# 18-866 (L)

## 18-1254 (XAP)

In the

# United States Court of Appeals

## For the Second Circuit

JONATHAN NNEBE, KHARIRUL, EDUARDO AVENAUT, NEW YORK TAXI WORKERS ALLIANCE, Individually and on behalf of all others similarly situated,

*Plaintiffs-Appellants-Cross-Appellees,*

- and -

ALEXANDER KARMANSKY, Individually and on behalf of all others similarly situated,

*Plaintiff,*

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

*(Caption Continued on Following Page)*

## BRIEF AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS-CROSS-APPELLEES

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v.

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

*Defendants-Appellees-Cross-Appellants*,

- and -

CHARLES FRAZIER,

*Defendant*.

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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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*The City, then, is not standing on an assumption that automatic continuance of a suspension—after a hearing at which only identity or offense can be disputed—is consistent with due process. The City's defense of the process it affords is 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.*

— *Nnebe v. Daus*, 644 F.3d 147 (2d Cir. 2011)

*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.*

— District Court Order, Jan. 10, 2014, three days before trial

*[T]he 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…. [Nevertheless] the Court finds that Plaintiffs have failed to prove their constitutional claims.*

— District Court Post-trial Order, April 28, 2016

## PRELIMINARY STATEMENT

This civil rights action, filed more than a decade ago, is before this Court for a second time. 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, just an arrest. This practice leads to cabdrivers being denied a constitutionally protected right on which their livelihoods depend for months at a time. The TLC suspends automatically upon receipt of a computer-generated notification that the driver has been charged with an offense, without any inquiry into the circumstances underlying the arrest. It then

offers drivers an elaborate but empty hearing, ostensibly to determine whether or not the driver's license should remain suspended. In fact, the TLC has never discontinued a single suspension-on-arrest as a result of this post-deprivation process. The TLC persists despite knowing that the vast majority of suspended drivers are reinstated.

Plaintiffs-Appellants Jonathan Nnebe, Khairul Amin, and Eduardo Avenaut, joined by the New York Taxi Workers Alliance are victims of the TLC policy and practice. Their central claim is that the post-deprivation procedure is constitutionally deficient and indeed affords no process at all. The TLC treats the bare fact of arrest as conclusive proof that the driver poses a threat to public safety, ignoring any and all evidence to the contrary. In addition, because the TLC provides no meaningful process post-suspension, the initial summary suspensions are also unconstitutional.

* * *

Seven years ago, this Court vacated a district court decision that had granted defendants summary judgment on the theory that a post-suspension hearing that did no more than confirm the driver's identity and the fact of arrest was constitutionally adequate. This Court highlighted important errors in the district court's reasoning, but nonetheless remanded. It did so relying on the City's representations that the TLC *did not* treat an arrest for a listed offense as "*per se*

evidence" that a continued suspension was warranted. While this Court observed that evidence supporting these representations was "scant," its remand included directions that the district court "to determine what really occurs at the hearing…." *Nnebe v. Daus*, 644 F.3d 147, 160, 162 (2d Cir. 2011).

The evidence presented at a January 2014 trial and the district court's Findings of Fact substantiate plaintiffs' claims—and refute the factual representations that prompted the remand. The court found that only the fact of arrest and the generic penal code provision matter in the TLC's post-suspension process. Evidence that a driver's licensure would pose no danger even if the arrest charges were "true" is treated as irrelevant. Nevertheless, the district court ruled for defendants as it had before. It did so via a startling, *sua sponte* post-trial pronouncement that plaintiffs' claims actually "sound" in "substantive due process" and therefore warrant indulgent "rational basis" review.

That extraordinary conclusion conflicts with this Court's 2011 mandate. This mandate settled definitively—and correctly—that plaintiffs assert quintessential *procedural* due process claims: When the government deprives an individual of property, it must do so through procedures designed to avoid error and substantive unfairness. Applying this Court's mandate and the governing law to the facts established at trial (indeed before trial) demonstrates a long-running

flagrant disregard for basic constitutional rights. This Court should reverse with instructions to award judgment to plaintiffs.

## 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 order entered on March 27, 2018, was filed on March 29, 2018.

## STATEMENT OF ISSUES

1. Is the TLC post-suspension hearing process, as described in the district court's factual findings, meaningful and sufficient to afford suspended taxi drivers due process of law?

2. Is the TLC's denial of any pre-suspension opportunity to be heard also a denial of due process of law?

3. Did the district court deny plaintiffs their right to a jury trial by ruling that a jury would not be allowed to announce a verdict?

4. Did the district court err in concluding for the first time on remand that plaintiffs' claims concerning the TLC's post-suspension hearing process could be challenged only as a denial of substantive due process?

5. Have defendants forfeited any argument that plaintiffs' claims sound in substantive due process?

6. Are the TLC's pre-hearing notices, which do not indicate the issues that the hearing may address, constitutionally inadequate?

7. Did the District Court err in finding that OATH ALJs make individualized assessments of an individual's driver's dangerousness

when, in fact, only a handful of their recommendations (all rejected by the TLC chair) even purported to do so?

## STANDARD OF REVIEW

The district court's rulings on each issue are subject to de novo review except as to factual findings, which are subject to review for clear error.

## STATEMENT OF THE CASE AND FACTS[1]

### The TLC Suspension-on-Arrest Practice

In 2006, the individual plaintiffs, all taxi drivers,[2] and the New York Taxi Workers Alliance (NYTWA), a membership organization dedicated to advancing cabdrivers' well-being and fair treatment, brought this 42 U.S.C. §1983 civil rights action for declaratory, injunctive, and compensatory relief on behalf of themselves and others subject to the TLC's suspension-on-arrest practice. By that practice, the TLC automatically suspends licenses based on arrest reports, and continues those suspensions until the criminal charges are favorably resolved, which they nearly always are.

The origins of the policy are unknown: Asked when and how the policy started, defendant Matthew Daus, who was TLC general counsel before becoming

[1] This statement in based on the district court's findings of fact and, where noted, defendants' admissions or uncontested trial testimony. Citations to trial testimony (including Marc Hardekopf's videotaped deposition, which was aired at trial and marked PX A1), identifies the witness.

[2] A fourth plaintiff, Alexander Karmansky, died in 2014 and is not a party to this appeal.

its chair, testified, "I don't know. I don't remember." JA-240. Thomas Coyne, the deputy chief TLC ALJ in charge of suspension hearings, was also at a loss. He testified that "the standard" he trained TLC judges to follow at post-suspension hearings was derived from an unpublished TLC manual. JA-307-308/Coyne. At the time the named plaintiffs were suspended, no TLC rule even mentioned arrest-based suspensions. The letter notifying drivers of their suspensions referenced instead a TLC rule that authorized a suspension if the chair determined that "emergency action [was] required to insure public health, safety or welfare … pending revocation proceedings" to be commenced within five days. JA-61-62. In fact, "a TLC employee," not the chair, ordered the suspensions, and no revocation proceedings were ever initiated. JA-65.[3] The employee's "determination" of emergency, meanwhile, was based solely on a computer-generated arrest report and a TLC list of penal code sections. That list was "not publicly available, and neither its existence nor its contents were disclosed to drivers or members of the public." JA-65.

[3] In December 206, after suit was filed, the TLC promulgated a rule that specifically referenced arrests and provided that an immediate revocation proceeding was not required. TLC Rule 8-16. This rule announced that the issue was "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." Findings 5. The hearings were also transferred to the Office of Administrative Trials and Hearings (OATH). The text of Rule 8-16 was amended several times, but with no effect on TLC practice. JA-61-65. According to the Findings, the TLC rules are authorized by §19-512.1(a) of the New York City Administrative Code.

Three of the four of the named plaintiffs were arrested on misdemeanor charges. Three of the four arrests arose from off-duty incidents involving a landlord, a parent, and an ex-girlfriend. All but Avenaut proceeded to hearings before a TLC-employed administrative law judge, which were "to determine whether [their] TLC license should remain suspended pending the final disposition of [the] criminal case." JA-65.

At each hearing, the TLC prosecutor presented evidence of arrest and rested his case. The drivers explained their version of the arrest incidents and the hardships suspensions imposed on them and their families. Each time, the ALJ expressed sympathy and advised that the suspension would be lifted as soon as the charges were dismissed, reduced, or adjourned (with little doubt that this would occur). *See* JA-483. But each ALJ issued a written decision, in the form of a recommendation to the TLC chair, that the suspension should continue "pending final disposition of the criminal charges…due to the risk [the driver] poses to the public." In each case, according to the TLC prosecutor, the TLC chair signed "a standard form letter," JA-378, accepting the ALJ's recommendation. And in each case, the driver's license was reinstated when their criminal charges were favorably resolved. The named plaintiffs suspensions lasted approximately three to four months. 644 F.3d at 153.

The named plaintiffs' experience, as NYTWA and lawyers for drivers recognized, was common, indeed routine. Hundreds of TLC-licensed drivers are subject to similar suspensions annually causing real suffering to a largely immigrant workforce reliant on daily earnings to support their families.[4] The "bulk of" suspensions arise from misdemeanor charges. A "very low" percentage involve alleged misconduct while the driver is on duty. JA-309/Coyne. Indeed, defendant Charles Fraser, the former TLC General Counsel, testified that the TLC knew of only two convictions of taxi drivers for crimes of violence in the four-year period from 2005 through 2008. Neither was known to involve a taxi passenger. Fraser. JA-326/Fraser.

As testimony of the TLC prosecutor and TLC statistics would later confirm, the vast majority of suspended drivers, like the named plaintiffs, are reinstated. That the conviction rate for taxi drivers is low should come as no surprise. Taxi drivers are employed and are subject to drug testing, fingerprinting, and criminal record checks to obtain licensure. Thus a "very low number" of drivers have prior criminal records. JA-316/Daus; *see also* JA-298/Desai. Their photographs and

[4] JA-360, 384/Hardekopf. That hundreds of taxi drivers (out of more than a hundred thousand licensed by the TLC) are arrested annually does not suggest that cabdrivers are unusually likely to be arrested. Overall, roughly one in 28 New York City residents is arrested in a given year. *See* New York State Division of Criminal Justice Services website, reporting that at least 300,000 New Yorkers were arrested every year between 2006 and 2014. http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/nyc.pdf.

license numbers are on display in their taxis. Drivers are also monitored by GPS. Nevertheless, at the time of suit, it was understood that TLC ALJs rarely, if ever, recommended reinstatement. And the TLC hearing process never resulted in anything other than the suspension being extended.

One episode, unearthed during discovery, shed light on the workings of the TLC process. It turned out that three summary suspension hearings (among the hundreds conducted between 2003 and 2007) *had* resulted in an ALJ recommendation that the driver be permitted to resume his livelihood. All three were issued by the same ALJ, Eric Gottlieb, over a two-week period, "because he determined, based on facts particular to the driver, that the suspended driver was not a danger to the public." JA-68.

Gottlieb's recommendations (each involving a driver who was ultimately reinstated) created a firestorm within the agency. The ALJ "was strongly admonished by his supervisor," Coyne, who directed that "[in] the future if you believe a summary suspension should be lifted, please call me and discuss the matter with me before mailing it out." 644 F.3d at 152. Coyne reached out to the agency's general counsel to explain his understanding that TLC ALJs lacked "discretion" to recommend a suspension be lifted. He emphasized that he had trained ALJs that this was the rule. Gottlieb, who like all TLC ALJs was an at-will employee of the agency, apologized to Coyne for this "mishap" and assured the

supervisor that "this will not happen again." *Id.* Neither he nor any other TLC ALJ ruled against the TLC after that.

**The District Court's Initial Decision**

In 2009 the district court (J. Sullivan) awarded defendants summary judgment on all claims, including plaintiffs' procedural due process claims. 665 F.Supp.2d 311 (S.D.N.Y. 2009). The court first concluded that, given the public safety concerns raised by an arrest, the absence of any pre-deprivation process was constitutionally permissible. It next ruled that Due Process did not require the City to afford a hearing that did more than establish "the fact of a licensee's arrest" in order to warrant extending the suspension. 665 F.Supp.2d at 326. In so ruling, the court rejected the relevance of Second Circuit procedural due process decisions in *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir.2002) (Sotomayor, J.), and *Spinelli v. City of New Yor*k, 579 F.3d 160 (2d Cir.2009). It pointed instead to *Brown v. Dept. of Justice*, 715 F.2d 662 (D.C. Cir.1983), and to three other out-of-circuit opinions it viewed as supporting the sufficiency of a fact-of-arrest hearing. It also cited *Gilbert v. Homar*, 520 U.S. 924 (1997), which had upheld the suspension without pre-deprivation process of a police officer based on a criminal charge, but said nothing about *post*-deprivation process, except to note that the officer would be afforded additional process after his initial suspension.

**This Court's 2011 Decision and Mandate**

On appeal, this Court reinstated NYTWA's claims, which the district court had dismissed on standing grounds. On the merits, the Court recognized the "enormous" hardship even a brief summary suspension inflicts 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 harms from erroneous suspensions could be "mitigated" by prompt post-suspension hearings. 644 F.3d at 159. This Court also cited the "strong government interest in ensuring that the public is protected in the short term." *Id.*

That rationale did not establish that an equally perfunctory *post-deprivation* proceeding was permissible after the government's short-term interest was no longer operative. In the post-deprivation context, "[b]alancing the *Mathews* [*v. Eldridge*, 424 U.S. 319 (1976)] factors … against the relative value of additional process could lead to the conclusion that the plaintiffs' interests outweigh the burden on the City of providing additional procedural protections beyond mere confirmation of identity and charge." 644 F.3d at 162. On that question, this Court noted that the cases the district court relied upon were "at least arguably in some tension with" controlling circuit precedent. It also identified several constitutionally "crucial distinctions" the district court had neglected. These

distinctions included that "the misconduct that results in summary suspension" is not required to be "related to the cab driver's work"; that the "summary suspension policy is triggered even by a warrantless arrest"; and that taxi drivers are not "City employees—they are private earners who hold a public license." *Id. Brown*, by contrast, involved Border Patrol officers indicted for on-duty felonies involving physical abuse of immigrants in their custody. While the decision echoed Judge Sullivan's concern that post-suspension hearings not become "mini-trials," it recognized that a hearing that enabled reinstatement of drivers whose licensure would not endanger the public, even if charges were true, would be more meaningful. *Id.* at 160.

Rather than rule definitively on the Due Process question, the Court highlighted a factual issue that counseled reserving judgment. Although the case had been litigated and decided by the district court on the understanding that the TLC provided a confirmation-of-arrest hearing only, the City *did not* adhere to that position in this Court. In this Court, the City did not argue 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 of the process it affords [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 decision 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 health or 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*.

This Court did not conceal its skepticism about these claims. 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 its claim that the post-deprivation hearings went "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. Finally, this Court directed that, if the district court determined "that the post-suspension hearing does not comport with due process," it must "reconsider its ruling in its entirety." *Id*. The City moved to amend the panel's opinion, but at no point did it disavow or even clarify the representations recorded therein.

**Post-Remand Proceedings**

On remand, both sides again moved for summary judgment. The district court denied these motions, concluding, "The question of whether the City meaningfully considers evidence other than the fact of arrest is a factual one … [that] is genuinely in dispute." JA-255. The court set the case for a January 13, 2014 trial, to be focused on the "narrow" question of what actually happens in the TLC post-suspension process, with proceedings on the constitutional questions to follow. Dkt. 245. The court also ruled that while a jury might be the fact-finder, the district judge would rule on whether the TLC's practice denied drivers due process. *Id*. & Dkt. 286 at 35-36.

On January 8, days before the trial was to begin, 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: whether the driver "had any prior criminal arrests"; "the facts and circumstances that led to the arrest"; "whether the driver was given a desk appearance ticket by the arresting officer as opposed to being detained"; whether the driver was released without bail; and "the driver's maturity, family background" and community ties. JA-386.

Defendants objected to the Verdict Form, urging that "the enumerated factors do not play a part in determining whether continued licensure poses a threat to the health or safety of the public." JA-423. In response, the 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." JA-425. 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." JA-426.

