09-4305-cv

United States Court of Appeals

for the

Second Circuit

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

Plaintiffs-Appellants,

– v. –

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

Defendants-Appellees.

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

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS

LAW OFFICE OF DANIEL ACKMAN, ESQ.
12 Desbrosses Street
New York, New York 10013
(917) 282-8178

– and –

DONAHUE & GOLDBERG, LLP
99 Hudson Street
New York, New York 10013
(212) 334-8813

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes & Rules

Other Authorities

JURISDICTION

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

PRELIMINARY STATEMENT

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

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

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

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

STATEMENT OF ISSUES

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

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

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

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

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

STANDARD OF REVIEW

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

FACTS AND PROCEEDINGS BELOW

A. The New York Taxi Industry and the TLC

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

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

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

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

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

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

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

B. The Suspension-Upon-Arrest Policy

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

1. Summary Suspension

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

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

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

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

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

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

2. The Post-Suspension Hearings

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

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

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

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

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

---

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

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

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

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

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

---

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

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

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

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

3. Reinstatement

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

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

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

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

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

---

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

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

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

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

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

C. The TLC Tribunal

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

D. Proceedings Below

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. The TLC is a Proper Section 1983 Defendant

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

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

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

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

B. The Taxi Workers Alliance is a Proper Plaintiff

1. There is no Section 1983 Exception for Associational Standing

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

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

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

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

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

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

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

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

A. Plaintiffs Demonstrated Systemic Violations of the City Charter

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated: New York, New York
January 14, 2010

David T. Goldberg (DG-0292)
Donahue & Goldberg, LLP
99 Hudson Street, 8th Floor
New York, NY 10013
tel: 212-334-8813
fax: 212-965-9084
david@donahuegoldberg.com

Daniel L. Ackman (DA-0103)
12 Desbrosses Street
New York, NY 10013
tel: 917-282-8178
fax: 917-591-8300
d.ackman@comcast.net

Attorneys for Plaintiff-Appellants

SPECIAL APPENDIX

09-4305-cv

United States Court of Appeals

for the

Second Circuit

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

Plaintiffs-Appellants,

– v. –

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

Defendants-Appellees.

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

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS

LAW OFFICE OF DANIEL ACKMAN, ESQ.
12 Desbrosses Street
New York, New York 10013
(917) 282-8178

– and –

DONAHUE & GOLDBERG, LLP
99 Hudson Street
New York, New York 10013
(212) 334-8813

Attorneys for Plaintiffs-Appellants

SPECIAL APPENDIX

TABLE OF CONTENTS

SPA-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

JONATHAN NNEBE, et al.,

Plaintiffs,

-against-

MATTHEW DAUS, et al.,

Defendants.

----------X

06 CIVIL 4991 (RJS)

JUDGMENT

The parties having cross-moved having moved for summary judgment, plaintiffs having moved for class certification, and the matter having come before the Honorable Richard J. Sullivan, United States District Judge, and the Court, on September 30, 2009, having rendered its Opinion and Order granting defendants' motion for summary judgment as to plaintiffs' federal claims, denying plaintiffs' motion for summary judgment as to plaintiffs' federal claims, declining to exercise supplemental jurisdiction over Plaintiffs' state law claims, and denying plaintiffs' motion for class certification as moot, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion and Order dated September 30, 2009, defendants' motion for summary judgment as to plaintiffs' federal claims is granted; plaintiffs' motion for summary judgment as to plaintiffs' federal claims is denied; the Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claims; and plaintiffs' motion for class certification is denied as moot; accordingly, the case is closed.

Dated: New York, New York
September 30, 2009

J. MICHAEL McMAHON

Clerk of Court

BY: _____

Deputy Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON _____

SPA-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

№ 06 Civ. 4991 (RJS)

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

Plaintiffs,

VERSUS

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

Defendants.

OPINION AND ORDER
September 30, 2009

RICHARD J. SULLIVAN, District Judge:

Plaintiffs Jonathan Nnebe, Alexander Karmansky, Eduardo Avenaut, Khairul Amin, and the New York Taxi Workers Alliance ("NYTWA") 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, alleging violations of the United States Constitution, New York state law, and New York City municipal law.

Before the Court are the parties' cross-motions for summary judgment and Plaintiffs' motion for class certification. For the reasons set forth below, the Court grants Defendants' motion for summary judgment as to Plaintiffs' federal claims, denies Plaintiffs' motion for summary judgment as to Plaintiffs' federal claims, declines to exercise supplemental jurisdiction over Plaintiffs' state law claims, and denies Plaintiffs' motion for class certification as moot.

I. BACKGROUND

This case arises from the TLC's policy of suspending a taxi driver upon notification of the driver's arrest, without providing either a pre-deprivation hearing or a post-deprivation hearing that does more than confirm the fact of the driver's arrest.

A. Facts[1]

1. The Parties

Defendant TLC is a commission, established pursuant to the New York City Charter (the "Charter"), that regulates taxicabs and other for-hire vehicles in the City of New York. (Defs.' 56.1 ¶ 1.)

Defendant Daus is the Chairman of the TLC. (Decl. of Matthew Daus in Supp. of Defs.' Mot. ("Daus Decl.") ¶ 1.) Defendant Fraser is a deputy commissioner and general counsel of the TLC. (Decl. of Charles Fraser in Supp. of Defs.' Mot. ("Fraser Decl.") ¶ 1.) Defendant Eckstein is the deputy commissioner of the TLC tasked with oversight of the TLC's Adjudications Department. (Decl. of Joseph Eckstein in Supp. of Defs.' Mot. ("Eckstein Decl.") ¶ 1.) Defendant Bonina is the Chief Administrative Law Judge for the TLC. (Decl. of Elizabeth Bonina in Opp'n to Pls.' Mot. ("Bonina Opp'n Decl.") ¶ 1.)

Plaintiffs Nnebe, Karmansky, Avenaut, and Amin are taxi drivers whose licenses were suspended pursuant to the challenged procedures. (Defs.' Opp'n 56.1 ¶ 3.) Their suspensions are discussed more fully below in section I.A.5, *infra*.

Plaintiff NYTWA is a not-for-profit corporation that seeks to improve the working conditions of taxi drivers, safeguard their rights, and promote reform of the industry. (Decl. of Mary O'Sullivan in Supp. of Defs.' Mot. ("O'Sullivan Decl.") Ex. RR (Dep. Tr. of Bhairavi Desai ("Desai Dep. Tr.")), at 5:17-22.)

2. Statutory and Regulatory Framework

The TLC is charged by the New York City Charter with establishing an overall policy for the taxicab and for-hire vehicle industry, including the adoption of criteria and standards for customer service, driver safety, and equipment safety and design. Charter Ch. 65, § 2300. To ensure that these criteria and standards are followed, the Charter grants the TLC the authority to regulate and supervise the taxicab and for-hire vehicle industry, including the power to issue, revoke, and suspend the drivers' licenses. *Id.* § 2303(b)(5). Pursuant to this authority, the TLC is empowered by the Charter and the New York City Administrative Code (the "Administrative Code") to promulgate certain rules and regulations to effectuate its prescribed purposes. Charter § 2303(b)(11); Administrative Code § 19-503.

[1] The following facts are taken from the Local Rule 56.1 statements submitted by the parties and the affidavits and exhibits submitted in connection with the motions. Where only one party's Rule 56.1 statement is cited, the opposing parties do not dispute that fact or have offered no admissible evidence to controvert that fact. Citations to additional facts in the Discussion section follow the same conventions. The abbreviation "Pls.' 56.1" refers to Plaintiffs' Amended Local Rule 56.1 statement in support of their motion for summary judgment, while "Pls.' Opp'n 56.1" refers to Plaintiffs' Local Rule 56.1 statement in opposition to Defendants' motion for summary judgment. Similarly, "Defs.' 56.1" refers to Defendants' Local Rule 56.1 statement in support of their motion for summary judgment, while "Defs.' Opp'n 56.1" refers to Defendants' Local Rule 56.1 statement in opposition to Plaintiffs' motion for summary judgment.

3. The Suspension Procedure Generally

The Administrative Code provides that the TLC may

> for good cause shown relating to a direct and substantial threat to the public health or safety and prior to giving notice and an opportunity for a hearing, suspend a taxicab or for-hire vehicle license issued pursuant to this chapter and, after notice and an opportunity for a hearing, suspend or revoke such license.

Administrative Code § 19-512.1(a).

TLC Rule 8-16 implements the summary suspension procedures at issue in this case. *See* 35 Rules of the City of N.Y. 8-16(a). The version of TLC Rule 8-16 in effect until December 2006, pursuant to which the individual Plaintiffs were suspended, provided that "[i]f the Chairperson finds that emergency action is required to insure public health or safety, he/she may order the summary suspension of a license or licensee, pending revocation proceedings."[2]

If a license is summarily suspended pursuant to this procedure, the TLC is required to provide notice of the suspension within five calendar days; the licensee may request a hearing before the TLC or a competent administrative tribunal within ten days of receipt of the notice of suspension. Administrative Code § 19-512.1(a); TLC Rule 8-16(c). The TLC generally must afford the licensee a hearing within ten calendar days of receiving the licensee's request. Administrative Code § 19-512.1(a); TLC Rule 8-16(c).

After the hearing, the tribunal must issue a written recommendation that the Chairperson may accept, modify, or reject; the Chairperson's decision represents "the final determination of the Commission with respect to the summary suspension." TLC Rule 8-16(e). Should the Chairperson fail to issue a final decision within sixty days of the conclusion of the suspension hearing, the suspension is stayed until a decision is made. TLC Rule 8-16(f).

4. Suspension Hearings

All taxicab-license applicants are fingerprinted as part of the license-application process. Administrative Code § 19-505(b)(4). These fingerprints are kept on file with the New York State Division of Criminal Justice Services ("DCJS"). (Defs.' 56.1 ¶ 13.) The fingerprints allow the DCJS both to provide the TLC with an applicant's criminal history,

[2] On December 2, 2006, TLC Rule 8-16 was amended to add a new section (c), which provides that "the Chairperson may summarily suspend a license . . . based upon an arrest on criminal charges that the Chairperson determines is relevant to the licensee's qualifications for continued licensure." TLC Rule 8-16(c). The amended rule explains that at the post-deprivation hearing, "the issue shall be whether the charges underlying the licensee's arrest, if true, demonstrate that the licensee's continued licensure during the pendency of the criminal charges would pose a threat to the health or safety of the public." *Id.* Defendants have represented that the revised Rule did not substantively change the summary suspension policy (*see* Decl. of Daniel L. Ackman in Supp. of Pls.' Mot. ("Ackman Decl.") Ex. B. (Dep. Tr. of Charles Fraser ("Fraser Dep. Tr.")), at 236:23-237:5), and, to the extent applicable, Plaintiffs raise the same objections to the revised Rule.

if any, and to notify the TLC if a licensee is arrested. (*Id.*)

If a licensee is arrested, the DCJS arrest notification contains, in addition to the licensee's identifying information, the date and location of the arrest, the arrest charges, and the penal code section pursuant to which the licensee was arrested. It does not, however, contain any of the alleged factual bases for the arrest. (*See, e.g.*, O'Sullivan Decl. Ex. A (Nnebe DCJS Notice); *id.* Ex. K (Karmansky DCJS Notice); *id.* Ex. V (Amin DCJS Notice); *id.* Ex. GG (Avenaut DCJS Notice).)

