10-4411-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

SAUL ROTHENBERG, individually and on behalf of all others similarly situated, EBRAHIM ABOOD, individually and on behalf of all others similarly situated, TOBBY KOMBO, individually and on behalf of all others similarly situated, KONSTANTINOS KATSIGIANNIS, individually and on behalf of all others similarly situated, BOUBACAR DOUMBIA, individually and on behalf of all others similarly situated, ROBERT DYCE, individually and on behalf of all others similarly situated, MOUSTACH ALI, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

MATTHEW DAUS, DIANE MCGRATH-MCKECHNIE, JOSEPH ECKSTEIN, ELIZABETH BONINA, THOMAS COYNE, THE NEW YORK CITY TAXI LIMOUSINE COMMISSION, THE CITY OF NEW YORK,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York (New York City)

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 notice of appeal of the district court's final order, entered on September 30, 2010, was filed on October 25, 2010.

PRELIMINARY STATEMENT

This case concerns the rights of New York City taxi drivers whose licenses have been revoked by the New York City Taxi and Limousine Commission (TLC). Plaintiffs allege, and the facts are undisputed, that in some cases the TLC acted on the basis of its unwritten policy of revoking licenses of cabdrivers who have been convicted of a crime, including misdemeanors and even violations committed off-duty and where no passenger or TLC official was involved. Other drivers were permanently deprived of their licenses based on a single positive drug test, even where there was no allegation or suggestion that the driver was ever impaired while on-duty, or addicted to drugs. The drivers allege that neither of the TLC's mandatory enforcement regimes is grounded in law and that defendants have thereby denied them Due Process of Law. The drivers allege that the "hearings" that ostensibly protected their valuable property rights were meaningless in that the TLC's judges always rule for the agency, regardless of circumstance, mitigating factors or the driver's record. These hearings were held before the TLC's own

tribunal, presided over by judges who are hired, fired and beholden to the agency. The TLC chairman—while authorized to accept, reject or modify the judges' rulings— accepted and revoked the license without fail. Indeed in 843 straight cases where the TLC prosecutor sought revocation, the TLC ALJ recommended it, and the TLC chairman ordered it.

Plaintiffs brought this 42 U.S.C. § 1983 action on behalf of themselves and others subject to the policies, contending, among other things, that the policies are unconstitutional under the Due Process Clause as well as the Fourth Amendment. This appeal is from the district court's grant of summary judgment to defendants.

STATEMENT OF ISSUES

1. Whether the district court erred by applying an incorrect standard on summary judgment both by denying plaintiffs reasonable inferences from undisputed facts and by ruling for defendants based on unsubstantiated speculation.

2. Whether the Taxi and Limousine Commission's policies-in-fact violated Due Process by denying plaintiffs fair warning of the law.

3. Whether the TLC tribunal is systemically biased in favor of the agency given that the TLC hires the administrative law judges (ALJs), directs their rulings, and can fire them without cause.

4. Whether the TLC tribunal's revocation hearings, where the TLC prevails every time, are consistent with Due Process of Law.

5. Whether plaintiffs are entitled to judgment on their state law claims.

STANDARD OF REVIEW

On all issues, the district court's rulings are subject to *de novo* review.

FACTS AND PROCEEDINGS BELOW

A. The New York Taxi Industry and the TLC

To drive a taxicab in New York City, whether a yellow taxi or a for-hire-vehicle, an individual must be licensed by the TLC, an agency of the City of New York. NYC Code § 19-505(a). Though licensed by the city, taxi drivers are not employed by the city. As independent businessmen, cabdrivers are not protected by civil service rules, have no union, and cannot engage in collective bargaining. A-1385; *Hecht v. Monaghan,* 307 N.Y. 461 (1954); Hodges, *Taxi! A Social History of the New York City Cabdriver* (Johns Hopkins Press 2007), pp.147-48. The taxi drivers' political voice is likewise muted, as 91% are first-generation immigrants. Schaller, "NYC Taxi Fact Book," p. 2.[1]

The rules pertaining to taxi licenses are set forth in the NYC Administrative Code (NYC Code), which is enacted by the City Council. In addition, the TLC's own rules regulate the taxi industry in greater detail. Rules pertaining to taxi drivers are set forth in Chapters 2 and 6 of the TLC rules, which govern yellow cab and for-hire-vehicle (FHV) drivers, respectively. Other rules pertaining, for

[1] Available at www.schallerconsult.com/taxi/taxifb.pdf.

instance, to taxicab owners, paratransit services, and the issuance and sale of taxicab licenses, are set forth in other chapters. Chapter 8 covers adjudications by the TLC tribunal.

The TLC itself was established in 1971 as "a non-mayoral agency." It is composed of nine commissioners appointed by the mayor, subject to the advice and consent of the City Council. NYC Charter § 2301(a)-(b). One of the commissioners serves as chairman and has executive responsibilities. § 2301(c).[2]

The TLC's powers and duties are defined and limited by sections 2300 and 2303 of the Charter. The Charter vests the TLC with responsibility for "the regulation and supervision of the business and industry of transportation of persons by licensed vehicles," § 2303, and for "the issuance, revocation [and] suspension of licenses for drivers, chauffeurs, owners or operators of vehicles." § 2303(b)(3). The Charter further states: "The commission shall have power to act by a majority of its members." § 2301(e). *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). As with all city agencies, the TLC's rulemaking and its adjudications are governed by the City Administrative Procedure Act (CAPA). Charter §§ 1041-1046.

[2] Pertinent sections of the Charter, the NYC Code and the TLC Rules are reproduced at A-258-369.

B. Revocations Pursuant to TLC Rules

The TLC commissioners have passed rules stating myriad grounds for the revocation of taxi drivers' licenses (as well as for other licenses issued by the TLC). The enacted rules permit or require revocation, the most serious sanction the TLC can order, for various misconduct. These rules specifically permit or require revocation for criminal acts committed while the driver is on-duty, offenses specific to taxi driving, and repeated traffic violations.

A taxi driver, for example, may have his license revoked if he "threaten[s], harass[es] or abuse[es] any passenger or any governmental or Commission representative, public servant or other person while performing his duties and responsibilities as a driver." TLC Rule 2-60A.[3] His license may be revoked if he "use[es] or attempt[s] to use any physical force against a passenger, Commission representative, public servant or other person while performing his duties and responsibilities as a driver." TLC Rule 2-60B. The same penalty may apply where a "driver, while performing his duties and responsibilities as a driver [commits] or attempt[s] to commit … any act of fraud, misrepresentation or larceny against a passenger, Commission representative, public servant or any other person." TLC Rule 2-61A1. His license is subject to revocation if the driver "while performing his

[3] In all cases, the penalty provisions for violations of the substantive rules are listed in TLC Rules 2-86 or 2-87. Chapter 6 of the TLC rules has a parallel scheme for FHV drivers.

duties and responsibilities as a driver" distracts, harms or attempts to harm a service animal. TLC Rules 2-60A&B.

In addition, a driver shall have his license revoked if he "offer[s] or give[s] any gift, gratuity or thing of value to any employee, representative or member of the Commission, or any public servant, or any [taxi] dispatcher…." TLC Rule 2-62A. TLC rules likewise require revocation where a driver overcharges a passenger by more than $10. TLC Rule 2-34. More generally, the TLC may revoke a taxi driver's license if he "while performing his duties and responsibilities as a taxicab driver, [commits or attempts] … any willful act … which is against the best interests of the public." TLC Rule 2-61A2.[4] In short, TLC Rules provide for revocation of a taxi driver's license whenever the taxi driver commits any crime—from harassment to attempted assault to bribery to fraud. But revocation is only permitted where the crime occurs while the cabdriver is "performing his duties and responsibilities as a driver" and where the victim is a "passenger, Commission representative [or] public servant."

[4] TLC Rules also permit revocation for traffic violations. Thus a driver's license may also be revoked if he drives in a way that "unreasonably endangers users of other vehicles, pedestrians, or his passengers," or if he leaves the scene of an accident. TLC Rules 2-21A&C. A driver faces mandatory revocation if he "accumulates ten or more points against his license issued by the Department of Motor Vehicles" within a 15-month period. TLC Rule 2-07B. A driver is also subject to revocation if he fails to report the installation of a taximeter not "approved by the Commission" or that has been "tampered with" in any way. TLC Rule 2-66C.

Despite the comprehensive nature of the regulations, neither the Council nor the commission has ever adopted *any* rule that authorizes revocation for criminal acts committed off-duty, where neither a passenger nor a TLC official is a victim. In the off-duty context, the rules and the code are silent. Indeed, then-Chairman Daus, at his deposition, testified first that there was a rule that authorized the TLC's conviction practice, but he could not find it. Then he said it would "take some time" for him to review the rules. Given time, he admitted he could find no rule that permits revocations in response to convictions "specifically" or, he added, "generally." A-168-173. Nevertheless, the TLC routinely revokes cabdrivers' licenses upon conviction of off-duty crimes. A-1361-1366.[5]

C. The Phantom Menace of the Violent Cabdriver

In this case, none of the plaintiffs was accused of assaulting, cheating, harming or attempting to harm any passenger or TLC official. There is likewise no allegation or evidence that any of the plaintiffs whose licenses were revoked (or any member of the plaintiff class) presented any danger to any passenger or TLC official. In fact, defendants have not cited a single instance of any taxi driver assaulting or attempting to harm a passenger. Indeed the TLC concedes that taxi

[5] The TLC will likely note that it does not seek revocation for all offenses, but "only" for those included on a "list" of offenses. This list is drafted not by the commissioners, but by agency's general counsel. The list is not published, and is not available to drivers or even to the TLC ALJs. A193-194; A210; A133.

passengers were victims in less than one case in 20 and that TLC officials were victims in "maybe" one case out of 100. A-225. TLC General Counsel Fraser, meanwhile, admitted in sworn declaration that just *two* taxi drivers in three years were convicted of a "violence related" offense. A-448-449 (Chart 1). Even in these rare cases, Fraser makes no allegation that the crime was on-the-job or against a taxi passenger.

As the Report below notes, NYC Code § 19-505(b)(5) also provides that a taxi driver must be of "good moral character," a standard that arguably contemplates weighing even off-duty crimes. But the TLC never invoked this character clause in any of the plaintiffs' revocation proceedings. And none of the conduct for which plaintiffs were revoked indicates defective character.

The Report further notes that there is a section of the NYC Code— § 19-512.1, which is titled "Revocation of taxicab licenses"— that provides:

> The commission may, for good cause shown relating to a direct and substantial threat to the public health or safety and prior to giving notice and an opportunity for a hearing, suspend a taxicab or for-hire vehicle license …. The commission may also … issue a determination to seek suspension or revocation of such license and after notice and an opportunity for a hearing, suspend or revoke such license.

The Report omits, however, that the TLC *never* invoked § 19-512.1 in any of its revocation notices. Nor was this section ever mentioned by any TLC judge or by Chairman Daus. That it remained unmentioned makes perfect sense: As discussed

infra, the section pertains to "taxicab licenses" and has no bearing on the taxicab *driver's* licenses at issue here.

D. Revocation Hearings Concerning Criminal Convictions

When the TLC seeks revocation, the TLC holds a session with one of its ALJs, which, in Judge Ellis's words, "take[s] the form of a 'fitness hearing.'" The TLC concedes that these "fitness hearings" are not based on the alleged violation of any TLC rule or statute. A-168-173; A-1345-1346.

The hearing notices are form letters, identical except for a few inserted details, such as the hearing date. The notices allege nothing of substance except the fact of the conviction, certainly nothing about the driver's character or any threat to public health or safety. At the hearings themselves, the TLC presents no evidence apart from documentation of the conviction. A-1157-1158, ¶ 22. While the TLC judges hear testimony, they admit that they do not consider whether the crime was committed off-duty, or in the heat of passion, or a first offense. Mitigating evidence such as the cabdriver's record on-the-job or as a citizen is also disregarded. A-201; A-1312-1313; A-1351; A-1157-1158, ¶ 22. In most cases the TLC did not even learn "the underlying facts." A-1312; A-1359-1363. Yet once the TLC proved the fact of the conviction, it was "Game Over."

Following the hearing, the TLC ALJ invariably "recommends" revocation, the TLC having prevailed in every such hearing since 2003.[6] In the course of discovery, defendants produced at least 843 letter rulings by Chairman Daus dating back to 2002. (The letter rulings relate to both conviction revocations and drug-test revocations.) The chairman accepted the recommendation to revoke every time. A-30-31; A-177. The chairman's order is final, with no appeal to the commissioners. A-1248-1249.

E. TLC Drug Testing

No statute or ordinance authorizes the drug testing of taxi drivers. The NYC Code provides that a taxi driver may not be "addicted to" drugs or alcohol. NYC Code § 19-505(b)(6). TLC Rule 2-20 requires revocation where a driver "operate[s] a taxicab while his driving ability is impaired" whether by alcohol or drugs.[7] The same rule even bars drivers from consuming intoxicants "for six hours prior to driving or occupying such taxicab."

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[6] Marc Hardekopf, the TLC's chief prosecutor, testified that the TLC prevailed in every criminal conviction case brought in the TLC tribunal since 2003. In drug cases, he testified that the TLC prevailed in every case except one since he started in 2002. A-1338-1339; A-1343-44; *see also* Decisions at A-103-118.]

[7] New York's Vehicle and Traffic Law requires a six-month suspension of a driver's license for a first driving-while-intoxicated offense. § 1193(2)(a)(2). A first driving-while-ability-impaired offense (which is not a crime, but a traffic infraction) carries a three-month suspension. § 1193(2)(a)(1). Thus the VTL already punishes off-duty driving offenses and it insures that an offender will be off the road for a six- or three-month period.

TLC Rule 2-19 concerns drug testing. Rule 2-19A authorizes the TLC to require a drug test where the TLC "has reasonable suspicion to believe that a driver has a drug or controlled substance impairment that renders him or her unfit for the safe operation of a taxicab." TLC Rule 2-19B requires annual drug tests, even absent cause or suspicion. It is undisputed that when the TLC implemented its suspicionless and warrantless drug-testing mandate, it had never found (nor even sought) evidence of a drug problem in the industry. A-184-185; A-252. Indeed, the TLC prosecutor conceded, in the last nine years, the TLC has never had cause to test a driver based on a reasonable suspicion of drug use, let alone probable cause. Even among taxi drivers who have tested positive, not even one was found to be impaired while on duty. A-221; A-444.

F. Drug Test Revocation Hearings

TLC Rule 2-19B2 provides: "If the results of said test are positive, the driver's license *may be* revoked after a hearing in accordance with §8-15 of this title." The hearing notices preceding such hearings allege a positive test—and inform the driver his license has been suspended—but do not indicate what drug was found or how much. A-119-122. At the hearings themselves, the TLC presents no evidence apart from the putative test result. A-1172-1173. Following the hearing, the TLC judge always finds for the agency, never finding that driver's

drug use was inadvertent, that the testing was faulty or that the chain of custody of the sample unproven. A-1265; A-1270; A-1273.

At the hearing, there is no testimony from anyone involved in the testing, whether the specimen-intake process, the chain of custody, or the testing itself. TLC ALJs admit that they are trained to accept by rote the "representation" that the drug test was conducted properly, and they were provided "boilerplate language" to that effect for insertion in their decisions. A-1265-1271. In fact, the TLC lab made no such representation and it does *not* comply with federal guidelines.[8] Nonetheless, acceptance of the validity of the putative test result was automatic. Even in the instances where a driver presented an expert toxicology witness, there was no chance of upsetting the finding because, as Coyne testified, "[T]hat was beyond something I could rule on as a judge because the TLC always accepted whatever was in that document was valid." A-1272.

As in the conviction context, the TLC ALJ invariably recommends revocation. Chairman Daus accepts the recommendations to revoke *without fail*. Like the ALJs, the chairman requires no evidence of on-the-job impairment or

[8] Despite submitting hundreds of pages of affidavits, defendants offered no statement by LabCorp, the lab hired by the TLC, that it complied with federal standards *in its TLC testing*. In fact, as Dr. James Woodford testified, they do not comply with those standards, which require, among other things, the use of split samples to allow testing of a 'B' sample when the 'A' sample tests positive. LabCorp does not use split samples in taxi driver tests. A-1386-1388.

addiction. A-177; A-1338-1339; A-444, ¶ 25. Again, the chairman's order is final. A-131-132.

G. The TLC Tribunal

1. TLC ALJs May be Fired At-Will:

TLC ALJs are at-will employees of the agency.[9] They work on a per-diem basis, enjoying no fixed term in office. They have no contractual or civil service protections. A-1383; A-1253-1254. Chairman Daus has the ultimate authority in hiring ALJs. A-174; A-241. Once hired, ALJs must apply for work assignments each month. Supervisors issue assignments, which may be denied without cause. A-138; A-250. ALJs report to the supervisory ALJs, who report in turn to a deputy commissioner. A-129-130.

The TLC tribunal has four locations and a staff of 50-80 ALJs at any given time. A-254. Most ALJs remain at Long Island City, adjudicating ordinary citations. A much smaller cohort presides over the so-called fitness hearings,

[9] While the TLC has maintained an administrative court for decades, the tribunal was not authorized explicitly by statute until 2008, when the Council amended section 2303 of the Charter. The 2008 amendment permitted the TLC to establish a tribunal "to adjudicate charges of violation of provisions of the administrative code and rules and regulations promulgated thereunder." Local Law 16 of 2008, § 2. A-366. The same local law, however, required going forward that the TLC submit discretionary revocation cases (such as those at issue here) to the Office of Administrative Trials and Hearings (OATH), rather than to its own tribunal. *Id*. § 4, codified at NYC Code 19-506.1. The named plaintiffs in this action all had their revocation hearings before TLC ALJs.

which were at the relevant time conducted at the TLC headquarters. Indeed in these revocation cases, just five ALJs presided 63% of the time. A-31.

There may be some dispute as to *how many* ALJs the TLC has fired recently. But since Matthew Daus joined the agency initially as "special counsel," it has fired at least 30. A-1193-1194; A-1232-1243 (termination letters). Daus personally fired at least one judge, Eugene Glicksman, who issued rulings against the agency. A-33-43; A-1288. Daus also fired Dominic Pistone, a former director of adjudications, who challenged his practices. A-44-47. The TLC has insisted that it has the right to fire ALJs without cause and has litigated successfully in defense of that right. *Glicksman v. New York City Env. Control Bd.*, 2008 WL 282124 (S.D.N.Y. 2008) (confirming that TLC ALJs have no right to "decisional independence"), *summarily aff'd*, 2009 WL 2959566 (2d Cir. 2009). Certainly there is no dispute that the TLC ALJs know they can be fired at any time. A-136; A-203.14; A-1383.

2. Demotion or Reprimand for 'Incorrect' Rulings:

Short of termination, an ALJ can be simply left off the calendar, as the TLC has done. A-245; A-879.48. TLC ALJs are also subject to reprimands and threats from superiors. For example, in early 2006, ALJ Eric Gottlieb recommended in three "summary suspension" hearings (another form of fitness hearing) that a driver's suspension be lifted. In these rulings, Gottlieb stepped out of line: For

years before, in hundreds of cases, *every* other TLC ALJ ruled that the driver's suspension should remain in effect. A-48-49; A-203.10-203.11.

The agency's response to ALJ Gottlieb was alarmed and aggressive: When he learned of Gottlieb's recommendations, Deputy Chief Thomas Coyne phoned him and e-mailed him. Coyne told Gottlieb his ruling were "improper." A-1228. Coyne also told Gottlieb to inform him before he (Gottlieb) issued another pro-driver recommendations. *Id.* Gottlieb testified that he was told his rulings had angered TLC executives, and that he was worried he could be sent back to Long Island City. A-203.14. As a result, he promised to change and, in fact, he never ruled in favor of a cabbie on summary suspension again. A-203.10-203.11; Pl. Rule 56.1 Statement (Docket #56) ¶¶ 27-30.

Like his colleagues, Gottlieb *never* ruled against the agency in a drug test or criminal conviction revocation hearing. But shortly before he quit the agency he did prepare a draft recommendation that favored a taxi driver named Devon Elliot. (Elliot had tested positive, but Gottlieb found that his drug use was unintentional.) Gottlieb asked Coyne, his supervisor, for "approval" to issue the decision "due to the unorthodox nature of the result"—meaning that it was in favor of the cabdriver. A-1144; A-203.18-203.19. Gottlieb offered the Elliot ruling in draft form because, he testified, "I knew that my supervisors would be very upset had I done that.

They would probably consider that to be insubordination." *Id*.; Pl. Rule 56.1 Statement ¶¶ 31-37.

Coyne circulated Gottlieb's draft to TLC Deputy Commissioner Eckstein and to his fellow supervisors. The supervisors denounced the draft, with Chief ALJ Bonina stating that while "we can't tell an ALJ how to decide a case… we as supervisors do have an obligation to point out to an ALJ when a decision is blatantly wrong." A-1147. Coyne then ordered Gottlieb to change his decision. A-203.16-203.19. Gottlieb, though he believed his ruling correct, reversed course. He ruled for the agency, as he knew his fellow ALJs did without fail. A-74. Gottlieb testified: "I tried to obtain a result that I thought was proper. I was told to do it a different way. Therefore I did it the way I was told it should be done." A-203.18-203.19; Pl. Rule 56.1 Statement ¶¶ 35-37.

3. Promoting Favored ALJs:

In addition to the power to terminate or demote, the TLC promotes favored ALJs. ALJs Coyne, Bonina, and Schwecke have been named supervisors. Other former ALJs, such as Lisa Rana (who was named chief of staff), Peter Mazer (later general counsel) and Joseph Eckstein (deputy commissioner) have been promoted to full-time salaried positions within the agency. A-45; A-190. While all ALJs are paid at the same hourly rate, some work much more than others. Some receive

"special projects," and additional income, doing non-adjudicative work. A-165-66; A-203.3-203.4; A-238-239.

4. Ex Parte Communications:

The TLC judges enforce the agency's unwritten rules in compliance with pervasive *ex parte* directives. These directives are communicated through training and through an internal manual. The Manual is not available to taxi drivers or to the public; it is not reviewed or voted on by the commissioners. Nor is not published on the TLC website. A-188; Def. Rule 56.1 Statement ¶ 62. But it is required reading for TLC ALJs. The ALJs are told to consider the manual binding, to make it their "Bible." A-157; A-162. The lead author of the 2000 Manual is Matthew Daus, the agency's general counsel when it was promulgated. A-96.

It is the training and the internal manual, not any rule enacted by the commission, that provides the rule of decision in revocation cases. It is the manual, not the rules, that states: "Any driver who fails to rebut the positive test results is no longer fit to be licensed." It is the Manual, not the rules, that bars any consideration of the cabbie's DMV record at drug test hearings. A-102. Likewise the manual speaks to revocations upon a criminal conviction. A-100-101; A-161. The Manual's *ex parte* dictates are repeatedly and directly reflected in the ALJs' decisions. A-64-95.

TLC judges concede that they follow TLC policies stated in the Manual, even when that policy has not been enacted by rule. A-1277-1279; A-1305; A-1307; A-1317; A-1255; A-1258. Deputy Chief ALJ Coyne testified: "[W]e were told we had to abide by the manual" and that he felt no less bound by the Manual as compared to enacted rules. A-1276-79. ALJ Schwecke, another supervisor, described her training for fitness hearings as observing and "reviewing the manual that was in place at that time. That was basically it." A-1380. ALJ Fioramonti, who conducted more revocation hearings than anyone, summarized the practice: "You're going to be doing fitness hearings, you watch somebody doing them and you do them." A-1321. Of course, any new ALJ watching his colleagues would surely note that, as night follows day, when the TLC seeks revocation, it gets revocation.

H. The Individual Plaintiffs

Plaintiffs Tobby Kombo, Robert Dyce and Moustach Ali were all longtime taxi drivers who had their licenses revoked following criminal convictions. In each case the crime was off-duty. Kombo's crime was assault, a class D felony, committed in his kitchen against his ex-wife, who, Kombo testified, angered him by appearing at his apartment uninvited, refusing to leave, and by deliberately breaking his dishes. A-658. A first-time offender, he was sentenced to five years probation, and awarded a certificate of relief from disabilities. A-598; A-654.

Dyce was guilty of a misdemeanor, criminal possession of a forged instrument, specifically a parking pass, which he used to park in front of his church. He was sentenced to two days community service. A-910. Ali was convicted of a non-criminal DWAI violation, which occurred while he was off-duty in upstate New York. His New York State driver's license was suspended for 90 days and he was required to pay a $300 fine and complete an alcohol and drug program. A-940; A-960. As with hundreds of other revocations, the TLC never alleged the violation of any Code section or rule pertaining to cabdrivers. A-114-118.

Plaintiffs Saul Rothenberg, Ebrahim Abood, Konstantinos Katsigiannis and Boubacar Doumbia all had their taxi drivers' licenses revoked after testing positive for drugs. None was accused of being impaired while on duty or of being addicted to drugs.

I. Proceedings Below

Plaintiffs Rothenberg, Abood and Kombo filed this action in January 2008 on behalf of themselves and others similarly situated and were later joined by the four additional plaintiffs. The complaint, as amended, alleged that the TLC's *de facto* revocation policies and practices violate the Due Process Clause and the Fourth Amendment as well as the City Administrative Procedure Act.

In August 2009, plaintiffs moved for partial summary judgment. This motion was never decided. In May 2010 — after plaintiffs were granted leave to

amend their complaint to add their fair warning claims—defendants moved for summary judgment. With leave from Judge Ellis, plaintiffs filed a separate summary judgment motion on their fair warning claim, as well as a cross-motion as to all other claims.

By a Report and Recommendation (R&R) dated September 8, 2010, Judge Ellis recommended that defendants be granted summary judgment on the constitutional claims and that the court decline to exercise jurisdiction over plaintiffs' state law claims. The Report concluded that the taxi drivers had "sufficient notice" that their licenses would be revoked because of a criminal conviction because TLC rules required them to notify the TLC of any conviction and because of a reference in § 19-512.1 to revocations for "threats to public health or safety." R&R 11. It concluded that plaintiffs had fair warning of the TLC policy mandating revocation without exception for positive drug tests because the "purpose behind" the drug testing rule was to have a "zero tolerance approach to illegal drug use." R&R 9-10.

The Report found that the hearing notices were adequate because they stated that the "purpose of the hearing" was to determine the drivers' fitness to maintain a license. R&R 16. As to the drug test hearings, the Report concluded that the TLC's practice of relying solely on unauthenticated documents was permissible because "a positive drug test" is an "objectively verifiable piece of evidence."

R&R 17. The criminal conviction hearings were constitutionally adequate, the Report held, because the "The TLC's burden is to present valid evidence that the licensee has engaged in conduct that calls into question the licensee's fitness to retain a license." R&R 19. The Report rejected plaintiffs' tribunal bias claim because plaintiffs had not presented "allegations against a specific adjudicator" and had not named any particular ALJ as a defendant. R&R 21.

The Report, which the district court adopted, concluded: "The TLC has a strong interest in preventing conditions dangerous to the public welfare that outweighs Plaintiffs' strong interest in their licenses." R&R 25. It added: "Given the fact that the notices and hearings provided to Plaintiffs protected them against a high risk of erroneous deprivation, the TLC provided them with sufficient pre-deprivation due process." *Id*. In any event, there could be no due process violation because "New York state courts provide for [a post-deprivation] remedy through Article 78 proceedings." R&R 25. The Report added that the complaint against the TLC should be dismissed because city agencies "cannot be sued" in their own names and that all the individual defendants were shielded by qualified immunity. R&R 28 & 29.

Plaintiffs filed objections to the Report, as did defendants. Judge Stein adopted the Report "in its entirety" on September 30, even before plaintiffs' time to respond to defendants' objections. Judge Stein added "additional conclusions"

correcting "the heading of section III(B)(3) of the Report" to state that the hearings were post-deprivation, not pre-deprivation. Judge Stein also found that Judge Ellis was incorrect in his view that one particular plaintiff, Dyce, was denied fair notice of the policy that led to his license revocation.

SUMMARY OF ARGUMENT

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

Nothing in the NYC Code or in the TLC rules in any way permits or even mentions revocations for off-duty crimes. The laws that have been enacted permit revocation only where the victim is a government official or a passenger and where the driver is "performing his duties and responsibilities as a driver." The TLC's routine imposition of penalties not based on law denies taxi drivers fair warning of the law, a fundamental aspect of Due Process.

The TLC rules, if not the Code, at least mention revocation owing to a positive drug test. But the TLC chairman's *de facto* practice changes a permissive ("may be") penalty to a mandatory dictate. As to the penalty scheme, TLC again denies taxi drivers fair warning of the law.

The so-called fitness hearings, which precede the revocation orders, are inconsistent with Due Process. They begin with something less than the "gesture" of notice that this Court held constitutionally inadequate in *Spinelli v. City of New*

York, 579 F.3d 160, 172 (2d Cir. 2009). They proceed without regard to factors — such as the driver's prior record, mitigating evidence, or the circumstances of the crime—that might make the hearings meaningful. The judges are guided by secret law and *ex parte* directives. And the hearings end invariably with the conclusion not that the driver violated any law, but that he is "not fit."

The hearings are judged by TLC ALJs who are not only at-will employees of the prosecuting agency and subject to a variety of incentives to rule in the agency's favor, but who are subject to direct *ex parte* influence at the individual and general level. Thus plaintiffs were denied another fundamental aspect of Due Process: a fair trial in a fair tribunal.

The Report also erred in its conclusion that plaintiffs' Dues Process claims should be rejected because they did not file an Article 78 action. As the Supreme Court and this Court have held repeatedly, Section 1983 does not require the exhaustion of state remedies, certainly not where the violations were repeated and systemic. Regardless of whether plaintiffs could have later sued in state court, they were denied the *meaningful* pre-deprivation hearing that Due Process requires.

ARGUMENT

It is beyond question, as the court below acknowledged, that a taxi driver's license is a form of property that cannot be denied without Due Process of Law. *Bell v. Burson*, 402 U.S. 535, 539 (1971). While "[a]ny significant taking of

property by the State is within the purview of the Due Process Clause," *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972), the permanent denial of a license is an urgent matter. *Kuck v. Danaher*, 600 F.3d 159, 164 (2d Cir. 2010). This is because the Supreme Court has "'repeatedly recognized the severity of depriving someone of his or her livelihood.'" *Spinelli*, 579 F.3d at 171 (quoting *FDIC v. Mallen*, 486 U.S. 230, 243 (1988)). Nevertheless, defendants' practices deprived plaintiffs of fair warning of the law, notice of the charges, and a fair hearing. The ruling below that plaintiffs received due process is founded on errors of law and an improper reading of the record.

I. THE REPORT IMPROPERLY GRANTED DEFENDANTS' MOTION BASED ON SPECULATION AND CONJECTURE

The Report, as adopted, misapplies the standard for summary judgment because it "disregarded critical evidence favorable" to plaintiffs and failed to "draw all reasonable inferences in favor of the nonmoving party." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 & 152 (2000)*; see also Spinelli*, 579 F.3d at 167; *Huminski v. Corsones*, 396 F.3d 53, 70 (2d Cir. 2005). It permits defendants to rely on "unsubstantiated speculation." *See Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998). It also errs particularly by crediting conjecture when applying the familiar balancing test announced by *Mathews v. Eldridge*, 424 U.S. 319 (1976).

A party opposing a motion for summary judgment "may not rely on conclusory allegations or unsubstantiated speculation." *Scotto*, 143 F.3d at 114; *see also, e.g., Woodman v. WWOR-TV, Inc*., 411 F.3d 69, 75 (2d Cir. 2005). Certainly summary judgment cannot be *granted* based on theoretical dangers or phantom fears. But the Report adopted by the district court does just that.

To cite just a few examples: As to fair warning of the law:

- The Report disregards the regulatory scheme, which states precisely that a taxi driver's license may be revoked for on-the-job misconduct, but makes no mention of off-duty crimes.

- At the same time, it credits the TLC for relying on a statutory provision that the TLC never once mentioned in the administrative process.

As to the TLC tribunal:

- The Report omits that the fitness hearings are *always* resolved in favor of the TLC, minimizing this glaring fact by noting that recommendations against the TLC "appear to be rare." R&R 22.

- It refuses natural and reasonable inferences from the fact that TLC ALJs may be terminated without cause, and that they rule based on directives in the *ex parte* manual. Indeed, Judge Ellis downgrades the *admitted* facts concerning the ALJ's employment status to an "assert[ion]." R&R 6.

- It does not even mention the specific reprimand to the one ALJ who threatened to break ranks.

As to drug testing and drug test hearings:

- The Report never mentions expert testimony as to the various ways a putative drug test result can be erroneous.

- It also ignores that the TLC never found (or looked for) evidence of taxi drivers being impaired on the job.

As to the *Mathews* test:

- The Report cites the TLC's "strong interest" in ensuring that passengers are not placed "in a vulnerable position with possibly dangerous drivers," even though there is no evidence that any of the plaintiffs posed a threat to any passenger at any time.

These omissions and this conjecture infect each and every one of the Report's conclusions.

II. THE TLC'S DE FACTO PRACTICES DENIED TAXI DRIVERS FAIR WARNING OF THE LAW

Stated in the original Latin, "*Nulla poena sine lege*," the ancient principle that there can be no penalty without law is pervasive in our law. In cases such as *Bouie v. City of Columbia*, the Supreme Court has recognized "The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime." 378 U.S. 347, 350-51 (1964). The Court has further held that the principle applies in the quasi-criminal context such as the one at issue here. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499-500 (1982).[10] In the civil context, the Court has held, "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the

[10] Both the Supreme Court and this Court have termed license disbarment proceedings "quasi-criminal." *In Re Ruffalo*, 390 U.S. 544, 551 (1968); *Erdman v. Stevens*, 458 F.2d 1205, 1210 (2d Cir. 1972).

conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996). In the administrative context, this Court has "refused, on due process grounds, to defer to [an administrative agency's] imposition of sanctions where 'doing so would penalize an individual who has not received fair notice of a regulatory violation.'" *D'Alessio v. S.E.C.*, 380 F.3d 112, 123-24 (2d Cir. 2004) (quoting *Upton v. S.E.C.*, 75 F.3d 92, 98 (2d Cir.1996)). "Fair notice of the standards against which one is to be judged is a fundamental norm of administrative law: '[t]here is no justification for the government depriving citizens of the opportunity to practice their profession without revealing the standard they have been found to violate.'" *Marrie v. S.E.C.*, 374 F.3d 1196, 1206-1207 (D.C. Cir. 2004) (quoting *Checkosky v. S.E.C.*, 139 F.3d 221, 225-26 (D.C. Cir. 1998)); *see also KPMG, LLP v. S.E.C.*, 289 F.3d 109, 116-117 (D.C. Cir. 2002); *Kramer v. NYC Board of Educ.*, 715 F.Supp.2d 335, 360 (E.D.N.Y. 2010) (sustaining Due Process challenge where cited regulation was "clearly inapplicable on its face," citing *Thibodeau v. Portuondo*, 486 F.3d 61, 65 (2d Cir. 2007)).

The absence of law authorizing a penalty imposed is not a minimal or technical violation. It is a "basic protection against 'judgments without notice' afforded by the Due Process Clause." *BMW*, 517 U.S. at 575 n.22, (quoting *Shaffer*

v. Heitner, 433 U.S. 186, 217 (1977)). Plaintiffs' Fair Warning claim is not what the *Bouie* court called "the typical 'void for vagueness' situation" where the question is whether "men of common intelligence must necessarily guess at [the law's] meaning." 378 U.S at 352, (citing *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). Plaintiffs' claims are grounded in a distinct but "related manifestation of the fair warning requirement." *U.S. v. Lanier*, 520 U.S. 259, 266-67 (1997).

The Court explained in *Bouie*:

> When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. 378 U.S. at 352.

The TLC's practices violate Due Process norms in precisely this fashion: The duly enacted regulations are precise, and they give no indication that the TLC would seek, and obtain, revocation for off-duty crimes outside the scope of the TLC rules.

A. The TLC's Revocation-Upon-Conviction Practice Imposes a Penalty Never Authorized by Law

The rules enacted by the commission permit revocation for all manner of on-duty conduct. But where the conduct, even if criminal, was off-duty, the rules impose no sanction (or nothing beyond that imposed by New York's Penal Law). This is not a case of a statute being vague. This is a case, like *Bouie*, where the

written law is clear. That the TLC commissioners have consistently drawn a line between on-duty offenses involving passengers and off-duty misconduct makes perfect sense given the agency's jurisdiction.[11] The constitutional violation occurs because TLC executives, acting by fiat, ignore the line, and insist on revocation "based on a single factor not mentioned" in the rules as enacted. *Deegan v. City of Ithaca*, 444 F.3d 135, 145-46 (2d Cir. 2006).

Taxi drivers "were given not only no 'fair warning,' but no warning whatever." *Bouie*, 378 U.S. at 355.[12] Thus the drivers have suffered a "potentially greater deprivation" than in the typical void-for-vagueness case. *Id. at* 352. This is also not a case of interpretation or "deference" to an agency's interpretation of its rules. The agency—that is, the nine-member commission—has offered no interpretation. In any event, as this Court stated in *Upton v. S.E.C*, "[A reviewing court] cannot defer to the [agency's] interpretation of its rules if doing so would penalize an individual who has not received fair notice of a regulatory violation." 75 F.3d 92, 98 (2d Cir. 1996).

[11] "Administrative agencies, as creatures of the Legislature within the executive branch, can act only to implement their charter as it is written and as given to them." *Liao v. New York State Banking Dep't*, 74 N.Y.2d 505, 510 (N.Y. 1989).

[12] All of the named plaintiffs pleaded guilty to the criminal allegations. Had the TLC rules stated that their convictions would lead also to the loss of their livelihoods, they might have chosen to plead not guilty and contest the charges.

The Report errs by resting on *Piscottano v. Murphy*, 511 F.3d 247 (2d Cir. 2007), and *Grayned v. City of Rockford*, 408 U.S. 104 (1972)— typical void-for-vagueness cases— while ignoring altogether the line of cases stretching from *Bouie* through *BMW* to *D'Allessio* and *Deegan*. Thus the Report skirts past plaintiffs' fair warning claim. Judge Ellis writes, "[I]t is within the TLC's prerogative to conclude that any violent or other serious criminal conduct is necessarily related to the driver's job." Whether or not the TLC has this prerogative, the TLC commissioners certainly never exercised it by majority vote. The Report mentions that, per TLC Rule 2-63A, a driver must notify the TLC within fifteen days of a criminal conviction. R&R 4. But that rule *also* says nothing about the consequences of a conviction. Nor does it imply any consequence or penalty that will flow from the conviction. The TLC might, for example, require notification so it can determine whether the crime, such as an assault on or the attempt to defraud a passenger, violated TLC rules. Or it might initiate an investigation to determine just what occurred and whether it demonstrates bad character.[13]

[13] It is axiomatic that not every crime demonstrates moral turpitude. This Court, for instance, has held that a drunk driving offense is not a crime of moral turpitude, *even if on the third offense*, making it a felony. *Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001). Even in the case of Kombo, who was convicted of a felony, there was no "bad character" allegation. Nor could there have been, as his crime was one of momentary anger, not malice. *U.S. ex rel. Mongiovi v. Karnuth*, 30 F.2d 825, 826 (2d Cir. 1929) (second degree manslaughter not a

Nothing anywhere in the code or rules pertaining to licensing standards disqualifies an ex-felon, let alone a misdemeanant, from obtaining a hack license. Indeed, it is irrational to permit a former offender a better chance at licensure than a currently licensed taxi driver who has committed the same offense. Thus, the TLC's rule-in-fact violates the Equal Protection Clause as well as the Due Process Clause. *Miller v. Carter*, 547 F.2d 1314 (7th Cir. 1977), *aff'd by an equally divided court*, 434 U.S. 356 (1978).

As to Fair Warning: The question is not whether the TLC commissioners could have rationally enacted a rule denying licensure or calling for revocation upon off-duty convictions. The point is that the commissioners never did. By writing their own rules, the TLC executives violated a "basic principle," *Bouie*, 378 U.S. at 350, and "[e]lementary notions of fairness." *BMW*, 517 U.S. at 574. In this critical regard, the TLC has "fail[ed] to do what the Constitution requires." *Deegan*, 444 F.3d at146.

B. The Unenacted Change to the Drug Test Penalty Violates Due Process Standards

Even though no statute authorizes the penalty, there is no dispute that the TLC revokes the license of every taxi driver it asserts has tested positive for drugs. The governing statute speaks of "addiction," not use, which can be solitary or

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crime of moral turpitude).

occasional. While the TLC rule as enacted admits the possibility of revocation, the TLC's rule-in-fact makes it a certainty. Thus the TLC executive has substituted its caprice for law. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003).

When the drug-testing program was enacted, the TLC commissioners, discussing the rule at their public meeting, focused on the problem of *addiction*. A-1197.1. At all times since, the rule has stated that a positive test "may" lead to revocation, never that it "must" or that it "shall." A-1198-1213. When the drug test rule was amended in 2006, the discretionary language was retained. Indeed, the "statement of basis and purpose" that accompanied the 2006 amendment states: "This rule *further clarifies* that if the drug test result is positive, the licensee will undergo a fitness hearing *to determine whether* the license should be revoked." A-897.33; A-879.36 (emphasis added)]. The TLC's "Drug Test Requirements" notices are to the same effect. Exhs. 25 & 27 to Ackman Decl. of 6/30/10.

In actuality, a positive drug test leads to revocation in every case. A-199 (Fraser: "no mitigation, no exceptions"); A-209. TLC General Counsel Fraser argued in a *declaration* that "No alternative sanction is provided for … and in fact it would not be logical to find a licensee unfit to hold the license, and yet impose any penalty other than license revocation, such as suspension or a fine." A-435, ¶ 10.

But this administrative fiat is no more grounded in logic than it is in law. Nothing in the Code or the rules indicates that the TLC has no discretion to consider other factors or that a single test failure makes a driver permanently "unfit." It need hardly be said that a positive drug test can lead to a lesser sanction, or even no sanction. In *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 632 (1989), for example, the Supreme Court noted that a drug test standing alone could not prove intoxication on-the-job.[14] A test that shows the presence of metabolites that could have been in the driver's system for days or weeks, could "provide the basis for further investigative work" to determine whether an employee was impaired at the time of an accident. In *Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17*, the Supreme Court rejected the argument that an arbitrator was required to discharge a truck driver who *twice* tested positive: "The [federal drug testing] Act says that 'rehabilitation is a critical component of any testing program.…' Neither the Act nor the regulations forbid an employer to reinstate in a safety-sensitive position an employee who fails a random drug test once or twice." 531 U.S. 57, 64-65 (2000).[15]

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[14] TLC General Counsel Fraser likewise admitted: "A positive drug test does not show the driver was under the influence at the time of testing" and that drug use could have been "even months" before the test. He also admitted that the TLC does not test for alcohol "because use of alcohol is legal." A-444-445.

[15] *See also Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 314 (1989) ("An employee whose first test is positive may go to Conrail's Employee Counseling Service for evaluation. If the evaluation reveals an

Other NYC agencies permit an employee who tests positive to seek counseling or treatment. Bus drivers, for example, are not terminated for a single positive drug test.[16] Train conductors are given a second chance, and even second-time offenders are permitted to enter a rehabilitation program. *See Kwok v. New York City Transit Authority*, 2001 WL 829876, 3 (S.D.N.Y. 2001). The U.S. military accepts an innocent ingestion defense and requires the government to prove that the drug use was "knowing" and "purposeful." *U.S. v. Brewer,* 61 MJ 425 (U.S. Court of Appeal for the Armed Forces 2005). But for the TLC the putative test result ends the inquiry.

C. Nothing in the Regulatory History Permits the TLC's Rule-In-Fact

The Report permits defendants to sidestep the statutory and regulatory language—to change the law by resort to what Judge Ellis asserts is "the purpose behind these rules." R&R 10. This purpose is divined not from the rule itself or from the Code, but from a single sentence taken out of context from a statement

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addiction problem, and the employee agrees to enter an approved treatment program, the employee will be given an extended period of 125 days to provide a negative test.")

[16] Section 17-610 of the NYC Code, which applies to school bus drivers, provides for a second test after an initial failure, permits a return to duty, and states that the medical review officer "may, where appropriate, recommend rehabilitation or other treatment programs." *See also Gomez v. New York City Dep't of Educ.*, 50 A.D.3d 583, 584, 856 N.Y.S.2d 603, 604 (1st Dep't 2008) (first strike revocation held unlawful); *Brown v. Triboro Coach Corp.*, 153 F.Supp.2d 172, 175 (E.D.N.Y. 2001) (bus driver who tests positive referred for counseling).

that accompanied its passage. That sentence states, tendentiously, "The regulations clearly establish a Commission policy of zero tolerance for licensees who use illegal substances, or who operate their vehicles while their ability to do so is impaired." In context, even this sentence does not purport to alter the rule's plain meaning. The very same statement says: "A positive test result would lead to the denial of a new license application and *may* lead to the denial of a renewal application following a hearing." (emphasis added). It also refers to the "penalty of mandatory revocation" that applies where a driver is "convicted of operating a vehicle while impaired." There is no such mandate for a positive test. A-1011.3. Thus the statement of purpose, like the rules themselves, distinguishes between mandatory and discretionary penalties. *See Natural Resources Defense Council v. NYC Dep't of Sanitation*, 83 N.Y.2d 215, 220 (N.Y. 1994) ("[W]hen the City Council intended to impart discretion" it used the word "may," not "shall").

In any event, the statement of alleged "purpose" was not enacted by the Council or the commission. As the Supreme Court has stated, "Interpretations such as those in opinion letters–like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all … lack the force of law." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *see also De La Mota v. U.S. Dep't of Educ*., 412 F.3d 71, 79 (2d Cir. 2005). Indeed the single statement that the Report quotes out of context does not even accurately *describe* the law.

The TLC's practice denies taxi drivers fair notice of the mandatory nature of the penalty it imposes in fact. *BMW,* 517 U.S at 574. And it imposes that penalty based without fair warning, without explanation, without regard to circumstances or mitigating evidence, based "on a single factor." *Deegan*, 444 F.3d at 146. This is precisely the kind of "arbitrary and vindictive use of the laws" that the Fair Warning principle was designed to prevent. *Rogers v. Tennessee*, 532 U.S. 451, 460 (2001).[17]

D. The TLC Did Not Plead a Violation of Section 19-512.1, and it Provides no Authority for Defendants' Actions

The Report also cites NYC Code § 19-512.1 as a basis for the TLC's revocation authority, saying it provided "sufficient notice" that the TLC "may revoke any license where the licensee constitutes a threat to the public health, or safety." R&R 12. While the Report cites this provision, the TLC, in its administrative process, never did. The hearing notices, the ALJ decisions, Chairman Daus's revocation orders— none even mentions § 19-512.1. Nor did the TLC ever claim or find, in the language of the section, "a direct and substantial

[17] In addition, under the Supreme Court's ruling in *Skinner*, 489 U.S. at 607 & 633, as well as *Chandler v. Miller*, 520 U.S. 305, 323 (1997), the undisputed fact that there is no factual basis or historical grounds for the TLC's suspicionless drug testing regime renders the testing regime itself unreasonable and in violation of the Fourth Amendment.

threat to the public health or safety." Thus, by its actions, the TLC admits that this section has no bearing on taxicab driver license revocations.

There is good reason for this admission: The language, context and structure of § 19-512.1 all demonstrate that it does not reach taxicab *drivers* at all. Its language refers instead to "taxicab or for-hire-vehicle" licenses. Other provisions enacted at the same time refer to "taxicab or for-hire vehicle *driver's* license[s]." *See* § 19-507.1 (emphasis added). Both "vehicle license" and "driver's license" are defined terms in the Code, with different definitions. §§ 19-502(d) & (e).

As to context, § 19-512.1 is appended to § 19-512, which concerns the "Transferability of taxicab licenses." 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" — make sense when applied to taxicab owners. They have no relevance to drivers. Thus, contrary to the Report's assertion, plaintiffs' conduct (or any taxi drivers' conduct) is not "within the ambit of the provision." *See* R&R 12. For the district court to find that a provision the TLC never mentioned (at least not until defending this action) afforded notice of the TLC's rule-in-fact was clear error.[18]

[18] Under both federal and state law, reviewing courts may not supply a basis for the agency's action that the agency itself has not given. *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *U.S. ex rel. Johnson v. Shaughnessy*, 336 U.S. 806, 819 (1949) ("The rule against raising questions on judicial review that were not raised in

III. DEFENDANTS FAILED TO PROVIDE ADEQUATE NOTICE OF THE CHARGES THAT LED TO REVOCATION

"An elementary and fundamental requirement of due process … is notice reasonably calculated … to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also Morrissey v. Brewer*, 408 U.S. 471 (1972). Beyond its reliance on secret law, the TLC fails to meet this fundamental requirement. This failure denies taxi drivers "[t]he touchstone of due process." *Mathews*, 424 U.S. at 348-49. Indeed, even in the context of prison hearings, this Court has held, notice must be "something more than a mere formality" and must be "specific as to the misconduct" alleged. *Taylor v. Rodriguez*, 238 F.3d 188, 192-93 (2d Cir. 2001) (internal citations and quotation omitted).

The hearing notices in both the criminal conviction cases and the drug test cases are three-paragraph form letters that provide even less than the "gesture" of notice that this Court condemned in *Spinelli*. 579 F.3d at 171-72. For criminal conviction cases, the first paragraph states the time and location of the hearing; the third paragraph tells him that he can bring a lawyer and/or a translator. The second

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administrative proceedings has general application," citing New York cases); *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Services*, 77 N.Y.2d 753, 758 (N.Y. 1991).

paragraph tells the driver: "The purpose of this hearing will be to determine your fitness to maintain a license in light of your final disposition in your criminal case pursuant to Rule 8-15(a)." (TLC Rule 8-15(a) being the procedural rule for "fitness hearings"). The notice tells him to bring a copy of the criminal court complaint and the certificate of disposition. A-124-125; A-599; A-911. But it offers nothing as to what facts apart from the conviction might be considered.

In drug test cases, the notice states: "The Commission has been advised that the result of your recent drug test was positive." It tells the driver his hack license has been suspended (before *any* hearing). But it does not even identify the drug for which the driver tested positive or the quantity of drug residue allegedly found.

Neither notice cites *any* NYC Code provision or TLC Rule. Neither alleges a violation of § 19-512.1 or bad character. Neither offers any inkling of what the TLC must prove to sustain the allegation—that is to the extent that the letter contains an allegation. Neither offers any " information … needed to prepare meaningful objections or a meaningful defense." *Spinelli*, 579 F.3d at 172.

IV. THE TLC TRIBUNAL IS SYSTEMICALLY BIASED IN THE AGENCY'S FAVOR

Proceeding without notice or fair warning, the hearings continue inexorably to revocation. The certainty of outcome is surely owed in large part to the unconstitutional structure of the TLC tribunal. Any hearing where one side hires, directs and can fire the judges without cause cannot be consistent with Due Process

and violates the right to a "fair trial in a fair tribunal." *Caperton v. A.T. Massey Coal Company, Inc.*, 129 S. Ct. 2252, 2259 (2009).

The idea that it is fundamentally unfair for one side to control the judge's compensation is as old as the Republic. Indeed one of the founders' grievances against King George listed in the Declaration of Independence was: "HE has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries." Alexander Hamilton expressed the same sentiment in *The Federalist* No. 79, where he wrote, "A power over a man's subsistence amounts to a power over his will." *See also U.S. v. Hatter*, 532 U.S. 557, 568 (2001); *Nash v. Califano*, 613 F.2d 10, 15 (2d Cir. 1980).

The structure of the TLC tribunal is in stark opposition to the founders' admonitions: The agency determines where and when and how often a judge sits—and thus how much he is paid. There is no need to inquire about the ALJs' personal honesty or integrity. Here "a realistic appraisal of psychological tendencies and human weakness … poses such a risk of actual bias or prejudgment." That risk, made manifest by the ALJs' rulings, "must be forbidden if the guarantee of due process is to be adequately implemented." *Caperton*, 129 S. Ct. at 2263 (internal quotation omitted).