The court 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 concluded: "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*." *Id*. (emphasis added).

Days later, the parties appeared for trial. But first, given the City's admissions, the court heard argument whether, given the City's recent statements, there were any disputed facts to be tried. At that point, the City's litigators informed the court that Meera Joshi, the TLC General Counsel, was now advising the litigators that, in her capacity as "chair designee," she *would not* disregard the categories of individualized evidence listed on the Jury Verdict Form. JA-273/colloquy. The court decided to proceed. But at Judge Sullivan's suggestion, plaintiffs consented to a bench trial, albeit with the court noting that plaintiffs "wouldn't be waiving any jury right." JA-282/colloquy.

**The Trial**

At trial, the court heard from 13 witnesses and received numerous exhibits. Plaintiffs called plaintiff Amin and Bhairavi Desai, NYTWA's Executive Director, but made their principal case through the testimony of *TLC officials* with the most experience with the suspension-on-arrest practice: Daus, the former general counsel and chair for a decade, and Hardekopf, who had represented the TLC at almost every hearing from 2000 through 2010. Plaintiffs also called ALJ

Supervisor Coyne and ALJ Gottlieb. The City called the TLC's top lawyers and chair designees Joshi and Fraser, but no ALJ and no TLC prosecutor.

Joshi repeated under oath and at length her claim to apply a holistic "balancing test" when deciding whether to continue a driver's suspension. Joshi 488. Joshi also testified that the TLC prevailed "more often than not" at suspension hearings, an odd formulation, given the evidence of the TLC's decade-long one-hundred-percent win rate. She also testified that she could not recall having seen the TLC list of offenses—despite the fact that, as it would later emerge, the TLC had just promulgated a new version of the suspension rule, shepherded through the Commission by Joshi herself, that, for the first time, incorporated the list. JA-64; JA-428.

Fraser, Joshi's predecessor, insisted that the TLC had *always* taken a holistic approach and that he had done so as "chair designee" from 2010 to 2011. He testified to having "reviewed over 50 and likely over 100" suspensions, though, in fact, he signed just three decisions, none of which hinted at that approach. JA-71-72. Judge Sullivan found both Joshi's and Fraser's testimony not credible. JA-71.

Other TLC witnesses presented an entirely different understanding of TLC practice. Coyne testified that the purpose of the hearings was to confirm the fact of arrest and nothing else. JA-311-12/Coyne. He explained that drivers were permitted (indeed encouraged) to create "a record," though the record was

"irrelevant to" the ALJ's decision. JA-310/Coyne. Hardekopf, the longtime TLC prosecutor, confirmed that understanding. JA-370, 374-75/Hardekopf. 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." JA-70, n.11.

The trial ended on January 21, 2014 with Judge Sullivan returning to the subject of 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.… JA-333/colloquy. Judge Sullivan added: "I mean, again, I think there is going to be a price to be paid for that statement to the circuit." JA-334/colloquy.

**The District Court's Findings**

Judge Sullivan issued Findings of Fact on August 8, 2014. The Findings confirmed a series of important facts that had become essentially undisputed: that suspension is based "only [on] the fact of arrest and whether the charged offense is on the list, and does not consider any additional facts," JA-66, including whether the allegation "related to the cab driver's work." 644 F.3d at 162; that reinstatement (through favorable resolution) *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 with an offense on the list." JA-66.

Judge Sullivan confirmed that the hearing process has *never led to discontinuation of a driver's arrest-based suspension*, JA-60, and identified the reason for futility: TLC has followed a consistent practice 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." JA-68, 70-71. Nor will the TLC consider the circumstances underlying the arrest or even the "factual allegations of the complaint." "Only the statutory elements of th[e] charge matter." JA-70, 72.

The court explained that it could "not credit" Joshi's contrary testimony because "[i]t flatly contradicts official Chairperson decisions she herself authored." JA-72. So, too, for Fraser: "[H]e 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." JA-71.

Contrary to the adamant testimony of the TLC's chief legal officers, the court found, once the TLC chair noted that the driver was charged with an offense, that charges were still pending and that there was some "nexus" between penal code section charged and public health or safety, "the inquiry is over and any other

facts or arguments are irrelevant." JA-72. The "nexus" element, the court explained, is based on "philosophical" argument, not fact, and is established if one "'could argue'" that a person who had violated the cited penal code provision "'could possibly'" pose a threat to public health or safety. JA-67, 70 (quoting Daus).

The court emphasized that the TLC had several times changed the wording and numbering of its suspension rule. Yet "the summary suspension process has for the most part continued unchanged." Rule changes "merely reflected and restated preexisting practice." JA-65. Indeed, the court noted, the text of the TLC rule that took effect "while the trial was under way" was *on defendants' account*, riddled with error. *Id*. Still, defendants had assured the court that their practices would continue unaffected. JA-428.

The district court, while recognizing that the chair's practice was controlling, also made findings with respect to ALJ hearings. The court found that TLC ALJs had applied the same "narrow" approach as the chair: Though drivers were encouraged "to argue anything they wanted—including that they were not a threat to public health or safety or that they were innocent," TLC ALJs did not consider "any facts other than" whether the driver had been charged and that the charges were still pending. JA-67-68. At the time named plaintiffs were suspended,

however, they had no way of knowing what the ALJ and chair would consider and what it would receive but disregard. JA-67.

As for hearings at OATH, there was no dispute that the TLC's arguments were "exactly the same" as was the chair's practice. JA-375/Hardekopf; JA-60, 70. The district court highlighted, however, that some OATH ALJ decisions seemed to consider evidence beyond the arrest. Some had undertaken to determine whether the driver's licensure would pose any real threat and had recommended lifting suspensions on that basis. JA-60. All such recommendations were rejected by the chair. JA-71. However, to the extent the district court implied that this approach was *generally* followed at OATH, that finding is contrary to the record and ignores the powerful distorting effect of the chair's practice.

**The District Court's Legal Rulings**

On April 28, 2016—more than two years after the trial ended and nearly five years after this Court's remand—the district court issued a memorandum and order ruling on the law. JA-75. Despite agreement with plaintiffs on the facts, the court announced that (with the exception of a claim as to pre-2007 notice), plaintiffs had "failed to prove their constitutional claims." The decision's linchpin was the conviction that plaintiffs were "really asserting a *substantive* due process challenge." JA-88.

The court likened plaintiffs' claim to the one in *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003), that held that Due Process did 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 designed and "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" of the danger licensure would pose. JA-87.

The court then 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. JA-88-92.

The court rendered a split decision with respect to plaintiffs' claims of constitutionally inadequate notice. For the period before 2007, plaintiffs prevailed. For after 2007, the court found the notices sufficient. In a footnote, the court recognized plaintiffs' contentions that the mandate rule and that principles of judicial estoppel and forfeiture each precluded defendants from advancing the

court's substantive due process theory of the case, but stated, without elaboration, that it "disagree[d]." JA-80, n.4.

Because the 2014 trial and the 2016 decision had focused on only whether the TLC hearing process was constitutionally adequate, plaintiffs' remaining federal claims and their state claims remained unresolved. Thus there was no final judgment, not even after the parties completed extensive briefing on the issues remaining in the case post-trial. Dkt. 395, 396. (Plaintiffs filed an appeal in 2016, citing the court's denial of injunctive relief. This Court dismissed that appeal for lack of jurisdiction.)

At a late 2017 hearing on a related case, *Stallworth v. Joshi*, 17-cv-07119 (RJS), the district court suggested that plaintiffs "just sort of walk away from the remaining claims." Stallworth Dkt. 10 at 14. On January, 31, 2018, plaintiffs advised the court that they were withdrawing "all remaining claims not decided by" the 2016 Memorandum and Order." Dkt. 411. The district court issued an amended final judgment on March 27, 2018, Dkt. 420, more than four years after the end of the trial.

## SUMMARY OF ARGUMENT

This Court should reverse the district court's judgment based on the April 2016 memorandum and order and direct judgment for plaintiffs.

The TLC suspends deprives taxi drivers' licenses and their livelihoods upon their arrest, without consideration of the facts underlying the arrest, irrespective of the driver's record, and without any process at all. The post-suspension hearing process, which theoretically could mitigate the harm from summary suspensions, is a sham, providing no real opportunity to be heard. Before it even begins, the agency misleads drivers about what facts and which arguments it will (and will not) consider. Throughout the entire process, the TLC considers an arrest *per se* evidence that the driver presents a substantial threat to public safety. The TLC presumes that the driver is guilty. And it indulges the equally counterfactual presumption that allowing him to drive poses a substantial danger to passengers. All told, defendants' assurances to this Court, which induced the remand, have been exposed as false. Their pre-trial representations and trial testimony have been equally discredited.

Given the facts found by the district court, its rejection of plaintiffs' claims depends fully on its thirteenth-hour pronouncement that plaintiffs' claims "sound" in "substantive due process" and therefore warrant minimal scrutiny. But this Court's decision and mandate (not to mention principles of forfeiture and judicial estoppel) foreclose that startling reversal of course. Even if those arguments were not precluded, plaintiffs' challenge to the TLC's procedures sounds quintessentially in *procedural* due process.

Application of the *Mathews* test to the facts found by the district court leads inescapably to the conclusion that drivers have been denied due process of law. Plaintiffs' individual interest is "enormous," all the more because the eventual return of a taxi driver's license leaves a "temporary," but often devastating, deprivation un-remedied. The risk of error is exceedingly high. And it is beyond dispute that the TLC could provide a more accurate and fair process at *no* added cost simply by not systemically disregarding all evidence that the driver is *not* a threat. Because the post-suspension process in no way mitigates the harm from the initial deprivation, the summary suspensions must be deemed unconstitutional, too.

In light of the lengthy and circuitous district court proceedings to date, this Court should take an active role in fashioning a remedy. And because the Findings make clear that summarily suspended cabdrivers have not received due process of law, this Court should direct the district court to grant judgment for plaintiffs.

## ARGUMENT

While plaintiff' ultimately consented to a bench trial, the district court's pre-trial rulings that a jury would not be allowed to render a verdict had already denied them their Seventh Amendment right to a true jury trial.[5] That said, whether the

[5] In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, the Supreme Court held that a Section 1983 action alleging a regulatory taking was "an action at law within the meaning of the Seventh Amendment." 526 U.S. 687, 709 (1999). The Court further explained that the Seventh Amendment must be interpreted "to preserve the right to a jury's resolution of the ultimate dispute." *Id.* at 718.

decision was by a jury, from a directed verdict, or by the district judge, the facts found could yield only a judgment for plaintiffs.

## I. THE TLC'S POST-SUSPENSION HEARING PROCESS, AS DESCRIBED BY THE DISTRICT COURT, AMOUNTS TO A DRASTIC DENIAL OF DUE PROCESS

This Court has already held that a taxi driver's license is a form of property that cannot be denied without due process of law. 644 F.3d at 158; *see also Bell v. Burson*, 402 U.S. at 539 (1971); *Padberg v. McGrath-McKechnie*, 203 F.Supp.2d 261, 276 (E.D.N.Y. 2002). 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 relies on a presumption of guilt and 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 just infer an ongoing direct and substantial threat from the fact of arrest, it disregards all evidence (not only evidence of innocence) that tends to establish the contrary.

Indeed, the TLC invariably discards ALJ determinations concluding that the driver poses no real threat.

This Court's prior decision held that *Mathews* determines both when a hearing is required (pre- or post-deprivation) and what process is due. The *Mathews* factors include: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation through the procedures used and the probable value of additional or substitute safeguards; and (3) the Government's interest, including the fiscal and administrative burdens that the alternative procedures would entail. 644 F.3d at 154 n.3. Application of this test shows that the constitutional violation here is more clear-cut and serious than in any of this Court's procedural due process cases. Indeed, this is the rare case where each *Mathews* prong condemns the challenged practice.

### A. Taxi Drivers Have a Profound Interest in their Licenses

A cabdriver's interest in his license is not merely "sufficient to trigger due process protection"; it is "profound." *Padberg*, 203 F.Supp.2d at 277. As this Court held, the "private interest at stake … is enormous." 644 F.3d at 159. More than depriving drivers' abstract interest in "pursuing a particular livelihood," *Spinelli*, 579 F.3d at 171, 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). Indeed, what this Court's

*Krimstock* decision recognized as an unusually compelling hardship, that some claimants depend on their vehicles to earn a living, 306 F.3d at 61, is true for *every* suspension of a hack license.

Moreover, as *Krimstock* and *Spinelli* instruct, heightened due process safeguards are required for provisional deprivations like those at issue here because someone "'erroneously deprived of a license cannot be made whole' simply by reinstat[ement]." *Spinelli*, 579 F.3d at 171 (quoting *Tanasse v. City of St. George*, 172 F.3d 63 (10th Cir. 1999)). As in *Krimstock*, an "ultimate [TLC] decision that the claimant is entitled to return of the property … rendered months after the [suspension does] 'not cure the temporary deprivation that an earlier hearing might have prevented.'" 397 U.S. at 64 (quoting *United States v. James Daniel Good Real Property*, 510 U.S. 43, 56 (1993), and *Connecticut v. Doehr*, 501 U.S. 1, 15 (1991)). Indeed, *Brown v. DOJ*, on which the district court has relied, is more emphatic. 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 at 668 (emphasis added).

The trial record shows the "temporary" hardship here to be far *greater* than this Court had supposed. ALJs have no authority to reinstate a driver's license. Findings 2, 4, 9. Reinstatement requires a ruling by the chair. This takes months,

not days. Khairul Amin and Jonathan Nnebe were both suspended for 37 days before the chair even ruled (as always) that his suspension should continue. In a more recent case, *TLC v. Tarshem Singh*, OATH No. 14-689, the "chair designee" ruled more than 120 days after the initial suspension. *See* Dkt. 318.[6]

Lost income aside, for drivers who own their own taxicabs or medallions, finance payment obligations persist even when the driver is barred from work. Desai 122. The practice burdens other constitutionally significant interests as well. Amin—who had an excellent work record, who had never been convicted of any crime, and who was not *accused of* any crime or wrongdoing in connection with cab driving—to this day maintains his innocence on the charge of assaulting his landlord's son. But his need to support his family required him to accept an adjournment in contemplation of dismissal, which ended his suspension, rather than put his accuser to his proof. JA-305/Amin.

### B. The Need for Further Protections is Great because the Risk of Error is High

It hardly needs saying that an officer who makes an arrest based on an on-the-scene assessment of probable cause makes no determination that the driver's continued licensure poses a substantial threat. One assessment has essentially nothing to do with the other. *See Krimstock*, 306 F.3d at 53 ("warrantless arrest by

[6] *Tarshem Singh* and *TLC v. Nau*, OATH No. 14-985, are both dated January 30, 2014, just following the trial. Both decisions are irreconcilable with Joshi's testimony about she what she would do—or might do—when acting for the chair.

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 grand jury's probable cause finding and forfeiture standards). It is, as this Court has recognized, a vast and counterfactual leap that even a driver *guilty* of an off-duty misdemeanor will (1) offend again (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 itself 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 "treat[ing] something as true" based on probable cause finding). Indeed, the TLC disregards that the arresting officer issued a desk appearance ticket (DAT), reflecting the officer's judgment that the driver posed no substantial threat even at the moment of arrest. JA-306/Gottlieb; JA-319/Joshi.

Here, the Findings and trial testimony dramatically confirm the inaccuracy of the TLC's process in identifying drivers who pose a genuine threat: Upwards of 75% of suspended drivers (90% in non-DUI-arrests, according to the TLC prosecutor) are ultimately reinstated when their criminal charges are favorably

resolved. To be sure, this rate of reinstatement does not establish that every suspension—or every continuation—was wrongful. Sometimes the facts appear worse than they turn out. But reinstatement does represent *the TLC's own* judgment that a 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 threat *while* charges are still pending than after they are resolved. The reality that some favorable resolutions (which include acquittals as well as adjournments and charge reductions) are not declarations of innocence only highlights this point: The TLC itself understands that many who *were* factually guilty as charged nevertheless pose no real threat of attacking passengers while on the job. *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 not reinstated—would *also* not have posed any genuine threat in the interim period.