The TLC maintains a list of offenses for which it will summarily suspend a driver upon arrest. (*See* Pls.' 56.1 ¶ 5; Ackman Decl. Ex. A (Dep. Tr. of Marc Hardekopf ("Hardekopf Dep. Tr.")), at 12:13-17; Fraser Dep. Tr. at 115:7-14.) Offenses qualify for inclusion on the list if, presuming the charges are true, "continued licensure during the pendency of the criminal charges would pose a risk to public health or safety." (Defs.' 56.1 ¶ 14.)

Upon receipt of an arrest notification from DCJS, and prior to any hearing, a TLC attorney decides whether to suspend the driver, and, if the driver is suspended, notifies the driver. (Pls.' 56.1 ¶¶ 2, 4-5; Defs.' Opp'n 56.1 ¶¶ 1, 5.) Neither the factual allegations underlying the arrest, nor the licensee's driving record, nor the licensee's prior criminal record affect the decision to suspend. (Pls.' 56.1 ¶ 5; Defs.' Opp'n 56.1 ¶ 5.) Generally, neither the TLC Chairperson nor the full Commission is consulted before a suspension is instituted. (Hardekopf Dep. Tr. at 13:24-14:5; Fraser Dep. Tr. at 108:6-23.)

At the post-suspension hearing, a TLC attorney provides the Administrative Law Judge ("ALJ") with a copy of the DCJS form, as well as a copy of the relevant penal code section describing the elements of the offense in question. (Hardekopf Dep. Tr. at 51:10-18.) The TLC attorney generally presents no other material. (*Id.*) A licensee may testify and present evidence that he was not actually arrested or that the offense listed in the DCJS notice is incorrect. (Eckstein Decl. ¶ 6; Daus Decl. ¶ 9.) A licensee may also argue that the charges, even if true, "do not demonstrate that the licensee's continued licensure would pose a threat to public health or safety." (Eckstein Decl. ¶ 6.)

In considering whether the suspension should be lifted, the ALJ does not assess the likelihood of a licensee's actual guilt or the driver's criminal, personal, or professional history. (Ackman Decl. Ex. G (Dep. Tr. of Thomas Coyne ("Coyne Dep. Tr.")) at 53:4-54:24.) Rather, the standard applied by the ALJ at the suspension hearing is whether, if the charges against the licensee are true, the licensee poses a risk to the public health or safety. (Ackman Decl. Ex. D (Dep. Tr. of Elizabeth Bonina ("Bonina Dep. Tr.")) at 62:14-21; Coyne Dep. Tr. at 34:2-9; Eckstein Decl. ¶ 5.)

The vast majority of the ALJs' recommendations following a hearing recommend continuing the licensee's suspension during the pendency of the criminal proceedings. (Pls.' 56.1 ¶ 12.) It is undisputed that the TLC Chairperson typically accepts the recommendation that the suspension be continued. (Pls.' 56.1 ¶ 20.)

5. The Individual Plaintiffs' Suspensions

a. Nnebe

Nnebe was suspended on May 29, 2006, after he was arrested for and charged with Assault with Intent to Cause Physical Injury, 3rd Degree, a misdemeanor. (Defs.' 56.1 ¶ 22.) A May 30, 2006, letter from TLC attorney Marc Hardekopf advised Nnebe of the suspension and his right to request a hearing within ten days of receipt of the letter. (*Id.* ¶ 23.)

On June 1, 2006, Nnebe requested a hearing, and the hearing was held June 8, 2006, in front of ALJ Frank Fioramonti. (*Id.* ¶¶ 24-26.) ALJ Fioramonti issued his recommendation to the TLC Chairperson, dated June 13, 2006, recommending the continued suspension of Nnebe's license; Nnebe was notified of the decision and his right to respond to the recommendation by letter dated the same day. (*Id.* ¶¶ 29-30.)

By letter dated June 22, 2006, counsel for Nnebe responded to the recommendation, and on July 3, 2006, Chairman Daus notified Nnebe by letter of the continued suspension of his license. (*Id.* ¶¶ 31-32.) On September 27, 2006, following notification by the New York County District Attorney's Office that the charges against Nnebe would be dropped, Nnebe's license was reinstated. (*Id.* ¶ 34.)

b. Karmansky

Karmansky was suspended on May 23, 2006, after he was arrested for and charged with Criminal Contempt, 1st Degree, a felony, and Criminal Trespass, 2nd Degree, a misdemeanor. (*Id.* ¶ 35.) By letter dated May 26, 2006, Hardekopf advised Karmansky of the suspension and his right to request a hearing within ten days of receipt of the letter. (*Id.* ¶ 36.)

On June 5, 2006, Karmansky requested a hearing, and on June 8, 2006, a hearing was held before ALJ Fioramonti. (*Id.* ¶¶ 37, 39.) On June 13, 2006, ALJ Fioramonti recommended the continued suspension of Karmansky's license; Karmansky was notified of the decision and his right to respond to the recommendation by letter dated the same day. (*Id.* ¶¶ 45-46.)

By letter dated June 21, 2006, Chairman Daus notified Karmansky of the continued suspension of his license. (*Id.* ¶¶ 46-47.) On August 17, 2006, the Assistant District Attorney in charge of Karmansky's case advised Hardekopf that the charges against Karmansky would be dropped on August 28, 2006; thereafter, Karmansky's license was immediately reinstated. (*Id.* ¶ 48.)

c. Avenaut

Avenaut was suspended on July 17, 2006, after he was arrested for and charged with Assault with Intent to Cause Physical Injury, 3rd Degree. (*Id.* ¶ 52.) Avenaut was notified of the suspension and his right to request a hearing within ten days by letter dated July 20, 2006. (*Id.* ¶ 53.) Avenaut did not request a hearing, but on October 27, 2006, his license was reinstated based on documents showing that the case against him had been dismissed. (*Id.* ¶ 54.)

d. Amin

Amin was suspended on June 11, 2005, after he was arrested for and charged with Menacing in the 2nd Degree, with a Weapon, and Assault with Intent to Cause Physical Injury, 3rd Degree, on June 11, 2005. (*Id.* ¶ 58.) A June 14, 2005, letter from the TLC advised Amin of his suspension and his right to request a hearing on the suspension within ten days of receipt of the letter. (*Id.* ¶ 59.)

On June 17, 2005, Amin requested a hearing, and on June 22, 2005, a hearing was held before ALJ Fioramonti. (*Id.* ¶¶ 60, 62.) On June 22, 2005, ALJ Fioramonti recommended the continuation of the suspension to Chairman Daus; Amin was notified of that recommendation and of his right to respond by letter dated the same day. (*Id.* ¶¶ 66-67.)

On August 24, 2005, Amin's license was reinstated based on notification to the TLC that the charges against him were adjourned in contemplation of dismissal. (*Id.* 56.1 ¶ 69.)

B. Procedural History

The first Complaint, which named Nnebe and Karmansky as Plaintiffs, was filed on June 28, 2006, and was assigned to the Honorable Kenneth M. Karas, United States District Judge. An Amended Complaint was filed on August 3, 2006. On October 27, 2006, the Second Amended Complaint ("SAC") was filed, adding Avenaut, Amin, and the NYTWA as named Plaintiffs. Plaintiffs' motion for class certification was filed on November 22, 2006, and the motion was fully submitted on December 12, 2006. Plaintiffs' and Defendants' respective motions for summary judgment were fully submitted on July 20, 2007, and on September 4, 2007, the matter was reassigned to the docket of the undersigned. Oral argument on the pending motions was held on March 13, 2009.

II. STANDARD OF REVIEW

The Federal Rules of Civil Procedure provide that summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *accord Matican v. City of N.Y.*, 524 F.3d 151, 154 (2d Cir. 2008). The moving party bears the burden of showing that he or she is entitled to summary judgment. *See Huminski v. Corsones*, 396 F.3d 53, 69 (2d Cir. 2005). "'A dispute about a 'genuine issue' exists for summary judgment purposes where the evidence is such that a reasonable jury could decide in the non-movant's favor.'" *Beyer v. County of Nassau*, 524 F.3d 160, 163 (2d Cir. 2008) (quoting *Guilbert v. Gardner*, 480 F.3d 140, 145 (2d Cir. 2007)); *see also Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986) (holding that summary judgment should be denied if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party").

III. DISCUSSION

Before reaching the merits of Plaintiffs' challenges to the summary suspension procedures, the Court addresses two threshold issues relating to whether (1) the TLC is a suable entity, and (2) the NYTWA has

standing to bring these claims. As explained herein, the Court resolves both questions in the negative.

A. TLC as a Defendant

As a preliminary matter, all claims against the TLC must be dismissed because, as an agency of the City of New York, it is not a suable entity. *See, e.g.*, *Cruz v. N.Y. City Taxi & Limousine Comm'n*, No. 06 Civ. 6614 (CBA) (LB), 2007 WL 4243861, at *3 (E.D.N.Y. Nov. 29, 2007) ("[T]he TLC, an agency of the City of New York, cannot be sued under § 1983."); *Gabris v. N.Y. City Taxi & Limousine Comm'n*, No. 05 Civ. 8083 (HB), 2005 WL 2560384, at *2 n.4 (S.D.N.Y. Oct. 12, 2005) (collecting cases and holding that "to the extent plaintiff raises *any* claims against defendant TLC, an agency of the City of New York, such claims are dismissed as a New York City agency cannot be sued in its own capacity" (citations omitted)).

B. Standing of the NYTWA

Defendants challenge the NYTWA's standing to bring this action. Specifically, they argue that the NYTWA may not raise Section 1983 claims on behalf of its members, and that, in its own capacity, it has demonstrated only de minimis injury. For the following reasons, the Court finds that the NYTWA lacks standing.

1. Applicable Law

An organization generally may have standing to vindicate its own interests or to bring claims on behalf of its members. *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir. 1998). The Second Circuit has held, however, that Section 1983 creates a right of action "personal" to the injured party, and thus that organizations do not have standing to vindicate the rights of their members under Section 1983. *See League of Women Voters of Nassau County v. Nassau County Bd. of Supervisors*, 737 F.2d 155, 160 (2d Cir. 1984) ("This Circuit has restricted organizational standing under § 1983 by interpreting the rights it secures to be personal to those purportedly injured."); *Aguayo v. Richardson*, 473 F.2d 1090, 1099 (2d Cir. 1973) ("Neither [the statutory] language nor the history . . . suggests that an organization may sue under the Civil Rights Act for the violation of rights of members."); *Alexandre v. N.Y. City Taxi & Limousine Comm'n*, No. 07 Civ. 8175 (RMB), 2007 WL 2826952, at *6 n.9 (S.D.N.Y. Sept. 28, 2007); *Padberg v. McGrath-McKechnie*, 203 F. Supp. 2d 261, 275 (E.D.N.Y. 2002).[3]

An organization may also have standing to bring claims on its own behalf. In order "to

[3] The Second Circuit has recognized a limited exception to the general rule that organizations may not bring Section 1983 claims on behalf of their members where the organization alleges a violation of the First Amendment right to freedom of association. *See Aguayo v. Richardson*, 473 F.2d 1090, 1099-1100 (2d Cir. 1973) (distinguishing claims seeking to vindicate First Amendment associational rights from other Section 1983 claims); *see also Lopez Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161, 170 n.1 (2d Cir. 2006) (holding that an organization could bring claims on behalf of its members because of "the First Amendment associational interests that this suit seeks to vindicate"). In this case, Plaintiffs have not asserted a violation of their First Amendment rights to free association, and their briefing asserts only that the NYTWA has standing to sue in its own capacity. (*See* Pls.' Opp'n at 24-25). The Court thus addresses only whether the NYTWA has standing to vindicate injury to its own interests.

satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 180-81 (2000).

