DOCKET NO.

18-490

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ANTHONY STALLWORTH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PARICHAY BARMAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, NOOR TANI, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, NEW YORK TAXI WORKERS ALLIANCE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

-against-

MEERA JOSHI, CHRIS WILSON, STAS SKARBO, CITY OF NEW YORK,

Defendants-Appellees.

APPELLANT'S BRIEF & SPECIAL APPENDIX

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel for Plaintiffs-Appellants New York Taxi Workers Alliance (NYTWA) certifies for purposes of Rule 26.1 that:

NYTWA is a non-governmental, New York not-for-profit corporation, which has no parent corporation, subsidiaries or corporate affiliates.

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> *Defendants must be warned, however, if they cannot even suggest any factors that an ALJ or the TLC Chair can consider beyond the fact of arrest, then a directed verdict in this trial would appear inevitable.*
>
> —Judge Sullivan, Order in *Nnebe v. Daus*, January 10, 2014

PRELIMINARY STATEMENT

The City of New York, acting through its Taxi and Limousine Commission (TLC), routinely suspends the licenses of taxi and for-hire vehicle drivers based on an arrest—not a conviction or even formal charges, just an arrest. During a prior appeal, the City assured this Court that before extending such suspensions it afforded drivers an evidentiary hearing at which it met a regulatory standard stated in a TLC rule and a City ordinance that requires a finding that the driver's "continued licensure would constitute a direct and substantial threat to public health or safety." *Nnebe v. Daus*, 644 F.3d 147, 160 (2d Cir.2011). In actual practice, however, the TLC continues suspensions based on an arrest alone.

Thus, the TLC suspends *and continues suspensions* without any consideration of the driver's lack of criminal record or work history and without any inquiry into the facts or circumstances of the alleged crime. It extends suspensions without regard to whether the driver was released without bail and irrespective of whether the alleged crime was off duty. In short, the hearing process, like the initial suspension, is deliberately blind to any and all evidence that the driver poses no real threat to public safety. And the hearing process *always*

results in the suspension being continued. The TLC persists in this practice despite knowing that the vast majority of suspended drivers will be reinstated. These suspensions, and the loss of livelihoods, last, on average, more than four months.

Appellants Anthony Stallworth, Parichay Barman, and Noor Tani are recent victims of this practice. Their central claim is the same as the plaintiffs' claim in *Nnebe*: that the TLC post-deprivation procedure is constitutionally deficient, a *de facto* rubber stamp that is tantamount to no process at all. Plaintiffs further contend that because the TLC provides no meaningful process post-deprivation, the initial summary suspensions are themselves unconstitutional.

* * *

The first time this Court considered the TLC suspension-on-arrest practice it vacated a district court judgment premised on the theory that a hearing that does no more than confirm the driver's identity and the fact of his arrest was nevertheless constitutionally adequate. This Court criticized the lower court's reasoning, but remanded for further proceedings based on the City's representations that the TLC *did not* treat an arrest on a charge on a TLC list as "*per se* evidence" that his licensure posed an ongoing threat to public safety. Although this Court observed that evidence supporting these representations was "scant," it afforded the City the chance to prove its assertion, ordering the district court to "determine what really occurs at the hearing…." *Id.* at 160, 162.

The remand led to a January 2014 bench trial and then to Findings of Fact by Judge Sullivan (Findings). These Findings substantiate plaintiffs' claims—and thoroughly rejected the City's representations that prompted the remand: As a matter of policy and practice, in the TLC post-suspension process all that matters is the fact of arrest. Evidence that a driver's licensure would pose no danger even if the arrest charges are "true" is treated as irrelevant.

These Findings should have led to a judgment for the *Nnebe* plaintiffs. Nevertheless, in an April 2016 decision not issued until more than two years after the trial, the district court ruled for the City. It did so via a startling and new pronouncement that plaintiffs' claims challenging the TLC's process actually "sound" in "substantive due process" and therefore warrant indulgent "rational basis" review of the TLC's policy of suspending and extending suspensions based on an arrest on charges that have some "nexus" with public safety. Because the post-trial decision in *Nnebe* did not result in a final judgment, the *Nnebe* plaintiffs could not appeal. (Days ago, seven years after the remand and after the plaintiffs offered to withdraw their unresolved claims, Judge Sullivan finally issued a final judgment. Nnebe Dkt. #s411, 417.) Thus, plaintiff-appellants here, who have no stake in the unresolved questions in *Nnebe* filed a new action to challenge their suspensions. This appeal is from Judge Sullivan's dismissal of that action.

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(a)(4) and 2201. A timely notice of appeal of the district court's judgment entered on February 6, 2018, was filed on February 12, 2018.

STATEMENT OF ISSUES

1. Whether the TLC practice of suspending taxi and for-hire vehicle drivers' licenses based on an arrest without any consideration of the driver's record, without any inquiry as to the circumstances of the alleged crime and without any opportunity to be heard is a denial of Due Process of Law.

2. Whether the TLC post-deprivation process—during which the TLC continues to rely on the fact of arrest and disregards all other evidence that the driver is not a direct and substantial threat to public safety and which never results in a driver's reinstatement—denies taxi and for-hire vehicle drivers Due Process of Law.

3. Whether the TLC's reliance on a *de facto* presumption of guilt is unconstitutional.

4. Whether the TLC's enforcement of a *de facto* standard permitting the extension of a license suspension based on arrest-plus-nexus denied drivers fair warning of the law and, therefore, Due Process of Law.

STANDARD OF REVIEW

On all questions, the standard of review is de novo.

STATEMENT OF THE CASE AND FACTS

The Suspension-on-Arrest Practice and its Unknown Origin

The TLC routinely suspends taxi and for-hire vehicle drivers upon its receipt of a computer-generated notice from the state Division of Criminal Justice Services stating that the driver has been arrested.[1] The exact origins of this policy are unknown: Former TLC Chairman Matthew Daus "was unable to recall how or when the informal, pre–2006 policy of summarily suspending drivers upon arrest was first adopted." *Nnebe*, 644 F.3d at 152. Certainly, however, it dates back to a least 2006, the date the *Nnebe* action was filed.

Only *after* that filing did the TLC enact a rule that allowed for suspensions on arrest. A-112-114. And it was only during the *trial* in *Nnebe* in 2014 that the TLC added to the rule a list of alleged crimes for which it would suspend. A-116. According to Judge Sullivan, "The source of the TLC's authority to summarily suspend a driver is § 19-512.1(a) of the New York City Administrative Code. That provision authorizes the TLC to suspend a driver, 'prior to giving notice and an opportunity for a hearing,' 'for good cause shown relating to a direct and substantial threat to the public health or safety.'" A-113; *see also Nnebe,* 644 F.3d

[1] This statement of facts is based on on Judge Sullivan's Findings in *Nnebe,* on uncontested trial testimony in *Nnebe* and on recent admissions by the TLC.

at 150. The TLC rule authorized suspensions based on the TLC "chairperson's" finding that "emergency action is required to insure public health, safety or welfare." In fact, "a TLC employee," not the chair, orders the suspensions based on a computer-generated arrest notice. A-117.

However it came into being, the TLC practice is extraordinary. The City and State of New York together regulate more than 75 trades and professions. A-152-155. Apart from the TLC, it does not appear that any city or state agency suspends tradesmen following a similar practice. By the same token, neither the Nassau County TLC nor the Westchester County TLC has any rule calling for the suspension of a driver upon arrest.

The TLC Rule and the Threat Requirement

The rule enacted after *Nnebe* was filed is, TLC Rule 8-16, part of the "Adjudications" Chapter of the TLC rules. The statement of basis and purpose that accompanied the rule, however, did not cite any facts suggesting why it was necessary. A-156. There was no indication, for example, that there was even a single incident of a driver assaulting a passenger while facing unresolved criminal charges. Nor did the statement cite or claim any history of taxi drivers' assaulting passengers generally.

Rule 8-16(a) provided: "If 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…." Subsection (c) added: "[T]he Chairperson may summarily suspend a license … based upon an arrest on criminal charges that the Chairperson determines is relevant to the licensee's qualifications for continued licensure." It also afforded the driver a post-suspension hearing before and administrative law judge (ALJ) to determine whether or not the suspension should be continued. "[T]he issue [at such hearings] shall be whether the charges underlying the licensee's arrest, if true, demonstrate that the licensee's continued licensure during the pendency of the criminal charges would pose a threat to the health or safety of the public." These hearings, the rule provided, "shall be held before an ALJ who shall consider relevant evidence and testimony under oath." A-113-115.

Rule 8-16 was amended and renumbered several times. But each iteration required a finding that "emergency action" was "required to insure public health or safety." The rule also allowed for summary suspensions on arrest. But it always afforded the suspended driver a hearing to determine whether the suspension should be continued, a hearing during which the TLC was called on to demonstrate that continued licensure during the pendency of the charges would constitute a "threat" or a "direct and substantial threat" to public safety. A-113-116. The *Nnebe* court referred to these requirements as the rule's "regulatory standard." 644 F.3d at

160. The current TLC Rule 68-15 was promulgated in 2014. A-172. It includes, for the first time, a list of charges for which the TLC might suspend.

The ALJs who preside over post-suspension hearings have no authority to lift a suspension.[2] They are limited to making a recommendation to the TLC chair that the chair may accept, modify or reject. TLC Rule 68-15(c). While Rule 68-15(b) states that the hearing is "to be held within 10 calendar days of the receipt of the request," there is no time limit on how long a summary suspension may last following the hearing prior to the chair's final determination.

As Judge Sullivan found, "Despite the numerous versions of the Rule, the summary suspension process has for the most part continued unchanged." The TLC practice has been (and continues to be) to suspend the driver upon receipt of a computer-generated arrest report without permitting the driver any chance to be heard. A-117; 644 F.3d at 151. Even post-suspension, the chair considers "only the fact of arrest and whether the charged offense is on the list, and does not consider any additional facts." A-118. The TLC recently admitted that the suspensions average 136 days. *Stallworth v. Joshi*, Case #17-3678, Dkt. # 15-16 at 4.

[2] Between 2003 and 2007, hearings were held before ALJs employed by the TLC, who could be fired by the agency without cause. After 2007, the hearings were held before New York City Office of Administrative Trials and Hearings (OATH). A-112.

The City's Representations to the *Nnebe* Court

Nothing about the summary suspension practice has ever been disputed. The *Nnebe* defendants did, however, attempt to assure this Court that the *post-suspension* hearing process was and is meaningful. While *Nnebe* had been litigated and decided by the district court on the understanding that the TLC provided a confirmation-of-arrest hearing only, in this Court the City did not attempt to defend the position "that automatic continuance of a suspension—after a hearing at which only identity or offense can be disputed—is consistent with due process." 644 F.3d at 161. Instead, "The City's defense … [was] premised on a contention that it provides drivers with a real opportunity to show that they do not pose a risk to public safety, arrests notwithstanding." *Id.*

The *Nnebe* opinion recorded in unusual detail the Court's efforts to avoid "any misunderstanding of" the City's representations. *Id.* It emphasized that it was "not the City's position that arrest for one of the offenses listed on the TLC's summary suspension chart is *per se* evidence" that the driver's licensure pending disposition of the criminal charges would pose a threat to public safety. *Id.* It underscored that the City claimed that "proof regarding the charged offense" (*i.e.*, the basis for the initial suspension) and proof regarding an ongoing safety threat were "separate issues." *Id.* The *Nnebe* court did not conceal its skepticism. It observed that the factual assertions had "scant" record support and that the

regulatory language the City referenced "appears to be an oft-quoted nullity." Thus, the Court was "not convinced … that the City binds itself to the standard it says is in place." *Id.* at 160-61.

The Court nevertheless remanded to give the City an opportunity to prove that the post-deprivation hearings actually provide something "beyond mere confirmation of identity and charge." Further litigation would establish "what really occurs at the hearing and what the City means by what it says." *Id.* at 163. This Court directed the district court "to determine whether the post-suspension hearing the City affords did indeed provide an opportunity for a taxi driver to assert that, even if the criminal charges are true, continued licensure does not pose any safety concerns," and to then decide "whether the hearing the City actually provides—whatever it may consist of—comports with due process." *Id.* at 161.

As to the TLC's summary suspensions, the *Nnebe* court recognized the "enormous" hardship even a brief summary suspension could inflict on a taxi driver and called it "deeply problematic." But it nonetheless agreed that a departure from the "'general rule' … that a pre-deprivation hearing is required," was justifiable because notification of an individual's arrest could itself be "cause for concern" and because the harm from unnecessary suspensions could be "mitigated" by prompt post-suspension hearings. 644 F.3d at 159. This Court directed, however, "In the event the [district] court determines that the post-

suspension hearing does not comport with due process," it must "reconsider its ruling in its entirety." *Id*. at 163.

The City's Representations Prove False

During the post-remand litigation, the City's representations to this Court came crashing down. After denying both sides summary judgment, Judge Sullivan set the case for a January 2014 trial. That trial would focus on the "narrow" question of what actually happens in TLC post-suspension process, with proceedings on the constitutional questions to follow. Nnebe Dkt. #245.

Days before the trial was to begin, on January 8, Judge Sullivan invited the parties' comments on a proposed Jury Verdict Form. This Verdict Form featured a series of "special interrogatories" concerning whether or not the TLC hearing process "considered" particular factors in determining whether a driver should remain suspended. These factors included, among others, "the facts and circumstances that led to the [driver's] arrest," whether he was released on his own recognizance, and "the driver's maturity, family background, [and] ties to the community." A-70-83.

Defendants strenuously objected to the Verdict Form, saying that that "none of the factors listed in the verdict form are considered by ALJs or the TLC chair, and thus none should be included on the form." A-84-86. In response, the district court observed that the City's submission "present[ed] a quandary.… In order for

there to be a real, *de facto* opportunity 'to assert that, even if the criminal charges are true, continued licensure does not pose any safety concerns,' the ALJs and the TLC chair must be able to consider something other than the mere fact of a criminal charge." A-87-88. The court added: "Whether a person poses a threat to safety is a complicated question, and any decision-maker honestly considering the issue must balance many competing factors. Yet Defendants have not identified what, if any, factors ALJs or the TLC Chair may weigh in determining dangerousness, other than the existence of a criminal charge." A-88-89.

Judge Sullivan ordered defendants to submit by the next day a letter that either accepted the Verdict Form, "suggest[ed] other factors that an ALJ or the TLC Chair might consider in determining dangerousness" or "formally admit[ted] that the factors listed on the verdict form are not considered." *Id.* The court "warned" the defendants: "[I]f they cannot even suggest any factors that an ALJ or the TLC Chair can consider beyond the fact of arrest, then a directed verdict in this trial would appear inevitable." A-89.

Sure enough, counsel for the City then informed the court that Meera Joshi, then the TLC general counsel [now its chair], had recently advised the litigators that, in her capacity as "chair designee" in suspension cases, she did not disregard the categories of individualized evidence that appeared on the Jury Verdict Form. .

Judge Sullivan decided to proceed with the trial, and at the court's suggestion the *Nnebe* plaintiffs consented to a bench trial for this phase of the case. A-92.

At trial, Joshi repeated under oath and at length her pre-trial claim to apply a holistic "balancing test" when deciding whether to continue a driver's suspension. Nnebe Dkt. #308 at 488. Joshi also testified that "more often than not" the hearing process resulted in a continued suspension, an odd formulation, given the evidence that the TLC, in fact, prevailed 100% of the time. Later, Judge Sullivan concluded he could "not credit" Joshi's testimony that she applied a balancing test because "[i]t flatly contradicts official Chairperson decisions she herself authored." A-124. Indeed, Joshi invariably rejected ALJ recommendations recommending reinstatement on the ground that the suspended driver would not pose any threat to public safety. A-122, 124.

Charles Fraser, Joshi's predecessor, also insisted that the TLC had always taken a holistic approach and that he had done so as "chair designee" from 2010 to 2011. Fraser testified to having "reviewed over 50 and likely over 100" suspensions, though, in fact, he signed just three decisions, none of which hinted at any such approach. A-123-124. As with Joshi, Judge Sullivan found Fraser's claims incredible, noting that he "appeared to have little memory of his actual experience reviewing summary suspension hearings, and what memory he did have was contradicted by the documentary record." A-123.

Other TLC witnesses testified truthfully and presented an entirely different picture of the TLC practice. Thomas Coyne, who had been the deputy chief TLC ALJ in charge of suspension hearings, testified that the purpose of the hearings was to confirm the fact of arrest and nothing else. A-94-95. He explained that drivers were permitted (indeed encouraged) to create "a record," though the record was "irrelevant to" the ALJ's decision. A-93. Marc Hardekopf, the TLC prosecutor, confirmed that understanding. A-105-108. Former TLC Chair Matthew Daus was likewise emphatic that a driver's efforts to prevail through evidence of a clean record or circumstances relating to the arrest were futile: Although he "read the evidence" presented to an ALJ and "thought about it," he treated that "evidence []as irrelevant and [it] played no role in [his] decision." A-122, n.11. TLC judge Eric Gottlieb confirmed deposition testimony that had been highlighted by this Court that when he recommended lifting three suspensions based on specific facts, it provoked a firestorm within the agency: Gottlieb was contacted by his superiors and reprimanded, which led to his apologizing profusely and promising never to rule that way again. Nnebe Dkt. #304 at 211-215; *see* 644 F.3d at 152.

The trial ended on January 21, 2014, with Judge Sullivan revisiting the City's statements to this Court:

> I wouldn't want to be the lawyer that argued to the circuit given the record that's been developed here, because I think the circuit may consider that to have been very disingenuous or ignorant [compared] to what the accurate state of play was.…

A-102.

Judge Sullivan added: "I mean, again, I think there is going to be a price to be paid for that statement to the circuit." A-103.

The Trial Court Findings

The district court's post-trial Findings confirmed what had become essentially undisputed: That TLC suspensions are based "only [on] the fact of arrest and whether the charged offense is on the list, and does not consider any additional facts," A-118, including whether the allegation "related to the cab driver's work." 644 F.3d at 162. Judge Sullivan confirmed as well that "No driver has ever had her or his suspension lifted through the summary suspension review process." A-112; *see also* 644 F.3d at 151. He further found that reinstatement (through favorable resolution of the criminal charge) is the ultimate result in the vast majority of arrest-suspension cases and that the TLC, in reinstating "does not consider why the charge is no longer pending—all that matters is that the driver is no longer charged…." A-118.

Judge Sullivan also identified *why* the hearing process is invariably and inevitably futile: The TLC has followed a consistent practice on chair review of considering only identity, the fact of arrest, and the offense alleged—and of "not consider[ing]" evidence "that the particular driver would not pose a direct and substantial threat to public health or safety." A-120-123. The TLC did not consider

the circumstances underlying the arrest or even the "factual allegations of the complaint…." A-122, 124. Judge Sullivan further found that the TLC would not consider whether it was the driver's first arrest, whether the arresting officer issued a Desk Appearance Ticket (DAT) instead of detaining the driver before arraignment, whether the arrest was off duty, whether the driver was likely innocent—or indeed any other factor. Instead, once the TLC found that the driver was charged with an offense, that charges were still pending, and that there is a "nexus" between the charges and public health or safety, "the inquiry is over, and any other facts or arguments are irrelevant." A-124. In short, in a plain and direct answer to the question that inspired the remand, Judge Sullivan found that the TLC "does not consider [the regulatory standard, whether a] driver would not pose a direct and substantial threat to public health or safety." A-123 (citations omitted)

While recognizing that the chair's practice was controlling, Judge Sullivan also made findings with respect to OATH ALJ hearings. First, the TLC conceded that its arguments at OATH hearings were "exactly the same" as when the TLC's own judges presided. A-108. The agency presents proof of the fact of arrest and the penal code provision charged and rests its case. Judge Sullivan, however, noted that certain OATH ALJs considered evidence apart from the arrest and had undertaken to determine whether the driver's licensure would in fact pose any real

threat. Some of the ALJs had recommended lifting suspensions. A-121. The TLC chair, however, rejected all such recommendations. A-109.[3]

To cite just one example, in *TLC v. Bhatti*, the ALJ urged that the suspension be lifted. A-193. The ALJ cited, among other factors, that the driver had a clean record over 25 years, that he was arrested based on an accusation by a fellow driver with whom he had had an ongoing dispute, that he "is a middle-aged man with heart problems," and that the arresting officer did not see him as a danger. Indeed, the ALJ highlighted a sad irony of the TLC's policy: That because those issued DATs wait the longest before a criminal court date on the understanding that the accused is at liberty, was not required to post, a cab driver who receives a DAT and is released by the arresting officer is, in terms of his suspension, worse off. A-192.

The *Bhatti* ALJ was "left with the overwhelming conclusion that respondent poses no direct and substantial threat to the public health or safety." A-191-192. While not questioning any of these findings, in a ruling issued 123 days after the denial of his livelihood, Joshi rejected the recommendation. A-195-196. The Findings list several other cases where the ALJ recommended reinstatement and

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[3] While TLC rules require "the Chairperson" to "accept, modify, or reject" ALJ recommendations, the chair has often "delegated" his duty to the TLC general counsel. A-119 n.6. The chair (or delegate) has rejected *every* ALJ recommendation that a driver's license be reinstated. A-109, 122 (noting ALJ decisions rejected by the chair).

the chair rejected the advice. A-122-123 (citing *TLC v. Riano*, *TLC v. Nau*, *TLC v. Mirakov*, *TLC v. Adjoor* and *TLC v. Pugati*). There is, however, not even one instance where the chair failed to accept a recommendation that a driver remain suspended.