In *Valmonte v. Bane*, this Court concluded that the fact that "nearly 75% of those who seek expungement of their names from the list [of suspected child abusers] are ultimately successful … indicates that the initial [agency] determination … is at best imperfect." 18 F.3d 992, 100 (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 this Court's prior decision here make clear, that an *initial* deprivation was arguably valid does not establish that its continuation is constitutional. This Court's tentative conclusion that a summary suspension may be constitutionally permissible did not imply that its *continuation* was correct. Rather, summary suspensions were deemed 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. Of course, whatever facts the TLC learns—always from the driver, never its own inquiry—it disregards.

The "value of additional … procedural safeguards," *Mathews*, 424 U.S. at 335, is plainly greater here than in *Krimstock*. The district court's focus on the fact that the *Krimstock* plaintiffs had had "no" hearing (M&O 11) misses the point: *Krimstock* did not hold that Due Process was satisfied by *just any* hearing. This Court, in three separate decisions, formulated a multi-part substantive standard entitling motorists to contest both their ongoing dangerousness and the likelihood

that the deprivation would be permanent. *See Ferrari v. Cty. of Suffolk*, 845 F.3d 46, 66 (2d Cir. 2016), as amended (Jan. 4, 2017) (summarizing the afforded protections). 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 the probable cause determinations there (based on direct observation and Breathalyzer tests) were unusually *reliable.* 306 F.3d at 47, 49, 62.

The district court brushed *Krimstock* aside as not "relevant"—though this Court had cited it repeatedly— suggesting, as it had in 2009, that the decision was concerned with the rights of "innocent" owners. But that suggestion is simply incorrect: Six of the seven named *Krimstock* plaintiffs were arrestees who were driving their cars when they were seized. The mandated hearings are provided to all vehicle owners, not just to non-drivers. 306 F.3d at 45-46. Moreover, non-arrestee owners did not, as the district court appeared to assume, enjoy an automatic right of return—a vehicle "permitted or suffered" to be driven unlawfully by someone else is subject to forfeiture, too. NYC Admin. Code §14-140(e). 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 substantial threat to public safety—is exceptionally high.[7]

### C. A Far More Meaningful Hearing Process Could be Devised without Added Cost

The second *Mathews* factor vividly condemns the TLC practice. This Court's 2011 decision recognized the likelihood that "a meaningful hearing can be devised at minimal cost to the City that does not constitute a mini-trial … [yet] provide[s] … drivers considerably more opportunity to be heard than the current system." 644 F.3d at 162. Defendants did not attempt to show below that a more accurate process would be burdensome or infeasible. Such an argument would contradict their repeated representations that *they already provide hearings that genuinely determine* whether a driver's licensure would endanger the public. Indeed, this is the rare case where the considerations of cost and administration, usually stressed by the government in the *Mathews* balance, have *no weight*.

[7] At various junctures, the City and district court have posited that the TLC has a distinct interest in continuing suspensions of drivers who are not in fact dangerous or guilty based on drivers occupying positions of "great trust." *See* 665 F. Supp. 2d at 327. This scheme is, however, far removed from rare settings such as *FDIC v. Mallen*, 486 U.S. 220 (1986), or *Gilbert*, in which the fact that a criminal proceeding has been initiated is *itself* the focus of concern. In *Mallen*, public knowledge of a bank official's indictment for financial dishonesty could jeopardize the bank's solvency. In *Gilbert*, the fact that felony charges were pending against a police officer could itself undermine the performance of his duties. Defendants' ostensible suspension authority is, by contrast, anchored to "*direct* and substantial" safety threats. They cannot seriously claim that a misdemeanor arrestee cannot perform the functions of taxi driver while a criminal case is being resolved.

The Potemkin process the TLC already provides is not cheap. The problem for defendants 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 not that "procedures … [for] evaluat[ing] the likelihood of future dangerousness … specifically designed to further the accuracy of that determination" are well known. *U.S. v. Salerno*, 481 U.S. 739, 742, 751 (1987). It is also that ALJs have made such determinations *in suspension cases. See* Findings 11 (noting certain OATH ALJ decisions finding that the driver is not a threat even after assuming guilt). Everything else aside, at no added cost the TLC process would be rendered dramatically more accurate by ending the categorical refusal to consider evidence already at hand that tends "to make a fact [danger] … less probable." Fed. R. Evid. 401(a).

The TLC has never offered any coherent explanation for its failure to provide meaningful protection (when not falsely claiming it already does). Often, defendants have changed the subject to the safety concerns prompting the policy or their desire to avoid "mini-trials." But "due process analysis" looks to the "reason … that justifies" the refusal to provide greater protection, not the interest 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' procedural due process right to adversarial hearing prior to involuntary civil commitment). Loose assertions that *any* risk to passengers is too great, *see* 665 F.Supp.2d at 325, are at odds with the City Council mandate that only "direct and substantial" dangers support suspension (and also with defendants' practice of *reinstating* drivers, even where the accusations concerned on-duty misconduct, if charges are dropped).

Even if defendants' presumption of guilt were unproblematic, it could not justify disregarding all other relevant evidence. Instead, this extraordinary presumption 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). The

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TLC's premise is that persons (presumed) guilty of a listed offense pose a heightened danger, which means that an innocent person does not. But if factually innocent drivers are prevented from offering evidence of innocence—on the ground that "mini-trials" are infeasible—then Due Process demands, at a minimum, they be afforded *every other* reasonable means to refute that they are a threat and to regain their livelihoods. *See Little v. Streater*, 452 U.S. 1, 2 (1981) (holding, in view of State's rule that "reputed father's testimony alone" could not

overcome showing of paternity, that Due Process required that State pay for blood-type testing).

### D. The Process the TLC Provides Is Literally Meaningless

There is, in fact, no need for recourse to the *Mathews* balance to perceive the TLC's affront to procedural Due Process. The post-suspension hearing *never* changes anything because, by design, it *cannot* change anything: A driver whose licensure does not pose a direct and substantial threat—even where the absence of threat is determined after a hearing— still will *not be* reinstated if the arrest offense is on the TLC list. 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). At the end of the day, that is all the TLC offers.

One exchange, discussed during the *Nnebe* trial, between a TLC prosecutor and an OATH ALJ underscored this meaninglessness. The ALJ, frustrated by the prosecutor's repeated assertions that various 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." Trial Tr. 599.

The 2016 decision below, sparing the City from the full sting of the 2014 Findings, suggested "three" ways that what it 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 no "arguable" "nexus" between the penal code provision cited and taxi-driving. But this is not a standard "separate" from the initiating suspensions. It is the same standard applied a second time. And it treats an arrest not only as "*per se* evidence" that the driver is a dangerous, 644 F.3d at 161, but as *conclusive* evidence.

The first two "prongs" of the "arrest-plus-nexus" standard are self-evidently worthless. A driver who is a victim of mistaken identity or who no longer faces charges need not pursue a hearing. The TLC prosecutor has authority to reverse a suspension in those circumstances—ALJs do not). Findings 8. The ostensible third "opportunity," to persuade the chair of the lack of nexus, is wholly chimerical. As Joshi testified, the TLC has already determined, "for every crime that's on this [long unpublished] list, there's some nexus…." Trial Tr. 556/Joshi; *see also* JA-87. The "chance" to persuade the TLC chair that a hypothetical person who is presumed guilty "'could [not] possibly' pose a threat to public health or safety," JA-67, 70, is no chance at all.

Trial evidence showed "nexus" to be even less of a check in practice than in theory. That the TLC process even considered "nexus" would surprise Coyne, who trained ALJs and testified that he could take "anything else into account" apart from identity and arrest that would allow lifting a suspension. JA-312/Coyne. And

not only has the chair never discontinued a suspension on nexus grounds (or on any other ground) defendants identified no decision where it was a close call. Indeed, when asked how *public welfare* felony allegations (like all felony allegations) invariably have a "nexus" to passenger safety, defendant Fraser theorized that any felony charge, if true, would establish a driver's "moral turpitude," which would show an inability to conform to rules generally, including rules against assaulting passengers. JA-327/Fraser. Thus, the TLC inevitably "concludes" that any listed offense relates to passenger safety (or, when minding its language, that it establishes a "direct and substantial" threat).

### E. Defendants' Pre-Hearing Notice Practice is Blatantly Unconstitutional

Among the strongest evidence of defendants' indifference to drivers' interests and to rudimentary fairness is the TLC's longstanding failure to provide drivers notice that informs them of what evidence it will and will not consider *de facto* in its hearing process. "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right, they must first be notified.'" *Fuentes v. Shevin*, 407 U.S. 67, 80 (1983) (quoting *Baldwin v. Hale*, 1 Wall. 223, 233 (1863)). "[I]n the absence of effective notice, the other due process rights afforded … such as the right to a timely hearing—are rendered fundamentally hollow." *Kapps v. Wing*, 404 F.3d at 123-24 (citation omitted).

As the district court itself concluded, the notices sent to the named plaintiffs in this case (and to all other drivers suspended before suit was filed), nowhere identified what the TLC's process treats as "the critical issue[s]." *Turner v. Rogers*, 131 S. Ct. 2507, 2519 (2011). Instead, drivers were told that "the purpose of th[e] hearing will be to determine whether your TLC license should remain suspended pending the final disposition of your criminal case." JA-67. The notices did not hint at the fact that the TLC would *not* consider, for example, evidence and testimony that the driver was innocent or likely to be reinstated or that the alleged offense occurred off duty. The district court rejected the City's contention that even this type of notice satisfied due process, recognizing that a driver seeking relief from an arrest-based suspension would naturally begin with evidence that the charges were unfounded. Indeed, the TLC affirmatively encouraged that understanding. JA-93-94.

The TLC's current practice, contrary to the district court's conclusion, is not substantially different. The court found that more recent notices "cite[d] to the operative version of the [summary suspension] Rule, which, … expressly stated the relevant 'issue[s]' to be considered at the summary suspension hearing—that is, the three inquiries comprising the arrest-plus-nexus standard." JA-93. In fact, neither the rule nor the notice makes clear that identity, fact-of-arrest and philosophical "nexus," are the *sole* issues to be contested. The reference to

"charges" might suggest that *the TLC's* presentation would focus on the allegations. *See* JA-87. But even that focus would not foreclose examining the circumstances underlying the charge. And the "if true" formulation is an unusually oblique way of signaling that the TLC is oblivious to evidence that an allegation is, in fact, *un*true.

Indeed, the district court's focus ignores everything else in the rule that would lead a driver to an entirely different understanding: its emphasis on the right to adduce *evidence*; the individual and forward-looking character of the necessary "demonstrate[ion]" that a driver's licensure "would" pose a substantial danger; and the very concept of a "hearing." Last, the district court's conclusion that this text indicates what the TLC does—and does not—consider is surely refuted by the testimony of *the TLC's chief attorneys* that the rule *does* permit consideration of individualized evidence. Even if Joshi and Fraser's trial testimony was false and insincere, it would be extraordinary to charge drivers with an understanding contradicted by the agency's senior officials while under oath. Moreover, the same *affirmative* misleading that occurred in 2006 persists to this day. A pamphlet on the OATH website entitled "Taxi and TLC-Licensee Cases, A Guide to Your Hearing at the OATH Tribunal," developed with the TLC's input, does not advise drivers to

confine themselves to "arrest-plus-nexus": It encourages them to present "their side of the story."[8]

### F. OATH ALJ Hearings are also Constitutionally Defective

Because ALJs lack authority to reinstate drivers on any ground, and because the practice the chair follows is so completely disdainful of relevant facts (and ALJ recommendations), the ALJ hearing stage is of limited constitutional significance. That said, the district court'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," JA-68, may not stand. The court clearly erred not in its reading of the OATH decisions it highlighted, but rather in its suggestion that these decisions were representative. In fact, the vast majority of ALJ recommendations do not purport to make any individualized finding.

There are several explanations why most OATH judges have not made individualized determinations (and why ALJs who did so once took a more constrained approach in later decisions). But the most obvious is surely chair review. If a reinstatement recommendation based on careful fact-finding has no prospect of assisting the respondent driver, the point of following that course is hardly apparent. OATH ALJs have adjusted to that reality or contented themselves

[8] https://www1.nyc.gov/assets/oath/downloads/pdf/OATH_taxicases_guide.pdf.

with airing doubts about the meaninglessness of their own hearings—or are waiting for this case to reckon with the TLC. *E.g.*, JA-242, 465, 473; Dkt. 321.

The shadow cast by the TLC chair's practice is longer still. Success at an *evidentiary hearing* requires marshaling *evidence*, which entails commitment of resources and often assistance of counsel—and it requires that a hearing occur. But as this Court previously recognized, 644 F.3d at 161, attorneys and advocates for drivers have largely and rationally concluded that, with chair review blocking the way, nothing is gained from the post-suspension process. Indeed, the district court found that OATH ALJs themselves advise drivers in pre-hearing conferences that the hearings are pointless, JA-69, n.8; see also JA-380/Hardekopf 108-09. There is no basis for the assumption 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 relevant evidence rather than irrebuttable presumptions.

### G. The TLC's Process Is Irretrievably Broken

The longstanding hiding of operative standards from those sorely affected is one sign among many of an agency process that is utterly lost. Indeed, this Court recently characterized the practice of "authoriz[ing] a hearing and at the same time insist[ing] that no new findings or conclusions could be based on [the hearing] record" as "incoherent." *NFL Mgmt. Council v. NFL Players Ass'n*, 820 F.3d 527,

541 (2d Cir. 2016). Nevertheless, this was standard operating procedure for the TLC for more than a decade.

The TLC allows prosecutors draft decisions for the chair, playing the role of judge. JA-378/Hardekopf; JA-322/Daus. It is one where ALJs were told to seek prior approval before releasing any decision against the TLC. The entire enterprise amounts to a mindless ritual, one that proceeds with contemptuous disregard for Due Process norms and utter indifference to the real hardship inflicted on hard-working cabdrivers who the agency knows pose no real threat to passengers.

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

The guiding presumption in TLC hearings is that the driver is guilty, or at least that his guilt cannot be questioned. The Findings state (1) that "OATH ALJs presume that the driver committed the crime with which he or she was charged;" and (2) "Like TLC ALJs, the Chairperson does not consider evidence that the driver might be innocent of the charges." JA-69, 71. The Supreme Court's recent decision in *Nelson v. Colorado*, 137 S.Ct. 1249 (2017), strongly suggests that this practice itself denies Due Process.

In *Nelson*, the petitioners, their convictions having been overturned on appeal, filed a civil action for reimbursement of court costs and restitution payments mandated by their criminal convictions. The Colorado Supreme Court rejected the claim, reasoning that a Colorado statute 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." The Supreme Court reversed, holding that Colorado's regime did "not comport with 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 presuming innocence. 137 S.Ct. at 1260. The Court concluded that the presumption of innocence must govern, calling it 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 (internal quotations omitted).

The TLC policy, like the one struck down in *Nelson*, is to presume that a driver, who not been convicted or even tried, is guilty as charged. Absent that presumption there is simply no basis for finding the driver a substantial threat. Indeed, in cases involving desk appearance tickets, the TLC presumes guilt where the driver has not yet been *arraigned*. Even worse, 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.

## III. THE SUMMARY SUSPENSION PRACTICE IS ALSO UNCONSTITUTIONAL BECAUSE ITS HARM REMAINS UNMITIGATED

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

While "[d]ue process does not, in all cases, require a hearing before the state interferes with a protected interest," as a general rule some pre-deprivation process is required. 644 F.3d at 158 (quoting and citing *Brody v. Vill. of Port Chester*, 434 F.3d 121, 134 (2d Cir.2005). *Mathews* guides "whether to tolerate an exception to the rule requiring pre-deprivation notice and hearing." *Id*. (quoting *Krimstock*, 306 F.3d at 60 and *James Daniel Good*, 510 U.S. at 53).

