agency; DAVID YASSKY, in his
26 official capacity, as Commissioner of the New
27 York City Taxi and Limousine Commission,

28
29 DEFENDANTS-APPELLANTS.

30
31 - - - - -x

32
33 Before: JACOBS, Chief Judge, KEARSE and HALL,
34 Circuit Judges.

1 Appeal from a temporary injunction entered in the
2 United States District Court for the Southern District of
3 New York (Daniels, J.) requiring all new taxi medallions and
4 street-hail livery licenses issued in the City of New York
5 be limited to vehicles that are wheelchair accessible. We
6 conclude that defendants are not in violation of Title II,
7 Part A, of the Americans with Disabilities Act and that the
8 district court therefore erred in granting partial summary
9 judgment for plaintiffs and entering the temporary
10 injunction.

11 Vacated and remanded for entry of partial summary
12 judgment for defendants and further proceedings consistent
13 with this opinion.

14 Michael A. Cardozo, Corporation
15 Counsel of the City of New York
16 (Leonard Koerner, Robin Binder,
17 Michelle Goldberg-Cahn, Ronald E.
18 Sternberg, on the brief), for
19 Defendants-Appellants.
20

21 Sid Wolinsky (Julia Pinover, Mary-
22 Lee Smith, Kara J. Janssen, on the
23 brief), Disability Rights Advocates
24 (Allegra L. Fishel, Outten and
25 Golden, LLP, on the brief), for
26 Plaintiffs-Appellees.
27

28 Richard D. Emery (Emery Celli
29 Brinckerhoff & Abady LLP), for
30 Taxicab, Limousine & Paratransit
31 Association as amicus curiae in
32 support of Defendants-Appellants.

1 DENNIS JACOBS, Chief Judge:

2 Two people who use wheelchairs and the organizations
3 that represent persons with disabilities bring this class
4 action against the New York City Taxi and Limousine
5 Commission ("TLC") and the TLC Commissioner David Yassky for
6 violation of Parts A and B of Title II of the Americans with
7 Disabilities Act ("ADA"), the Rehabilitation Act of 1973,
8 and the New York City Human Rights Law. The United States
9 District Court for the Southern District of New York
10 (Daniels, J.) granted plaintiffs partial summary judgment as
11 to liability on the claim that defendants are violating Part
12 A of Title II of the ADA ("Title II(A)") by failing to
13 provide meaningful access to taxi services for persons with
14 disabilities. The district court also entered a temporary
15 injunction that requires that all new taxi medallions and
16 street-hail livery licenses be limited to vehicles that are
17 wheelchair accessible ("accessible taxis"), until the TLC
18 proposes and the district court approves a comprehensive
19 plan to provide meaningful access to taxi service for
20 wheelchair-bound passengers.

21 Defendants appeal the injunction and the grant of
22 partial summary judgment upon which the injunction is
23 premised. Appellate jurisdiction exists to review the
24 injunction and the underlying merits that relate to it. We

1 conclude that, though the TLC exercises pervasive control
2 over the taxi industry in New York City, defendants were not
3 required by Title II(A) to deploy their licensing and
4 regulatory authority to mandate that persons who need
5 wheelchairs be afforded meaningful access to taxis. The
6 district court therefore erred in entering the temporary
7 injunction.

8 Accordingly, we vacate the temporary injunction and
9 remand for the district court to enter summary judgment for
10 defendants on the Title II(A) claim and for further
11 proceedings consistent with this opinion.¹

12

13

BACKGROUND

14 The facts are not in dispute. Plaintiffs are [1]
15 persons with disabilities who seek fuller access to New York
16 City taxis and [2] organizations who represent them. They
17 contend that the taxi services in New York City fail to give
18 meaningful access to persons with disabilities and that the
19 TLC thus discriminates in violation of the ADA, the
20 Rehabilitation Act, and the New York City Human Rights Law.

¹ Because we vacate the temporary injunction as improvidently granted, we need not address defendants' secondary argument that the district court erred by entering an injunction that, as defendants contend, exceeded the scope of the litigation and the request of plaintiffs.