The Supreme Court has said that an organization suffers sufficient injury to confer Article III standing when its activities are "perceptibly impaired" because its resources are diverted to fighting a challenged practice. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) ("Such concrete and demonstrable injury to the organization's activities — with the consequent drain on the organization's resources — constitutes far more than simply a setback to the organization's abstract social interests."). Thus, in *Padberg*, the court concluded that the NYTWA had standing to challenge a City policy because the policy forced the NYTWA to divert resources from other policy priorities. *Padberg*, 203 F. Supp. 2d at 275.

2. Analysis

Because of the Second Circuit's holding that Section 1983 creates only a personal cause of action, the NYTWA does not have standing to bring the federal constitutional claims asserted here on behalf of its members. The NYTWA has further failed to demonstrate that it has suffered meaningful injury in its own capacity.

Plaintiffs assert that the NYTWA is injured by the challenged practice because "the NYTWA devotes resources to addressing summary suspension, diverting resources from its broader mission of seeking reform in the taxi industry." (Pls.' Opp'n at 25.) As Plaintiffs note, NYTWA Executive Director Bhairavi Desai did testify at her deposition that one of the purposes for which the NYTWA was founded was "to make systemic reform." (Desai Dep. Tr. at 5:22.)

While Desai's deposition testimony indicates that the NYTWA does more than assist drivers whose licenses have been suspended pursuant to the challenged procedures, her testimony provides scant evidence for the proposition that the NYTWA's efforts in these areas were "perceptibly impaired." *Havens Realty Corp.*, 455 U.S. at 379. Although Desai testified that the NTYWA counsels drivers whose licenses have been suspended pursuant to the challenged policy (Desai Dep. Tr. at 10:7-10; 11:6-21), it appears that the organization does so infrequently. For example, when Desai was deposed in February 2007, the NYTWA had only assisted two drivers with license suspension issues under the challenged policy so far that year. (*See id.* at 13:7-21.) Plaintiffs have pointed to no other evidence that the NYTWA is involved with a substantial number of summary suspension cases.

Even if the NYTWA were involved with many summary suspension cases, moreover, it has not identified the priorities on which it was unable to focus as a result of the summary suspension procedures. Although Desai testified to the efforts that the NYTWA sometimes engages in when a driver is

suspended, Desai never testified that the NYTWA is rendered less able to provide other services by assisting suspended drivers, and Plaintiffs have pointed to no other evidence that would allow a fact finder to conclude as much.

Thus, unlike in *Padberg*, here the NYTWA has put forward insufficient evidence to allow a reasonable fact finder to conclude that "it has had to divert greater resources to more individualized services and away from . . . reform efforts." *Padberg*, 203 F. Supp. 2d at 275. Because the NYTWA has provided virtually no evidence that its activities have been "perceptibly impaired" by the existence of the summary suspension procedures, it lacks standing to prosecute this action.

C. Plaintiffs' Constitutional Challenges

The SAC alleges numerous constitutional wrongs, including violations of both the procedural and substantive due process protections of the Fourteenth Amendment and violations of the Fifth Amendment. Because the precise nature of Plaintiffs' claims is rather ambiguous from the SAC, the Court construes and summarizes them here before proceeding to its analysis.

Plaintiffs' first claim for relief, "Lack of Hearing," is explicitly brought under Section 1983. It challenges the TLC's practice of suspending taxi drivers' licenses without providing a pre-deprivation hearing. (SAC ¶ 99.) The Court construes this claim as seeking to vindicate Plaintiffs' procedural due process rights.

Plaintiffs' second claim for relief, "Sham Hearings," is also explicitly brought under Section 1983. It claims that the post-deprivation hearings are inadequate because "taxi drivers may have their license suspended based on a [sic] unproven allegations in the absence of evidence and without a meaningful hearing" (*id.* ¶ 103), and because the TLC authorizes continued suspensions on the assumption that the facts supporting the arrests are true (Pls.' Mem. at 30). The Court also construes this claim as seeking to vindicate Plaintiffs' procedural due process rights.

Plaintiffs' third, fourth, and fifth claims for relief, all brought under Section 1983, apparently seek to vindicate Plaintiffs' substantive due process rights. The third and fifth claims for relief allege that drivers' licenses are suspended without a finding of good cause by the full TLC commission, in violation of Administrative Code § 19-512.1. (SAC ¶¶ 107, 115.) The fourth claim for relief alleges that licenses are suspended without a finding of good cause by the TLC Chairperson, in violation of TLC Rule 8-16. (*Id.* ¶ 111.) Although Plaintiffs do not explicitly state how these actions implicate their rights under Section 1983, the Court construes these three claims as substantive due process challenges predicated on the TLC's violation of state law.

Plaintiffs also argue that, because neither Administrative Code § 19-512.1 nor the pre-December 2006 version of TLC Rule 8-16 explicitly provides for summary suspension as a result of an arrest, drivers receive no prior notice that they may be suspended for engaging in certain conduct. (*See* Pls.' Mem. at 23-24.) Though a claim of inadequate

notice is not clearly identified in a claim for relief, the Court addresses it because it arguably falls within the ambit of the SAC's due process challenges.

Plaintiffs' twelfth claim for relief — the only other federal claim in the SAC — is not explicitly brought under Section 1983. It does, however, allege violation of Plaintiffs' Fifth Amendment Rights. Specifically, it alleges that Defendants "invite and expect" suspended licensees to testify at their summary suspension hearings, that the licensees "are led to believe, however falsely, that their testimony may lead to reinstatement of their license [sic]," and that Defendants do not "inform[] the taxi driver of his right to remain silent pursuant to the 5th Amendment." (SAC ¶ 137.)

1. Procedural Due Process Claims

As discussed above, Plaintiffs raise procedural due process challenges to both the absence of a pre-deprivation hearing and the adequacy of the post-deprivation hearing.

a. Applicable Law

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Thus, "the Due Process Clause provides that certain substantive rights — life, liberty, and property — cannot be deprived except pursuant to constitutionally adequate procedures." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

The procedural due process analysis comprises two steps. The court "must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of life, liberty, or property; if protected interests are implicated, [the court] then must decide what procedures constitute due process of law." *Ingraham v. Wright*, 430 U.S. 651, 672 (1972) (internal quotation marks omitted). Procedural due process "is not a technical conception with a fixed content unrelated to time, place and circumstances," but rather "is flexible and calls for such procedural protections as the particular situation demands." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (internal citations and quotation marks omitted).

The process required in a given situation is dictated by the balancing of three factors identified in *Mathews*:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute requirement would entail.

424 U.S. at 335. While due process often "'requires an opportunity for a hearing before a deprivation of property takes effect,'" *Brody v. Vill. of Port Chester*, 434 F.3d 121, 135 (2d Cir. 2005) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 88 (1972)), "where a State must act quickly, or where it would be impractical to

provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause," *Gilbert*, 520 U.S. at 930. The *Mathews* test thus governs "both when a hearing is required (that is, pre- or post-deprivation) and what kind of procedure is due a person deprived of liberty or property." *Brody*, 434 F.3d at 135.

b. Analysis

It is undisputed that a taxi driver has a protected property interest in his license. *See Bell v. Burson*, 402 U.S. 535, 539 (1971) ("[L]icenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."); *Padberg*, 203 F. Supp. 2d at 276 ("[T]axicab drivers have a property interest in their taxicab licenses sufficient to trigger due process protection."). The question for the Court is simply what process is due.

i. Pre-Deprivation Hearing

Procedural due process generally requires a hearing prior to the State's interference with a protected property or liberty interest. *Brody*, 434 F.3d at 135. Nonetheless, the Supreme Court has repeatedly "rejected the proposition that [due process] *always* requires the State to provide a hearing prior to the initial deprivation of property." *Gilbert*, 520 U.S. at 930 (alteration in original and internal citations and quotations omitted) (collecting cases); *see also Zinermon v. Burch*, 494 U.S. 113, 128 (1990); *FDIC v. Mallen*, 486 U.S. 230, 240 (1988). Rather, "an important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Gilbert*, 520 U.S. at 930-31.

Plaintiffs argue that in this case "a pre-suspension hearing is required as a matter of due process." (Pls.' Mem. at 27.) They contend that the first two prongs of the *Mathews* test clearly favor a pre-suspension hearing, as the drivers have a strong interest in earning a living and the challenged procedures create a great risk of erroneous deprivation because the vast majority of arrests do not result in conviction. (*Id.* at 28.) Plaintiffs further argue that the TLC has little interest in suspending Plaintiffs' licenses before a hearing is held. This is so, Plaintiffs claim, because the TLC suspends licenses regardless of whether the alleged criminal conduct took place on the job and does so without examining the facts giving rise to the arrest. (*Id.* at 29.) "Absent some real evidence of immediate danger," Plaintiffs contend, "there is no compelling interest in immediate suspension." (*Id.*)

With respect to the first *Mathews* factor, the private interest at stake here is undoubtedly significant, as the Supreme Court has consistently "recognized the severity of depriving someone of the means of his livelihood." *Gilbert*, 520 U.S. at 932; *see also Mallen*, 486 U.S. at 243. At the same time, however, the Supreme Court has also noted that the deprivation of a protected interest is mitigated by the availability of prompt post-deprivation review. Thus, "[s]o long as the suspended [party] receives a sufficiently prompt post-suspension hearing," procedural

due process is not offended. *Gilbert*, 520 U.S. at 932.[4]

In this case, the TLC is required by statute to act promptly following a pre-hearing suspension. The TLC must notify a licensee of the suspension within five days, afford the licensee a summary suspension hearing before an ALJ within ten days of the licensee's request for a hearing (unless the licensee requests otherwise), and issue a final decision no later than sixty days from the conclusion of the hearing. Administrative Code § 19-512.1; TLC Rule 8-16.[5] Thus, although the private interest asserted by Plaintiffs is undoubtedly significant, the impact is mitigated by the availability of prompt post-deprivation review. *See Mallen*, 486 U.S. at 243 ("In many cases, perhaps most, [a period of ninety days prior to a final decision] will be justified by an important government interest coupled with factors minimizing the risk of an erroneous deprivation.").

With respect to the second *Mathews* factor, the government's interest counsels strongly against requiring a pre-deprivation hearing. Among the most critical functions performed by the TLC are ensuring the safety of the taxi-riding public and maintaining the public's trust in the safety of taxis. *See Buliga v. N.Y. City Taxi & Limousine Comm'n*, No. 07 Civ. 6507 (DLC), 2007 WL 4547738, at *4 (Dec. 21, 2007) (noting the TLC's strong interest in ensuring passenger safety). A taxi passenger is in a uniquely vulnerable position, in a confined space with a stranger who may lock the doors, block egress, and limit the passenger's ability to summon police assistance. Passengers consent to what would otherwise be a perilous situation because a TLC license reflects the TLC's opinion that a licensee meets the standard of fitness for licensure set forth in the TLC Rules. Accordingly, the TLC has a strong interest in ensuring both that passengers are not placed in a vulnerable position with possibly dangerous drivers and in ensuring that the public perceive the taxi industry to be safe. (Fraser Decl. ¶ 11.)