In its 2011 decision, this Court permitted an exception 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 "in its entirety" its determination that a pre-suspension hearing was unnecessary. *Id*. at 163. The facts found by Judge Sullivan demand that reconsideration.

### B. TLC Post-Suspension Hearings are Neither Prompt Nor Meaningful

This 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). It added, "The Supreme Court has repeatedly recognized the severity of depriving someone of the means of his livelihood." *Id*. Against that interest was "a strong government interest" in ensuring public safety "in the short term." The Court also suggested 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 implied would be no more than ten days. Finally, this Court 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 the 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 *United States v. Monsanto*, 924 F.2d 1186, 1192 (2d Cir.1991) (en banc); *see also Gilbert*, 520 U.S. at 932 ("So long as a suspended employee receives a sufficiently prompt post-suspension hearing, the lost income is relatively insubstantial"). Where, however, the post-suspension hearing is "deficient," where it does not constitute prompt and meaningful review, the initial deprivation is "constitutionally infirm." *Barry*, 443 U.S. at 66.

This infirmity condemns the TLC practice here. The agency's post-suspension process is meaningless and is far more dilatory in practice than the enacted 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 agency to conduct a hearing but time for the ALJ to draft a recommendation and for the chair to rule on it. This can take months. Absent prompt and meaningful review even post-suspension, the denial of any pre-deprivation opportunity to be heard must also be deemed unconstitutional.

## IV. THE DISTRICT COURT'S GROUNDS FOR REFUSING TO APPLY PROCEDURAL DUE PROCESS PRECEDENTS ARE IN CONFLICT WITH THE MANDATE AND ARE FUNDAMENTALLY ERRONEOUS

In a truly startling turn of events, the district court—nearly five years after this Court's remand—refused to apply procedural due process standards to its findings on the factual dispute that prompted that remand. Instead, the court announced that plaintiffs' central claim—that the TLC could without undue burden employ a post-suspension process that more accurately separates those arrested drivers who might pose an actual threat from those who do not—sounds in "*substantive* due process." Thus, the district court held, the TLC practice was reviewable only for minimal rationality. JA-85.

The district court pronounced the TLC's *de facto* practice of determining dangerousness based only on the fact of arrest a "substantive standard." Plaintiffs'

claim, he reasoned, was therefore indistinguishable from *Reno v. Flores*, 507 U.S. 292 (1993), and from *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003), which both held that Due Process does not require individualized hearings to determine facts not relevant under a statutory scheme. JA-82-83. He then concluded that—because "the TLC's post-suspension hearing is designed [only] to determine" the fact-of-arrest and "nexus"—a driver's due process rights are limited to being heard on those matters. JA-86-87 (pronouncing the fact that the TLC's practice "ensnare[s] some non-dangerous drivers" irrelevant to the due process inquiry).

That ruling was a bolt-out-of-the blue. It contravenes this Court's governing mandate. It is also deeply mistaken as a matter of constitutional principle. The decisions the court viewed as supporting a highly deferential standard did so because the governmental actions challenged *did not* entail—as the TLC's indisputably does— the deprivation of property or liberty. In this case, the central mandate of *procedural* Due Process—which attaches without showing of a fundamental right—is an obligation to provide processes that will "minimize substantively unfair or mistaken deprivations" of such rights. *James Daniel Good*, 510 U.S. at 53. And a local agency's decision as to what *it* will consider "proof enough" (JA-87)—whether expressed by statute, regulation, "interpretation," or as a simple matter of practice—cannot control the constitutional question.

### A. This Court's Decision and Mandate Definitively Settled that Plaintiffs' Claims Sound in Procedural Due Process

That the district court's conclusion came ten years in to this litigation after an appeal and remand makes its departure even more remarkable. At no point in these lengthy proceedings did defendants dispute that plaintiffs' claim to "a post-deprivation hearing that does more than confirm the existence of … criminal proceedings," 665 F. Supp.2d at 326, sounds in procedural due process. Thus, adherence to basic rules of forfeiture would have prevented these proceedings from veering so far off course. *See* below.

But forfeiture aside, the district court's rationale inexplicably defies this Court's mandate. 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" and "prohibits the district court from reopening the issue on remand unless the mandate can reasonably be understood as permitting it to do so." *U.S. v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir.2001). The principal relief this Court's 2011 decision awarded was to vacate the grant of "summary judgment *on the plaintiffs' claim that the post-suspension hearing is inadequate*," 644 F.3d at 160 (emphasis added). The grounds for doing so were stated in a lengthy section of the opinion entitled "*III. Procedural due process*," *Id.* at 158-163, that analyzed plaintiffs' claim under leading Circuit and Supreme Court procedural due process precedents. *See, e.g., id.* at 162-63 & n.8. Nor was

there any misunderstanding as to what the reinstated claim entailed. 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 it was his first arrest) 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" to be among the *procedural protections* that might be constitutionally required after "[b]alancing the *Mathews* [procedural due process] factors." *Id*. at 162. 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. This Court then explained, citing and quoting *Krimstock*, that it was "entirely possible" that a different, "meaningful *hearing can be devised* at minimal cost to the City that does not constitute a mini-trial on the criminal charges." *Id.*

The 2011 opinion treated "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." *Id.* at 161 (emphasis added). The 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).

Indeed, this Court's only mention of substantive due process was in a footnote rejecting the district court's construction of plaintiffs' state law claims as being substantive due process claims. *Id*. at 153 n.2.

In affording defendants a chance to substantiate their representations, this Court made 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," the decision can only be read to foreclose a ruling that a fact-of-arrest hearing would then become the "substantive standard" by which plaintiffs' constitutional rights are measured. The mandate simply does not contemplate that drivers' procedural due process rights would *contract* after they proved that defendants' purportedly "separate" standard for continuing suspensions was a "nullity."

This understanding of the mandate prevailed *in the district court* throughout the lengthy remand proceedings and at the 2014 trial. When the district court denied plaintiffs' post-remand summary judgment motion on their procedural due process claims, it did so on the ground that certain OATH decisions could be read

to support "*defendants['] conten[tion]* that … an ALJ *will consider evidence* that even if the charges are true, suspension is unwarranted because the license does not pose a sufficient public danger." JA-249 at 7-8 (emphasis added).

Later, the court's Jury Verdict Form provided for specific determinations about whether the TLC's post-suspension process "meaningfully considered" particular types of evidence such as whether the driver had been released without bail. The court never suggested, as it would later rule, that the City's legal position would be *strengthened* if the factfinder determined that the TLC did not meaningfully consider any evidence beyond evidence of arrest. On the contrary, the court "warned" defendants that their 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."[9]

### B. Plaintiffs' Entitlement To Relief Sounds In Procedural, Not Substantive, Due Process

This Court's unambiguous 2011 decision was not a mistake. Circuit and Supreme Court precedent offer no support for the notion that procedural due process rights are limited to an opportunity to present whatever evidence the government is willing to consider *de facto*. Instead, procedural due process

[9] The district court's 2009 opinion likewise described plaintiffs' "second claim for relief, 'Sham Hearings,' … claim[ing] that the post-deprivation hearings are inadequate[,] … as seeking to *vindicate Plaintiffs' procedural due process rights*." 665 F. Supp. 2d at 322 (quoting complaint, emphasis added).

decisions dating back decades have invalidated standards, whether codified in law or carried out in practice, by which individuals are denied property or liberty. Courts have held that procedural due process mandates promulgation of substitute standards and can even command new or different types of hearing. *E.g.*, *Bell v. Burson*, 402 U.S. at 540-41 (state's consideration of only the magnitude of damage claimed and failure to consider the likelihood of liability denied drivers a meaningful opportunity to be heard); *Valmonte*, 18 F.3d at 1002 (requiring a more demanding standard of proof for listing an individual on registry of child abusers); *Krimstock*, 306 F. 3d at 68-70 (ordering hearings that state law did not require and promulgating standards).

The district court's contrary conclusion reflects serial misunderstandings of fundamental Due Process principles. This case is in every constitutionally significant respect *un*like the cases the district court cited. In *Flores*, no individualized process was "due" because the Supreme Court held that the plaintiffs were *not* "deprived" of any protected liberty interest. *Doe* expressed grave doubt that publication of a factually accurate registry could be a deprivation. *See Paul v. Davis*, 424 U.S. 693 (1976) (reputational harm standing alone not actionable under § 1983). Here the TLC does not merely *disclose* that the driver was arrested, it suspends his license and denies his livelihood. The district court's lengthy exegeses about "fundamental and non-fundamental rights" and about

judicial reluctance to "confer[] constitutional status upon a previously unrecognized liberty," M&O 14-17, and its ultimate invoking of "rational basis" review were all, therefore, grounded on a constitutional mistake. Such considerations operate in substantive due process cases where courts must decide *whether* certain interests are so important as to put them beyond infringement regardless of process. But where the government deprives a person of property, Due Process does not ignore the interests of individuals needlessly ensnared. It *commands* procedures that will minimize error and unfairness. Equally alarming is the court's effort to confine *Krimstock* to cases involving seizure of tangible property. That suggestion is at war with generations of precedent establishing that procedural due process principles apply fully to government-issued licenses as in *Mackey*, *Spinelli*, and *Kuck*, not to mention *Mathews*, which involved government benefits.

The district court's further suggestion that, as in *Doe*, "the dangerousness of an individual driver" is "irrelevant" under the TLC "scheme" is even more wrong. The Connecticut statute at issue in *Doe* did not purport to determine that individuals registered as sex offenders posed a threat. *See* 538 U.S. at 4 ("Indeed, the public registry explicitly states that officials have not determined that any registrant is currently dangerous"). Here, by contrast, ongoing dangerousness is the focal point of the entire regime: Code §19-512.1 and the TLC rule link action to

"direct and substantial" threats to public safety. And the TLC will continue a driver's suspension based on an "evidentiary hearing" that ostensibly "determines" that his "licensure" would pose such a threat while charges are pending.

That the TLC—directly contrary to its representations—considers a driver's arrest for a listed charge to be "proof enough" that he would endanger the public, M&O 13—to the point that it affirmatively disregards everything else—does not extinguish procedural due process concerns, it intensifies them. The governmental defendant in *Bell v. Burson* could not have prevailed by announcing that it deemed the magnitude of liability to be "proof enough" to suspend a driver's license. Nor could New York City have avoided liability in *Krimstock* by providing a hearing that determined only that drunk driving charges were still pending.

The district court's error—treating whatever process the government provides as the process due—is the very 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 a citizen of property could determine what procedures are "due." 470 U.S. 532, 541 (1985). For that reason, the district court's focus on whether the TLC's practice may be squared with the text of its hearing rule is beside the point. As this Court's opinion made clear, the TLC's practices could deny procedural due process "whether *de facto or de jure*." 644 F.3d at 161. Because "minimum requirements" are a matter of

federal law, Due Process rights are not "diminished by the fact that the State may have specified its own procedures that it may deem adequate." *Vitek v. Jones*, 445 U.S. 480, 491 (1980). This principle would govern even if the features of the TLC practice were explicit in a statute. It is no less applicable to a purported (and dubious) "interpretation" of an agency rule. *See Clark*, 602 F.3d at 147 (rejecting agency "interpretation" of probable cause finding as determining a fact is "true").

### C. Forfeiture and Judicial Estoppel Principles Preclude Defendants' Arguments

The district court's ruling that plaintiffs' claims sound in substantive due process and that an arrest-plus-nexus hearing is constitutionally adequate were both *sua sponte*. Any attempt by defendants to adopt them should be barred by rules of forfeiture and judicial estoppel.

Judicial estoppel bars a litigant from adopting a new position where (1) a "party's 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)). That is exactly what happened here.

As Judge Sullivan recognized in his comments at the end of trial, defendants have shown their disregard for due process norms not only in the

practices at issue but in their dealings with this Court and the court below. They have protracted this civil rights litigation and frustrated fair and orderly adjudication by serial affirmative misrepresentations, including in sworn testimony, failures to correct misunderstandings and changes in position. What Judge Sullivan called the "price to be paid," JA-334, could well include a monetary sanction. But at the least this Court should not hesitate to bar attempts to bait and switch.

Just as it is axiomatic that new arguments will not normally be considered on appeal, a party may not offer new arguments after remand *following* an appeal. 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). Defendants never argued that plaintiffs' claims sounded in substantive due process; they have forfeited that position. Nor did defendants ever argue that an arrest-plus-philosophical-nexus hearing was consistent with Due Process. Instead, they claimed in this Court that the TLC hearing process allowed for a particularized assessment of whether licensure would pose a threat. They secured a remand based on that stance. They must be held to that position.

## CONCLUSION

The Constitution envisions an equipoise between power and responsibility.

Defendants have exercised, and still exercise, their power without knowledge or inquiry, and have denied plaintiffs' critically important rights. When the time comes to temper their conduct 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
June 12, 2018

_/s/_____

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# SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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No. 06-cv-4991 (RJS)

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JONATHAN NNEBE, *et al.*,

Plaintiffs,

VERSUS

MATTHEW DAUS, *et al.*,

Defendants.

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OPINION AND ORDER
August 7, 2014

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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 ("TLC"), and the City of New York (the "City" and, with the other defendants, "Defendants"), alleging that the TLC's policy of summarily suspending taxi drivers upon notification of their arrest violates the United States Constitution, New York state law, and New York City municipal law. (Doc. No. 42 ("Sec. Am. Compl.").) Having held a bench trial in this action, the Court issues the following Findings of Fact, as required by Rule 52(a) of the Federal Rules of Civil Procedure. Specifically, after carefully considering the evidence introduced at trial, the arguments of counsel, and evidence of which the Court has taken judicial notice, the Court concludes that:

- The TLC summarily suspends drivers who are arrested if it determines that the charged crime is sufficiently serious, and normally summarily suspends only for certain crimes, which are found on a list, and are limited to (1) misdemeanors related to violence, driving, or sexual misconduct; and (2) all felonies;

- Drivers may seek review of their summary suspension and may argue to an Administrative Law Judge ("ALJ") and the TLC Chairperson (the "Chairperson") that, even if the charges are true, continued licensure does not pose any safety concerns because there is no nexus between the charges and public health or safety;

- Between 2003 and 2007, when the hearings were held before TLC ALJs, ALJs would consider only whether (a) the suspended driver had been charged with a crime, (b) the charge was still pending, and (c) there was a nexus between the charged crime, as defined by its statutory elements, and public health or safety;

- Between 2007 and the present, at hearings before ALJs employed by the New York City Office of Administrative Trials and Hearings ("OATH"), ALJs have considered whether (a) the suspended driver has been charged with a crime, (b) the charge is still pending, and (c) assuming the charges are true, the particular driver would pose a direct and substantial threat to public health or safety;

- When reviewing a summary suspension, the Chairperson considers only 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, as defined by its statutory elements, and public health or safety;

- The Chairperson never considers or attempts to determine whether the particular driver would pose a direct and substantial threat to public health or safety;

- Only the Chairperson's review, and not the ALJ hearing, affects a driver's suspension because the Chairperson makes the final decision and is not bound by the ALJ's recommendation;

- The standard applied in the summary suspension review process was not made public until 2006 at the earliest; and

- No driver has ever had her or his suspension lifted through the summary suspension review process.

In light of these findings, the Court orders the parties to submit additional briefing addressing whether the TLC's summary suspension process violates the Plaintiffs' procedural due process rights under the Fourteenth Amendment.

## I. Background

The Court presumes the parties' familiarity with the facts and history of this case. Put briefly, the Court entered summary judgment in Defendants' favor on September 30, 2009. *Nnebe v. Daus* (*Nnebe I*), 665 F. Supp. 2d 311 (S.D.N.Y. 2009). On appeal, the Second Circuit vacated the Court's order and remanded to the Court to "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 v. Daus* (*Nnebe II*), 644 F.3d 147, 163 (2d Cir. 2011). The Court subsequently denied a post-remand

summary judgment motion. *Nnebe v. Daus* (*Nnebe III*), No. 06-cv-4991 (RJS), 2013 WL 4494452 (S.D.N.Y. Aug. 22, 2013).