1 There are two types of licensed taxis in New York City:
2 the traditional yellow cabs and the livery cabs. The yellow
3 cabs are "medallion taxis" because the license is
4 accompanied by a metal "medallion" that is affixed to the
5 outside of the taxi. N.Y.C. Admin. Code § 19-502(h). A
6 yellow taxi is a 5-passenger vehicle for hire licensed "to
7 accept hails from passengers in the street." Id. § 19-
8 502(1). A livery cab is a 5-passenger vehicle for hire that
9 is dispatched from a livery base station on a pre-arranged
10 basis. See 35 N.Y.C. Rules & Regs. §§ 59A-03(j), (k); see
11 generally N.Y.C. Admin. Code § 19-502(g) (defining "for-hire
12 vehicle"). Livery cabs have not been authorized to accept
13 street hails.²

² New York adopted legislation in December 2011 (amended in February) (1) allowing the TLC to sell 2,000 additional yellow taxi medallions, all of which must be for accessible taxis, and (2) establishing the Hail Accessible Inter-Borough License ("HAIL") program, which permits livery vehicles to respond to street hails in northern Manhattan and the other boroughs. See 2012 NY ALS 9 (amending 2011 NY ALS 602). The TLC will be authorized to issue 18,000 HAIL licenses over a three-year period: 6,000 in the first year, 6,000 in the second year, and 6,000 in the third year. Twenty percent of the HAIL licenses are for accessible vehicles. Id. at § 5(b).

The licenses and medallions are expected to yield over a billion dollars in revenue for the City. Significantly, the TLC cannot sell any of its new accessible medallions until the HAIL license program commences. Id. at § 8.

1 Under the City Charter, all taxis are licensed and
2 regulated by the TLC, an administrative agency of the City
3 of New York under the Deputy Mayor for Operations. See 65
4 N.Y.C. Charter § 2300. As a condition of licensure, taxi
5 owners and drivers must comply with the TLC's applicable
6 laws and regulations. Id. §§ 2300, 2303; N.Y.C. Admin. Code
7 § 19-504. Under the City Charter, the TLC "adopt[s] and
8 establish[es] an overall public transportation policy
9 governing taxi, coach, limousine, wheelchair accessible van
10 services and commuter van services as it relates to the
11 overall public transportation network of the city." N.Y.C.
12 Charter § 2300. This includes "set[ting] standards and
13 criteria for the licensing of vehicles, drivers and
14 chauffeurs"; establishing "standards of service, . . .
15 insurance and minimum coverage, . . . driver safety, . . .
16 equipment safety and design, . . . noise and air pollution
17 control"; and adjudicating "charges of violations of the
18 provisions of the administrative code and rules promulgated
19 thereunder." Id. §§ 2300, 2303.

20 The number of medallions is limited by law to 13,237.
21 At least 231 are designated for wheelchair-accessible
22 vehicles, though any medallion owner may operate such a taxi

1 regardless of whether the medallion has that designation.
2 Currently, 233 taxis are so accessible; 98.2% of medallion
3 taxis are therefore inaccessible to persons in wheelchairs.³
4 Not surprisingly, the wait time for accessible taxis is
5 prolonged. The record shows that the chances of hailing any
6 taxi in Manhattan within ten minutes is 87.33%, whereas the
7 chances of hailing an accessible taxi within ten minutes is
8 3.31%.

9 * * *

10 After some discovery, plaintiffs moved for partial
11 summary judgment only on the ADA claims and only as to
12 liability. Defendants cross-moved on all claims. Each
13 side's motion for summary judgment was granted in part and
14 in part denied.

15 As to Part B of Title II of the ADA ("Title II(B)"),
16 which governs public transportation, the district court
17 granted summary judgment in favor of defendants. The
18 district court reasoned that although the TLC has "extensive
19 regulatory powers," the agency itself has "no authority to

³ The complaint alleges that 60,000 people in New York City are wheelchair users. The City's population exceeds eight million. See 2010 Census Bureau, available at <http://www.nyc.gov/html/dcp/html/census/popcur.shtml> (last visited June 20, 2012). Accordingly, people in wheelchairs make up approximately 0.73% of New York City's population.

1 provide [public transportation] services, and does not
2 function as a transportation services provider, to the
3 public." Noel v. New York City Taxi & Limousine Comm'n, --
4 F. Supp. 2d --, No. 11 Civ. 237 (GBD), 2011 WL 6747466, *5
5 (S.D.N.Y. Dec. 23, 2011). Because the TLC does not
6 "operate" a public transportation service, the district
7 court held that the TLC is not obligated under Title II(B)
8 to ensure meaningful access to taxis for persons with
9 disabilities. Id. at *6.

10 However, as to Title II(A), which governs public
11 services generally, the district court granted summary
12 judgment in favor of plaintiffs. The district court
13 reasoned that the TLC "is a public entity carrying out a
14 public regulatory function that affects and confers a
15 benefit on New York City taxicab riders," and therefore may
16 not discriminate in any of its functions--including its
17 regulatory activities--and must ensure persons with
18 disabilities have meaningful access to taxis in New York
19 City. Id. at *8. The district court determined that
20 plaintiffs enjoyed no meaningful access to taxis, id., and
21 were therefore entitled to summary judgment, id. at *8-9.

1 The district court then entered a temporary injunction
2 that had immediate impact in view of recent changes in New
3 York State law, which had authorized the issuance of
4 additional medallions and authorized, for the first time,
5 livery cabs to pick up street hails in under-served areas of
6 the City. See supra note 1. The injunction is as follows:

7 [t]he TLC must propose a comprehensive plan to
8 provide meaningful access to taxicab service for
9 disabled wheelchair bound passengers. Such a plan
10 must include targeted goals and standards, as well
11 as anticipated measurable results. Until such a
12 plan is proposed and approved by th[e District]
13 Court, all new taxi medallions sold or new street-
14 hail livery licenses or permits issued by the TLC
15 must be for wheelchair accessible vehicles.

16 Id. at *9.

17 On appeal, defendants challenge the temporary
18 injunction and the grant of summary judgment, to the extent
19 it bears on the injunction. While the appeal was pending,
20 we granted defendants' motion to stay enforcement of the
21 injunction. We now consider the merits of defendants'
22 appeal and vacate the temporary injunction.⁴

⁴ Because this appeal comes to us on review of the district court's temporary injunction and because plaintiffs have not cross-appealed, the issue of whether the district court correctly granted summary judgment for defendants on the Title II(B) claim is not before us. In addition, because the district court did not rule on plaintiffs' Rehabilitation Act and state law claims, those claims are also not before us.

1 participation in or be denied the benefits of the services,
2 programs, or activities of a public entity, or be subjected
3 to discrimination by any such entity." 42 U.S.C. § 12132.
4 To prevail under Title II(A), "plaintiffs must demonstrate
5 that (1) they are 'qualified individuals' with a disability;
6 (2) that the defendants are subject to the ADA; and (3) that
7 plaintiffs were denied the opportunity to participate in or
8 benefit from defendants' services, programs, or activities,
9 or were otherwise discriminated against by defendants, by
10 reason of plaintiffs' disabilities." Henrietta D., 331 F.3d
11 at 272. Defendants do not dispute that plaintiffs are
12 qualified individuals or that the TLC is a public entity
13 that is generally subject to Title II(A). The only question
14 on appeal then is whether the TLC denied plaintiffs an
15 opportunity to participate in its services, programs, or
16 activities, or otherwise discriminated against them on
17 account of a disability.

18 19 II

20 "As a remedial statute, the ADA must be broadly
21 construed to effectuate its purpose" of providing "a clear
22 and comprehensive national mandate for the elimination of

1 discrimination against individuals with disabilities."
2 Innovative Health Sys., Inc. v. City of White Plains, 931 F.
3 Supp. 222, 232 (S.D.N.Y. 1996) (internal quotation marks
4 omitted), aff'd in part, 117 F.3d 37 (2d Cir. 1997),
5 recognized as superseded on other grounds, Zervos v. Verizon
6 N.Y., Inc., 252 F.3d 163, 171 n.7 (2d Cir. 2001).
7 Accordingly, the phrase "services, programs, or activities"
8 has been interpreted to be "a catch-all phrase that
9 prohibits all discrimination by a public entity."
10 Innovative Health Sys., 117 F.3d at 45.

11 Although the ADA is to be interpreted broadly, "the
12 scope of Title II is not limitless." See Reeves v. Queen
13 City Transp., Inc., 10 F. Supp. 2d 1181, 1185 (D. Col.
14 1998). In enacting Title II, Congress directed the Attorney
15 General to promulgate regulations to implement Title II(A),
16 see 42 U.S.C. § 12134(a), and the Attorney General's
17 regulations add scope and shape to the general prohibitions
18 in the ADA, which are not self-reading. As the House
19 Judiciary Committee Report conceded, it is "the purpose of
20 this section . . . to direct the Attorney General to issue
21 regulations setting forth the forms of discrimination
22 prohibited." H.R. Rep. 101-485(III) at 52, reprinted in
23 1990 U.S.C.C.A.N. 445, 475.

1 The most relevant regulation here is 28 C.F.R.
2 § 35.130(b)(6), which governs the conduct of a public entity
3 administering a licensing program. The TLC, of course,
4 administers a licensing program: the licensing of taxis.
5 Section 35.130(b)(6) prohibits a "public entity" from
6 "administer[ing] a license or certification program in a
7 manner that subjects qualified individuals with disabilities
8 to discrimination on the basis of disability" or
9 "establish[ing] requirements for the programs or activities
10 of licensees or certified entities that subject qualified
11 individuals with disabilities to discrimination on the basis
12 of disability."

13 Notwithstanding the broad construction of the ADA,
14 Section 35.130(b)(6) does not support plaintiffs' claim
15 against the TLC. Section 35.130(b)(6) prohibits the TLC
16 from refusing to grant licenses to persons with disabilities
17 who are otherwise qualified to own or operate a taxi (i.e.,
18 qualified medallion purchasers and drivers); it does not
19 assist persons who are consumers of the licensees' product.
20 This reading of Section 35.130(b)(6) is consistent with the
21 Technical Assistance Manual of the Department of Justice
22 ("TAM"), which is persuasive authority as to the ADA's
23 meaning, unless it is plainly erroneous or inconsistent with

1 the ADA's regulations. See Innovative Health Sys., 117 F.3d
2 at 45 n.8. The section involving licensing makes clear that
3 the persons who are protected are those who are seeking
4 licenses:

5 A public entity may not discriminate on the basis
6 of disability in its licensing, certification, and
7 regulatory activities. A person is a "qualified
8 individual with a disability" with respect to
9 licensing or certification, if he or she can meet
10 the essential eligibility requirements for
11 receiving the license or certification. . . .
12 Public entities may not discriminate against
13 qualified individuals with disabilities who apply
14 for licenses, but may consider factors related to
15 the disability in determining whether the
16 individual is "qualified."

17 ADA TAM II-3.7200, available at
18 <http://www.ada.gov/taman2.html#II-3.7200> (last visited June
19 20, 2012). The example given in the TAM reinforces that
20 limitation:

21 ILLUSTRATION: A State prohibits the licensing of
22 transportation companies that employ individuals
23 with missing limbs as drivers. XYZ company
24 refuses to hire an individual with a missing limb
25 who is 'qualified' to perform the essential
26 functions of the job, because he is able to drive
27 safely with hand controls.

28 Id. The TAM concludes that such a licensing requirement
29 would violate Title II(A), id., but--critically--that "[t]he
30 State is not accountable for discrimination in the
31 employment or other practices of XYZ company, if those

1 practices are not the result of requirements or policies
2 established by the State.” Id.

3 That guidance goes far to deciding this appeal. The
4 gravamen of plaintiffs’ claim is that there are too few
5 accessible taxis in New York City and that the TLC should
6 use its regulatory authority to require that more taxis be
7 accessible. But no such claim is cognizable under Title
8 II(A) against the TLC because nothing in the TLC’s
9 administration of the licensing program discriminates
10 against persons with disabilities. Although only 231
11 medallions are conditioned on wheelchair accessibility, none
12 of the medallions issued by the TLC prohibits any medallion
13 owner from operating an accessible taxi.

15 III

16 Plaintiffs contend that the TLC violates Title II(A)
17 because the industry it licenses fails to provide meaningful
18 access to taxis for persons with disabilities.

19 As an initial matter, Title II(A) makes clear that
20 “[t]he programs or activities of entities that are licensed
21 or certified by a public entity are not, themselves, covered

1 by [Title II(A)]." 28 C.F.R. § 35.130(b)(6).⁵ As the TAM
2 advises: "[a]lthough licensing *standards* are covered by
3 title II, the *licensee's activities themselves* are not
4 covered. An activity does not become a 'program or
5 activity' of a public entity merely because it is licensed
6 by the public entity." ADA TAM II-3.7200 (emphasis added).
7 At the risk of being obvious, "[t]he New York City taxicab
8 industry is a private industry." Freidman v. Gen. Motors
9 Corp., 721 F. Supp. 2d 218, 220 (S.D.N.Y. 2010).

10 Accordingly, even if private industry (such as the New York
11 City taxi industry) fails to provide meaningful access for
12 persons with disabilities, a licensing entity (such as the
13 TLC) is not therefore in violation of Title II(A), unless
14 the private industry practice results from the licensing
15 requirements. See ADA TAM II-3.7200.

16 This conclusion was adopted by the two district courts
17 that have considered the issue. It was claimed in Tyler v.
18 City of Manhattan, 849 F. Supp. 1429, 1441-42 (D. Kan.
19 1994), that Manhattan (Kansas) violated Title II(A) by
20 granting liquor licenses to businesses that were

⁵ Cf. 49 C.F.R. § 37.37(a) (Title III) (Department of Transportation regulation providing that "[a] private entity does not become subject to the requirements of this part for public entities[] because it . . . is regulated by, or is granted a . . . permit to operate by a public entity.").

1 inaccessible to persons with disabilities. The district
2 court concluded "that the regulations implementing Title II
3 of the ADA do not cover the programs and activities of
4 [private] entities that are licensed or certified by a
5 public entity." Id. at 1441 (citing 28 C.F.R.
6 § 35.130(b)(6)); accord id. (explaining that "[a]lthough
7 *City programs* operated under contractual or licensing
8 arrangements may not discriminate against qualified
9 individuals with disabilities, the programs or activities of
10 licensees or certified entities are not themselves programs
11 or activities of the public entity merely by virtue of the
12 license or certificate." (internal citation, quotation
13 marks, and alteration omitted)). Tyler ruled that the
14 licensing of non-accessible private establishments did not
15 deny "access to services, aids, and programs *provided by the*
16 *City* under licensing or contractual arrangements." Id. at
17 1442.

18 The plaintiff in Tyler also argued that the city's
19 physical inspection of licensed facilities provided a
20 benefit to non-disabled people only, because only non-
21 disabled people could enter those establishments. Id. The
22 district court explained that it was not the government
23 inspections that denied access to the facilities or the

1 benefits of being there; it was the facilities themselves,
2 which were operated privately. Id. Such a claim is not
3 actionable under Title II(A), Tyler reasoned, because "Title
4 II . . . and its implementing regulations prohibit
5 discrimination against qualified individuals only *by public*
6 *entities*" and do "not go so far as to require public
7 entities to impose on private establishments, as a condition
8 of licensure, a requirement that they make their facilities
9 physically accessible to persons with disabilities." Id.
10 Because private establishments are not services, programs or
11 activities of a public entity, Tyler held that they are not
12 governed by Title II(A) or its implementing regulations.
13 Id.

14 In Reeves v. Queen City Transportation, Inc., 10 F.
15 Supp. 2d 1181 (D. Colo. 1998), a private company transported
16 guests to resorts in vehicles that were not wheelchair
17 accessible. The plaintiffs sued the public utility
18 commission that had issued the company a certificate to
19 operate, alleging a violation of Title II(A). Id. at 1182-
20 83.

21 In rejecting the Title II(A) challenge, the District of
22 Colorado concluded that the utility commission "operates a
23 certification program, not a transportation program," and

1 that "issuance of a certificate of" operation to a private
2 transportation company "does not constitute a violation of
3 Title II even if [that company] subsequently engage[s] in
4 unlawful discrimination." Id. at 1186 (internal quotation
5 marks omitted).

6 Plaintiffs undertake to distinguish these cases on the
7 ground that this Circuit interprets the ADA more broadly.
8 To be sure, this Circuit broadly interprets the ADA, see
9 Innovative Health Sys., 117 F.3d at 45--and the district
10 court here relied on that broad construction, see Noel, 2011
11 WL 6747466, at *7-8. However, the ADA is not without
12 limits, and limits are found in the Attorney General's
13 regulations, which (as relevant here) emphasize that Title
14 II(A)'s prohibition on discrimination by public entities
15 does not compel public entities to police compliance by the
16 private entities they license. E.g., 28 C.F.R.
17 § 35.130(b)(6); see also ADA TAM II-3.7200. Moreover,
18 Reeves can hardly be distinguished on the ground that it is
19 incompatible with the Second Circuit's broad reading of the
20 ADA; Reeves properly cites our decision in Innovative Health
21 Systems for that proposition. Reeves, 10 F. Supp. 2d at
22 1183.

1 Plaintiffs also contend that this case is different
2 because the TLC's control of the taxi industry is pervasive.
3 See N.Y.C. Charter § 2303(b); Statharos v. N.Y. City Taxi &
4 Limousine Comm'n, 198 F.3d 317, 321, 324 (2d Cir. 1999).
5 Pervasive control is significant, plaintiffs argue, because
6 it was the dispositive factor in Paxton v. State of West
7 Virginia Department of Tax & Revenue, 451 S.E. 2d 779 (W.
8 Va. 1994).

9 In Paxton, the West Virginia Supreme Court affirmed a
10 writ of mandamus compelling a lottery commission--a public
11 entity--to require all places that sell lottery tickets to
12 be accessible to persons with disabilities. Id. at 781,
13 786. The court noted that the lottery commission has
14 substantial control and regulatory authority over the
15 lottery, id. at 783-84, but that was not essential to the
16 decision. The crucial fact--which was held to distinguish
17 the lottery franchises from the liquor licenses in Tyler--
18 was that, "through its contract vendors the Lottery
19 Commission furnishes the lottery devices and services that
20 allow the licensee to conduct lottery sales." Id. at 785.
21 Thus the lottery commission was not "only engaged in a
22 licensing arrangement," but "provide[d] an aid, benefit or
23 service on a continuing basis to its licensee"; and that is

1 the reason that the West Virginia Supreme Court held that
2 the commission was covered by Title II(A). Id. (“[T]he
3 lottery is the service provided by the Lottery Commission,
4 and it is this service that makes the Lottery Commission
5 subject to the ADA under 28 C.F.R. § 35.130(b)(1).”).⁶

6 We neither endorse nor challenge the reasoning of
7 Paxton. In any event, our case is a closer analog to Reeves
8 and Taylor, in which the public entity is merely the entity
9 charged with regulating and licensing private industry. The
10 TLC’s control over the taxi industry, however pervasive it
11 is at this time, does not make the private taxi industry “a
12 ‘program or activity’ of a public entity.” See ADA TAM II-
13 3.7200; accord 28 C.F.R. § 35.130(b)(6).⁷ Accordingly, the

⁶ Reeves distinguished Paxton on this same basis: that Paxton “relied heavily on” the fact “that state statutes charged the Lottery Commission with operation of the state lottery on a continuous basis,” such that “the lottery is the service provided by the Lottery Commission.” Reeves, 10 F. Supp. 2d at 1187 (internal quotation marks omitted).

⁷ Plaintiffs’ “pervasive control” argument might have more force if the TLC failed to include accessible models on its list of vehicles that medallion holders can use as taxis. There is no showing, however, that the TLC inhibits the purchase of accessible medallions or vehicles that can be adapted for wheelchair access. In short, the ADA does not require a licensing entity to use its regulatory power to coerce compliance by a private industry.

Plaintiffs suggest that the Taxi-for-Tomorrow Initiative violates Title II(A) by effectively preventing medallion owners from using an accessible vehicle. Taxi-for-Tomorrow, which is non-binding, “seeks to select the

1 TLC does not violate the ADA by licensing and regulating a
2 private taxi industry that fails to afford meaningful access
3 to passengers with disabilities.
4

5 IV

6 None of the regulations cited by plaintiffs require a
7 different result.

8 Section 35.130(b)(1)(i) provides that "[a] public
9 entity, in providing any aid, benefit, or service, may not,
10 directly or through contractual, licensing, or other
11 arrangements, . . . [d]eny a qualified individual with a
12 disability the opportunity to participate in or benefit from
13 the aid, benefit, or service" "on the basis of [that
14 individual's] disability." 28 C.F.R. § 35.130(b)(1)(i).

15 This provision bars a public entity from discriminating by
16 refusing to issue a license to a person who has a disability
17 because of the disability; but the TLC denies that it
18 engages in any such discrimination, and Plaintiffs do not

next vehicle that will be used as the standard taxicab of
New York." Joint App'x 33. According to the record, a
committee tentatively accepted the Nissan NV200. The
current model of the NV200 is not accessible, but the model
that would serve as the standard taxi is still being
developed. Joint App'x 142. We decline to decide now
issues that might arise in the future as the project goes
forward.

1 dispute the point. Moreover, to the extent that plaintiffs
2 argue that the "service" the TLC provides is the regulation
3 of the taxi industry, plaintiffs' argument is the same
4 argument that was rejected in Tyler, where the plaintiff
5 pleaded inability to avail himself of the benefits of the
6 municipality's physical inspections of non-accessible
7 facilities.

8 Plaintiffs also rely on 28 C.F.R. § 35.130(b)(3)(i),
9 which prohibits a "public entity . . . , directly or through
10 contractual or other arrangements," from "utiliz[ing]
11 criteria or methods of administration . . . [t]hat have the
12 effect of subjecting qualified individuals with disabilities
13 to discrimination on the basis of disability." This is
14 aimed at requirements that discriminate against people with
15 disabilities, such as when a public entity refuses to do
16 business with a person who has a disability. See, e.g., ADA
17 TAM II-3.7100, available at
18 <http://www.ada.gov/taman2.html#II-3.7100> (last accessed June
19 20, 2012). Plaintiffs raise no such claim against the TLC.

20 Finally, plaintiffs argue that Section 35.130(b)(6)
21 (discussed at length above) governs their claim because it
22 (in part) prohibits "a public entity [from] establish[ing]
23 requirements for the programs or activities of licensees or

1 certified entities that subject qualified individuals with
2 disabilities to discrimination on the basis of disability.”
3 An example of such discrimination would be denying licenses
4 to transportation companies that employ individuals with
5 disabilities, which causes discrimination against
6 prospective employees who are otherwise qualified. ADA TAM
7 II-3.7200. The TLC licensing scheme is distinguishable on
8 the elementary ground that it does *not* cause discrimination.

9 Instead, plaintiffs contend that the TLC violates the
10 ADA because it *could* require more taxis to be accessible,
11 but does not. The TLC’s licensing requirements do not
12 discriminate and do not cause anyone else to discriminate,
13 by licensing or otherwise. The TLC’s licenses do not bar
14 taxi owners from operating accessible vehicles. The only
15 medallions that specify whether the taxi must be accessible
16 specify that the taxi operated pursuant to that license be
17 *accessible*. No doubt, more such taxis would be on the
18 streets if the TLC required more of them to be accessible.
19 But the TLC’s failure to use its regulatory authority does
20 not amount to discrimination within the meaning of the ADA
21 or its regulations.

22
23

1
2 It may be that there is a failure to provide meaningful
3 access to taxis for persons with disabilities. But if so,
4 it is a failure of the taxi industry in New York City.
5 Plaintiffs do not--and cannot--bring such a claim against
6 the taxi industry directly under Title III of the ADA (which
7 governs private entities), because Title III expressly
8 exempts taxi providers from purchasing or leasing
9 "accessible automobiles." 49 C.F.R. § 37.29(b).⁸

10 Plaintiffs assert their claim under Title II(A), but
11 Title III is instructive nevertheless. Plaintiffs contend
12 that the TLC violates the ADA because the industry it
13 pervasively regulates fails to afford meaningful access to
14 persons with disabilities. But since the taxi industry
15 itself is exempt, there is no underlying violation of the
16 ADA for the TLC to redress by regulation. The district
17 court, which has held that the TLC must increase the number
18 of handicap-accessible taxis, has thus run counter to the

⁸ If, however, "a provider of taxi service purchases or leases a vehicle other than an automobile, the vehicle is required to be accessible" 49 C.F.R. § 37.29(b). Nevertheless, because "[a] provider of taxi service is not required to purchase vehicles other than automobiles in order to have a number of accessible vehicles in its fleet," a taxi provider is not obligated to purchase or lease vehicles accessible to persons with disabilities. Id.

1 policy choice of the political branches, which exempted the
2 taxi industry from the ADA.

3 This was a problem of which the district court was all
4 too aware. Discussing plaintiffs' Title II(B) claim, the
5 district court observed:

6 Title III cannot be read as exempting taxicab
7 owners from any requirement that they purchase
8 wheelchair accessible automobiles, but at the same
9 time have intended that subtitle B of Title II
10 impose such a personal obligation based solely on
11 the extent of the control of the public regulatory
12 agency. The effect would be to impose an
13 obligation on those private owners under subtitle B
14 of Title II that Congress explicitly intended to
15 exempt under Title III. Congress had the same
16 power to require regulated private owners providing
17 taxi service to purchase wheelchair accessible
18 automobiles under Title III, and chose not to do
19 so.

20 Noel, 2011 WL 6747466, at *6.

21 That sound reasoning applies with equal force to
22 plaintiffs' Title II(A) claim. If the TLC is required under
23 Title II(A) to ensure that the taxi industry provides a
24 sufficient number of accessible taxis, then private taxi
25 owners would be required to purchase or lease accessible
26 taxis even though the ADA explicitly exempts them from such
27 requirements. 49 C.F.R. § 37.29(b). The exemption compels
28 the conclusion that the ADA, as a whole, does not require
29

1 the New York City taxi industry to provide accessible
2 taxis.⁹

3 * * *

4 In sum, Title II(A) does not obligate the TLC to use
5 its licensing and regulatory authority over the New York
6 City taxi industry to require that taxi owners provide
7 meaningful access to taxis for persons with disabilities.
8 The district court therefore erred in granting summary
9 judgment for plaintiffs on their Title II(A) claim and in
10 entering a temporary injunction premised on that grant of
11 summary judgment. See Abrahams, 644 F.3d at 115 (holding
12 that “[a] district court abuses its discretion when it[,
13 inter alia,] rests its decision on an error of law”).

⁹ We reject plaintiffs’ argument that, in this case, Title II and Title III merely provide differing standards of obligations under the ADA and that, where standards differ, the standard providing the highest degree of access must be met. See ADA TAM II-1.3000, Illustration 3, available at <http://www.ada.gov/taman2.html#II-1.3000> (last accessed June 20, 2012). It may be true, as the TAM example demonstrates, that when public and private entities form a joint venture to build a stadium, the stadium must comply with both Title II and Title III and, where the standards differ, the stadium must comply with the higher standard. But here, there is no joint venture. Nor do standards differ: the taxi industry is exempt from the ADA. If Title II(A) were construed to require indirectly that the taxi industry provide accessible vehicles, Title III’s exemption would be undone altogether.

1 **CONCLUSION**

2 Accordingly, the district court's temporary injunction
3 is vacated. The case is remanded with instructions for the
4 district court to grant summary judgment to defendants on
5 the Title II(A) claim and for further proceedings consistent
6 with this opinion.