Although the majority of the individual Plaintiffs were suspended following misdemeanor arrests, the offenses at issue were uniformly serious and generally involved an element of violence. As discussed in section I.A.5, *supra*, Nnebe was charged with Assault with Intent to Cause Physical Injury, 3rd Degree. Karmansky was charged with Criminal Contempt, 1st Degree (a felony), as well as Criminal Trespass, 2nd Degree. Avenaut was charged with Assault with Intent to Cause Physical Injury, 3rd Degree. Finally, Amin was charged with Menacing in the 2nd Degree, with a Weapon,

[4] Plaintiffs also challenge the adequacy of the post-suspension hearings. Because, as discussed in section III.C.1.b.ii., *infra*, the post-suspension hearings satisfy the requirements of procedural due process, the Court addresses only the promptness of those hearings at this stage in the analysis.

[5] TLC Attorney Hardekopf attested that summary suspension hearings must take place within ten days "unless it is determined that the hearing would be prejudicial to any ongoing civil or criminal investigation" or the licensee requests that it take place later, and he noted that he "often extends the ten day limit for requesting a hearing at licensee's request." Hardekopf Decl. ¶¶ 10-12. All named plaintiffs in this action received prompt notice. *See* section I.A.5, *supra*.

as well as Assault with Intent to Cause Physical Injury, 3rd Degree.

Plaintiffs' contention that no imminent danger sufficient to warrant summary suspension exists because most drivers are suspended for off-the-job incidents is unpersuasive. To only consider arrests for on-the-job conduct would significantly compromise the TLC's interest, forcing the public to bear the risk that a driver's unlawful behavior might not stop at the taxicab door. The Court sees no reason why this risk should be placed upon the taxi-riding public.

Nor is Plaintiffs' reliance on *Padberg* persuasive. The dispute in that case stemmed from the TLC's practice of summarily suspending taxi drivers' licenses upon charges of unjustified service refusals. *Padberg*, 203 F. Supp. 2d at 266. The court stated that "although racially-motivated service refusals perpetuate the problem of racial discrimination and those who commit such offenses must be held accountable, the circumstances do not present the sort of immediate threats to health and safety that would permit summary suspension." *Id.* at 281. "If a taxicab driver has refused service on the basis of race," the court explained, there is "little danger in holding him accountable at most ten days later at a meaningful hearing on the merits." *Id.*

Unlike in *Padberg*, the conduct giving rise to suspensions under the challenged TLC policy in this case is closely related to the safety of the taxi-riding public, thus falling squarely within the "health and safety" exception to the pre-suspension hearing requirement. The government interest thus weighs considerably more heavily than it did in the *Padberg* case.

The third and final *Mathews* factor — the risk of erroneous deprivation and the relative value of additional process — also weighs in favor of Defendants. As the Court explains below, the very existence of a criminal proceeding is a reason to suspend a driver, as pending criminal allegations — even if later dismissed — implicate the TLC's interest as licensor. Thus, the suspension is not "erroneous" simply because the charges against the driver are eventually dropped. Rather, the suspension pending the resolution of the criminal case protects the TLC's interest without regard to the ultimate disposition of the criminal charges.

In light of the factors discussed above, the Court concludes that Plaintiffs were not constitutionally entitled to a pre-deprivation hearing.

ii. Post-Deprivation Hearing

Plaintiffs further argue that, even if the lack of a pre-deprivation hearing were constitutional, the post-deprivation hearing is not because its scope extends no further than determining whether the plaintiff was actually arrested. Necessarily implicit in this argument is the contention that the government must prove more than the fact of a licensee's arrest before suspending him. As discussed below, however, due process does not require such proof. Moreover, it would be difficult, if not impossible, for the TLC to prove that a driver had actually engaged in the charged criminal conduct without interfering with the criminal investigation.

As explained below, federal courts have held both (1) that an agency is entitled to suspend an employee on the basis of pending criminal proceedings against him, and (2) that because an agency may do so, a hearing that does no more than confirm the existence of such criminal proceedings does not violate the suspended employee's rights.

In *Brown v. DOJ*, 715 F.2d 662 (D.C. Cir. 1983), the United States Border Patrol suspended two agents after their indictment for crimes including conspiracy to defraud the United States. *Id.* at 664. The suspension was to remain in effect during the pendency of the criminal charges. *Id.* The agents claimed that the agency must have relied on the facts of the indictment in issuing the suspension, and thus that their inability to challenge the facts alleged by the indictment violated due process. *Id.* at 665.

The court rejected the claim. As it explained, the agency's suspension was based not on the facts alleged by the indictment, but by the existence of the indictment itself. *See id.* at 667 ("[T]he agency here relied solely on the fact of petitioners' indictment in suspending them; since the agency did not rely on petitioners' commission of the alleged criminal acts, the indictment was not used as evidence of those acts."). Because the suspensions were based solely on the existence of the indictment, the agents were entitled to contest no more than that fact itself:

> This observation effectively disposes of petitioners' due process argument, which is premised on their contention that the suspensions were in fact based on the wrongdoing charged in the indictment. Petitioners assert that because the agency produced no evidence of misconduct other than the indictment, they were denied an opportunity to confront the witnesses against them and to present evidence in their own behalf. However, as we have seen, the suspensions were based on the very fact of petitioners' indictment on job-related charges. Since the administrative proceedings offered them ample opportunity to contest this fact, their due process rights were not violated.

Id. at 667 n.2. The court further explained why the fact of an indictment itself, even absent proof of the underlying facts, could justify a decision to suspend the agents:

> [I]n allowing suspensions to be based solely on an employee's indictment on job-related charges, we are recognizing that when an employee is targeted by the criminal justice system, the administrative requirements of the agency are implicated. An indictment is a public record, and public knowledge that an individual formally accused of job-related crimes is still on duty would undoubtedly erode public confidence in the agency. In addition, if an employee indicted on work-related charges were retained on the job and if the employee engaged in conduct of the sort alleged in the indictment, the functioning of the agency might be severely hindered or even undermined.

Id. at 667; *see also Mallen*, 486 U.S. at 244-45 ("[T]he return of the indictment *itself is an objective fact* that will in most cases raise serious public concern that the bank is not being managed in a responsible manner." (emphasis added)).

As noted above, the TLC suspends arrested taxi drivers regardless of whether the alleged misconduct occurs on or off the job and regardless of whether the victim is a passenger. Nevertheless, while an assault of a non-passenger occurring when the taxi driver is off-duty is arguably less "job-related" than the alleged conduct in *Brown*, given the great trust that passengers place in taxi drivers, it is within the TLC's prerogative to conclude that any violent or other serious criminal conduct is necessarily related to the driver's job.

Several other circuits have also concluded that the existence of a criminal proceeding may justify governmental interference with a protected property right. In *James A. Merritt & Sons v. Marsh*, 791 F.2d 328 (4th Cir. 1986), a military contractor was suspended from eligibility for government contracts after its indictment for filing false claims in connection with Navy contracts. *Id.* at 329. The suspension was to remain in effect pending resolution of the criminal proceedings. *Id.* The court rejected the company's claim that an indefinite suspension based solely on the fact of the indictment violated its due process rights:

> The Constitution does not require the government to wait for the outcome of the criminal proceedings before implementing an administrative suspension when a contractor has been accused of fraud after the grand jury's investigation and deliberative process. An indictment triggers a judicial process which protects the rights of the accused while determining guilt or innocence.

Id. at 330-31.

Similarly, in *Cooke v. Social Security Administration*, 125 F. App'x 274 (Fed. Cir. 2004), the plaintiff was suspended from his job as a Claims Representative after the United States Attorney filed a criminal complaint accusing him of violations of the Computer Fraud and Abuse Act, with the suspension to remain in effect pending the resolution of his criminal charges. *Id.* at 275. The court rejected his contention that the suspension violated his due process rights:

> Mr. Cooke argues that the agency has an incorrect policy to impose indefinite suspension once criminal charges are filed against an employee regardless of the merits of any response. . . . [T]he Government interest outweighs Mr. Cooke's interest because of the need to retain the trust of the public, whose social security records may be viewed and changed by employees like Mr. Cooke.

Id. at 277-78. *Cooke* is particularly relevant precedent in light of the fact that the suspension in that case followed only a criminal complaint, and not the issuance of an indictment.

The Second Circuit has not held contrary to the D.C., Federal, and Fourth Circuits. *See Komlosi v. N.Y. State Office of Mental*

Retardation & Developmental Disabilities, No. 88 Civ. 1792 (JFK), 1994 WL 465993, at *10 (S.D.N.Y. Aug. 23, 1994) ("Neither the United States Supreme Court nor the Second Circuit has held that a public employee [sic] who suspends an employee without pay violates due process by staying an administrative appeal pending disposition of criminal charges arising from the alleged misconduct."), *rev'd in part on other grounds*, 64 F.3d 810 (2d Cir. 1995).

The conclusion that Plaintiffs are not entitled to a full adversarial hearing before the TLC is bolstered by the third factor in the *Mathews* analysis: the value of additional procedures and the burden that such additional procedures would entail. Put simply, requiring the TLC to prove that each driver engaged in the charged conduct would unacceptably interfere with the parallel criminal proceeding. A hearing such as the one that Plaintiffs advocate, in which the ALJ would be required to evaluate the driver's "criminal record (if any), his driving record, his personal history, the credibility of his accusers, the circumstances of the alleged crime, his guilt or innocence, or whether the crime occurred while the driver was driving his taxi" (*see* Pls.' Opp'n Mem. at 13), would be unworkable. Holding such a hearing would present the significant possibility of interference with the criminal investigation and proceedings, including the risk that a criminal defendant might get a free preview of the criminal case against him through the parallel civil proceeding. Indeed, it is by no means clear that the police or the District Attorney would cooperate, given the risk of interference with a criminal investigation or prosecution.

Further, additional safeguards of the sort that Plaintiffs advocate would present a significant financial and administrative burden on the TLC. Defendants have put forth evidence that additional information about a licensee's arrest is either not available or not accessible through the DCJS system. (Fraser Decl. ¶¶ 14-15.) Accordingly, information pertaining to "whether an arrest was based on a police officer's personal observations or on a complaint reported to the police, whether an arrest was made pursuant to [an] arrest warrant, whether the arrestee was arraigned or indicted, whether bail was required, and whether a complaint, information, or supporting affidavit was filed" would need to be obtained "on a case-by-case basis" from the court or from the prosecutor handling the licensee's criminal case. (*Id.* ¶ 15.) Given that the number of summary suspensions based on arrest averaged slightly fewer than forty-six per month in the six months following the filing of this action (*id.* ¶ 16), procuring this information on a case-by-case basis would present a significant burden.

The District of Columbia Circuit reached a similar conclusion in *Brown*. As the court there noted, "any administrative hearings that precede trial on the criminal charges would constitute improper interference with the criminal proceedings if they churn over the same evidentiary material." *Brown*, 715 F.2d at 668. "Thus, the interests of both the employee and the public are better protected by allowing suspension based on the fact of indictment alone, rather than requiring administrative inquiry into the unlawful conduct alleged in the indictment." *Id.*; *accord Rutigliano Paper Stock, Inc. v U.S. Gen. Servs. Admin.*, 967 F. Supp. 757, 767

(E.D.N.Y. 1997) (noting that the General Services Administration was not bound to hold fact-finding hearings after suspending indicted contractors, as it lacked the capacity to subpoena accusing witnesses or compel the production of evidence).