On January 13, 2014, the Court began a bench trial on the issue identified by the Court of Appeals in *Nnebe II*. At the trial, Plaintiffs introduced the deposition testimony of Marc Hardekopf and called Bhairavi Desai, Khairul Amin, Eduardo Avenaut, Eric Gottlieb, Thomas Coyne, Matthew Daus, Tynia Richard, Meera Joshi, Michael Spevack, and Allison Green; Defendants called Meera Joshi, Charles Fraser, and Joseph Eckstein. The parties also introduced numerous exhibits, most of which were admitted by stipulation, and most of which were documents generated during the summary suspension process – for example, notification letters, transcripts, ALJ recommendations, and Chairperson decisions. Trial concluded on January 21, 2014, and the parties filed post-trial submissions on January 31, 2014. (Doc. Nos. 303, 313.)

## II. FINDINGS OF FACT

The Second Circuit, in its Opinion, sought more detail on the TLC's summary suspension process both "de facto [and] de jure." *Nnebe II*, 644 F.3d at 161. The Court therefore addresses both the written legal standards and the process as it has been practiced throughout the alleged class period of 2003 to the present. (*See* Sec. Am. Compl. ¶ 19.)

### A. The Law as Written

#### 1. Statutory Law

The source of the TLC's authority to summarily suspend a driver is § 19-512.1(a) of the New York City Administrative Code (the "Code"), which was originally enacted in 1999. *See* N.Y.C. Code § 19-512.1(a); New York City, N.Y., Local Law No. 20 Int. 472-C (1999). 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." *Id.*[1] 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.*

The TLC can implement the provisions of the Code through rules and regulations. *See* N.Y.C. Code § 19-503 ("The commission shall promulgate such rules and regulations as are necessary to . . . implement the provisions of this chapter."). Pursuant to that authority, the TLC has implemented its § 19-512.1-summary-suspension powers through a summary-suspension rule (the "Rule"). The history and content of that rule is discussed below.

#### 2. Implementing Regulations

The Rule has been amended and renumbered several times since 2003. The Court addresses each change in turn.

##### a. The 1999 Version

The earliest version of the Rule, then designated § 8-16, was enacted in 1999. The full text of that version reads:

> § 8-16 Emergency Suspension to Protect the Public Welfare

[1] Before 2008, the provision required a "threat," but not a "direct and substantial threat." *See* New York City, N.Y., Local Law No. 16 Int. No. 256-A (2008) (amending § 19-512.1(a) to change "threat" to "direct and substantial threat").

(a) If the Chairperson finds that emergency action is required to insure public health, safety or welfare, he/she may order the summary suspension of a license or licensee, pending revocation proceedings.

(b) Such revocation proceedings shall be initiated within five (5) calendar days of the summary suspension.

(c) The Commission shall notify the licensee either by personal service or by both first class and certified mail of the summary suspension within five (5) calendar days of the suspension. If the licensee wishes to receive a hearing concerning the suspension, he or she may request a hearing within ten (10) calendar days of the receipt of the notice of suspension. Upon receipt of a request for a hearing, the Commission shall schedule a hearing, which shall be held within ten (10) calendar days of the request, unless the Commission determines that such hearing will be prejudicial to any ongoing civil or criminal investigation.

(d) A summary suspension hearing conducted pursuant to this section shall be held before an ALJ who shall consider relevant evidence and testimony under oath, according to the hearing procedures set forth in this Chapter. In any such hearing, the affirmative defenses set forth in subdivision b of § 19-512.1 of the Administrative Code may be available.[2]

(e) Upon the conclusion of the summary suspension hearing, the ALJ shall issue a written Recommended Decision to the Chairperson, who may accept, reject or modify the recommendation. The decision of the Chairperson shall be the final determination of the Commission with respect to the summary suspension.

(f) In the event no decision is rendered by the Chairperson within sixty (60) calendar days of the conclusion of the suspension hearing, the suspension shall be thereafter stayed until such decision is rendered.

(Plaintiffs' Exhibit ("PX") B ("§ 8-16 (1999)").)

Compared to later versions of the Rule, the 1999 version is notable for what it does not say. Although the Rule allowed a driver to challenge her or his suspension at a hearing, it did not indicate what standard would apply at the hearing or what issue the hearing would decide. Similarly, the Rule required ALJs to "consider relevant evidence and testimony under oath" (*id.*), but gave no guidance on what kinds of evidence might be relevant. In other words, the Rule stated that drivers could challenge their suspension, but it did not state how they might succeed in that challenge.

[2] These affirmative defenses relate to the "exercise[] [of] due diligence in the inspection, management and/or operation of" vehicles, and are not relevant to summary suspensions for arrests. *See* § 19-512.1(b).

b. The 2006 Version

The Rule was amended in December 2006. The most relevant change was the addition of a new subdivision (c), which stated:

> (c) Notwithstanding subdivision (b) of this section, the Chairperson may summarily suspend a license subject to the provisions of subdivisions (a) and (d) [formerly subdivision (c)] through (g) [formerly subdivision (f)] of this section based upon an arrest on criminal charges that the Chairperson determines is relevant to the licensee's qualifications for continued licensure. At the hearing pursuant to subdivision (e) [formerly subdivision (d)] of this section, the issue shall be whether the charges underlying the licensee's arrest, if true, demonstrate that the licensee's continued licensure during the pendency of the criminal charges would pose a threat to the health or safety of the public. Revocation proceedings need not be commenced during the pendency of the criminal charges. In such a case, within five (5) calendar days of the Commission's receipt from the licensee of a certificate or disposition of the criminal charges, the Chairperson shall either lift the suspension or commence revocation proceedings.

(PX C ("§ 8-16 (2006)").)

This version provided the standard that had been missing in the previous version. The new version explained that a driver would succeed at a hearing if the Chairperson determined that "the charges underlying the licensee's arrest, [even] if true, [did not] 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." *Id.*

c. The 2008 Version

In 2008, in order to track the newly amended language of § 19-512.1(a), subdivision (c) was amended to change "threat" to "direct and substantial threat." *See supra* note 1; N.Y.C. TLC, *Notice of Public Hearing and Opportunity to Comment on Proposed Rules* at 5, 6 (2008), http://www.nyc.gov/html/tlc/downloads/pdf/proposed_rules_08_07_2008.pdf. In all other respects, the Rule remained unchanged.

d. The 2011 Version

In 2011, § 8-16 was amended and renumbered as § 68-21 as part of a general reworking of the City's rules and regulations. Although the language of the Rule changed slightly, the changes were stylistic only. As relevant here, the new version of the Rule stated:

> § 68-21. Special Procedures – Summary Suspension Pending Revocation.
>
> . . .
>
> (d) Summary Suspension for Criminal Charges.
>
> (1) The Chairperson can summarily suspend a License based upon an arrest on criminal charges 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.

(2) The Chairperson need not commence revocation proceedings while the criminal charges are pending. However, the Respondent is entitled to request a 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 the health or safety of the public.

(4) Within five calendar days from the date the Commission receives from the Licensee a certificate of disposition of the criminal charges, the Chairperson must either lift the suspension or commence revocation proceedings.

(PX E ("§ 68-21 (2011)").)

e. The 2014 Version

In January 2014, while the trial was under way, the City amended the Rule once more and renumbered it as § 68-15. Neither party brought the change to the Court's attention until several weeks after the trial had ended. (Doc. Nos. 312, 314, 315.) The amendment did not change the standard set forth in subdivision § 68-21(d)(3) (2011), but elaborated on the Chairperson's authority under subdivision (d)(1). Specifically, the new version states:

(d) Summary Suspension for Criminal Charges.

(1) The Chairperson can summarily suspend a License based upon an arrest on criminal charges 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 act, as prohibited by these Rules, of driving a TLC licensed vehicle while Impaired by intoxicating liquor (regardless of its alcoholic content), or Drugs;

(B) Any act, as prohibited by these Rules, of bribery, fraud, material misrepresentation, theft, threat against a person, harassment, abuse, or use of physical force;

(C) Any act, as prohibited by these Rules, involving the possession of a Weapon in a vehicle licensed under these Rules;

(D) Any felony conviction;

(E) Or any conviction of the following criminal offenses:

[A list of eighteen categories of offenses.]

N.Y.C. TLC, *TLC Rules and Local Laws: Chapter 68 – Procedures Relating to Enforcement* at 13–15 (2014), http://www.nyc.gov/html/tlc/downloads/pdf/rule_book_current_chapter_68.pdf ("§ 68-15 (2014)").

The Court notes that Defendants claim that most of these changes were made in error, and that subdivisions (d)(1)(D) and (E) should say "arrest" instead of "conviction," and subdivisions (d)(1)(A) through (C) should not have been included at all. (Doc. No. 312.) Nevertheless, neither party disputes that the amendments were enacted, and that the January 2014 version is the most current version of the Rule.

B. The Summary Suspension Process in Practice

Despite the numerous versions of the Rule, the summary suspension process has for the most part continued unchanged. Even the most significant change to the Rule – the addition of the substantive standard in 2006 – merely reflected and restated pre-existing practice. (Tr. at 335:21–336:18; *see* PX 17 at 3188 (pre-2006-amendment Chairperson decision stating the post-2006 standard); PX 17 at 3238 (same).) Consequently, the Court's description of the process generally applies equally to the entire relevant period. To the extent the practice has changed, the Court notes the change specifically.

The Court addresses the summary suspension process in two stages: (1) the initial suspension process; and (2) the summary suspension review process.

1. The Initial Suspension Process

The process of suspending a driver usually starts when the New York Division of Criminal Justice Services ("DCJS") sends the TLC an arrest notification, which informs the TLC that a TLC driver has been arrested. (Tr. at 588:22–589:12; Dep. of Marc Hardekopf, dated Dec. 13, 2013, PX A1, at 7:6–14, 12:4–8.)[3] The arrest notifications include a driver's name; identifying information, such as a Social Security number and date of birth; and the offense or offenses for which the driver was arrested. (PX A1 at 7:15–20, 12:11–15; *see* PX 9 (example of a DCJS arrest notification); Defendants' Exhibit ("DX") J-1 to J-15 (same).) Upon receiving an arrest notification, a TLC employee checks the identifying information on the arrest notification against the TLC's internal database to make sure that the person arrested is actually a TLC driver. (Tr. at 589:17–22; PX A1 at 7:21–24.) If the arrested person is in fact a driver, and if the TLC employee determines that the charged offense is serious, the employee suspends the driver. (Tr. at 589:17–590:4; PX A1 at 7:22–24.) The Chairperson is never involved in the initial suspension process. (PX A1 at 16:10–12.)

To determine if an offense is serious, the employee looks to a list of offenses created in 2000 (and modified in 2006 and 2009) for use by TLC staff. (Tr. at 590:23–591:10, 701:7–14; PX A1 at 9:18–24, 18:2–5, 41:5–42:7, 46:23–48:1); *see* DX A (the list of offenses in use from June 2009 to the present).) The crimes on this list are all either (1) misdemeanors involving violence, driving, or sexual misconduct; or (2) felonies. (DX A.) Generally, if the offense is on the list, the TLC suspends the driver, and if the offense is not on the list, the TLC does not suspend the driver. The list was not publicly available before this case, and neither its existence nor its contents were

[3] PX A1 is a transcript from portions of Marc Hardekopf's deposition that were played during the trial. The video of those portions of the deposition is PX A.

disclosed to drivers or members of the public. (PX A1 at 41:5–44:8.)[4]

In some very rare cases the TLC might vary from the list. For instance, if an offense appears serious but is not on the list, the TLC might still suspend the driver. *See TLC v. Nahamov*, OATH Index No. 1796/12 (June 4, 2012) (reviewing a suspension for promoting prostitution in the fourth degree, an offense that is not on the list)[5]; (Tr. at 590:23–591:4; PX A1 at 9:18–10:06). In the vast majority of cases, however, the TLC employee considers only the fact of arrest and whether the charged offense is on the list, and does not consider any additional facts. (Tr. at 589:21–22, 590:16–19, 598:20–24, 600:23–601:16; PX A1 at 9:18–10:06, 17:11–18:5, 55:6–55:16.)

Once the TLC employee suspends the driver, the TLC informs the driver of the suspension by letter. (Tr. at 177:7–178:4, 590:9–15; *see* PX 32, 72, 73 (samples of suspension notice letters); DX K-1 to K-16, K-18 to K-23 (same).) The letter states that (1) the TLC has learned of the driver's arrest, (2) the driver's license has been suspended, and (3) the driver can schedule a hearing to contest the suspension by calling the TLC. (*See* PX 32, 72, 73; DX K-1 to K-16, K-18 to K-23.) Although the letter cites to the version of the Rule in force at the time of the letter's issuance, it does not otherwise state what standard will be applied at the hearing. (*Id.*) In addition, the letter states that the TLC may lift the suspension if the charges are disposed of in the driver's favor and urges drivers to notify the TLC of any changes in the criminal case. (*Id.*)

If the driver contacts the TLC to request a hearing – about nine out of ten do – the TLC begins the review process, which is described below in Subsection II.B.2. (Tr. at 591:16–24.) If a driver contacts the TLC to inform it that the charges against the driver have been dismissed, reduced to an offense that is not on the list, or otherwise resolved in the driver's favor, the TLC employee lifts the suspension. (Tr. at 391:24–393:6; PX A1 at 134:05–09.) The driver can notify the TLC of a favorable disposition and have the suspension lifted at any time, even after going through the review process. *See TLC v. Choukri*, OATH Index No. 1058/14, at 1 n.* (Nov. 22, 2013) (noting that the suspension was lifted by the agency after the hearing before the ALJ); *TLC v. Singh*, OATH Index No. 1278/10, at 1 n.* (Dec. 2, 2009) (same); *TLC v. Bogy*, OATH Index No. 989/09, at 1 n.* (Oct. 1, 2008) (same); (Tr. 392:25–393:6). 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. (PX A1 at 135:11–136:03.) Ultimately, more than 75% of suspended drivers have their suspension lifted through this informal process. (*Id.* at 138:20–139:03.)

2. The Summary Suspension Review Process

If a driver requests a hearing, the TLC schedules a hearing and notifies the driver of the hearing by letter. (PX A1 at 29:2–30:1; *see* PX 27–29, 31 (samples of hearing notice letters); DX L-1 to L-23 (same).) The letter informs the driver of the time, date, and location of the hearing and states that drivers can present evidence and call witnesses on their behalf. (PX 27–29, 31; DX L-1 to L-

[4] As set forth above, the current version of the Rule now enumerates offenses for which the TLC may suspend drivers and includes all of the offenses from the most recent TLC list. *See supra* Subsection II.A.2.e; *compare* § 68-15(d)(1)(E) (2014), *with* DX A.

[5] All OATH opinions cited throughout this Opinion can be found through the searchable OATH Tribunal Database, located at http://a820-isys.nyc.gov/ISYS.

23.) The letter states that "the purpose of th[e] hearing will be to determine whether your TLC license should remain suspended pending the final disposition of your criminal case," but does not state what standard will be applied at the hearing to make that determination. (PX 27–29, 31; DX L-1 to L-23.)

The hearings themselves proceed in two parts. In the first part (the "ALJ Hearing"), the driver and a TLC attorney can present evidence and argue before an ALJ, who subsequently issues a non-binding recommendation to the TLC Chairperson that the suspension either be continued or discontinued. (*See* Tr. at 270:7–9, 454:20–460:11.) In the second part ("Chairperson Review"), drivers can respond to the recommendation by submitting a letter to the Chairperson,[6] who then makes the final decision. The Court addresses these two parts separately.