The practical impossibility of a driver prevailing through the hearing process has become well known within the taxi industry. Thus, advocates for taxi drivers, and even the ALJs themselves, advise drivers they have no chance, leading most of them to forgo hearings. A-121 n.8. Indeed, the TLC recently admitted that between 2012 and 2016, it conducted just 17 hearings despite thousands of suspensions on arrest. A-176-177.

The *Nnebe* court seemed to suppose that the driver's hardship from a summary suspension was truly "temporary." The 2011 decision described the harm from postponing meaningful review as limited to "the income [a driver] could have earned between the [suspension] … and the date of the post-suspension hearing" (roughly a 10-day window). Even that loss, the Court recognized "can be deeply problematic for a taxi driver." 644 F.3d at 159. In fact, the loss is much worse. "Summary" suspensions continue not until the hearing process starts, but until it ends. ALJs have no authority to reinstate on the hearing date or after. A-112, 114, 119. Reinstatement requires a ruling by the chair. This takes months, not days. For example, Barman was suspended on January 13, 2017. A-180. The chair did not

accept until March 14 the recommendation that the suspension continue. A-341. So the "summary" suspension lasted 60 days, not 10.[4]

Judge Sullivan's Findings and post-trial admissions by the TLC all dramatically confirm that the TLC hearing process is also highly inaccurate in identifying drivers who pose a genuine threat. Judge Sullivan found, "Ultimately, more than 75% of suspended drivers have their suspension lifted." A-118; *see also Nnebe*, 644 F.3d at 152 (noting testimony that the conviction rate is very low "and in no event more than one quarter"). Recent admissions, however, indicate that the revocations based on convictions are actually even more rare. In an April 13, 2017, response to a FOIL request, the TLC stated, "From January 1, 2012 to January 1, 2017, there were 6669 TLC-licensees who were suspended due to an arrest" and that just "15 TLC licensees had their licenses revoked due to a criminal conviction." A-222 (quoting FOIL response).[5] Thus, in this time period, suspension

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[4] In the case of mistaken identity or a charge reduction to a non-criminal violation, the TLC prosecutor could reinstate a license, but an ALJ could not. A-118.

[5] That roughly 1300 drivers are arrested annually (for any felony or one of 18 misdemeanors on the TLC list) is not an indication that taxi drivers are especially prone to crime given that the TLC currently licenses "more than 150,000" drivers. TLC 2016 Annual Report http://www.nyc.gov/html/tlc/downloads/pdf/annual_report_2016.pdf. State records indicate that one in 28 New Yorkers is arrested in a given year. Thus, the TLC licensee arrest rate is almost certainly much lower than for city residents overall. *See* Division of Criminal Justice Services Report on Adult Arrests in NYC (reporting that, between 2012 and 2016, an average of just over 299,000 adult city residents were arrested annually out of a population of 8.5 million).

ripened into revocation in just 0.2% of all cases. Moreover, just two of the 15 were convicted of a crime of violence, specifically misdemeanor assault. A-177.[6] And even of these two there is no indication that the victim was a passenger. In sum, the vast majority of drivers subjected to the policy have had their licenses reinstated—albeit after months without being able to earn a living—reflecting the TLC's judgment that their continuing their trade posed no substantial threat to public safety after all.

Reinstatement results only from "a favorable disposition" of the arrest charges. A-118. "The TLC does not consider why the charge is no longer pending—all that matters is that the driver is no longer charged with an offense on the list." *Id.* Not even one driver, of course, has been reinstated through the hearing process. It was not until April 28, 2016—two-and-a-half years after the *Nnebe* trial ended and more than five years after the remand—that Judge Sullivan issued a memorandum and order stating his conclusions of law, which are discussed below. But because the court did not rule on the plaintiffs' other constitutional and state

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http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/nyc.pdf.

[6] Nine of the 15 were convicted of "driving while impaired." *Id*. On this it must be noted that Judge Stein has held that a revocation for a conviction for this non-criminal violation, is itself unconstitutional because the TLC never gave drivers fair warning of the law that such a conviction could lead to revocation. *Rothenberg v. Daus*, No. 08–CV–567 (SHS), 2014 WL 3765724, *9 (S.D.N.Y. July 31, 2014).

law claims—even after a decade of litigation—there was no final judgment for the plaintiffs to appeal.[7] Meanwhile, the suspensions-on-arrest continued unabated.

The Instant Suspensions Confirm the Findings

Barman, Tani, and Stallworth, the plaintiffs-appellants here, were each impacted by the TLC practice. All three were arrested for leaving the scene of an accident, a misdemeanor charge for which not even one TLC-licensed driver had been convicted and revoked in the previous five-year period. In each case, the TLC suspended upon receipt of an arrest notice without any inquiry into the underlying facts or the driver's lack of a criminal record or the fact that the arresting officer had issued a DAT. A-197-199. At each hearing, the TLC prosecutor introduced a printout showing that the respondent was a TLC-licensed driver and the arrest notice, and rested his case. A-219 (Stallworth); A-256-258 (Barman); A-299-303 (Tani). In each case, the TLC prosecutor argued that a suspension must be continued on a mere showing that the arrest charges were still pending and that there was some "nexus" between the charge and public safety. In no case did the prosecutor contest that the suspension would cause real hardship for the driver and his family. The TLC did not dispute that the arresting officer issued a DAT or released the driver, that the driver had a solid work history, and that there was

[7] The *Nnebe* plaintiffs filed an appeal based on the 2016 order denying them injunctive relief. But on February 3, 2017 this Court dismissed that appeal for lack of jurisdiction.

substantial evidence of innocence. In the TLC's view, none of these factors mattered.

In Barman's case, for example, the TLC prosecutor told the ALJ: "What the opposing counsel is stating is that we need to prove that the driver is dangerous, that the driver poses a substantial threat. That is not the standard…. *What the [TLC] needs to prove is that we have a licensee who was, who was charged with … a violation that has a sufficient nexus with public health and safety, that that char-, and that that charge is still pending.*" A-281-282 (emphasis added). In *Barman* and *Tani*, the ALJ agreed with TLC policy, citing Judge Sullivan's 2016 decision. A-330, 337. In both cases, the TLC chair—actually the general counsel—followed with a form letter agreeing with the ALJ. A-341, 347. In Barman's case, the chair did not rule until 50 days after his suspension. For Tani, the chair ruling took 54 days. Predictably, both drivers were reinstated when they agreed to plead guilty to a reduced charge of disorderly conduct.

Last, the TLC suspended Stallworth on August 4, 2017, a day after he was arrested. Following a hearing, on September 26, OATH ALJ Joycelyn McGeachy-Kuls issued a report and recommendation that Stallworth's taxi-driver's license be reinstated. Her decision noted that at the post-suspension hearing the TLC relied (as it always does) exclusively on documents showing that Stallworth was a licensed taxi driver and had been arrested. ALJ McGeachy-Kuls also heard,

however, Stallworth' testimony, which she found "clear, credible and convincing" and supported by documentary evidence. Second Cir. Case No, 17-3678, Dkt. #15-31. She considered that Stallworth had in fact stayed at the scene for over an hour and had called the police three times. She noted that Stallworth had been employed by Citigroup and had worked as a security guard before becoming a taxi driver. She related the facts and circumstances leading to the arrest, that the arresting officer issued a DAT, and that Stallworth had no criminal or disciplinary record. "Based on this record, the Commission failed to show that continued suspension of [Stallworth's] TLC license is necessary to protect the public. Respondent does not pose a direct or substantial risk to public health or safety." *Id*. at 6. Thus the ALJ recommended lifting the suspension.

The TLC, as always, rejected this recommendation. By a letter signed by General Counsel Christopher Wilson, the agency did not actually deny that Stallworth posed no direct or substantial threat. Instead, the agency relied solely on the fact that Stallworth had been charged, citing "two recent [TLC Chair] decisions" that held that a criminal charge was sufficient if there was a "nexus" between the charge and public safety. Second Cir.Case No, 17-3678, Docket 15-32. Thus Stallworth's "summary" suspension lasted 75 days, including 22 days *after* a neutral hearing officer decided his licensure would pose no threat. Ultimately, on or around December 13, 2017, the assistant D.A. in Stallworth's

case told the TLC that the charges against him would be dismissed, and the TLC reinstated his license. *Id*. Dkt. #71.

The District Court Orders

Plaintiffs filed this action on September 19, 2017, listing it as related to *Nnebe*, and moved for a temporary restraining order and a preliminary injunction. Plaintiffs alleged the same due process claims as those asserted in *Nnebe* and added two new claims. Based on the Supreme Court's post-*Nnebe* decision in *Nelson v. Colorado*, 137 S. Ct. 1249 (2017), they asserted that the TLC process imposes a presumption of guilt that is itself unconstitutional. They also claimed that the TLC's imposition of a *de facto* standard that is different from and harsher than the *de jure* regulatory standard denied taxi drivers fair warning of the law.

At a hearing the next day, Judge Sullivan stated he would deny the TRO. He also urged the defendants to move to dismiss the complaint, which they later did. A brief order dated October 11 formally denied the TRO and also denied plaintiffs leave to move for class certification "in light of Defendants' contemplated motion to dismiss."[8] On November 22, the court denied the preliminary injunction as well. Finally, on January 31, 2018, plaintiffs, noting that the court's reasoning on its preliminary injunction ruling would also support dismissal, asked the court to rule on defendants' motion to dismiss and issue a final judgment. The court granted the

[8] Plaintiffs appealed, but after Stallworth's license was reinstated, this Court dismissed that appeal as moot in an order dated December 21, 2017.

motion, citing "the reasons stated in the Court's [preliminary injunction] Order … and the Court's opinion in *Nnebe v. Daus*, 184 F. Supp.3d 54 (S.D.N.Y.2016) [A-426]."

The 2016 decision in *Nnebe*—issued more than two years after the trial and five years after the remand—cited the factual findings detailed above but nevertheless concluded that the plaintiffs had "failed to prove their constitutional claims." The decision's linchpin was its conviction that plaintiffs were "really asserting a substantive due process challenge." A-438. The court likened plaintiffs' claim to the one asserted in *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003), which held that Due Process does not require an individualized hearing to determine a convicted sex offender's dangerousness before his name was included on a public registry. Noting that the Connecticut law made the fact of conviction its sole focus, Judge Sullivan reasoned that the TLC had likewise "interpreted" its hearing rule to make evidence—even proof—of non-dangerousness "irrelevant." The TLC had decided that "being charged with one of those crimes is proof enough" that the licensure was a threat. A-437. For that reason, the plaintiffs only had a due process right to a hearing where they could deny they were arrested or refute the "nexus" between the arrest charge and public safety. A-437-438.

The court offered a lengthy discussion of the "substantive due process" claim it believed plaintiffs could and should have brought. It concluded that no

such claim could succeed, however, because plaintiffs had not identified a sufficiently "fundamental right" that the TLC violates and because there was a "rational basis" for treating arrested drivers as posing an ongoing danger even if some (or most) do not. A-440-441. That decision omits any mention of the City's representations in *Nnebe* or that they had now been proven false.

Judge Sullivan's November 2017 decision in this case offers barely a nod to this Court's decision in *Nnebe*. It rejects plaintiffs' claim that the denial of a pre-suspension hearing was a denial of due process on the ground that he has already "reaffirmed [his] holding that the 'arrest-plus-nexus' standard constitutes sufficient post-deprivation process." A-418. It rejects plaintiffs' argument that the TLC had imposed a presumption of guilt, stating that the TLC process did not actually presume guilt. A-420. It denies plaintiffs' fair warning of the law claim on the ground that "everyone now knows the standard, which is why so few drivers demand hearings." A-421. Finally, it concludes that the court's prior characterization of the *Nnebe* plaintiffs' claims as sounding in substantive due process was just "an alternative holding prompted by the *Nnebe* plaintiffs' apparent misapprehension of their own arguments." A-422.

SUMMARY OF ARGUMENT

This Court should reverse the district court's judgment and direct judgment for plaintiffs.

Judge Sullivan's answer to the question on which the *Nnebe* court remanded—did the City "bind[] itself to the standard it says is in place"—is no. This response can only yield a conclusion that defendants denied the taxi driver plaintiffs Due Process of Law. If such a finding does not lead to a plaintiffs' judgment (here and in *Nnebe* as well), the *Nnebe* court would not have vacated the district court's 2009 judgment. If a negative response did not matter, the *Nnebe* remand would have served no purpose.

The City's false representations and incredible testimony aside, the Findings demonstrate that the TLC's sham post-suspension process does not in any way mitigate the harm from the summary suspensions. Even post-suspension, the TLC *does* in fact consider an officer's determination of probable cause (even if *ex parte* and likely based on a complainant's potentially biased view) *per se* evidence that the driver presents a substantial threat to public safety. Indeed it considers the arrest *conclusive* evidence. At no point does the TLC allow consideration of the underlying facts or of the driver's record. And at every point, the TLC persists in its presumption that the driver is guilty, which is the sole support for its further conjecture that he is dangerous.

Given the Findings, the district court's rejection of plaintiffs' claims depends on its 2016 pronouncement, uttered for the first time after a full decade of litigation, that the *Nnebe* plaintiffs' case "sounds" in "substantive due process."

But this court's decision in *Nnebe* (not to mention of principles of forfeiture and judicial estoppel) forecloses that startling change of course. And with good reason: Plaintiffs' challenge to the TLC's process for depriving drivers of their property is a quintessentially due process case.

Application of the *Mathews* test likewise leads with equal certainty to the conclusion that drivers have been denied Due Process. Plaintiffs' individual interest is enormous especially because the eventual reinstatement leaves the "temporary" deprivation unremedied. The risk of error is exceedingly high. And it is beyond dispute that the TLC could provide a more meaningful process without added cost simply by not systemically disregarding all evidence that permitting the driver's reinstatement would not pose any genuine danger. And because the post-suspension process fails to alleviate the harm from the initial deprivation, the initial summary suspensions are unconstitutional as well.

ARGUMENT

I. THE TLC SUMMARY SUSPENSION PRACTICE IS UNCONSTITUTIONAL BECAUSE ITS HARM REMAINS UNMITIGATED BY THE POST-SUSPENSION PROCESS

A. Denial of a Pre-deprivation Hearing Depends on Access to a Prompt and Meaningful Post-deprivation Review

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); *Nnebe*, 644 F.3d at 158; *Padberg v. McGrath-McKechnie*, 203 F.Supp.2d 261, 276 (E.D.N.Y. 2002).

While "[d]ue process does not, in all cases, require a hearing before the state interferes with a protected interest, so long as some form of hearing is provided before an individual is finally deprived," as a general rule some pre-deprivation hearing is required. *Mathews* guides "whether to tolerate an exception to the rule requiring pre-deprivation notice and hearing." *Nnebe*, 644 F.3d at 158 (quoting and citing *Brody v. Vill. of Port Chester*, 434 F.3d 121, 134 (2d Cir.2005), *Krimstock v. Kelly*, 306 F.3d 40, 60 (2d Cir.2002) (Sotomayor, J.) and *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993)). In either context, in determining what process is due, *Mathews* requires a court to examine: "first, 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 finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute requirement would entail." *Mathews*, 424 U.S. at 335.

Nnebe allowed for an exception to the general rule requiring at least some pre-deprivation hearing based on the premise that the post-deprivation process would be prompt and meaningful. This Court, however, ended with a critical caveat: If "the post-suspension hearing does not comport with due process," the district court would have to reconsider its determination that a pre-suspension

hearing was unnecessary "in its entirety". *Id*. at 163. The facts found by Judge Sullivan demand that reconsideration.

B. The Post-Suspension Hearings are Neither Prompt Nor Meaningful

Applying *Mathews*, the *Nnebe* court recognized that, for a taxi driver, "the private interest at stake … is enormous—most taxi drivers rely on the job as their primary source of income and often earn the sole income for large families in a city where the cost of living significantly exceeds the national average." *Id*. at 159 (internal quotations omitted). *Nnebe* further noted, "The Supreme Court has repeatedly recognized the severity of depriving someone of the means of his livelihood." *Id*. (internal quotations and citations omitted). Against that interest was "a strong government interest" in ensuring public safety "in the short term." And it found that the driver's loss was limited to "the income [a driver] could have earned between the [suspension] … and the date of the post-suspension hearing," *id*, which the TLC rule implies would be no more than ten days. Finally, *Nnebe* operated on the premise that "the risk of erroneous deprivation is mitigated by the availability of a prompt post-deprivation hearing." *Id*. These seemingly reasonable assumptions allowed the conclusion that TLC could constitutionally suspend without a hearing "in the immediate aftermath of an arrest." *Id*.

The Supreme Court has likewise held that the exceptional cases that permit forgoing pre-deprivation process depend on prompt and meaningful post-

deprivation process. *Mackey v. Montrym*, 443 U.S. 1, 12 (1979); *Barry v. Barchi*, 443 U.S. 55, 66 (1979); *accord Krimstock*, 306 F.3d at 67-69; *United States v. Monsanto*, 924 F.2d 1186, 1192 (2d Cir.1991) (en banc); *see also Gilbert v. Homar*, 520 U.S. 924, 932 (1997) ("So long as a suspended employee receives a sufficiently prompt post-suspension hearing, the lost income is relatively insubstantial"). But where the post-suspension hearing is "deficient" because it does not constitute prompt and meaningful review, the initial deprivation is necessarily "constitutionally infirm." *Barry*, 443 U.S. at 66.

This infirmity condemns the TLC practice here. The agency's post-suspension process, as described by the Findings, is meaningless. It is also far more dilatory in practice than the TLC rule might be read to suggest. "[T]he immediate period" before a driver can even obtain review is hardly brief. It includes not just the ten days for the TLC to schedule and conduct a hearing, but time for the ALJ to draft a recommendation and for chair review. Given how long it takes for the TLC hearing process to conclude—75 days for Stallworth, 123 days for Bhatti—along with the inevitability of that conclusion, the *Mathews* factors must be re-assessed. Absent prompt and meaningful review even post-suspension, the denial of *any* pre-deprivation opportunity to be heard must also be deemed unconstitutional.

II. THE TLC'S POST-SUSPENSION HEARING PROCESS, IN WHICH THE AGENCY CONTINUES TO REST ON THE FACT OF ARREST, AMOUNTS TO NO PROCESS AT ALL

A. The Post-Suspension Process is Based Entirely on Presumptions, Not Facts

While there is no set formula, "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 323 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Courts must "look to substance, not to bare form, to determine whether constitutional minimums have been honored." They must also assure that the hearing provided is "appropriate to the nature of the case." *Bell v. Burson*, 402 U.S. at 541-42 (quotation and citations omitted).

The TLC process, however elaborate, is tantamount to no process. The Findings establish that drivers never prevail at post-suspension hearings. They also identify the reason why: The agency does not merely infer an ongoing direct and substantial threat from a finding of probable cause to arrest, it disregards all evidence (not just evidence of innocence) that tends to establish the contrary. Indeed, the agency invariably discards ALJ determinations concluding that the driver poses no real threat.

B. All Three *Mathews* Factors Indicate a Denial of Due Process

1. A Cabdrivers has a Profound Interest in his Livelihood

A driver's interest in his license is not merely "sufficient to trigger due process protection," it "is profound." *Padberg*, 203 F.Supp.2d at 277. More than depriving drivers' abstract interest in "pursuing a particular livelihood," *Spinelli v. City of New York*, 579 F.3d 160, 171 (2d Cir.2009), the TLC's actions strike at "the very means" by which plaintiffs support their families. *See Goldberg v. Kelly*, 397 U.S. 254, 264 (1970); *Sniadach v. Family Finance Corp*., 395 U.S. 337, 341-342 (1969). What *Krimstock* recognized as an unusually compelling hardship—where a claimants depend on their vehicles to earn a living, 306 F.3d at 61—is true every time the TLC suspends a working driver.

As *Krimstock* and *Spinelli* instruct, heightened due process safeguards are required for provisional deprivations like those at issue here because a driver "'erroneously deprived of a license [is not] made whole' simply by reinstat[ement]." *Spinelli*, 579 F.3d at 171 (quoting *Tanasse v. City of St. George*, 172 F.3d 63 (10th Cir.1999)). As in *Krimstock*, "ultimate [reinstatement] … rendered months after the [suspension does] 'not cure the temporary deprivation that an earlier hearing might have prevented.'" 306 F.3d at 64 (quoting *James Daniel Good,* 510 U.S. at 56, and *Connecticut v. Doehr*, 501 U.S. 1, 15 (1991)). *Brown v. Dept. of Justice,* on which Judge Sullivan's 2009 opinion relied, makes

an equivalent point. It holds that "the nature of a suspension based solely on an employee's indictment demands … compensation for the loss of wages and benefits during the suspension period [of a] subsequently acquitted and reinstated employee." 715 F.2d 662, 668 (D.C. Cir.1983).

2. The Risk of Error of Suspending Driver whose Licensure Poses No Real Threat is Exceedingly High

It hardly needs saying that an arresting officer makes no determination that the driver's continued licensure while charges are pending poses a substantial threat. One assessment has essentially nothing to do with the other. *See Krimstock*, 306 F.3d at 53 ("warrantless arrest by itself does not constitute an adequate, neutral 'procedure' for testing the City's justification for continued and often lengthy detention of [an arrestee's] vehicle"); *United States. v. Cosme*, 796 F.3d. 226, 234 (2d Cir.2015) (distinguishing between probable cause to indict and forfeiture standards). It is, as this Court has effectively recognized, a vast and counterfactual leap that even someone guilty of a misdemeanor will offend (1) again in the future; (2) against a passenger; (3) while seeking to resolve a pending criminal charge. *See Krimstock*, 306 F.3d at 66 (noting that persons caught driving dangerously will have "regained sobriety on the morrow"). The gap between an officer's probable cause determination—likely based on a complainant's "one-sided" "version of [a] confrontation"—and factual guilt is similarly large. *See Connecticut v. Doehr*, 501 U.S. at 14 (highlighting "likelihood of error"); *Clark v. Astrue*, 602 F.3d 140, 147-

48 (2d Cir.2010) (rejecting government's policy of "treat[ing] something as true" based on "probable cause" finding). Indeed, the TLC disregards that the arresting officer issued that driver a DAT, reflecting his judgment that public safety did not require detention even at the moment of arrest.

Here, the Findings and post-trial admissions dramatically confirm the inaccuracy of the TLC's process for identifying drivers who pose a genuine threat: The TLC ultimately reinstates vast majority—75% or far more.[9] To be sure, this high rate of reinstatement does not establish that every suspension was wrongful. Sometimes the facts appear worse than they turn out (assuming the suspending agency, at some point, attempts to learn the facts, which the TLC never does). But reinstatement does represent the TLC's own judgment that the driver's continuing licensure does not pose a substantial danger, his prior arrest notwithstanding. And it defies common sense to suppose that many such individuals present a greater

[9] The TLC may argue, as it has, that some drivers do not report the disposition of their criminal charges. But even if half of the remaining 2,408 suspension-arrests resulted in convictions, the overall conviction rate would still be just 18%. Moreover, the conviction rate for all misdemeanors in New York City is also low: In 2012 just 20% of misdemeanor arrests resulted in a criminal conviction (with a slightly higher percentage being convicted of noncriminal infractions). Mayor's Office of the Criminal Justice Coordinator, Criminal Justice Indicator Report Summer 2013 at 4. http://www.nyc.gov/html/om/pdf/2013/criminal_justice_indicator_report_summer_2013.pdf. Thus, whatever the precise statistic, defendants' admissions—at the *Nnebe* trial, before the trial and since the trial—demonstrate a strong likelihood that a suspended driver will be reinstated, not revoked.

threat while charges are still pending than after they are resolved. That some favorable resolutions (which include acquittals and charge reductions) are not declarations of innocence only highlights this point: The TLC's own understanding is that even a driver who might have been factually guilty nevertheless poses no ongoing danger to passengers. *Compare Gilbert*, 520 U.S. at 927 (suspension remained in effect after "criminal charges were dismissed … [while police department employer] continued its own investigation"). Indeed, some (likely most) drivers who are eventually convicted—and whose licenses are then revoked—also would not have posed any actual threat during the interim period.

In *Valmonte v. Bane*, this Court concluded that the fact that "nearly 75% of those who seek to expunge their names from the list [of suspected child abusers] are ultimately successful … indicates that the initial determination made by the local [agency] is at best imperfect." 18 F.3d 992, 1004 (2d Cir.1994). The D.C. Circuit in *Brown v. DOJ* likewise held, "The final disposition of the charges is vitally important," because "a suspension based solely on the fact of an employee's indictment on job-related charges" is "[un]justified" when it does not "ripen into a termination." 715 F.2d at 669. *See also Furlong v. Shalala*, 238 F.3d 227, 237 (2d Cir.2001) (relying on "high rate of reversal[s]" to establish "the second *Mathews v. Eldridge* factor").

As *Krimstock* and *Nnebe* make clear, that an initial deprivation was arguably valid does not establish that its continuation is beyond constitutional concern. The *Nnebe* court's tentative conclusion that an initial summary suspension may be constitutionally permissible did not imply that its continuation was "correct." Rather, summary suspensions were held tolerable because the "minimal information" immediately at hand gave rise to "concern" that an individual might pose an ongoing threat and because suspension would enable the TLC to learn the facts before making its decision. 644 F.3d at 159. This was theory in *Gilbert*, too. The arrest of a police officer, whose conduct was observed by fellow officers, permitted a summary suspension, assuming there would be a "more comprehensive" and "sufficiently prompt" evidentiary investigation post-suspension. 520 U.S. at 929 and 932.

In actual practice, the TLC never investigates. And if facts are introduced at a hearing, the agency insists they are of no relevance. The "value of additional … procedural safeguards," *Mathews*, 424 U.S. at 335, is plainly greater here than in *Krimstock*. To focus, as Judge Sullivan does, on the fact that the *Krimstock* plaintiffs had been afforded "no" post-seizure hearing, 184 F.Supp.3d at 67, misses the point: *Krimstock* did not hold that due process was satisfied by just any interim hearing. This court, in three decisions, formulated a multi-part substantive standard that entitled motorists to contest the police officer's probable cause assessment and

the likelihood that the seizure would lead to forfeiture. It did so though forfeiture rates are far higher than the revocation rates here. *See* Acquaviva & McDonough, How to Win a Krimstock Hearing: Litigating Vehicle Retention Proceedings before New York's Office of Administrative Trials and Hearings, 18 Widener L.J. 23, 26 (2008). It so ruled even though probable cause assessments would seem unusually reliable in the *Krimstock* context as they were based on an officer's direct observation and on Breathalyzer tests. 306 F.3d at 47, 49, 62.

Judge Sullivan's 2016 decision brushes *Krimstock* aside as not "relevant"—though this Court had cited it repeatedly—suggesting that the decision was concerned with the rights of "innocent" owners. But that simply is not correct: Six of the seven named *Krimstock* plaintiffs were arrestees, and the mandated hearings are afforded all vehicle owners, not just non-drivers. 306 F.3d at 45-46. For all these reasons, the constitutionally relevant risk here—that an individual will suffer a continued deprivation even though allowing him to resume work would pose no real, substantial threat to public safety—is exceptionally high.

3. A Far More Fair and Accurate Process Could be Devised Without Additional Cost

Nnebe recognized the likelihood that "a meaningful hearing can be devised at minimal cost to the City that does not constitute a mini-trial on the criminal charges…. [yet] provide[s] … drivers considerably more opportunity to be heard than the current system." 644 F.3d at 162. This *Mathews* factor vividly condemns

the TLC's current practice. Indeed, any argument that a process that actually allowed for an assessment of facts underlying an arrest or the driver's record would be too unwieldy would contradict the TLC's repeated, though false, representations that they already provide such hearings.

This is the rare case where the considerations of cost and administration, usually stressed by governmental defendants, have no weight. The TLC's Potemkin process is not cheap. The problem for the City is not just that "[t]here is nothing inherently unattainable about a prediction of future criminal conduct." *Schall v. Martin*, 467 U.S. 253, 278 (1984). It is also that "procedures … [for] evaluat[ing] the likelihood of future dangerousness" are well known. *U.S. v. Salerno*, 481 U.S. 739, 742, 751 (1987). Indeed, ALJs have made such determinations in suspension cases. *See* Findings 11. Everything else aside, the TLC process would be made dramatically more accurate by taking the costless step of ending the categorical refusal to consider evidence already at hand that tends "to make a fact [danger] …less probable." Fed. R. Evid. 401(a).

This Court's recent decision in *Ferrari v. County of Suffolk*, 845 F.3d 46 (2d Cir.2017), another *Krimstock* progeny, underscores the point. *Ferrari* notes that a car owner contesting the seizure of his vehicle is constitutionally entitled to a hearing before a neutral magistrate. In *Krimstock* cases, the magistrate does not merely recommend, but rules. At that hearing, the magistrate must "determine

whether probable cause existed for the defendant's warrantless arrest." The TLC, by contrast, refuses to consider this factor. The *Krimstock* hearing magistrate must consider "whether the County is likely to succeed on the merits of the forfeiture action." Again, the TLC steadfastly resists any evidence that tends to show that the taxi driver is unlikely to have his license revoked. The county's process also considers "whether any other measures would better protect the County's interest." 845 F.3d at 50. The TLC, however, is adamant that suspension is the only option and will not consider whether any remedy short of suspension might be adequate.

The TLC has never offered any coherent explanation for its failure to provide meaningful protection (when not claiming it already does so). Often, defendants have changed the subject to the safety concerns they purport to advance. But "due process analysis" looks to the "reason … that justifies" the refusal to provide rights greater protection, not the interest purportedly served by the regulatory regime as a whole. *Kuck v. Danaher*, 600 F.3d 159, 164 (2d Cir.2010). And procedural Due Process rights have been vindicated in cases where public safety interests are far more compelling than here. *E.g.*, *Boumediene v. Bush*, 553 U.S. 733 (2008) (citing *Mathews* and concluding that process afforded accused terrorists had an unacceptably high risk of error); *Bailey v. Pataki*, 708 F.3d 391 (2d. Cir.2013) (vindicating convicted sex offenders' due process right to adversarial hearings prior to involuntary civil commitment). Loose assertions that

any risk to passengers is too great are at odds with the City Council mandate that only "direct and substantial" dangers support suspension as well as with the commonplace notion that we all—taxi drivers or anyone else—might do wrong at some time.

Even if the TLC's extraordinary presumption of guilt were not constitutionally suspect, it could not justify disregarding all other relevant evidence. Instead, it heightens the constitutional imperative for other protections. Like any rule excluding relevant evidence, the presumption is inherently "in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 & n.18 (1974). If factually innocent drivers are denied the opportunity to rely on such uniquely probative evidence, then Due Process demands, at a minimum, that they be afforded every other reasonable means to refute their dangerousness. *See Little v. Streater*, 452 U.S. 1, 2 (1981) (holding that in view of state's rule that "reputed father's testimony alone" could not overcome showing of paternity, Due Process required that State pay for exonerative blood-type testing).

D. A Meaningless Hearing Affords No Due Process

The TLC's affront to procedural Due Process is clear-cut. The post-suspension hearing never changes anything because, by design, it cannot: A driver whose licensure in fact does not pose a direct and substantial threat—and is so determined at the hearing the TLC provides—will still not be reinstated. A

"meaningless hearing is no hearing at all." *Los Angeles Sheriff Deputies v. County of Los Angeles*, 648 F.3d 986, 995 (9th Cir.2011). After the dust has settled, that is all the TLC offers.

One exchange, discussed during the *Nnebe* trial, between a TLC prosecutor and an OATH ALJ underscored this worthlessness. The ALJ, frustrated by a prosecutor's repeated assertions that the facts were "moot" and the driver's record "would be irrelevant," finally demanded: "What's the purpose of having [a hearing], why are we here?" The prosecutor's response: "Because he [the taxi driver] requested to have a hearing." Tr. 599-600.

Despite such admissions, Judge Sullivan spared the City from the full sting of his Findings. He suggested "three" ways that what he re-christened "the 'arrest-plus-nexus' standard" might enable reinstatement: if the driver is not the person arrested; if the charge for a listed offense is no longer pending; or if the driver persuades the chair that there is not an arguable "nexus" between the penal code provision cited and taxi driving. A-437-438. But this is not a standard "separate" from the one for ordering the suspension in the first place. It is the same standard applied a second time.

The first two "prongs" of the "arrest-plus-nexus" standard are self-evidently useless. A driver who is a victim of mistaken identity or who is no longer facing charges need not pursue a hearing. The TLC prosecutor may reverse a suspension

outside the hearing process in those circumstances (though hearing ALJs may not). Findings 8. The ostensible third "opportunity," to persuade the chair that there is no nexus, is chimerical. As Joshi testified, the TLC has already determined, "for every crime that's on this [unpublished TLC] list, there's some nexus…." A-97; *see also* A-437. The "chance" to persuade the TLC chair that a person presumed guilty of a listed crime "'could [not] possibly' pose a threat to public health or safety," A-118, is no chance at all.

Not only has the chair never discontinued a suspension on nexus grounds (or any other ground), the TLC has never acknowledged a close call. Asked to explain how public welfare misdemeanor allegations (and all felony allegations) invariably have a "nexus" to passenger safety, Fraser offered that any felony charge, if true, would establish a driver's "moral turpitude," which would suggest an inability to conform to rules generally, including rules barring assault on passengers. A-101. Thus, the TLC inevitably "concludes" that any offense relates somehow to passenger safety (or, when it is minding its language, that it establishes a "direct and substantial" threat).

E. Demonstration of a Direct and Substantial Threat Demands Individualized Evidence

While there is no case law on how to prove that a cabdrivers' licensure does or does not threaten public safety, courts in other contexts have required individualized evidence. In employment-disability litigation, for example, where it

is the defendant's burden to establish that a plaintiff poses a "direct threat" of harm to others, "that determination requires an individualized assessment of the [employee's] present ability ... based on medical or other objective evidence." *Hargrave v. Vermont*, 340 F.3d 27, 35-36 (2d Cir.2003) (internal citations and quotations omitted); *see also Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 85-86 (2002) ("The direct threat defense must be based on … an expressly individualized assessment …") (internal citations and quotations omitted). If the government seeks to deny a defendant bail, it "must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *Salerno*, 481 U.S. at 750-51.

In his 2016 decision, however, Judge Sullivan suggested that no individualized evidence—indeed no evidence—was necessary because the TLC rule looks to whether "the charge," not the person, is a threat. A-437-438. But this conclusion is directly at odds with what the City told this Court: that the TLC did not treat an arrest for a listed offense as "*per se* evidence" that a continued suspension was warranted. It also disregards that NYC Code § 19-512.1, the putative authority for the rule, requires a finding of "good cause" relating to "a direct and substantial threat to the public health or safety." Even as a matter of logic and grammar the conclusion makes no sense. A bomb or a gunman can be a threat. A charge cannot be. Finally, Judge Sullivan's conclusion that only the

charge is relevant plainly ignores the TLC rule requirement that the ALJ hear evidence. It ignores as well all the evidentiary factors he would have instructed the jury to consider—the facts and circumstances of the arrest, whether the driver was required to post bail and so on—he laid out in an order just days before the *Nnebe* trial commenced. A-70.

F. The TLC's Process is Irretrievably Broken

What a recent decision of this Court presented as self-evidently "incoherent"—to both "authorize a hearing and at the same time insist that no new findings or conclusions could be based on a record expanded as a consequence of a hearing"—is what Judge Sullivan found to be the TLC's standard operating procedure. *See Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 541 (2d Cir.2016). The process is one where prosecutors draft decisions for the chair playing the role of judge (Tr.100-101 (Hardekopf), 421 (Daus)) and where ALJs know that only one type of recommendation will be accepted. This blind adherence to pre-existing practice, however incoherent, goes deeper still: The entire arrest-suspension enterprise amounts to an ornate ritual but proceeds with complete indifference to evidence and the hardship inflicted on hard-working cabdrivers who the agency knows will be later reinstated.

G. OATH Hearings are also Constitutionally Defective

Because in the TLC's system ALJs lack authority to reinstate drivers on any ground, and because the practice the chair follows is disdainful of recommendations that favor drivers, the process provided at the ALJ hearing stage is of limited constitutional significance. That said, Judge Sullivan's apparent finding that OATH judges generally "seek to determine whether the particular suspended driver is, in fact, a direct and substantial threat to public health or safety," A-120, is erroneous. The OATH decisions cited are not representative, but aberrational. In fact, the vast majority of these decisions do not purport to make any individualized determination.

There are several explanations why most OATH judges have not made individualized determinations. But the most obvious is surely chair review. If a reinstatement recommendation based on careful fact-finding has no prospect of being accepted (it does not), the point of following that course would seem pointless. OATH ALJs have adjusted to that reality or contented themselves with airing doubts about whether their own hearings have any real purpose or meaning. *E.g.*, *TLC v. Riano*, A-364.

The shadow cast by the TLC chair's practice is longer and darker still. Success at an evidentiary hearing requires marshalling evidence, which entails commitment of resources and often assistance of counsel—and it requires that a

hearing occur. But as the *Nnebe* court recognized, 644 F.3d at 161, attorneys and advocates for drivers have largely and rationally concluded that, with chair review blocking the way, nothing can be gained from the post-suspension process. Indeed, Judge Sullivan found that OATH ALJs themselves advise drivers along those lines in pre-hearing conferences. A-121, n.8. There is thus no ground for assuming that rulings made under this fundamentally compromised regime, are in any way indicative of what would occur if OATH judges were truly permitted to make binding rulings based on evidence rather than presumptions.

III. THE TLC'S EXTRAORDINARY PRESUMPTION OF GUILT IS ITSELF UNCONSTITUTIONAL

While the *Nnebe* court agreed that the TLC was not required to conduct a mini-trial on the criminal charges, the Supreme Court's recent decision in *Nelson* strongly suggests that the TLC's effective presumption of guilt is itself a denial of Due Process. The TLC practice—even post-deprivation—is to bar consideration of a driver's assertion of innocence of the arrest charges. Indeed, the TLC insists it need not consider the possibility of innocence *as a factor* in determining whether the drive should be reinstated. A-123. In Stallworth's case, for example, the TLC general counsel faulted the ALJ for even contemplating "guilt or innocence." *Stallworth v. Joshi*, Case #17-3678, Dkt. #14-31.[10] ALJs likewise "presume that

[10] In his 2017 decision, Judge Sullivan denied that the TLC relies on a presumption of innocence. A-420 But that statement is belied by his findings. The 2017

the driver committed the crime with which he or she was charged." A-121. This presumption, essentially irrebuttable, is extraordinary given that the "presumption of innocence" is a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Nelson*, 137 S.Ct. at 1256 n.9.

In *Nelson*, the Colorado Supreme Court had rejected the petitioners' claims in a civil action for reimbursement of court costs and restitution in connection with their criminal convictions, reasoning that Colorado law permitted the state to retain the payments "unless and until the prevailing defendant institutes a discrete civil proceeding and proves her innocence by clear and convincing evidence." But Supreme Court reversed, holding that Colorado's regime did "not comport with due process." Seven Justices agreed that the claim—that a different procedure and a less burdensome evidentiary standard was required—sounded in procedural due process. In doing so, they squarely rejected the centerpiece of Justice Thomas's lone dissent that the petitioners' claim was one of "substantive due process." 137 S.Ct. at 1265; *see also* 137 S.Ct. at 1256 n.11. Six Justices agreed that the *Mathews* test governed. *See also United States v. Brooks*, 872 F.3d 78, 89 (2d Cir.2017)

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decision also cites *Kaley v. United States*, 134 S. Ct. 1090 (2015), as distinguishing *Nelson*, saying that in *Kaley,* the Court allowed the state to seize assets pre-trial based on a grand jury indictment, not a mere arrest. The TLC, of course, acts not on an indictment but an arrest and strips the driver of his livelihood in misdemeanor cases where there is no indictment. *See Krimstock*, 306 F.3d at 44 (noting that a misdemeanor charge requires no post-arrest determination of probable cause)

(*Nelson* decided "on the basis of due process"). Applying *Mathews*, the Court held that the risk of erroneous deprivation was high because the state conditioned refunds "on defendants' proof of innocence by clear and convincing evidence" instead of applying the presumption of innocence. 137 S.Ct. at 1260.

The TLC policy like the one struck down in *Nelson* is to presume that a driver who had been arrested but not tried, is guilty as charged. Without that presumption there is simply no basis for finding him a threat. Indeed, in cases involving DATs, the TLC presumes guilt where the driver has not yet been *arraigned*. Worse than in *Nelson*, the TLC essentially permits no rebuttal of that presumption through clear and convincing evidence or otherwise. This practice, even if justified pre-suspension, surely denies Due Process post-suspension.

IV. THE DISTRICT COURT'S SUBSTANTIVE DUE PROCESS THEORY IS CONTRARY TO *NNEBE* AND TO SUPREME COURT PRECEDENT AND, IN ANY EVENT, DEFENDANTS ARE BARRED FROM ADVANCING IT

A. The *Nnebe* Decision and Mandate Definitively Settled that Plaintiffs' Claims Sound in Procedural Due Process

Judge Sullivan concluded that the driver plaintiffs' claims sounded in substantive due process. That he reached this conclusion *sua sponte* for the first time in 2016 after 10 years of litigation makes it all the more remarkable. Even if it could be properly asserted, this theory defies the *Nnebe* mandate. *See U.S. v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir.2001). As *Ben Zvi* states, the mandate rule "compels

compliance on remand with the dictates of the superior court and forecloses re-litigation of issues expressly or impliedly decided by the appellate court." It also "prohibits the district court from reopening the issue on remand unless the mandate can reasonably be understood as permitting it to do so." *Id*.

The principal relief this Court awarded in *Nnebe* was to vacate the grant of "summary judgment on the plaintiffs' claim that the post-suspension hearing is inadequate." 644 F.3d at 160. The grounds for doing so were stated in a lengthy section of the opinion headlined "III. Procedural due process." *Id.* at 158-163. This section analyzed plaintiffs' claim under leading Circuit and Supreme Court procedural due process precedents. *Id.* at 162-63 & n.8.

There was no misunderstanding as to what the reinstated claim entailed. The *Nnebe* plaintiffs' briefs argued that a hearing process that disregards proof that a driver's licensure would not endanger the public is constitutionally deficient, citing the same kinds of evidence (*e.g.*, that the offense alleged was not work-related or that the driver had a stable family life) that would later appear in the district court's Jury Verdict Form.

This Court's opinion identified a "hearing" that went "beyond mere confirmation of identity and charge," *Id*. at 162, to be among the "procedural protections" that might be constitutionally required after "[b]alancing the *Mathews* [procedural due process] factors." *Id*. It indicated that the district court, by

assuming that the only alternative was a "mini-trial," took too blinkered a view of the "additional process" that *Mathews* requires courts to evaluate. *Id*. at 163.

Nnebe treats "due process protections" as synonymous with a driver's right to show that his continued licensure does not pose a threat to public safety and to introduce evidence enabling him to "prevail at a suspension hearing after an arrest" for a listed offense. *Id*. at 161 (emphasis added). This Court observed:

> Even a hearing at which the ALJ is permitted to examine the factual allegations underlying the arrest without making a determination of likely guilt or innocence would provide to drivers considerably more opportunity to be heard than the current system, because the ALJ might in some cases determine that th[os]e allegations, although arguably consistent with the criminal statute, do not provide any basis for finding the driver to be a threat to public safety. *Id*. at 163 (emphasis added).

Nnebe makes clear the legal significance of the factual question it remanded. Directing the district court to determine whether defendants had a practice "*de facto* or *de jure*, [of not] considering anything other than the identity of the driver and the offense for which he was charged," the decision can only be read to foreclose any ruling that a fact-of-arrest hearing process would then be deemed the "substantive standard" by which plaintiffs' constitutional rights would be measured.

This understanding of the *Nnebe* mandate prevailed in the district court throughout the lengthy remand proceedings. Towards the end of that process, the district court's Jury Verdict Form provided for specific determinations about

whether the TLC's post-suspension process "meaningfully considered" specific types of evidence such as whether the driver had been released without bail. The district court recognized at that time that consideration of these factors was critical to due process. Thus it warned that defendants' failure "even [to] suggest any factors that an ALJ or the TLC Chair can consider beyond the fact of arrest" would make "a directed verdict [for plaintiffs]… inevitable."

B. Supreme Court Precedent Also Establishes that Plaintiffs' Claims Sound In Procedural, Not Substantive, Due Process

Supreme Court precedent likewise rebuffs the notion that procedural due process rights are limited to an opportunity to present only the evidence the government agrees to consider *de facto*. Instead, procedural due process decisions dating back decades and the recent decision in *Nelson* have invalidated "standards," whether codified in state law or carried out in practice, by which individuals are deprived of property or liberty. The Court has also held that procedural due process sometime requires promulgation of substitute standards and entirely new types of hearing.

In *Nelson*, the Supreme Court barred the state from imposing a burden of proof of innocence by clear and convincing evidence and required instead that it act based on the presumption of innocence. 137 S.Ct. at 1256. In *Bell v. Burson*, the Court held that the state's consideration of only the magnitude of damages claimed, and its failure to consider the likelihood of liability, denied drivers a

meaningful opportunity to be heard. 402 U.S. at 540-41. In *Valmonte*, this Court required a different and more demanding standard of proof for listing an individual on a state registry of child abusers. 18 F.3d at 1002. In *Krimstock*, this Court ordered hearings that state law did not require and new promulgated standards. 306 F.3d at 68-70.

This case is in every constitutionally significant respect unlike the cases on which Judge Sullivan relied. In *Reno v. Flores*, 507 U.S. 292 (1993), no individualized process was "due" because the Supreme Court held that the plaintiffs were not "deprived" of any protected liberty interest. *Conn. Dep't of Pub. Safety* expressed grave doubt that publication of a factually accurate registry recording prior sex offense convictions could be a deprivation of a legal right. 538 U.S. at 6-7; *see also Paul v. Davis*, 424 U.S. 693 (1976) (reputational harm standing alone not actionable under § 1983). Here, the TLC does not merely announce the driver's arrest; it also indisputably denies him a constitutional right.

Judge Sullivan's further suggestion that "the dangerousness of an individual driver" is "irrelevant" under the TLC "scheme," A-436, as it was in *Conn. Dep't of Pub. Safety* is even more wrong. The statute at issue there did not purport to determine that a person required to register as a sex offender posed an ongoing threat. It just disclosed their prior sex-crime conviction, stating explicitly that the department "has made no determination that any individual included in the registry

is currently dangerous." 538 U.S. at 2. Here, by contrast, a danger finding is the focal point of the entire regime. The determination that driver's arrest is "proof enough" that he poses a threat is reminiscent of Colorado's conclusion that an exonerated defendant is still "guilty enough" to deny reimbursement. It is this conclusion that *Nelson* rejected.

Judge Sullivan's premise—treating whatever process the government provides as determinative of what process is due—is precisely the error the Supreme Court warned against in *Cleveland Bd. of Educ. v. Loudermill*: The Constitution's safeguards "would be reduced to a mere tautology" if the same officials who deprive individual of property could determine what procedures are "due." 470 U.S. 532, 541 (1985); *see also Vitek v. Jones*, 445 U.S. 480, 491 (1980) (Due Process rights not "diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action"). The focus on whether TLC's practice may be squared with the text of its rule is thus misguided. As *Nnebe, Bell, and Nelson* all make clear, the TLC practices could deny procedural due process "whether *de facto* or *de jure*." 644 F.3d at 161.

C. Forfeiture and Judicial Estoppel Preclude Any Arguments about Substantive Due Process

Even if it had merit, any attempt by defendants to advance Judge Sullivan's substantive due process argument would be barred by the law of forfeiture and

judicial estoppel. Judicial estoppel precludes a litigant from adopting a new position where (1) its "later position is clearly inconsistent with its earlier position," (2) the former position was "adopted in some way by the court in the earlier proceeding," and (3) the "party asserting the two positions would derive an unfair advantage against the party seeking estoppel." *DeRosa v. Nat'l Envelope Corp*., 595 F.3d 99, 103 (2d Cir.2010) (citing *New Hampshire v. Maine*, 532 U.S. 742, 749 (2011)). This doctrine bars the City from adopting Judge Sullivan's position here. The *Nnebe* defendants secured a remand by insisting that the TLC adhered to the "regulatory standard" enacted by rule and statute. They cannot now change their stance, concede the falseness of their prior position and propose a new one.

Defendants have also forfeited the argument that an arrest-plus-philosophical nexus hearing was consistent with Due Process. They made no argument about "nexus" at all. They must be held to their prior position. As Judge Friendly wrote in *Fogel v. Chestnutt*, "It would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost." 668 F.2d 100, 108-09 (2d Cir.1981).

V. ENFORCEMENT OF AN ARREST-PLUS-NEXUS STANDARD DENIES DRIVERS FAIR WARNING OF THE LAW

While the City represented in *Nnebe* that it allowed individual drivers a real opportunity at an evidentiary hearing to show that their reinstatement did not jeopardize public safety, arrests notwithstanding, and while Joshi testified that her chair reviews were "holistic," the Findings establish that both statements were false. The *de facto* regulatory standard, Judge Sullivan found, countenanced both a suspension and its continuation based on a purely legal "arrest-plus-nexus" test. The nexus question, moreover, was not factual, but "philosophical." A-119. That being the case, defendants have denied drivers fair warning of the law, which is also an element of Due Process.

In *SEC v. Sloan*, a case concerning the summary suspension of trading in a security, the Court called "the power to summarily suspend …without any notice, opportunity to be heard, or findings based upon a record" an "awesome power with a potentially devastating impact" and said that a "clear [legislative] mandate" was necessary to confer it. 436 U.S. 103, 112 (1978). As this Court held in *Rothenberg v. Daus*, which involved the same defendants as here, "Even in the civil regulatory context … we cannot defer to [an agency's] interpretation of its rules if doing so would penalize an individual who has not received fair notice of a regulatory violation." 2012 WL 1970438 (2d Cir.2012) (internal quotation omitted).

A few weeks later, the Supreme Court ruled even more emphatically in *FCC v. Fox Television Stations, Inc*., 132 S.Ct. 2307 (2012). The Court held:

> A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment. It requires the invalidation of laws that are impermissibly vague.… [A] regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because *it is unclear as to what fact must be proved*. 132 S.Ct. at 2317 (internal citations, quotations and parentheticals omitted, emphasis added).

Nothing in the text of the TLC rule, including the cryptic "if true" language, indicates that a driver could not meaningfully assert that the arrest charges are not in fact "true." The rule's language does not state or suggest that the TLC would not consider the driver's work history, his lack of criminal record or that the alleged offense was off-duty. A driver familiar with the adjudications chapter of the TLC rules might comprehend that his license could be suspended on an arrest, but he would never imagine that there was, in fact, no chance of reinstatement before the criminal case was fully resolved. By enforcing *de facto* policies and practices by which it continued the suspension of the plaintiffs' licenses, the TLC violated this fundamental principle. Thus defendants denied drivers "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictat[ing] that a person receive fair notice not only of the 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).

CONCLUSION

The Constitution envisions an equipoise between power and responsibility. Defendants exercise their power, denying plaintiffs' their critical important property rights, without knowledge or inquiry. Then, when the time comes to temper their actions with a reasoned assessment of facts and evidence, defendants fail utterly. For this fundamental reason and for all the particular reasons stated, this Court should reverse the district court's judgment and mandate judgment for plaintiffs.

Dated: New York, New York
March 28, 2018

/s/_____
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CERTIFICATE OF COMPLIANCE

As counsel of record for Appellant, I hereby certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. I am relying upon the word count of the word-processing system used to prepare this brief, which indicates that 13,894 words appear in this brief.

Dated: New York, New York
March 28, 2018

/ s / Daniel L. Ackman/
Attorney(s) for Appellant

SPECIAL APPENDIX

Order of Hon. Richard J. Sullivan Granting Dismissal (Feb. 1, 2018) [SA.2-3]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTHONY STALLWORTH, *individually and on behalf of all others similarly situated, et al.*,

Plaintiffs,

-v-

MEERA JOSHI *et al.*,

Defendants.

No. 17-cv-7119 (RJS)
ORDER

RICHARD J. SULLIVAN, District Judge:

On September 20, 2017, Plaintiffs filed this action and sought a temporary restraining order and a preliminary injunction. (Doc. Nos. 1, 5.) The next day, the Court denied Plaintiffs' request for a temporary restraining order and set a briefing schedule for their request for a preliminary injunction, which was fully briefed on October 6, 2017. (Doc. No. 15.) On October 24, 2017, Defendants moved to dismiss the complaint for the same reasons that they opposed the preliminary injunction. (Doc. No. 21.) The Court denied Plaintiffs' request for a preliminary injunction on November 22, 2017. (Doc. No. 31.)

The Court is now in receipt of a letter from Plaintiffs, dated January 31, 2018, in which Plaintiffs state they are "withdrawing their opposition to the [City's] motion to dismiss." (Doc. No. 36.) Specifically, Plaintiffs suggest that the Court's prior decisions foreclose their claims. (*Id.* (*citing Friedrichs v. Cal. Teachers Ass'n*, No. SACV 13-676-JLS, 2013 WL 9825479, at *2 n.3 (C.D. Cal., Dec. 5, 2013)).) The Court agrees. Accordingly, for the reasons stated in the Court's November 22, 2017 Order (Doc. No. 31) and the Court's opinion in *Nnebe v. Daus*, 184 F. Supp. 3d 54 (S.D.N.Y. 2016), IT IS HEREBY ORDERED THAT Defendants' motion to dismiss is

granted. The Clerk of Court is respectfully directed to terminate the motions pending at docket numbers 21 and 26 and to close this case.

SO ORDERED.

Dated: February 1, 2018
New York, New York

RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE

Order of Hon. Richard J. Sullivan Denying Preliminary Injunction (Nov. 22, 2017) [SA.4-18]

individually and on behalf of all others similarly situated et al.

et al

(the "TLC"), alleging that the TLC's policy of summarily suspending a taxi driver's license upon arrest for any felony charge or certain enumerated misdemeanor charges violates the United States Constitution and the New York State Constitution. (Doc. No. 1 ("Compl.").) Specifically, Plaintiffs contend that (1) taxi licenses are improperly suspended without a pre-deprivation hearing; (2) suspensions occur pursuant to a "sham" post-deprivation hearing; (3) the post-deprivation hearings do not require the TLC to make findings sufficient to justify suspension; (4) Plaintiffs had insufficient notice of what evidence they could present at the post-deprivation hearings they were afforded; and (5) Plaintiffs had insufficient warning of the standard the TLC would employ at post-deprivation hearings.

On the same day that he filed his complaint, Plaintiff Anthony Stallworth also filed a motion for a temporary restraining order and preliminary injunction reinstating his license – which was suspended upon his arrest for one of the enumerated misdemeanors – pending the outcome of

this lawsuit. (Doc. Nos. 3, 5.) On September 20, 2017, the Court held a conference at which it denied Stallworth's motion for a temporary restraining order and set a briefing schedule on the motion for a preliminary injunction, which was fully submitted on October 26, 2017 (Doc. Nos. 5, 15, 17, 20, 23). For the reasons that follow, Stallworth's motion for a preliminary injunction is DENIED.

I. BACKGROUND

A. Regulatory Framework

The New York City Administrative Code authorizes the TLC to "suspend or revoke" a license upon a showing of "good cause" relating "to a direct and substantial threat to the public health or safety." NYC Admin. Code § 19-512.1(a). The TLC may suspend a license "prior to giving notice and an opportunity for a hearing" so long as a driver is provided with notice and the opportunity for a hearing promptly after the suspension. *Id*.; *see also Nnebe v. Daus*, 184 F. Supp. 3d 54, 57 (S.D.N.Y. 2016) (setting forth the regulatory regime that governs license suspensions). Specifically, the TLC must notify drivers of a summary suspension within five days and hold a hearing within ten days of a driver's request for a hearing "unless the [TLC] . . . determines that such hearing would be prejudicial to an ongoing criminal or civil investigation." NYC Admin. Code § 19-512.1(a).

Pursuant to its authority to implement provisions of the Code through rules and regulations, *see id*. § 19-503, the TLC has promulgated a rule identifying the circumstances under which a taxi driver's license may be summarily suspended after that driver has been arrested (the "Rule"). The current version of the Rule is codified at Chapter 68 § 68-15 of the Rules of the City of New York and provides:

(d) *Summary Suspension for Criminal Charges*.

> (1) The Chairperson [of the TLC] can summarily suspend a License based upon an arrest or citation if the Chairperson believes that the charges, if true, would demonstrate that continued licensure would constitute a direct and substantial threat to public health or safety. Such charges include but are not limited to the following:
>
> (A) Any arrest for a crime which constitutes a felony;
>
> (B) Or any arrest or citation for the following offenses:
>
> [A list of eighteen categories of misdemeanor offenses.]
>
> (2) The Chairperson need not commence revocation proceedings while the criminal charges are pending. However, the Respondent is entitled to request a Summary Suspension hearing.
>
> (3) At the Summary Suspension hearing, the issue will be whether the charges underlying the Licensee's arrest, if true, demonstrate that the continuation of the License while awaiting a decision on the criminal charges would pose a direct and substantial threat to public health or safety.

R.C.N.Y. § 68-15(d) (Nov. 2017). Plaintiffs' complaint primarily challenges the final provision, which has been referred to as the "arrest-plus-nexus" standard in related litigation. *See Nnebe*, 184 F. Supp. 3d at 59.

B. Anthony Stallworth's License Suspension

On or about August 4, 2017, Anthony Stallworth's taxi license was suspended after he was arrested for leaving the scene of an accident. (Compl. ¶ 15, 87.) Stallworth requested a hearing, which was held on August 18, 2017 in front of an Administrative Law Judge ("ALJ"). (*Id.* ¶ 88.) ALJs, who are part of the Office of Administrative Trials and Hearings, are authorized to conduct hearings and to make recommendations to the Chairperson, who thereafter issues a final decision in the matter. (Doc. No. 9-1 at 4–5.) At Stallworth's hearing, the TLC prosecutor presented evidence to the ALJ establishing that Stallworth was a TLC licensee and that he had been arrested for a class "A" misdemeanor listed in the Rule, Leaving the Scene of a Personal Injury Accident. (*Id.* ¶ 89); (Doc. No. 23-1 at 1). The TLC prosecutor provided no additional evidence, arguing instead that the "pending charge in and of itself" was sufficient to warrant suspension under the

Rule. (Compl. ¶ 99.) On September 26, 2017, after reviewing the documentary evidence submitted by Stallworth and the TLC, the ALJ concluded that the City "did not prove that continued suspension of [Stallworth's] TLC license is necessary to protect the public" and recommended to the TLC Chairperson that Stallworth's license be reinstated. (Doc. No. 9-1 at 7.) However, on October 18, 2017, the TLC Chairperson declined to adopt the ALJ's recommendation and notified Stallworth via letter that his license would remain suspended pending "the final outcome of [his] criminal case." (Doc. No. 23-1 at 2.) Writing on behalf of the TLC Chairperson, the Deputy Commissioner stated that the legal standard applied by the ALJ was "incorrect" because the ALJ looked beyond the fact of Stallworth's arrest and the nature of the charges and instead weighed the evidence of Stallworth's guilt on the pending criminal charges. (*Id.*) According to the Deputy Commissioner, the ALJ "must determine whether there is a safety risk to the public *if the charges are substantiated*, not the licensee's guilt or innocence based upon the circumstances underlying the arrest." (*Id.* at 1–2 (emphasis added).)

Stallworth's license remains suspended. On October 24, 2017, Stallworth submitted an affidavit to the Court detailing the financial hardships that he has endured since his taxi license was suspended in August. (Doc. No. 20-1.) Stallworth explained that although he has been able to sublease his taxi medallion to cover its cost, he has been unable to earn any additional income due to the ongoing suspension of his license. (*Id.* ¶ 6.) He approximates that he has lost $18,000 in income since his suspension in August 2017. (*Id.* ¶7.) In addition, Stallworth asserts that he is behind on utility payments and has been served with a petition for non-payment of rent. (*Id.* ¶ 9, 10.) Finally, Stallworth alleges that he has been unable to pay tuition at the Borough of Manhattan Community College and has therefore had to cease his coursework in computer technology. (*Id.* ¶11.) Stallworth's next court date is presently set for January 4, 2018, at which point his license

will have been suspended for 153 days. (*Id.* ¶8.) Stallworth does not claim that he has been unable to obtain, or even sought, alternative employment.

II. LEGAL STANDARD

Stallworth seeks a preliminary injunction requiring the reinstatement of his license, but he must satisfy an especially exacting standard in light of the nature of the government action he challenges and the kind of preliminary injunction he seeks. A party seeking a preliminary injunction must ordinarily establish "(1) irreparable harm; (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party; and (3) that a preliminary injunction is in the public interest." *York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015) (citing *Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154, 164 (2d Cir. 2011)). That standard is itself difficult to satisfy. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (describing a preliminary injunction as an "extraordinary remedy never awarded as of right"). Here, however, Stallworth seeks "to enjoin government action 'taken in the public interest pursuant to a statutory or regulatory scheme,'" so he "cannot resort to the 'fair ground for litigation' standard, but is required to demonstrate irreparable harm and a likelihood of success on the merits." *Metro. Taxicab Bd. of Trade v. City of New York*, No. 08-cv-7837 (PAC), 2008 WL 4866021, at *3 (S.D.N.Y. Oct. 31, 2008) (citing *Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir. 1996)) (TLC is "government agency acting in the public interest"). Thus, Stallworth must show a likelihood of success on the merits and may not fall back on the less demanding "fair ground for litigation" standard for a preliminary injunction.

Moreover, Stallworth seeks reinstatement of his license rather than preservation of the status quo. The Second Circuit has held that in cases where a plaintiff seeks an injunction that will alter rather than maintain the status quo during the pendency of litigation, "an even higher standard

applies." *Jolly*, 76 F.3d at 473. That "higher standard" requires Stallworth to make a "clear" or "substantial" showing of a likelihood of success before a preliminary injunction may issue. *E.g.*, *Tom Doherty Assocs., Inc. v. Saban Ent., Inc.*, 60 F.3d 27, 33–34 (2d Cir.1995) ("[A] mandatory injunction," which is an injunction that "alter[s] the status quo by commanding some positive act," is proper "only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief."). Thus, the "clear" or "substantial" showing requirement "alters the traditional formula by requiring that the movant demonstrate a *greater* likelihood of success." *Id.* at 34 (emphasis added).

In addition to establishing a "clear" or "substantial" likelihood of success on the merits, Stallworth must of course demonstrate that he will be irreparably harmed if the Court does not issue an injunction reinstating his license. That showing, an "absolute requirement for a preliminary injunction," *Holt v. Cont'l Group, Inc.*, 708 F.2d 87, 90 (2d Cir. 1983) (citing *Triebwasser & Katz v. Am. Tel. & Tel. Co.*, 535 F.2d 1356, 1359 (2d Cir. 1976)), requires a plaintiff to identify a non-speculative "injury for which a monetary award cannot be adequate compensation," *Javarai v. Scappini*, 66 F.3d 36, 39 (2d Cir. 1995) (citations omitted). Absent "extraordinary circumstances," irreparable harm "is not established by loss of income or position, or the inability to find other employment." *Shady v. Tyson*, 5 F. Supp. 2d 102, 109 (E.D.N.Y. 1998) (citing *Holt*, 708 F.2d at 90–91). Put simply, if the harm alleged is compensable at a later date by money damages, "the plaintiff must quite literally find [himself] being forced into the streets or facing the spectre of bankruptcy before a court can enter a finding of irreparable harm." *Id.* (citing *Williams v. State Univ. of N.Y.*, 635 F. Supp. 1243, 1248 (E.D.N.Y.1986)); *Wisdom Imp. Sales Co. v. Labatt Brewing Co.*, 339 F.3d 101, 113–14 (2d Cir. 2003) ("[O]nly harm shown to be non-compensable in terms of money damages provides the basis for awarding injunctive relief.");

Borey v. Nat'l Union Fire Ins. Co., 934 F.2d 30, 34 (2d Cir. 1991) ("[W]hen a party can be fully compensated for financial loss by a money judgment, there is simply no compelling reason why the extraordinary equitable remedy of a preliminary injunction should be granted.").