A. The TLC's Ability to Remove its Judges from Office Causes Potential and Even Actual Pro-Agency Bias

Plaintiffs have presented undisputed evidence that merits summary judgment in their favor. Defendants admit that plaintiffs' factual allegations concerning the TLC tribunal are "accurate." Def. Oct. 16, 2009 Br. at 13. In addition to systemic incentives deriving from how the judges are employed, there is testimonial and documentary proof of *ex parte* directives applied generally and particularly in the rare cases where an ALJ rules (or even threatens to rule) for a driver.

The Supreme Court has stated repeatedly: 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*, 129 S.Ct. at 2259 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Even when a judge does not have any direct pecuniary interest in a case, the probability of actual bias can be too high to be constitutionally tolerable. The test is not *actual* bias, but *potential* bias. *Caperton*, 129 S.Ct. at 2262; *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972).

Thus in *Ward*, the Supreme Court invalidated a conviction in a "mayor's court" where a town mayor presided over criminal cases in which guilty parties were to pay fines that went to the town's general fund. The Court held that the arrangement was unconstitutional even if the mayor did not share directly in the fines. The fact that the mayor was responsible for the town's budget led to a

"'possible temptation'" that the mayor might "'forget the burden of proof required to convict … or which might lead him not to hold the balance nice, clear, and true between the state and the accused.'" 409 U.S. at 60 (quoting *Tumey v. Ohio,* 272 U.S. 510, 532 (1927)). In *Gibson v. Berryhill*, the Court held that a state optometry board "composed solely of optometrists in private practice for their own account" could not sit as judges in cases where licensed optometrists were charged with violating state law by working as employees for a corporation. 411 U.S. 564, 578 (1973).

In *Brown v. Vance*, the Fifth Circuit invalidated the Mississippi "fee system" courts where the judges were paid based on the number of cases they heard, and where the prosecutors and plaintiffs could select which of a county's judges would hear a particular case. 637 F. 2d 272 (5th Cir. 1981). Writing for the court, Judge Wisdom stated, "In considering the Mississippi fee system the relevant constitutional fact is that a judge's bread and butter depend on the number of cases filed in his court." *Id. at* 276. Following *Tumey*, *Ward* and *Gibson*, the court held:

> Because of the relation between the judge's volume of cases and the amount of his judicial income, the fee system creates a possible temptation for judges to be biased against defendants. *There is no getting around this inherent vice in a system* where two judges, dependent on fees for subsistence, have concurrent jurisdiction. *Id. at* 281 (emphasis added).

Likewise, there is no avoiding the fact that TLC judges work at the pleasure of chairman, so they depend on the agency's good graces for their continued compensation, which, as Hamilton wrote, will surely affect their will.

In *Haas v. County of San Bernardino*, 27 Cal. 4th 1017, 45 P.3d 280 (Calif. 2002), the California Supreme Court considered a system where a county seeking the revocation of a massage parlor's license selected on an *ad hoc* basis a local lawyer to serve as the hearing officer. The massage parlor's owner argued that the county hiring its own hearing officer would create an actual or potential conflict of interest in violation of the Due Process clauses of the Federal and California constitutions. The court agreed and wrote:

> A judge has a disqualifying financial interest when plaintiffs and prosecutors are free to choose their judge and the judge's income from judging depends on the number of cases handled. No persuasive reason exists to treat administrative hearing officers differently. 45 P.3d at 285-86 (footnotes omitted).

The court then held:

> Here … the prosecuting authority may select its adjudicator at will … [W]hile the adjudicator's pay is not formally dependent on the outcome of the litigation, *his or her future income as an adjudicator is entirely dependent on the goodwill of a prosecuting agency* that is free to select its adjudicators and that must, therefore, be presumed to *favor its own rational self-interest by preferring those who tend to issue favorable rulings*. 45 P. 3d at 289 (citations and footnotes omitted, emphasis added).

This holding applies perfectly to the TLC tribunal.

Finally, in *Padberg*, a group of taxi drivers—who were facing revocation for violation of TLC Rule 2-61A2—sued the TLC and its chair, alleging tribunal bias and citing some (but not all) of the same evidence. *See Padberg* Complaint, A-879.11-879.15. Defendants moved for summary judgment, seeking dismissal of the complaint. Judge Dearie held that the plaintiffs had presented sufficient evidence and a triable claim:

> The evidence of possible bias among TLC ALJs, while not overwhelming, is enough to defeat defendants' cross motion for summary judgment. The Rana Memo raises a legitimate question as to whether the TLC ALJs were finding violations of both rules based on the facts of the case, or whether they were 'prejudging the facts' and merely … revoking licenses pursuant to the TLC policy.… Given this evidence, the Court agrees with plaintiffs that genuine issues of fact remain [concerning the] issue of potential systemic incentives and possible bias among the TLC ALJs. *Padberg*, 203 F. Supp. 2d at 288.

Following discovery, the defendants moved again for summary judgment. Judge Dearie upheld the sufficiency of the cabdrivers' claim a second time, holding that the issue must be tried. 2006 WL 4057155 (E.D.N.Y. 2006). These decisions are directly on point. Even more, they must be given collateral estoppel effect, precluding the same defendants from again arguing that the same tribunal bias claim is legally insufficient. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *see also Fuchsberg & Fuchsberg v. Galizia*, 300 F.3d 105 (2d Cir. 2002) (New York law); *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80,

89-90 (2d Cir. 1961) (determinations on motions may be *res judicata*) (Friendly, J.).

Finally, while the facts here are distinct from those in *Caperton*, where the Supreme Court held that one litigant's outsized contribution to a judge's election campaign caused potential bias, the principle is the same. Indeed, here the possible temptation and probability of actual bias is far greater. The *Caperton* court (and dissent) recognized the limits of a campaign contributor's influence: Only the voters could elect a judge and there was no way to know whether an individual's contributions swayed the election. 129 S.Ct. at 2264 & 2274 (Roberts, C.J., dissenting). No contributor, no matter his fortune, can limit a judge's compensation or *remove* him from office

B. The Evidence of Bias Here is Both Undisputed and Overwhelming

With TLC ALJs, by contrast, TLC executives not only hire them, they can (and do) fire them. They also control assignments. The right to fire without cause is alone sufficient to cause a constitutional violation: Any ALJ concerned with his future status or employment will naturally favor the agency. As the Supreme Court has recently reiterated, "The power to remove officers at will and without cause is a powerful tool for control." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S.Ct. 3138, 3162 (2010) (internal citations and quotations omitted). The TLC has the same tool and exercises the same control.

The TLC ALJs admit also that they rule based on an internal manual—their "Bible," testified Deputy Chief ALJ Coyne—which was unavailable to cabdrivers. Even in a quasi-adjudicative context, this Court has held that "the insulation of the decisionmaker from *ex parte* contacts is justified by basic notions of due process." *Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2d Cir. 1984); *see also Stone v. FDIC*, 179 F.3d 1368, 1377 (Fed. Cir. 1999); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 56 (D.C. Cir. 1977) (*ex parte* contacts inconsistent with "fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking"). Here, the *ex parte* communications are standing orders telling ALJs how to rule and ensuring the results.

The Report ignores these admissions altogether. It rejects plaintiffs' systemic bias claim because "Other than broad allegations of systematic bias, Plaintiffs present no evidence of actual bias" and because plaintiffs failed to "present allegations against a specific adjudicator." R&R 20-21. Here the district court errs on both the law and the facts.

First: "[T]he Due Process Clause has been implemented by objective standards that do not require proof of actual bias." *Caperton*, 129 S.Ct. at 2263 (citing cases). Second, none of the Supreme Court's cases require demonstration of cause-and-effect as to how a bias-infused system led to a result in a particular case. To the contrary, the cases from *Tumey* through *Gibson* and *Caperton* all turn

on how financial incentives impact, or potentially impact, rulings *in general*. Third, the Court's cases do not require a plaintiff to focus on a "specific adjudicator." Adding that requirement here would make no sense since the bias is systemic, not personal, and every TLC ALJ rules the same way. Fourth, the TLC's ALJs admit to taking their rules of decision from the *ex parte* Manual. These admissions are powerful evidence of actual bias. So are the Gottlieb e-mails.

V. THE TLC'S 'FITNESS HEARINGS' ARE HEARINGS IN FORM ONLY

The TLC's "fitness hearings" are empty of substance. While allowing for testimony and argument, they are charades that violate the "fundamental … right … to be heard in a meaningful manner." *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). The hearings fail under *Bell v. Burson* because they give no weight to opposing or mitigating evidence and thus "[exclude] consideration of an element essential to the decision." 402 U.S. at 542.

They also fail under the *Mathews* test. *See Krimstock v. Kelly*, 306 F.3d 40, 50-55 (2d Cir. 2002). Contrary to the ruling below, the hearings provide no protection against the risk of erroneous deprivation because the TLC ALJs rubber-stamp the agency every time. *See N.A.A.C.P. v. Town of E. Haven*, 70 F.3d 219, 225 (2d Cir. 1995) (recognizing special evidentiary significance of "inexorable zero"). Indeed all three *Mathews* factors indicate that defendants deny Due Process to taxi drivers.

A. Criminal Conviction Hearings:

The TLC admits that the only evidence it presents at criminal conviction-revocation hearings is evidence of the conviction. If there were some rule of law that required (or allowed) revocation upon conviction, this might suffice. Because there is no such law, the hearing is constitutionally inadequate. *Connecticut v. Doehr*, 501 U.S. 1, 12-13 (1991). Even under the Report's theory that the never-pleaded § 19-512.1 governs, the TLC must prove "a direct and substantial threat to the public health or safety." But the TLC and its ALJs give no weight to evidence that might speak to threat— such as the nature of the misconduct or whether the crime was a first offense. A-221-224; A-229-236; A-1312-1314. Once the TLC shows the conviction, it's end of story. In short, the TLC accepts as conclusive the very same inference that the *Krimstock* court rejected as implausible: that an individual acting unlawfully one day (in his kitchen) will necessarily be dangerous the next (in his taxicab). 306 F.3d at 66.

B. Drug Test Hearings:

For drug test cases, TLC ALJs admit that they are trained to accept by rote the nonexistent "representation" that the testing was proper and accurate. A-1265-1270; A-1273. In fact, the TLC lab does not even claim to comply with federal guidelines in its TLC work. Even where a driver presented an expert toxicology witness, he had no chance of upsetting the test finding because, as Coyne testified,

"[T]hat was beyond something I could rule on as a judge because the TLC always accepted whatever was in that document was valid." A-1272.

C. The Mathews Test:

Under the familiar *Mathews* balancing test, a reviewing court must weigh (1) the private interest affected; (2) the risk of erroneous deprivation through the procedures used and the value of other safeguards; and (3) the government's interest. 424 U.S. at 335. While Judge Ellis acknowledged plaintiffs' "strong private interest in their licenses," he assessed the risk of error as minimal because the TLC's "burden" was simply to show the cabdriver "engaged in conduct that calls into question [his] fitness" and because the TLC's drug test document is an "objectively verifiable piece of evidence." R&R 17, 19.

The Report ignores the value of other safeguards that the TLC could have employed at little or no cost. The TLC could have considered—in the context of its existing hearings—whether the driver had violated a TLC rule, or whether the driver's actions placed a passenger at risk. The TLC chose not to do either, willfully increasing the risk of a warrantless revocation. Even if the drug-test result is evidence, it is hardly conclusive evidence. Moreover, the minimal "burden" Judge Ellis announced appears nowhere in the law: Even if a conviction calls a driver "into question," it does not alone prove him a threat to the public.

The Report ignores the expert affidavit by Dr. James Woodford, who testified "[E]rrors can occur in the intake of the specimen; the handling of the specimen within a given facility; and the transfer of the specimen from the intake center to a distant testing facility. Errors can also occur in the testing process itself." A-1392. It also disregards the Supreme Court's admonition that even an honest technician can make mistakes. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2537 (2009). As the *Melendez-Diaz* court put it, it is not "evident that [so-called] 'neutral scientific testing' is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation." *Id*. at 2536. For this reason, the Court required that in criminal cases the technician be subject to cross-examination.

Nevertheless, the TLC tribunal permits the agency to "prove" its case solely based on an unauthenticated report said to be "objective." Since the TLC presents no witness at the hearings, there is no one for the driver to cross-examine. Nor is there any way for driver to know whom from the lab he might attempt to question. The TLC's conclusive reliance on an unauthenticated document, coupled with the practical impossibility of cross-examination, itself "is not consonant with due process." *Galvin v. New York Racing Ass'n*, 70 F.Supp.2d 163, 178 (E.D.N.Y. 1998) (citing *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970)).[19]

[19] *See also Burka v. New York City Transit Authority*, 739 F. Supp. 814, 838-39

Finally, the Report vastly overstates the government's interest by ignoring the complete absence of evidence that any of the plaintiffs ever endangered any passenger or the public in general. Indeed, this Court has rejected a police department's *Mathews* claims where the department could cite no "record evidence" and where that the claim was "unsupported by past events or by hypotheticals regarding the future." *Krimstock v. Kelly*, 464 F.3d 246, 255 (2d Cir. 2006); *see also Ciambriello v. County of Nassau*, 292 F.3d 307, 320 (2d Cir. 2002) (government interest in permitting demotion of an employee where there is "no indication" his performance was unsatisfactory is "virtually nonexistent"). The scenario the Report paints involving passengers "placed in a vulnerable position with possibly dangerous drivers" is based *entirely* on conjecture. This conjecture is doubly inadequate to support defendants' motion for summary judgment because it is taken exclusively, but improperly, from defendants' self-serving affidavits. *Reeves*, 530 U.S. at 153. Indeed, though the TLC knows the facts, it remains the case that it has not proffered evidence of a single actual incident involving the injury to a passenger. Certainly none of the plaintiffs here threatened any passenger any harm. Absent such proof, the government's interest is minimal.

(S.D.N.Y. 1990) (Drug tests termed "scientific evidence of questionable validity" admissible so long as there are procedures, including the right to examine witnesses, "sufficient to challenge the test results"). Indeed, in the only federal case that the Report cites on this point, *Griffin v. LIRR*, 1998 U.S. Dist. LEXIS 19336 (E.D.N.Y. 1998), the railroad worker *was* afforded the opportunity to cross-examine a medical department employee.

Thus, when the *Mathews* balance is struck using evidence rather than speculation, it tips overwhelmingly in the plaintiffs' favor.

VI. PLAINTIFFS WERE NOT REQUIRED TO SUE IN STATE COURT BEFORE FILING THIS ACTION

Judge Ellis rejected plaintiffs' Due Process claims on the additional ground that "An Article 78 proceeding constitutes a wholly adequate post-deprivation hearing for due process purposes." R&R 26 (citing *Nnebe v. Daus*, 665 F. Supp. 2d 311, 330 (S.D.N.Y. 2009), and *Gabris v. TLC*, 2005 U.S. Dist. Lexis 23391 (S.D.N.Y. 2005) (internal quotations omitted)).

Contrary to the Report's finding, however, plaintiffs are not required to exhaust state remedies. This has been the law of the land ever 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 Pres. and Development*, 959 F.2d 395, 404 (2d Cir. 1992); *Pangburn v. Culbertson*, 200 F.3d 65, 71 (2d Cir. 1999). Thus, the rule the district court cites applies only where the plaintiff's claim is based on random and

unauthorized acts by state employees. This is because when state action is random, "'it is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place.'" *Velez v. Levy*, 401 F.3d 401 F.3d 75, 92 (2d Cir. 2005) (quoting *Hudson v. Palmer,* 468 U.S. 517, 532 (1984)).

In this case, the TLC's conduct was repeated and deliberate. Judge Ellis relies on district court cases, one of which, *Nnebe*, is still on appeal. The other, *Gabris*, is a *sua sponte* ruling made without briefing by the parties. Meanwhile, the district court mentions none of the recent decisions of this Court such as *Roach*, *Velez*, *New Windsor Volunteer Ambulance Corps, Inc. v. Meyers*, 442 F.3d 101, 115 (2d Cir. 2006), and *DiBlasio v. Novello,* 344 F.3d 292 (2d Cir. 2003). In these cases, this Court "reconfirmed the long-standing and well settled proposition that an ex post, as opposed to a pre-removal, hearing is inadequate to satisfy the dictates of due process where the government actor in question is a high-ranking [state] official with final authority over significant matters." *Velez*, 401 F.3d at 91 (quoting *Burtnieks v. City of New York,* 716 F.2d 982, 988 (2d Cir. 1983)) (internal quotations omitted).

The TLC had every opportunity to provide meaningful process. It chose not to do so. Chairman Daus and the ALJs are "precisely" the sort of "high ranking official" who have ultimate authority and thus the duty "to ensure that the [agency] followed" prescribed procedures at the administrative hearings. *Velez*, 401 F.3d at

92. As in *DiBlasio,* "any abuse of that authority … cannot be considered random and unauthorized." 344 F.3d at 304 (internal quotation omitted). As this Court stated in *Krimstock,* the "onus" is not on the cabdriver, having been deprived of his license, to hire a lawyer and litigate in state court. 306 F.3d at 59-60. This is especially true where an Article 78 proceeding "does not provide a prompt and effective means" for challenging the revocation. 306 F.3d at 49. It is rather, the TLC's obligation to provide Due Process in the first instance.

VII. THE TLC CAN BE SUED; NONE OF THE DEFENDANTS IS ENTITLED TO IMMUNITY

The Report relies on *Gabris* and *Nnebe* also for the proposition that "claims against Defendant TLC, an agency of the City of New York, should be dismissed because a New York City agency cannot be sued in its own capacity." R&R 28. This conclusion is entirely at odds with *Monell v. New York City Dep't Social Servs.*, 436 U.S. 658, 690 (1978) the Supreme Court's landmark 42 U.S.C. § 1983 case. The *Monell* court relied on prior cases involving school boards, entities characterized as "arms" of local government, and permitted an action against an agency of the City of New York. Since then, there have been an untold number of cases where this Court has upheld claims against city agencies. *E.g., Aulicino v. New York City Dept. of Homeless Services*, 580 F.3d 73 (2d Cir. 2009); *Ford Motor Credit Co. v. NYC Police Dep't*, 503 F.3d 186 (2d Cir. 2007); *D.D. ex rel. V.D. v. New York City Bd. of Educ.*, 465 F.3d 503 (2d Cir. 2006). Indeed, just last

year, this Court affirmed a preliminary injunction against the TLC. *Metropolitan Taxicab Board of Trade v. City of New York*, 615 F.3d 152 (2d Cir. 2010). As Judge Stein succinctly stated in an earlier case: Section 1983 claims are permitted against "municipalities *or their agencies* [where] plaintiff's injuries … resulted from policy or practice endemic to the agency." *Johnson v. City of New York*, 2006 WL 2354815, 6 (S.D.N.Y. 2006) (emphasis added).

The Report recommends that the individual defendants be protected by qualified immunity because, it finds, they did not violate clearly established rights. R&R 29. The Report errs in that the constitutional right to a fair and meaningful hearing prior to the state taking an individual's property has been established for decades. The Report holds further that none of the defendants can be sued in their official capacities because "[p]laintiffs have failed to allege facts sufficient to demonstrate … an officially adopted policy or custom of the City of New York." This conclusion is contrary to the undisputed facts. A policy that enforced repeatedly by agency judges and the agency chairman is nothing if not official—even if it is unlawful and unauthorized by the commissioners.

VIII. PLAINTIFFS ARE ENTITLED TO JUDGMENT ON THEIR STATE LAW CLAIMS

Plaintiffs' state claims, grounded in alleged violations of the City Charter, parallel their federal claims. The 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 "*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 it mandates: "Except as otherwise provided for by state or local law, the party commencing the adjudication shall have the burden of proof." § 1046(c)(2).

The TLC's *de facto* revocation policies are unarguably "*standards for the … revocation of a license*." Because they have been imposed despite the absence of a majority vote and without public notice and comment, they are clearly in violation of the Charter § 1043. *See, e.g., Schwartfigure v. Hartnett*, 83 N.Y.2d 296, 301 (1994) (interpreting a parallel state statute); *Matter of Miah v. TLC*, 306 A.D.2d 203 (1st Dep't 2003) (holding unlawful an unpublished change in method of calculating license "points"). Because the TLC enforces its policies through "internal agency directives not published as rules," it violates § 1046 of the Charter in two respects. As the facts are undisputed, plaintiffs are entitled to judgment on these claims as well.

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
February 16, 2011

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,900 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point font.

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SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAUL ROTHENBERG, EBRAHIM ABOOD, TOBBY KOMBO, KONSTANTINOS KATSIGIANNIS, BOUBACAR DOUMBIA, ROBERT DYCE and MOUSTACH ALI, individually and on behalf of all others similarly situated,

Plaintiffs,

- against -

MATTHEW DAUS, DIANE MCGRATH-MCKECHNIE, JOSEPH ECKSTEIN, ELIZABETH BONINA, THOMAS COYNE, THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION, and THE CITY OF NEW YORK,

Defendants.

REPORT AND RECOMMENDATION

08 Civ. 567 (SHS)(RLE)

To the HONORABLE SIDNEY H. STEIN, U.S.D.J.:

I. INTRODUCTION

Plaintiffs individually and on behalf of all others similarly situated filed their Amended Complaint against TLC Chairperson Matthew Daus, former TLC Chairperson Diane McGrath-McKechnie, former TLC Deputy Commissioner Joseph Eckstein, Chief Administrative Law Judge ("ALJ") of the TLC Elizabeth Bonina, Deputy Chief ALJ Thomas Coyne, The New York City Taxi and Limousine Commission ("TLC" or "Commission"), and The City of New York ("City"), on September 24, 2009. Plaintiffs bring the instant action under the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983, and under the New York State Constitution and New York law. (Am. Compl. ¶¶ 5, 6, 138-39, 142-43, 146.) They seek an order for injunctive relief from this Court directing Defendants to reinstate the taxi driver licenses of Plaintiffs and those similarly situated. (*Id.* at 31 ¶ F.) Plaintiffs also

seek a judgment declaring that the TLC's revocation policies and procedures are unconstitutional and violate state law. (*Id.* ¶¶ B-D.) Finally, Plaintiffs seek compensatory and punitive damages. (*Id.* ¶¶ H, I.)

Before the Court are two separate motions for summary judgment by Plaintiffs (Doc. Nos. 48 & 78) and a motion for summary judgment by Defendants (Doc. No. 76). For the reasons that follow, I recommend that Defendants' Motion be **GRANTED**, and Plaintiffs' Motions be **DENIED**, and that the Complaint be **DISMISSED** in its entirety. Specifically, I recommend that: 1) Defendants' Motion for Summary Judgment be granted as to the federal claims; 2) Plaintiffs' Motion for Summary Judgment be denied as to the federal claims; 3) Plaintiffs' state claims be dismissed for lack of supplemental jurisdiction; 4) Plaintiffs' claims against agency Defendant TLC be dismissed; and 5) Plaintiffs' claims against individual Defendants Daus, McGrath-McKechnie, Eckstein, Bonina, and Coyne, in their individual and official capacities, be dismissed.

II. BACKGROUND

Defendant TLC has broad authority to regulate and supervise the New York taxi industry, and to establish standards and criteria for the licensing of drivers. *See* New York City Charter ("N.Y. Charter"), ch. 65, §§ 2300, 2303(a) (2009). In order to obtain a taxicab driver's license or a for-hire vehicle ("FHV") driver's license, each applicant must: "1) Hold a New York state chauffeur's license; 2) Be nineteen years of age or over; 3) Be of sound physical condition with good eyesight and no epilepsy, vertigo, heart trouble or any other infirmity of body or mind which might render him or her unfit for the safe operation of a licensed vehicle; 4) Be

fingerprinted; 5) Be of good moral character; [and] 6) Not be addicted to the use of drugs or intoxicating liquors." New York City Administrative Code ("N.Y. Code") § 19-505(b) (2009).[1]

The TLC has the authority to revoke a license when it becomes aware of information that the driver no longer meets the requirements for a taxicab driver's license. Rules & Regulations of the City of New York, Tit. 35, § 2-02(f) ("35 RCNY § __") (2009). The N.Y. Code allows for notice and opportunity for a hearing before revocation:

> The commission may, for good cause shown relating to a direct and substantial threat to the public health or safety and prior to giving notice and an opportunity for a hearing, suspend a taxicab or for-hire vehicle license . . . and, after notice and an opportunity for a hearing, suspend or revoke such license. The commission may also, without having suspended a taxicab or for-hire vehicle license, issue a determination to seek suspension or revocation of such license and after notice and an opportunity for a hearing, suspend or revoke such license.

N.Y. Code § 19-512.1(a).

This hearing can take the form of a "fitness hearing" conducted before an ALJ. *Id.* at § 8-15(a). The TLC must notify the driver of the "date, time and location of the hearing and the basis for the Commission's charge that the [driver] fails to meet the minimum requirements for licensure." *Id.* at § 8-15(b). The ALJ "review[s] the documentary evidence and testimony submitted by the Commission and afford[s] the driver an opportunity to respond under oath and to proffer evidence on his or her behalf."[2] *Id.* at § 8-15(d). The ALJ issues a Recommended Decision, which includes a determination of the driver's fitness to continue to possess a license. *Id.* at § 8-15(e). The Chairperson reviews the Recommendation, and may accept, reject or modify it. *Id.* The Chairperson's decision is the final determination of the Commission. *Id.* The

[1] Applicants also must pay a licensing fee, provide two recent photos, be examined as to his or her physical condition, and be examined as to his or her knowledge of the city and pertinent laws. N.Y. Code. § 19-505(c)-(e).
[2] In 2007, the TLC transferred the function of adjudicating license revocations based upon criminal convictions (effective June 29, 2007), and positive drug testing (effective August 31, 2007), to the New York City Office of Administrative Trials and Hearings ("OATH"). (Am. Compl. ¶ 104; *Nnebe v. Daus*, 665 F. Supp. 2d 311 (S.D.N.Y. 2009); Declaration of Marc T. Hardekopf, Pls.' Ex. 40, ¶¶ 8-9.) OATH, a City agency, employs ALJs who hear cases from a variety of City agencies. (Am. Compl. ¶ 104.) Plaintiffs' fitness hearings occurred prior to the OATH transfers. (Am. Compl. ¶¶ 111-34.)

Commission may also revoke a license at any time during the term of a taxicab driver's license when it becomes aware of information that the driver no longer meets the requirements. *Id.* at § 2-02(f).

In addition to drug testing for all applicants prior to licensure, 35 RCNY § 2-02(i), the TLC requires licensees to undergo annual drug testing, 35 RCNY § 2-02(i). If the licensee's test results are positive, the TLC may revoke the driver's license after a fitness hearing in accordance with § 8-15. *Id.* at § 2-19(b)(2). For criminal convictions, the TLC requires all applicants to be fingerprinted and have their criminal history reviewed. N.Y. Code § 19-505(b)(4); 35 RCNY § 2-02(c). After licensure, a driver must notify the TLC within fifteen days of a criminal conviction, and deliver a certified copy of the certificate of disposition within fifteen days of sentencing. *Id.* at § 2-63(a).

Plaintiffs are formerly licensed taxicab drivers who had their licenses to operate a medallion (yellow) taxicab or a FHV, revoked based on either a falied drug test or a criminal conviction. (Am. Compl. ¶¶ 10-16.) Ali is the only named plaintiff who held a FHV license. (Defs.' Reply Memo in Further Support of their Mot. for Summ. J. and in Opp. to Pls.' Cross-Motion for Summ. J., at 1; Ex. D113.) Rothenberg, Abood, Katsigiannis, and Doumbia, all had their licenses revoked after failing drug tests. (*Id.* ¶¶ 10-11, 13-14.) Kombo's license was revoked because of a conviction for assault in the second degree (*Id.* ¶ 12; Defs.' Ex. D27.) Dyce's license was revoked for possession and use of a forged instrument in relation to his capacity as an ordained minister. (*Id.* ¶ 15; Defs.' Ex. D96.) Ali's license was revoked for a conviction for driving his personal car while ability impaired. (*Id.* ¶ 16; Defs.' Ex. D108.)

III. DISCUSSION

A. Legal Standard

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper if the record shows that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Only disputes over facts that might affect the outcome of the suit under the governing substantive law are material. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* The party moving for summary judgment bears the initial burden of demonstrating the absence of any genuine issue of material fact. *See Consarc Corp. v. Marine Midland Bank, N.A.*, 996 F.2d 568 (2d Cir. 1993) (*citing Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)). When considering cross-motions for summary judgment in which both parties assert an absence of a genuine issue of material fact, a court need not enter a judgment for either party, but must examine each motion separately and, in each case, draw all reasonable inferences against the moving party. *Padberg v. McGrath-McKechnie*, 203 F. Supp. 2d 261, 274 (E.D.N.Y. 2002) (*citing Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 122 (2d Cir. 2001); *Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993)). Summary judgment is appropriate where no reasonable trier of fact could find in favor of the non-moving party, *H. L. Hayden Co. of N.Y., Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1011 (2d Cir. 1989), thereby "dispos[ing] of meritless claims before becoming entrenched in a frivolous and costly trial." *Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 58 (2d Cir. 1987).

B. Summary Judgment Should be Granted in Favor of Defendants on the Federal Claims

1. Due Process Claims Under § 1983

"To prevail on a § 1983 claim, a plaintiff must prove (1) that the challenged practices are attributable, at least in part, to a person acting under color of state law and (2) that the challenged practices deprive the plaintiffs of a right, privilege or immunity secured by the Constitution or laws of the United States." *Padberg*, 203 F. Supp. 2d at 276 (*citing Wimmer v. Suffolk County Police Dep't*, 176 F.3d 125, 136-37 (2d Cir. 1999). Plaintiffs cannot prevail on their § 1983 claim because the challenged policies and practices did not deprive Plaintiffs of their due process rights. Plaintiffs bring three federal due process claims under the Fourteenth Amendment to the United States Constitution. First, they assert that "[b]ecause of the nature of their employment and compensation, TLC judges in fitness hearings are systematically biased in favor of the agency" and the hearings themselves are inconsistent with due process of law. (Am. Compl. ¶ 137.) Second, they contend that the fitness hearings are "sham hearings" and not "meaningful." (Am. Compl. ¶ 142.) Finally, they claim that the TLC failed to give fair notice because "former taxi drivers may have their license applications denied without published standards established by law." (Am. Compl. ¶ 146.)

2. Plaintiffs Have a Protected Property Interest in Their Taxi Licenses

The Due Process Clause of the Fourteenth Amendment provides that no state may "deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV, § 1. In order to assert a violation of procedural due process, a plaintiff must "first identify a property right, second show that the state has deprived him of that right, and third show that the deprivation was effected without due process." *Local 342, Long Island Pub. Serv. Employees v. Town Bd. of Huntington*, 31 F.3d 1191, 1194 (2d Cir. 1994). First, "[i]t is

undisputed that a taxi driver has a protected property interest in his license sufficient to trigger due process protection." *Nnebe*, 665 F. Supp. 2d at 323; *Padberg*, 203 F. Supp. 2d at 276. *Bell v. Burson*, 402 U.S. 535, 539 (1971). Second, since the TLC, a municipal agency, revoked Plaintiffs' licenses, there is no question of deprivation by the state.

3. The TLC Provided Plaintiffs with Sufficient Pre-Deprivation Due Process

"Due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (*citing Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). Accordingly, not all situations requiring for procedural safeguards necessitate the same kind of procedure. In most cases, "something less than a full evidentiary hearing is sufficient prior to adverse administrative action." *Bell*, 402 U.S. 535 (finding less than a full evidentiary hearing sufficient for revocation of state-granted driver's license); *Mathews*, 424 U.S. 319 (1976) (termination of social security benefits); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (termination of public employee). While deprivation of certain interests, such as welfare benefits, requires a pre-deprivation hearing closely approximating a judicial trial, *Goldberg v. Kelly*, 397 U.S. 254 (1970), Plaintiffs are not entitled to a full adversarial hearing before the TLC, *see Nnebe*, 665 F. Supp. 2d at 328.

Determining the process due in a given situation requires a balancing of the interests involved. While Plaintiffs have a strong interest in retaining their taxicab licenses as a means of their livelihood, the TLC also has an interest in licensing satisfactory taxicab drivers, *see Loudermill*, 470 U.S. at 542-43, and protecting the public welfare. First, the Court must consider "the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and third, the Government's interest, including the

function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

a. Plaintiffs have a strong interest in their licenses

An individual has a heightened interest in a license if it is essential for employment. *Bell*, 402 U.S. at 537 (clergyman's driver's license used for ministry to three rural communities); *Spinelli v. City of N.Y.*, 579 F.3d 160, 171 (2d Cir. 2009) (gun shop owner's license); *Turco v. Monroe County Bar Ass'n*, 554 F.2d 515 (App. Div. 1975) (attorney's license). Plaintiffs have a strong private interest in their licenses because they are necessary for the pursuit of their livelihood. *Padberg*, 203 F. Supp. 2d at 278 (*citing Bell*, 402 U.S. 535).

b. Plaintiffs had fair notice and opportunity to be heard

"Procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions." *Mathews*, 424 U.S. at 344. Plaintiffs assert that the TLC procedures currently in place did not adequately afford Plaintiffs due process because there was a lack of notice and a meaningful hearing (Am. Compl. ¶¶137, 142, 146). While Plaintiffs are not entitled to a full adversarial hearing before the TLC, they are entitled to fair notice and opportunity to be heard in order to reduce the risk of erroneous deprivation.

1. Plaintiffs had fair notice

a. Except for Dyce, Plaintiffs had adequate statutory notice

Plaintiffs assert that Defendants have deprived them of fair notice because "former taxi drivers may have their licenses revoked without published standards established by law." (Am. Compl. ¶ 146.) They allege that the TLC never issued public notice of its drug test or criminal

conviction revocation policies, (*Id.* ¶ 97), and that there is no statute or TLC rule requiring or permitting the revocation policy (*Id.* ¶ 65, 66).

i. Drug Testing

Rothenberg, Abood, Katsigiannis, and Doumbia, all had their licenses revoked in response to positive annual drug tests. (*Id.* ¶¶ 10-11, 13-14.) Rothenberg, Abood, and Doumbia tested positive for marijuana and Katsigiannis tested positive for cocaine. (*Id.* ¶¶ 112, 116, 120, 124.) The TLC rules provide that it may test a driver for drugs if it has a reasonable suspicion to believe that a driver has an impairment that renders him or her unfit to safely operate a taxicab. 35 RCNY § 2-19(a). In addition to § 2-19(a), each licensee must be tested annually for drugs or controlled substances as set forth in § 3306 of the Public Health Law. *Id.* at § 2-19(b)(1). If the test results are positive, the driver's license "may be revoked" after a fitness hearing. *Id.* at § 2-19(b)(2). The purpose of the drug testing rules is to provide a "drug-free driving force ensur[ing] the health and safety of passengers, other motorists and pedestrians in the City of New York." 35 RCNY § 2-19, Statement of Basis and Purpose in City Record, Nov. 21, 2005.

35 RCNY § 2-19(b)(2) puts a licensee on notice that he is required to take an annual drug test, and that upon failing such a test, his license may be revoked. *Fung v. Daus*, 846 N.Y.S.2d 104 (App. Div. 2007). While Plaintiffs assert that there is insufficient notice as to which drugs or controlled substances are prohibited (Am. Compl. ¶ 44), Public Health Law § 3306 lists prohibited drugs and controlled substances including marijuana and cocaine. Plaintiffs' claim that the TLC rules do not require or permit "suspicionless drug testing" (*Id.* ¶ 43) is without merit because, notwithstanding the reasonable suspicion drug testing, the TLC requires each licensee to submit to mandatory drug tests annually. 35 RCNY § 2-19(b)(1). An annual, mandatory drug test is inherently "suspicionless" in that the TLC administers it according to

protocol, in the absence of individual suspicion. In addition, Plaintiffs' claim that there is insufficient notice as to what constitutes a drug test failure (Am. Compl. ¶ 44), also fails because a reasonable taxicab driver familiar with the rules should be aware that any amount of an illegal substance warrants a drug test failure. In any case, the TLC has a zero-tolerance approach to illegal drug use.[3]

Plaintiffs have safety-related jobs that require them to be drug-free. They are given driver's manuals including drug-testing rules, and are required to pass an examination about these rules. *See* 35 RCNY § 2-02(c); (Abood Dep., Defs.' Ex. D178, 13:22-15:13; Katsigiannis Dep. Defs.' Ex. D179, 68:15-69:6.) Plaintiffs have sufficient notice of the drug testing requirements as they are easily accessible, along with all other TLC rules, on the TLC website.[4]

Plaintiffs also assert that the TLC does not allege or attempt to prove drug use in accordance with already established rules such as: that the driver was under the influence of illegal drugs while driving his taxi (35 RCNY § 2-20); or that the driver used the illegal drugs within six hours of driving his taxi (35 RCNY § 2-20); or that the driver is addicted to drugs or alcohol (N.Y. Code § 19-505(b)(6)). (Am. Compl. ¶¶ 48, 51.) Plaintiffs' claim ignores the purpose behind these rules. Since the TLC's objective is to license drivers who are not using drugs or alcohol, the zero tolerance drug testing policy is a logical and reasonable way to test and enforce the objective. 35 RCNY § 2-19, Statement of Basis and Purpose in City Record, Nov. 21, 2005 (using the non-addiction rule as a guideline, the TLC required that all drivers annually submit to a drug test as proof that they are not using drugs or alcohol). A positive drug test is one

[3] Various drug-related rules including 35 RCNY § 2-02(i), § 2-19(a), § 6-15(a)(3), § 6-16, § 2-20(a), Statement of Basis and Purpose in City Record, June, 26, 1998, Defs.' Ex. D143 ("[t]he regulations clearly establish a Commission policy of zero tolerance for licensees who use illegal substances, or who operate their vehicles while their ability to do so is impaired by substances, whether or not illegal.").
[4] Important Information About Drug Testing Requirements, http://www.nyc.gov/html/tlc/html/licenses/drivers.shtml, (Defs.' Ex. 64)

way to prove addiction to drugs or intoxicating liquors, and it serves as sufficient proof of possible use in relation to work or addiction. For these reasons, there is no genuine issue of material fact as to the adequacy of notice given to Plaintiffs regarding drug testing.

ii. Criminal Convictions

Plaintiffs assert that the TLC never issued public notice of its criminal conviction revocation policies, (*Id.* ¶ 97), and that, though there is no published law or rule, TLC judges assume that any driver convicted of a crime shall have his license revoked, (*Id.* ¶ 58). A law or regulation whose violation could lead to a due process deprivation " 'must be crafted with sufficient clarity to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited and to provide explicit standards for those who apply them.' " *Nnebe*, 665 F. Supp. 3d at 332 (*quoting Piscottano v. Murphy*, 511 F.3d 247, 280 (2d Cir. 2007)). In the context of agency regulations, it is enough that "a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objective the regulations are meant to achieve, has fair warning of what the regulations require." *Padberg*, 203 F. Supp. 2d at 286-87 (*citing Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 156 (2d Cir. 1999)).

In *Nnebe*, taxicab drivers had their licenses suspended upon notification of arrest for misdemeanor assault or, in one case, felony contempt and trespass. *Nnebe*, 665 F. Supp. 3d at 318-19. Although the drivers' criminal charges were dropped and their licenses were reinstated, they brought suit asserting that TLC's summary suspension policy violated their due process rights because they lacked notice that their license would be suspended upon arrest for specified crimes. *Id.* at 332. The court found that since all drivers are fingerprinted as part of the license application process under N.Y. Code § 19-505(b)(4), there was sufficient notice that the TLC might learn of plaintiffs' arrests. *Id.* And since it is within the intelligence of an ordinary licensee

to understand that their arrest for a violent or felony offense might be deemed a threat to public safety, whether or not they had access to the list of offenses that would result in suspension, those plaintiffs were on notice that their arrests were sufficient to warrant suspension. *Id.* at 332-33.

Here, Plaintiffs similarly had sufficient notice that the TLC would learn of any criminal conviction because licensees must notify the TLC in writing of a criminal conviction within 15 days of conviction, and deliver a certified copy of the certificate of disposition within 15 days of sentencing. 35 RCNY § 2-63(a). They also had sufficient notice, under N.Y. Code § 19-512.1(a), that the TLC "may revoke any license where the licensee constitutes a threat to the public health, or safety." *TLC v. Fuentes*, OATH Index No. 201/08 (Aug. 28, 2007). General provisions, such as N.Y. Code § 19-512.1(a), do not violate due process where the plaintiff's conduct has clearly fallen within the ambit of the provision, regardless of whether other conduct might present a more questionable case. *Id.*; *Piscottano*, 511 F.3d at 280-84 (rejecting vagueness challenge to a regulation that penalized any behavior that "could . . . reflect negatively on the Department of Correction" because it was not beyond the intelligence of a correctional officer to recognize that his association with an organization affiliated with criminal activity reflected negatively on the agency" (internal citations omitted)); *Fernandez v. TLC*, 193 A.D.2d 423 (App. Div. 1993) (rejecting vagueness challenge to 35 RCNY § 2-61(a)(2), which states that drivers shall not engage in behavior which is "against the best interests of the public" where licensee harassed, made sexual comments to and grabbed a female passenger in his taxicab). Likewise, a reasonably prudent licensee has fair warning that convictions for felony assault or driving while ability impaired might be deemed a threat to public safety sufficient to warrant revocation.

Kombo's license was revoked because of a conviction of second degree assault, (*id.* ¶ 12), a class D felony, N.Y. Penal Law § 120.5. While an assault of a non-passenger occurring when the taxi driver is off-duty is arguably not "job-related," given the great trust that passengers place in taxi drivers, it is within the TLC's prerogative to conclude that any violent or other serious criminal conduct is necessarily related to the driver's job. *Nnebe*, 665 F. Supp. 3d at 327. Proof of an arrest for second degree assault poses a threat to the public safety. *TLC v. Chaudhry*, OATH Index No. 1012/08 (Nov. 30, 2007). As a result, Kombo had fair warning that his actions could lead to revocation of his taxicab license.

Ali's license was revoked because of a conviction for driving his personal car while ability impaired. (*Id.* ¶16.) He was licensed to operate a FHV, which are prohibited from accepting street hails. 35 RCNY § 6-01. FHV operators must inform the TLC *immediately* when convicted of any crime. 35 RCNY § 6-15(e). If a FHV operator is convicted for any serious criminal offense as set forth in New York Vehicle and Traffic ("VAT") Law § 498.1(f), the license "*shall be revoked*" after notice and hearing. *Id.* Although driving while ability impaired does not constitute a "serious criminal offense," Ali's conviction is still subject to discretionary review by the TLC. 35 RCNY § 6-15(e) leads a reasonable FHV licensee to believe that his license could be revoked for crimes other than the "serious criminal offense[s]" listed in the VAT. While Ali asserts that there is no TLC rule or Code provision allowing revocation where a taxi driver is found to be intoxicated while driving off duty, (Pls.' Mot. for Partial Summ. J., 12), the TLC has held otherwise. *TLC v. Padro*, OATH Index No. 798/08 (Oct. 31, 2007) (finding revocation proper because licensee's conviction for driving his personal car while ability impaired by alcohol established the driver posed a risk to public safety), Comm'r/Chair's Dec. (Nov. 19, 2007) (affirming revocation on the ground that conviction for violation alone

established licensee was unfit). Ali had fair warning that driving while ability impaired might be deemed a threat to public safety sufficient to lead to license revocation.

Dyce's license was revoked because of a misdemeanor conviction involving an improper designation on a parking badge he used in his capacity as an ordained minister. (*Id.* ¶ 15.) The TLC rules state that "[a] driver, while performing his duties and responsibilities as a driver, shall not commit or attempt to commit . . . any act of fraud, misrepresentation or larceny against a passenger, Commission representative, public servant or any other person," 35 RCNY § 2-61(a)(1). It is not clear how this rule, in itself, provided Dyce with sufficient notice that his actions might result in license revocation, or that his offense is related to his work. There remains a dispute of material fact as to the sufficiency of the statutory notice given Dyce.

Plaintiffs assert that there is no statute or TLC rule requiring or permitting the revocation policy (*Id.* ¶ 65, 66.) This claim is without merit. As mentioned above, under N.Y. Code § 19-512.1 the TLC may revoke any license "for good cause shown relating to a direct and substantial threat to the public health or safety." Also, under 35 RCNY § 2-02(f), the TLC may revoke a taxicab driver's license if it becomes aware of information that the driver no longer meets the requirements. 35 RCNY § 2-02(f) is authorized under § 2303(a)(b) of the Charter of the City of New York, which empowers the TLC to regulate and supervise the vehicles for-hire industry, and to promulgate rules and regulations relating to the issuance of licenses; under N.Y. Code § 19-503, authorizing the TLC to promulgate rules and regulations necessary to exercise authority conferred upon it by the Charter; and under N.Y. Code § 19-505, authorizing the TLC to establish criteria for licensure.

Rothenberg, Abood, Kombo, Katsigiannis, Doumbia, and Ali all had sufficient notice that their actions could lead to license revocation. The Court recommends that there is no genuine

issue of material fact as to their statutory notice claims. To the extent that Plaintiffs' claims might be construed as a facial challenge to the rules, their claim must fail. A plaintiff whose conduct is proscribed by the statute may not bring a facial vagueness challenge. *Padberg*, 203 F. Supp. at 287 (*citing Vill. of Hoffman Estates v. Flipside*, 455 U.S.489, 495 (1982). Dyce's statutory notice claim remains disputed.

b. Plaintiffs had fair notice of hearings

Plaintiffs also assert that the TLC provided insufficient notice of their hearings by omitting statements of the legal authority and jurisdiction under which the hearing was to be held, reference to particular sections of law or rules, and a short and plain statement of the matters to be adjudicated. (Am. Compl. ¶ 100.) Fair notice must set forth the alleged misconduct with particularity. *Spinelli*, 579 F.3d at 171-72 (*citing* In re *Gault*, 387 U.S. 1, 33 (1967). "The particularity with which alleged misconduct must be described varies with the facts and circumstances of the individual case; however, due process notice contemplates specifications of acts or patterns of conduct, not general, conclusory charges unsupported by specific factual allegations." *Id.* at 172.

In *Spinelli*, the license suspension notice provided by the New York Police Department License Division to plaintiff gun dealer was constitutionally inadequate. *Id.* The police officer who initially inspected the gun shop and shooting range noted safety infractions such as an unwatched counter area, a large hole in the backyard fence, and two unlocked safes. *Id.* at 164. However, notice letters sent to the plaintiff did not specify any of these infractions. *Id.* Rather, the letters provided only conclusory statements indicating suspension due to "failure to provide adequate security." *Id.* at 164, 172. The court found the notice given to the plaintiff failed to " 'reasonably . . . convey the required information' " that would permit her to " 'present [her]

objections' " to the City. *Id.* (*quoting Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

Unlike *Spinelli*, the TLC provided Plaintiffs with specific grounds for their appearance at their fitness hearings. The TLC's notices to Rothenberg, Abood, Doumbia, and Katsigiannis, each stated that the purpose of the hearing was "to determine [the licensee's] fitness to maintain a TLC licenses in light of [his] positive drug test result." (Defs' Ex. D7, D8, D19, D126, D134.) The notices also instructed that the licensee could submit medical evidence that medication could have caused the positive result, and that the licensee had a right to request a retest of the original specimen from a different laboratory. *Id.*

The TLC issued suspension notices upon arrest and fitness hearing notices upon conviction to Kombo, Dyce, and Ali. (Defs.' Ex. D27, D29, D96, D98, D108, D110.) Their suspension notices stated the dates of their arrests and their crimes. (Defs.' Ex. D27, D96, D108.) The notices indicated that if the drivers were found guilty, the TLC might initiate proceedings to revoke their licenses based upon a determination that they were not fit to possess a TLC license. *Id.*

All Plaintiffs' notices stated that a license revocation recommendation might be given as a result of the hearing, that the licensee could bring legal representation to the hearing, and that the licensee could present evidence and witnesses in his defense. (Defs' Ex. D7, D8, D19, D, 29, D98, D110, D126, D134.) Given the nature of Plaintiffs' violations, the Court finds that the notices set forth the alleged misconduct with particularity, and that Plaintiffs were given enough information to adequately present their objections and defenses to the TLC. For these reasons, there is no genuine issue of material fact as to the adequacy of the hearing notices.

2. Plaintiffs Had a Sufficient Opportunity to be Heard

a. Adequacy of fitness hearings

Plaintiffs assert that drivers are subject to a standardless fitness review and may be denied a license even where the conviction is unrelated to driving a taxi. (Am. Compl. ¶ 63.) They assert that, as a matter of policy and practice, the license revocation is automatic and the hearing is pre-ordained. (Am. Compl. ¶¶ 47, 49, 68.)

i. Drug testing

Plaintiffs assert that the TLC allows no witnesses or evidence apart from a form indicating the drug test results, and no opportunity to cross-examine anyone involved in the sample collection, the chain of custody, or the testing itself. (*Id.* ¶¶ 50, 178.) Despite Plaintiffs' claim, "[d]ue process does not require that in every case of a positive [drug] test result the employer produce at its own expense the individuals responsible for overseeing and administering the drug testing program." *Griffin v. Long Island R.R.*, 1988 U.S. Dist. LEXIS 19336, *64 (E.D.N.Y. June 5, 1988); s*ee also Fung*, 846 N.Y.S.2d at 104 (finding no basis for claim that the TLC should have provided licensee at least one witness for cross-examination at hearing based on positive drug test for marijuana).

Risk of erroneous deprivation is reduced when it is based on an objectively verifiable piece of evidence such as a positive drug test. *See Padberg*, 203 F. Supp. 2d at 279 (*citing Barry*, 443 U.S. at 65-66). Documentary evidence including an affidavit from a toxicologist, with accompanying chain of custody form, toxicology reports and a confirmation from a medical review officer, is sufficiently reliable by itself without witness testimony to establish a prima facie case that a licensee's urine tested positive for drugs. *TLC v. Shakoor*, OATH Index No 860/08 (Nov. 30, 2007). Such documentary evidence constitutes substantial evidence, *Fung*, 846

N.Y.S.2d at 104, i.e., "relevant proof [that] a reasonable mind may accept as adequate to support a conclusion or ultimate fact." *300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 379 N.E.2d 1183, 1186 (N.Y.1978). An Article 78 proceeding is the proper venue to challenge whether a determination made as a result of a hearing is supported by substantial evidence. N.Y. CPLR § 7803(4) (McKinney 2008).

Plaintiffs' assertion that license revocation is "automatic" and the hearing is "pre-ordained" lacks merit. TLC judges have allowed drivers adjournments to provide medical documentation to explain the positive drug test result, or to call additional witnesses. (Defs.' Opp'n to Pls.' Mot. for Partial Summ. J. 15.) In the event the medical review officer determines that the medical documentation is sufficient to explain the positive drug result, the TLC would withdraw the case from hearing, and reinstate the license. (*Id.*; Eckstein Decl. ¶ 5.) Also, it is unclear what value if any would be added to the process if the TLC routinely requested drug testing witnesses to be cross-examined about information readily available in the documentary evidence. Thus, Rothenberg, Abood, Katsigiannis, and Doumbia, were all afforded a meaningful opportunity to be heard through their fitness hearings.

ii. Criminal convictions

In revocation hearings based on criminal convictions, the TLC prosecutor submits the certificate of disposition from the New York State Department of Criminal Justice Services ("DCJS") of the driver's conviction, and presents an argument that the conviction has a sufficient nexus to the driver's fitness to operate a taxicab. (Defs.' Opp'n to Pls.' Mot. for Partial Summ. J. 10; Defs.' Mot. for Summ. J. 8; Defs.' 56.1 ¶ 41.) If the ALJ determines that there is a factual connection between the conviction and the licensed activity, the ALJ will seek to revoke the license at a fitness hearing. (Eckstein 9/29/08 Dep. Tr. at 68-69, Ex. D44; Hardekopf 10/08/08

Dep. Tr. at 34, 78-79, 104-05, Ex. D49; Fraser 04/09/09 Dep. Tr. at 13, Ex. D51; Weinblatt Decl. ¶ 67; Hardekopf Decl. ¶ 18; Fraser Decl. ¶ 31.)

For Kombo, ALJ Schwartz recommended revocation because he found that Kombo's conviction for assault in the second degree had a direct relationship to his ability to safely transport the riding public. (Recommendation to the TLC Chairperson, Defs' Ex. D36.) For Dyce, ALJ Fioramonti recommended revocation because he found that, in light of being convicted of criminal possession of a forged instrument in the Third Degree, Dyce possessed a forged instrument with intent to defraud or deceive another, and that his actions had a "direct bearing on his ability to comply with TLC Rules and Regulations and thus to operate a taxi in a lawful manner." (Recommendation to the TLC Chairperson, Defs.' Ex.103.) ALJ Rivers recommended revocation for Ali because he found Ali's conviction of DWAI to be "a very serious offense that is directly related to his ability to carry out the responsibilities of a FHV driver and to whether he can be entrusted with the safety of passengers and abide by governing rules and regulations. (Recommendation to the TLC Chairperson, Defs.' Ex. D114.) Kombo, Dyce and Ali's convictions were determined by an independent entity (e.g., the Supreme or Criminal Courts), and pursuant to guilty pleas. (Defs.' Mot. for Summ. J. 8; Defs.' 56.1 ¶ 185, 202, 217.)

Plaintiffs assert that the TLC should present additional evidence at the fitness hearings, such as the driver's prior record (i.e., criminal record, driving record, personal history), the circumstances of the alleged crime, or whether the crime occurred while the driver was driving his taxi (*see* Am. Compl. ¶¶ 64, 69). The Court disagrees. The TLC's burden is to present valid evidence that the licensee has engaged in conduct that calls into question the licensee's fitness to retain a license. The licensee may introduce evidence to explain or mitigate the significance of the criminal conviction. *Id.* at 518 n.5 (*citing Matter of Levy*, 333 N.E.2d 350, 352 (N.Y. 1975))

(upholding exclusion of plaintiff's testimony on question of guilt and refusing to remit case because the attorney did not avail himself of the opportunity to present evidence in mitigation during his disciplinary proceeding).

Plaintiffs had the opportunity to introduce mitigation evidence at their fitness hearings, but they failed to do so. Once the TLC has adduced evidence to demonstrate that the conviction had a sufficient nexus to the driver's fitness to operate a taxicab, the burden shifts to the licensee to present evidence in mitigation. There is no genuine issue of material fact as to the adequacy of the hearings provided to Plaintiffs because they had an opportunity to introduce information they deemed relevant, and there is a no allegation that they were deprived of such opportunity.

b. Bias of TLC ALJs

Plaintiffs also assert that "[b]ecause of the nature of their employment and compensation, TLC judges in fitness hearings are systematically biased in favor of the agency." (Am. Compl. ¶ 137.) They assert that TLC judges are not independent because they are hired by the TLC on a per diem basis and may be fired without cause, with no contractual, civil service or statutory job protections. (*Id.* ¶ 75.) The underlying premise is valid: Plaintiffs have a right to an impartial ALJ in their fitness hearings. A biased decisionmaker violates the basic due process requirement of a "fair trial in a fair tribunal." *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (citations omitted). The Plaintiffs, however, are incorrect in their conclusion that the ALJs are inherently biased by their position in the TLC structure. Plaintiffs' contention of bias must overcome the presumption of honesty and integrity accorded to adjudicators. *Id.* at 47. "[City] administrators are assumed to be [people] of conscience and intellectual discipline capable of judging fairly." *Id.* at 55. Other than broad allegations of systematic bias, Plaintiffs present no evidence of actual bias.

A due process violation may be established without showing actual bias where " 'a court determin[es] from the special facts and circumstances present in the *case before it* that the risk of unfairness is intolerably high.' " *Greenberg v. Bd. of Governors of the Fed. Reserve Sys.*, 968 F.2d 164, 167 (2d Cir. 1992) (alterations in original) (emphasis added) (*quoting Withrow*, 421 U.S. at 58). Various situations, such as a judge's pecuniary interest in the outcome, lend themselves to the probability of bias. *Withrow*, 421 U.S. at 47. In order to succeed on a pecuniary interest claim, a plaintiff should present allegations against a specific adjudicator. *See Tumey v. State of Ohio*, 273 U.S. 510, 523 (1927) (overturning a conviction because a small part of the judge's income consisted of court fees collected from convicted defendants); *see also Ward v. Vill. of Monroeville, Ohio*, 409 U.S. 57, 58-59 (1972) (holding that trial before a mayor, who was responsible for the village finances and whose court provided a substantial portion of the village funds, denied plaintiff a trial before a disinterested and impartial officer).

While Plaintiffs assert that ALJs have a pecuniary interest in the outcome of their cases, they neither name one ALJ in their Amended Complaint nor allege any specific improper conduct. Even in *Padberg*, a case where taxicab drivers asserted that the TLC ALJs who conducted *their* suspension and revocation hearings were biased, plaintiffs named the ALJs. *See, e.g.*, *Padberg*, 203 F. Supp. 2d. at 272-73, 287 (naming ALJs McFaul, Schwartz, and Elliott). Moreover, after granting the plaintiffs' summary judgment motion finding that the TLC's summary suspension of drivers who allegedly refused service violated their procedural due process rights (*id.* at 281-82), the court then denied defendants' summary judgment motion on the bias issue, leaving it as the sole remaining issue in the case. *Id.* at 290. The court found that a memo from the Chief ALJ to TLC ALJs provided sufficient, though "not overwhelming," evidence to raise a question of fact as to whether the ALJs were prejudging the facts in service

refusal cases and revoking licenses pursuant to TLC policy. (*Id.* at 288-89.) While Plaintiffs in the instant case assert that the court in *Padberg* ruled in plaintiffs' favor on the bias issue, (Pls.' Sur-Reply Mem. on Collateral Estoppel, 1) in fact, the parties subsequently settled and no judgment was entered on the merits of the bias claim. (Stipulation of Settlement, Docket No. 311, July 20, 2006, Ex. P43.) Plaintiffs cannot assert a sufficiently specific bias claim without naming the ALJs or presenting some specific evidence in support. Plaintiffs' attempt to fill this gap by submitting emails between ALJ Eric Gottlieb and his supervisor Deputy Chief ALJ Coyne (Am. Compl. ¶ 85) in which Gottlieb requested guidance about his proposed recommendation against revocation of Devon Elliot's license despite a positive drug test. Coyne questioned whether Gottlieb was ignoring the test results by focusing on Elliot's excuse that he was unknowingly drugged. (Pls.' Mot. for Partial Summ. J, Ackman Decl. Exs. 4,5.) Gottlieb eventually issued a recommendation for revocation. (*Id.*) Plaintiffs apparently believe that this exchange shows the undue influences the TLC has over ALJs. This example, however, does not support the broad contention urged by Plaintiffs in this case because Gottlieb did not serve as an ALJ for the named Plaintiffs, Elliot is not one of the named Plaintiffs, and even Gottlieb conceded that his recommendation was "unorthodox."

Plaintiffs also assert that, as a matter of policy and practice, license revocation is automatic and the hearing is pre-ordained. (Am. Compl. ¶¶ 47, 49, 68.) They allege that in drug test and conviction revocation cases, TLC judges rule in favor of the agency every time. (*Id.* ¶ 84.) While ALJ recommendations against the TLC appear to be rare (*see, e.g.*, Ackman Decl. Hardekopf Dep. 26-7, 37, 100-07; Daus Dep. 8), an ALJ's record of ruling in favor of the agency does not demonstrate a "closed mind" so as to establish illegal bias. *Pharon v. Bd. of Governors of Fed. Reserve Sys.*, 135 F.3d 148, 155 (D.C. Cir. 1998), cert. denied, 525 U.S. 947 (1998).

Plaintiffs also assert that ALJs are told that there are no defenses to a positive drug test, (*Id.* ¶ 82), and that they should assume that any driver convicted of a crime shall have his license revoked, though there is no published law or rule indicating that penalty. (*Id.* ¶ 90.) The first claim is directly refuted by the fact that there is a medical documentation defense to a positive drug test. The second claim is a conclusory allegation without sufficient factual support in the record. First, often there is little factual dispute about the final disposition of a person's criminal case. Second, Plaintiffs have failed to demonstrate that ALJs are prejudging the facts of a licensee's defense in a revocation hearing.

The risk of bias in this case is not intolerably high and does not raise a sufficiently great possibility that the ALJs have a pecuniary interest in the outcome of the case strong enough to render them biased. Also, Plaintiffs' evidence suggesting improper communications between ALJs and TLC commissioners, an automatic revocation policy, and the absences of specific allegations against the ALJs who presided in Plaintiffs' hearings do not raise an issue of material fact that overcomes the presumption of honesty and integrity given to the ALJs. The record shows TLC's testing scheme and fitness hearings to be commonplace and necessary for administrative practice. *Nash v. Bowen*, 869 F.2d 675, 680-681 (2d Cir. 1989) ("[p]olicies designed to insure a reasonable degree of uniformity among ALJ decisions are not only within the bounds of legitimate agency supervision but are to be encouraged . . .") (citations omitted). In addition, Plaintiffs had recourse to an Article 78 proceeding, which is sufficient for claims that the agency adjudicator was biased and prejudged the outcome or that *ex parte* communications with other officials may have infected the adjudicator's ruling. *Nnebe*, 665 F. Supp. 2d at 330; *Locurto v. Safir*, 264 F.3d 2154, 174 (2d Cir. 2001).

Notwithstanding Dyce's statutory claim, the TLC's statutory notice and practice of notice of hearings provided the other Plaintiffs with adequate protection against erroneous deprivation of their taxicab drivers' licenses. The hearings provided all Plaintiffs with a meaningful opportunity to submit evidence that might help mitigate the severity of their actions. Plaintiffs' bias claim fails because they have not shown that partial ALJs preside over the hearings. For these reasons, Plaintiffs have failed to show a risk of erroneous deprivation of their licenses through the TLC procedures used, and the value of their proposed procedural safeguards.

c. The TLC Has a Strong Interest in Preventing Conditions That Pose a Danger to the Public Welfare

"[T]he business of transporting passengers for hire by motor vehicle in the [C]ity of New York is affected with a public interest, [and] is a vital and integral part of the transportation system of the [C]ity, and must therefore be supervised, regulated and controlled by the [C]ity." N.Y. Code § 19-501. The regulation of transportation and the preventing of conditions dangerous to the public welfare are legitimate governmental purposes. *Ricketts v. City of N.Y.*, 722 N.Y.S.2d 25 (App. Div. 2001). Among the most critical functions performed by the TLC are ensuring the safety of the taxi-riding public and maintaining the public's trust in the safety of taxis. *Nnebe*, F. Supp. 2d at 324-25 (*citing Buliga v. N.Y. City TLC*, No. 07 Civ. 6507 (DLC), 2007 WL 4547738, at *4 (S.D.N.Y. Dec. 21, 2007). The TLC has a strong interest in ensuring both that passengers are not placed in a vulnerable position with possibly dangerous drivers and in ensuring that the public perceive the taxi industry to be safe. *Id.* at 325. A taxi license represents the TLC's judgment that the licensee is qualified to drive a taxi and interact with passengers. *Id.* at 329. Every license issued by the TLC necessarily implicates the TLC's interest as a licensor. *Id.*

The TLC has a strong interest in preventing conditions dangerous to the public welfare that outweighs Plaintiffs' strong interest in their licenses. Given the fact that the notices and hearings provided to Plaintiffs protected them against a high risk of erroneous deprivation, the TLC provided them with sufficient pre-deprivation due process. While there exists a factual dispute about Dyce's statutory notice claim, his due process rights were not violated because he, and the other Plaintiffs, had an opportunity to avail himself of post-deprivation due process through an Article 78 proceeding.

4. Article 78 Provides Plaintiffs with Sufficient Post-Deprivation Due Process

"[A]lthough notice and a pre[-]deprivation hearing are generally required, in certain circumstances, the lack of such pre[-]deprivation process will not offend the constitutional guarantee of due process, provided there is sufficient post[-]deprivation process." *Spinelli*, 579 F.3d at 170 (*citing Catanzaro v. Weiden*, 188 F.3d 56, 61 (2d Cir. 1999)). *Sindone v. Kelley*, 2007 U.S. App. LEXIS 26463, *2 (2d Cir. 2007) (challenge to departmental disciplinary proceedings as being infected by bias failed due to availability of subsequent Article 78 review); *Campo v. N.Y. City Employees' Ret. Sys.*, 843 F.2d 96, 100-03 (2d Cir. 1988) (dismissing procedural due process claim based on the availability of Article 78 review of administrative determination). " 'An Article 78 proceeding [] constitutes a wholly adequate post-deprivation hearing for due process purposes.' " *Nnebe*, 665 F. Supp. 2d at 330 (*quoting Locurto*, 264 F.3d at 174)); *see also Fleming v. Kerlikowske*, 1999 U.S. Dist. Lexis 7226, *17 (W.D.N.Y. 1999).

Even if adequate pre-deprivation due process was not found for Plaintiffs, their motion should still be denied because a due process claim for the deprivation of a property interest is not cognizable in a federal district court if state courts provide a remedy for the deprivation of that property interest. *Gabris*, 2005 U.S. Dist. Lexis 23391, at *8 (*citing Hudson v. Palmer*, 468 U.S.

517, 533 (1984); *Marino v. Ameruso*, 837 F.2d 25, 47 (2d Cir. 1988)). New York state courts provide for such a remedy through Article 78 proceedings. N.Y. CPLR. §§ 7801, 7803 (McKinney 2008). An Article 78 proceeding "provides the mechanism for challenging a specific decision of a state [or municipal] administrative agency." *Gabris*, 2005 U.S. Dist. Lexis 23391, at *8-9 (*quoting Campo*, 843 F.2d at 101) (alteration in original). The proceeding "permits a petitioner to submit affidavits and other written evidence; and where a material issue of fact is raised, have a trial of the disputed issue, including constitutional claims." *Id.* at *8 (*quoting Locurto*, 264 F.3d at 174). The proper form and forum for the relief sought by the Plaintiffs is an Article 78 proceeding in the Supreme Court. N.Y. CPLR § 7801(1); *Fuca v. City of N.Y.*, 836 N.Y.S.2d 757 (App. Term 2007).

A plaintiff's failure to commence an Article 78 proceeding within the four-month limitations period does not prevent this Court from taking into account the availability of such proceedings when determining whether he has been afforded due process. *Fleming*, 1999 U.S. Dist. Lexis 7226, *16-17 (*citing Giglio v. Dunn*, 732 F.2d 1133, 1135 (2d Cir. 1984). Plaintiffs failed to take advantage of the post-revocation process in connection with their license revocations. For these reasons, there is no genuine issue of material fact as to the adequacy of the process provided Plaintiffs.

5. TLC's Drug Testing Policy Does Not Violate the Fourth Amendment

Plaintiffs vague assertion of a violation of the Fourth Amendment in Counts 1 through 3 of their Amended Complaint is clarified in Count 7, a state claim, which states that the TLC administers drug tests in the "absence of probable cause or reasonable suspicion" in violation of the New York State Constitution, Article 1, § 6. (Am. Compl. ¶¶ 161-63.) "The collection and analysis of a urine specimen is a Fourth Amendment search and is therefore subject to a

reasonable inquiry." *Griffin v. Long Island Railroad*, 96 Civ.4673 (ARR), 1998 U.S. Dist. Lexis 19336, at *20 (*citing Chandler v. Miller*, 520 U.S. 305 (1997); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989)). The reasonableness standard requires an administrator of drug tests to balance the privacy intrusion against the promotion of legitimate governmental interests. *Skinner*, 489 U.S. at 619. "[R]andom testing of safety-sensitive employees has been approved, even in the absence of a safety-triggering event," *Griffin*, 1998 U.S. Dist. Lexis 19336, at *20. (*citing Ry. Labor Executives' Ass'n v. Skinner*, 934 F.2d 1096 (9th Cir. 1991)), or individual suspicion, *Skinner*, 489 U.S. at 624 (rail employees involved in train accidents or who committed safety violations). *See also Int'l Bhd. of Teamsters v. Dept. of Transp.*, 932 F.2d 1292, 1304 (9th Cir.1991) (upholding random drug testing of commercial truck drivers); *Int'l Bhd. of Elec. Workers, Local 1245 v. Skinner*, 913 F.2d 1454, 1458 (9th Cir.1990) (upholding random testing of all employees engaged in operations on gas pipelines); *Bluestein v. Skinner*, 908 F.2d 451, 457 (9th Cir.1990) (upholding random drug testing of flight instructors and dispatchers). The TLC has a compelling interest in administering drug tests, and Plaintiffs had a minimal expectation of privacy in light of their safety-sensitive position as drivers. For these reasons, the TLC drug testing policy does not violate Plaintiffs' Fourth Amendment protection against unreasonable search and seizure.

C. Plaintiffs' State Claims Should be Dismissed

Plaintiffs bring state law claims in Counts 4 through 12 of their Amended Complaint, pursuant to this Court's supplemental jurisdiction as articulated in 28 U.S.C. § 1367. (Am. Compl. ¶ 7.) These claims should be dismissed along with the federal claims. A district court may decline to exercise supplemental jurisdiction over state law claims when it "has dismissed all claims over which it has original jurisdiction[.]" 28 U.S.C. § 1367(c)(3). "It is well

established that when federal claims are dismissed before trial, the state claims should be dismissed as well." *Avello v. Hammons*, 963 F.Supp. 262, 270 (S.D.N.Y. 1997) (*citing United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966)); *Castellano v. Bd. of Trustees of the Police Officers' Variable Supplements Fund*, 937 F.2d 752, 758 (2d Cir. 1991). The factors of judicial economy, convenience, fairness, and comity weigh heavily in favor of declining to exercise jurisdiction over remaining state-law claims. *Castellano*, 937 F.2d at 758.

Furthermore, exercising supplemental jurisdiction over Plaintiffs' claims based on the New York Constitution "would violate fundamental principles of federalism and comity" because "New York State has a definite interest in determining whether its own laws comport with the New York Constitution." *Schulz v. The N.Y. State Executive*, 960 F. Supp. 568, 580-81 (N.D.N.Y. 1997) (*citing Young v. N.Y. City Transit Auth.*, 903 F.2d 146, 163-64 (2d Cir. 1990)). While the sum and substance of Plaintiffs' state claims are the same as their federal claims, these claims allege violations of the New York Constitution, (Am. Compl. ¶¶ 6, 161-62, 168-69), and various New York statutes. Therefore, this Court should not exercise supplemental jurisdiction over Plaintiffs' state claims, and those claims should be dismissed.

D. Claims Against TLC and Individual Defendants Should be Dismissed

1. Claims Against Defendant TLC Should be Dismissed

Plaintiffs' claims against Defendant TLC, an agency of the City of New York, should be dismissed because "a New York City agency cannot be sued in its own capacity." *Nnebe*, 665 F. Supp. 2d at 320 (*citing Gabris*, 2005 U.S. Dist. Lexis 23391, at *7 n.4). "All actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the [C]ity of New York and not in that of any agency, except where otherwise provided by law." N.Y. Charter, ch. 17, § 396 (2009); *Davis v. City of N.Y.*, No. 00 Civ. 4309 (SAS), 2000

WL 1877045, n.1 (S.D.N.Y. Dec. 27, 2000) (concluding that the New York Police Department is an agency of the City of New York and therefore a not subject to sueable entity); *Siino v. Dep't of Educ. of the City of N.Y.*, 843 N.Y.S.2d 828, 829 (App. Div. 2007) (finding that the Department of Investigation is not a proper party to litigation).

2. Claims Against Daus, McGrath-Mckechnie, Eckstein, Bonina, and Coyne, in their Individual and Official Capacities, Should be Dismissed

Plaintiffs allege that Defendants have "willfully, knowingly, and with [] specific intent," conspired to "deprive plaintiffs of their constitutional rights . . . ." (Am. Compl. ¶¶ 139, 143.) Defendants cannot be liable in their individual capacities because they are protected by qualified immunity. Qualified immunity shields government officials who perform discretionary-as distinct from ministerial-functions from liability for damages arising from their actions which do " 'not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Kaminsky v. Rosenblum*, 929 F.2d 922, 925 (2d Cir. 1991) (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The immunity question turns on whether it was objectively reasonable for officials to believe that their decisions did not violate plaintiffs' clearly established constitutional rights. *McEvoy v. Spencer*, 124 F.3d 92, 96 (2d Cir. 1997). Resolution of this question entails inquiry into the nature and extent of rights asserted, and whether plaintiffs' entitlement is well-settled. *Id.* (*citing Kaluczky v. City of White Plains*, 57 F.3d 202, 206 (2d Cir. 1995). As mentioned above, Plaintiffs have a claim of entitlement in their licenses. However, ALJs, TLC chairperson, and the deputy commissioner all have discretionary functions within the TLC. As a result, qualified immunity, which exists to protect officials and encourage the vigorous exercise of official authority, should apply to them. *See Walz*, 46 F.3d at 169 (*citing Harlow*, 457 U.S. at 807).

A suit brought against a public officer in his official capacity is treated as a suit against the government. *P.C. v. McLaughlin*, 913 F.2d 1033, 1039 (2d Cir. 1990) (*citing Kentucky v. Graham*, 473 U.S. 159, 165-68 (1985). Official capacity generally represents only another way of pleading an action against an entity of which an officer is an agent. *Kentucky*, 473 U.S. at 165. In an official capacity suit the entity's "policy or custom" must have played a part in the violation of federal law. *Id.* at 166. Plaintiffs have failed to allege facts sufficient to demonstrate that an officially adopted policy or custom of the City of New York (the proper municipal defendant in this case) caused a violation of Plaintiffs' federally protected rights. *Dwares v. City of N.Y.*, 985 F.2d 94, 100 (2d Cir. 1993) (stating that a mere assertion of a custom or policy is not sufficient to sustain a § 1983 claim against a municipal defendant in the absence of any allegations of fact). Therefore, Plaintiffs' official capacity claims should be dismissed.

IV. CONCLUSION

For the foregoing reasons, I recommend that Defendants' Motion for Summary Judgment (Doc. No. 76) be **GRANTED** and Plaintiffs' Motions for Summary Judgment (Doc. Nos. 48 & 78) be **DENIED** and that the Complaint be **DISMISSED** in its entirety.

Pursuant to Rule 72, Federal Rules of Civil Procedure, the parties shall have fourteen (14) days after being served with a copy of the recommended disposition to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court and served on all adversaries, with extra copies delivered to the chambers of the Honorable Sidney H. Stein, 500 Pearl Street, Room 1010, and to the chambers of the undersigned, 500 Pearl Street, Room 1970. Failure to file timely objections shall constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. *See Thomas v. Arn*,

474 U.S. 140, 150 (1985); *Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989) (*per curiam*); 28 U.S.C. § 636(b)(1) (West Supp. 1995); FED. R. CIV. P. 72, 6(a), 6(d).

Dated: September 8, 2010
New York, New York

Respectfully Submitted,

The Honorable Ronald L. Ellis
United States Magistrate Judge

Copies of this Report and Recommendation were sent to:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAUL ROTHENBERG, EBRAHIM ABOOD, TOBBY KOMBO, KONSTANTINOS KATSIGIANNIS, BOUBACAR DOUMBIA, ROBERT DYCE, and MOUSTACH ALI, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

MATTHEW DAUS, DIANE MCGRATH-MCKECHNIE, JOSEPH ECKSTEIN, ELIZABETH BONINA, THOMAS COYNE, THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION and THE CITY OF NEW YORK,

Defendants.

08 Civ. 00567 (SHS)

ORDER

SIDNEY H. STEIN, U.S. District Judge.

Plaintiffs and defendants have filed motions for summary judgment pursuant to Fed R. Civ. P. 56. On September 8, 2010, Magistrate Judge Ronald L. Ellis issued a Report and Recommendation detailing the factual and procedural history of this action and recommending that defendants' motion for summary judgment be granted and that plaintiffs' motions for partial summary judgment be denied. Plaintiffs filed timely objections and defendants responded. After *de novo* review of the Report and Recommendation, plaintiffs' objections, and defendants' objections, *see* 28 U.S.C. § 636(b)(1)(B)-(C), the Court adopts the Report and Recommendation in its entirety, except as to the following two issues.

First, the heading of section III(B)(3) of the Report and Recommendation should more properly be titled "The TLC's Post-Deprivation Procedures Afforded Plaintiffs' Due Process" rather than "The TLC Provided Plaintiffs with Sufficient Pre-Deprivation Due Process," because plaintiffs' licenses were suspended before they were afforded a hearing to contest the suspension.

While due process often "requires an opportunity for a hearing before a deprivation of property takes effect," *Brody v. Vill. of Port Chester*, 434 F.3d 121, 135 (2d Cir. 2005) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 88 (1972)), "where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause," *Gilbert v. Homar*, 520 U.S. 924, 930 (1997). Here, as discussed at length in *Nbebe v. Daus*, 665 F. Supp. 2d 311 (S.D.N.Y. 2009), the government's interest in ensuring the "safety of the taxi-riding public and maintaining the public's trust in the safety of taxis" supports the TLC's decision to summarily suspend taxi drivers who tested positive for drugs or who were arrested or convicted of crimes.[1] *Id.* at 324 (citation omitted). Moreover, the TLC is required by statute to offer a prompt post-deprivation hearing to taxi drivers whose licenses have been suspended. *See* Admin. Code § 19-512.1(a).

Second, although the Report and Recommendation properly determined that Dyce was afforded due process because an Article 78 proceeding in state court provides a "wholly adequate" mechanism for challenging a specific decision of a state or municipal agency (Rep. & Rec. at 25-26), this Court also finds that there is no genuine issue of material fact as to whether Dyce was deprived of fair notice that his license might be suspended and revoked if he committed a fraud-related crime involving his taxicab. Although a "law or regulation whose violation could lead to . . . a deprivation [of property] must be crafted with sufficient clarity to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited and to provide explicit standards for those who apply them," it "need not achieve meticulous specificity, which would come at the cost of flexibility and reasonable breadth." *Piscottano v. Murphy*, 511 F.3d 247, 280 (2d Cir. 2007) (internal quotation marks and citation omitted). The "question of whether a statute or regulation is unconstitutionally vague is determined by whether it afforded fair notice to the

[1] Dyce and Ali were convicted of Possession of a Forged Instrument in the Third Degree and Driving While Ability Impaired, respectively, before the TLC suspended their licenses. (*See* Decl. of Amy J. Weinblatt dated May 25, 2010 ("Weinblatt Decl."), Exs. 96-97, 109-10.) Kombo was arrested for Assault in the Second Degree before his license was suspended and was convicted of that offense before his license was revoked. (*Id.* at Exs. 28-30, 40.)

plaintiff to whom it was applied." *Id.* Additionally, the Supreme Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Id.* at 281 (citing *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982)).

In this action, several rules and regulations, independently and in combination, provided Dyce with fair notice. First, the New York City Charter states that "[a] driver shall not use . . . his taxicab for any unlawful purpose" and that "[a] driver shall immediately inform the [TLC] when convicted of any crime." Charter, Ch. 35, §§ 2-61(b), 6-15(e). Second, the New York City Administrative Code and the TLC Rules contained provisions that provide for the summary suspension of a license "for good cause shown relating to a direct and substantial threat to the public health or safety," Admin. Code § 19-512.1, or "[i]f the Chairperson finds that emergency action is required to insure public health or safety, he/she may order the summary suspension of a license or licensee . . . ." Charter, Ch. 35, § 8-16.[2] Third, section 19-505 of the Administrative Code states that all applicants for a license must "[b]e of good moral character" and that the TLC "may, after a hearing, suspend or revoke any driver's license for failure to comply with" this provision. Admin. Code § 19-505(b)(5), (l).

Here, Dyce had pled guilty to Possession of a Forged Instrument in the Third Degree, a Class A misdemeanor, before his license was suspended or revoked. (Exs. 96-97 to Weinblatt Decl.) Dyce's arrest occurred when police pulled over his taxicab for displaying a "police department insignia on a parking badge" that permitted him to park in "an otherwise restricted zone." (Am. Compl. ¶ 128.) Based on the previously cited rules and regulations prohibiting the use of taxicabs for unlawful purposes, mandating that drivers immediately report their conviction of a crime to the TLC, and requiring that license holders be "of good moral character," Dyce's

[2] On December 2, 2006, TLC Rule 8-16 was amended to add subsection (c), which provides that the TLC Chairperson may suspend a license based upon "an arrest on criminal charges" that the Chairperson determines is "relevant to the licensee's qualifications for continued licensure." Charter, Ch. 35 § 8-16(c). This subsection, however, was not yet in effect at the time Dyce was arrested in April 2006.

assertion that he did not have "fair notice" strains credulity. Indeed, Dyce had ample notice that the TLC might summarily suspend his license, as the rules allow, based on a finding that in light of his plea of guilty to Possession of a Forged Instrument, he represented a threat to "public health or safety." Admin. Code § 19-512.1; Charter, Ch. 35 § 8-16(c).

Accordingly, it is hereby ORDERED that Magistrate Judge Ellis's Report and Recommendation be adopted with the additional conclusions noted above. As recommended by Magistrate Judge Ellis, defendants' motion for summary judgment is granted (Dkt. # 76) and plaintiffs' motions for partial summary judgment are denied (Dkt. # 48 and # 85).

Dated: New York, New York
September 30, 2010

SO ORDERED:

Sidney H. Stein, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

SAUL ROTHENBERG, et al.,

Plaintiffs,

-against-

MATTHEW DAUS, et al.,

Defendants.

----------X

08 **CIVIL** 0567 (SHS)

JUDGMENT

Whereas on September 8, 2010, the Honorable Ronald L. Ellis, United States Magistrate Judge, having issued a Report and Recommendation (the "report") recommending that defendants' motion for summary judgment be granted, and that plaintiffs' motions for partial summary judgment be denied, and the matter having come before the Honorable Sidney H. Stein, United States District Judge, and the Court, on September 30, 2010, having rendered its Order adopting the report with the additional conclusions as noted in that Order, granting defendants' motion for summary judgment, and denying plaintiffs' motions for partial summary judgment, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order dated September 30, 2010, the report is adopted with the additional conclusions as noted in that Order; defendants' motion for summary judgment is granted; and plaintiffs' motions for partial summary judgment are denied.

Dated: New York, New York
September 30, 2010

RUBY J. KRAJICK

Clerk of Court

BY:

Deputy Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAUL ROTHENBERG, EBRAHIM ABOOD, TOBBY KOMBO, KONSTANTINOS KATSIGIANNIS, BOUBACAR DOUMBIA, ROBERT DYCE, and MOUSTACH ALI, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

MATTHEW DAUS, DIANE MCGRATH-MCKECHNIE, JOSEPH ECKSTEIN, ELIZABETH BONINA, THOMAS COYNE, THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION and THE CITY OF NEW YORK,

Defendants.

08 Civ. 00567 (SHS)

ORDER

SIDNEY H. STEIN, U.S. District Judge.

In this action, Magistrate Judge Ronald L. Ellis issued a Report and Recommendation on September 8, 2010 recommending that defendants' motion for summary judgment be granted and plaintiffs' motions for partial summary judgment be denied. On September 21, 2010, defendants filed objections to the Report and Recommendation and, on September 27, 2010, plaintiffs filed their objections. After reviewing the Report and Recommendation and considering both parties' objections, on September 30, 2010, this Court issued an Order adopting the Report and Recommendation. On the same day, plaintiffs filed a response to defendants' objections. On October 1, 2010, the following day, plaintiffs sent this Court a letter requesting that the Order be "withdrawn and reserved" because "it seems unlikely" that the Court considered plaintiffs' September 30 response.

This Court has now reviewed plaintiffs' September 30 response and it does not alter this Court's conclusion that Magistrate Judge Ellis's Report and Recommendation should be adopted

as set forth in the September 30 Order. Accordingly, the Court denies plaintiffs' request to withdraw the September 30 Order.

Dated: New York, New York
October 21, 2010

SO ORDERED:

Sidney H. Stein, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X——————————————————————X

SAUL ROTHENBERG, EBRAHIM ABOOD, TOBBY KOMBO, KONSTANTINOS KATSIGIANNIS, BOUBACAR DOUMBIA, ROBERT DYCE and MOUSTACH ALI, individually and on behalf of all others similarly situated,

08-CV-00567 (SHS)(RLE)

Plaintiffs,

-Against-

MATTHEW DAUS, DIANE MCGRATH-MCKECHNIE, JOSEPH ECKSTEIN, ELIZABETH BONINA, THOMAS COYNE, THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION, AND THE CITY OF NEW YORK,

Defendants.

X——————————————————————X

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that plaintiffs appeal to the United States Court of Appeals for the Second Circuit from an order entered on and dated September 30, 2010, adopting with added comments a magistrate judge's report and recommendation dated September 8, 2010, granting defendants summary judgment, denying plaintiffs summary judgment, and dismissing plaintiffs state law claims for lack of supplemental jurisdiction. The magistrate's report dated September 8, 2010, the opinion and order and the judgment dated and entered on September 30, 2010 are all attached hereto.

Dated: New York, New York
October 25, 2010

/s/

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917-282-8178

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TO:

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Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2010, I caused the foregoing to be served as indicated on the parties listed below.

Daniel L. Ackman

BY E-MAIL & MAIL TO:

Mary O'Sullivan, Esq.
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Counsel For Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X——————————————————————X

SAUL ROTHENBERG, EBRAHIM ABOOD, TOBBY KOMBO, KONSTANTINOS KATSIGIANNIS, BOUBACAR DOUMBIA, ROBERT DYCE and MOUSTACH ALI, individually and on behalf of all others similarly situated,

08-CV-00567 (SHS)(RLE)

Plaintiffs,

-Against-

MATTHEW DAUS, DIANE MCGRATH-MCKECHNIE, JOSEPH ECKSTEIN, ELIZABETH BONINA, THOMAS COYNE, THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION, AND THE CITY OF NEW YORK,

Defendants.

X——————————————————————X

AMENDED NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that plaintiffs appeal to the United States Court of Appeals for the Second Circuit from an order entered on and dated September 30, 2010, adopting with added comments a magistrate judge's report and recommendation dated September 8, 2010, granting defendants summary judgment, denying plaintiffs summary judgment, and dismissing plaintiffs state law claims for lack of supplemental jurisdiction. The magistrate's report dated September 8, 2010, the opinion and order and the judgment dated and entered on September 30, 2010 are all attached hereto.

Dated: New York, New York
October 26, 2010

/s/

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Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2010, I caused the foregoing to be served as indicated on the parties listed below.

/s/
Daniel L. Ackman

BY E-MAIL & [redacted]L TO:

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