The Court notes from the outset, however, that the final result of the review process has always been the same. Regardless of the recommendation from the ALJ, the Chairperson has always ultimately continued the suspension. (Tr. at 270:14–19, 479:24–480:6; PX A1 at 96:05–98:04, 133:22–134:03.)

a. The ALJ Hearing

Before November 2007, the ALJ Hearings were held before ALJs employed by the TLC. *See Nnebe III*, 2013 WL 3863867, at *1 n.4 (S.D.N.Y. July 23, 2013). After November 2007, the hearings were held before ALJs employed by OATH. (*Id.*) Because the hearings before the TLC and OATH ALJs operated differently, the Court addresses the historical practice before TLC ALJs first and then turns to the current practice before OATH ALJs.

i. Hearings Before TLC ALJs

At TLC ALJ Hearings, the ALJ determined only: (1) whether the suspended driver had been charged with a crime (Tr. at 271:20–25, 283:3–9; PX A1 at 65:22–66:03), (2) whether the charge was still pending (Tr. at 271:20–25), and (3) whether there was a "nexus" between the charged crime and public health or safety (Tr. at 258:7–18, 594:24–595:23; PX A1 at 24:11–20, 65:22–66:9).

The first two issues – whether the driver had been charged with a crime and whether the charges were still pending – were factual questions and were decided through the presentation of evidence. (Tr. at 339:20–340:9.) In practice, however, the TLC always met its burden by submitting the DCJS notification, a printout from the TLC's database showing that the suspended driver was the same person named in the arrest notification, a copy of the penal statute for the charged crime, and – on some occasions – a copy of the criminal complaint. (Tr. at 195:21–196:24, 257:5–14, 593:17–594:4, 595:24–596:7; PX A1 at 23:1–25, 24:21–25, 65:22–66:09; PX 55 (excerpt from the TLC ALJ Manual).)

The third issue – the nexus – was a "philosophical" question and was decided based on argument, not facts. (Tr. at 291:1–292:5.) A nexus between the charged crime and public health or safety was deemed to exist if there was a rational basis to conclude that allowing a driver who had, in fact, committed that crime to continue driving would pose a threat to public health or safety. (*See* Tr. at 282:3–19; PX 55.) In

[6] Since 2010, the Chairperson has delegated summary suspension reviews to the TLC General Counsel. (Tr. at 487:3–7.) For the purposes of this Opinion, the Court does not distinguish between decisions made by the Chairperson and decisions made by the Chairperson's designees.

other words, a nexus existed if a hypothetical driver who had committed the crime in question would *arguably* be a threat to public health or safety.

To decide whether there was a "nexus" between the crime and public health or safety, TLC ALJs considered each suspension on a case-by-case basis and did not rely on the TLC's list of offenses. (Tr. at 257:23–258:6, 269:2–19.) Nevertheless, because the nexus determination focused on a hypothetical driver, TLC ALJs did not make any assessment of, or consider any facts pertinent to, the threat to public health or safety posed by the particular suspended driver. (Tr. at 272:17–274:15, 282:9–14, 283:3–12, 290:8–12.) In addition, TLC ALJs did not consider any facts alleged in the criminal complaint against the driver, but instead focused solely on the penal code definition of the charged crime. (Tr. at 256:14–258:13, 273:24–274:1, 307:12–17.)

TLC ALJs did not tell drivers what the applicable standard was (Tr. 308:1–309:19; DX D-5 at 2:22–3:12 (transcript of a TLC ALJ hearing); DX E-5 at 4:6–21 (same); DX F-5 at 3:21–4:10 (same)), and most, if not all, suspended drivers did not understand what the standard was (Tr. at 312:12–24). Moreover, instead of focusing drivers on the standard, TLC ALJs encouraged drivers to argue anything 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. (Tr. at 290:19–23, 292:23–293:4, 308:7–13; DX D-5 at 2:22–3:12; DX E-5 at 4:6–21; DX F-5 at 3:21–4:10.) Drivers were also permitted to call witnesses and present evidence. (PX 27–29, 31; DX L-1 to L-23.) Nevertheless, TLC ALJs did not consider any facts other than the three factors discussed above. (Tr. at 290:19–25, 292:23–293:6, 310:7–15.)

Ultimately, these hearings resulted in a nearly unbroken record of recommendations that the suspension be continued. Indeed, the Court heard evidence of only three occasions – out of hundreds of summary suspension hearings (Tr. at 312:12–15; PX A1 at 18:25–19:16, 90:11–15) – where a TLC ALJ recommended that the suspension be lifted.[7] On those three occasions, the ALJ – Eric Gottlieb – recommended that suspensions be lifted because he determined, based on facts particular to the driver, that the suspended driver was not a danger to the public. (Tr. 197:12–22, 214:11–231:12, 233:13–20, 246:22–248:11; PX 83 (copies of the recommendations).) As a result of those recommendations, however, ALJ Gottlieb was strongly admonished by his supervisor (Tr. at 188:4–11, 198:15–200:4, 201:13–202:24, 203:13–204:1, 213:9–14, 244:3–20; PX 44 (email correspondence between Gottlieb and his supervisor)), and the recommendations were rejected by the Chairperson, who continued the suspensions (PX A1 at 120:1–13).

ii. Hearings Before OATH ALJs

Procedurally, hearings before OATH ALJs are identical to the hearings that were held before TLC ALJs. (PX A1 at 87:7–88:04.) The standard applied at the hearings, however, is different.

While TLC ALJs focused on whether a hypothetical driver who had committed the charged crime would arguably be a threat to public health or safety, OATH ALJs seek to determine whether the particular suspended driver is, in fact, a direct and substantial threat to public health or safety. *See TLC v.*

[7] Although one witness suggested there "just might have been one or two" other occasions where a TLC ALJ recommended lifting a suspension (PX A1 at 19:18–20:10), no party admitted any evidence demonstrating that those "other" recommendations actually were made.

*Nau*, OATH Index No. 985/14, at 4, 6 (Nov. 22, 2013) (acknowledging that a nexus exists between drunk driving and public health or safety but stating that the standard is whether "considering [the evidence regarding the risk to public health or safety submitted by the driver] as well as [the driver]'s DWI arrest, would reinstating [the driver]'s license to drive pose a 'direct and substantial' risk to the public"); *TLC v. Ahmed*, OATH Index No. 1649/08, at 3 n.1 (Feb. 27, 2008) ("[A] particularized assessment of risk is required by rule 8-16(c)."). Thus, although OATH ALJs presume that the driver committed the crime with which he or she was charged, *see TLC v. Springle*, OATH Index No. 1011/008, at 3–4 (Nov. 30, 2007) ("[I]t must be assumed that [the driver] committed the crimes with which he is charged . . . ."); *accord TLC v. Basar*, OATH Index No. 874/12, at 4 (Jan. 20, 2012); *TLC v. Kamal*, OATH Index No. 2607/10, at 4 (June 1, 2010); *TLC v. Diao*, OATH Index No. 1641/08, at 5 (Mar. 6, 2008); (Tr. at 444:2–4), they also consider evidence beyond the charge, such as "the driver's character[] and the likelihood of recurrence," *TLC v. Khair*, OATH Index No. 1842/14 (Mar. 26, 2014), at 3; *see TLC v. Motala*, OATH Index No. 1465/14, at 2–3 (Feb. 6, 2014) (citing cases); *TLC v. Chauca*, OATH Index No. 1002/14, at 3 (Nov. 27, 2013) (same); (Tr. at 463:3–20, 466:16–468:22). Under this standard, although the number of recommendations to lift a suspension remain low, drivers are more likely to receive a recommendation that a suspension be lifted than was the case before TLC ALJs. Specifically, the record reflects that out of the hundreds of hearings conducted by TLC ALJs between 2000 and 2007, there were only three recommendations to lift suspensions. By contrast, there have been six recommendations to lift suspensions from OATH ALJs out of the few dozen hearings conducted between 2007 and 2014.[8]

b. Chairperson Review

After the ALJ makes its recommendation, the TLC mails the driver a copy of the recommendation and notifies the driver that he or she may submit to the Chairperson a written response to the recommendation. (DX P-1 to P-20 (samples of letters to drivers notifying them of the recommendation).) The notification also informs drivers that their response "must be limited solely to any exceptions or objections [they] have to the conclusions contained in the [recommendation]" and that "[n]o evidence outside of the hearing record can be considered." (*Id.*) Like other notices, this letter does not inform drivers what standard will be applied by the Chairperson.

Although the Chairperson thoroughly reviews the recommendation and any submission by the driver (Tr. at 337:23–339:4, 342:10–25, 350:12–19, 407:14–22, 501:8–502:3), the standard the Chairperson

[8] Hearings before OATH ALJs are significantly less frequent than they were before TLC ALJs. (*Compare* PX A1 at 90:11–15 (stating that there were between two and ten driver suspension hearings before TLC ALJs every week), *with* PX A1 at 89:25–90:10 (stating that there is "maybe one [driver suspension hearing before OATH ALJs] every three months").) The drop in the number of hearings is largely due to the pre-hearing conferences held at OATH, at which an OATH ALJ – not the ALJ assigned to the hearing – meets with the driver and the TLC lawyer. (Tr. 448:1–449:24, 592:8–12; PX A1 at 106:6–14, 107:08–11.) At those conferences, the TLC lawyer advises the driver that the suspension will be lifted if the charges are dropped or reduced. (PX A1 at 106:18–25; *see* Tr. at 453:6–21.) In addition, the OATH ALJ discourages drivers from going forward with the hearing by informing the driver that there is "little or no chance" that the driver will ultimately prevail. (PX A1 at 112:14–113:23.) After the conference, most drivers agree to waive or postpone their hearing. (PX A1 at 122:18–123:11.)

applies in making her or his decision is narrow. Like TLC ALJs, the Chairperson at all times has focused only on 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 TLC v. Bhatti*, Comm'n Dec. (Sept. 24, 2013), *rejecting* OATH Index No. 2364/13 (Aug. 27, 2013)[9]; (Tr. at 342:18–24, 358:23–359:10, 361:13–362:1, 406:23–407:13; *see also* Tr. at 363:9–15 (testimony by Daus that "It's a very simple hearing. . . . [I]t's like a sufficiency hearing or a safeguard hearing that was put into place that we decided to do to make sure basically these are the right people and you're not making a serious mistake.")).

With respect to the first two inquiries – the identity of the driver and the pendency of the charges – the Chairperson can consider the driver's testimony and other evidence, including the criminal complaint against the driver or other official charging documents. *See TLC v. Riano*, Comm'n Dec. (July 11, 2008) ("A licensee may . . . offer evidence that she was not in fact the person arrested, or that the charges are incorrectly reflected in the arrest report, or that even if correctly reflected, the charges have been reduced or dismissed after the arrest report was made."), *rejecting* OATH Index No. 2554/08 (June 11, 2008); (Tr. at 358:23–359:10). However, charging documents would be considered only to determine "the nature of the charges" that are pending. *TLC v. Al-kafi*, Comm'n Dec. (Jan. 2, 2014), *adopting* OATH Index No. 580/14 (Nov. 7, 2013).[10] In other words, the charging documents would be relevant only to the extent they showed that the driver was not actually facing the charges identified by the TLC. (Tr. at 378:6–379:12, 380:23–381:7, 566:19–567:8.) For instance, a situation could arise where the DCJS arrest notification indicated that the driver had been arrested for a certain crime, but the criminal complaint supported a charge for a lesser charge only. In that situation, the Chairperson could rely on the charging documents to find that only the lesser charge was pending.[11]

The existence of the nexus, on the other hand, is a "common sense" determination (Tr. at 562:24–563:22), "based on the nature of the pending charges," *TLC v. Al-Kafi*, Comm'n Dec. (*See also* Tr. at 416:19–417:4 (testimony by Daus that a nexus would exist where "you could argue" that a person who had committed the crime "could possibly" pose a threat to public health or safety).) In making that determination, the Chairperson is not bound by the TLC's list of offenses and can determine that an offense on the list does not have a nexus to public health or safety or vice versa. (Tr. at 414:1–12, 553:1–15.) Nevertheless, the nexus decision is made based on the statutory elements of the crime (Tr. at 518:7–17; 562:24–563:14), not on the factual allegations in the criminal complaint or other charging documents. As discussed above, charging documents can be used to

[9] Chairperson decisions are appended to the end of the respective OATH recommendations.

[10] The Chairperson's decision in *TLC v. Al-kafi* is not available through the OATH database, but was introduced at trial as DX R-20.

[11] Matthew Daus, the Chairperson from 2001 to 2010 (Tr. 318:18–21) and Meera Joshi, the Chairperson's designee from 2011 to 2014 (Tr. at 486:22–487:7), each testified that they "considered" evidence, when they meant they read the evidence and thought about it, even if the evidence was irrelevant and played no role in their decision. (*See, e.g.*, Tr. at 342:11–25, 407:14–22, 419:20–420:5, 514:3–22, 533:24–534:11, 536:3–23.) For purposes of this Opinion, when the Court says that a decision-maker "considered" evidence, it means that the decision-maker gave the evidence some weight in making her or his decision. As the Court uses the term, irrelevant evidence is not "considered," even if read.

challenge whether the driver was charged with the crime that the TLC alleges. Once the charge is determined, however, only the statutory elements of that charge matter.[12] *See TLC v. Nau*, Comm'n Dec. (Jan. 30, 2014) (focusing on the nexus between the "crime of driving while intoxicated" and public health or safety, as opposed to between the underlying conduct and public health or safety), *rejecting* OATH Index No. 985/14 (Nov. 22, 2013); *TLC v. Bhatti*, Comm'n Dec. (finding a nexus between "Assault in the Third Degree" and public health or safety, as opposed to between the particular assaultive conduct alleged and public health or safety); *TLC v. Mirakov*, Comm'n Dec. (Jan. 8, 2008) (finding a nexus because the "crime of assault in the third degree" is "a serious crime"), *rejecting* OATH Index No. 1053/08 (Dec. 7, 2007); *TLC v. Adjoor*, Comm'n Dec. (Dec. 20, 2007) (same), *rejecting* OATH Index No. 1044/08 (Dec. 7, 2007).

[12] This issue was also addressed and conceded by Defendants' counsel immediately before trial:

> MS. O'SULLIVAN: . . . So your Honor, maybe I can say it this way. Are you saying that if the facts as alleged in the complaint meet the penal law elements, is there any other facts or any other factor that would be considered?
>
> THE COURT: That's a place to start, yes.
>
> MS. O'SULLIVAN: From the decisions that are in the record, it doesn't appear so, but the ALJs from OATH have considered the other factors. . . . As to the ALJs, yes, they consider other factors. As to the chair, the chair decisions have each come out in favor of deciding to continue the suspension based upon the elements. And the decisions don't use the word "elements," but based upon the charge, the arrest charge, if it was true.

(Tr. at 10:9–23.)

Like TLC ALJs, the Chairperson does not consider evidence that the driver might be innocent of the charges (Tr. at 359:18–360:1, 370:18–371:6) or that the particular driver would not pose a direct and substantial threat to public health or safety (Tr. at 407:14–22, 418:24–420:5, 421:10–422:12); *see also TLC v. Pugati*, Comm'n Dec. (Feb. 18, 2014) (rejecting the ALJ's consideration of whether the event underlying the arrest was "unusual" and whether there were "mitigating circumstances"), *rejecting* OATH Index No. 1245/14 (Dec. 27, 2013); *TLC v. Nau*, Comm'n Dec. (rejecting the ALJ's consideration of whether the driver suffered from alcoholism); *TLC v. Bhatti*, Comm'n Dec. (rejecting the ALJ's consideration of whether a driver "would assault passengers or members of the public" or whether "the police deemed [the driver] [to be] a serious threat to the public").