III. DISCUSSION

A. Clear or Substantial Likelihood of Success on the Merits

In *Nnebe v. Daus*, this Court addressed at length the legal questions presented in Stallworth's complaint and held that the TLC's practice of "summarily suspending a taxi driver's license upon notification of the driver being charged with a crime" does not violate the United States Constitution. 184 F. Supp. 3d at 57. Because Stallworth's arguments are substantially the same as those presented and rejected in *Nnebe*, Stallworth must identify a change in controlling law or facts relevant to the constitutionality of the TLC's suspension policy.[1] Stallworth has failed to do so, and therefore his constitutional claims are unlikely to be successful for the reasons already articulated by the Court in *Nnebe*.

1. Pre-deprivation Hearing

Stallworth first argues that "the TLC's practice of suspending drivers without a hearing of any kind is a denial of due process." (Doc. No. 5 at 17.) He argues that the constitutionality of the TLC's policy of summarily suspending licenses without a *pre-deprivation* hearing depends on access to a meaningful post-deprivation hearing. (*Id.*) And, according to Stallworth, because the post-deprivation hearing is a "sham," the TLC must provide a pre-deprivation hearing. (*Id.* at 17–20.) As Stallworth acknowledges, an identical argument for a pre-deprivation hearing was rejected by this Court in its original summary judgement order in *Nnebe*. *See* 665 F. Supp. 2d 311, 323–25 (S.D.N.Y. 2009). The Second Circuit subsequently agreed that "insofar as the post-suspension

[1] Further confirming the identity of issues, Stallworth devotes the bulk of his submissions to attacking *Nnebe* itself, rather than advancing arguments that distinguish his case from *Nnebe*. (*E.g.*, Doc. No. 5 at 37–39.)

hearing affords adequate process, no pre-suspension hearing is required," and, although the panel declined at that time to rule on whether the "arrest-plus-nexus" standard represented "adequate process," 644 F.3d 147, 159 (2d Cir. 2011), the Court thereafter reaffirmed its holding that the "arrest-plus-nexus" standard constitutes sufficient post-deprivation process, thus obviating any requirement of a pre-deprivation hearing, 184 F. Supp. 3d at 69. Stallworth argues, essentially, that the Court's latest decision in *Nnebe* was wrong in light of the Court's finding that the TLC in fact employed the stringent "arrest-plus-nexus" standard. But Stallworth points to no intervening change in law or facts that "demand" the "reconsideration" of *Nnebe* that he admittedly seeks. (Doc. No. 5 at 18.) To be sure, Stallworth was not a party to *Nnebe* and may press his claims independently. But in light of the Court's holding in *Nnebe* that the TLC's post-deprivation hearings are constitutionally sufficient, Stallworth is unlikely to be successful on the merits of his claim for a pre-deprivation hearing in *this* case.

2. The TLC's Alleged "Presumption of Guilt"

Stallworth next argues that the TLC's arrest-plus-nexus standard amounts to a "presumption of guilt [that] is itself unconstitutional." (Doc. No. 5 at 20.) Here, Stallworth relies on *Nelson v. Colorado*, 137 S. Ct. 1249 (2017), a case decided after the Court's decision in *Nnebe*, in which the Supreme Court confronted a legal regime – created by Colorado's Compensation for Certain Exonerated Persons statute – that required an exonerated defendant whose property had been forfeited upon conviction to institute a discrete civil proceeding and prove his innocence by clear and convincing evidence before he could reclaim conviction-related assets. *Id.* at 1252. The Supreme Court concluded that the scheme was unconstitutional, citing the "axiomatic and elementary" proposition that "the presumption of innocence 'lies at the foundation of our criminal law.'" *Id.* at 1255–56 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)). Ultimately, though, the Court's holding relied on the balancing test articulated in *Mathews v. Eldridge*. 424

U.S. 319 (1976). Applying *Mathews*, the Court determined that because Colorado "has no interest in withholding from [exonerated defendants] money to which the State currently has zero claim of right," the individuals could not be required to prove their innocence by clear and convincing evidence before the state was obliged to return their forfeited property. *Nelson*, 137 S. Ct. at 1257.

Stallworth's reliance on *Nelson* is misplaced. Specifically, Stallworth cites *Nelson* for the proposition that "a hearing process premised on a presumption of guilt denies due process for that reason alone," and continues on to characterize the TLC's post-deprivation hearings as proceedings that "presume that an arrested driver, who has never even been tried, is guilty as charged." (Doc. No. 5 at 20–21.) But *Nelson* is a case "concern[ing] the continuing deprivation of property after a conviction has been reversed or vacated, with no prospect of reprosecution," *id.* at 1255, whereas Stallworth's claims pertain to the process that is due to a taxi driver whose license has been suspended during the interim period between his arrest and conviction. Put simply, *Nelson* would be apt if, in order to have his license suspension lifted, the TLC required Stallworth to prove his innocence by clear and convincing evidence *after* he had already been adjudged not guilty in criminal court. The Supreme Court's reasoning in *Nelson* rested heavily on the fact that "once [the individuals'] convictions were erased, the presumption of their innocence was restored." *Id.* (citing *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988)). Without the conviction, there was no authority for the state to retain the property; as Justice Ginsburg clearly articulated, "the risk [at issue in *Nelson*] is not the risk of wrongful or invalid conviction . . . . It is, instead, the risk faced by a defendant whose conviction has already been overturned that she will not recover funds taken from her solely on the basis of a conviction no longer valid." *Id.* at 1257. That risk – of the state *permanently* retaining property to which it has no claim – is not the same risk facing taxi drivers during the interim period between arrest and final adjudication of their criminal case.

More fundamentally, there is no "presumption of guilt" underlying the TLC's suspension policy. In fact, the "arrest-plus-nexus" standard eschews any presumption or determination of guilt, instead asking simply whether the charges, *if* substantiated, "demonstrate that the continuation of the License while awaiting a decision on the criminal charges would pose a direct and substantial threat to public health or safety." R.C.N.Y. § 68-15(d). Stallworth conflates the suspension policy's reliance on the fact of arrest – which itself signifies *probable cause* to believe that the driver committed the crime for which he was arrested – with a "presumption of guilt." On that final point, Stallworth ignores that probable cause findings have long been held sufficient to justify post-arrest, pre-adjudication interim forfeitures exactly like the suspension of the taxi license here. *See United States v. Monsanto*, 491 U.S. 600 (1989).

Indeed, the Supreme Court's recent decision in *Kaley v. United States*, 134 S. Ct. 1090 (2015), is particularly instructive on this point. In that case, defendants were indicted and their forfeitable assets were seized in order to preserve them in the event they were ultimately convicted at trial. Like Stallworth, the *Kaley* defendants claimed they were entitled to a hearing at which they could challenge the facts underlying their indictment, i.e., a hearing at which the defendant could argue "the possibility" that they were "not guilty." The Supreme Court rejected their attempt to re-litigate the grand jury's probable cause finding during the period between indictment and final disposition of the criminal proceedings, even though the deprivation in that case infringed on the defendants' ability to hire counsel of their choosing – a right enshrined in the Sixth Amendment. *Id*. at 1105. In sum, Stallworth's attempt to drum up a new precedent that undermines the Court's decision in *Nnebe* is unconvincing.

3. "Arrest-Plus-Nexus" Standard

Stallworth devotes the majority of his brief to arguing, as the plaintiffs did in *Nnebe*, that "the TLC's post-suspension hearing process, which considers neither the facts surrounding the

suspension nor the driver's record, is inconsistent with due process of law." (Doc. No. 5 at 22.) Stallworth invokes the *Mathews* test, asserting that "all three *Mathews* factors indicate a denial of due process." (*Id.* at 23.) However, the Court addressed all of the *Mathews* factors in *Nnebe* and concluded that they did not tip in favor of the plaintiffs in that case. 184 F. Supp. 3d at 61–69. Stallworth does not even attempt to argue that his situation is distinguishable from that of the plaintiffs in *Nnebe*; in fact, at the conference on September 20, 2017, counsel for Stallworth admitted that his brief in support of Stallworth's motion for a preliminary injunction "takes a lot from the appeals brief" filed in the *Nnebe* litigation. (Doc. 10 at 3.) Thus, for the same reasons previously articulated by the Court in *Nnebe*, Stallworth cannot demonstrate a likelihood of success on the merits for his claim that the TLC's suspension policy violates procedural due process under the *Mathews* test.

4. Fair Warning

Stallworth also argues that "if arrest-plus-nexus is the *de facto* standard, the TLC denied drivers fair warning of the law." (Doc. No. 5 at 36.) Again, that same argument was considered and rejected by the Court in *Nnebe*. *See* 184 F. Supp. 3d at 74. The Court found that the letters mailed to drivers notifying them of the suspension of their license adequately cited the Rule, thus providing the drivers with notice of the standard to be applied at the hearing. *Id*. As the Court recognized, the *Nnebe* plaintiffs "effectively conceded that everyone now knows the standard, which is why so few drivers demand hearings." *Id*. (citation omitted). Thus, the Court held that "the notice provided to suspended taxi drivers after December 2006" – the time at which the standard was added to the text of the Rule – "is constitutionally adequate." *Id*. Stallworth is again unable to point to any intervening change in law or fact that undermines the Court's previous conclusion. For that reason, he has failed to demonstrate a clear and substantial likelihood of success on the merits of his notice claim.

5. Substantive Due Process

Finally, Stallworth rehashes the argument advanced in support of his motion for a Temporary Restraining Order, that the Court in *Nnebe* improperly applied the standard for a substantive due process violation when "Plaintiffs' claims, as the Second Circuit has held, sound in procedural due process, not substantive due process." (Doc. No. 5 at 37.) But that argument misses the mark for the simple reason that the Court's discussion of substantive due process was an alternative holding prompted by the *Nnebe* plaintiffs' apparent misapprehension of their own arguments. Nevertheless, the Court in *Nnebe* expressly found that "the TLC's post-suspension hearing does not violate procedural due process." 184 F. Supp. 3d at 69. Therefore, even if Stallworth is correct that his claims are not properly characterized as sounding in substantive due process, that conclusion is simply irrelevant in light of the Court's holding in *Nnebe* that the TLC's license suspension policy did not violate the Constitution's procedural due process protections.

B. Irreparable Harm

In addition to failing to demonstrate a "clear" and "substantial" likelihood of success on the merits, Stallworth has also failed to demonstrate irreparable harm, as he must before he is entitled to a preliminary injunction. *Oneida Nation of N.Y.*, 645 F.3d at 164. A plaintiff who suffers an injury that is remediable at a later date upon an award of monetary damages does not face irreparable harm absent "extraordinary circumstances." To be sure, Stallworth claims that he is losing significant income, that he is behind on utility payments, that he is unable to make his rent payments, and that he has ceased coursework in computer technology because he cannot afford tuition payments. While it is "possible that the consequences of job loss" such as those cited by Stallworth "could rise to the level of irreparable harm," courts generally have concluded that "the situation would have to be extraordinary, [and] at least one court has suggested that a plaintiff would have to show little or no chance of securing future employment, no personal or

family resources, and the inability to finance a loan or obtain public assistance." *Cooper v. TWA Airlines, LLC*, 274 F. Supp. 2d 231, 241 (E.D.N.Y. 2003) (citing *Pinckney v. Bd. of Educ. of Westbury Union Free Sch. Dist.*, 920 F. Supp. 393, 401 (E.D.N.Y. 1996)); *accord Shady*, 5 F. Supp. 2d at 109. Here, Stallworth has not demonstrated any impediment to his procuring other gainful employment while his license is suspended, nor has he alleged that he has even attempted to find interim work to cover his financial obligations.

Stallworth nonetheless relies on *Padberg v. McGrath-McKechnie*, in which Judge Dearie concluded that "any loss that threatens the continuing viability of a party's business [is] an irreparable harm." 108 F. Supp. 2d 177, 182 (E.D.N.Y. 2000) (citing *Tom Doherty Assocs., Inc.*, 60 F.3d at 37). The Court is unpersuaded by the reasoning in that case. As explained in *Tom Doherty Associates*, the narrow exception to the general rule that harm compensable by monetary damages is not irreparable developed in cases where the moving party established that an entire business would be "obliterated." *Tom Doherty Assocs., Inc.*, 60 F.3d at 37. In essence, the exception acknowledges that "the right to continue a business 'is not measurable entirely in monetary terms.'" *Id.* (quoting *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1205 (2d Cir. 1970)). But the suspension of Stallworth's license does not "threaten the continuing viability" of his business; indeed, Stallworth himself acknowledges that he has been able to sublease his taxi medallion and he does not allege that he is in danger of losing it. So, far from being "obliterated," the value of the medallion has been maintained and its costs have even been recouped by Stallworth.

Moreover, an injunction is proper only when the claimed financial hardships will be difficult to calculate at trial, which is often the case when an entire business is forced to close. *Tom Doherty Assocs., Inc.*, 60 F.3d at 38. By contrast, the Second Circuit has "reversed a finding

of irreparable harm where the facts demonstrate . . . only provable monetary damages from the loss of a profitable line of business." *Id*. (citation omitted). Here, Stallworth has already articulated the total monetary damages he expects to incur in light of the suspension, thus negating any claim that the damages are uncalculatable. (Compl. ¶7, 8.)

Taking a different approach, Stallworth claims that because he alleges a deprivation of a constitutional right, "no further showing of irreparable injury is necessary." (Doc. No. 5 at 44 (citing *Bery v. City of New York*, 97 F.3d 689, 694 (2d Cir. 1996).) But an allegation of a constitutional violation is not a magic wand that can be waved to conjure up irreparable harm. *See Abish v. Nw. Nat. Ins. Co.*, 924 F.2d 448, 453 (2d Cir. 1991) ("In determining whether irreparable harm exists, the critical inquiry is not whether the [plaintiff's] rights are lost, but whether the loss of those rights will cause serious or irreparable harm."). To be sure, the Second Circuit has concluded that an alleged violation of a constitutional right itself may in some cases constitute irreparable harm sufficient to justify injunctive relief. But those cases are wholly inapposite here, where Stallworth alleges a procedural due process violation. In fact, Stallworth relies exclusively on cases where the alleged constitutional violations implicated substantive rights touching on conditions of confinement, speech regulations, and the like – cases, in other words, where the alleged violations by their very nature could not be easily remedied by after-the-fact monetary damages. *See Charette v. Town of Oyster Bay*, 159 F.3d 749, 755 (2d Cir. 1998) (First Amendment challenge to permitting regulation); *Bery*, 97 F.3d at 694 (First Amendment challenge to licensing requirement); *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992) (Fourth Amendment challenge to body cavity searches in prison). Put simply, notwithstanding Stallworth's allegations of a procedural due process violation, he has failed to demonstrate an "irreparable" injury that justifies

the drastic relief he seeks – a mandatory injunction compelling the TLC to reinstate his currently suspended license.

IV. CONCLUSION

In light of Stallworth's inability to show a clear or substantial likelihood of success on the merits of his claims and his failure to demonstrate irreparable harm caused by the suspension of his license pending resolution of his criminal case, Stallworth's motion for a preliminary injunction is DENIED. The Clerk of Court is respectfully directed to terminate the motion pending at docket number 20.

SO ORDERED.

Dated: November 22, 2017
New York, New York

RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE

KeyCite Yellow Flag - Negative Treatment
Distinguished by Pierre v. New York City Taxi and Limousine Commission, E.D.N.Y., April 19, 2017

184 F.Supp.3d 54
United States District Court,
S.D. New York.

Jonathan **Nnebe**, et al., Plaintiffs,
v.
Matthew **Daus**, et al., Defendants.

No. 06–cv–4991 (RJS)
|
Signed April 28, 2016

Synopsis
Background: Taxicab drivers and non-profit organization brought putative class action against municipality, municipal officials, and others, alleging that municipality's policy of summarily suspending drivers' taxicab licenses upon notification of drivers being charged with certain crimes violated federal constitution, state law, and municipal law. Bench trial was held, and findings of fact were issued, 2014 WL 3891343.

Holdings: The District Court, Richard J. Sullivan, J., held that:

[1] drivers had protected due process property interest in their taxi licenses;

[2] post-suspension hearing that city afforded to drivers who had their licenses suspended did not violate procedural due process;

[3] city did not violate drivers' substantive due process rights; and

[4] suspension notices given by city taxi and limousine commission to drivers were constitutionally inadequate.

Ordered accordingly.

West Headnotes (20)

[1] **Constitutional Law**
Hearings and adjudications

Due process is fully applicable to adjudicative proceedings conducted by state and local government administrative agencies. U.S. Const. Amend. 14.

Cases that cite this headnote

[2] **Constitutional Law**
Egregiousness; 'shock the conscience' test
Constitutional Law
Duration and timing of deprivation; pre- or post-deprivation remedies

Due Process Clause's substantive component protects against government action that is arbitrary, conscience-shocking, or oppressive in constitutional sense, while its procedural component ensures that, before person is deprived of life, liberty, or property, he is provided constitutionally adequate procedures. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[3] **Constitutional Law**
Duration and timing of deprivation; pre- or post-deprivation remedies

In evaluating claim for denial of procedural due process, court must consider: (1) whether plaintiff possessed liberty or property interest protected by United States Constitution or by statute; and if so, (2) what process was due before plaintiff could be deprived of that interest. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[4] **Constitutional Law**
Benefits, rights and interests in

Property interests protected by Due Process Clause are created and their dimensions are defined by existing rules or understandings that stem from independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. U.S. Const. Amend. 14.

Cases that cite this headnote

[5] **Constitutional Law**
Licenses, permits, and certifications in general

While person does not have protected interest in possible future license, since that involves purely speculative property interest, once government has granted business license to individual, government cannot deprive individual of such interest without appropriate procedural due process safeguards. U.S. Const. Amend. 14.

Cases that cite this headnote

[6] **Constitutional Law**
Notice and Hearing

Touchstone of procedural due process is requirement that person in jeopardy of serious loss be given notice of and opportunity to respond to case against him. U.S. Const. Amend. 14.

Cases that cite this headnote

[7] **Constitutional Law**
Duration and timing of deprivation; pre- or post-deprivation remedies

In determining whether procedures provided by government before deprivation of protected interest satisfy with due process, court should consider: (1) private interest that will be affected by official action; (2) risk of erroneous deprivation of such interest through procedures used, and probable value, if any, of additional or substitute procedural safeguards; and (3) government's interest, including function involved and fiscal and administrative burdens that additional or substitute procedural requirement would entail. U.S. Const. Amend. 14.

Cases that cite this headnote

[8] **Constitutional Law**
Procedural due process in general

In evaluating procedural due process claim, question that court must ask is whether governmental entity provides adequate procedures for party to challenge whether applicable substantive standard has been met. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[9] **Constitutional Law**
Notice and Hearing

As matter of procedural due process, hearing must accord plaintiff opportunity to prove or disprove particular fact or set of facts when, and only when, fact in question is relevant to inquiry at hand. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[10] **Constitutional Law**
Notice and Hearing

Procedural due process does not require government agency to provide party with individualized hearing where purpose of such

hearing would be to address fact not relevant to applicable substantive inquiry; instead, procedural due process only requires that individual be granted opportunity to prove or disprove facts relevant to substantive standard selected by legislature. U.S. Const. Amend. 14.

Cases that cite this headnote

[11] **Automobiles**
In General; Grounds
Constitutional Law
Taxicabs and limousines

Taxi drivers whose licenses had been summarily suspended following their arrests had protected due process property interest in their taxi licenses, where licenses had already been issued at time of suspension and, pursuant to city's rules and regulations, city taxi and limousine commission did not have unfettered discretion to revoke or suspend taxi drivers' licenses. U.S. Const. Amend. 14.

Cases that cite this headnote

[12] **Automobiles**
Administrative procedure in general
Constitutional Law
Taxicabs and limousines

Post-suspension hearing that city afforded to taxi drivers who had their licenses suspended after felony or serious misdemeanor arrest did not violate procedural due process, even though hearing did not permit driver to provide individualized evidence of lack of dangerousness, where only relevant fact in suspension decision was nature of charged crime, and hearing afforded driver opportunity to contest whether he was actually person charged with crime and/or whether crime charged was among those identified by city as one that implicated public health or safety. U.S. Const. Amend. 14; R.C.N.Y. § 68–15(d).

Cases that cite this headnote

[13] **Constitutional Law**
Levels of scrutiny; strict or heightened scrutiny

Substantive due process forbids government to infringe certain fundamental liberty interests at all, no matter what process is provided, unless infringement is narrowly tailored to serve compelling state interest. U.S. Const. Amend. 14.

Cases that cite this headnote

[14] **Constitutional Law**
Egregiousness; 'shock the conscience' test

Where fundamental right is not implicated, substantive due process protects against government action that is arbitrary, conscience-shocking, or oppressive in constitutional sense, but not against government action that is incorrect or ill-advised. U.S. Const. Amend. 14.

Cases that cite this headnote

[15] **Constitutional Law**
Rights and interests protected; fundamental rights

For right to be afforded constitutional protection under substantive component of Due Process Clause, alleged interest must be fundamental, and one traditionally protected by society. U.S. Const. Amend. 14.

Cases that cite this headnote

[16] **Automobiles**
Administrative procedure in general
Constitutional Law

Taxicabs and limousines

Taxi driver who was arrested and charged with crime did not have fundamental right to have suspension of his license lifted pending resolution of his criminal case, and thus city taxi and limousine commission's refusal to permit taxi drivers who had their licenses suspended after felony or serious misdemeanor arrest to challenge suspensions on basis of individualized evidence of lack of dangerousness did not violate drivers' substantive due process rights; suspension of taxi drivers facing felonies or certain misdemeanor charges furthered governmental purpose of protecting public health and safety. U.S. Const. Amend. 14; R.C.N.Y. § 68–15(d).

Cases that cite this headnote

[17] **Constitutional Law**
Notice

Elementary and fundamental requirement of due process in any proceeding that is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of pendency of action and afford them opportunity to present their objections. U.S. Const. Amend. 14.

Cases that cite this headnote

[18] **Constitutional Law**
Notice

Notice must do more than simply inform aggrieved party of his entitlement to hearing; rather, in order to satisfy requirements of procedural due process, notice must adequately inform party as to what critical issues of hearing will be, for purposes of permitting party to present his objections. U.S. Const. Amend. 14.

Cases that cite this headnote

[19] **Automobiles**
Administrative procedure in general
Constitutional Law
Taxicabs and limousines

Notices given by city taxi and limousine commission to taxi drivers whose licenses were summarily suspended following their arrests for enumerated crimes did not provide drivers with sufficient information necessary to prepare meaningful objections or meaningful defense, and thus were constitutionally inadequate as matter of procedural due process, where notices did not convey to drivers that they would be allowed, and encouraged, to make arguments that went beyond arrest-plus-nexus standard. U.S. Const. Amend. 14; R.C.N.Y. § 68–15(d).

1 Cases that cite this headnote

[20] **Injunction**
Persons entitled to apply; standing

To have standing to seek injunctive relief, plaintiffs must prove that there is continuing violation or real risk of same type of violation in future.

Cases that cite this headnote

Attorneys and Law Firms

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Mary O'Sullivan and Amy Weinblatt of the New York City Law Department, Office ***57** of the Corporation Counsel, 100 Church Street, New York, New York 10007, for Defendants.

MEMORANDUM AND ORDER

Richard J. Sullivan, District Judge:

Plaintiffs Jonathan **Nnebe**, Eduardo Avenaut, and Khairul Amin, together with the New York Taxi Workers Alliance ("Plaintiffs"), bring this putative class action against Defendants Matthew **Daus**, Charles Fraser, Joseph Eckstein, Elizabeth Bonina, the New York City Taxi and Limousine Commission (the "TLC"), and the City of New York (the "City") (collectively, "Defendants"), alleging that the TLC's policy of summarily suspending a taxi driver's license upon notification of the driver being charged with a crime violates the United States Constitution, New York state law, and New York City municipal law. (Doc. No. 42.) Having held a bench trial in this action, and having issued findings of fact as required by Rule 52(a) of the Federal Rules of Civil Procedure (*see* Doc. No. 323 (the "Findings of Fact")), the Court hereby issues its Conclusions of Law. Collectively, this Memorandum and Order and the Findings of Fact form the Court's bench opinion as to Plaintiffs' constitutional claims. For the reasons set forth below, the Court finds that the notice provided by the TLC with respect to summary post-suspension hearings held prior to December 2006 violated the procedural component of the Due Process Clause of the United States Constitution. In all other respects, the Court finds that Plaintiffs have failed to prove their constitutional claims.

I. BACKGROUND

The Court presumes the parties' familiarity with the facts and long history of this case, which are set forth in detail in the Findings of Fact. Put briefly, the TLC summarily suspends the taxi licenses of taxi drivers who are arrested on criminal charges that the TLC considers serious. Ordinarily, a driver's license is suspended when he has been arrested for a certain crime found on a list maintained by the TLC. That list includes all felonies and certain misdemeanors related to violence, driving, or sexual misconduct.

Currently, the TLC derives its authority to summarily suspend taxi drivers' licenses from § 19–512.1(a) of the New York City Administrative Code, which authorizes the TLC to (1) suspend a license "prior to giving notice and an opportunity for a hearing" for "good cause shown relating to a direct and substantial threat to the public health or safety," and (2) "suspend or revoke" a license "after notice and an opportunity for a hearing." NYC Admin. Code § 19–512.1(a). The provision also requires the TLC to notify drivers of a summary suspension within five days and to hold a hearing within ten days of a driver's request for a hearing, "unless the [TLC] ... determines that such hearing would be prejudicial to an ongoing criminal or civil investigation." *Id.* Pursuant to its authority to implement provisions of the Code through rules and regulations, *see id.* § 19–503, the TLC has promulgated a rule delineating the circumstances under which a taxi driver's license may be suspended after that driver has been arrested (the "Rule"). The current version of the Rule is codified at Chapter 68 § 68–15 of the Rules of the City of New York. *See* R.C.N.Y. § 68–15(d) (Nov.2014).

As relevant, the current version of the Rule provides:

> (d) Summary Suspension for Criminal Charges.
>
> (1) The Chairperson [of the TLC] can summarily suspend a License based upon an arrest or citation if the Chairperson believes that the charges, if true, would demonstrate that continued licensure would constitute a direct ***58** and substantial threat to public health or safety. Such charges include but are not limited to the following:
>
> (A) Any arrest for a crime which constitutes a felony;
>
> (B) Or any arrest or citation for the following offenses:
>
> [A list of eighteen categories of misdemeanor offenses.]
>
> (2) The Chairperson need not commence revocation proceedings while the criminal charges are pending. However, the Respondent is entitled to request a Summary Suspension hearing.
>
> (3) At the Summary Suspension hearing, the issue will be whether the charges underlying the Licensee's arrest, if true, demonstrate that the continuation of the License while awaiting a decision on the criminal charges would pose a direct and substantial threat to public health or safety.

R.C.N.Y. § 68–15(d) (Nov.2014).[1]

Plaintiffs in this action are taxi drivers in New York City who have had their licenses suspended by the TLC on the basis of having been charged with a crime. In essence,

Plaintiffs object to the TLC's decision to suspend their licenses without a pre-suspension hearing and without extending the scope of a *post*-suspension hearing to an individual assessment of whether continued licensure of the particular driver poses a risk to public safety. Specifically, each named Plaintiff is a taxi driver whose license was suspended in 2005 or 2006, after an arrest. Plaintiff **Nnebe** was charged with third-degree assault with intent to cause physical injury, Plaintiff Avenaut with third-degree assault with intent to cause physical injury, Plaintiff Amin with second-degree menacing with a weapon and third-degree assault with intent to cause physical injury, and Plaintiff Alexander Karmansky with first-degree criminal contempt and second-degree criminal trespass. *See* ***Nnebe*** *v.* ***Daus*** (“***Nnebe*** *II*”), 644 F.3d 147, 153 (2d Cir.2011).[2] Plaintiffs were each summarily suspended upon arrest, and with the exception of Avenaut, who did not request a post-deprivation hearing, each received a post-suspension hearing before an administrative law judge (“ALJ”). The outcome at each hearing was the same—that is, the ALJ recommended the continued suspension of the driver's license pending resolution of the criminal proceedings against the driver, and the TLC Chairperson (**Daus**) accepted the ALJ's recommendation. All four drivers eventually secured the reinstatement of their licenses when the charges against them were dropped or otherwise dismissed. In each driver's case, his license was suspended for approximately three to four months.

On September 30, 2009, the Court entered summary judgment in favor of Defendants on Plaintiffs' due process claims, ***59** finding that (1) the TLC's policy of suspending a license without first affording the driver a hearing did not violate procedural due process, (2) the agency's post-suspension hearing also did not violate procedural due process, (3) these summary suspension procedures did not violate Plaintiffs' substantive due process rights, and (4) Plaintiffs had fair and adequate notice that they faced suspension if arrested for certain crimes. ***Nnebe*** *v.* ***Daus*** (“***Nnebe*** *I*”), 665 F.Supp.2d 311, 325–26, 330–33 (S.D.N.Y.2009). On March 25, 2011, the Second Circuit affirmed the Court's conclusion that no pre-suspension hearing was necessary to comply with the Due Process Clause, but vacated ***Nnebe*** *I* and remanded to the Court “to conduct additional fact-finding, in the manner it deems appropriate, to determine whether the *post*-suspension hearing the City affords does indeed provide an opportunity for a taxi driver to assert that, even if the criminal charges are true, continued licensure does not pose any safety concerns.” ***Nnebe*** *II,* 644 F.3d at 163 (emphasis added). On July 8, 2011, the Second Circuit issued its mandate (Doc. No. 163), pursuant to which the Court directed the parties to submit additional declarations, affidavits, and supplemental memoranda of law regarding their cross-motions for summary judgment *(see* Doc. No. 190). The Court also held oral argument and allowed the parties to file post-argument submissions. (*See* Doc. No. 209.) Thereafter, the Court denied the parties' post-remand cross-motions for summary judgment in ***Nnebe*** *v.* ***Daus*** (“***Nnebe*** *III*”), No. 06–cv–4991 (RJS), 2013 WL 4494452 (S.D.N.Y. Aug. 22, 2013).

Between January 13 and 21, 2014, the Court held a bench trial on the issue identified by ***Nnebe*** *II*—that is, the standard actually applied at post-suspension hearings. The Court issued its Findings of Fact on August 7, 2014. In the Findings of Fact, the Court found that although ALJs—who constitute the first level of review for a driver contesting his or her suspension—have employed different standards at various times in the last decade, the TLC Chairperson, who is vested with the ultimate authority to determine whether a taxi driver's license suspension should continue, has consistently considered *only* whether (a) the suspended driver has been charged with a crime, (b) the charge is still pending, and (c) the underlying charges, if true, are sufficiently connected to public health or safety. (*See* Findings of Fact at 2, 12); *see also* R.C.N.Y. § 68–15(d)(3). The Court will refer to this substantive standard as the “arrest-plus-nexus” standard, and it is this standard that the TLC actually employs at post-suspension hearings.

In determining whether there is a sufficient nexus between the charged crime on the one hand, and public health or safety on the other, the TLC Chairperson considers only the statutory elements of the crime charged, and does not look to the particularized facts underlying the charges or any facts relating to the individual characteristics of the driver. (Findings of Fact at 12.) Indeed, as the Court found in the Findings of Fact, the TLC maintains a list of offenses—specifically, all felonies and certain misdemeanors—for which it will summarily suspend a driver upon arrest. In essence, this list captures those offenses that the TLC views as “constitut[ing] a direct and substantial threat to public health or safety.” R.C.N.Y. § 68–15(d) (listing specific crimes that the TLC has deemed as satisfying the arrest-plus-nexus standard). Thus, if the crime with which a driver is charged is on this list, that is sufficient for purposes of the nexus inquiry.

With respect to the notice given to drivers of a suspension and their right to a post-suspension hearing to challenge it, the Court found that drivers whose licenses ***60** have been suspended receive two notices in the mail from the TLC, and that at least one of those notices references the

Rule pursuant to which the license has been suspended. (Findings of Fact at 8–9.) However, the Court also found that neither notice on its face contains the actual standard applied at post-suspension hearings—that is, the arrest-plus-nexus standard. *(Id.)* Moreover, neither notice reflected the different considerations employed by ALJs at different times. Specifically, with respect to hearings prior to November 2007, the Court found that TLC ALJs actively encouraged drivers to argue anything that they wanted, "including that they were not a threat to public health or safety or that they were innocent," so that "those arguments could be included in the record," despite the fact that the TLC Chairperson never meaningfully considered those factors when deciding whether a suspension should be continued. (*Id.* at 10.) Since November 2007, however, the TLC's post-suspension hearings have been held before ALJs employed by the Office of Administrative Trials and Hearings ("OATH"). With respect to these hearings, the Court found that "although OATH ALJs presume that the driver committed the crime with which he ... was charged, ... they also consider evidence beyond the charge, such as the driver's character and the likelihood of recurrence," and that, under this standard, although the number of recommendations to lift a suspension remains low, "drivers are more likely to receive a recommendation that a suspension be lifted than was the case before TLC ALJs." (*Id.* at 11.) In addition, both before and after November 2007, the Court found that once the ALJ makes its recommendation, the TLC mails the driver a copy of the recommendation and notifies the driver that he may submit to the TLC Chairperson a written response to the recommendation, which "must be limited solely to any exceptions or objections [the driver] ha[s] to the conclusions contained in the [recommendation]," and that "[n]o evidence outside of the hearing record can be considered." (*Id.*) Moreover, the Court determined that, like the TLC's prior suspension notices, this letter does not inform drivers of the arrest-plus-nexus standard to be applied by the TLC Chairperson. (*Id.* at 11–12.)

With respect to the TLC Chairperson's final review of summary suspensions, the Court found that the Chairperson has never lifted a suspension where the driver was charged with one of the TLC's enumerated offenses. (*See id.* at 10–14.) Similarly, the Court determined that in the relatively few instances in which ALJs recommended that a driver's license be restored for reasons other than dismissal of the underlying charge, the TLC Chairperson rejected that recommendation. (*See id.*)

At the conclusion of the Findings of Fact, the Court directed the parties to submit briefing as to the legal implications of the facts found on Plaintiffs' due process claims. Thus, on October 3, 2014, Plaintiffs submitted a post-trial memorandum of law in support of their claims. (Doc. No. 338 ("Pl.Mem.").) On November 14, 2014, Defendants filed their response (Doc. No. 347 ("Def.Mem.")), and the issue was fully briefed following Plaintiffs' November 21, 2014 reply (Doc. No. 348). On December 5, 2014, the Court held oral argument. (Doc. No. 349.) Thereafter, the Court received a number of supplemental letters from the parties, including: (1) a post-argument letter from Plaintiffs, dated January 7, 2015; (2) Defendants' response, dated January 10, 2015; (3) a letter from Plaintiffs, dated January 30, 2015, informing the Court of a "recent TLC decision" issued on November 14, 2014; (4) a letter from Plaintiffs, dated April 28, 2015, raising new claims with respect to the March 2015 suspension of an individual (Mr. Youcef Yazli) who is not a party to this action; ***61** and (5) Defendants' response, dated May 1, 2015. (Doc. Nos.351–55.)[3] In addition, the parties submitted dueling letters—dated September 8, 2015, September 17, 2015, September 22, 2015, October 6, 2015, and October 14, 2015—regarding recent decisions by the Second Circuit and another court in this District that Plaintiffs claim lend support to their due process arguments. (Doc. Nos.356–60.)

II. Discussion

[1] [2]The Due Process Clause of the Fourteenth Amendment provides that "[n]o state shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Due process "is fully applicable to adjudicative proceedings conducted by state and local government administrative agencies." *N.Y.S. Nat'l Org. for Women v. Pataki,* 261 F.3d 156, 163 (2d Cir.2001). Due process has both a substantive component and a procedural component. *See Pabon v. Wright,* 459 F.3d 241, 250 (2d Cir.2006). The substantive component "protects against government action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense," *Kaluczky v. City of White Plains,* 57 F.3d 202, 211 (2d Cir.1995), while the procedural component ensures that, before a person is deprived of life, liberty, or property, he is provided "constitutionally adequate procedures," *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 541, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

Here, Plaintiffs principally rely on procedural due process in arguing that (1) the TLC provided constitutionally inadequate notice because the agency's letters to suspended taxi drivers do not explain what evidence would be relevant to the post-suspension hearing; and (2)

Defendants refused to take into account whether the drivers posed a "genuine, substantial, and ongoing" threat to public health or safety in determining whether to continue or lift their suspensions. (Pl. Mem. at 57.) Nevertheless, because parts of Plaintiffs' arguments drift into considerations that appear to sound in *substantive* due process, the Court will address Plaintiffs' claims under both the procedural and substantive components of the Due Process Clause.

A. Whether *Procedural* Due Process Requires an Individualized Determination of Dangerousness

Plaintiffs' primary argument is that procedural due process requires an individualized assessment of a driver's actual dangerousness in order to justify the continued suspension of a taxi driver's license. Specifically, Plaintiffs argue that the TLC, at a minimum, must "demonstrate by a preponderance of the evidence" that allowing a particular driver to continue to hold his license pending resolution of his criminal charge represents a "genuine, substantial and ongoing threat to public health or safety." (*Id.*) Thus, according to Plaintiffs, procedural due process demands that the scope of the TLC's post-suspension hearing extend to a consideration of whether an individual driver personally poses a risk to the public.[4] In assessing this argument, the ***62** Court will first discuss the legal principles underlying procedural due process before applying that standard to the facts of this case.

1. Legal Standard: Procedural Due Process

[3]The procedural component of the Due Process Clause "provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures." *Loudermill,* 470 U.S. at 541, 105 S.Ct. 1487. Thus, in evaluating a claim for a denial of procedural due process, a court must consider two questions: (1) "whether the plaintiff possessed a liberty or property interest protected by the United States Constitution or ... [by] statute[ ]"; and if so, (2) "what process was due before the plaintiff could be deprived of that interest." *Green v. Bauvi,* 46 F.3d 189, 194 (2d Cir.1995).

[4] [5]As to the first question, property interests do not spring from the Constitution. *See, e.g., Bd. of Regents of State Colls. v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Rather, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* Moreover, the Supreme Court has determined that, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it.... He must, instead, have a legitimate claim of entitlement to it." *Id.* Accordingly, with respect to licenses, while a "person does not have a protected interest in a possible future ... license," since that "involves a purely speculative property interest," once "the government has granted a business license to an individual, the government cannot deprive the individual of such an interest ... without ... appropriate procedural safeguards." *Spinelli v. City of New York,* 579 F.3d 160, 169 (2d Cir.2009) (alterations and citation omitted). Thus, in *Barry v. Barchi,* the Supreme Court found that the respondent "clear[ly] ... had a property interest in his [horse trainer] license sufficient to invoke the protection of the Due Process Clause," given that, "[u]nder New York law," such a license could only be suspended "upon proof of certain contingencies," and not "at the discretion of the racing authorities." 443 U.S. 55, 64 & n. 1, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979); *see also, e.g., Spinelli,* 579 F.3d at 169 (recognizing that plaintiff had a "property interest in [her] gun dealer license" sufficient "to invoke the protection of the Due Process Clause" where "the City did not have unfettered discretion" to revoke or suspend the license (citation omitted)).

[6]Once a court finds that a plaintiff has a protected property interest, it must then turn to the second question and determine what process is due before the plaintiff may be deprived of that interest. This question as to what the "minimum procedural requirements" are in a given case is "a matter of federal law." *Ciambriello v. Cty. of Nassau,* 292 F.3d 307, 319 (2d Cir.2002) (citation omitted). That is to say, "[t]he Constitution, not state law sources ..., determines what process is due." *Id.* As a matter of federal law, the "touchstone" of procedural due process is "the requirement that a person in jeopardy of serious loss [be given] notice of" and an "opportunity" to respond to "the case ***63** against him." *Spinelli,* 579 F.3d at 169 (alteration in original) (quoting *Mathews v. Eldridge,* 424 U.S. 319, 348–49, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)); *see also Bd. of Regents of State Colls.,* 408 U.S. at 592 n. 7, 92 S.Ct. 2701 ("While many controversies have raged about ... the Due Process Clause, ... it is fundamental that except in emergency situations ... due process requires that when a [s]tate seeks to terminate a protected interest ..., it must afford notice and opportunity for [a] hearing appropriate to the nature of the

case before the termination becomes effective." (alterations and citation omitted)). Moreover, the notice and opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Fuentes v. Shevin,* 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (citation omitted). "However, due process is flexible and calls for such procedural protections as the particular situation demands." *Spinelli,* 579 F.3d at 170 (citation omitted); *see also Gilbert v. Homar,* 520 U.S. 924, 930, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997) (noting that due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances"). Thus, in any given circumstance, procedural due process requires a hearing that is "meaningful" and "appropriate to the nature of the case." *Bell v. Burson,* 402 U.S. 535, 541–42, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971) (citations omitted).

[7] [8] [9]In determining the adequacy of the procedures given and the need for additional process, courts must consider the following three factors identified by the Supreme Court in *Mathews v. Eldridge:*

> First, 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 finally, the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335, 96 S.Ct. 893. In applying the second factor, the relevant consideration is "the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions." *Id.* at 344, 96 S.Ct. 893. Moreover, in assessing *procedural* due process, the underlying substantive standard must be accepted as a given. *See Conn. Dep't of Pub. Safety v. Doe,* 538 U.S. 1, 7, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003); *see also Mathews,* 424 U.S. at 343, 96 S.Ct. 893 ("Central to the evaluation of any administrative process is the nature of the relevant inquiry."). Thus, the factors identified in *Mathews* for evaluating procedural due process all focus solely on the adequacy of the procedure—that is, the hearing necessary to vindicate the substantive standard—and not the fairness of the standard itself. *See* 424 U.S. at 341–49, 96 S.Ct. 893. By contrast, substantive due process considers the fairness of the underlying standard and not the adequacy of the procedures used to implement that standard. Consequently, in evaluating a procedural due process claim, the question a court must ask is whether the governmental entity provides adequate procedures for a party to challenge whether the applicable substantive standard has been met. As a matter of *procedural* due process, the hearing must "accord the plaintiff [the opportunity] to prove or disprove a particular fact or set of facts" when, and *only* when, "the fact in question" is "relevant to the inquiry at hand." *Conn. Dep't of Pub. Safety,* 538 U.S. at 7, 123 S.Ct. 1160. Thus, although the determination of what process is due before a property right may be impaired is a constitutional ***64** question, the requirements as to the *factual scope* of the hearing required are bound up with the applicable substantive standard. Put simply, a person being deprived of a liberty or property interest has a procedural due process right to challenge the existence or non-existence of certain facts if, and only if, such facts would be relevant to the underlying substantive standard.

This point is well-illustrated by the Supreme Court's decision in *Connecticut Department of Public Safely v. Doe.* There, the Supreme Court analyzed the constitutionality of Connecticut's sex offender registry law, which required the plaintiff to publicly register as a sex offender based solely on the fact of his conviction and not on a showing of dangerousness to the community. Like Plaintiffs here, the plaintiff in that case argued that he was not in fact dangerous and that the statute therefore deprived him of a liberty interest without due process. *See Conn. Dep't of Pub. Safety,* 538 U.S. at 6–7, 123 S.Ct. 1160. Rejecting this argument, the Supreme Court determined that, under the substantive standard established by the Connecticut law, "even if [the plaintiff] could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information of all sex offenders—currently dangerous or not—must be publicly disclosed." *Id.* at 7, 123 S.Ct. 1160 (emphasis omitted). The Supreme Court therefore found that procedural due process "d[id] not entitle [the plaintiff] to a hearing to establish a fact"—such as his dangerousness (or lack thereof)—"that [was] not material under the Connecticut statute." *Id.* Accordingly, the Supreme Court concluded that, unless the plaintiff "c[ould] show that [the] *substantive* rule of law [was] defective (by conflicting with a provision of the Constitution), any hearing on current dangerousness [would be] a bootless exercise," and that the plaintiff's claim was "actually a substantive challenge to Connecticut's statute 'recast in procedural due process terms.' " *Id.* at 7–8, 123 S.Ct. 1160 (quoting *Reno v. Flores,* 507 U.S. 292, 308, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993)).

The Second Circuit recently came to the same conclusion in *Doe v. Cuomo,* 755 F.3d 105 (2d Cir.2014), which, like *Connecticut Department of Public Safety,* addressed constitutional challenges to a state sex offender registration statute. In *Cuomo,* the plaintiff—a convicted sex-offender subject to the challenged statute's registration requirements—had filed a petition in state court seeking relief from those requirements on the ground that he did not in fact pose a danger to the community. *See* 755 F.3d at 112–13. The state court denied the plaintiffs petition, noting that the statute "required level-one offenders like [the plaintiff] to remain registered for a minimum period of twenty years without providing any avenue for relief from registration," and that the plaintiff had only been registered for ten years. *Id.* at 109. In challenging the state statute in federal court, the plaintiff claimed that he was deprived of procedural due process because his petition was denied "without a hearing or other opportunity to show that he was not a danger to the community." *Id.* at 113. The Second Circuit rejected this argument, finding that "[a]ll of the facts necessary to conclude" that the plaintiff was subject to the statute's registration requirements were "known and unchallenged" when the plaintiff's petition was denied. *Id.* Indeed, the Circuit emphasized that the plaintiff was not challenging "the procedure by which New York State" passed the registration statute, "the procedure by which [the] State convicted" the plaintiff of a relevant offense under the statute, or "the procedure" by which the State "determined that [the plaintiff] was a level-one (low risk) offender" required to register under the statute; nor did the ***65** plaintiff otherwise suggest "that he was not convicted of a relevant offense." *Id.* Accordingly, the Circuit concluded that "[t]here [was] no inquiry left to be made and no reason to require elaborate procedures to make it." *Id.* As for the plaintiff's assertion that he was nevertheless "entitled to due process in the determination [of] whether he [was] sufficiently dangerous to justify subjecting him to [the registration statute]," the Circuit found that this argument—a substantive due process challenge recast in procedural due process terms—failed in light of the Supreme Court's decision in *Connecticut Department of Public Safety. Id.*

[10]In short, it is well-established that procedural due process does not require a government agency to provide a party with an individualized hearing where the purpose of such a hearing would be to address a fact not relevant to the applicable substantive inquiry. *See Conn. Dep't of Pub. Safety,* 538 U.S. at 7–8, 123 S.Ct. 1160; *see, e.g., Michael H. v. Gerald D.,* 491 U.S. 110, 120–21, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989) (rejecting plaintiff's procedural due process claim that he was entitled to an evidentiary hearing before the state could deny him his paternity status because whether the plaintiff was in fact the child's biological father was irrelevant to the substantive rule of law of the paternity statute that plaintiff sought to challenge); *Black v. Snow,* 272 F.Supp.2d 21, 34 (D.D.C.2003) (applying *Connecticut Department of Public Safety* to statute prohibiting felons from possessing guns and noting that "where the fact to be proven at the hearing is not relevant to the legal scheme responsible for the deprivation (that is, where it is clear that the government would strip the individual of his liberty even if he were able to prove or disprove the particular fact or set of facts), such a hearing would be an exercise in futility, which is not required by *procedural* due process"), *aff'd sub nom. Black v. Ashcroft,* 110 Fed.Appx. 130 (D.C.Cir.2004); *see also Air Line Pilots Ass'n, Int'l v. Quesada,* 276 F.2d 892, 897 (2d Cir.1960) (Lumbard, C.J.) (where regulation barred commercial pilots from flying after the age of 60, procedural due process did not require individualized hearings as to the fitness of "each contesting airman"). Instead, procedural due process only requires that the individual be granted an opportunity to prove or disprove facts relevant to the substantive standard selected by the legislature.

2. Application

[11]With respect to the first prong of the *Mathews v. Eldridge* test, the Court finds that Plaintiffs had a protected property interest in their taxi licenses, since Plaintiffs' licenses had already been issued at the time of suspension and, pursuant to the City's rules and regulations, the TLC does not have unfettered discretion to revoke or suspend taxi drivers' licenses, *see, e.g.,* R.C.N.Y. § 68–15. Indeed, the Second Circuit previously found as much in ***Nnebe*** *II,* 644 F.3d at 158 (stating that "a taxi driver has a protected property interest in his license" for purposes of procedural due process (quoting ***Nnebe*** *I,* 665 F.Supp.2d at 323)). Accordingly, the Court directs its focus to what minimal process a taxi driver is due before he may be deprived of his property interest in his license, and whether the process afforded drivers is sufficient for such purposes.

As discussed above, the TLC's Rule provides the substantive standard with respect to summary suspension of a taxi license. Specifically, the Rule provides that "the Chairperson can summarily suspend a License based upon an arrest ... if the Chairperson believes that the charges, if true, would demonstrate that continued licensure would constitute a direct and substantial threat to public health or safety." ***66** R.C.N.Y. § 68–15(d)(1). Moreover, the Rule states that, in the event a licensee wishes to have a

post-suspension hearing, "the issue will be whether the charges underlying the Licensee's arrest, if true, demonstrate that the continuation of the License while awaiting a decision on the criminal charges would pose a direct and substantial threat to public health or safety." *Id.* § 68–15(d)(3).

The parties offer starkly different interpretations of the Rule. According to the TLC, the Rule requires the continuation of a driver's suspension where the driver has been charged with a crime that has a nexus with public health or safety. In contrast, Plaintiffs argue that the Rule requires individualized consideration of the risk to public health or safety posed by the specific driver contesting the suspension. (*See* Pl. Mem. at 57.)

Having carefully parsed the language of the Rule, the Court finds that Defendants have the better argument. Pursuant to the Rule, the initial, pre-hearing suspension decision is based on whether the *charges—presumed to be true*—demonstrate a threat to public health or safety. R.C.N.Y. § 68–15(d)(1). Similarly, § 68–15(d)(3), which sets forth the substantive standard for the post-suspension hearing, expressly states that the "issue" to be resolved is "whether the *charges* underlying the Licensee's arrest, *if true,* demonstrate that the continuation of the License while awaiting a decision on the criminal charges would pose a direct and substantial threat to public health or safety." *Id.* § 68–15(d)(3) (emphases added). A plain reading of the Rule shows that the entire regulatory scheme turns on whether the *charges* reflect a threat to public health or safety, *not* on whether an individual driver in fact poses a risk to public health or safety.

Significantly, Plaintiffs do not contend that their reading of the Rule is based on principles of statutory interpretation. Rather, they assert that, as a matter of procedural due process, a taxi driver may not be deprived of his license "without first being afforded the chance to show that he is not dangerous." *Black,* 272 F.Supp.2d at 34. But just as in *Connecticut Department of Public Safety,* the dangerousness of an individual driver is simply not relevant in deciding whether to continue a suspension under the Rule. Rather, the decision to continue suspension is "based on the fact of [an arrest and criminal charges], not the fact of current dangerousness." *Conn. Dep't of Pub. Safety,* 538 U.S. at 4, 123 S.Ct. 1160. Accordingly, as in *Connecticut Department of Public Safety,* the hearing before the TLC is a limited one, and an inquiry into the individual driver's dangerousness would be a "bootless exercise." *Id.* at 8, 123 S.Ct. 1160. Put another way, even if the driver were able to convince the hearing officer that he was not dangerous, that determination would not be relevant to the standard articulated by the Rule, since the standard simply requires that the *charges* demonstrate a threat to public health or safety. Given the limited focus of the Rule, the driver's individual characteristics and evidentiary arguments relating to the strength of the criminal case against him are simply not relevant to the regulatory framework, which rests on a limited inquiry into the fact and nature of the *charges.* Thus, an additional hearing on an irrelevant issue would have no bearing on or otherwise prevent an "erroneous" license deprivation. *Mathews,* 424 U.S. at 335, 96 S.Ct. 893.

Krimstock v. Kelly-to which the parties devote much of their briefing—does not require otherwise. 306 F.3d 40 (2d Cir.2002). That case involved the seizure of motor vehicles from those "accused of driving while intoxicated and of committing other crimes for which a motor vehicle ***67** could be considered an instrumentality," and focused on what process an individual was due after the seizure but "prior to judgment in any civil forfeiture proceeding." *Id.* at 43–44. In particular, the plaintiffs in *Krimstock* challenged the fact that they were not provided with any opportunity to promptly challenge "the City's retention of the vehicles" prior to the formal civil forfeiture proceedings themselves. *Id.* at 44. While Plaintiffs seek to analogize *Krimstock* to this case, such an analogy is unsound.

First, in *Krimstock,* the procedural due process argument was based on the fact that the plaintiffs had *no* opportunity to promptly challenge the City's seizure and continued retention of their motor vehicles. Thus, the court in *Krimstock* had to determine whether procedural due process required the City to provide the plaintiffs with a prompt, post-deprivation hearing in the first place. *See id.* at 45, 48. By contrast, the issue here is not whether Plaintiffs are entitled to such a hearing, but rather whether the hearing they receive comports with procedural due process.

Second, in *Krimstock,* the court was also troubled by "the plight of innocent owners," *id.* at 48, since the owners of the seized motor vehicles—who were not necessarily the individuals who "participated in ... the alleged illegal use of the property"—had no opportunity to "promptly [challenge] ... the City's continued custody of the vehicle," *id.* at 71 n. 9, 45. Here, unlike in *Krimstock,* the impaired property interest necessarily belongs to the individual driver charged with the crime. Furthermore, the taxi drivers here, unlike the plaintiff in *Krimstock,* have the opportunity to show at a summary suspension hearing that their licenses should be reinstated because they were not in fact charged with a crime and/or because the charges against them are no longer pending. (*See* Findings

of Fact at 2, 9; *see also* Doc. Nos. 304—316 (Transcript of Proceedings, dated Jan. 13–21, 2014) ("Tr.") at 363:9–15 (**Daus** testifying that the post-suspension hearing is in part "to make sure basically these are the right people and you're not making a serious mistake").)

Finally, the constitutional concerns animating the court's decision in *Krimstock* were based not only on the Due Process Clause of the Fourteenth Amendment but also on the Fourth Amendment's substantive requirement that all searches and seizures be reasonable. 306 F.3d at 48 (finding the lack of a prompt hearing "constitutionally infirm" based on "the dictates of the Fourth *and* Fourteenth Amendments" (emphasis added)); *see also id.* at 50–51, 71 n. 7. Indeed, the relevant substantive standard in *Krimstock* was the Fourth Amendment standard as applied in the context of civil forfeiture proceedings, *id.* at 48–49, pursuant to which the government must demonstrate "probable cause for the initial seizure or offer post-seizure evidence to justify continued impoundment" of the seized property, *id.* at 50. Therefore, the due process procedures in *Krimstock* had to be adequate to adjudicate *that* substantive standard. In that context, the court in *Krimstock* found that procedural due process required a prompt post-seizure, prejudgment hearing that, "at a minimum," "enable[d] claimants to test the probable validity of continued deprivation of their vehicles." *Id.* at 69.

Here, Plaintiffs do not argue—nor could they—that the suspension of a taxi license is a seizure for Fourth Amendment purposes or that the Fourth Amendment's substantive standard otherwise applies to the TLC's summary suspension hearings. Accordingly, since the applicable substantive standard in this case is meaningfully different than the substantive standard in ***68** *Krimstock,* the latter is simply not relevant, much less determinative, in deciding what process taxi drivers are due before the continuation of their license suspension. In other words, because *Krimstock* concerned a different substantive rule of law, it cannot answer the relevant question here as to whether the TLC's summary suspension procedures are adequate to adjudicate the Rule's substantive arrest-plus-nexus standard. As long as the TLC's procedures are adequate for purposes of adjudicating *that* standard, Plaintiffs' procedural due process claim must fail.

[12]As set forth above, the TLC's post-suspension hearing is designed to determine whether (a) the suspended driver has been charged with a crime, (b) the charge is still pending, and (c) there is a nexus between the charged crime and public health or safety. *(See also* Findings of Fact.) Clearly, the hearing is sufficient for that purpose. With respect to the first two inquiries, **Daus** and other witnesses credibly stressed the significance of the fact and pendency of charges to the TLC's decision to continue a suspension, not to mention the fact that a driver had the opportunity to contest whether he was actually the person charged with a crime and/or whether the crime charged was among those identified by the TLC as one that implicates public health or safety. (*See, e.g.,* Tr. at 340:4–9, 15–19; 342:11–25; 359:1–10; *see also id.* at 229:3–6 (former ALJ testifying that his role was "to determine" whether "the person before me actually [was] arrested and charged with a criminal offense"); *id.* at 271:22–25 (another witness testifying that "[t]he licensee could come in and say it's not me, the charges are incorrect, the charges have been dismissed, the charges have been reduced").) As for the nexus determination, **Daus** and others credibly testified that this third inquiry was also relevant to the decision to continue the suspension of a taxi license. (*See, e.g., id.* at 369:4—8, 13–17; *see also id.* at 247:24—248:7; 254:23–255:1; 256:15–24; 257:16–19; 258:10–13; 260–68; 290–291.) As the Court found, however, in determining whether this inquiry is satisfied in a particular case, the only relevant fact is the nature of the charged crime—that is, the statutory elements of the crime. (*See* Findings of Fact.) Moreover, the primary—if not exclusive—consideration with respect to this inquiry is whether the statutory crime charged is on the TLC's list of relevant offenses. In essence, this list reflects the fact that the TLC has already determined that certain crimes are sufficiently connected to public health or safety for purposes of the nexus inquiry. This short-hand for the analysis makes sense given that the inquiry is focused on the nature of the charges pending against a driver, and not the factual allegations underlying the charges or other individualized facts as to the danger or threat posed by a particular taxi driver.

Again, as noted above, the fact that the TLC's decisionmakers do not consider individualized evidence of a driver's dangerousness does not give rise to a procedural due process violation, since such evidence is simply not relevant under the TLC's statutory scheme. *See Conn. Dep't of Pub. Safety,* 538 U.S. at 8, 123 S.Ct. 1160 ("Plaintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme."). Therefore, even if Plaintiffs could prove that they do not present an actual danger or threat to public health or safety, that will not change the outcome of the hearing because the TLC has decided that, regardless of the underlying facts, certain statutory crimes are sufficiently related to public health or safety, and that being charged with one of those crimes is proof enough of a taxi driver's threat to public health or safety.

Accordingly, as in *Connecticut Department of Public Safety,* ***69** a hearing to determine a particular taxi driver's dangerousness would be an exercise in futility, since that fact is "of no consequence" under the TLC's substantive arrest-plus-nexus standard. *Id.*

Moreover, while the TLC's substantive standard may ensnare some non-dangerous drivers, "principles of '*procedural* due process' " do not bar the TLC "from drawing such classifications." *Id.* (citation omitted). Thus, in arguing that due process requires an opportunity for a taxi driver to show that he does not in fact pose a risk to public health or safety, Plaintiffs really seem to be asserting a substantive due process challenge to the TLC's arrest-plus-nexus standard—that is, that the standard is "defective" because it "conflict[s] with a provision of the Constitution." *Id.* at 7–8, 123 S.Ct. 1160. Although the Court will address this issue below, such arguments are simply not relevant to a *procedural* due process claim.

In sum, the record clearly shows that the TLC's post-suspension hearing is adequate to address the three relevant inquiries that comprise the substantive standard set forth in the TLC's Rule. As a result, with the exception of the notice provided in connection with pre–2006 suspensions—which is also discussed below—the Court finds that the TLC's post-suspension hearing does not violate procedural due process.

B. Whether *Substantive* Due Process Requires an Individualized Determination of Dangerousness

Although Plaintiffs have couched their arguments in the language of *procedural* due process, it could be argued that Plaintiffs actually mean to challenge the fairness of the underlying substantive suspension standard itself, and not the fairness of the procedures used in applying that standard. If that is the case, then Plaintiffs are really asserting a *substantive* due process challenge. *See, e.g., Conn. Dep't of Pub. Safety,* 538 U.S. at 7–8, 123 S.Ct. 1160 ("[Procedural] due process does not entitle [the plaintiff] to a hearing to establish a fact that is not material under the ... statute.... It may be that [the plaintiffs] claim is actually a substantive challenge to Connecticut's statute recast in procedural due process terms." (citation omitted)); *Flores,* 507 U.S. at 308, 113 S.Ct. 1439 (plaintiffs' argument that an immigration procedure "is unconstitutional because it does not require [a] ... determin[ation] in the case of each individual alien juvenile that detention in [government] custody would better serve [the alien's] interests than release to some other 'responsible adult[ ]' ... is just [a] 'substantive due process' argument recast in 'procedural due process' terms"); *Michael H.,* 491 U.S. at 119–21, 109 S.Ct. 2333 (rejecting plaintiff's procedural due process argument that he was entitled to a hearing to demonstrate his paternity before he could be denied parental status pursuant to a state statute because he was really challenging the fairness of the law's substantive standard, "not the adequacy of procedures" provided); *see also Catlin v. Sobol,* 93 F.3d 1112, 1118 (2d Cir.1996); *Cardoso v. Reno,* 127 F.Supp.2d 106, 116, 115 (D.Conn.2001) (finding that plaintiffs procedural due process claim seeking an individualized bail hearing was "simply her substantive due process argument recast in 'procedural due process' terms" because she was really "challeng[ing] the substantive constitutional underpinnings of the statute pursuant to which the government acted" in arguing that she "ha[d] a fundamental liberty interest" not to be detained "without some individualized determination of her flight risk and dangerousness"). Accordingly, the Court will address whether the TLC's arrest-plus-nexus standard meets the requirements of substantive due process.

***70** 1. Legal Standard: Substantive Due Process

[13] [14]As noted above, the Fourteenth Amendment's substantive due process component "bar[s] certain government actions regardless of the fairness of the procedures used to implement them." *Cty. of Sacramento v. Lewis,* 523 U.S. 833, 840, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (quoting *Daniels v. Williams,* 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986)). In particular, substantive due process "forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Flores,* 507 U.S. at 302, 113 S.Ct. 1439 (emphasis omitted). By contrast, where a fundamental right is not implicated, "[s]ubstantive due process protects against government action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense, but not against government action that is 'incorrect or ill-advised.' " *Kaluczky,* 57 F.3d at 211 (quoting *Lowrance v. Achtyl,* 20 F.3d 529, 537 (2d Cir.1994)); *see also Sensational Smiles, LLC v. Mullen,* 793 F.3d 281, 284 (2d Cir.2015) (where "a statute neither interferes with a fundamental right nor singles out a suspect classification," the statute will be "invalidate [d] ... on substantive due process grounds only when a plaintiff can demonstrate that there is no rational relationship between the legislation and a legitimate legislative purpose" (quoting *Molinari v. Bloomberg,* 564 F.3d 587, 606 (2d Cir.2009))).

[15]Given the different treatment of fundamental and non-fundamental rights, the Court's substantive due process "analysis must begin with a careful description of the asserted right." *Flores,* 507 U.S. at 302, 113 S.Ct. 1439 (citation omitted). In determining whether an asserted right is constitutionally protected, the Supreme Court has recognized that "guideposts for responsible decisionmaking in this unchartered area are scarce." *Collins v. Harker Heights,* 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). As a result, the Supreme Court has expressed a deep "reluctan[ce] to breathe ... further substantive content into the Due Process Clause," *Michael H.,* 491 U.S. at 122, 109 S.Ct. 2333 (citation omitted), and has stressed the need to exercise "judicial self-restraint" and "the utmost care whenever [it is] asked to break new ground in this field," *Collins,* 503 U.S. at 125, 112 S.Ct. 1061. Moreover, for a right to be afforded constitutional protection under the substantive component of the Due Process Clause, the Supreme Court has "insisted not merely that the [alleged] interest be 'fundamental' (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society." *Michael H.,* 491 U.S. at 122, 109 S.Ct. 2333. Put another way, "the Due Process Clause affords only those protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Id.* (quoting *Snyder v. Massachusetts,* 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674 (1934)); *see also Kerry v. Din,* —— U.S. ——, 135 S.Ct. 2128, 2134, 192 L.Ed.2d 183 (2015) ("[B]efore conferring constitutional status upon a previously unrecognized liberty, we have required a careful description of the asserted fundamental liberty interest, as well as a demonstration that the interest is objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed." (citation omitted)). A plaintiff asserting a substantive due process claim thus bears the burden of establishing that the asserted right satisfies this high bar. *See Michael H.,* 491 U.S. at 125, 109 S.Ct. 2333.

***71** The substantive due process inquiry in this case is analogous to that in *Reno v. Flores,* in which the Supreme Court rejected a substantive due process challenge that, pending a deportation hearing, an alien juvenile was entitled to an individualized assessment as to whether it was in his best interest to be placed in the care of a private custodian rather than in the care of a government institution. 507 U.S. at 302, 113 S.Ct. 1439. The Court identified the alleged right at issue as the right of an orphan child "to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution." *Id.* Remarking on its novelty, the Court found that this alleged right "certainly" could not be "considered so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* (citation omitted). Accordingly, the Court determined that the substantive standard of the immigration regulation at issue "d[id] not violate the Constitution" because "[i]t [was] rationally connected to a governmental interest in 'preserving and promoting the welfare of the child,' ... and [was] not punitive since it [was] not excessive in relation to that valid purpose." *Id.* at 303, 113 S.Ct. 1439 (citations omitted).

In addition, after rejecting the notion that there is a categorical right to be placed in private custody, the Supreme Court considered a "somewhat more limited constitutional right" asserted by the plaintiffs—namely, "the right to an individualized hearing on whether private [custody] placement would be in the [alien] child's 'best interests.' " *Id.* But this argument fared no better than the first, as the Court explained that the "best interests of the child" standard—while a "venerable phrase" in divorce and child custody proceedings—was "not traditionally the sole criterion," much less the "sole *constitutional* criterion," for "other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others." *Id.* at 303–04, 113 S.Ct. 1439. Thus, with respect to the government's custodial responsibilities, the Court found that, while certain "[m]inimum standards must be met, and the child's fundamental rights must not be impaired[,]" the government's "decision to go beyond those [minimum] requirements ... is a policy judgment rather than a constitutional imperative." *Id.* at 304–05, 113 S.Ct. 1439.

Finally, the Court found that the plaintiffs' "best interests of the child" argument was:

> in essence, a demand that the [challenged immigration] program be narrowly tailored to minimize the denial of [a child's] release into private custody. But narrow tailoring is required only when fundamental rights are involved. The impairment of a lesser interest (here, the alleged interest in being released into the custody of strangers) demands no more than a "reasonable fit" between governmental purposes (here, protecting the welfare of the juveniles who have come into the

> [g]ovemment's custody) and the means chosen to advance that purpose.

Id. at 305, 113 S.Ct. 1439. The Court explained that this "reasonable fit" standard "leaves ample room for an agency to decide ... that administrative factors ... favor using one means rather than another." *Id.* Applying this standard, the Court concluded that "[t]here is ... no constitutional need for an [individualized] hearing to determine whether private placement would be better, so long as institutional custody is ... good enough." *Id.*[5]

***72** 2. Application

[16]Here, as an initial matter, Plaintiffs have consistently and vigorously denied that they are asserting a *substantive* due process claim. (*See, e.g.,* Doc. Nos. 42 ¶¶ 107–12; 330 at 2–3; and Pl. Mem. at 8.) In fact, the Second Circuit made note of Plaintiffs' "express disavowal" of any such claims in ***Nnebe*** *II,* 644 F.3d at 153 n. 2. Accordingly, it could be argued that Plaintiffs have waived any claim that the Rule violates substantive due process. However, even if Plaintiffs did *not* waive their substantive due process arguments, the Court nevertheless finds that Plaintiffs have failed to (1) establish that the Rule infringes on a categorical right "sufficient to trigger constitutional protection whenever a regulation in any way touches upon [that alleged right]," *Kerry,* 135 S.Ct. at 2135, or (2) demonstrate the lack of a rational relationship between the Rule on the one hand and a legitimate governmental purpose on the other.

Viewed broadly, the right that Plaintiffs seem to assert is, in essence, the alleged right of a taxi driver who has been arrested and charged with a crime to have the suspension of his license lifted pending resolution of his criminal case. But the Court is unaware "that any court ... has ever held" that such a fundamental right exists, and, as in *Flores,* the "mere novelty" of this alleged right "is reason enough to doubt that 'substantive due process' sustains it." 507 U.S. at 303, 113 S.Ct. 1439. Indeed, courts in this Circuit have refused to recognize a fundamental right with respect to a person's property interest in using and possessing his own vehicle. *See, e.g., Fasciana v. Cty. of Suffolk,* 996 F.Supp.2d 174, 183–84 (E.D.N.Y.2014) (dismissing substantive due process claim because "[p]laintiff's property interest in his vehicle is not the type of fundamental right subject to substantive due process protections" (citation omitted)); *Reyes v. Cty. of Suffolk,* 995 F.Supp.2d 215, 230 (E.D.N.Y.2014) (same). The Court sees no reason to conclude otherwise with respect to Plaintiffs' property interest in their taxi licenses. Accordingly, in light of the Supreme Court's extreme reluctance to recognize new fundamental rights protected under the Constitution, other courts' refusal to confer such constitutional status on similar property rights, and the lack of any evidence in the record to suggest that a taxi driver's interest in having his suspended license returned to him pending resolution of his criminal case is so "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [that interest] was sacrificed," the Court finds that Plaintiffs' asserted right—even broadly construed—is not a categorical right "sufficient to trigger constitutional protection whenever a regulation in any way touches upon an aspect" of it. *Kerry,* 135 S.Ct. at 2134–35 (citation omitted).

As for whether the TLC's application of the arrest-plus-nexus standard is "arbitrary, conscience-shocking, or oppressive," Plaintiffs' arguments fail for the same reasons explained by the Supreme Court in *Flores.* Specifically, as in *Flores,* Plaintiffs' assertion that they are entitled to an individualized determination as to dangerousness is really a demand that the TLC's summary suspension procedures be "narrowly tailored" to minimize the risk that non-dangerous drivers will have their licenses suspended pending resolution of their criminal charges. But as the Supreme Court explained in *Flores,* "narrow ***73** tailoring is required only when fundamental rights are involved," which, for the reasons previously explained, is not the case here. 507 U.S. at 305, 113 S.Ct. 1439. To the contrary, where, as here, only a "lesser interest" is concerned, there need only be a " 'reasonable fit' between governmental purpose" and "the means chosen to advance that purpose." *Id.* And as the Supreme Court determined in *Flores,* so long as this "reasonable fit" standard is met, there is "no constitutional need for a hearing to determine" an individual's actual dangerousness. *Id.*; *see also Air Line Pilots Ass'n, Int'l v. Quesada,* 182 F.Supp. 595, 597 (S.D.N.Y.) (regulation setting mandatory retirement age for commercial pilots was reasonably related to the goal of air safety, even though "there [was] no doubt that many of these older pilots [could] successfully continue flying"), *aff'd,* 276 F.2d 892 (2d Cir.1960) (Lumbard, C.J.).

Here, the Court has little difficulty concluding that there is a "reasonable fit" between the governmental purpose behind the TLC's Rule—that is, protecting the public from dangerous taxi drivers—and the substantive arrest-plus-nexus standard applied by the TLC to advance that purpose. Indeed, it seems quite obvious that continuing

the suspension of taxi drivers facing felonies or certain misdemeanor charges will further the governmental purpose of protecting public health and safety. The fact that there may be a subset of non-dangerous drivers whose licenses are suspended pursuant to the Rule's substantive standard does not alter the Court's conclusion that the Rule is rationally related to a legitimate governmental interest. *See Cuomo,* 755 F.3d at 113 (finding that there "is clearly a rational basis for the line that New York chose to draw" in deciding that "a conviction for a relevant offense was proof enough of dangerousness," even if the plaintiff "happen[ed] to fall within the subset of convicted sex offenders who are not actually dangerous"). Indeed, as *Flores* makes clear, the "reasonable fit" standard leaves "ample room" for the TLC to decide how to exercise its summary suspension responsibilities and to balance an individual driver's interests against competing administrative factors, such as the TLC's lack of expertise in analyzing an individual's actual dangerousness and the administrative burden that such an individualized determination would impose.[6]

Of course, reasonable minds may differ as to the wisdom of the means chosen by the TLC to further its goal of protecting public health and safety, and it may be that the costs associated with moving to an individualized assessment of a driver's dangerousness would not be inordinately burdensome in relation to the benefits of such a scheme. However, the law is clear that, with respect to non-fundamental rights, the government need not narrowly tailor its legislation, and it is not for courts to rewrite statutes or "judge the wisdom, fairness, or logic of legislative choices." *Sensational Smiles, LLC,* 793 F.3d at 284. So long as there is a rational relationship between the legislation and a legitimate legislative purpose, which the Court finds exists here, that is enough as a matter of substantive due process. Accordingly, the Court finds that any claim by Plaintiffs sounding in substantive due process must fail.

***74** C. Whether the TLC's Notice Violates Procedural Due Process

[17] [18] [19]The parties also contest the procedural due process implications of the Findings of Fact with respect to the notice given to suspended drivers. (*See* Pl. Mem. at 17–22; Def. Mem. at 24–30.) "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *see also Int'l House v. N.L.R.B.,* 676 F.2d 906, 911 (2d Cir.1982) ("The very essence of due process is the requirement of notice and an opportunity to be heard."). Thus, notice must do more than simply inform an aggrieved party of his entitlement to a hearing. Rather, in order to satisfy the requirements of procedural due process, notice must adequately inform the party as to what the "critical issue[s]" of the hearing will be, *Turner v. Rogers,* 564 U.S. 431, 131 S.Ct. 2507, 2519, 180 L.Ed.2d 452 (2011), for purposes of "permit[ting] [the party] to 'present' [his] objections to the safety. Moreover, until December 2007, the initial hearing was presided over by TLC ALJs, who "encouraged drivers to argue anything they wanted," including "that they were not a threat to public health or safety or that they were innocent," rather than focusing them on the arrest-plus-nexus standard that the TLC Chairperson actually and exclusively applied in making the ultimate suspension determination. (*Id.* at 10.) With respect to these TLC ALJ hearings, neither the pre-December 2006 notice nor the Rule itself conveyed to a driver that he would be allowed, and encouraged, to make arguments that went beyond—and in fact were not even relevant to—the arrest-plus-nexus standard. Accordingly, the Court concludes that the notice given to suspended drivers prior to December 2006—which includes the notice received by each of the named Plaintiffs—was constitutionally inadequate as a matter of procedural due process because it did not provide a driver with sufficient "information" necessary "to prepare meaningful objections or a meaningful defense." *Spinelli,* 579 F.3d at 172.

D. Damages

[20]Having determined that there was a violation of Plaintiffs' procedural due process rights with respect to the notice provided to suspended drivers prior to December 2006, the Court must determine the appropriate form of relief with respect to this violation. As an initial matter, the Court finds that Plaintiffs are not entitled to injunctive relief. To have standing to seek such relief, Plaintiffs must prove that there is a continuing violation or a real risk of the same type of violation in the future. *See EEOC v. KarenKim, Inc.,* 698 F.3d 92, 100 (2d Cir.2012) (stating that courts may issue injunctions only where "there exists some cognizable danger of recurrent violation"). Here, Plaintiffs have only established a past due process violation. Thus, in light of the Court's finding that the TLC's notice since December 2006 has been sufficient, Plaintiffs cannot satisfy their burden of

establishing that they face a cognizable danger of a continuing or future violation based on inadequate notice.

With respect to monetary damages, the Supreme Court has determined that "a plaintiff normally cannot recover any compensatory damages from the mere fact that constitutional rights were violated." *Ortiz v. Regan,* 769 F.Supp. 570, 573 (S.D.N.Y.1991) (citing *Carey v. Piphus,* 435 U.S. 247, 262–63, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978)). Thus, compensatory damages are generally not available if the ***75** deprivation would have occurred even if a plaintiff's procedural due process rights had not been violated. However, the Supreme Court has also held that "a plaintiff who is deprived of liberty or property without due process of law is entitled to nominal damages even if the deprivation was justified." *Carey,* 435 U.S. at 266, 98 S.Ct. 1042; *see also id.* ("[T]he denial of procedural due process should be actionable for nominal damages without proof of actual injury."). Thus, in *Carey v. Piphus,* the Supreme Court found that students who had been suspended from school without a hearing would not be entitled to compensatory damages, but might still receive nominal damages of no more than one dollar if the district court on remand concluded that the students would have been suspended even if their procedural due process rights had not been violated. *Id.* at 264, 98 S.Ct. 1042; *see, e.g., Kim v. Hurston,* 182 F.3d 113, 121 (2d Cir.1999) ("[T]he denial of procedural due process ... was a technical violation that resulted in no compensable damages. The appropriate remedy is an award of only nominal damages.").

Here, it seems that while nominal damages are potentially available with respect to the notice violation, compensatory damages are not. Specifically, Plaintiffs have failed to establish that they would have prevailed at their hearings and had their licenses restored had they received constitutionally adequate notice of the standard to be applied at the hearing. Put another way, Plaintiffs have not demonstrated that but for the TLC's inadequate notice, they would have been able to meet all three inquiries comprising the substantive arrest-plus-nexus standard. Accordingly, since it appears that Plaintiffs suffered no actual injury as a result of this procedural due process violation, it would seem that compensatory damages are not available to them. Nevertheless, because the parties have not yet had an opportunity to brief—or present evidence on—the issue of damages pertaining to the pre–2006 notice letters, the Court will allow the parties to address this issue, including the need for further briefing, discovery, and fact finding, in a letter to be jointly submitted to the Court.

Moreover, Plaintiffs may also be entitled to attorneys' fees pursuant to 42 U.S.C. § 1988, as well as punitive damages, provided that they can meet their burden of showing that Defendants' failure to provide constitutionally adequate notice prior to December 2006 was malicious. *See Carey,* 435 U.S. at 257 n. 11, 98 S.Ct. 1042. Accordingly, the parties should also address this issue in their joint letter.

E. Plaintiffs' State Law Claims

Finally, now that the Court has determined Defendants' liability with respect to Plaintiffs' due process claims, the Court must consider whether it is appropriate to exercise pendent jurisdiction over Plaintiffs' remaining state law claims. However, since the parties have not yet had the opportunity to brief this issue in light of the Court's due process ruling, the Court will allow the parties to also address this topic in their joint letter.

III. CONCLUSION

For the reasons set forth above, the Court finds that, with the exception of the notice provided to Plaintiffs prior to December 2006, Plaintiffs have failed to sustain their burden of proof with respect to their due process claims.

IT IS HEREBY ORDERED THAT, by May 27, 2016, the parties shall file a joint letter setting forth their positions as to the next steps required in this action with respect to damages, attorneys' fees, and Plaintiffs' remaining state law claims. IT IS FURTHER ORDERED THAT the parties shall appear for a conference on ***76** Friday, June 3, 2016 at 10:30 a.m. to address these issues.

SO ORDERED.

All Citations

184 F.Supp.3d 54

Footnotes

1 Prior to December 2006, the Rule simply provided that a license could be summarily suspended if such "emergency action [was] required to insure public health, safety or welfare," and that the TLC Chairperson made the final determination following the summary suspension hearing. R.C.N.Y. § 8–16 (1999). Notably, this early version of the Rule did not indicate what standard would apply, or what issue(s) would be decided, at the hearing. (*See* Findings of Fact at 4.) Since then, the Rule has been amended a number of times. (*See id.* at 3–7.) However, in all ways material to the Court's conclusions, the substance of the Rule since December 2006 has remained unchanged. Thus, except where otherwise noted, all references to the Rule are to the current, November 2014 version.

2 Plaintiff Karmansky passed away in 2013, and although his estate continues to represent him in this action in his individual capacity, he no longer represents the putative class. (*See* Doc. No. 252.)

3 Since Mr. Yazli is not a party to this action, the Court does not address his claims in this Memorandum and Order.

4 As an initial matter, the Court notes that Plaintiffs devote much of their opening brief to the assertion that because Defendants did not acknowledge on appeal that the TLC actually employs the arrest-plus-nexus standard at post-suspension hearings, they are "judicially estopped from contending that an arrest-plus-nexus hearing is constitutionally adequate and have waived that claim." (Pl. Mem. at 51.) The Court disagrees. In any event, regardless of Defendants' positions here or before the Second Circuit, *Plaintiffs* have the burden of establishing that the TLC's hearing is constitutionally infirm. *See, e.g., Miner v. City of Glens Falls,* 999 F.2d 655, 660 (2d Cir.1993) ("In this Circuit, the burden is normally on the plaintiff to prove each element of a § 1983 claim."). Accordingly, the Court will not declare the TLC's procedures *unconstitutional* merely because lawyers for Defendants claimed at oral argument that the TLC employed a different process than the one found by the Court.

5 The Supreme Court also found that the plaintiffs' argument that *procedural* due process required an inquiry into whether detention would better serve a child's best interests was "just the 'substantive due process' argument recast in 'procedural due process' terms, and we reject it for the same reasons." *Flores,* 507 U.S. at 308, 113 S.Ct. 1439.

6 Additionally, although the Court acknowledges that the temporary suspension of a taxi driver's license is a serious deprivation with potentially significant collateral consequences to the driver's livelihood, the driver has a panoply of rights, including a constitutional right to a speedy trial, *see* U.S. Const. amend. VI, and a multitude of other statutory and constitutional protections designed to resolve the ultimate merits of the driver's criminal case in a timely fashion.

End of Document

Clerk's Judgment (Feb. 6, 2018) [SA.37-38]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

Anthony Stallworth, individually and on behalf of all others similarly situated, et al.,

Plaintiffs,

-against-

17 **CIVIL** 7119 (RJS)

JUDGMENT

Meera Joshi et al.,

Defendants.

----------X

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's November 22, 2017 Order (Doc. 31) and this Court's opinion in Nnebe v. Daus, 184 F. Supp. 3d 54 (S.D.N.Y. 2016), Defendants' motion to dismiss is granted and the complaint is dismissed; accordingly, the case is closed.

Dated: New York, New York
February 6, 2018

RUBY J. KRAJICK

Clerk of Court

BY: _____

Deputy Clerk

New York, NY 10038
e-mail: dan@danackmanlaw.com
tel: 917-282-8178

STATUTORY REFERENCE

28 U.S.C. § 1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S. Code § 2201

(a)
In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b)
For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

Rule 401. Test for Relevant Evidence

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

N.Y. New York City Administrative Code 19-512.1 –
Revocation of Taxicab, For-Hire or Hail License or Licenses

a. The commission or successor agency 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, for-hire vehicle license or a HAIL license issued pursuant to this chapter and, after notice and an opportunity for a hearing, suspend or revoke such license. The commission or successor agency may also, without having suspended a taxicab, for-hire vehicle license or a HAIL 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. Notice of such suspension or of a determination by the commission or successor agency to seek suspension or revocation of a taxicab, for-hire vehicle license or a HAIL license shall be served on the licensee by personal delivery or by certified and regular mail within five calendar days of the pre-hearing suspension or of such determination. The licensee shall have an opportunity to request a hearing before an administrative tribunal of competent jurisdiction within ten calendar days after receipt of any such notification. Upon request such hearing shall be scheduled within ten calendar days, unless the commission or successor agency or other administrative tribunal of competent jurisdiction determines that such hearing would be prejudicial to an ongoing criminal or civil investigation. If the tenth day falls on a Saturday, Sunday or holiday, the hearing may be held on the next business day. A decision shall be made with respect to any such proceeding within sixty calendar days after the close of the hearing. In the event such decision is not made within that time period, the license or medallion which is the subject of the proceeding shall be returned by the commission or successor agency to the licensee and deemed to be in full force and effect until such determination is made, unless the commission or successor agency or other administrative tribunal of competent jurisdiction determines that the issuance of such determination would be prejudicial to an ongoing criminal or civil investigation.

b. It shall be an affirmative defense that the holder of the taxicab, for-hire vehicle license or a HAIL license or the owner of the taxicab, for-hire vehicle or HAIL vehicle has (1) exercised due diligence in the inspection, management and/or operation of the taxicab, for-hire vehicle or HAIL vehicle and (2) did not know or have reason to know of the acts of any other person with respect to that taxicab license, for-hire vehicle license or a HAIL license or taxicab, for-hire vehicle or HAIL vehicle upon which a suspension, proposed suspension or proposed revocation is based. With respect to any violation arising from taximeter tampering, an owner’s due diligence shall include, but not be limited to, those

actions set forth in subdivision h of section 19-507.1 of this chapter. Any pre-hearing suspension period shall be counted towards any suspension period made in any final determination.