Plaintiffs rely largely on *Krimstock v. Kelly* (*Krimstock I*), 306 F.3d 40 (2d Cir. 2002), to support their argument that the present post-deprivation hearing is insufficient. In the *Krimstock* litigation, plaintiffs challenged New York City's retention of seized vehicles from initial seizure following an arrest for drunk driving through judgment in a civil forfeiture proceeding. Although the relevant civil forfeiture statute provided for a hearing upon request, those proceedings were often stayed pending resolution of the criminal proceedings. *Id.* at 45.

In *Krimstock*, plaintiffs argued that the lack of a prompt post-seizure hearing to determine the validity of continued retention of the seized vehicles violated their procedural due process rights. The Second Circuit held that a post-seizure, pre-forfeiture-hearing opportunity to be heard was required, finding significant the "months or even years" that the plaintiffs might be deprived of their property, the fact that the lack of a post-deprivation hearing might result in the deprivation of the property of innocent owners, and the fact that the City's primary asserted interest in the forfeiture was financial. *Id.* at 60-67. Subsequently, in *Krimstock v. Kelly* (*Krimstock II*), 464 F.3d 246 (2d Cir. 2006), the court held that the government must — albeit by ex parte process — justify its continued retention of the vehicles even when its reason for seizing the vehicles is for use as evidence at trial. *Id.* at 255.

Both *Krimstock I* and *Krimstock II* are readily distinguishable from the case at hand. The first difference between this case and *Krimstock* pertains to the government interest. A taxi license represents the TLC's judgment that the licensee is qualified to drive a taxi and interact with passengers; as the District of Columbia Circuit noted in *Brown*, "public knowledge that an individual formally accused of job-related crimes is still on duty would undoubtedly erode public confidence in the agency." *Brown*, 715 F.2d at 667. As a result, every license issued by the TLC necessarily implicates its interest as a licensor. This interest is analogous to the interest as government employer identified in *Brown* and *Cooke*. No such interest existed in *Krimstock*, where only private ownership of automobiles was at stake.

Rather, the *Krimstock I* court made clear that the City's primary interest in retaining the seized vehicles was financial. *See Krimstock I*, 306 F.3d at 64 ("The first, and the most compelling among [the interests that] the City has adduced, is to prevent a vehicle from being sold or destroyed before a court can render judgment in future forfeiture proceedings."). Indeed, the government's true motivation was revealed by the fact that the City retained and sought forfeiture of not all vehicles involved in drunk driving arrests, but only "those that might yield an attractive price at auction." *Id.* at 66.[6]

---

[6] The *Krimstock I* court also noted the City's public-safety interest in denying drunk drivers access to vehicles but concluded that (1) the seizures had little public-safety benefit, since drivers remained free to

The second difference between *Krimstock* and this case pertains to the heightened risk of erroneous deprivation that existed on *Krimstock*'s facts. Specifically, the risk of erroneous deprivation was elevated by the risk posed to innocent owners of vehicles merely driven by the arrestee, who would have no opportunity to press the defense of innocent ownership under the forfeiture statute until the initiation of civil forfeiture proceedings. *Id.* at 55-57. Here, there is no such risk of a similar problem, as licenses are only suspended after the particular licensee is arrested.

Finally, the third difference between *Krimstock* and this case pertains to the feasability of alternative procedures. In *Krimstock*, the New York City Police Department was a party to both the criminal proceedings and the civil forfeiture proceedings; there was thus little difficulty in ordering the police to make an evidentiary showing to maintain the seizure of the car. The TLC, as an independent agency, lacks the information that Plaintiffs would have it provide to justify an interim suspension. It was thus far easier for the Police Department to participate in a searching post-seizure hearing than it would be for the TLC to do so.[7]

* * *

Lastly, to the extent that Plaintiffs allege bias on the part of the ALJs who preside over the summary suspension hearings, Plaintiffs had recourse to an Article 78 proceeding, had they chosen to avail themselves of that mechanism. This remedy is sufficient for purposes of due process. *See Locurto v. Safir*, 264 F.3d 154, 174 (2d Cir. 2001) ("Petitioners proceeding under Article 78 may raise claims that the agency adjudicator was biased and prejudged the outcome . . . or that *ex parte* communications with other officials may have infected the adjudicator's ruling. An Article

---

drive other cars, and (2) if the City truly had an interest in public safety, it would not seize only valuable cars. *Krimstock I*, 306 F.3d at 66-67. Here, the Court concludes that the TLC has a valid public-safety interest, the TLC is not motivated by financial concerns, and suspending a taxi driver's license is a reasonably effective way of limiting the driver's potentially dangerous interactions with the public.

It should also be briefly noted that the *Krimstock II* court required some post-deprivation process when a vehicle is seized by the police for use as evidence, even though a nonfinancial government interest existed. The court concluded that only an ex parte hearing was required, however, *Krimstock II*, 464 F.3d at 255, and so in light of the other remaining differences between *Krimstock* and this case, *Krimstock II* is weak support for Plaintiffs' contention that they are entitled to an adversarial hearing.

[7] Plaintiffs have also called attention to the Second Circuit's recent decision in *Spinelli v. City of New York*, No. 07 Civ. 1237, 2009 WL 2413929 (2d Cir. Aug. 7, 2009), but it too is weak support for Plaintiffs' contention that the post-suspension hearings in this case are inadequate. In *Spinelli*, a gun shop owner's license was suspended for 58 days after the New York City Police Department observed several violations of required security restrictions. *Id.* at *1-2. The Second Circuit concluded that the owner's procedural due process rights had been violated by the delay between the suspension and a post-suspension hearing. *Spinelli* is distinguishable, however, for at least two reasons. Critically, unlike in this case, *Brown*, *Cooke*, and *Marsh*, the suspending authority and the investigating authority were the same: the New York City Police Department. There was thus less difficulty in requiring the suspending authority to participate in a hearing. Second, the court in *Spinelli* found that the the plaintiff received inadequate notice of her suspension, in the form of only cursory letters, *id.* at *8-9, a problem that does not exist in this case, where Plaintiffs were promptly notified of their suspensions.

78 proceeding therefore constitutes a wholly adequate post-deprivation hearing for due process purposes." (citations omitted)).

For the reasons stated above, Plaintiffs have failed to show a violation of their procedural due process rights.

2. Substantive Due Process Claims

Plaintiffs also raise substantive due process challenges to the summary suspension procedures. As explained herein, Plaintiffs' claims lack merit.

a. Applicable Law

The Due Process Clause "has been held to have a substantive component that protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133, 144 (2d Cir. 1994) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). The Second Circuit has held that "[s]ubstantive due process protects a liberty or property interest in pursuing the common occupations or professions of life." *N.Y. State Trawlers Ass'n v. Jorling*, 16 F.3d 1303, 1311 (2d Cir. 1994) (internal quotation marks omitted).

Substantive due process represents the "outer limit on the legitimacy of governmental action." *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999). It thus protects against state actions that are "arbitrary, conscience-shocking, or oppressive in a constitutional sense, but not against government action that is incorrect or ill-advised." *Lowrance v. Achtyl*, 20 F.3d 529, 537 (2d Cir. 1994) (internal quotation marks and citations omitted). Accordingly, not every violation of state law by a government agency rises to the level of a substantive due process violation, no matter how "incorrect or ill-advised" that decision might be. *See, e.g.*, *Natale*, 170 F.3d at 263 (noting that the Due Process Clause "does not forbid governmental actions that might fairly be deemed arbitrary or capricious and for that reason correctable in a state court lawsuit seeking review of administrative action" and holding that "[s]ubstantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority").

b. Analysis

As described above, Plaintiffs' contention appears to be that Defendants have violated state law in a sufficiently outrageous way that substantive due process is implicated. As the Court construes Plaintiffs' occasionally enigmatic briefing, the third and fifth claims for relief allege that a finding of good cause to suspend must be made by the full commission, as the Administrative Code provides that "[t]he *commission* may, for good cause shown relating to a direct and substantial threat to the public health or safety and prior to giving notice and an opportunity for a hearing, suspend a taxicab or for-hire vehicle license issued pursuant to this chapter." Administrative Code § 19-512.1 (emphasis added). The fifth claim for relief, in contrast, argues that a finding of good cause must be made by the TLC Chairperson. This argument relies on TLC Rule 8-16, which provides that "the *Chairperson* may summarily suspend a license . . . based upon an arrest on criminal charges that the *Chairperson* determines is relevant to the

licensee's qualifications for continued licensure." TLC Rule 8-16(c) (emphasis added).

Plaintiffs' Complaint fails to allege a violation of substantive due process on its face. Not only is it far from clear that the TLC acted contrary to state law, but even if it did, the Court finds that Defendants' actions were not so "outrageously arbitrary" as to rise to the level of a substantive due process violation.

With respect to Plaintiffs' claim that the full commission must rule on every license suspension, Plaintiffs are likely incorrect in their interpretation of New York law. As at least one New York court has concluded, "[a] plain reading and common sense suggest that the drafters of section 19-512.1(a) did not mean 'full commission' every time the term 'commission' is used throughout this chapter of the Administrative Code." *Wai Lan Fung v. Daus*, 846 N.Y.S.2d 104, 105 (App. Div. 2007). Even if Plaintiffs are correct that their interpretation of the laws at issue is the proper one, however, substantive due process provides no protection "against government action that is" merely "incorrect or ill-advised." *Lowrance*, 20 F.3d at 537. Plaintiffs have made no attempt to argue that the TLC's action rises to the level of the "outrageously arbitrary." *Natale*, 170 F.3d at 263.

With respect to Plaintiffs' claim that the TLC Chairperson may not delegate his Rule 8-16 authority to TLC attorneys, Plaintiffs again appear to be incorrect as a matter of New York law. New York courts have held that, even where certain tasks are granted to the head of an administrative agency, the agency head may delegate these tasks to agency employees. *See Grant v. N.Y. State Continuing Legal Educ. Bd.*, 739 N.Y.S.2d 139, 140 (App. Div. 2002) (holding that a state agency's delegation of certain tasks to its staff was "'a commonsense proposition'" and "'an inevitable incident of hierarchical organization.'" (quoting *Suffolk County Bd. Ass'n v. County of Suffolk*, 46 N.Y.2d 613, 620 (1979)). Indeed, the City Charter specifically provides that the TLC chair "shall have charge of the organization of its office and have authority to employ, assign and superintend the duties of such officers and employees as may be necessary to carry out the provisions of this chapter." Charter § 2301(c). In light of the fact that the TLC oversees some 100,000 licenses (Fraser Decl. ¶ 13), the Court agrees that it is a "commonsense proposition" that the TLC Chairperson may delegate tasks to his employees. It certainly is not "outrageously arbitrary" for him to do so.

For the reasons stated above, Plaintiffs have failed to show a violation of their substantive due process rights.

3. Due Process: Fair Notice

Plaintiffs contend that the summary suspension policy is unconstitutional because taxi drivers lack notice that they will be suspended after they are arrested for specified crimes. This argument lacks merit.

a. Applicable Law

A regulation or statute that provides for the deprivation of a property interest "must be crafted with sufficient clarity to give the person of ordinary intelligence a reasonable

opportunity to know what is prohibited and to provide explicit standards for those who apply them." *Piscottano v. Murphy*, 511 F.3d 247, 281 (2d Cir. 2007) (internal quotation marks and citations omitted). While a plaintiff may challenge the constitutionality of a statute or regulation on an as-applied or facial basis, to succeed on a facial vagueness challenge, the plaintiff must demonstrate that the challenged law is "'impermissibly vague in all of its applications.'" *Rubin v. Garvin*, 544 F.3d 461, 471 n.2 (2d Cir. 2008) (quoting *Arriage v. Mukasey*, 521 F.3d 219, 224 n.2 (2d Cir. 2008)). "Such a showing is impossible for a [litigant] whose as-applied challenge lacks merit, because he cannot establish that the statute is vague in his own case." *Id.*

Thus, "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982); *accord Parker v. Levy*, 417 U.S. 733, 756 (1974). Accordingly, "prohibitions phrased in general terms have been upheld when they were plainly applicable to the conduct of the . . . plaintiff, despite the existence of questions as to whether they would give fair notice with respect to other, hypothetical, conduct at the periphery." *Piscottano*, 511 F.3d at 281 (collecting cases).[8]

b. Analysis

As discussed above, the Administrative Code and TLC Rules contain provisions that provide for summary license suspension "for good cause shown relating to a direct and substantial threat to the public health or safety," Administrative Code § 19-512.1, or when "emergency action is required to insure public health, safety, or welfare," TLC Rule 8-16. Each individual Plaintiff here was arrested for an offense that was a felony or involved some element of violence. All drivers, by law, are fingerprinted as part of the license application process. *See* Administrative Code § 19-505(b)(4). Plaintiffs thus had notice that the TLC might learn of any arrests. Under these circumstances, it is eminently within the intelligence of an ordinary licensee to grasp that an arrest for a violent or felony offense might be deemed a threat to public safety sufficient to warrant suspension, whether or not they had access to the list of offenses that resulted in suspension. This is especially true given the vulnerable position in which passengers are placed when entrusting their safety to a stranger possessed of a TLC license.

The Second Circuit has upheld similarly general provisions where the plaintiff's conduct has clearly fallen within the ambit of the provision, regardless of whether other conduct might present a more questionable case. *See, e.g.*, *Piscottano*, 511 F.3d at 280-84 (rejecting vagueness challenge to a regulation that penalized any behavior that "could . . . reflect negatively on the Department of Correction" because "it is not beyond the intelligence of an ordinary person, much less that of a correctional officer, to recognize that a criminal-justice-system officer's association with an organization whose affiliates engage in criminal activity reflects negatively on the agency that employs

[8] The narrow exception to this rule, involving conduct protected by the First Amendment, does not apply here. *See Vill. of Hoffman Estates*, 455 U.S. at 495 n.7.

him" and collecting cases (internal quotation marks and citations omitted)). Accordingly, Plaintiffs' vagueness challenge fails.

4. Fifth Amendment Claim

Plaintiffs also allege that the Defendants violated their Fifth Amendment rights by failing to advise Plaintiffs at their hearings of their right to remain silent. (SAC ¶¶ 136-38.) The Supreme Court has held, however, that a party is not compelled to be a witness against himself, and, consequently that there is no Section 1983 claim for violation of the Self-Incrimination Clause, where the statements at issue were not used against the speaker in a criminal proceeding. *Chavez v. Martinez*, 538 U.S. 760, 767 (2003) (plurality opinion); *see also Higazy v. Templeton*, 505 F.3d 161, 171 (2d Cir. 2007) ("The Supreme Court concluded that an officer could not be subjected to civil liability for an alleged violation of the privilege against compelled self-incrimination where the coerced statement is not thereafter used against the person who gave the statement.").

Given that the record here is devoid of evidence that any statements made by Plaintiffs at their suspension hearings were later used against them in a criminal proceeding, Plaintiffs' Fifth Amendment claim is dismissed.

D. Jurisdiction Over State Law Claims

The SAC also alleges several claims under New York state law. (*See* SAC ¶¶ 117-35.) Because jurisdiction in this case is not premised on diversity of the parties pursuant to 28 U.S.C. § 1332, the Court has subject matter jurisdiction to decide the state law claims only if it exercises supplemental jurisdiction under 28 U.S.C. § 1367. *See Richardson v. N.Y. City Health & Hosps. Corp.*, No. 05 Civ. 6278 (RJS), 2009 WL 804096, at *22 (Mar. 25, 2009).

As discussed above, all of Plaintiffs' federal claims have been dismissed. "'When all bases for federal jurisdiction have been eliminated . . . the federal court should ordinarily dismiss the state claims.'" *Id.* (quoting *Bhd. of Locomotive Eng'rs Div. 269 v. Long Island R.R. Co.*, 85 F.3d 35, 39 (2d Cir. 1996)); *see also In re Merrill Lynch Ltd. P'ships Litig.*, 154 F.3d 56, 61 (2d Cir. 1998) ("[W]hen the federal claims are dismissed the state claims should be dismissed as well." (internal quotation marks and citations omitted)). The decision to exercise jurisdiction over state law claims is within the sound discretion of the court, but "'the usual case . . . will point toward declining jurisdiction over the remaining state-law claims.'" *In re Merrill Lynch Ltd. P'Ships Litig.*, 154 F.3d at 61 (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988)).

Here, reasons of judicial economy and comity militate against retaining jurisdiction over the state claims, as the Plaintiffs will suffer no prejudice as a result of being required to bring their state law claims in state court. *See Tishman v. Assoc. Press*, No. 05 Civ. 4278 (GEL), 2007 WL 4145556, at *9 (S.D.N.Y. Nov. 19, 2007) ("[S]ince New York's CPLR § 205 allows a plaintiff to recommence a dismissed suit within six months without regard to the statute of limitations, plaintiffs will not be prejudiced by the dismissal of their [state and municipal law] claims." (internal quotation marks and

citations omitted)); *Murray v. Visiting Nurse Servs. of N.Y.*, 528 F. Supp. 2d 257, 281 (S.D.N.Y. 2007) (citing cases). The Court thus declines to exercise supplemental jurisdiction over the remaining state and municipal law claims in the SAC.

IV. CONCLUSION

For the foregoing reasons, the Court grants Defendants' motion for summary judgment as to Plaintiffs' federal claims, denies Plaintiffs' motion for summary judgment as to Plaintiffs' federal claims, declines to exercise supplemental jurisdiction over Plaintiffs' state law claims, and, because there are no claims remaining before the Court, denies Plaintiffs' motion for class certification as moot.

The Clerk of the Court is respectfully directed to terminate the motions docketed at Doc. Nos. 47, 96, and 104, and to close this case.

SO ORDERED.

RICHARD J. SULLIVAN
United States District Judge

Dated: September 30, 2009
New York, New York

***

Plaintiffs Jonathan Nnebe, Alexander Karmansky, Eduardo Avenaut, Khairul Amin, and the New York Taxi Workers Alliance are represented by Daniel L. Ackman, Esq., 12 Desbrosses St., New York, NY 10013.

Defendants Matthew Daus, Charles Fraser, Joseph Eckstein, Elizabeth Bonina, the New York City Taxi and Limousine Commission, and the City of New York are represented by Mary M. O'Sullivan, New York City Law Department, Office of the Corporation Counsel, 100 Church St., New York, NY 10007.

NEW YORK CITY CHARTER PROVISIONS

CHAPTER 65

NEW YORK CITY TAXI AND LIMOUSINE COMMISSION

Sec. 2300. Commission. There shall be a New York city taxi and limousine commission, the purposes of which shall be the continuance, further development and improvement of taxi and limousine service in the city of New York. It shall be the further purpose of the commission, consonant with the promotion and protection of the public comfort and convenience to adopt and establish an overall public transportation policy governing taxi, coach, limousine, wheelchair accessible van services and commuter van services as it relates to the overall public transportation network of the city; to establish certain rates, standards of service, standards of insurance and minimum coverage; standards for driver safety, standards for equipment safety and design; standards for noise and air pollution control; and to set standards and criteria for the licensing of vehicles, drivers and chauffeurs, owners and operators engaged in such services; all as more particularly set forth herein.

§ 2301. Membership of commission. a. The commission shall consist of nine members to be appointed by the mayor with the advice and consent of the city council; five of said members, one resident from each of the five boroughs of New York city, shall be recommended for appointment by a majority vote of the councilmen of the respective borough.
b. Such members shall be appointed for terms of seven years. The members shall first be appointed to serve as follows:
1. Five members recommended by the city council for a term of two years.
2. Two members for a term of four years.
3. Two members for a term of six years. Each such other member shall serve until the appointment and qualification of a successor. For the purpose of fixing the expiration of terms, they shall be deemed to have commenced on the first day of February in the year of appointment and qualification, irrespective of the actual date of appointment and qualification. Vacancies other than by expiration of a term shall be filled for the unexpired term. The mayor may remove any such member for cause, upon stated charges. Notwithstanding the provisions of this

paragraph, any public officer appointed to the commission shall serve only during the period that he holds such public office and shall receive no additional compensation.
c. The mayor shall designate one member of the commission to act as the chairman and chief executive officer. The chairman shall have charge of the organization of its office and have authority to employ, assign and superintend the duties of such officers and employees as may be necessary to carry out the provisions of this chapter. The chairman shall devote his full time to this position and as such he shall receive compensation.
d. The other members of the commission shall not be entitled to compensation.
e. A majority of the whole number of members of the commission then in office shall constitute a quorum for the transaction of any business. The commission shall have power to act by a majority of its members.

§ 2302. Reports of commission. All proceedings of the commission and all documents and records in its possession shall be public records and the commission shall make an annual report to the city council on or before the second Monday of January in each year. The chairman of the city council committee on consumer affairs may at any time direct the commission or the chairman of the commission to appear before the committee to give testimony pertaining thereto, and to furnish to the members of the council any reports deemed necessary.

§ 2303. Jurisdiction, powers and duties of commission. a. The jurisdiction, powers and duties of the commission shall include the regulation and supervision of the business and industry of transportation of persons by licensed vehicles for hire in the city, pursuant to the provisions of this chapter.
b. Such regulation and supervision shall extend to:
1. The regulation and supervision of rates of fare to be charged and collected.
2. The regulation and supervision of standards and conditions of service.
3. The revocation and suspension of licenses for vehicles, other than licenses issued pursuant to state law, provided, however, that taxicab licenses represented by medallions heretofore issued shall in all respects remain valid in accordance with their terms and transferable according to law.

4. Taxicab licenses represented by medallions which have heretofore been surrendered are hereby revoked. Additional taxicab licenses may be issued from time to time only upon the enactment of a local law providing therefor. Any nontransferable licenses shall be deemed revoked upon the surrender by or death of the holder thereof.
5. The issuance, revocation, suspension of licenses for drivers, chauffeurs, owners or operators of vehicles, other than licenses issued pursuant to state law, and for taxicab brokers and the establishment of qualifying standards required for such licensees.
6. Requirements of standards of safety, and design, comfort, convenience, noise and air pollution control and efficiency in the operation of vehicles and auxiliary equipment.
7. Requirements for the maintenance of financial responsibility, insurance and minimum coverage.
8. The establishment of, and the requirement of adherence to, uniform system of accounts, with the right of the commission to inspect books and records and to require the submission of such reports as the commission may determine.
9. The development and effectuation of a broad public policy of transportation affected by this chapter as it relates to forms of public transportation in the city, including innovation and experimentation in relation to type and design of equipment, modes of service and manner of operation, which for limited purposes and limited periods of time may depart from the requirements otherwise established for licensed vehicles pursuant to this chapter. 10. Assistance to the business and industry of public transportation affected by this chapter in aid of the continuation, development and improvement of service and the safety and convenience of the public, including assistance in securing federal and state grants.
11. The formulation, promulgation and effectuation of rules and regulations reasonably designed to carry out the purposes, terms and provisions of this chapter.
c. (1) The commission or an administrative tribunal which may be established by the commission to adjudicate charges of violation of provisions of the administrative code and rules and regulations promulgated thereunder shall have the power to enforce its decisions and orders imposing civil penalties, not to exceed ten thousand dollars for each respondent, for violations relating to unlicensed vehicles for hire and unlicensed drivers of vehicles for hire and for violations relating to the operation of commuter van services without authorization and the

operation of unlicensed commuter vans and unlicensed drivers of commuter vans pursuant to chapter five of title nineteen of the administrative code as if they were money judgments, without court proceedings, in the following manner: Any such decision or order of the commission or administrative tribunal imposing a civil penalty, whether the adjudication was had by hearing or upon default or otherwise, shall constitute a judgment rendered by the commission or administrative tribunal which may be entered in the civil court of the city of New York or any other place provided for the entry of civil judgments within the state. Before a judgment based upon a default may be so entered the commission or administrative tribunal shall have first notified the respondent by first class mail in such form as the commission may direct: (i) of the default and order and the penalty imposed; (ii) that a judgment will be entered in the civil court of the city of New York or any other place provided by law for the entry of civil judgments within the state of New York; and (iii) that entry of such judgment may be avoided by requesting a stay of default for good cause shown and either requesting a hearing or entering a plea pursuant to the rules of the commission or administrative tribunal within thirty days of the mailing of such notice.

(2) The commission or tribunal shall not enter any decision or order pursuant to paragraph one of this subdivision unless the notice of violation shall have been served in the same manner as is prescribed for service of process by article three of the civil practice law and rules or article three of the business corporation law except that: (a) with respect to any notice of violation which alleges the operation of an unlicensed vehicle for hire the operator of such vehicle who is not the owner thereof but who uses or operates such vehicle with the permission of the owner, express or implied, shall be deemed to be the agent of such owner to receive such notice of violation and service made pursuant to this paragraph on such operator shall also be deemed to be lawful service upon such owner; or (b) with respect to any notice of violation which alleges the operation of an unauthorized commuter van service or an unlicensed commuter van, the operator of the vehicle giving rise to such violation who is not the owner of such commuter van service or such commuter van, as applicable, but who uses or operates such vehicle with the permission, express or implied, of the owner of such commuter van service or such commuter van, as the case may be, shall be deemed to be the agent of the owner of such commuter van service or such commuter van, as the case may be, to receive such notice of violation. Service

made pursuant to this paragraph on such operator shall be deemed to be lawful service upon the owner of such commuter van service or commuter van, as applicable.

§ 2304. Rates. a. The amount to be charged and collected for the hire of a taxicab for one or more passengers within the city of New York shall be the total of the following items:
1. For the first one-fifth mile or fraction thereof, or the first one minute of waiting time or fraction thereof, or the combination thereof, sixty cents.
2. For each additional one-fifth mile or fraction thereof, or seventy-two seconds of waiting time or fraction thereof, or the combination thereof, ten cents.
3. Fifty cents for each trunk.
4. All bridge and tunnel and ferry tolls.
5. There shall be no charge for personal luggage or for other belongings of the passengers transported in the interior of the taxicab.
b. Hereafter, and notwithstanding the rates set forth in paragraph a of this section, the commission shall prescribe, revise and otherwise regulate reasonable rates of fare which may be charged and collected for each type of service rendered.
c. In determining the rates of fare, the commission may consider all facts which in its judgment have a bearing on a proper determination, with due regard among other things to the time and distance of travel, to the character of the service provided, to the gross revenues derived from operation, to the net return derived from operation, to the expenses of operation including the income of drivers or operators, to the return upon capital actually expended and the necessity of making reservations out of income for surplus and contingencies, to the number of passengers transported, to the effect of fares upon the public and in relation to the fares for other forms of public transportation, and to the fares and practices with respect to similar services in other cities of the United States.
d. No determination by the commission changing the rates of fare shall be made except after a public hearing before the commission, at which evidence shall be taken.
e. At any public hearing involving a change in the rates of fare, the burden of proof to show that existing rates are not reasonable shall be upon such segment of the business or industry affected by this chapter as is involved in the change in rates.

f. The costs reasonably attributable to a public hearing involving a change in the rates of fare, including the expenses of the commission and the compensation of its officers, agents and employees, shall be charged to and paid by such segment of the business or industry affected by this chapter as is involved in the change in rates.

NYC ADMINISTRATIVE CODE PROVISIONS

CODE PROVISION AS OF THE FILING DATE

§ 19-512.1 Revocation of taxicab licenses. a. The commission may, for good cause shown relating to a threat to the public health, or safety and prior to giving notice and an opportunity for a hearing, suspend a taxicab or for-hire vehicle license issued pursuant to this chapter and, after notice and an opportunity for a hearing, suspend or revoke such license. The commission may also, without having suspended a taxicab or for-hire vehicle license, issue a determination to seek suspension or revocation of that taxicab or for-hire vehicle license and after notice and an opportunity for a hearing suspend or revoke such license. Notice of such suspension or of a determination by the commission to seek suspension or revocation of a taxicab or for-hire vehicle license shall be served on the licensee by personal delivery or by certified and regular mail within five calendar days of the pre-hearing suspension or of such determination. The licensee shall have an opportunity to request a hearing before the commission or other administrative tribunal of competent jurisdiction within ten calendar days after receipt of any such notification. Upon request such hearing shall be scheduled within ten calendar days, unless the commission or other administrative tribunal of competent jurisdiction determines that such hearing would be prejudicial to an ongoing criminal or civil investigation. If the tenth day falls on a Saturday, Sunday or holiday, the hearing may be held on the next business day. A decision shall be made with respect to any such proceeding within sixty calendar days after the close of the hearing. In the event such decision is not made within that time period, the license or medallion which is the subject of the proceeding shall be returned by the commission to the licensee and deemed to be in full force and effect until such determination is made, unless the commission or other administrative tribunal of competent jurisdiction determines that the issuance of such determination would be prejudicial to an ongoing criminal or civil investigation.

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

not be limited to, those actions set forth in subdivision h of section 19-507.1 of this chapter. Any pre-hearing suspension period shall be counted towards any suspension period made in any final determination.

CODE PROVISION AS AMENDED

§ 19-512.1 Revocation of taxicab licenses. a. The commission may, for good cause shown relating to a direct and substantial threat to the public health or safety and prior to giving notice and an opportunity for a hearing, suspend a taxicab or for-hire vehicle license issued pursuant to this chapter and, after notice and an opportunity for a hearing, suspend or revoke such license. The commission may also, without having suspended a taxicab or for-hire vehicle license, issue a determination to seek suspension or revocation of such license and after notice and an opportunity for a hearing, suspend or revoke such license. Notice of such suspension or of a determination by the commission to seek suspension or revocation of a taxicab or for-hire vehicle license shall be served on the licensee by personal delivery or by certified and regular mail within five calendar days of the pre-hearing suspension or of such determination. The licensee shall have an opportunity to request a hearing before an administrative tribunal of competent jurisdiction within ten calendar days after receipt of any such notification. Upon request such hearing shall be scheduled within ten calendar days, unless the commission or other administrative tribunal of competent jurisdiction determines that such hearing would be prejudicial to an ongoing criminal or civil investigation. If the tenth day falls on a Saturday, Sunday or holiday, the hearing may be held on the next business day. A decision shall be made with respect to any such proceeding within sixty calendar days after the close of the hearing. In the event such decision is not made within that time period, the license or medallion which is the subject of the proceeding shall be returned by the commission to the licensee and deemed to be in full force and effect until such determination is made, unless the commission or other administrative tribunal of competent jurisdiction determines that the issuance of such determination would be prejudicial to an ongoing criminal or civil investigation.

b. It shall be an affirmative defense that the holder of the taxicab or for-hire vehicle license or the owner of the taxicab or for-hire vehicle has (1) exercised due diligence in the inspection, management and/or operation

of the taxicab or for-hire vehicle and (2) did not know or have reason to know of the acts of any other person with respect to that taxicab or for-hire vehicle license or taxicab or for-hire vehicle upon which a suspension, proposed suspension or proposed revocation is based. With respect to any violation arising from taximeter tampering, an owner's due diligence shall include, but not be limited to, those actions set forth in subdivision h of section 19-507.1 of this chapter. Any pre-hearing suspension period shall be counted towards any suspension period made in any final determination.

PERTINENT TLC RULES

§2-07 Critical Driver Program.

(a) The taxicab driver's license of any driver who, within a period of fifteen months, accumulates six or more points against his license issued by the Department of Motor Vehicles or an equivalent license issued by the
driver's state of residence, unless previously revoked, shall be suspended for thirty days.

(b) The taxicab driver's license of any driver who, within a period of fifteen months, accumulates ten or more points against his license issued by the Department of Motor Vehicles or an equivalent license issued by the driver's state of residence shall be revoked.

(c) The Commission may at any time review the fitness of a driver to be licensed by the Commission in view of any moving violation, accident, or other driving related incident. Nothing contained herein shall preclude the imposition by the Commission of additional or more severe penalties, or any other action deemed appropriate, in accordance with the Rules of the Commission.

(d) For the purpose of this rule, the points assigned by the Department of Motor Vehicles for any violation shall be deemed to have been accumulated as of the date of occurrence of the violation.

(e) The relevant fifteen month period to be used for calculating any suspension or revocation imposed under subsection (a) or (b) herein shall be calculated from the date of the most recent occurrence which led to a conviction of a violation carrying points; provided however, that no action under subsection (a) or (b) shall be taken with regard to any violation carrying points which occurred prior to February 15, 1999.

(f) For the purpose of calculating penalties pursuant to subsection (a) or (b), herein, a driver who has accumulated points for multiple violations arising from a single incident shall be deemed to have accumulated points for the single violation with the highest point total.

(g) Any licensee who voluntarily attends and satisfactorily completes a

motor vehicle accident prevention course approved by the Department of Motor Vehicles, and who furnishes the Commission with proof that the course was completed on or before August 31, 1999, shall have two (2) points deducted from the total number of points assessed for the purpose of determining any suspension or revocation pursuant to this Rule. No point reduction shall affect any suspension or revocation action which may be taken pursuant to these Rules prior to the completion of the course; and no person shall receive a point reduction unless attendance at the course is voluntary on the part of the licensee.

(h) Any licensee who voluntarily attends and satisfactorily completes a motor vehicle accident prevention course approved by the Department of Motor Vehicles, and who furnishes the Commission with proof that the course was completed on or after September 1, 1999, shall have two (2) points deducted from the total number of points assessed pursuant to this Rule. No point reduction shall affect any suspension or revocation action taken pursuant to these Rules prior to the completion of the course. No person shall receive a point reduction pursuant to this subsection more than once in any eighteen month period; and no person shall receive a point reduction unless attendance at the course is voluntary on the part of the licensee.

§2-31 Tampering with Taximeter, Taximeter Technology System and Rooflight Prohibited.

(a) A driver shall not operate a taxicab in which the taximeter or the seals affixed thereto by a licensed taximeter repair shop or the taxicab technology system have been tampered with, broken or altered in any manner. The operation of a taxicab with a broken taximeter seal shall give rise to a rebuttable presumption that the driver knew of the tampering or alteration and operated the taxicab with such knowledge.

(b) A driver shall not tamper with, repair or attempt to repair, or connect any unauthorized device to, the taximeter or the taxicab technology system, or any seal, cable connection or electrical wiring thereof, or make any change in the vehicle's mechanism or its tires which would affect the operation of the taximeter or the taxicab technology system.

(c) A driver shall not tamper with the roof light or any of the interior lights or connections except to replace a defective bulb or fuse. The

rooflight of a taxicab shall be automatically controlled only by the movement of the taximeter button or ignition switch so that it is lighted only when the taximeter is in an off or "Vacant" position and unlighted when the taximeter is in a recording or "Hired" position. The operation of a taxicab with an unauthorized installation or device controlling interior or roof lighting shall give rise to a rebuttable presumption that the driver knew of the unauthorized installation or device and operated the taxicab with such knowledge.

(d) It shall be an affirmative defense to a violation of section 2-31(b) that the driver: (1) did not know of or participate in the alleged taximeter or taxicab technology system tampering; and (2) exercised due diligence to ensure that taximeter-tampering or tampering with the taxicab technology system does not occur.

§2-60 Abuse and Physical Force Prohibited.

(a) A driver shall not threaten, harass or abuse any passenger or any governmental or Commission representative, public servant or other person while performing his duties and responsibilities as a driver. A driver shall not distract or attempt to distract a service animal accompanying a person with a disability.

(b) A driver shall not use or attempt to use any physical force against a passenger, Commission representative, public servant or other person while performing his duties and responsibilities as a driver. A driver shall not harm or use physical force against or attempt to harm or use physical force against a service animal accompanying a person with a disability.

§2-61 Compliance with Law.

(a) (1) A driver, while performing his duties and responsibilities as a driver, shall not commit or attempt to commit, alone or in concert with another, any act of fraud, misrepresentation or larceny against a passenger, Commission representative, public servant or any other person.

(2) A driver, while performing his duties and responsibilities as a taxicab driver, shall not commit or attempt to commit, alone or in concert with another, any willful act of omission or commission which is against the best interests of the public,

although not specifically mentioned in these Rules.

(b) A driver shall not use or permit any other person to use his taxicab for any unlawful purpose.

(c) A driver shall not conceal any evidence of a crime nor voluntarily aid violators to escape arrest.

(d) A driver shall report immediately to the police any attempt to use his taxicab to commit a crime or escape from the scene of a crime.

(e) A driver shall, upon filing for Workers' Compensation benefits because of a disabling work-related injury, submit his or her driver's license to the Commission and cease driving, for so long as the driver claims a disability that prevents the driver from operating a taxicab. Such license shall not be returned until such driver presents to the Commission documentation of cessation of Workers' Compensation benefits due to recovery from such work-related disability, as provided in §1-43(d) of this title.

§2-70 Program for Persistent Violators of Taxicab Drivers Rules (*effective date, October 15, 1989*).

(a) Any driver who has been found guilty of three or more violations that occurred within a fifteen month period and whose license has not been revoked shall be required to attend a remedial or refresher course and will accumulate one point on his taxicab driver's license. Any driver who does not complete such course upon notification by the Commission shall have his license suspended until compliance.

(b) Any driver who has accumulated six or more points against his taxicab driver's license within a fifteen month period and whose license has not been revoked shall have his license suspended for thirty days.

(c) Any driver who has accumulated ten or more points against his taxicab driver's license within a fifteen month period shall have his license revoked.

(d) For the purposes of subdivisions (a) through (c) of this section, a driver who has been found guilty of multiple violations arising from a single incident shall be deemed guilty of the single violation with the highest point total for purposes of this section.

(e) The minimum penalties set forth in subdivisions (a) through (c) of this section shall not preclude the imposition by the Commission of additional or more severe penalties in accordance with Rules of the Commission.

(f) The penalties set forth herein will be imposed following the hearing where the driver has been found in violation of rules that bring his accumulated point total to the level described in subdivisions (b) and (c). Persistent violator penalties will be in addition to those penalties imposed for the underlying rule violations.

(g) Rule violations that occurred prior to July 26, 1998 will not be deemed to have any point value for the purpose of imposing any persistent violator penalty under this section.

§6-18 Personal Conduct of Licensees.

(a) No licensee shall offer or give any gift, gratuity or thing of value to any employee, representative or member of the Commission or any public servant.

(b) A licensee shall immediately report to the Commission any request or demand for a gift, gratuity or thing of value by any employee, representative or member of the Commission or any public servant.

(c) A licensee shall not offer or give any gift or gratuity or thing of value to a person or persons employed at any airport or other transportation terminal to provide ground transportation information services, dispatching service, security services, traffic and parking control or baggage handling whether or not such person or persons is employed by Port Authority of New York and New Jersey, LIRR, Metro-North or any similar entity.

(d)

(1) A licensee, while performing his duties and responsibilities as a licensee, shall not commit or attempt to commit, alone or in concert with another, any act of fraud, misrepresentation or larceny against a passenger, Commission representative, public servant or any other person.

(2) A licensee, while performing his duties and responsibilities as a licensee, shall not commit or attempt to commit, alone or in concert with another any willful act of omission or commission which is against the best interests of the public, although not specifically mentioned in these Rules.

(e) A licensee shall cooperate with all law enforcement officers and authorized representatives of the Commission, including but not limited to giving, upon request, his name, license number and other documents required to be in his possession.
(f) A licensee shall not use or attempt to use any physical force against a passenger, Commission representative, public servant or other person, while performing his duties and responsibilities as a licensee or as a result of actions which occurred in connection with a licensee's performance of his duties as a licensee. A licensee shall not distract, harm or use physical force against or attempt to distract, harm or use physical force against a service animal accompanying a person with a disability.
(g) A licensee shall be responsible for answering truthfully and complying as directed with all questions, communications, directives, and summonses from the Commission or its representatives, as well as producing any licenses or other documents required to be kept by the Commission whenever the Commission requires him to do so, within ten days of notification. A base owner shall have an affirmative duty to aid the Commission in obtaining information sought by the Commission regarding drivers or vehicles affiliated with such base.
(h) Except as provided in Rule 6-15(e), a licensee shall be responsible for notifying the Commission within fifteen (15) calendar days after any felony conviction of the licensee, individually, or, in the case of a base, as a member of a partnership or any officer of a corporation. Such notification shall be in writing and must be accompanied by a certified copy of the certificate of disposition issued by the clerk of the court with respect to such conviction.
(i) A licensee shall not threaten, harass or abuse a passenger, Commission representative, public servant or other person, while performing his duties and responsibilities as a licensee. A licensee shall not harm or use physical force against or attempt to harm or use physical force against a service animal accompanying a person with a disability.
(j) A licensee shall be courteous to passengers.
(k) The owner or operator of a vehicle licensed by a qualified jurisdiction operating in the City of New York pursuant to section 498 of the New York State Vehicle and Traffic Law must comply with the provisions of subdivisions (a) through (g) and (i) through (j) of this section as though such owner or operator was a "licensee" under this section.

§ 8-11 Hearing Procedure.

(a) No licensee shall be permitted to appear at a hearing unless he or she shows a valid photo ID to the Commission prior to the hearing.

(b) All hearings shall be conducted before an ALJ who shall consider all relevant testimony and review documentary evidence submitted at the hearing. Evidence at a hearing may include affidavits or affirmations submitted under penalties of perjury and may also include the records of the Commission or of another governmental body maintained in the regular course of business. Failure of the respondent to produce at a hearing any document either requested by the Commission or required to be maintained by the respondent pursuant to Commission Rules shall lead to a rebuttable presumption that the document, if produced, would have been adverse to the respondent. Although the formal rules of evidence do not apply, all witnesses shall testify under oath.

(c) All hearings shall be recorded. The record of the hearing and the written decision of the ALJ shall constitute the only official record of the hearing. No individual may record or photograph the hearing without prior written permission from the Commission.

(d) At the conclusion of the hearing, the ALJ shall issue a decision which shall include findings of fact and conclusions of law. If the ALJ finds a violation has been committed, the appropriate penalties shall be imposed, which may include a fine, and/or suspension or revocation of the respondent's license. In the event a suspension for a specified period of time is imposed, such suspension period will not include any period of time during which the respondent's license is not in the possession of the Commission.

TLC RULE 8-16 AS OF FILING DATE

§8-16 Emergency Suspension to Protect the Public Welfare.
(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 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.
(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.

TLC RULE 8-16 AS AMENDED

§8-16 Summary Suspension Pending Revocation to Protect the Public Health or Safety.

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

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

(c) Notwithstanding paragraph (b) of this section, the Chairperson may summarily suspend a license subject to the provisions of (a) and (d) through (g) 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) 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 direct and substantial threat to the health or safety of the public. Revocation proceedings need not be commenced during the pendency of the criminal charges. In such a case, within five (5) calendar days of the Commission's receipt from the licensee of a certificate of disposition of the criminal charges, the Chairperson shall either lift the suspension or commence revocation proceedings.

(d) The Commission shall notify the licensee either by personal service or by first class 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 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 receipt of the request, unless the Commission determines that such hearing will be prejudicial to any ongoing civil or criminal investigation. This paragraph shall not apply, and no summary suspension hearing shall be required, where the Commission schedules the revocation hearing within fifteen (15) calendar days of the suspension.

(e) 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, where applicable, the affirmative defenses may include those set forth in subdivision b of §19-512.1 of

the Administrative Code.
(f) 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.
(g) 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.

STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE**
	)	ss.:	**BY OVERNIGHT**
COUNTY OF NEW YORK	)		**EXPRESS MAIL**

I, , being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On January 14, 2010

deponent served the within: **Brief and Special Appendix for Plaintiffs-Appellants**

upon:

Susan Choi-Hausman
Mary M. O'Sullivan, Esq.
Office of Corporation Counsel
Attorney for Defendants-Appellees
100 Church Street
New York, New York 10007
(212) 788-0303
Schoi-ha@law.nyc.gov

the address(es) designated by said attorney(s) for that purpose by depositing **2** true copy(ies) of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Overnight Express Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York also by electronic service via e-mail.

Sworn to before me on January 14, 2010

MARIANA BRAYLOVSKAYA
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2010

Job # 226666

ANTI-VIRUS CERTIFICATION FORM
Pursuant to Second Circuit Local Rule 32(a)(1)(E)

CASE NAME: Nnebe, et al. v Daus, et al.

DOCKET NUMBER: 09-4305-cv

I, Antoina V. Robertson, certify that I have scanned for viruses the PDF version of the

___X___ Appellant's Brief and Special Appendix

_____ Appellee's Brief

_____ Reply Brief

_____ Amicus Brief

that was submitted in this case as an email attachment to <civilcases@ca2.uscourts.gov> and that no viruses were detected.

Please print the **name** and the **version** of the anti-virus detector that you used:

Vipre AntiVirus version 3.1 was used.

_____
Antoina V. Robertson

Date: January 14, 2010