Although two witnesses – Charles Fraser, the Chairperson's designee from 2010 to 2011 (Tr. at 682:13–21), and Meera Joshi, the Chairperson's designee from 2011 to 2014 (Tr. at 486:22–487:7) – testified to a broader inquiry by the Chairperson, the Court does not find their testimony credible on that issue. The Court does not credit Fraser's testimony because, based on his demeanor and testimony, 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. For instance, Fraser claimed to have reviewed over 50 and likely over 100 such suspensions. (Tr. at 816:22–818:6.) In fact, the evidence shows that only four summary suspension hearings occurred while Fraser was the Chairperson's designee, *TLC v. Yim*, OATH Index No. 2365/11 (May 20, 2011); *TLC v. Koutroulos*, OATH Index No. 1205/11 (Dec. 15, 2010); *TLC v. Kastner*, OATH Index No. 835/11 (Oct. 12, 2010);

*TLC v. Kamal*, OATH Index No. 2607/10 (June 1, 2010), and that Fraser reviewed only three of those suspensions himself (*see* DX R-17 to R-19). Fraser also claimed to review drivers' submissions in response to the ALJ's recommendation. (Tr. at 684:13–685:1.) In fact, in each of the three decisions he authored, he specifically stated that the driver had not submitted a response. (DX R-17 to R-19.) Fraser further stated that he could not say "for sure" whether or not he had ever lifted a suspension. (Tr. at 685:2–9, 692:1–8.) Again, however, he issued only three decisions, and each was a form letter continuing the driver's suspension. (DX R-17 to R-19.) The Court does not credit Joshi's testimony on this issue because it flatly contradicts official Chairperson decisions she herself authored. (*Compare* Tr. at 550:3–15 (testimony by Joshi that the review process is individualized and includes consideration of the particular driver's dangerousness), *with TLC v. Nau*, Comm'n Dec. (decision written by Joshi in a case involving drunk driving rejecting consideration of a driver's risk of alcohol abuse), *and TLC v. Bhatti*, Comm'n Dec. (decision written by Joshi in a case involving an assault rejecting consideration of whether "there is [an] indication that [the driver] would assault passengers or members of the public").)

* * *

As discussed above, the Second Circuit remanded this case for the Court "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. Based on the facts set forth above, the Court concludes that drivers do have such an opportunity: a driver who has been arrested may argue that continued licensure does not pose any safety concerns because the charged crime, based on its statutory elements, does not have a nexus to public health or safety. The argument may rarely succeed – so far, it never has – but the evidence in the record shows that drivers may make such arguments, the Chairperson may consider such arguments, and the Chairperson may lift a suspension if the argument is persuasive. That argument, however, is the only argument an arrested driver can make. A driver cannot argue, based either on any facts particular to the driver or on the factual allegations in the criminal complaint, that he or she would not pose any safety concerns. Put simply, once the Chairperson has determined that (1) the driver was charged with a crime, (2) the crime is still pending, and (3) the charged crime has a nexus to public health or safety, the inquiry is over and any other facts or arguments are irrelevant.

## III. Next Steps

The Second Circuit held that, after further fact-finding, the Court "must then determine whether the hearing the City actually provides . . . comports with due process." *Nnebe II*, 644 F.3d at 163. Although the Court addressed this issue in a previous opinion, *see Nnebe I*, 665 F. Supp. 2d 311, the Court will allow the parties to submit additional briefing in light of these findings of fact.

In their briefing, the parties should focus only on procedural due process, as Plaintiffs have explicitly waived any substantive due process claims. *See Nnebe II*, 644 F.3d at 153 n.2 ("On appeal, the plaintiffs state that they did not intend to bring any substantive due process claims [and] expressly disavow any such claims . . . . Accordingly, we will not discuss the district court's substantive due process analysis and will not review any of the plaintiffs' claims in terms of

substantive due process."). Thus, the arguments should be limited to whether the TLC provided and provides adequate procedure – including notice – to allow drivers to meaningfully test whether the TLC's standard was met in their case. Arguments relating to substantive due process, such as attacks on the TLC's standard's fairness or reasonableness, should be avoided. *See Southerland v. City of New York*, 680 F.3d 127, 151 (2d Cir. 2012) ("*Substantive* due process rights safeguard persons against the government's exercise of power without any reasonable justification in the service of a legitimate governmental objective." (emphasis added and internal quotation marks omitted)); *see also Air Line Pilots Ass'n, Int'l v. Quesada*, 276 F.2d 892, 896 (2d Cir. 1960) (holding that procedural due process does not require an agency to "afford[] each [person] affected [by a regulation] an opportunity to present evidence upon the fairness of the regulation"). In other words, the briefing should address only whether the TLC's procedures allowed and allow a driver to adequately challenge whether: (1) the driver was charged with a crime, (2) the crime is still pending, and (3) the charged crime has a nexus to public health or safety. Moreover, to the extent Plaintiffs intend to challenge the correctness of the TLC's interpretation of the Code and the Rule, those are state law arguments and should be reserved until after the Court has determined whether Due Process is satisfied, at which time the Court may reach Plaintiffs' state law claims. *See Nnebe II*, 644 F.3d at 163 ("Once the district court has determined how it will treat the federal claim, it may then examine how it will treat the state claims.").

In addition, the parties should keep in mind the potentially available remedies. If Plaintiffs are unable to establish a continuing violation or a risk of a future violation, they cannot receive an injunction. *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"). To the extent Plaintiffs can establish a past violation – including for lack of sufficient notice prior to 2006 – they may be entitled to actual damages, provided they can meet their burden of showing that "the property or liberty deprivation[s] for which [they] [seek] compensation would not have occurred had proper procedure been observed." *Miner v. City of Glens Falls*, 999 F.2d 655, 660 (2d Cir. 1993). Further, even if Plaintiffs cannot show actual injury, they may still be entitled to nominal damages, *see Carey v. Piphus*, 435 U.S. 247, 266 (1978) ("[T]he denial of procedural due process should be actionable for nominal damages without proof of actual injury."), and punitive damages, *see King v. Macri*, 993 F.2d 294, 297–98 (2d Cir. 1993) (stating that punitive damages may be awarded even absent actual injury in § 1983 cases). In addition, if the Court finds liability for any constitutional violations, Plaintiffs may be able to seek class certification, attempt to revive all of their state law claims, and seek attorneys' fees pursuant to 42 U.S.C. § 1988.

## IV. Conclusion

IT IS HEREBY ORDERED THAT the parties shall submit briefing addressing whether, under the facts as found by the Court, the TLC's summary suspension process violates procedural due process. Plaintiffs shall submit their brief no later than September 5, 2014, Defendants shall submit a brief in opposition no later than September 26, 2014, and Plaintiffs shall reply no later than October 3, 2014. IT IS FURTHER ORDERED THAT the parties shall appear for oral argument on November 18, 2014 at 11:30 a.m.

SPA-16



SO ORDERED.

RICHARD J. SULLIVAN
United States District Judge

Dated: August 7, 2014
New York, New York

* * *

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Plaintiffs Khairul Amin, Eduardo Avenaut, and New York Taxi Workers Alliance are represented by Daniel Lee Ackman, 12 Desbrosses Street, New York, New York 10013; David Thomas Goldberg of Donahue & Goldberg, L.L.P., 99 Hudson Street, 8th Floor, New York, New York 10013; and Gregg L. Weiner and Michael Alexander Kleinman of Fried, Frank, Harris, Shriver & Jacobson LLP, One New York Plaza, New York, New York 10004.

Defendants are represented by Mary M. O'Sullivan and Amy J. Weinblatt of the New York City Law Department, Office of the Corporation Counsel, 100 Church Street, New York, New York 10007.

# UNITED STATES DISTRICT COURT
# SOUTHERN DISTRICT OF NEW YORK

No. 06-cv-4991 (RJS)



JONATHAN NNEBE, *et al.*,

Plaintiffs.

VERSUS

MATTHEW DAUS, *et al.*,

Defendants.

MEMORANDUM AND ORDER
April 28, 2016

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 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, 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

[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.)

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 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; 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

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

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

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 (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 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

The procedural component of the Due Process Clause "provides that certain substantive rights – life, liberty, and property – cannot be deprived except

[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.

pursuant to constitutionally adequate procedures." *Loudermill*, 470 U.S. at 541. 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).

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 (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.11 (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)).

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 against him." *Spinelli*, 579 F.3d at 169 (alteration in original) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 348–49 (1976)); *see also Bd. of Regents of State Colls.*, 408 U.S. at 592 n.7 ("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 (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 (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 (1971) (citations omitted).

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. 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. 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 (2003); *see also Mathews*, 424 U.S. at 343 ("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. 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. Thus, although the determination of what process is due before a property right may be impaired is a constitutional 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 Safety 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. 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 (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 (quoting *Reno v. Flores*, 507 U.S. 292, 308 (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 plaintiff's 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 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.*

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; *see, e.g.*, *Michael H. v.*

*Gerald D.*, 491 U.S. 110, 120–21 (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 F. App'x 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

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." 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. 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. 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.

*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 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, pre-judgment 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 *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.

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 ("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*, 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. 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 ("[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 plaintiff's] claim is actually a substantive challenge to Connecticut's statute recast in procedural due process terms." (citation omitted)); *Flores*, 507 U.S. at 308 (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 (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 plaintiff's 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.

#### 1. Legal Standard: Substantive Due Process

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 (1998) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (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 (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))).

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 (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 (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 (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. 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. 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 (1934)); *see also Kerry v. Din*, 135 S. Ct. 2128, 2134 (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.

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. 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 (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. 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.

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]overnment's custody) and the means chosen to advance that purpose.

*Id.* at 305. 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]

2. Application

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

[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.

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. 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 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. 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.

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

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 (1950); *see also Int'l House v. NLRB*, 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*, 131 S. Ct. 2507, 2519 (2011), for purposes of "permit[ting] [the party] to 'present' [his] objections to the

[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.

[decisionmaker]," *Spinelli*, 579 F.3d at 172. *See also Kapps v. Wing*, 404 F.3d 105, 124 (2d Cir. 2005) ("Claimants cannot know *whether* a challenge to an agency's action is warranted, much less formulate an effective challenge, if they are not provided with sufficient information to understand the basis for the agency's action."). "[A]ssessing the adequacy of a particular form of notice requires balancing the interest of the [s]tate against the individual interest sought to be protected by the Fourteenth Amendment." *Jones v. Flowers*, 547 U.S. 220, 229 (2006) (citation omitted); *see also Spinelli*, 579 F.3d at 172 ("The particularity with which alleged misconduct must be described varies with the facts and circumstances of the individual case; however, due process notice contemplates specifications of acts or patterns of conduct[.] . . . The degree of required specificity also increases with the significance of the interests at stake.").

Here, once a taxi driver's license is suspended, he is informed through the mail of the suspension and of the right to a hearing. And, although the notice does not, on its face, state the substantive standard and determinative inquiry to be applied at the hearing, it does make express reference to the Rule pursuant to which the suspension is being carried out. (Findings of Fact at 8.) In addition, after receiving this notice, a driver who requests a hearing receives a second letter from the TLC, which states (1) "the time, date, and location of the hearing," (2) that drivers "can present evidence and call witnesses on their behalf," and (3) that "the purpose of th[e] hearing will be to determine whether your TLC license should remain suspended pending the final disposition of your criminal case." (*Id.* at 8–9.)

With respect to suspensions *since* the December 2006 amendment to the Rule, the Court finds that although the TLC's notice letters to suspended drivers do not contain the Rule's substantive standard on their face, they do cite to the operative version of the Rule, which, since December 2006, has expressly stated the relevant "issue[s]" to be considered at the summary suspension hearing – that is, the three inquiries comprising the arrest-plus-nexus standard. Thus, a driver seeking to contest the TLC's decision to suspend his license would be able to access the text of the Rule and learn what the relevant substantive standard is, since the Rule itself clearly states that, at the hearing, "the issue will be whether the charges . . . 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)(3); (*see* Findings of Fact at 5–6). Indeed, Plaintiffs have effectively conceded that everyone now knows the standard, which is why so few drivers demand hearings. (*See* Findings of Fact at 11 n.8.) Accordingly, the Court finds that the notice provided to suspended taxi drivers after December 2006 is constitutionally adequate.

The same cannot be said for the period prior to December 2006. As noted above, before December 2006, the text of the Rule did not indicate that the relevant inquiry for continued suspension was limited to whether the *charges, if true*, implicated public health or safety, even though in practice the TLC applied the same arrest-plus-nexus standard prior to December 2006. (*See id.* at 4.) Thus, before December 2006, even assuming that a driver looked up and read the language of the Rule cited in the suspension notice, the driver would have had no way of knowing that the "critical issues" relevant to the summary suspension hearing were limited to the fact of charges, the pendency of charges, and the nexus between those charges and public health or

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

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 (1978)). Thus, compensatory damages are generally not available if the 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; *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; *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. 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 Friday, June 3, 2016 at 10:30 a.m. to address these issues.

SO ORDERED.

RICHARD J. SULLIVAN
United States District Judge

Dated: April 28, 2016
New York, New York

* * *

Plaintiffs are represented by Daniel L. Ackman, 222 Broadway, 19th Floor, New York, New York 10038; David T. Goldberg of Donahue & Goldberg, LLP, 99 Hudson Street, 8th Floor, New York, New York 10013; and Janice Mac Avoy and Michael A. Kleinman of Fried, Frank, Harris, Shriver & Jacobson LLP, One New York Plaza, New York, New York 10004.

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JONATHAN NNEBE *et al.*,

Plaintiffs,

-v-

MATTHEW DAUS *et al.*,

Defendants.

3/27/18

No. 06-cv-4991 (RJS)
ORDER

RICHARD J. SULLIVAN, District Judge:

On March 23, 2018, the Court issued a final Opinion, Order, and Judgment in this case. (Doc. No. 417.) The Court is in receipt of a letter from Defendants, dated March 26, 2018, asking the Court to dismiss Plaintiff Alexander Karmansky from this case because he is deceased and no party has been substituted for him in this matter. (Doc. No. 418.) The Court construes this letter as a motion for reconsideration and grants Defendants' request.

On January 2, 2014, Plaintiff notified the Court that Mr. Karmansky was deceased. (Doc. No. 252.) On January 3, 2014, the Court directed Mr. Karmansky's estate to file a motion to intervene no later than January 8, 2014. (Doc. No. 265.) On January 8, 2014, counsel for Plaintiffs informed the Court that no party intended to so move. (Doc. No. 282.) Thereafter, no party moved to dismiss Mr. Karmansky's claims.

Federal Rule of Civil Procedure 25(a) provides: "If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent

*must be dismissed*." Fed. R. Civ. P. 25(a) (emphasis added). Because more than 90 days have passed after the service of a statement noting the death and no party, successor, or representative has filed a motion for substitution, the Court must dismiss Mr. Karmansky's claims.

Accordingly, IT IS HEREBY ORDERED THAT Defendants' motion is GRANTED. The Clerk of Court is respectfully directed to reopen the case, to vacate the Court's prior Opinion, Order, and Judgment (Doc. No. 417) as to Mr. Karmansky's claims, to dismiss Mr. Karmansky's claims as a plaintiff in this action and al claims previously brought by him, and to close the case.

SO ORDERED.

Dated: March 27, 2018
New York, New York

RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JONATHAN NNEBE *et al.*,

Plaintiffs,

-v-

MATTHEW DAUS *et al.*,

Defendants.

3/27/18

No. 06-cv-4991 (RJS)
AMENDED OPINION, ORDER, and JUDGMENT

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 taxi drivers' licenses upon their arrest for enumerated crimes is unlawful under the U.S. Constitution and various state laws. (Doc. No. 42.) Now before the Court are Plaintiffs' motions for nominal damages and to voluntarily dismiss their remaining claims pursuant to Federal Rule of Civil Procedure 41(a). For the reasons set forth below, Plaintiffs' requests are granted.

## I. BACKGROUND

The Court assumes the parties' familiarity with the facts and procedural history of this case, which are set forth in numerous prior decisions. (*See, e.g.*, Doc. Nos. 156, 201, 323, 366.) Accordingly, the Court will provide only the details necessary to resolve the remedial issues presented. On June 28, 2006, Plaintiff Nnebe, a New York City taxi driver, initiated this action

against Defendants (Doc. No. 1), and on October 27, 2006, Plaintiffs Avenaut, Amin, and the New York Taxi Workers Alliance joined in the Second Amended Complaint. (Doc. No. 42.) On September 30, 2009, the Court granted summary judgment to Defendants with respect to Plaintiffs' federal due process claims. *Nnebe v. Daus*, 665 F. Supp. 2d 311 (S.D.N.Y. 2009). That decision contained multiple holdings including, as relevant here, that Plaintiffs had fair and adequate notice that they faced suspension if they were arrested for any of the enumerated crimes. *Id.* at 332–33. Plaintiffs timely appealed.

