09-4305-cv

United States Court of Appeals

for the

Second Circuit

JONATHAN NNEBE, ALEXANDER KARMANSKY, individually and on behalf of all others similarly situated, KHARIRUL AMIN, EDUARDO AVENAUT, NEW YORK TAXI WORKERS ALLIANCE, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

– v. –

MATTHEW DAUS, CHARLES FRAZIER, JOSEPH ECKSTEIN, ELIZABETH BONINA, THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION, THE CITY OF NEW YORK, CHARLES FRASER,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS

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JURISDICTION

This Court has jurisdiction based on 28 U.S.C. § 1291. The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(4), 1367, and 2201. A timely notice of appeal of the district court's final order entered on September 30, 2009 was filed on October 15, 2009.

PRELIMINARY STATEMENT

This case concerns the constitutional rights of New York City taxi drivers. The City's Taxi and Limousine Commission (TLC) has for years followed a policy of summarily suspending the licenses of taxi drivers who have been arrested for any of a variety of offenses. This suspension-upon-arrest policy applies to arrests for misdemeanors, including for conduct alleged to have occurred off-duty (the vast majority of cases), to charges unrelated to taxicab driving or driving of any sort, and (in the case of felonies) ones that are not even arguably related to safety. The TLC continues these suspensions until the criminal charges are resolved in the cabdriver's favor, as they almost invariably are—though not, typically, until months later. At that point, the TLC summarily reinstates the license, and the driver may resume earning his living.

The TLC affords the affected individuals no notice or opportunity to be heard before it acts; nor does it provide any remedy to individuals wrongly or unnecessarily deprived of their ability to earn a living. The *only* process the

agency affords is a post-deprivation hearing before an administrative law judge, at which the lone issue a driver may contest is the fact of his arrest on the charges referenced.

Plaintiffs, individuals who were deprived of their licenses pursuant to the suspension-upon-arrest policy and a membership organization dedicated to advancing cabdrivers' well-being and fair treatment, brought this 42 U.S.C. § 1983 action on behalf of themselves and others subject to the policy, contending, among other things, that it is unconstitutional under the Due Process Clause. This appeal is from the district court's grant of summary judgment to defendants.

STATEMENT OF ISSUES

1. Whether a New York City taxi driver is entitled to a pre-deprivation hearing before his taxi driver's license is suspended based solely on an arrest report;

2. Whether the TLC post-suspension hearings comport with Due Process;

3. Whether the TLC tribunal is unconstitutionally biased in favor of the TLC;

4. Whether plaintiffs are entitled to summary judgment on their state law claims; and

5. Whether plaintiffs' class certification motion, dismissed as moot, should be reinstated.

STANDARD OF REVIEW

The district court's rulings on each issue are subject to *de novo* review.

FACTS AND PROCEEDINGS BELOW

A. The New York Taxi Industry and the TLC

In order to drive a taxi in the City of New York (whether a yellow cab or a for-hire-vehicle), an individual must be licensed by the TLC.

In 2005, there were 42,900 licensed taxi drivers eligible to drive the 12,779 licensed taxis. Schaller Consulting, The New York City Taxicab Fact Book 51 (March 2006) (available at http://www.schallerconsult.com/taxi/taxifb.pdf) ("Fact Book"). Cabdriving is a difficult and dangerous job. Drivers work long shifts, for relatively modest pay, under very unpleasant conditions, performing a task that is stressful, grueling, and dangerous. Because the virtually all of them are legally "independent contractors," who lease cabs from owners, rather than "employees," JA-53, drivers have no employer-provided health insurance or other benefits, such as sick leave, and vacation pay, that many salaried employees receive.

Consistent with the taxi industry's historic role as the "poor man's gateway to mainstream America," (see James Dao, "A Living, Barely, Behind the Wheel; Low Pay and Long Hours Cut Through Taxi World Stratum" The New York

Times (Dec. 6, 1992), 89 percent of cabdrivers were born outside the United States, with the largest group, 43 percent of the total, from South Asia (principally India, Pakistan, and Bangladesh). JA-53.

The city's taxi industry has long been regulated by the City Council and, since 1971, also by the TLC. See City Charter §§ 2300-2304. The Commission is composed of nine members, including a chairman with executive responsibilities. The TLC's jurisdiction, powers and duties are defined by the Charter. This jurisdiction encompasses "the regulation and supervision of the business and industry of transportation of persons by licensed vehicles," *Id*. § 2303, including "the issuance, revocation [and] suspension of licenses for drivers, chauffeurs, owners or operators of vehicles." *Id*. § 2303(b)(3); *see generally Padberg v. McGrath-McKechnie*, 203 F. Supp. 2d 261, 267-68 (E.D.N.Y. 2002), *aff'd* 60 Fed. Appx. 861 (2d. Cir.), *cert. denied*, 540 U.S. 967 (2003).

The City Council and the Commission have adopted myriad rules governing suspension or revocation of taxi driver licenses. For example, a driver will be suspended if he accumulates six DMV "points" in a 15-month period. Admin. Code § 19-507.2. The same penalty applies for six "TLC points." *Id.* § 19-507.1. A driver may be suspended if he drives with a defective taximeter (TLC Rule 2-31). A cabdriver may also be suspended if he "threatens harasses or abuses" or "uses or if he attempts to use any physical force against" a passenger or "or any

governmental or Commission representative, public servant or other person while performing his duties and responsibilities as a driver." TLC Rules 2-60, 6-18i (parallel rules for yellow taxi drivers and for-hire-vehicle drivers). He may also be suspended if he commits "any act of fraud, misrepresentation or larceny" if that conduct occurs "while performing his duties and responsibilities as a driver." TLC Rule 2-61. Suspensions under these rules, however, may be imposed only after a driver has had a fact-finding hearing and been found guilty. See TLC Rule 8-11(b).

B. The Suspension-Upon-Arrest Policy

Although there was not, at the time plaintiffs' licenses were suspended, any TLC rule or public statement of the suspension-upon-arrest policy (a rule memorializing it was adopted months after this action was filed, see *infra*), the basics of its substance and its operation are not in dispute.

1. Summary Suspension

When the TLC receives a computer-generated notice that a driver has been arrested, a TLC lawyer (at times relevant here, Marc Hardekopf) checks whether the arrest charge matches any on a list of Penal Code sections compiled by the TLC legal department. If it does, the lawyer orders an immediate license suspension and issues a letter notifying the driver. JA-274-75, 299-300, 497

("Suspension Letter"). As the district court observed, "Neither the factual allegations underlying the arrest, nor the [individual's] driving record, nor [his] prior criminal record affect th[is] decision." Slip. Op. 4. Indeed, the lawyer acts without seeing a copy of the criminal complaint (or, in the rarer case of a felony charge, the indictment) or knowing whether criminal charges have been filed in court. JA-256-58, 423.

At no point prior to this summary suspension is the affected driver afforded any notice or opportunity to show that suspension would be factually or legally unwarranted or would cause him hardship. JA-256-58. Although the form letter states the suspension was "based upon *a determination by the Commission* that emergency action [was] required to insure public health, safety, and welfare," [JA-497, 531, 595, emphasis added] the lawyer in fact does not consult (or inform) the members of the Commission or the even the chairman before acting. JA-252-53, 272-73, 421-22.

Nor was the list of offenses triggering suspension developed, reviewed or voted upon by the Commission. JA-88, 277-79, 423. Indeed, as explained below, at the time the named plaintiffs were suspended and this suit was brought, neither the substance nor the procedural aspects of the arrest-suspension policy had been considered or approved by the Commission or the City Council. The list of offenses does not appear in any TLC rule or City law. Indeed, until produced in

discovery in this case, neither the list nor the criteria used to develop it had been publicly disclosed, let alone explained, or even provided to those suspended. JA-264, 277-79, 284.

Although in the court below defendants generally described the policy as applying to arrests for "serious" offenses, including (but not limited to) penal code provisions with an "element of violence," they did not dispute that most of the individuals affected face misdemeanor charges, as did all the named plaintiffs; that few of the cases involve allegations of on-duty conduct, or that an overwhelming majority of all arrests result in favorable resolutions—at which point the license is restored. JA-86-87, 263, 890-91.

2. The Post-Suspension Hearings

The Suspension Letter also notifies the driver that he has 10 days to "request a hearing to have the emergency suspension action by the Commission reviewed." JA-497, 531, 595, 630. At the inception of this case, the character and scope of these proceedings, which were then conducted before TLC-employed administrative law judges (ALJs), was a matter of some dispute.[1] Defendants resisted plaintiffs' contention that these hearings offered drivers no real

[1] In 2007 the TLC decided (in an action announced in a court filing in this case) that post-suspension hearings would be conducted by the NYC Office of Administrative Trials and Hearings (OATH), rather than by TLC ALJs, albeit with Chairman Daus continuing his role as the ultimate arbiter.

opportunity for relief, insisting that the presiding ALJs possessed "discretion" to overturn the summary suspensions (or, more precisely, to recommend that the chairman do so) and noting that the chairman retained similar authority, in cases where the ALJ had recommended continued suspension.

The evidence supplied little support for this account. Notwithstanding deposition testimony by the chairman that he had lifted suspensions imposed under this policy once (or perhaps twice) "in recent memory," JA-345-49, he could not recall the names of the drivers involved or anything more about the specific circumstances, and defendants did not produce evidence of even one suspension he had overturned. The evidence likewise showed that, with just one exception, no ALJ employed by the TLC had ever *recommended* that a suspension be overturned. JA-86.[2]

That ALJ's actions, discovery disclosed, precipitated an alarmed and aggressive response within the agency. On three occasions in late February and early March 2006, ALJ Eric Gottlieb recommended that licenses be reinstated, based on what he found in each case to be the "overwhelming likelihood" of a non-

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[2] The district court risked understatement in observing that the "vast majority of the ALJs recommend … continuing the suspension." Slip Op. 4. The record establishes that TLC ALJs had recommended continuation in 225 of the 228 cases, with the three outliers' issued by a single ALJ during a single two-week period in 2006. It should be noted that most drivers suspended under the policy, aware of these realities, do not request hearings. JA-234-35.

criminal disposition. JA-187-192. Word of these decisions led Thomas Coyne, then Deputy Chief ALJ, to telephone Mr. Gottlieb repeatedly and to have the agency's Chief ALJ, Elizabeth Bonina, call him as well. JA-372-73. These calls were reinforced by an email in which Coyne notified Gottlieb that his actions had been "**improper**," (emphasis original), directing that "In the future if you believe a summary suspension should be lifted please call me and discuss the matter before mailing [a recommendation] out." JA-185. (Gottlieb responded apologetically, describing his actions as a "mishap,"— one, he assured Coyne, that would "never happen again." JA-185, 390-92. In fact, he never again ruled for a driver in a summary suspension case. JA-392). In another e-mail, Coyne told TLC Attorney Hardekopf, who represented the agency in suspension hearings, that "[i]f the ALJs **now** have the authority to lift summary suspensions then this change should be in writing since it conflicts with … my understanding of current policy." JA-197 (emphasis in original).

By the time the case was ready for decision, defendants' position had undergone a significant shift, now openly acknowledging that the "only issue" for resolution at the post-suspension hearings was (and long had been) whether the driver had, in fact, been arrested for violating the penal code provision referenced. Indeed, the district court cited defendants' representation that the rule promulgated

after suit was filed, which expressly limits the scope of hearings to this issue, "did not substantively change the summary suspension policy." Slip Op. 3 n. 2.

In particular, the ALJs who presided at plaintiffs' hearings were directed in making their decision to assume a 100% certainty that the driver would be convicted of violating the penal code provision charged, JA-204, despite knowing, as an empirical matter, that the percentage of suspended drivers ultimately convicted is "very low." JA-263.[3] And as noted, the policy also denies ALJs power to give effect to contrary evidence – *i.e.*, that conviction is unlikely in the individual case at hand—even, as ALJ Gottlieb put it, when the prospect of dismissal is "overwhelming." JA-188.[4] TLC policy likewise requires the ALJ to conclude that continued driving by an individual arrested and charged with one of the listed offenses would constitute a danger. And both in practice and as understood by the district court, the adjudicator is without authority to consider, let

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[3] A review of Commission files produced in discovery demonstrated that 90 percent of suspended drivers later see their criminal charges dismissed, reduced to a violation, adjourned in contemplation of dismissal, or not-prosecuted at all. JA-87, 889-94. Although defendants took issue with the methodology of plaintiffs' sampling, they did not advance an alternative estimate (despite having possession of the data), and expressly conceded that the percentage of convictions was "very low." JA-263.

[4] In each of the cases where Gottlieb recommended reinstatement, criminal charges were in fact later dropped. In two of the three cases, criminal charges were dismissed even before Chairman Daus had a chance to reject the recommendation. *See* JA-193-96

alone give effect to, the particular circumstances of the arrest, such as the nexus (or lack thereof) between the allegations and the person's responsibilities as a cabdriver, *e.g.*, whether the charges involved a domestic dispute (as in the case of plaintiff Alexander Karmansky), a landlord-tenant dispute (as in Khairul Amin's case) or a barroom altercation. Slip. Op. 16.

Consistent with their increasingly clear acknowledgment that the fact of arrest is the *only* issue actually considered in the post-suspension hearings, defendants have not identified any other legal or factual ground that has been or would be ground for overturning a suspension under the policy. Neither an exemplary driving and work record nor an unblemished criminal record, nor the willingness of a cab or medallion owner to continue entrusting his taxi to the driver affects the automatic decision to suspend. Nor does the TLC consider the generally strong incentives persons awaiting disposition of pending criminal charges have to stay within the law. Nor does it provide for consideration of special hardships that deprivation would cause an individual driver or his family. JA-256-59. While the TLC Rule 8-16F (Rule 8-16E in the prior version) permits the chairman to "modify or reject" suspension recommendations, Chairman Daus, in fact, never does so. The chairman's decision, defendants admit, is the agency's final word. JA-200.

3. Reinstatement

Just as it keys suspension exclusively to the fact of arrest, so too does TLC policy give automatic, dispositive effect to the criminal justice system's ultimate (favorable) disposition of the charges. Thus, the Suspension Letter explains that the TLC's policy is to reinstate a license upon receiving notification that criminal charges have been dismissed or adjourned. JA-497, 531, 595. In such cases, the TLC attaches no further significance to the fact of arrest, JA-70-78, nor does the policy provide for independent agency investigation of (or discipline for) the conduct underlying the arrest. The Suspension Letters state that a *conviction* on the charge referenced "may" lead the Commission to "initiate revocation proceedings, based on a determination that [the driver is not] fit to possess a TLC license." But, as the letter indicates, in carrying out the policy, the TLC does not initiate revocation proceedings unless and until a conviction occurs. And even in that (statistically rare) event, neither punishment nor commencement of further proceedings is automatic.

4. The Unknown Origins of and Uncertain Legal Basis for the TLC Policy

The origins of the suspension-upon-arrest policy are obscure, as is the source of legal authority supporting it. Chairman Matthew Daus, a ten-year veteran of the agency (who was TLC General Counsel before becoming Chairman) testified "I

don't know. I don't remember," JA-338, when asked how and when it originated. Charles Fraser, the current General Counsel, testified he did not know when or by whom the rule had been established. JA-270-71. Hardekopf, the lawyer who orders the suspensions and represents the agency at the hearings, was likewise unaware. JA-247. Coyne, the deputy chief ALJ in charge of those hearings, testified that the "standard" to be applied could be found in the TLC's "ALJ Manual," but did not know who had written the relevant section or when. JA-375-76.

Although the policy now appears in a TLC rule (which is set out below), that rule was not in effect when the named plaintiffs were suspended or when this action was filed.[5] The authority the district court cited for the policy, Administrative Code § 19-512.1, was not mentioned in the Suspension Letters, nor was it cited in the written "recommendations" by TLC ALJs or the chairman's orders continuing their suspensions. The code provision was never mentioned

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[5] TLC Rule 8-16C, as amended, reads:

> [T]he Chairperson may summarily suspend a license … based upon an arrest on criminal charges that the Chairperson determines is relevant to the licensee's qualifications for continued licensure. At the hearing … the issue shall be whether the charges underlying the licensee's arrest, if true, demonstrate that the licensee's continued licensure during the pendency of the criminal charges would pose a direct and substantial threat to the health or safety of the public. Revocation proceedings need not be commenced during the pendency of the criminal charges.

presumably because, as explained below, Section 19-512.1 on its face concerns *vehicle* rather than *driver's* licenses. See *infra*. The provision that *was* invoked contemporaneously, TLC Rule 8-16A, while granting the chairman authority to suspend where "emergency action is required to insure public health or safety," applies only to suspensions "*pending revocation proceedings*," with a direction that "[s]uch revocation proceedings shall be initiated within five (5) calendar days of the summary suspension." TLC 8-16B (prior version, emphasis added). No such proceedings were initiated (within five days or at any time), against the named plaintiffs or others subject to the policy. And neither that rule nor the Administrative Code provision even hints at authorization for the extraordinarily circumscribed post-suspension hearings of the kind conducted here.

As Coyne testified, the policy did appear in a "Manual," which was authored by Daus and others and was disseminated to TLC ALJs, but not to the public, or to drivers or to lawyers appearing for drivers at hearings. JA-268, 368-69, 859, 917. (Appellants obtained a copy through discovery.). The TLC ALJ Manual explained that "[t]he standard to be applied in such hearings is not whether the licensee has a likelihood of prevailing on the merits at a subsequent license revocation hearing or pending criminal proceeding. ***The only issue for determination by an ALJ is whether the acts alleged, if established and substantiated, form a rational basis for the licensee's suspension for the protection of the public health safety or***

welfare." JA-203-04 (emphasis in original). It further instructs that "The attorney who presents the Commission's case will submit documentary evidence [of an arrest … and that] such documents are sufficient evidence from which the ALJ can conclude that a licensee poses a risk to the public." *Id*. The Manual provides no similar guidance as to what evidence, if any, could support a contrary conclusion.

C. The TLC Tribunal

The ALJs who presided at plaintiffs' hearings lacked even the rudiments of structural or decisional independence. They are at-will employees of the agency. They work on a per-diem basis and enjoy no tenure or term in office and no contractual or civil service protections. JA 435.5, 871. ALJs must apply for work assignments on a monthly basis, and those assignments may be denied without cause. JA-320, 435.5, 872. Indeed, the TLC has successfully litigated its right to terminate ALJs at-will. *See Glicksman v. New York City Env. Control Bd.*, 2008 WL 282124 (S.D.N.Y. 2008) (confirming that they have no right to "decisional independence"), *summarily aff'd*, 2009 WL 2959566 (2d Cir. 2009). ALJ Gottlieb even testified that Coyne's reprimands had caused him concern that he might be sent back to the agency's less desirable Long Island City location. JA-395.

D. Proceedings Below

In 2006, Plaintiff Jonathan Nnebe, later joined by other individuals, filed this suit on behalf of himself and others similarly situated. The individuals were also joined by the New York Taxi Worker's Alliance, a membership organization dedicated to defending drivers' rights, which had been a co-plaintiff in the *Padberg* litigation, in which the TLC policy of summarily suspending licenses of drivers accused of violating the agency's refusal-of-service rules was held unconstitutional. The gravamen of their claim was that policy and the agency's implementation of it violate the Due Process Clause.

The district court (Sullivan, J.) granted Summary Judgment for defendants on the constitutional claims, denied plaintiffs' motion for class certification as moot and declined to exercise jurisdiction over state law claims, which were dismissed without prejudice.

Before reaching the merits, the court held that "all claims against the TLC must be dismissed" citing three unpublished district court opinions as establishing that only the City itself — and not "an agency … can[] be sued under § 1983." Slip Op. 6 and that the Taxi Workers Alliance lacked standing. *Slip op.* 7-9. The court read circuit precedent to foreclose associational standing in § 1983 cases (because rights under that statute are "personal") and then held that the Alliance lacked standing to vindicate its own interests, on the ground it had not adduced sufficient

evidence of "priorities on which it was unable to focus" on account of its efforts assisting drivers subjected to the policy. Slip Op. 8.

The district court then addressed the Due Process claims, ultimately holding that neither the Commission's failure to provide pre-deprivation process nor the *pro forma* process afforded post-deprivation was unconstitutional. Accepting as "undisputed that a taxi driver has a protected property interest in his license," the court explained that whether a case is an exception to the general "due process … require[ment of a pre-deprivation] hearing" and "what kind of procedure is due" are both governed by the *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), balancing test, Slip Op. 10-11 (quoting *Brody v. Village of Port Chester*, 434 F.3d 121, 135 (2d Cir. 2005)).

As to "the first *Mathews* factor, the private interest at stake here," the court acknowledged the "'severity of depriving someone of the means of his livelihood,'" Slip Op. 11 (quoting *Gilbert v. Homar*, 520 U.S. 924, 932 (1997)), but explained that this factor can be substantially "mitigated" by the "'availability of prompt post-deprivation review,'" (*id.*), and held it was so mitigated here, citing the TLC's post-suspension hearings.

The court then concluded that the government interest "counseled strongly against requiring a pre-deprivation hearing." Describing the "uniquely vulnerable position" of a taxi passenger "in a confined space with a stranger who may lock the

doors, block egress, and limit the passenger's ability to summon police assistance," the court found the TLC to have "strong interest[s]" in "ensuring [both] that passengers are not placed in a vulnerable position with possibly dangerous drivers … and that the public perceive the taxi industry to be safe." Limiting suspensions, the court continued, to "arrests for on-the-job conduct would significantly compromise" this interest by "forcing the public to bear the risk that a driver's unlawful behavior might not stop at the taxicab door." Slip Op. 12-13.

The court then held that the risk of erroneous deprivation and the costs and benefits of additional process, see *Mathews*, 424 U.S. at 335, also favored defendants. The court reasoned that "a suspension is not 'erroneous' simply because the charges against the driver are eventually dropped," explaining that "[t]he very existence of a criminal proceeding is a reason to suspend a driver, as pending criminal allegations — even if later dismissed — implicate the TLC's interest as licensor." Slip Op. 13. The court denied that Due Process requires the government to "[go] further than determin[ing] whether [a driver] was actually arrested" in suspending plaintiffs, citing three decisions described as holding that a government employer may constitutionally limit a "hearing [to] … confirm[ing] the existence of … [pending] criminal proceedings," against a suspended employee. *Id.* (quoting *Brown v. DOJ*, 715 F.2d 662 (D.C. Cir. 1983) and citing

James A. Merritt & Sons v. Marsh, 791 F.2d 328 (4th Cir. 1986) and *Cooke v. Social Security Admin.*, 125 F. App'x 274 (Fed. Cir. 2004)).

The court then turned to the "the burden that such additional procedures would entail," again finding support for defendants. It pronounced "unworkable" a "hearing such as the one that Plaintiffs advocate, in which the ALJ would be required to evaluate the drivers 'criminal record (if any), his driving record, his personal history, the credibility of his accusers, the circumstances of the alleged crime, his guilt or innocence, or whether the crime occurred while the driver was driving his taxi.'" Slip Op. 16. The court also cited the possibility of "interference with the criminal investigation and proceedings" (including "the risk that a criminal defendant might get a free preview of the criminal case against him"), *id.* 16, and the "financial and administrative burden" of procuring individualized information for the average 46 monthly suspensions under the policy.

This Court's decisions in *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002); see also *Jones v. Kelly*, 378 F.3d 198 (2d Cir. 2004) ("*Krimstock II*"); *Krimstock v. Kelly*, 464 F.3d 246 (2d Cir. 2006) ("*Krimstock III*"), which had held Due Process to require administrative hearings determining the "probable validity" of the City's retention of vehicles seized from drunken drivers, the court then explained, were "readily distinguishable," because "every license issued by the TLC necessarily implicates its interest as a licensor," whereas in *Krimstock,* "only private

ownership of automobiles was at stake." Slip Op. 17. The court further noted that "the City's primary interest in retaining the seized vehicles [had been] financial" (citing *Krimstock*, 306 F.3d at 64) and that its policy raised an "erroneous deprivation" risk not present here: that "innocent owners of vehicles merely driven by the arrestee, … would have no opportunity to press the defense of innocent ownership … [until] civil forfeiture proceedings," (quoting *id.* at 55-57), whereas here, "licenses are only suspended after the particular licensee is arrested." Slip Op. 18.[6]

The court then held that plaintiffs' claims of unconstitutional bias on the part of the ALJs could not succeed, because "Plaintiffs had recourse to an Article 78 proceeding, had they chosen to avail themselves of that mechanism," and "[t]his remedy is sufficient for purposes of due process," citing *Locurto v. Safir,* 264 F.3d 154, 174 (2d Cir. 2001), for the proposition that Article 78 courts are empowered to decide claims of bias and therefore are "a wholly adequate post-deprivation hearing for due process purposes." Slip Op. 19 (citations omitted by district court).

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[6] The Court likewise identified "at least two" differences between the practice challenged here and the one held unconstitutional in this Court's then-recent decision in *Spinelli v. City of New York*, 579 F.3d 160, 169 (2d Cir. 2009): (1) that the suspending authority and the investigating authority in that case were the same and (2) that the plaintiff in *Spinelli* had "received inadequate notice of her suspension." Slip Op. 18 n.7.

Having dismissed the federal claims, the court declined to take jurisdiction over the New York state law claims, which it dismissed without prejudice, and then denied as moot plaintiffs' class certification motion.

SUMMARY OF ARGUMENT

The order granting defendants summary judgment should be reversed and summary judgment should be granted instead for plaintiffs.

The TLC's suspension-upon-arrest policy evinces a peculiar combination of harshness and irrationality. It fails under the *Mathews* test, of course, as demonstrated in detail *infra*. But its affronts to Due Process are visible even without any extensive balancing of interests. It is facially invalid under the specific requirements this Court in *Krimstock* held applies in cases involving governmental policies that, like the one here, effect provisional irreparable deprivations; it fails under the decision the district court cited as supporting its conclusion — *Brown v. DOJ*. The policy denies procedures for no legitimate reasons. It excludes costless measures that would provide a modicum of fairness and accuracy of determinations affecting drivers' very livelihood. The policy, whose origins are unknown to even the TLC chairman, has long been kept secret from the public. And it does all this while delivering a blow that courts have called "potentially devastating" and "profound."

As for *Mathews*, the denials of Due Process here are, in every respect that test deems relevant, more clear-cut and serious than the ones this Court ruled unconstitutional as a matter of law in *Krimstock* and *Spinelli*. The private interests affected are more compelling; the risk of unnecessary and unwarranted deprivation is far greater. And the cost of critically important safeguards would be far less: Whereas the decisions in *Krimstock* and *Spinelli* imposed an entirely new form of proceeding, the TLC need only modify its existing hearings. Indeed simply allowing a fair hearing to relevant evidence already before the commission would dramatically enhance accuracy and fairness.

There is a further reason why the TLC policy is a grosser violation than those found in *Krimstock* and *Spinelli*. Those cases involved deprivations of property that was itself being actively and unlawfully used (or was credibly believed to be), and in both the government acted under statutory and regulatory provisions clearly authorizing emergency measures. But the TLC has long acted without any statutory authorization, let alone a narrow or considered one.

The district court's disposition of the constitutional claims reflects an inexplicable shunting aside of this Court's recent and controlling precedents, as well as a serious misunderstanding of both the particulars and the broader precepts of *Mathews*. That the district court found no risk of erroneous deprivation at all —

despite being confronted with undisputed facts that an overwhelming majority of cabdrivers suspended and deprived for months of their livelihoods are ultimately determined by the TLC itself to pose no public danger — is a sure sign of its poorly calibrated application of *Mathews*. Finally, the decision confused interests that the government may legitimately pursue and the far narrower class of interests which might justify departure from basic Due Process norms. Interests of public perception and government as "licensor" relied on by the court below are no different from — and no greater — those invoked, unsuccessfully, to defend the denials in *Padberg* and *Spinelli*.

The district court's conclusion that plaintiffs' judicial bias claim is doomed by a "failure" to pursue an Article 78 proceeding, rather than a federal Section 1983 action, also must be reversed. *Locurto v. Safir*, the precedent cited by the court, does not — and could not, consistently with Supreme Court precedent – announce the exhaustion requirement the court relied on to dispose of this claim.

The district court committed two additional clear errors. There is no support for its holding that the TLC cannot be sued under section 1983 action: the City Charter provision it cited does not announce a rule of suability, and the TLC, no less than the city agency in *Monell v. New York City Dep't Social Servs.*, 436 U.S. 658, 690 (1978), is a "person" from whom section 1983 redress may be sought.

Likewise, the Taxi Workers Alliance has standing both to represent its members and in its own right.

ARGUMENT

I. THE TLC'S SUSPENSION-UPON-ARREST POLICY IS UNCONSTITUTIONAL

A. All Three *Mathews* Factors Strongly Condemn the Policy

Application of the *Mathews* balance also requires reversal of the decision below. Indeed, each of the *Mathews* factors, as understood and applied in this Court's precedents, help highlight distinct strands of the Due Process violation.

1. The Plaintiffs' Loss of Livelihood is a Profound Interest that Requires Strong Procedural Protections

Although the district court recognized that the suspension policy deprives drivers of a property interest (and that the first *Mathews* factor necessarily supports their claims), it proceeded to commit a series of legal errors causing it to seriously "discount," as the *Spinelli* Court put it, the character and legal significance of the interests deprived. 579 F.3d at 172.

First, the court drastically understated the personal impact of the policy's license suspensions. As the *Padberg* court explained, a cabdriver's interest in his license is not merely "sufficient to trigger due process protection," it "is profound." 203 F. Supp.2d at 277. Apart from abstract interest in "pursuing a particular

livelihood," *Spinelli*, 579 F.3d at 171, the deprivation here strikes at "the very means" by which plaintiffs earn their livings and support their families. *See Goldberg v. Kelly*, 397 U.S. 254, 264 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 341-342 (1969) (temporary deprivation of wages may "drive a wage-earning family to the wall"). The "interim period between erroneous deprivation and reinstatement can be financially devastating to the licensee," *Spinelli*, 579 F.3d at 171. Indeed, what *Krimstock* recognized as an unusually compelling case of hardship — that would support returning property where retention might otherwise be warranted, *i.e.*, that some claimants depended on vehicles to earn a living — is true for *every* suspension of a hack license. See *Krimstock*, 306 F.3d at 61; *Dixon v. Love*, 431 U.S. 105, 113 (1977) (noting significance of exceptions for commercial licensees).

Second, *Krimstock* and *Spinelli* make clear that special Due Process safeguards are required in provisional deprivation situations, because the person "'erroneously deprived of a license cannot be made whole,' simply by reinstat[ement]." *Spinelli*, 579 F.3d at 171 (quoting *Tanasse v. City of St. George*, 172 F.3d 63 (10th Cir.1999)). *Krimstock* made the same point with respect to real property. Quoting recent Supreme Court precedent, the Court highlighted the "contrast" between the interim seizure and the benefit terminations in cases like *Mathews*. In those cases, "full retroactive relief" is available (and awarded) when

the deprivation is unjustified. Here (as in *Krimstock*) an "ultimate judicial decision that the claimant is entitled to return of the property … rendered months after the seizure, 'would not cure the temporary deprivation that an earlier hearing might have prevented.'" 306 F.3d at 64 (quoting *James Daniel Good Real Prop. v. United States*, 510 U.S. 43, 56 (1993) and *Connecticut v. Doehr*, 501 U.S. 1, 15 (1991)). Indeed, *Brown* v. *DOJ*, the case the *district court* understood to provide a template for its ruling, was even more emphatic: It held that "the nature of a suspension based solely on an employee's indictment *demands … compensation for the loss of wages and benefits during the suspension period* [of a] subsequently acquitted and reinstated employee," 715 F.2d at 668 (emphasis added).

At least equally important, and as shown more fully below, the interference with plaintiffs' private interest here is not — as the district court held — "mitigated," by the TLC's *post*-deprivation procedures. Rather, it was "further exacerbated." *Padberg*, 203 F. Supp.2d at 278. Although the decision below grounded its conclusion on "*TLC Rules [which] appear to have built-in protections*," against undue suspensions, *Padberg* correctly recognized that apparent protection to be "illusory." This illusion occurred because "although the TLC Rules *seem* crafted to … ensure prompt review of suspensions," a "hearing [that] amounts to little more than a *pro forma* verification by the TLC ALJ … with the defendant having no chance to present evidence in his favor," actually "does

nothing to limit the duration of the suspension." 203 F. Supp.2d at 278. The TLC's suspension hearings at issue here are no different. Some 225 of the 228 hearings in the record resulted in continued suspension recommendations (with the remaining three disavowed as "mishaps" by the ALJ). Thus, drivers subject to the suspension policy here "are still faced with the prospect of extended periods without the means to earn a living." *Padberg*, 203 F. Supp. 2d at 278.

2. Risks of Erroneous Deprivation are Exceptionally High and have been Admitted by the TLC

Although the district court used the language of risk allocation to describe the suspension-upon-arrest policy, it attached *no* constitutional significance to the fact that the vast majority of persons who are subject to the policy — and deprived of their livelihood for lengthy periods of time — ultimately are cleared to drive. The district court declared that these are not "erroneous deprivations."

This holding has no foundation in law. Under any circumstances, the conclusion that the policy carries *no* "risk of erroneous deprivation" would be cause for immediate skepticism. The *Krimstock* Court stated just the opposite: "Some risk of erroneous seizure exists in all cases." 306 F.3d at 50. Worse, the TLC procedures are essentially identical to the ones the *Padberg* court held "so perfunctory … [that] the risk of erroneous deprivation increases exponentially." 203 F. Supp.2d at 280. And the same distinction the district court pronounced

irrelevant, between felonies and misdemeanors, *Krimstock* recognized to be of constitutional moment, because "[u]nlike a felony charge … requires no post-arrest determination of probable cause." 306 F.3d at 34.[7]

The district court presented its unprecedented conclusion that there was *no* error risk — *i.e.*, that a "suspension is not 'erroneous' … because the charges against the driver are eventually dropped" — as following from its finding that TLC's "interest" is "implicated" in every case where the policy applies. But that reasoning renders inoperative *Mathews*' central inquiry — and the core protection it and the Constitution afford. Thus, there was no question in *Krimstock* that the City's "interest" in seizing the instrumentalities of crime was "implicated" in "every" vehicle seizure, including ones ultimately returned after civil forfeiture proceedings. The City's interest as licensor was likewise undeniably "implicated" in *Spinelli*, though the plaintiff's property was nonetheless returned and her license reinstated. As these cases make clear, the *Mathews* test *presumes* that a valid interest is "implicated." But it requires determination of the likelihood that an interest ultimately supporting deprivation is *in fact* present in the individual's case (and whether more or different procedures would improve the accuracy of the government's determinations). Indeed, the reasoning of *Brown* again squarely

[7] Indeed, *Krimstock* highlighted that there was still a risk of error where, unlike here, the misdemeanor DWI arrests involved clear-cut conduct in the presence of police officers trained to detect it. 306 F.3d at 62-63.

contradicts the district court's: "The final disposition of the charges is vitally important" because "a suspension based solely on the fact of an employee's indictment on job-related charges" is "[un]justified' when it does not "ripen into a termination." 715 F.2d at 669 (quoting the statute).

To the extent the district court's reference to charges' being "dropped" was meant to note that some dismissals are not based on factual proof of innocence, this idea provides no support for the *TLC's* policies. As explained above, the Commission regards the interests underlying the suspension-upon-arrest policy as conclusively satisfied by a favorable "ultimate disposition," and it automatically reinstates a license on that basis. Compare *Gilbert*, 520 U.S. at 927 (suspension remained in effect after "criminal charges were dismissed … [while employer] continued with its own investigation").

Under the correct understanding of the law, the constitutionally-relevant risk here — that an individual will be deprived of his livelihood even though he actually poses no "direct and substantial threat to public safety"— is exceptionally, intolerably high. There is no dispute that only a fraction of drivers whose licenses are suspended are ultimately convicted. (Indeed, even those who are *convicted* on the offenses charged are not necessarily adjudged too "danger[ous]" to continue driving: the TLC admits that it does not automatically initiate revocation proceedings on that basis).

The district court, unlike the *Krimstock* Court, accepted the TLC's "safety" assertions without question. But the suspension-upon-arrest policy is actually premised on an assumption that *Krimstock* pronounced implausible: While not denying the importance of "the City's asserted interest in removing dangerous drivers from the road," the Court found the seizure policy "ill-suited to address[ing] it," because most of individuals engaging in that dangerous activity "regain[] sobriety on the morrow," 306 F.3d at 66, and pose no comparable ongoing threat.

The inferential leap (from alleged past misconduct to future "danger") at the center of the TLC policy is inestimably greater. As noted, there was a far reason to suspect that the individuals subject to the action had actually engaged in misconduct. See *id.* at 62-63. Moreover, the aggrieved parties in *Krimstock* had at least one instance of using *the property seized* in "a dangerous and unlawful manner." The TLC suspends even where the driver has not even allegedly misused his license and where the risk of harm to a taxi passenger is generally premised on alleged wrongdoing that have nothing to do with taxis or passengers.

Indeed, the risk inferred—of (1) harm to *passengers* (2) *during the pendency of criminal proceedings*— is especially remote. Individuals facing serious criminal charges have obvious reasons not to offend, lest they adversely influence charging and plea-bargaining decisions of the district attorney or the actions of a court. Cf.

Chambers v. United States, 129 S. Ct 687, 692 (2008) (noting that "an individual who [failed to report] would seem [especially] unlikely … to call attention to his whereabouts by … engaging in additional violent and unlawful conduct"). Stable employment, moreover, is widely recognized to diminish risks further. *See, e.g.*, 18 U.S.C. § 3142(g)(3)(a).

The scenario of passenger "peril" vividly described in the decision below is based *entirely* on conjecture. Indeed, the TLC did not proffer evidence of a single actual incident involving the injury to a passenger. Worse, the lurid picture ignores important realities well-known to the TLC. Taxi passengers see the driver's name, photograph, and license number as well as the cab's medallion number, and the city's 24-hour 311 number (911 is well known). The NYPD assigns special units to monitor cabs; the TLC has its own inspector force; cabs are equipped with GPS devices; and law enforcement authorities have drivers' fingerprints on file. As for taxi drivers who have been arrested, their address and employment information are known to police, the court system, the district attorney and the TLC. Thus a cab driver contemplating an assault on a passenger would confront, in addition to the virtual certainty of apprehension, weighty sanctions from the criminal justice system, the TLC, and perhaps immigration authorities as well.

In fact, the true "peril" runs the opposite way. Drivers work alone, with their backs to unknown passengers, are known to carry substantial sums of money,

and are legally required to drive to all parts of the city at all hours. It is thus not surprising that according to U.S. Bureau of Labor Statistics economists, the occupation "taxi driver" suffers the single highest rate of workplace homicides of any occupation in the U.S., 36 times the average for all trades. *See* Sygnatur & Toscano, "Work-related Homicides: The Facts," *Compensation and Working Conditions* at 3, 4, Spring 2000.

The district court's brute force distinction of *Krimstock*, on the ground that, unlike here, some claimants were "innocent owner[s]," does not withstand scrutiny. First, six of the seven named plaintiffs there were arrestees — particularly notable, given Chief Judge Jacobs's concern, 306 F.3d at 47 n.6, that those plaintiffs' claims might be atypically sympathetic. More important, *Krimstock* did not limit the procedural safeguards ordered to claimed "innocent owners." The Court held instead that the Constitution requires that *all* owners be provided a post-deprivation hearing — that considered (*inter alia*) "the probable validity of continued deprivation," *i.e.*, the likelihood that "the City will prevail in [the] action to forfeit the vehicle," and the lawfulness of the initial seizure. *See Krimstock v. Kelly*, 506 F. Supp. 2d 249, 252 (S.D.N.Y. 2007)).[8]

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[8] Judge Mukasey directed that these hearings be conducted by the Office of Administrative Trials and Hearings (OATH), a city agency that employs full-time judges serving five-year terms, and placed on the City the burden of proof on all points. See 2005 U.S. Dist. LEXIS 43845, *5-*7.

Indeed, the persons affected by the TLC policy are in relevant respects analogous to the *third-party* owners in *Krimstock*. Although the district court seemed to understand the "innocent owner" defense as akin to a right of automatic return upon proof that the intoxicated driver was not the car's owner, the law actually authorizes seizure (and ultimately forfeiture) when a non-driver owner "permit[ed] or suffer[ed]" the illegal use of car. See *id.* at 46 (quoting Admin. Code § 14-140(e)(1)). What really distinguishes non-driving owners in *Krimstock* is that their potentially inculpatory conduct (allowing someone else to drive their vehicles) occurred outside police observation. But this is also true of the vast majority of cabdrivers suspended upon arrest.[9]

Unsurprisingly, the "value of additional … procedural safeguards," *Mathews*, 424 U.S. at 335, would be greater here than those held constitutionally required in *Krimstock*. There, the Court held Due Process entitled plaintiffs to challenge the validity of even *initial* seizures, though they were incident to DWI arrests by trained officers, often confirmed through breathalyzer analysis, see 306 F.3d at 47, 49, 62. And another right the *Krimstock* procedure provides — the ability to obtain prompt return of property unlikely to be subject to permanent deprivation — is of greater value here: The percentage of cars that are forfeitable

[9] Nor is the "financial interest" noted in *Krimstock* as critical as the district court assumed. The court in *Spinelli* found a greater risk of erroneous deprivation than in that case – without any allegation of governmental self-interest.

after seizure based on an observed DWI is surely far higher than the vanishingly small percentage of drivers whose licenses are ultimately forfeited pursuant to TLC policy. *See* Acquaviva & McDonough, *How to Win a* Krimstock *Hearing: Litigating Vehicle Retention Proceedings before New York's Office of Administrative Trials and Hearings*, 18 Widener L.J. 23, 26 (2008) (describing "an uphill battle for a claimant in light of the broad forfeiture standard"). And as noted above, cabdrivers are far more likely than those affected by the NYPD policy to have the kinds of hardship claims that *Krimstock* recognized must be taken into account.

3. The Policy Deliberately Omits Procedures that are Property-Protecting, Accuracy-Enhancing — and Essentially Costless

There is an even more elementary Due Process defect in the Commission's policy than its presumption of certain conviction, in the face of widespread awareness that actual convictions are extremely unlikely, or its (quite implausible) assumption that an instance of off-duty misconduct is a reliable predictor of on-duty "threat" to passenger safety. Whether or not, as a matter of Due Process, off-duty misdemeanor arrest evidence could be admissible or sufficient to support suspension or continued suspension based on present danger (we would argue not), it is patently unconstitutional to refuse, as the TLC does, to give effect *to contrary evidence bearing directly on that question*. See *Bell v. Burson*, 402 U.S. 535, 542

(1971) ("a hearing which excludes consideration of an element essential to the [governmental] decision … does not meet [the constitutional] standard").

Unlike ALJs in *Krimstock* hearings, who are constitutionally required to release property when the City fails to establish (among other things) that ultimate deprivation is likely, TLC policy *requires* an ALJ who is persuaded by evidence that the driver is "overwhelmingly likely" to be acquitted to still *pronounce the driver a danger — and continue the deprivation.* See JA-204. The same goes for information about lack of prior offenses, the individual's driving record, his work history and connections to the community — all of which obviously would be relevant to determining whether an individual's driving pending the resolution of charges posed a direct and substantial threat. Yet TLC policy provides that it all must be disregarded. *Bell*, 402 U.S. at 542 ("When the procedures … do not allow for the presentation of potentially exculpatory evidence, there is little doubt that due process rights are in jeopardy").[10]

The district court's contrary conclusions rest both on legal error and on uncritical acceptance of a series of self-serving, unsubstantiated — and manifestly

[10] Nor can defendants be heard to argue that individual plaintiffs did not attempt to make one or another of these showings. It is *their* policy (belatedly reduced to writing) that the sole issue at the hearings is the fact of arrest — an understanding confirmed by the Commission's 225-3 record in suspension hearings (with defendants insisting that the three outliers are *improper*). In any event, as there was no published standard, it would have been impossible for any driver to know what issue to argue.

untenable— assertions of "unworkability." At the outset, all the "additional procedures" in this case relate to the way an *already-provided* judicial hearing is conducted. The "additional procedures" judicially ordered in *Krimstock* and *Spinelli* (and held "workable" therein) were court-imposed. Even more important, many of the modifications plaintiffs sought are literally or effectively costless. Information on the length and character of an individual's work and driving record is in the TLC's possession. Evidence concerning personal hardship is in the driver's possession, as would be "good character" evidence. And there would be no burden on the agency in requiring that ALJs give effect to, rather than consciously disregard, evidence already before them (from whatever source) persuading them of a strong likelihood that criminal proceedings against the driver will terminate favorably.

As for the "free preview of the criminal case," Slip Op. 14, precisely the same could have been said of the proceedings ordered in *Krimstock* and *Spinelli*. Indeed, it was said — and firmly rejected in the latter case, where Judge Walker explained that "permitting a licensee both to promptly join issue … and to present her views advances the City's understanding of the situation while facilitating prompt remediation [are] *in the public interest*." *Spinelli*, 579 F.3d at 173 (emphasis added). Surprise, in any event, is not a central value of a criminal justice system that provides the seriously accused (multiple) preliminary hearings

and all defendants constitutionally-enshrined rights of notice and compulsory process. *See Wardius v. Oregon*, 412 U.S. 470, 473 (1973) ("the ends of justice [are] best served by… giv[ing] both parties the maximum possible amount of information with which to prepare their cases and thereby reduc[ing] the possibility of surprise at trial," citing Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash.U.L.Q. 279).

Finally, the district court's concerns about "non-workability" rest entirely on self-serving statements by advocates of the kind generally disregarded on summary judgment, *see Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 150 (2000), and that have been viewed with particular suspicion in this area. See *Krimstock II*, 378 F.3d at 204. Defendants assertions in this regard are all the more implausible because the procedures the court was quick to pronounce unworkable closely track those already in place in *Krimstock* cases — which were ordered by Judge Mukasey and developed through adversarial presentation and testing, rather than self-serving assertions — and which experience shows do not involve the complexities and impracticalities defendants conjured. *See* Acquaviva & McDonough, 18 Widener L.J. at 83 (noting that "the typical *Krimstock* hearing involves testimony from only the claimant" with police relying on "several exhibits, including the arrest report and criminal complaint"). See *Krimstock III*,

464 F.3d at 241 ("data presented by the witnesses confirm that no undue burden on criminal enforcement results from mandated review by a neutral fact-finder").

The court likewise erred in crediting protests based on the "number of summary suspensions" currently ordered. These claims depend on the sort of bootstrap accounting that *Krimstock II* recognized must be guarded against. See 378 F.3d 203-204. The TLC is not required (or authorized) to initiate proceedings against 46 drivers every month — or even a fraction of that number. In short, if it ordered fewer suspensions, it would reduce its burden. If initial suspension decisions were limited to instances where the circumstances genuinely demonstrate a direct and substantial danger to passengers, the overall costs of suspension continuation hearings (even exceptionally thorough ones) would plummet.

B. 'Public Confidence' Considerations do not Authorize the Serious, Summary Deprivations Demanded by the TLC

Rather than focus on *Krimstock* and *Spinelli*, recent decisions of this Court involving due process requirements for interim deprivations of property, or the plainly analogous district court decision in *Padberg*, the district court sought for support from three out-of-circuit decisions (two, a quarter-century old and the third, more recent, but unpublished). These decisions had sustained the authority of public employers and contracting authorities to suspend based on criminal charges. The district court then reasoned that the "public perce[ption]" interests

(distinct from actual safety concerns) alluded to in these cases independently supported denying drivers' procedural protections.

These decisions are neither relevant to nor supportive of the TLC's policy. As has been stressed, *Brown* held in so many words that it would consider a public employee suspended based on indictment, but later acquitted and reinstated, to have been *wrongly* deprived — and indicated that such a policy could *only* be constitutional if it provided such individuals full monetary restitution. Not only would that rule entitle plaintiffs to judgment on their Due Process claim here, but, by requiring that authorities, rather than individual employees, bear the costs of unwarranted deprivations, it would surely encourage greater care in imposing harm than the TLC exercises here.

Moreover, the employees in *Brown* received notice and an opportunity to be heard *pre*-deprivation, see 715 F.2d at 664 (explaining that employees had received "only" 10 days' notice and that their attorney had met with agency officials), and both the suspensions and this mode of proceeding were pursuant to a statute enacted by Congress, 5 U.S.C. § 7513(b)(1). See also *id.* at 667 (highlighting both the role of grand jury and the "probable cause" standard). Likewise the rule applied in *Merritt*, which was laid out in federal notice-and-comment regulations and applied only to "[c]ommission of fraud or a criminal offense in connection with … a public contract or subcontract," did not "require … suspen[sion]" in the

event of indictment, see 48 C.F.R. § 9.407-1(b)(2); they allowed for, rather than precluded, "consider[ation] [of] … mitigating factors," *id.*; and, completely unlike the TLC policy, directed the authority to "assess[] the adequacy of the evidence, … how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result …." *Id.*

The district court overlooked both the facts and reasoning of these decisions, instead distilling from them the proposition that "public knowledge that an individual formally accused of job-related crimes is still on duty would undoubtedly erode public confidence in the agency,'" Slip. Op. 15 (quoting *Brown,* 715 F.2d at 667), which it then invoked as justifying the policy.

There are multiple errors in this reasoning. First, the "job-relatedness" in the government employee cases was not, as the district court posited (Slip Op. 15), merely "arguably" greater than the off-duty that the TLC routinely punishes: It was entirely different and obviously greater. The employees in *Brown* were border patrol agents "indicted … [for] interfering with the functions of the Border Patrol and … willfully violating the civil rights of suspected illegal aliens." The contractor in *Merritt* was indicted for defrauding the government. 791 F.2d at 328. The Social Security Administration employee in *Cooke* was charged with unlawfully accessing confidential citizen records at work. 125 Fed. Appx. at 275.

Each involved direct abuses of governmentally-provided authority. Cf. *California Div. Labor Standards Enforcement v. Dillingham Const., N.A., Inc.*, 519 U.S. 316, 335 (Scalia, J., concurring) ("as many a curbstone philosopher has observed, everything is related to everything else").

Furthermore, the TLC is not a cabdrivers' *employer*. This is no small point: "there is a crucial difference, with respect to constitutional analysis," between government's power as regulator and its "far broader" ones as employer, *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (citation omitted). The government acts through its employees, and is legally accountable for their past, present and future actions. See 28 U.S.C. § 1346(b); *Gilbert*, 520 U.S. at 932 (observing that "services" of police officer facing felony charges "are no longer useful" to employer). Indeed in *Hecht v. Monaghan*, the New York Court of Appeals, in the course of ruling for a cabdriver, made precisely this point a half century ago:

> The [driver] is not the employee of any public body nor is he the appointee of any municipal officer.… The rules applicable to the disciplining, suspension and discharge of civil employees should not be extended to include the suspension or revocation of licenses of those whose salaries are not paid from public funds.

307 N.Y. 461, 468-469 (1954). Indeed, as explained above, although the district court used the language of allocating "risks," unless kept within bounds, the TLC

(in contrast to public employers) may impose heavy burdens on blameless individuals at no cost to the TLC.

The shift from direct safety interests to open-ended "public confidence" rationales is problematic in many ways. Most important, the distinction is constitutionally problematic: *Padberg* made clear that a highly important, public-confidence-related interest — opposing licensees' racially discriminatory practices on-duty — could not support summary suspension. And even if the Constitution allowed denials of procedure on that basis, there is no evidence that the City Council conferred such open-ended authority. On the contrary, it has circumscribed the TLC's powers of action even in core areas of public safety, requiring that "emergency" suspensions be followed by full, prompt hearings and limiting suspension authority to cases of "direct and substantial" threats. Indeed, the TLC's own rules largely hew to its jurisdiction over abuses of "duties and responsibilities as a driver," see TLC Rule 2-60 & 2-61, and accord individuals charged with violating *those* rules *pre-deprivation* process.

There is scant basis for the premise that the "public" would lose confidence in the TLC if it allowed affected individuals some opportunity to respond — or learned the underlying facts — before subjecting them to the serious hardships indefinite suspensions entail. Neither the *Spinelli* nor the *Krimstock* Court contemplated that "confidence" in the agency would be "eroded" by providing a

modicum of process to individuals — even though *Spinelli* (entirely unlike this case) involved credible concerns of direct abuse of a highly safety-sensitive license. Finally, any suggestion that public perception was in fact the major motivating concern here would seem inconsistent with TLC's longstanding *secretiveness* about the policy's existence and operation.

C. TLC's Refusal to Afford Drivers *Any* Pre-Deprivation Notice or Process is Unconstitutional

The TLC's refusal to allow individuals affected *any* pre-deprivation notice or opportunity to be heard is constitutionally equally indefensible. As just noted, the "public confidence" rationale the district court borrowed from *Brown* did not prevent the employer in that case from providing pre-suspension notice and a hearing to employees who had been indicted by a grand jury for criminally abuse of their law enforcement authority.

The granting of a hearing even in those circumstances reflects "'[t]he root requirement' of the Due Process Clause: … 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" *Ciambriello v. Nassau County*, 292 F.3d 307, 321 (2d. Cir. 2002) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (emphasis in original). Although, Due Process "[does not] *always* require[ ] … a hearing prior to the initial deprivation of property," *Padberg,* 203 F. Supp.2d at

277 (brackets original; citation omitted), that course of proceeding is "condoned only in 'extraordinary situations,'" *Fuentes v. Shevin*, 407 U.S. 67, 90 (1983) (quoting *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971)), *i.e.*, "not just when there is an important government interest at stake, but also when 'very prompt action is necessary.'" *Padberg,* 203 F. Supp.2d at 280 (quoting *United States v. All Assets of Statewide Auto Parts,* 971 F.2d 896, 903 (2d Cir.1992)). Moreover, the constitutionality of peremptory action further depends on the availability of prompt and adequate *post-deprivation* procedures, see *id*, and on clear statutory authorization. *U.S. v. Monsanto*, 924 F.2d 1186, 1192 (2d Cir 1991) (en banc).

This case presents no such "extraordinary situation." As in *Padberg*, the post-deprivation procedures TLC affords are plainly not "adequate," and there is no plausible claim that denying notice or the right to be heard is necessitated by "pressing and immediate threats to the public health and safety." 203 F. Supp.2d at 280. On this point, this case could hardly be further from the initial deprivations in *Krimstock* or *Spinelli*. In both those cases, prompt action was required. See *Krimstock*, 306 F.3d at 66 (noting that "initial seizure" prevents "individual from driving in an inebriated condition"); *Spinelli*, 579 F.3d at 170-171 ("The City and the public have a strong interest in ensuring the security of gun shops, which was heightened further in the days immediately following the September 11th terrorist attacks.").

But both decisions were careful to avoid the confusion between "safety-related" interests of the kind asserted here and the kind of "urgent and pressing" threats that "are strong enough 'to dispense with normal due process guarantees,'" *Krimstock,* 306 F.3d at 66 (quoting *James Daniel Good*, 510 U.S. at 61, and noting that government's interest "los[t] its basis in urgency" once threat had passed).

Also dramatically absent is "clear mandate" or "narrowly-drawn statut[ory standards]:" In both *Krimstock* and *Spinelli*, the initial deprivations were effected "pursuant to [explicitly conferred] regulatory authority." *See Spinelli*, 579 F.3d at 168 (citing 38 RCNY § 4-06(a)(3), § 1-04(f)); *Krimstock*, 306 F.3d at 44. As the Supreme Court's decision in *FDIC v. Mallen*, 486 U.S. 230 (1988), makes clear, courts are more receptive to departures from traditional modes of proceeding when they are the product of legislative deliberation that seriously considers individual interests affected. *See also SEC v. Sloan,* 436 U.S. 103, 112 (1978) ("[T]he power to summarily suspend … even for 10 days, without any notice, opportunity to be heard, or findings based upon a record, is an awesome power with a potentially devastating impact … A clear mandate … is necessary to confer this power").

The TLC policy, of course, has no authorization whatsoever. The rule the agency actually cited in its Suspension Letters is limited to actions determined to warrant revocation — and required the TLC to promptly initiate proceedings to that end, proceedings with substantial procedural safeguards. The provision

highlighted by the agency's attorneys in this case, Admin. Code § 19-512.1, to the (questionable) extent relevant, has similar features. Both the code and the rule suggest narrowness of operation and concern for procedural fairness.[11] And for both the focus is exclusively prospective and limited to "direct and substantial threats." That focus is constitutionally significant, because when the City Council has authorized or required suspension based on allegations of completed conduct, it has not undertaken to modify the rule that the individual be afforded notice and opportunity to be heard — even in circumstances that far more plainly "implicate" the TLC's core interest as "licensor" than do the allegations of off-duty conduct that are the main concern of the policy. *See, e.g.*, Rule 2-61.

II. THERE IS NO EXHAUSTION REQUIREMENT PRIOR TO ASSERTING A BIAS CLAIM UNDER SECTION 1983

In addition to the constitutional defects inherent in the policy itself, plaintiffs presented undisputed evidence that the TLC administers it in violation of basic

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[11] The language and structure of the provision indicate that it is not meant to reach taxicab *drivers* at all, but rather taxicab (and medallion) *owners*. While the provision speaks of "taxicab or for-hire vehicle" licenses, other provisions enacted at the same time use the phrase "taxicab or for-hire vehicle *driver's* license," *Id.*§ 19-507.1, JA-155-165 — and "drivers license" and "vehicle license" are separately-defined terms. *Id.*§§ 19-502(d), (e). Moreover, the affirmative defenses set out in § 19-512.1*(b)*—"due diligence in the inspection, management and/or operation of the taxicab" and lack of knowledge of "acts of any other person with respect to that taxicab" — only make sense applied to owners. They have no relevance to drivers.

norms of fairness and regularity. For example, the evidence showed the TLC tribunal to be systemically biased in favor of the agency by the fact that its ALJs are at-will employees, subject to dismissal or demotion without cause. And the TLC has long administered its suspension-upon-arrest policy without actual authorization, in a manner inconsistent with its own rules and the plain language of laws on which it claimed to rely. The TLC executive relied on secret law, never publicly announcing its policy or describing its bounds, never articulating its premises and rationales or submitting them for public notice and comment. Indeed, the TLC never described the policy to the cabdrivers subject to it. As there was no public law stating its policy, the TLC directed its at-will ALJ's decisions by *ex parte* communications. These *ex parte* directives were general—the ALJ Manual—and particularized, as in the reprimanding e-mails to ALJ Gottlieb.

The district court refused to reach the substance of the systemic bias claim. It based its refusal on grounds—that drivers "had recourse to an Article 78 proceeding in which such claims were cognizable"— that defendants never urged and indeed had declined to adopt when invited to at oral argument. See JA-994. But contrary to the *sua sponte* holding, plaintiffs are not required to exhaust state remedies prior to filing a section 1983 action. This has been the law of the land for nearly 50 years, since *Monroe v. Pape,* 365 U.S. 167, 183 (1961). As then-Judge Sotomayor stated in *Roach v. Morse*, "Plaintiffs suing under 42 U.S.C. § 1983

generally need not exhaust their administrative remedies." 440 F.3d 53, 56 (2d Cir. 2006), citing *Patsy v. Bd. of Regents,* 457 U.S. 496, 516 (1982). The federal civil rights statute "assigned federal courts a 'paramount' role in protecting federal rights... and was intended 'to provide dual or concurrent forums in the state and federal system.'" *Roach*, 440 F.3d at 56 (quoting *Patsy*, 457 U.S. at 506). *See also Kraebel v. New York City Dept. of Housing Preservation and Development*, 959 F.2d 395, 404 (2d Cir. 1992); *Pangburn v. Culbertson*, 200 F.3d 65, 71 (2d Cir. 1999); *Alexandre v. Cortes*, 140 F.3d 406, 411 (2d Cir. 1998).

Ignoring *Monroe* and *Roach*, the district court relied on *Locurto v. Safir*, 264 F.3d 154 (2d Cir. 2001). But *Locurto* is miles removed from the case at bar. First, *Locurto affirmed* the constitutional right denied here — to an unbiased decisionmaker in a post-deprivation hearing. The question raised was whether, where adequate and unbiased post-deprivation review was indisputably available, it nonetheless violated the public-employee plaintiffs' rights that a decisionmaker in their pre-termination hearing process was not neutral. In finding no constitutional violation under the unique circumstances of that case (through a *Mathews* balancing emphasized the informality of pre-termination process), *Locurto* said nothing in support of the TLC's practices here. Unlike in *Locurto*, taxi drivers receive *no* pre-deprivation hearing, and post-deprivation review is before a biased tribunal. The *Locurto* Court stopped far short of suggesting (as the

district court understood it to hold) that the potential availability of a post-post-deprivation remedy could extinguish a core constitutional protection.

The district court's ruling ignored further critical differences. *Locurto* involved a decision finally terminating civil service employment. The Article 78 process that would follow the administrative hearing could, in that case, grant the plaintiffs full relief — reinstatement with back pay, see *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 348, 690 N.Y.S.2d 478, 482 (N.Y. 1999), and longer judicial proceedings would yield a commensurately larger award. Here, the property interest — in earning a living *pendent lite* — is one that *cannot* be vindicated by *additional* rounds of judicial process, see *supra*, especially in light of the limits on relief Article 78 courts may award. See CPLR § 7806 (limiting them to "incidental damages"); *Golomb v. Board of Educ.*, 460 N.Y.S.2d 805, 808 (2d Dept. 1983); *Murphy v. Capone*, 595 N.Y.S.2d 526 (2d Dept. 1993); cf. *Antonsen v. Ward*, 943 F.2d 198, 202 (2d Cir. 1991).

Moreover, even if Supreme Court precedent did not forbid an exhaustion requirement, imposing one here would be both inappropriate and inequitable. Not only do cabdrivers have limited resources, individual litigation of systemic bias claims would be neither cost- or time-effective and would be at constant risk of

being mooted by reinstatement. *Cf. Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975).

And the substance of the bias claims that the district court refused to even consider stand in stark contrast to *Locurto*, where the claim focused on the lack of neutrality of the Fire Commissioner who was sitting in review of an ALJ decision reached after a thorough pre-termination hearing. Here, plaintiffs receive no pre-deprivation process (not two levels of it), and the undisputed facts demonstrate the systemic pro-agency bias of the TLC administrative *tribunal*, to which drivers must look for post-deprivation relief. For this case to be comparable to Locurto, plaintiffs would have to be complaining about the bias of Chairman Daus. But the claim is, in fact, directed toward the TLC tribunal. That claim rests in turn on undisputed evidence that the TLC ALJs' continued employment, income, and work assignments are wholly at the pleasure and discretion of the same agency officials who appear before them. The proposition that such an arrangement cannot withstand constitutional scrutiny is hardly novel. Even where the Article III life tenure requirement does not apply (as it obviously does not here), the Supreme Court has held repeatedly and recently that there are "circumstances 'in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Caperton v. A.T. Massey Coal Company, Inc.,* 129 S. Ct. 2252, 2259 (2009), citing *Withrow v.*

Larkin, 421 U.S. 35, 47 (1975). The test is not *actual* bias but *potential* bias, whether the situation is one "which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Ward v. Village of Monroeville,* 409 U.S. 57, 60 (1972).

While the facts are certainly distinct, the probability of actual bias is clearly far higher in the TLC tribunal than in *Caperton*. The *Caperton* Court (and dissent) recognized the limits of a campaign contributor's influence; only the electorate (not any donor) could place a judge on the bench — there was no way of knowing the role an individual's contributions actually play in an election result, 129 S. Ct. at 2264 & 2274 (Roberts, C.J., dissenting). And no contributor, no matter how wealthy, can remove a state Supreme Court justice from office. With TLC ALJs, in contrast, it is perfectly clear that TLC executives hire their own judges. And, beyond that the TLC can (and does) fire them, and has successfully litigated its right to do so. *Glicksman,* 2008 WL 282124. And in actual practice, TLC ALJs rule for the agency (ALJ Gottlieb excepted) every time. Thus, unlike in *Locurto*, the bias of the TLC tribunal is not just "potential," but systemic and manifest. Faced with similar (albeit less stark) evidence, Judge Dearie *twice* held that a different group of taxi drivers had stated a bias claim and set the matter for trial. *Padberg*, 203 F. Supp. 2d at 288 and at 2006 WL 4057155 (E.D.N.Y. 2006). At

the very least, the district court clearly erred in refusing to consider the same claim here.

III. BOTH THE TLC AND THE ALLIANCE ARE PROPER PARTIES TO THIS SECTION 1983 SUIT

A. The TLC is a Proper Section 1983 Defendant

The district court dismissed plaintiffs' claims against the TLC on the ground that, "as an agency of the City of New York, it is not a suable entity." This ruling, premised on three other (unpublished) district court decisions, which in turn cited Section 396 of the City Charter, is manifestly incorrect. Section 396 does not to speak to, let alone control the question whether a city agency qualifies as a "person [acting] under color of … any State [law]," under 42 U.S.C. § 1983, and it could not determine that federal question if it did. *Cf. Haywood v. Drown*, 129 S. Ct. 2108 (2009).

Indeed, the provision does not appear to address questions of city agency "suab[ility]" at all. Rather, by its plain terms, it deals with when agencies may be named *plaintiffs* in "actions and proceedings for the recovery of penalties for the violation of any law." Consistent with that understanding, the TLC and its chairs have been sued in both state and federal court countless times, without any suggestion that the city was the proper or only "entity" "suable." *See, e.g., Statharos v. NYC Taxi and Limousine Comm'n,* 198 F.3d 317 (2d Cir. 1999)*;*

Metropolitan Taxicab, 2008 WL 4866021, 2 (S.D.N.Y. 2008); *Padberg*, 203 F. Supp. 2d at 267-68; *Matter of Singh v. Taxi and Limousine Comm.*, 282 A.D. 2d 368, 723 N.Y.S.2d 476 (1st Dep't 2001), *leave denied*, 96 N.Y.2d 720 (2001).

The same is true with respect to § 1983. As the caption attests, the Supreme Court's landmark decision on "municipal" liability under that statute, *Monell*, which explored the "person" language exhaustively, was rendered in a suit against a department of a city government (indeed, this City), and the Court's conclusion relied on prior cases involving school boards, entities characterized as "arms" of local government. This Court's decided cases paint the same picture. *Krimstock* was a § 1983 suit against (among others) the "Commissioner of the New York City Police Department," in his official capacity, as was *Locurto*.

B. The Taxi Workers Alliance is a Proper Plaintiff

1. There is no Section 1983 Exception for Associational Standing

The district court's dismissal of NYTWA's standing — in reliance on a circuit "rule" that associations may not sue as representatives of their members under § 1983 (save for in First Amendment cases) — should also be reversed.

Although the proposition the district court attributed to *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973), has support in that opinion and a handful of others (and arguably the holding of at least one, *League of Women*

Voters v. Nassau County Bd. of Supervisors, 737 F.2d 155, 160 (2d Cir. 1984)), which dismissed a plaintiff on that basis), it is contradicted by a raft of Supreme Court precedent. Indeed, as Judge Carter explained three decades ago, *see Huertas v. East River Housing Corp.*, 81 F.R.D. 641, 651 (S.D.N.Y. 1979), the *Aguayo* "rule" was effectively rejected by the Supreme Court in *Warth v. Seldin*¸ 422 U.S. 500, 513 (1975) — itself described as launching "modern doctrine of associational standing," *Brown v. UFCW*, 517 U.S. 544 (1996). Since then, the Court repeatedly has applied its general test, see *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), to sustain the standing of "an association" that "filed [an] action[] pursuant to 42 U.S.C. § 1983," as representative of its members. *Northeastern Florida Chapter, Associated General Contractors v. Jacksonville*, 508 U.S. 656, 668-669 (1993); *see also United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 337 (2007) ("Petitioners a trade association made up of solid waste management … [sued under] 42 U.S.C. § 1983"); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 656 (1990).

2. The Taxi Workers Alliance has Standing to Assert Its Own Interests

In holding that the Alliance lacked standing in its own right, the district court did not deny that the suspension-on-arrest policy affects the organization in a "concrete and particularized" way — and not just its "abstract social interests."

Havens Realty v. Coleman, 455 U.S. 363, 379 (1982). The court took note of undisputed testimony that the Alliance counsels drivers subject to the policy (Slip Op. 8) — efforts that would be unnecessary were the policy declared unconstitutional. And as the district court recognized, the Supreme Court and this Circuit have settled that "having to divert scarce resources . . . as a result of the challenged conduct may qualify as an injury that confers standing," *Coleman,* 455 U.S. at 379; *Ragin v. Harry Macklowe Real Estate Co.,* 6 F.3d 898, 905 (2d Cir.1993); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir.1990) ("the only injury which need be shown … is deflection of the agency's time and money").

The court's ruling was based on what it saw as the Alliance's failure to identify particular organizational "priorities" (Slip Op. 8) that the policy caused to be compromised. But that is not a proper basis for denying standing. When an organization adduces evidence of both (1) its general activities and (2) "time and money" spent as a result of the challenged practices, that is sufficient to infer "opportunity costs," *Dwivedi*, 895 F.2d at 1526, regardless of whether there is evidence of the particular "priority" from which resources are "deflect[ed]." *Id.*

IV. PLAINTIFFS ARE ENTITLED TO JUDGMENT ON THEIR STATE LAW CLAIMS AND REINSTATEMENT OF THEIR CLASS CERTIFICATION MOTION

A. Plaintiffs Demonstrated Systemic Violations of the City Charter

Although the district court discussed some of the state law issues plaintiffs raised in the course of holding that the violations alleged were insufficiently "outrageous" to make out a "substantive due process" denial, Slip Op. 19, the court dismissed plaintiffs' state law *claims*, JA-112-115, without prejudice, pursuant to 28 U.S.C. § 1367(c)(3). Reversal of the court's erroneous judgment on the federal claims reinstates these claims, see *Spinelli*, 579 F.3d at 175; *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 79 (2d Cir. 2003), and the undisputed facts entitle plaintiffs to summary judgment on these, as well.

The suspension-upon-arrest policy violates the City Charter in several critical respects. The City Charter mandates that the Commission make policy by a majority vote of its members. Charter § 2301(e). It further mandates that agency regulations not be enacted without giving the public notice and an opportunity to comment. § 1043. The notice-and-comment requirement applies not just to rules labeled as such, but to (1) "*standards which if violated may result in a sanction or penalty;*" and to "*standards for the issuance, suspension or revocation of a license or permit*." *Id.* § 1041(5) (emphasis added). The Charter further prohibits "*ex parte* communications [with ALJs] relating to other than ministerial [matters] …

including internal agency directives not published as rules," § 1046(c)(1), and mandates that, "Except as otherwise provided for by state or local law, the party commencing the adjudication shall have the burden of proof." § 1046(c)(2).

To recite the language of these provisions is to establish the TLC's flagrant violation of them — even without recourse to case law requiring strict interpretation of the Charter. *See, e.g., Schwartfigure v. Hartnett*, 83 N.Y.2d 296, 301 (1994) (interpreting a parallel state statute); *Matter of Miah v. Taxi and Limousine Comm. of the City of New York*, 306 A.D.2d 203 (1st Dept 2003) (holding unpublished change in method of calculating "points" held unlawful).

The suspension-upon-arrest policy is unarguably a "*standard[] for the . . .suspension of a license*," but the TLC members had never voted on it before named plaintiffs were suspended. Nor had the policy ever been disclosed to the public, let alone opened to comment, and even the defendants would concede that they did not follow the rule (8-16A) they told plaintiffs they were applying. (As then written, it allowed peremptory suspension only if revocation proceedings were initiated within five days). The ALJ Manual, which circulated freely between TLC attorneys and the judges whom they appeared before, is itself an *ex parte* communication. When ALJ Coyne (in the wake of the Gottlieb decisions) and attorney Hardekopf discussed in e-mail whether the "policy" might need to be "changed … in writing," JA-197, they were not referring to any public statement.

And when Deputy Chief Coyne directed Gottlieb to contact him in the before reaching a particular result in any future case (*i.e.*, ruling for a driver), he was not suggesting that Gottlieb publicly "certify" the question. JA-185.

Of course, the TLC's practice eliminates the need for any proof. At its hearings, the agency simply presents an arrest notice and rests its case. JA-269-60, 378. Indeed, asked what evidence the TLC was required to present at suspension hearings, Coyne replied, "What do you mean by 'evidence?'" JA-378. This practice is in stark contrast to *Krimstock*, where the district court applying this Court's mandate, required the police to bear the burden as to three specific standards in order to retain possession of a seized automobile. 2005 U.S. Dist. LEXIS 43845, *5-*7. Nonetheless, without presenting any proof, the TLC wins virtually every case.

To the limited extent the district court did address the state law questions — in the course of rejecting a "substantive due process" theory — it misread the complaint and misperceived the relationship between the state and constitutional law. Plaintiffs did not plead a "substantive due process" claim at all. Moreover, violations of state law can be — and are in this case — central to *procedural* due process analysis. The existence and clarity of legislative authorization is pivotal in assessing the constitutionality of a summary deprivation, *see, e.g.*, *Statewide Auto Parts,* 971 F.2d at 903, and satisfying the Constitution's "fair notice" mandate, and

compliance *vel non* with a state procedural requirement can determine whether Due Process has been provided. *See Spinelli*, 579 F.3d at 172 ("Had [a city] regulation been complied with, the notice might have been sufficient" to afford due process.").

B. Plaintiffs are Entitled to Reinstatement of their Class Certification Motion

As with the state law claims, the district court did not reach the merits of plaintiffs' pending motion for class certification, denying it as moot. Slip Op. 23. Reversal of that decision also follows from reversal of judgment on the underlying claims and the issue, which entails exercise of the district court's discretion in the first instance, should be remanded. *See, e.g., Johnson v. Riddle*, 443 F.3d 723 (10th Cir. 2006).

CONCLUSION

For the reasons stated, the order granting summary judgment to defendants should be reversed and summary judgment should be granted to plaintiffs.

Dated: New York, New York
January 14, 2010

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