The Second Circuit affirmed in part, vacated in part, and remanded the case to this Court for additional fact-finding. *Nnebe v. Daus*, 644 F.3d 147 (2d Cir. 2011). Specifically, the Second Circuit agreed with the Court that the Due Process Clause of the U.S. Constitution did not require that Plaintiffs receive a pre-deprivation hearing before the TLC suspended their taxi licenses. *Id.* at 158. Nevertheless, based on the City's representations during oral argument, the panel was unable to discern what standard the TLC applied at the post-deprivation hearings. *Id.* at 163. As a result, the panel remanded the case and directed 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." *Id.* at 163. The Second Circuit then instructed the Court to "determine whether the hearing the City actually provides—whatever it may consist of—comports with due process." *Id.* Finally, the panel ordered that, "[i]n the event the court determines that the post-suspension hearing does not comport with due process, the court is instructed to reconsider its [summary judgment] ruling in its entirety." *Id.*

In addition to affirming the Court's grant of summary judgment regarding the non-requirement of pre-deprivation hearings and remanding for additional fact-finding as to the

standard applied at post-deprivation hearings, the panel observed in a relevant footnote: "The district court also rejected certain other constitutional claims by the plaintiffs, including claims of insufficient notice of suspension . . . . The plaintiffs do not pursue th[at] claim[] on appeal, and we do not discuss [it] further." *Id.* at 155 n.4. (citing 665 F. Supp. 2d at 332–33). The Second Circuit was referring to the section of the Court's summary judgment opinion that rejected Plaintiffs' claim that "the summary suspension policy is unconstitutional because taxi drivers lack notice that they will be suspended after they are arrested for specified crimes." 665 F. Supp. 2d at 332–33.

On remand, the Court held a bench trial focused on "the narrow issue" highlighted in the Second Circuit's remand order – what standard is applied at the post-suspension hearings. (Doc. No. 245.) Thereafter, the Court issued an opinion setting forth its factual determination that the TLC utilized an "arrest-plus-nexus" standard whereby the decisionmaker considered only 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, as defined by its statutory elements, and public health or safety. 2014 WL 3891343, at *1–2 (S.D.N.Y. Aug. 8, 2014). The Court explicitly found that "the [TLC] Chairperson never considers or attempts to determine whether the particular driver would pose a direct and substantial threat to public health or safety." *Id.* at *2. After an additional round of briefing in light of these factual findings, the Court issued a separate opinion setting forth its conclusions of law. 184 F. Supp. 3d 54 (2016). Specifically, the Court determined that the TLC's post-suspension hearings did not violate procedural or substantive due process requirements, except with respect to the notices provided by the TLC prior to December 2006, which failed to inform Plaintiffs that "'the critical issues' relevant to the summary suspension hearing were limited

to the fact of charges, the pendency of charges, and the nexus between those charges and public health or safety." *Id.* at 75.

As for the remedies available to Plaintiffs, the Court determined that Plaintiffs were precluded from seeking injunctive relief because they had established only a past violation, not a continuing or future violation as required for such prospective relief. *Id.* at 74 (citing *EEOC v. KarenKim, Inc.*, 698 F.3d 92, 100 (2d Cir. 2012)). In addition, the Court expressed skepticism that Plaintiffs would ultimately be able to recover compensatory damages, *id.* (citing *Ortiz v. Regan*, 769 F. Supp. 570, 573 (S.D.N.Y. 1991)), but suggested that Plaintiffs might be able to obtain nominal damages, *id.* at 75 (citing *Carey v. Piphus*, 435 U.S. 247, 262–64 (1978)). However, "because the parties ha[d] not yet had an opportunity to brief – or even present evidence on – the issue of damages pertaining to the pre-2006 notice letters," the Court directed the parties to file supplemental briefs addressing this remedial question and others not relevant here. *Id.*

On May 24, 2016, without first seeking leave of the Court, Plaintiffs sought interlocutory appeal under 28 U.S.C. § 1292(a)(1). (Doc. Nos. 367, 371.) On June 3, 2016, the Court stayed the case during the pendency of Plaintiffs' appeal (Doc. Nos. 369, 372), which the Second Circuit, predictably, dismissed for lack of jurisdiction on February 3, 2017. (Doc. No. 381.) On February 7, 2017, the Court again ordered the parties to submit briefs addressing the remaining issues in the case. (Doc. No. 383 at 3.)

Although the parties filed submissions addressing several outstanding issues (Doc. Nos. 395, 396, 399, 400), the Court received a letter from Plaintiffs on January 31, 2018 withdrawing "all remaining claims not decided by the Court's April 28, 2016 Memorandum and Order" (Doc. No. 411). As for the sole claim on which Plaintiffs prevailed – the pre-December 2006 notice claim – Plaintiffs withdrew "all requests for relief except for nominal damages." (*Id.*) Defendants

responded. agreeing to "stipulate to dismissal of all [remaining] claims" and requesting "entry of final judgment on the condition that such dismissal is with prejudice." (Doc. No. 413.) Defendants nevertheless asserted that (1) Plaintiffs had waived their notice argument per the Second Circuit's footnote, and (2) none of the individual Plaintiffs were entitled to nominal damages. (*Id.*) The Court will consider each of these arguments before turning to whether Plaintiffs' voluntary dismissal of their remaining claims should be with or without prejudice.

## II. Discussion

### A. Waiver

Notwithstanding the Court's determination that the TLC's pre-2006 notice was inadequate to inform Plaintiffs of the "critical issues" relevant to the summary suspension hearing, 184 F. Supp. 3d at 74, Defendants persist in arguing that Plaintiffs categorically "waived all notice claims," citing the Second Circuit's footnote that referred to "claims of insufficient notice" not pursued on appeal (Doc. No. 396 (referencing 644 F.3d at 155 n.5)). In so arguing, Defendants conflate the notice objections presented at the initiation of this litigation and those that materialized only after the Court issued factual findings as to the scope of the TLC's post-suspension hearings. The notice argument originally pressed at summary judgment asserted that the summary suspensions were unconstitutional because Plaintiffs had no notice of "either the conduct barred or its consequences." (Doc. No. 139 at 2, 23–24.) Plaintiffs argued then that although there existed "a general statute and a general rule concerning summary suspension, neither mention[ed] arrests as a basis for agency action." (*Id.* at 4; *see also id.* at 24 ("There was no statute and no rule (until December 2006) that would alert a taxi driver that a mere allegation could result in the suspension of his license.").) Put simply, Plaintiffs argued that the governing regime did not put them on notice that an arrest would trigger an automatic suspension of their license.

By contrast, after the Court issued its factual findings, Plaintiffs argued – and the Court subsequently agreed – that the TLC's pre-2006 notice did not adequately inform Plaintiffs of the "critical issues" relevant to the summary suspension hearing. In particular, Plaintiffs argued that the "hearing notices [gave] no hint that seemingly relevant evidence would, in fact, always be ignored." (Doc. No. 338 at 18.) Indeed, Plaintiffs accused the TLC of "fail[ing] utterly to inform individuals whose livelihoods are at stake about the standards the government authorities will apply, or purport to apply" at the hearings, and, moreover, of "consistently and affirmatively misinform[ing]" Plaintiffs about the *de facto* standard. (*Id.*) This notice argument is different from the one originally presented to the Court at summary judgment and subsequently waived on appeal, which related to the enumerated crimes for which a driver might be suspended. Moreover, it is hard to imagine how Plaintiffs might have waived before the Second Circuit an argument pertaining to "the procedural due process implications" of a factual finding that the Court did not make until *after* remand. *See* 184 F. Supp. 3d at 75. ("[B]efore December 2006, the text of the [TLC rule] did not indicate that the relevant inquiry for continued suspension was limited to whether the charges, if true, implicated public health or safety, even though in practice the TLC applied the same arrest-plus-nexus standard prior to 2006.")

Nor did this Court's decision as to the pre-2006 notice go beyond the Second Circuit's mandate on remand. The panel instructed this Court to: (1) "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"; (2) "determine whether the hearing the City actually provides – whatever it may consist of – comports with due process"; and (3) "reconsider its [summary judgment] ruling in its entirety" if the Court "determines that the post-

suspension hearing does *not* comport with due process." *Nnebe*, 644 F.3d at 163. Consistent with that mandate, the Court first determined what standard the TLC actually employed, including during the time period before December 2006. 2014 WL 3891343, at *1–2. Next, the Court concluded that standard "[did] not comport with due process" because it did not adequately notify Plaintiffs of the standard employed by the TLC prior to December 2006. 184 F. Supp. 3d at 75. That determination is manifestly within the bounds of the Second Circuit's order.

B. Nominal Damages

Turning to the issue of damages, Plaintiffs have withdrawn all requests for damages save nominal damages. The law is clear that Plaintiffs are entitled to nominal damages.[1] In fact, the Supreme Court has recognized in the context of a Section 1983 claim that "the right to procedural due process is absolute," and that therefore "the denial of procedural due process [is] actionable for nominal damages without proof of actual injury." *Carey* , 435 U.S. at 266. Moreover, where a substantive constitutional right has been violated, "an award of nominal damages is not discretionary." *Matusick v. Erie Cty. Water Auth.*, 757 F.3d 31, 64 (2d Cir. 2014); *see also Gibeau v. Nellis*, 18 F.3d 107, 110–11 (2d Cir.1994) (citing *Carey*, 435 U.S. at 267). Defendants' argument to the contrary – namely, that no Plaintiff testified at trial that he was personally injured by the denial of adequate notice – finds no basis in law. Each of the individual Plaintiffs received

[1] By contrast, Plaintiffs would not be entitled to compensatory damages. "In the procedural due-process context, [compensatory] damages are based on the compensation for injuries that resulted from the plaintiff's receipt of deficient process." *Warren v. Pataki*, 823 F.3d 125, 143 (2d Cir.), *cert. denied sub nom. Brooks v. Pataki*, 137 S. Ct. 380 (2016) (citing *Poventud v. City of New York*, 750 F.3d 121, 135–36 (2d Cir. 2014) (en banc)). Usually, when considering whether to award compensatory damages, "courts must determine whether a different outcome would have been obtained had adequate procedural protections been given." *Id.* "If the outcome would not have been different, the plaintiff is presumptively entitled to no more than nominal damages." *Id.* (citing *Carey v. Piphus*, 435 U.S. 247, 263 (1978)). There is, of course, an exception to this general rule. Specifically, if a plaintiff "can show that he suffered mental and emotional distress caused by the denial of procedural due process itself . . . , he is entitled to recover actual damages only to that extent." *Warren*, 823 F.3d at 143 (citing *Carey*, 435 U.S. at 263); *see also Carey*, 435 U.S. at 263 (distinguishing between distress attributable to "the justified deprivation" and that caused by "deficiencies in procedure"). In any event, none of the Plaintiffs has shown that "a different outcome would have been obtained" had they been adequately noticed as to the standard employed by the TLC prior to December 2006, nor do they argue they suffered "mental and emotional distress" caused by the denial of adequate notice.

inadequate notice; they are not required to show that this procedural due process violation caused any additional harm other than that inherent in the deprivation of process to which they were entitled. *Carey*, 435 U.S. at 267. Accordingly, the Court finds that the individual Plaintiffs are entitled to nominal damages of $1.

C. Voluntary Dismissal

As noted above, Plaintiffs have agreed to "withdraw all remaining claims not decided by the Court's April 28, 2016 Memorandum and Order" (Doc. No. 411), and Defendants consent (Doc. No. 413). Thus, the only issue is whether this dismissal should be with or without prejudice. Applying the relevant multi-factor test articulated in *Zagano v. Fordham Univ.*, 900 F.2d 12, 14 (2d Cir. 1990), the Court concludes that dismissal with prejudice is appropriate for all remaining claims except Plaintiffs' state law claims.

Rule 41(a)(2) provides that, except where all parties agree to a stipulation of dismissal, "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). "A voluntary dismissal without prejudice under Rule 41(a) will be allowed 'if the defendant will not be prejudiced thereby.'" *D'Alto v. Dahon California, Inc.*, 100 F.3d 281, 283 (2d Cir. 1996) (quoting *Wakefield v. Northern Telecom Inc.*, 769 F.2d 109, 114 (2d Cir. 1985)); *see also Camilli v. Grimes*, 436 F.3d 120, 123 (2d Cir. 2006). In *Zagano*, the Second Circuit set out a number of factors relevant to determining whether the case had proceeded to the point where the defendant would be prejudiced by a dismissal without prejudice, including "the plaintiff's diligence in bringing the motion; any 'undue vexatiousness' on plaintiff's part; the extent to which the suit has progressed, including the defendant's effort and expense in preparation for trial; the duplicative expense of relitigation; and the adequacy of plaintiff's explanation for the need to dismiss." *Zagano*, 900 F.2d at 14. No one factor is

dispositive, and "the focus" of the analysis remains whether there is "prejudice to the defendant." *George v. Prof'l Disbosables Int'l*, 15-cv-3385 (RA), 2017 WL 1740395, at *2 (S.D.N.Y. May 2, 2017).

In light of the sheer length of time and effort expended in this litigation, the Court has little difficulty concluding that Plaintiffs' withdrawn federal claims should be dismissed with prejudice. *See id.* at *3; *see also Baldanzi v. WFC Holdings Corp.*, No. 07-cv-9551 (LTS), 2010 WL 125999, at *4 (S.D.N.Y. Jan. 13, 2010) ("Courts applying the *Zagano* factors frequently place the greatest emphasis on the efforts expended by the defendant in discovery and trial preparation and the corresponding prejudice the defendant would suffer if forced to relitigate."). However, the Court finds that the *Zagano* factors do not weigh in favor of dismissal of Plaintiffs' state law claims with prejudice. These claims were not litigated beyond summary judgment, since the Court declined to exercise supplemental jurisdiction and therefore dismissed them without considering their merits. And although the state law claims were reinstated by the Second Circuit pending resolution of Plaintiffs' federal claims, these claims have not been adjudicated on remand, so the City has expended hardly any resources to defend against them. Thus, notwithstanding the fact that this litigation has transpired over years, it cannot be argued that Plaintiffs have engaged in "vexatious" litigation tactics with regard to these claims. Indeed, part of the reason for the delay (*i.e.*, the need for a remand) was the City's failure during oral argument to articulate accurately the standard employed by the TLC at post-suspension hearings – even though that standard was central to the issues presented on appeal. Finally, Plaintiffs' state law claims, although factually related to Plaintiffs' federal claims, involve legal theories of liability wholly distinct from the federal claims, so there is little likelihood of "duplicative expense of relitigation." In sum, Defendants would not be prejudiced by having to litigate these claims in some future action: the parties never really

litigated them here, and the legal issues are sufficiently distinct from the claims that were actually adjudicated over the course of this litigation, which were limited to Plaintiffs' federal due process claims. Accordingly, the Court determines that dismissal without prejudice is appropriate for Plaintiffs' state law claims.

## III. Conclusion

For the reasons set forth above and in the Court's April 28, 2016 Memorandum and Order, *see* 184 F. Supp. 3d 54, IT IS HEREBY ORDERED, ADJUDGED, and DECREED THAT the individual Plaintiffs are each awarded $1 in nominal damages in light of the Court's determination that the notice provided by the TLC with respect to summary post-suspension hearings held prior to December 2006 violated the Due Process Clause of the U.S. Constitution. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT Plaintiffs have failed to prove all other constitutional claims for the reasons set forth in the Court's previous Memorandum and Order. The Clerk of the Court is respectfully directed to enter judgment accordingly, to dismiss Plaintiff's state law claims without prejudice, to dismiss all other claims with prejudice, and to close this case.

SO ORDERED.

Dated: March 27, 2018
New York, New York

RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE