UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JONATHAN NNEBE, ALEXANDER KARMANSKY, EDUARDO AVENAUT, KHAIRUL AMIN and the NEW YORK TAXI WORKERS ALLIANCE, individually and on behalf of all others similarly situated,

06-CV-4991 (RJS)

Plaintiffs,

-Against-

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

Defendants.

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PLAINTIFFS' POST-TRIAL MEMORANDUM OF LAW IN SUPPORT OF JUDGMENT ON THEIR FEDERAL CONSTITUTIONAL CLAIMS

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PRELIMINARY STATEMENT

Plaintiffs respectfully submit this post-trial memorandum of law in compliance with the Second Circuit Mandate to demonstrate three points. First, defendants failed to substantiate their factual assertions to the Court of Appeals, assertions that provided the basis for their defense to plaintiffs' federal civil rights claims and which permitted the remand. Second, the facts as found by this Court demonstrate that defendants denied plaintiffs and the putative plaintiff class Due Process of Law. Third, plaintiffs' claims are not grounded—and were never found or suggested by the Second Circuit to be grounded—in substantive due process. Based on the facts as found, the law of this case and the case law generally, the judgment must be for plaintiffs.

In its 2011 decision, the Court of Appeals remanded to:

> (1) Make factual findings as to "the scope of the hearing" defendants actually afford drivers, that is, whether the TLC process provides a "real opportunity" for a driver to show his licensure would not pose any direct and substantial threat to public health or safety, "arrest notwithstanding," 644 F.3d 147, 159 (2d Cir. 2011); and
>
> (2) Decide "whether the hearing the City actually provides—whatever it may consist of—comports with due process." *Id.* at 163.

The Findings of Fact (Findings, ECF # 323) establish that the answer to the Court of Appeals' first question is no. As the Findings detail, the New York City Taxi and Limousine Commission (TLC) suspends taxi drivers based on a computerized arrest notice alone. Throughout the post-suspension process, the TLC studiously ignores the facts and circumstances of the alleged crime and facts about the driver's record that might, by this Court's own reckoning, speak to whether the driver is a threat. Once suspended on arrest, a driver is *never* reinstated through the hearing process. Suspension without hearing or inquiry and the inexorable,

inevitable continuation of that suspension without meaningful review—this is the ever-present reality, exposed by trial.

Plaintiffs' central claims, stated in Counts I and II of their Second Amended Complaint, as this Court put it in its 2009 Opinion and Order, seek "to vindicate Plaintiffs' procedural due process rights." *Nnebe v. Daus*, 665 F. Supp. 2d 311, 322 (S.D.N.Y. 2009). The facts uncovered at trial establish serial denials of Due Process of Law, causing damages to plaintiffs and the plaintiff class of drivers of both yellow (medallion) taxis and for-hire (livery) vehicles. First, the TLC utterly denies drivers the most basic component of "the meaningful opportunity to be heard" and "most rudimentary demand[] of due process of law," the right to notice. *Armstrong v. Manzo*, 380 U.S. 545, 551 (1965). The Findings establish that the TLC provides an elaborate process, but it never informs drivers seeking to regain their property what evidence or arguments it will and will not consider. Drivers have been, and continue to be, actively *misdirected*, in word and deed. Findings 2, 8, 10. The house-of-mirrors system TLC has had in place for more than a decade is so suffused with confusion, irrationality, and dishonesty that it not merely *denies* drivers a meaningful opportunity to be heard, but actively interferes with any attempt.

Second, plaintiffs' entitlement to judgment on their procedural due process claims is conclusively established under the Supreme Court's decision in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), which the Second Circuit held governs here. Plaintiffs' individual interest is "enormous," all the more so because the eventual return of a taxi driver's license leaves a "temporary" (but lengthy) deprivation unremedied. 644 F.3d at 159. The risk of an erroneous deprivation is very high: Many drivers (a large majority, in all likelihood) will continue to be suspended *pendente lite* even if they would, in fact, not pose any real danger, and will ultimately have their licenses restored. Even allowing the extraordinary presumption that the driver is guilty

as charged, alternative procedures that are both fairer and more accurate are available at little cost. Indeed, the TLC's process would be far better if it simply reversed its practice of disregarding relevant probative evidence or simply afforded protections they represented were already "in place." 644 F.3d at 163, but actually are not. As for defendants' *de facto* current practice, it "does not allow for the presentation of potentially exculpatory evidence, [so] there is little doubt that due process rights are in jeopardy." *Bell v. Burson*, 402 U.S. 535, 542 (1971).

Third, and equally important, the process described in the Court's Findings is indistinguishable from the one defendants disavowed—through repeated, specific representations to the Court of Appeals. In fact, it is tantamount to no process at all. To the very uncertain extent the "nexus" test is actually applied (no license has been reinstated on that basis; and no decision has even suggested a close case), it is at best a tautology. It is a "philosophical" conclusion *by the TLC* that a penal code provision that *the TLC determined* is serious enough to warrant suspension is "arguably" serious enough to warrant suspension.

The facts alleged by plaintiffs now firmly established, defendants may be tempted to fall back on this Court's prior view that once there has been an arrest based on even an *ex parte* finding of "probable cause," no further process is due. But based on judicial estoppel, the law of the case doctrine and the mandate rule, that defense has been forfeited and may not be revived. Defendants may attempt to re-cast their *de facto* practice, revealed at the trial, as an "interpretation" that is entitled to "deference." But in fact, the TLC never promulgated its policy by statute, by rule, *or* through interpretation. Finally, defendants may pursue their recent suggestion that plaintiffs' claims are actually grounded in "substantive due process" and have been waived. But as the Second Circuit correctly resolved, plaintiffs raise a challenge to the "manner" by which "government action depriv[es] a person of life, liberty, or property." *U.S. v.*

Salerno, 481 U.S. 739, 746 (1987), and not a claim that defendants are without power to suspend licensees or continue suspensions, "regardless of the fairness of the procedures used." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (describing "substantive component" of due process). In any event, any late-breaking substantive due process argument is also barred because, as the Second Circuit clarified, neither plaintiffs' reinstated procedural due process claim nor their state law claims (also reinstated) were advanced under "substantive due process" claim. Thus the "disavowal" of such claims has no bearing on the claims that plaintiffs did advance, successfully, in the Court of Appeals.

Because defendants' post-deprivation processes are so seriously unconstitutional, this Court must, as the Second Circuit directed, reconsider its earlier grant of judgment "in its entirety." *Id*. at 163. The harms inflicted by initial *ex parte* arrest-based deprivations were not, in fact, "mitigated" by a post-suspension process now shown to be worthless. Thus this Court should find that these suspensions without hearings or process of any kind were constitutionally impermissible.

PROCEEDINGS TO DATE

This case was filed in 2006, alleging that the TLC's practice of suspending drivers based on an arrest alone and of always continuing those suspensions until criminal charges were favorably resolved was a deprivation of plaintiffs' property without Due Process of Law. Plaintiffs alleged in Count 1 of their Second Amended Complaint that the TLC gave drivers no notice or opportunity to be heard *prior* to depriving them of their property. Plaintiffs alleged further that the "hearings" that drivers were afforded *post*-suspension were "sham[s]," notwithstanding the elaborate trappings of process—the presence of attorneys, the right to submit evidence, the presence of an ALJ, a written decision, and review by the TLC Chair (Count 2). Despite the trappings, there was nothing an arrested driver could say to or show the TLC that would enable him to obtain return his constitutionally-protected property. In particular, it would make no difference if the driver showed that he was certain to be reinstated; that the allegations did not involve driving or arose from an off-duty incident; that the driver was issued a DAT; that he had a good record overall and no history of violence; or that he was actually innocent. Thus there was no *meaningful* opportunity to be heard.

The Initial Summary Judgment Motion

In 2009, this Court granted summary judgment to defendants (and denied plaintiffs' competing motion for summary judgment) on these claims. *Nnebe v. Daus*, 665 F. Supp. 2d 311 (S.D.N.Y. 2009). Recognizing that the claims were "seeking to vindicate Plaintiffs' procedural due process rights," both as to the initial summary suspension and the post-suspension hearing,

id. at 322, the Court concluded that any question as to the scope or fairness of the TLC hearings was immaterial under Fed. R. Civ. P. 56, citing decisions suggesting that a suspension based on "the fact of a licensee's arrest [alone]" was constitutional, meaning that no further process was "due." *Id*. at 326. The Court then concluded that the claim failed under the *Mathews v. Eldridge* procedural due process test and that the Second Circuit's decision in *Krimstock v. Kelly*, 306 F. 3d 40 (2d Cir. 2002), holding that Due Process required a meaningful hearing in order to continue a deprivation pending resolution of criminal charges, was distinguishable.

The Decision on Appeal

Plaintiffs' appeal of this Court's order concentrated on their procedural due process claims. Plaintiffs maintained that TLC's refusal to provide *any* notice or hearing pre-suspension failed the *Mathews* test and that the post-deprivation process was even more glaringly deficient. Plaintiffs did not focus on whether substantive concerns that gave rise to suspensions were legitimate, but on whether it was constitutional for the TLC to refuse to provide fair and accurate hearings. The appeal argued that defendants' suspension and hearing process disregarded evidence that would have permitted a driver to resume work because he did not pose a threat to public safety. It maintained that the TLC did not, based on undisputed facts, adhere to its regulatory standard.[1]

The Second Circuit was unconvinced that the ordinary rule—that notice and hearing must precede deprivation of property—should govern here. While recognizing that a suspension from

[1] In a side note, as discussed in detail below, plaintiffs also argued that the district court had mischaracterized their state law claims as based on "substantive due process." The Court of Appeals accepted plaintiffs' position and said it would "not discuss the district court's substantive due process analysis and will not review any of the plaintiffs' claims in terms of substantive due process." 644 F.3d at 154 n.2. There was no suggestion that plaintiffs' federal claims were substantive due process claims. Indeed, the Court headlined its discussion of the federal claims "*III. Procedural due process*." *Id*. at 158.

"the date of arrest [to] the date of the post-suspension hearing … can be deeply problematic for a taxi driver," the Court allowed that the TLC's interest in the immediate aftermath of arrest when few facts were known "is greater than the driver's interest in an immediate hearing." 644 F.3d at 159. Thus, the Second Circuit allowed the TLC to suspend first and *then* hold a prompt and meaningful review. *Id*.

The Court of Appeals, however, vacated the other aspect of this Court's order. Whether the fact of arrest alone would be tolerable for summary deprivation, the Court recognized, did not settle what process was constitutionally due in order to *continue* a deprivation. The Court of Appeals cited *Krimstock*, which allowed for summary deprivations, but held procedural due process rights violated. In the post-deprivation context, the Court explained, the *Mathews* balance could well be different. In particular, while the Court was less "troubled" by drivers' inability to obtain reinstatement based on claims of innocence, the interest in avoiding a "mini-trial" did not establish that a more fair process could not "be devised." *Id*. at 160. The Court further noted that the cases that this Court cited as establishing that no process was due were "at least arguably in some tension with" controlling circuit precedent, *Krimstock*. The Court of Appeals proceeded to distinguish these cases on multiple grounds.

The Second Circuit then noted the difficulty that impaired it from deciding whether the scope of the hearing the TLC, in fact, provided was within the constitutionally acceptable range. Although this Court's decision had accepted that the TLC's hearings were utterly perfunctory, defendants' arguments to the Court of Appeals were entirely different. The Court of Appeals made clear that the City was "not standing on an assumption that automatic continuance of a suspension—after a hearing at which only identity or offense can be disputed—is consistent with due process." Instead, "The City's defense of the process it affords [was] premised on a

contention that it provides drivers with a real opportunity to show that they do not pose a risk to public safety, arrests notwithstanding." *Id*. at 161.

The Court of Appeals was skeptical. It said, "The record basis for calling it the standard is scant…. [T]here is little evidence that an ALJ is allowed actually to apply this standard, there is considerable evidence supporting the appellants' view that they [do] not." *Id.* at 160-61. The opinion proceeded to record in unusual detail its efforts to avoid misunderstanding the City's position. The Second Circuit quoted the City's lawyer's use of the personal pronoun "I" as in the City's assertion that the driver could show that "I don't pose a risk to public safety." *Id*. at 161.

In particular, the Court of Appeals emphasized, it was "*not* the City's position that arrest for one of the offenses listed on the TLC's summary suspension chart is *per se* evidence" that the driver would pose a threat to public health or safety. *Id*. It underscored the City's claim that "proof regarding the charged offense and proof regarding the regulatory standard [were] separate issues at the post-suspension hearing." *Id*.

Despite its incredulity about the evidentiary support, based on the assertion by the City's lawyers, the Court remanded to give the City an opportunity to prove that the post-deprivation hearings actually provided something "beyond mere confirmation of identity and charge." Additional litigation would "determine what really occurs at the hearing and what the City means by what it says." *Id.* at 163. It added that it would be necessary for the district court to conduct fact-finding "to determine whether the post-suspension hearing the City affords did indeed provide an opportunity for a taxi driver to assert that, even if the criminal charges are true, continued licensure does not pose any safety concerns." *Id*.

That fact-finding ultimately required a trial. Now that it is complete, the Court of Appeals required that the district court "determine whether the hearing the City actually provides—whatever it may consist of—comports with due process." *Id*.

Post-Remand Litigation

On remand, defendants made the same representation in opposing plaintiffs' motion for summary judgment as they had in the Court of Appeals.[2] As this Court noted, defendants asserted "that the actual [post-suspension hearing] standard matches the official one.… Thus, Defendants contend, a licensee may present, and an ALJ will consider, *evidence* that even if the charges are true, [continued] suspension is unwarranted because *the licensee* does not pose a sufficient public danger." *Nnebe v. Daus,* 2013 WL 4494452 (S.D.N.Y. Aug. 22, 2013) (citing defendants' brief, emphasis added). At a pre-trial conference on December 20, 2013, this Court stated: "The focus should not be on whether the driver can assert that he is not dangerous, but rather whether the assertion would even be considered by the ALJ and the TLC. I think actually both of those inquiries are relevant. I think the latter is clearly the more important." Tr. of Dec. 20, 2013 Conference at 3. At the same conference, the Court added, "I think implicit in that is whether the driver gets to articulate those points and whether an ALJ or a fact finder would consider them, whether they're even permissible as considerations in reaching the licensure decision. So that's what we've been doing." *Id*. at 27.

This issue surfaced again when plaintiffs identified categories of evidence that would be relevant in determining whether driver's licensure presented a direct and substantial threat. Just days before the start of trial, this Court issued another Order , in which it wrote:

[2] Initially, this Court held that plaintiffs had not filed a post-remand motion for summary judgment. Following plaintiffs' motion for reconsideration, the Court agreed that plaintiffs, as well as defendants, had so moved, but it denied both motions. ECF # 210.

> The entire point of this trial is to determine 'whether the post-suspension hearing the City affords does indeed provide an opportunity [both *de jure* and *de facto*] for a taxi driver to assert that, even if the criminal charges are true, continued licensure does not pose any safety concerns.' [quoting the Court of Appeals].
>
> In order for there to be a real, *de facto* opportunity 'to assert that, even if the criminal charges are true, continued licensure does not pose any safety concerns,' the ALJs and the TLC Chair must be able to consider *something* other than the mere fact of a criminal charge. Order of Jan. 10, 2014 (ECF # 296) at 1.

This order ended with a warning to defendants that "if they cannot even suggest any factors that an ALJ or the TLC Chair can consider beyond the fact of arrest [on a charge on the TLC list], then a directed verdict in this trial would appear inevitable." *Id*. at 3.

Throughout this entire post-remand litigation—including a second round of summary judgment motions and pre-trial motions—neither defendants nor this Court stated or suggested that plaintiffs' claims were premised on substantive due process.

The Trial and Findings

Despite the warning in the January 10 Order, the case proceeded to a bench trial. The resulting Findings establish the truth of plaintiffs' allegations: Except in "some very rare cases," the TLC bases its suspensions "only [on] the fact of arrest and whether the charged offense is on [an unpublished internal TLC list], and does not consider any additional facts." Findings 8. At the post-suspension hearings, TLC ALJs "did not tell drivers what the applicable standard was," and "encouraged drivers to argue anything they wanted—including that they were not a threat to public health or safety or that they were innocent," though no such evidence or argument would be considered. *Id*. at 10.

Neither the TLC ALJs nor the chair ever "considers or attempts to determine whether the particular driver would pose a direct and substantial threat to public health or safety." *Id.* at 2, 10. Apart from establishing that he was not arrested for the offense reported, "the only argument an

arrested driver can make" under the TLC's regime is that his licensure would "not pose any safety concerns because the charged crime… does not have a nexus to public health or safety," *Id.* at 14. That argument, that "a hypothetical driver who had [violated the penal code section] … would [not even] *arguably* be a threat to public health or safety" was "philosophical," and "so far" it has never succeeded. *Id.* at 9-10, 14. Defendants' cagey testimony notwithstanding, the Findings confirm that TLC chair always accepts recommendations to continue a suspension and always rejects the rare recommendations to lift one. *Id.* at 9, 10.[3] Thus "no driver has ever had her or his suspension lifted through" the post-suspension hearing process. *Id.* at 2.

ARGUMENT

I. THE PRACTICE DESCRIBED BY THE COURT'S FINDINGS IS INDISTINGUISHABLE FROM THE ONE DEFENDANTS EXPRESSLY DISAVOWED AND DECLINED TO DEFEND ON APPEAL—AND IS EQUIVALENT TO NO PROCESS AT ALL

The TLC hearing process bears no resemblance to the one described in defendants' repeatedly-codified rule, which identifies the determinative "issue" as whether reinstatement pending resolution would pose a real public safety threat ("if" the arrest charges are "true")[4]—and directs that all "relevant evidence" must be "considered." Rather, as the Court found, relevant evidence, as the Federal Rules of Evidence defines the term—that is, evidence that

[3] Fraser testified he could not say "for sure" whether or not he had ever lifted a suspension. Findings 14. Daus testified that that he had recalled lifting a suspension, but "I have no idea what that was and whether it came out in the discovery, but I'm sure it happened." Tr. 343.

[4] As the Findings recognize, the TLC Rules have, since 2009, provided that suspensions may be continued *only* in cases where the agency proves that a driver's licensure pending resolution of the criminal case would pose a "direct and substantial" danger—conforming to language in a NYC Code provision that TLC has claimed (erroneously) authorizes the suspensions at issue here. At no point has the TLC accorded or even claimed to accord any significance to this limitation. Indeed, ALJs and chairs routinely used far looser language, finding continued deprivation warranted if "'you could argue' that a person who had committed the crime 'could possibly' pose a threat." Findings 12 (quoting Daus testimony).

would tend to establish that a driver could resume work *without* posing a direct and threat to the public—is strictly *disregarded*. Indeed, such evidence is disregarded even when it leaves an ALJ with the "overwhelming conclusion that [a driver's licensure] poses no direct and substantial threat to the public health and safety." PX 65 (Bhatti) at 5-6, rejected by Chair. *See also* Findings 10 (discussing TLC ALJ Gottlieb). Although TLC Rule 8-16 requires a determination specific to an individual, "*the* Licensee," the TLC process "does not consider evidence [as to] the particular driver," or the circumstances (or even allegations) underlying his arrest. "Only the statutory elements of th[e] charge matter." Findings 13.

The process described by the Findings is also directly contrary to specific representations defendants made to the Court of Appeals. In the face of pointed judicial skepticism, defendants represented that they "bind themselves" to the "*de jure*" standard laid out in their rules. 644 F.3dat 159. They further assured that a "separate standard" (different from the automatic, offense-based one that dictates the initial suspension) governed whether the suspension should be continued and that a driver could "prevail" at the hearing through evidence that "I don't pose a risk to public safety." *Id.* at 161. Defendants told the Court of Appeals that it "[was] *not* the City's position that arrest for one of the offenses listed on the TLC's summary suspension chart is *per se* evidence" that the driver posed a real threat to public health or safety if reinstated. *Id.* But the Findings establish that, at the hearings, the TLC prosecutor almost invariably introduces only the arrest notice. Hardekopf Dep. (PX A-1) 23-24, 68. In other words, proof of arrest and identity is not just "per se" evidence: It is normally the *only* evidence (distinct from argument) that the TLC ever considers.

The practice that the Findings describe is also in stark contrast with the defendants' sworn testimony at trial. Meera Joshi, the current TLC chair (and then-general counsel and "chair

designee") testified under oath that her "review process [was] individualized and includes consideration of the particular driver's dangerousness." But the Court could "not credit Joshi's testimony," recognizing that "it flatly contradicts official Chairperson decisions she herself authored." Findings 14. The Court likewise could not credit similar testimony of the former TLC general counsel and designee Charles Fraser for the same reason. *Id*. at 13. In fact, in determining whether or not to lift a suspension—and in 100% of the cases the answer is not—the TLC chair, who ultimately rules on the ALJ recommendations, "never considers or attempts to determine whether the particular driver would pose a direct and substantial threat to public health or safety." *Id*. at 2.

Most important, the post-suspension process described in the Findings—although costly and protracted—is the practical and constitutional equivalent of no process at all. Of the three ostensible component parts of the post-suspension hearing process, the first two "opportunities" the TLC affords a suspended driver—to show that he was not the individual arrested or that he was not facing the charges recorded on the DCJS computer printout—are worthless on their face. In any such instance, the Findings confirm, there is no need to run the gauntlet of a *hearing* because reinstatement on those grounds may be obtained via phone call to a TLC staff member. Indeed, while an ALJ can, at most, "recommend," the TLC prosecutor can actually *reinstate* a driver's license based on such a clerical mistake. Findings 8.

Apart from proof of "identity of the driver and the [charged] offense," the third, and supposedly distinct, "opportunity" the Findings say that drivers are afforded is to make a "philosophical" argument as to the penal offense/danger nexus. But this opportunity, if it exists at all, is surely what the Court of Appeals called "a nullity." *See id*. at 160. The "nexus" standard is both substantively different from and vastly less demanding than the regulatory standard to

which defendants claimed to "bind themselves." Moreover, the "opportunity" to make a "philosophical" no-nexus argument is good for nothing, because the TLC has *already* determined in developing its list of "serious" offenses that all have some nexus to public safety (or health).[6] Indeed, the 2011 version of the rule limits suspensions to arrests for "charges *the Chairperson believes* …would [make] continued licensure … a direct and substantial threat to public health or safety," Findings 5, belying any suggestion that *any* "separate [regulatory] standard" is operative in the suspension-continuation process. In the case of any regularly recurring charges, such as misdemeanor assault, the chair has already concluded the offense elements sufficient on prior chair review. Of course, drivers seeking reinstatement are never even told that this element-based argument is the only one that would, ostensibly, be "considered." *See infra*.

The evidence at trial establishes that defendants do *no more* than consider the generic offense. There is, meanwhile, no real support for the notion that post-suspension process contemplates whether arrest charges have a sufficient "nexus" with safety. As the evidence showed, ALJs, chairs and chair designees have had no evident difficulty conjuring a "nexus" in cases of drivers suspended on arrests for non-violent, non-driving, off-duty offenses—uniformly "deciding" that individuals who were not even *accused of* doing anything violent or unsafe would pose a direct and substantial safety threat while working. *See, e.g.* Tr. 744 (Fraser) ("The theory is that the moral turpitude reflected by a commission of a felony is a threat to health or safety."). And it is telling that there is no record of a chair reinstating a license on a lack-of-

[6] The Findings' use of the present tense refers only to the current "list." As *defendants* repeatedly have emphasized, the "list" in effect—though never publicly divulged—when named plaintiffs were suspended and when this class action was filed included large numbers of penal code provisions that did *not* possibly meet this description.

nexus determination in the many years that the TLC's list of offenses was, as *defendants* have time-and-again pointed out, highly indiscriminate. *See* 644 F.3d at 151.

Indeed Deputy Chief ALJ Coyne stated that, per TLC policy, ALJs had no "discretion" or "authority" to recommend lifting a summary suspension, based on "nexus" or indeed anything short of resolution of the criminal case. PX 54, 56. Then TLC General Counsel Fraser testified that he disagreed with Coyne. But he refused to state his position "in writing." Tr. 712-714 (Fraser). So as far as Coyne was concerned, the policy and practice remained as he understood it, and he so trained and supervised the ALJs. PX 47; Tr. 298-99 (Coyne). The testimony and evidence at trial confirmed what Coyne said at his deposition. Asked what a driver would have to show in order to have his suspension lifted: "He would have to prove at the summary suspension hearing that they have the wrong person, that he wasn't charged with those offenses. I can't think of anything else." Coyne 161-62 (ECF # 175-5). .

The TLC's insistence that its ALJs must not recommend lifting a suspension—based on nexus or anything else—came to a head when ALJ Gottlieb issued three recommendations that the TLC viewed as non-compliant with the non-public TLC ALJ Manual. As the Second Circuit noted, 644 F. 3d at 152, Coyne informed Gottlieb that the recommendations were "improper" as inconsistent with the Manual (not any TLC rule or NYC Code provision). More than that, Coyne also instructed, "In the future if you believe a summary suspension should be lifted please call me and discuss the matter with me before mailing it out." PX 44. Gottlieb apologized repeatedly and in an e-mail to Coyne he stated: "I want to assure you that this will not happen again." *Id*. Thus, Gottlieb interpreted the reprimand to mean he should never recommend lifting a summary suspension for any reason, and he never did. Findings 10; Tr. 209, 212-213, 234. Thus, in

addition to its reliance on an unpublished ALJ Manual, the TLC enforced its *de facto* policy though particularized *ex parte* directives, which is itself a constitutional violation.[7]

In both result and design, the process is no different from the one held to violate due process in *Padberg v. McGrath-McKechnie*. As in that case "although the TLC process [here] *seems* crafted to … ensure prompt review of suspensions," a "hearing [that] amounts to little more than a *pro forma* verification by the TLC … with the defendant having no chance to present evidence in his favor … does nothing to limit the duration of the suspension." 203 F. Supp.2d 261, 278 (E.D.N.Y. 2002).

Irrespective of questions of what type of hearing that *would* satisfy Due Process, *see infra*, these facts establish a *per se* violation. "Due process of law does not allow the state to deprive an individual of property [by going] … through the mechanics of providing a hearing, [when] the hearing is totally devoid of a meaningful opportunity to be heard." *Washington v. Kirksey*, 811 F.2d 561, 564 (11th Cir. 1987). Due process is not satisfied, as the Court observed at trial, by giving the drivers a chance "to vent." Tr. 948.[8] A functioning agency does not hold a pointless hearing, contrary to what the TLC prosecutor told an OATH ALJ, simply "because he

[7] The Second Circuit has held that "the insulation of the decisionmaker from *ex parte* contacts is justified by basic notions of due process." *Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2d Cir. 1984); *see also Ward v. U.S. Postal Serv.,* 634 F.3d 1274, 1279-80 (Fed. Cir. 2011); *Stone v. FDIC*, 179 F.3d 1368, 1377 (Fed. Cir. 1999); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 56 (D.C. Cir. 1977). Here, *ex parte* communications, whether from the Manual or enforced by training or personal instruction, told ALJs how to rule and ensured the results.

[8] In response to the Court's comment, which was offered more than once, defense counsel said, "I don't think that it's simply an opportunity to vent, it's an opportunity to create a record" for the TLC chair. Tr. 948. But the evidence—and the Court's Findings—make clear that the "record" was and is never *considered* by the chair in determining whether to a summary deprivation should be continued. Former TLC Chair Daus said, for his part, that venting would be a "possible" purpose for the hearing. Tr. 395.

[the driver] requested to have a hearing." PX N-4 (Al-Kafi hearing transcript). Rather, "[s]ince the essential reason for the requirement of a [] hearing is to prevent unfair and mistaken deprivations of property, ... it is axiomatic that the hearing must provide a real test." *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972). But a hearing which disregards the evidence, which offers, at most, a chance to make a philosophical argument, and which never changes the status of any respondent, is not a real test.

II. THE TLC FAILS TO GIVE DRIVERS NOTICE AND ACTIVELY MISLEADS THEM AS TO THE NATURE OF THE SO-CALLED HEARING, WHICH IS ITSELF A DENIAL OF DUE PROCESS

The Findings establish a further constitutional violation independent of deficiencies in the scope of the hearing process. "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' *Fuentes v. Shevin*, 407 U.S. at 80 (quoting *Baldwin v. Hale*, 1 Wall. 223, 233 (1863)). The TLC denies suspended drivers "[a]n elementary and fundamental requirement of due process," specifically "notice reasonably calculated … to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314; *see also Turner v. Rogers*, 131 S. Ct. 2507, 2519 (2011); *Morrissey v. Brewer*, 408 U.S. 471 (1972).

A. The Absence of Effective Notice of the Allegation Makes A Meaningful Hearing Impossible

As with other Due Process determinations, the requirement of adequate notice is "flexible," meaning "The [constitutional] adequacy of a particular form of notice requires balancing the interest of the State against the individual interest sought to be protected by the Fourteenth Amendment." *Jones v. Flowers*, 547 U.S. 220, 229 (2006) (internal quotation omitted). "The degree of required specificity ... increases with the significance of the interests at

stake." *Spinelli v. City of New York*, 579 F.3d 160, 172 (2d Cir. 2009). But the touchstone is information that allows a person at risk to "prepare meaningful objections or a meaningful defense." *Id*.

The constitutional failure here is basic and complete. The hearing notices that the TLC afforded taxi drivers provide even less than the "gesture" of notice that the Second Circuit condemned in *Spinelli*. 579 F.3d at 171-72. No state interest could possibly justify a regime that not only fails utterly to inform individuals whose livelihoods are at stake about the standards the government authorities will apply, or purport to apply, but which also consistently and affirmatively misinforms them.

Notice is a core requirement of procedural due process in and of itself and a prerequisite to a fair hearing. A taxi driver "cannot know *whether* a challenge to an agency's action is warranted, much less formulate an effective challenge, if they are not provided with sufficient information to understand the basis for that action. Thus, in the absence of effective notice, the other due process rights afforded …such as the right to a timely hearing—are rendered fundamentally hollow." *Kapps v. Wing*, 404 F.3d 105, 123-24 (2d Cir. 2005) (citation omitted).

B. The Hearing Notices Give no Hint that Seemingly Relevant Evidence Would, in Fact, Always be Ignored

As in *Rothenberg v. Daus*, a case involving the same defendants as here, the post-suspension hearing notices are "vague as to what, if any, provision of the regulations plaintiffs had violated." 481 F. App'x 667, 674 (2d Cir. 2012). The notices nowhere identify "the critical issue" they would need to address. *Turner*, 131 S. Ct. at 2519. Instead, after informing drivers of the time and location of the hearing and the right to present evidence and call witnesses, the notices state tersely that "the purpose of th[e] hearing will be to determine whether your TLC license should remain suspended pending the final disposition of your criminal case." Findings 9.

Critically, the notices do not hint at any of the distinctive features of the post-suspension process described in the Findings. A driver informed that his license had been suspended based on an arrest and notified that a hearing might establish that his license "should [not] remain suspended pending the final disposition of [his] criminal case," would naturally be expected to start with evidence showing that the arrest charges were, in fact, unfounded. But the TLC did not advise the drivers of its practice of never considering such evidence, no matter how compelling. Findings 13.

Nor are drivers advised of the other counterintuitive rules that characterize the TLC actual process. They are not informed that that evidence tending to show that the criminal charges would soon be favorably resolved will be disregarded. They are not advised to refrain from arguments (and evidence showing) that they are especially unlikely to pose a threat to passengers—because, for example, the arrest incident was aberrational or unrelated to taxi driving, or because of a stable and unblemished work history, or strong ties to work and family. Drivers are likewise not informed that arguments relating to the particular hardship that continued suspension would inflict would, in all cases, fall on deaf ears.

Indeed, drivers preparing for hearings were not told the TLC's extraordinary rule that essentially *no* evidence—apart from that which might establish mistaken identity or a faulty computer arrest report—would be considered. *See* Findings 8 ("whether the driver had been charged with a crime and whether the charges were still pending—were [the only] factual questions and were decided through the presentation of evidence"). Nor have drivers ever been apprised of the lone "argument" that (ostensibly) *could* be given effect, one based on the "nexus" between public safety and the elements of the penal code provision they were charged with violating.

As the Findings establish, what occurred after the notices were sent did not mitigate, but instead aggravated, this basic failure. "[I]nstead of focusing drivers on the standard, TLC ALJs encouraged drivers to argue anything they wanted—including that they were not a threat to public health or safety or that they were innocent—so that those arguments could be included in the record." Findings 10. (Of course, "the record" ALJs were supposedly making consisted exclusively of evidence that the Court found the chair or designee would never consider.)

Drivers seeking fuller guidance would not benefit by reading the TLC Rules. As the Court found, "The standard applied in the summary suspension review process was not made public until 2006 at the earliest." Thus, the rules in effect when named plaintiffs were suspended and when this suit was filed "did not indicate what standard would apply at the hearing or what issue the hearing would decide," let alone "state how [suspended drivers] might succeed" in gaining their license back. Findings 4.

Although the Findings describe later-promulgated versions of the rule as having "provid[ed] the standard that had been missing in the previous version," Findings 5, that is only partially accurate. Even concerning evidence of innocence, the language's oblique reference to the charges "*if true*" leaves the door seemingly open to evidence that the charges were *not* true. Moreover, even the later versions of the rule surely encouraged marshalling of evidence (no more effectual under the TLC's iron-clad practice) that the driver would, for reasons *unrelated* to guilt or innocence, pose no real threat. Any driver who might stumble into making a "nexus" argument would not be told that the TLC had developed a list of offenses that warranted suspension as, inexplicably, "neither [the list's] existence nor its contents were disclosed to drivers or members of the public." Findings 7-8. He would not be informed that the TLC had previously determined "nexus" based on "the statutory elements" of the same offense, in which

case, presumably, there was nothing to "argue." Tr. 772-73. Everything in the rules' language ("*the Licensee*", "demonstrate", "relevant evidence") and indeed the very concept of a "hearing" convey the impression of an individualized, factual determination, one entirely at odds with the process the Court found TLC affords.[9]

The shift to OATH hearings had no salutary effect with respect to fair notice. That agency made an effort to supply affected drivers with more accessible guidance about the post-suspension process. *E.g.*, DX L-1 - L-33. But these materials went even further toward encouraging arguments and evidence that could not possibly result in discontinuation of a TLC arrest suspension. For example, while "OATH ALJs [conclusively] presume that the driver committed the crime," Findings 11, OATH's *guidebook,* published on its website, urges drivers suspended on arrest to "tell their side of the story." PX H.

C. The Entire TLC Hearing Process is Infected by Indefensible Secrecy as well as Deception

In their most recent submission, defendants argued that plaintiffs' claim does not sound in procedural due process because the Supreme Court held in *Green v. McElroy*, 360 U.S. 474, 496 (1959), that procedural due process requires that "the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." Letter dated Sept. 5 (ECF # 333). There was no violation here, defendants argue, because the TLC does not "rely[] on evidence or information of which the Plaintiff is unaware or to which s/he has no access." Defendants' argument is legally specious. The practice held unconstitutional in *Green* represents

[9] The most version of Rule 8-16, which became effective during the trial, as the Findings records, gives a wholly misleading impression of the practice, suggesting that suspensions will be ordered based on on-duty misconduct or convictions. Findings 6. The rule, on the other hand, does mention "affirmative defenses set forth in subdivision b of § 19-512.1 of the Administrative Code" and says they "may be available." But, as the Findings state, these defenses "are not relevant to summary suspensions for arrests." Findings 4 n.2.

merely one way among many that a state agency might deny procedural due process. The due process violations in *Bell v. Burson*, 402 U.S. 535, *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994), *Santosky v. Kramer*, 455 U.S. 745 (1982), and *Krimstock* all had nothing to do with secret evidence. The plaintiff in *Turner v. Rogers* had "access" to information about his personal finances, but the problem was that the government never informed him of the "critical issue" in the hearing that led to his loss of liberty. 131 S.Ct. at 2519. As *Turner* illustrates, it is no less unfair, and no less a denial of the "opportunity to be heard," to apply a secret standard to known facts than it is to apply a known standard to secret facts.

The *factual* premise of defendants' latest argument is also seriously mistaken. As the Findings and evidence at trial establish, secrecy *is* a signature feature of the TLC's entire post-suspension process. The list of offenses was secret. The hearing standard was secret. The existence of the TLC ALJ Manual was secret. Tr. 307 (Coyne), 798 (Fraser). That both the TLC prosecutor and trial counsel in this case have a hand in writing decisions for the chair—that was secret, too. Hardekopf 95, 100-101; Tr. 363, 393, 420 (Daus); Tr. 526 (Joshi).

On the most benign understanding, the perpetual confusion about what, if anything, the hearing process is supposed to determine has led to a process that is profoundly dysfunctional, essentially the antithesis of Due Process of Law. Public and private resources are expended on a multi-stage routine that does not and cannot accomplish anything. Evidentiary "records" are developed to be "read" and ignored. This is a process whose agency participants—prosecutors, ALJs, supervisors, general counsels, and chairs —lack (or profess to lack) any shared understanding of the basic ground rules. The inevitable result is to waste time and money and to encourage false hope. No suspension is ever lifted. All of this betrays a callous disregard for

constitutionally protected property rights and for the ordeal endured by immigrant cabdrivers whose lives the TLC's actions deeply affect.

III. THE POST-SUSPENSION HEARING PROCESS DESCRIBED IN THE FINDINGS VIOLATES DRIVERS' PROCEDURAL DUE PROCESS RIGHTS

A. All Three *Mathews* Factors—the Taxi Drivers' Enormous Interest, the High Risk of Error and the Small Cost of Improved Process—Favor Plaintiffs

The Court of Appeals held that *Mathews v. Eldridge* establishes the test for both when a hearing is required (that is, pre- or post-deprivation) and for what process is due. The *Mathew*s factors include: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute requirement would entail. 644 F.3d at 154 n.3 (citing *Mathews*, 424 U.S. at 335). In every respect that *Mathews* deems relevant, the denials of Due Process here are more clear-cut and serious than those the Second Circuit ruled unconstitutional as a matter of law in recent cases.

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

It is no coincidence that the *Mathews* test begins with the private interest. As the Supreme Court has explained, the purpose of procedural due process is "to protect [an individual's] use and possession of property from arbitrary encroachment," reflecting "the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his." *Fuentes*, 407 U.S. at 81. The right to due process is "not only to ensure abstract fair play to the individual." It is "more particularly ... to protect … from arbitrary encroachment—to minimize

substantively unfair or mistaken deprivations." *James Daniel Good Real Prop*., 510 U.S. at 53 (quotation marks and citation omitted).

In this case, the Court of Appeals held, and trial testimony underscores, the "private interest at stake … is enormous." 644 F.3d at 159. A cabdriver's interest in his license is not merely "sufficient to trigger due process protection," it "is profound." *Padberg*, 203 F. Supp.2d at 277. More than an 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 a living and support their families. *See Goldberg*, 397 U.S. at 264; *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"). Indeed, what *Krimstock* recognized as an unusually compelling case of hardship, that some claimants depended on their vehicle to earn a living, is true for *every* suspension of a hack license. *See* 306 F.3d at 61; *Dixon v. Love*, 431 U.S. 105, 113 (1977) (noting significance of exceptions for commercial licensees).

Second Circuit precedent makes 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 personal property. Quoting Supreme Court authority, then-Judge Sotomayor highlighted the "contrast" between the interim seizures and the benefit terminations in cases like *Mathews*, in which "full retroactive relief" is available. Here, as in *Krimstock*, an "ultimate [TLC] decision that the claimant is entitled to return of the property … rendered months after the [suspension does] 'not cure the temporary deprivation that an earlier hearing might have prevented.'" 306 F.3d at 64 (quoting *James Daniel Good*, 510 U.S. at 56, and *Connecticut v. Doehr*, 501 U.S. 1,

15 (1991)). Indeed, *Brown* v. *DOJ*, the decision defendants have long claimed provides a template for their practice, 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).

As the trial evidence shows, the process the TLC provides is *far less* prompt than the Second Circuit presumed. The Court described the burden on the driver of postponing process as limited to "the income he could have earned between the [suspension] … and the date of the post-suspension hearing" (roughly a 10-day window), understanding "that even that loss can be deeply problematic for a taxi driver." 644 F.3d at 159. But ALJs have no power to reinstate on the day of the hearing or at any time after. Findings 2, 4, 9. Beyond the hearing, chair review is required in order to obtain reinstatement.

Khairul Amin, for instance, was suspended on June 14, 2005. DX F-03. His hearing was on June 22, with the ALJ recommending, as always, that the suspension should be continued. Chairman Daus, however, did not rule that the suspension should continue until July 21. DX F-09. Thus, he was suspended for 37 days before the hearing process even concluded (as it always concluded) that suspension should continue, which it did until August 24. After the hearings went to OATH, the period grew even longer. In the case of TLC v. Tarshem Singh, OATH No. 14-689, Joshi's ruling for Chairman Yassky was not issued until 99 days after the recommendation and more than 120 days after suspension. *See* Pl. Letter dated Feb. 2, 2014 (ECF # 318). Lost income aside, for drivers who own their own taxicabs or medallions, finance payment obligations continue even though the driver may not work. Tr. 122 (Desai).

As the trial testimony and evidence established, the TLC regime works to the particular disadvantage of drivers issued a desk appearance ticket (DAT) (by the same officer whose probable cause finding was the basis for suspension). Precisely because the criminal justice system views such individuals as particularly non-threatening, it takes longer to assign a prosecutor authorized to dismiss or reduce charges. This circumstance can extend the suspension period for drivers whom the police consider hardly dangerous at all, even at the moment of arrest. Tr. 117-118 (Desai); 200, 214-215 (Gottlieb); 506 (Joshi); *see also* PX 65 (Bhatti).

Finally, as testimony established, the practice burdens other constitutionally significant private interests. Amin—who had an essentially spotless work record, who had never been convicted of any crime, and who was never *accused* of any crime or wrongdoing in connection with cab-driving—to this day maintains his innocence on the charge of assaulting his landlord's son. But his need to support his family required him to accept an adjournment in contemplation of dismissal, which ended his suspension, rather than put his accuser to his proof. Tr. 170.

C. The Need for Further Protections Is Great because the Risk of Error is High

It is a premise of procedural due process doctrine that: "Some risk of erro[r] … exists in all cases." *Krimstock*, 306 F.3d at 50. Here, the Findings, along with trial evidence and "common sense," establish that the risks in TLC's system—that a driver will suffer a lengthy deprivation of property and loss of income even though his licensure during the pendency of criminal charges would *not* in fact pose any serious threat—are vast. Given the basic failures described above, it could hardly be otherwise: As Judge Dearie wrote, when process is "so perfunctory," the risk the Constitution is meant to protect against, of erroneous or substantively unfair property deprivation, "increases exponentially." *Padberg*, 203 F. Supp.2d at 280.

The sole basis for the deprivation (initial and continued), an officer's "probable cause" determination, itself carries a recognized, substantial risk that the person arrested did not in fact commit any crime. The very premise of the TLC's practice, that individuals arrested for certain crimes pose a danger if the charges are "true," necessarily recognizes that arrestees who are not in fact guilty do not pose that danger. This point holds whether or not there are valid justifications for not allowing drivers to obtain reinstatement by establishing innocence. Second Circuit cases recognize the error in depriving an individual of an important right based on a criminal allegation which proves to be unfounded. *Krimstock,* 306 F.3d at 69 (allowing motorists to challenge probable cause finding); *see also Clark v. Astrue*, 602 F.3d 140, 147 (2d Cir. 2010) (holding that the fact of a warrant based on probable cause to believe subject was violating a parole condition is not equivalent to a determination that he was in fact in violation). Indeed, the Supreme Court in *Connecticut v. Doehr* invalidated a regime that entailed a *judicial* "probable cause" determination, in part because "the risk of erroneous deprivation … [was too] substantial," noting that "[i]n a case like this involving an alleged assault, even a detailed affidavit would give only the [complainant's] version of the confrontation." 501 U.S. at 12, 14.

Likewise, as *Krimstock* recognized, it is implausible that all (or even many) cabdrivers who in fact had committed an offense pose any ongoing, substantial threat of re-offending. *Krimstock* specifically held that safety concerns supporting the seizing of cars of alleged drunk drivers would not justify continued deprivation because most who had engaged in that "dangerous" criminal activity "regain[] sobriety on the morrow." 306 F.3d at 66. "[P]robable cause for a seizure and the probable validity of a retention," the court explained, are not "coextensive." *Id*. at 49. What Chairman Daus described as the inferential "leap," Tr. 412, that the TLC makes from alleged past (off-duty) misconduct to ongoing "danger" to passengers, is

inestimably greater in this case. There was a far more substantial basis for believing that the *Krimstock* plaintiffs had actually engaged in criminal misconduct as compared to typical misdemeanor arrestees. *See* 306 F.3d at 62-63 (noting most arrests were made based on direct observation by officers trained in recognizing DWI). Those motorists, moreover, stood accused of using the very property at issue in "a dangerous and unlawful manner." *Id.*

The TLC, however, routinely continues deprivations where there is no accusation of either on-duty criminal activity or misuse of a TLC license. And it is especially unlikely that a taxi driver who is both (1) guilty as charged and (2) at some risk of re-offending would victimize a passenger during the pendency of criminal proceedings against him. Given the safeguards in place—passengers separated by partitions and provided with drivers' names and license numbers; law enforcement having drivers' addresses and fingerprints on file; GPS trackers in cabs—a driver already facing a criminal charge has added reason not to make trouble for a passenger, especially during that time. *Cf. Chambers v. United States*, 129 S. Ct. 687, 692 (2008) (noting that "an individual who [failed to report for incarceration] would seem [especially] unlikely … to call attention to his whereabouts by … engaging in additional violent and unlawful conduct").

It is, to be sure, "possible" that unlawful behavior will not "stop at the taxicab door," 665 F.Supp.2d at 625, and that a driver alleged to have stolen a bird from a pet store or gotten into a fight at a family barbecue will go on to commit an assault on-duty. (It is also *possible* that a licensed driver who has not been arrested *may* attack a passengers on any given day, or that the driver may *be* attacked, though driver-on-passenger attacks are practically unheard of. Tr. 109 (Desai), 738-39 (Fraser)). An accurate hearing process would focus on identifying which individuals in fact posed a real danger. But surely a large majority of the individuals whose

suspensions are continued through the TLC process would not pose any appreciable threat to passengers while charges against them are pending.

D. A Suspension that Does Not Lead to Revocation is Likely Erroneous

The evidence at trial and the Court's Findings confirm that there is no reason to believe a driver committing a second crime (on duty) while charges are pending is remotely likely, even assuming he committed the first. Of course, a large majority of arrested drivers are ultimately reinstated due to favorable resolution of the arrest charges. Findings 8. Defendants, however, have argued that the very high reinstatement rate is of no concern under *Mathews*, because a "suspension is not 'erroneous' simply because the charges against the driver are eventually dropped," and that the dismissal of a criminal case does not establish that TLC's legitimate interests were not "implicated" when it first acted. 665 F. Supp. 2d at 325.

But controlling precedent takes a starkly different view. The concern of procedural due process doctrine is not limited to preventing deprivations of property and liberty where no legitimate government interest is "implicated." There was, for example, no question that the City's "interest as licensor," *id.*, was "implicated" in suspending the plaintiff gun dealer's license in *Spinelli*, on account of "grossly inadequate" security, in the wake of the September 11 attack. 579 F.3d at 164. But Due Process requires a determination of the likelihood that the interest supporting ongoing deprivation is *in fact* present in the individual's case (and of whether different procedures would improve the accuracy of the government's determinations).

In *Valmonte*, the Second Circuit concluded that where "nearly 75% of those who seek expungement of their names from the list [of suspected child abusers] are ultimately successful … [that fact] indicates that the initial determination made by the local [agency] is at best imperfect." 18 F.3d at 1004. In *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 544 (1985),

the Supreme Court observed, "That the Commission saw fit to reinstate [the employee] suggests that an error might have been avoided had he been provided an opportunity to make his case to the Board." And the Court in *Brown v. DOJ* held that "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 662, 669 (D.C. Cir. 1983) (quoting the statute). *See also Furlong v. Shalala*, 238 F.3d 227, 237 (2d Cir. 2001) (relying on "high rate of reversal[s]" to establish "the second *Mathews v. Eldridge* factor").

To be sure, the rate of reinstatement does not establish that *every* suspension—or even every continuation—was wrongful or unfair. But reinstatement is fairly understood as representing the TLC's confidence that an individual's (continuing) licensure does not pose a substantial danger to the public even though he had been arrested. And it defies common sense to suppose that many such individuals' taxi-driving would have posed a *greater* threat to passengers *while charges were pending* than *after* they have been favorably resolved. Indeed the reality, trumpeted by *defendants*, that favorable resolutions (including acquittals, as well as adjournments, outright dismissals and charge reductions) are not declarations of innocence only proves the broader point: The TLC itself understands that many who are factually *guilty* of arrest charges nevertheless pose no real threat of attacking passengers while on the job. *Compare Gilbert v. Homar*, 924, 927 (1997) (suspension remained in effect after "criminal charges were dismissed … [while police department employer] continued with its own investigation"). On the other hand, some (probably most) drivers who are eventually *convicted* (and not reinstated) would not have posed any real threat in the interim period.

More important, as *Krimstock* and the Second Circuit's decision in this case make clear, that an initial seizure of property may be valid does not establish that a *continued* deprivation is beyond constitutional concern. *See Krimstock* at 306 F. 3d at 53 ("a warrantless arrest by itself does not constitute an adequate, neutral 'procedure' for testing the City's justification for continued and often lengthy detention of [an arrestee's vehicle]"). The holding of the Second Circuit here—that the initial, summary suspension was constitutionally permissible—did not establish or imply that continuation and protracted deprivation was therefore unproblematic or "correct." Rather, the Court held the summary suspensions tolerable precisely *because* the (limited) information immediately at hand gave rise to "concern" that the individual might pose a real, ongoing threat. That concern was sufficient to justify a brief *postponement* of a meaningful hearing, at which (or so defendants represented) the actual need for continued *pendente lite* deprivation could be properly determined. 644 F.3d at 159.

This same double-counting—assuming that a need for short-term emergency action establishes that continued deprivation is correct—is evident in defendants' description of the TLC process as a "simple hearing," reviewing presumptively correct government action "to make sure … you're not making a serious mistake." Findings 12 (quoting Daus). The flexibility in the law of procedural due process, which sometimes permits the state to relax or even dispense with ordinary pre-deprivation protections, comes with a hard and fast requirement that post-deprivation safeguards be both prompt and meaningful. *Mackey v. Montrym*, 443 U.S. 1, 12 (1979); *Barry v. Barchi*, 443 U.S. 55, 66 (1979); *see also Gilbert v. Homar*, 520 U.S. 924, 932 (1997) ("So long as a suspended employee receives a sufficiently prompt post-suspension hearing, the lost income is relatively insubstantial").

Unsurprisingly, the "value of additional … procedural safeguards," *Mathews*, 424 U.S. at 335, would be greater here than those held constitutionally required in *Krimstock*. The *Krimstock* court held that Due Process entitled plaintiffs to challenge the validity of seizures, though they were incident to DWI arrests by trained officers, often confirmed by breathalyzer analysis. 306 F.3d at 47, 49, 62. Another right *Krimstock* recognizes—the opportunity to obtain return of property unlikely to be subject to permanent deprivation—is of greater value here: The likelihood that a drunk driver's car will be subject to forfeiture is surely far higher than the small percentage of taxi drivers whose licenses are ultimately revoked 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").[10] For all these reasons, the constitutionally relevant risk here—that an individual will suffer a continued deprivation, even though allowing him to resume work would pose no real, substantial threat to public safety—are exceptionally high.

E. A Far More Meaningful Hearing Process Could be Provided at Minimal Cost

The Second Circuit stated that "a meaningful hearing can be devised at minimal cost to the City that does not constitute a mini-trial on the criminal charges…. [yet] provide[s] …

[10] *Krimstock* did not limit the procedural safeguards ordered to claimed "innocent owners." The Court held instead that the Constitution requires that *all* arrested motorists 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. *Krimstock v. Kelly*, 506 F. Supp. 2d 249, 252 (S.D.N.Y. 2007). Indeed, the persons affected by the TLC policy are in relevant respects analogous to the claimed "innocent" owners in *Krimstock*, in that the basis for forfeiture—permitting unlawful use of a car—was not conduct observed by a police officer. This is also true of the vast majority of cabdrivers suspended upon probable-cause determinations based, in turn, on civilian complaints.

drivers considerably more opportunity to be heard than the current system." 644 F.3d at 162. This is surely an understatement. As the Court makes clear, the accuracy of a determination that a substantial safety concern requires continued *pendente lite* deprivation could be drastically enhanced merely by ending the TLC's categorical refusal to consider readily available relevant evidence that tends "to make a fact [danger] …less probable." Fed. R. Evid. 401(a). As in *Bell*, "When the procedures … do not allow for the presentation of potentially exculpatory evidence, there is little doubt that due process rights are in jeopardy." 402 U.S. at 542.

Nor is at an answer that a "direct and substantial threat" is not precisely quantifiable or that determinations of dangerousness are not an exact science. Such imprecision is inherent in forward-looking assessments, which are ubiquitous in government decision-making. *Clark*, 602 F.3d at 147 ("The law often speaks of facts, but it usually operates on probabilities"). Nevertheless, government actors, including ALJs, are frequently called on to make similarly probabilistic "factual" determinations. Such determinations include ones relating to ongoing dangerousness in deciding whether to grant liberty (bail) to people who have been arrested or even convicted of a crime, *see United States v. Abuhamra*, 389 F.3d 309 (2d Cir. 2004), or, as in *Krimstock*, to release cars to those who drove them while intoxicated. *See Schall v. Martin*, 467 U.S. 253, 278 (1984) ("[T]here is nothing inherently unattainable about a prediction of future criminal conduct. Such a judgment forms an important element in many decisions").

Indeed, the categories of information that make such determination more reliable and accurate are well known. *See Salerno*, 487 U.S. at 742 , 751 (identifying "procedures … [for] evaluat[ing] the likelihood of future dangerousness … specifically designed to further the accuracy of that determination," including "the nature and seriousness of the charges, the substantiality of the Government's evidence against the arrestee, the arrestee's background and

characteristics"). Many appear on the Jury Verdict Form that this Court promulgated prior to trial. ECF # 286. The form queries, for example, whether a driver had any prior convictions or arrests, the facts and circumstances of the arrest, whether the driver was issued a DAT, and whether he was made to post bail. Though these and other factors are easily considered, the TLC ignores them all.

Defendants have never offered any coherent explanation or justification for their failure to provide more meaningful protection (when not falsely claiming they already do so). Often they have changed the subject to: (1) the benign motivations and safety rationale for the suspension policy, or (2) to claims that summary suspension hearings are poorly suited to adjudicate guilt or innocence. But, as governing precedent makes clear, "due process analysis" looks to the "reason … that justifies" *the challenged procedure*, not the interest served by the regulatory regime as a whole. *Kuck v. Danaher*, 600 F.3d 159, 164 (2d Cir. 2010); *see also James Daniel Good*, 510 U.S. at 56 ("The governmental interest we consider here is not some general interest in forfeiting property but… the specific interest in seizing real property before the forfeiture hearing").

Accordingly, procedural due process rights have been vindicated in cases where public safety interests are far more genuine and compelling than here. *E.g.*, *Boumediene v. Bush*, 553 U.S. 733 (2008) (applying *Mathews* analysis and concluding that process afforded accused terrorists had unacceptably high risk of error); *Bailey v. Pataki*, 708 F.3d 391 (2d. Cir. 2013) (vindicating convicted sex offenders' procedural due process right to adversarial hearing prior to involuntary civil commitment at the expiration of their criminal sentences); *cf. Salerno* (entertaining procedural due process challenge to pre-trial detention of an alleged Mafia boss charged in a 29-count federal indictment).

Critically important safeguards would cost far less here than in *Krimstock* or in *Spinelli*. In those cases, the Second Circuit imposed an entirely new form of proceeding. Here the TLC need only modify its existing hearings. Indeed, simply allowing consideration of relevant evidence already before the TLC would dramatically enhance the accuracy and fairness of its process. Defendants, having repeatedly represented to the Court of Appeals that various protections were "already" in place, could hardly claim that those are infeasible. *See infra.*

Defendants' extraordinary practice of conclusively presuming guilt, if anything, *heightens* the need for other protections. As explained above, drivers who are factually innocent of the arrest charges do not, by TLC's own logic, pose any elevated danger. If innocent drivers are to be denied the opportunity to introduce this uniquely powerful and relevant evidence on the ground that "mini-trials" are infeasible—then Due Process requires that they be afforded all other reasonable means to regain their livelihoods, such as through evidence that they would not endanger the public even assuming (counterfactually) the arrest charges were well-founded. *See Little v. Streater*, 452 U.S. 1, 2 (1981) (holding, in view of State's rule that "reputed father's testimony alone" could not overcome prima facie showing of paternity, that Due Process required that State pay for indigent's litigant's blood-type testing); *cf. United States v. Nixon*, 418 U.S. 683, 710 & n.18 (1974) (noting that rules excluding relevant testimony are inherently "in derogation of the search for truth").

Finally, defendants could not possibly justify under *Mathews* their practice of continuing suspensions of drivers who persuade (or would be able to persuade, if allowed) an ALJ that their reinstatement would pose no substantial threat. *See* Findings 11 (noting certain OATH ALJ decisions recommending reinstatement, based on a finding of non-dangerousness even after applying a conclusive resumption of guilt). In view of the weighty and urgent personal interests

at stake, it is truly extraordinary that the agency privileges an inference of ongoing danger resting solely on a finding of probable cause to *arrest* (including for an off-duty misdemeanor, with a DAT issued) over an ALJ's determination, after an adversary hearing, that allowing the driver to return to work would pose no substantial threat. As the Supreme Court held in *Barry v. Barchi*, "[o]nce suspension has been imposed, the [licensee's] interest in a speedy resolution of the controversy becomes paramount." 443 U.S. at 66.

Thus each of the *Mathews* factors, as understood and applied by the Supreme Court and the Second Circuit, highlights distinct strands of the Due Process violation suffered by the taxi driver plaintiffs in this case.

IV. THE COURT OF APPEALS MANDATE AND SETTLED PRECEDENT PRECLUDE DEFENDANTS FROM ARGUING THAT PLAINTIFFS' CENTRAL PROCEDURAL DUE PROCESS CLAIM WAS FORFEITED

Late in the proceedings, after the trial at which plaintiffs established the predicate for their central constitutional claim, the Court suggested that it would *not* decide whether the scope of the hearing process described in the Findings was constitutionally adequate. The Court indicated that this claim might no longer be "live" on the ground it sounds in "substantive" due process and therefore fell within plaintiffs' "express disavowal" of such claims in the Court of Appeals. Order of Sept. 16, 2014 (ECF # 336). Accordingly, the Court ruled, it would *only* allow arguments that drivers are denied a fair opportunity to be heard *under* the "arrest plus arguable nexus" hearing standard that TLC (after years of contrary representations, including at trial) was found to follow.

There is no basis for refusing to adjudicate plaintiffs' challenge to the adequacy of the hearing process. The first, and entirely sufficient, answer to the "substantive due process" and "express disavowal" arguments is that they have arisen far too late to be considered by this

Court. Prior to their September 5, 2014 letter, defendants had at no point in the *eight years* that this case has been pending disputed that plaintiffs' challenge to the adequacy of the post-suspension hearing process sounds in procedural due process. Nor had they argued or even suggested, in the *more than three years* the case has been pending on remand (which has included a round of summary judgment briefing, multiple pre-trial motions, and a trial), that plaintiffs' claim was, by operation of the footnote in the 2011 Second Circuit opinion, somehow extinguished. This understanding was shared by this Court, both before and after remand. Settled precedent establishes the correctness of that shared understanding.

A. The Second Circuit's Decision and Mandate Do Not Authorize—and Indeed Plainly Forbid—Extinguishing Plaintiffs' Procedural Due Process Claims

The recent suggestion, now adopted by defendants, is foreclosed by the Court of Appeals mandate. The Second Circuit's decision and what the September 16 Order terms "the reasons for the remand and subsequent trial," together establish with exceptional clarity that the claim this Court indicated somehow *should not* be considered is the very same claim that the Second Circuit mandated *must* be adjudicated.

Far from extinguishing plaintiffs' central procedural due process claims, the Second Circuit's decision revived them. The principal relief the appellate court granted was to *vacate* this Court's grant of "summary judgment *on the plaintiffs' claim that the post-suspension hearing is inadequate*," 644 F.3d at 160 (emphasis added). The Second Circuit's grounds for doing so are set out in a lengthy section of its opinion under a heading "*III. Procedural due process*." *Id.* at 158-163. Given its headline, that section, unsurprisingly, analyzed plaintiffs' claim in light of leading Supreme Court and Second Circuit procedural due process precedents (and that took significant issue with the District Court's understanding of those principles' application here). *See*, *e.g.*, *id.* at 162-63 & n.8.

Nor was there any misunderstanding by the Second Circuit as to what the reinstated claim entails. Plaintiffs' appellate briefs argued at length that a hearing process in which a driver's suspension is continued without consideration of evidence tending to show that he is not a threat is constitutionally deficient. These briefs referenced the same categories of evidence (*e.g.*, that the alleged crime was off-duty, individual maturity, ties to work and family, lack of criminal record, clean driving record) that appeared in this Court's Order and Jury Verdict Form (ECF # 286).

Page after page of the Second Circuit's decision refutes any suggestion that challenges to the adequacy of "the TLC's standard" and plaintiffs' claim that the hearing process wrongfully disregards a driver's relevant evidence is somehow beyond the "procedural due process" pale. The Second Circuit opinion identified a "hearing" that went "beyond mere confirmation of identity and charge" to be the among the "*procedural protections*" that might be constitutionally required after "[b]alancing the *Mathews* factors." 644 F.3d at 162. It suggested that this Court's 2009 decision had taken too blinkered a view of what "additional process" should be considered in the *Mathews* analysis. It questioned this Court's "[apparent assumption] that the only alternative to a hearing on identity and charge would be a hearing at which the TLC would be required to prove that each driver engaged in the charged conduct." *Id.* at 163. The Court then explained, citing leading cases that had established and applied the *Mathews* test, that it was "entirely possible" that a different, "meaningful *hearing can be devised* at minimal cost to the City that does not constitute a mini-trial on the criminal charges." *Id.* (quoting and applying *Krimstock,* emphasis added).

In view of this recitation, it would be startling if the cited footnote made any suggestion that the claim the Court was remanding had been "expressly disavow[ed]." It does not. Rather, as

the text surrounding those words makes clear, the footnote clarified plaintiffs' position concerning that three entirely different "claims for relief in [plaintiffs'] complaint," each alleging violations of state law that this Court's 2009 opinion had "construed" as "substantive due process." The Second Circuit noted that these claims (Counts 3, 4 & 5) were in fact being advanced "under state law directly." 644 F.3d at 153 n.2.[11] In view of this clarification, the Second Circuit said it would "not discuss the district court's substantive due process analysis and … not review any of the plaintiffs' claims *in terms of substantive due process*." *Id.* (emphasis added). The state law claims, thus clarified, were reinstated as well. *Id.* at 163.

Indeed, this Court's 2009 opinion, as the Second Circuit discussed, was *also* referring to those three state law claims in Counts 3, 4 & 5. As the Second Circuit footnote states, this Court did characterize the three claims as alleging a "substantive due process" violation. But plaintiffs' challenge to initial suspension and the adequacy of the post-deprivation hearing process (Counts 1 & 2) *were not* among them. The 2009 opinion describes plaintiffs' "second claim for relief, 'Sham Hearings,' … claim[ing] that the post-deprivation hearings are inadequate[,] … as seeking to *vindicate Plaintiffs' procedural due process rights*." 665 F. Supp. 2d at 322 (quoting complaint, emphasis added). Under the heading "**1. Procedural Due Process Claims,**" the 2009

[11] The relevant language from plaintiffs' brief (appearing in a Section entitled "State Law…," which followed briefing about procedural due process post-suspension) read: "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.

The only mention of "substantive due process" in defendants' appellate brief was in a footnote reciting that "[this] Court also held that plaintiffs had failed to show a substantive due process violation, noting, *inter alia*, that plaintiffs appeared to be incorrect in their interpretation of NY law as to their claims that the full TLC must rule on every suspension and that the TLC chair could not delegate his Rule 8-16 authority to a TLC attorney." Appellee Br. n.10.

opinion analyzed the claim that defendants' post-deprivation process was deficient *"because its scope extends no further than determining whether the plaintiff was actually arrested." Id*. at 322 & 326 (emphasis added).

The state law claims aside, the Court of Appeals decision leaves no doubt that plaintiffs' reinstated procedural due process claims focused on "the TLC's standard." Indeed, the entire point of the remand proceedings ordered by the Court of Appeals was to determine the contours of the TLC's post-suspension review. Its opinion treated "due process *protections*" as synonymous with: (a) the "showing" that "*a driver may attempt to make* [to regain his license];" (b) the *"standard"* TLC would "actually … apply," and (c) what evidence an individual driver is "entitled to [introduce]," in order to "*prevail* at a suspension hearing after an arrest." (emphasis added). To take one specific example, the Court of Appeals observed that:

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

The Court of Appeals made clear that these matters were "material" to the constitutional issues. *See* Fed. R. Civ. P. 56. And it left no doubt about their constitutional significance. Consistent with bedrock norms of due process, in directing the Court to determine whether defendants had a practice "*de facto* or *de jure* … [of not] considering anything other than the identity of the driver and the offense," the Court of Appeals made clear that plaintiffs would be *more likely* to establish a due process violation if the drivers were afforded *less* opportunity to be heard. If the facts disproved what the appeals court described as the "*premise*" of the TLC's defense—the "contention" that their process affords a driver "a real opportunity" to discontinue his suspension "arrest notwithstanding"— then plaintiffs should prevail. The Second Circuit did

not leave open any argument that if the TLC process was found to consider *less* its defense would actually *gain strength.*

This understanding of the appellate mandate prevailed *in this Court* throughout the remand proceedings and up to the trial. When the Court denied plaintiffs' post-remand motion for summary judgment on their procedural due process claims, it did so on the ground that evidence could be read to support "*defendants[']* *conten[tion]* that a licensee may present, and an ALJ will consider, evidence that even if the charges are true, suspension is unwarranted because the licensee does not pose a sufficient public danger." 2013 WL 4494452 (S.D.N.Y. Aug. 22, 2013) (emphasis added). This opinion also described plaintiffs' claim as sounding in "procedural due process."

When the Court promulgated a Jury Verdict Form (ECF #286) that provided for specific determinations whether TLC's post-suspension hearing process "meaningfully considered" evidence that a driver had a clean driving or criminal record or whether he had been released without bail, it did not suggest the defense would be *strengthened* if these questions were answered in the negative. On the contrary, just days before trial, the Court wrote that "Defendants must be warned, however, if they cannot even suggest any factors that an ALJ or the TLC Chair can consider beyond the fact of arrest, then a directed verdict in this trial would appear inevitable." This warning, of course, prompted defendants to once again make representations, and to proffer sworn trial testimony, later found to be not credible, that their process was individualized and holistic.

B. The 'Substantive Due Process' Objection Is Also Defeated by Established Precedent

As detailed, the Court of Appeals, this Court and all parties understood that plaintiffs' claim addressed to whether the hearing process affords taxi drivers a "real opportunity" sounded

in procedural due process. This shared understanding is because plaintiffs' claim *is* based on procedural, not substantive, due process. In *Salerno*, the Supreme Court gave a succinct description of the distinction between the two doctrines:

> So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.' When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as 'procedural' due process. 481 U.S. at 746 (internal citations omitted).

Plaintiffs' claim is not that the TLC is altogether without power to suspend arrested cabdrivers in certain circumstances. *See Zinermon v. Burch*, 494 U.S. 113, 125 (1990) ("[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them.") (internal quotation omitted). It focuses instead on the hearings and on the sufficiency, in light of the interests involved, of the process used in effecting and continuing suspensions.

The Supreme Court's and the Second Circuit's decisions offer no support for the notion that challenges to the adequacy of a "standard" sound in "substantive" due process. Nor do they suggest that procedural due process rights are limited to the opportunity to present whatever evidence the state has been willing to consider *de facto*. On the contrary, procedural due process decisions have repeatedly invalidated standards, whether codified in state law or carried out in practice, as insufficiently protective of property and liberty interests—and have indeed promulgated new standards and even new proceedings.

Bell v. Burson, for example, held constitutionally inadequate the hearings Georgia afforded uninsured motorists involved in accidents (and threatened with a driver's license suspension), on the ground that their failure to consider the *likelihood* of liability, and consideration of only the *magnitude* of liability claimed, denied drivers a meaningful opportunity

to be heard. 402 U.S. at 540-41. The Court nowhere suggested that plaintiffs' challenge to Georgia's "standard" was impermissibly "substantive." It did not say that procedural due process rights were limited to a fair opportunity to be heard on the amount-of-liability issue that the State, as a matter of practice, made determinative. In *Valmonte v. Bane*, 18 F.3d at 1002, the Second Circuit struck down a New York statute that required inclusion on a central state registry of any individual accused of child abuse where an investigation found there was "some credible evidence" supporting the complaint against them. It ruled that a different and more demanding standard of proof was necessary to reduce the risk of erroneous deprivation. The Court did not suggest that defendants' constitutional duties could be discharged by presuming that a preponderance standard was satisfied wherever "some evidence" was present.

In *Krimstock*, courts of the Second Circuit ordered hearings that state law had not provided for and promulgated standards for those hearings, all as a matter of procedural due process. These courts decided what arguments claimants could make, what evidence would be considered, and what standard of proof would govern. *Krimstock*, 306 F. 3d at 68-70; *Krimstock*, 506 F. Supp. 2d at 252. In *Morrissey v. Brewer*, the Supreme Court established, in response to a procedural due process claim, a comprehensive set of "minimum requirements" applicable to parole revocation proceedings nationwide, including a two-stage hearing process at which "[t]he parolee must have an opportunity to be heard and to show … that [1] he did not violate the [parole] conditions, [and 2] if he did, that circumstances in mitigation suggest that the violation does not warrant revocation." 408 U.S. at 488.

The decisions defendants and the Court have cited as "clearly establish[ing]" (Sept. 16 Order) that challenges to the adequacy of a procedural practice sound exclusively in "substantive" due process announce no such rule. Indeed, the claims in those cases, unlike in the

decisions just cited, failed largely because due process norms attach only to government action that deprives a person of a constitutionally protected property or liberty interest. In *Reno v. Flores*, the Court rejected a Due Process challenge by juveniles detained by immigration authorities on suspicion of being deportable and who had "no available parent, close relative, or legal guardian, and for whom the [federal] government [was] responsible." 507 U.S. 292, 302 (1993). Having determined that substantive protection for "liberty" did not include the plaintiffs' claimed "right to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution," the Court denied their claim to an individualized determination that "detention in INS custody would better serve [their] interests than release to some other 'responsible adult.'" *Id*. The Court described their claim as a "substantive due process" argument recast in "procedural due process" terms and held it failed "for the same reasons." *Id.* at 308. Here, by contrast, as the Second Circuit recognized, it "is undisputed: 'a taxi driver has a protected property interest in his license.'" Thus plaintiffs are entitled to have a court decide, as a matter of federal law, "what process is due." 644 F.3d at (quoting 665 F. Supp.2d at 323).

Nor may *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003), plausibly be read as announcing the sweeping revision of procedural due process law. In *Doe,* the convicted sex-offender plaintiffs sought a hearing to determine their dangerousness before being included on a state registry listing convicted state sex offenders. The Supreme Court's brief opinion identified numerous infirmities in that claim, none of which is even arguably present here. Echoing earlier precedent rejecting a "property" right in reputation, *Doe* noted serious doubts first as to the *existence* of a constitutionally protected liberty or property interest and then as to whether any cognizable "deprivation" had been alleged. The registry, the Court emphasized, expressly

advised the public that it was reporting only the *fact* of a past conviction and was not making any representation of ongoing danger. 538 U.S. at 8. Only then did the Court reject the claim to a court-imposed regime of individual hearings, observing, in language defendants seize upon, that "litigants" who "assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing *are relevant under the statutory scheme*." *Id.* (emphasis added).

Plaintiffs here do not "*assert* a right to a hearing." TLC already provides them with a hearing—however ineffectual and pointless. But most important, whether the driver presents a threat to the public is undeniably "*relevant under the statutory scheme.*" Indeed, the purported threat to public health or safety is the whole point of the exercise.

To the extent any statute speaks to the property deprivations at issue in this case, it highlights the *centrality* of individual danger. N.Y.C. Code § 19–512.1(a), the Code provision defendants and the Court have consistently (if problematically) pointed to as "authority," Findings 2, allows for summary suspensions where continued licensure would pose a "direct and substantial threat to the public health and safety." And the TLC rules provide for a post-suspension hearing at which "the issue" determining reinstatement is whether continuation of "the License" during the pendency of charges would pose a direct and substantial threat. At this hearing, sworn testimony and evidence "relevant" to that determination must be considered. *See* Findings 3-6 (quoting versions of Rule 8-16). This scheme is thus far removed from (rare) settings in which fact of arrest or indictment is *itself* the focus of concern—such as *FDIC v. Mallen*, 486 U.S. 220 (1986), where public knowledge of a bank official's indictment for financial dishonesty could in itself threaten the bank's solvency, or *Gilbert v. Homar*, where the fact that felony charges were pending against a police officer could itself impair performance of

his duties. In *Mallen*, the governing statute authorized suspension upon a felony "information, indictment, or complaint … involving dishonesty or breach of trust." 420 U.S. at 233. Here, by contrast, if not for that threat and the impending revocation, there would be no reason for the suspension at all. A claim that the hearing must require or at least allow inquiry into the alleged threat is no more substantive (and is far less intrusive) than the claims sustained in *Bell, Morrissey, Krimstock* and countless other cases.

Defendants have never argued that individual dangerousness is "irrelevant" under their "scheme"—or that arrestees, whether "currently dangerous or not," must be deprived of their livelihood for months. *Compare Doe*, 538 U.S. at 7 ("Connecticut has decided that the registry information of *all* sex offenders — currently dangerous or not — must be publicly disclosed"). The scenario of passenger peril defendants proffered to explain their policy did not involve a merely *arrested* or likely-to-be convicted cabdriver, but rather a potentially *dangerous* one. *See* 665 F.Supp.2d at 325. The TLC likewise defends its refusal to distinguish between off-duty and on-duty arrests with reference to "the risk that a driver's [alleged] unlawful behavior might not stop at the taxicab door." *Id*. And in the Second Circuit they *successfully* defended their refusal to afford pre-suspension process based on the practical difficulty of determining "in the immediate aftermath" of an arrest which individuals' licensure would genuinely pose an ongoing danger. 644 F.3d. at 159.

And of course, defendants obtained from the Court of Appeals an opportunity to supplement an evidentiary record that the Second Circuit said contained "scant" support for their central contention, by representing, repeatedly and unambiguously, that an individual arrested for a listed offense had a "real opportunity" to obtain reinstatement through evidence showing that "I don't pose a risk," even if the elements of the offense charge made it a "serious" one. *Id.* at 161.

These representations, and similar ones made to this Court, were the "premise[]," 644 F.3d at 161, not only of *their defense* to plaintiffs' procedural due process claim, but of the *Second Circuit's disposition of the case.* Any contrary argument at this stage would be barred by the mandate and, independently, by principles of judicial estoppel.

C. Labeling TLC's "De Facto" Practice An "Interpretation" Does Not Reduce the Required Judicial Scrutiny or Undermine Plaintiffs' Constitutional Rights

Nor may plaintiffs' due process claim be extinguished by labeling the TLC practice an "interpretation," subject to challenge only as a departure from state law (and then, the Court suggested, under highly "deferen[tial]" review). Sept. 11 Order at 3. The Court of Appeals mandate makes clear that whether defendants in fact bind themselves to the standard they represented was "in place" was central to the federal *constitutional* question remanded. It was assuredly not one of the "state law claims" this Court could postpone resolving until *after* adjudicating the federal due process claims. 644 F.3d at 163.

The reasons why this factual question is constitutionally *crucial* are also evident from the Second Circuit's opinion and the precedents it applied: Were the facts to establish (as they now have) that the TLC hearing process is wholly perfunctory, a violation under *Mathews* would follow directly because defendants could scarcely claim that the more fair and accurate process that they had contended they *already afforded* would be an infeasible "alternative" to "the current system." That a failure to live up to the binding standard would *also* be a violation of state law is common to many procedural due process cases. But it does not mean that plaintiffs may not sue and obtain relief for violation of their federal constitutional rights. *See, e.g.*, *Spinelli*, 579 F.3d at 171; *cf. Patsy v. Board of Regents*, 457 U.S. 496, 500 (1982).[12]

[12] It is also true that many practices or regulations violate state law, but not federal law, or *vice versa.* The failure to hold a *Krimstock* hearing presumably was perfectly permissible under

In any event, "interpretations"—even if validly promulgated—have no special status and enjoy no special immunity under the law of Due Process. Whether the state acts by statute, by regulation or by "interpretation," it is axiomatic that the "minimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Vitek v. Jones*, 445 U.S. 480, 491 (1980). This view that the state has free reign to define procedures "misconceives the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee." *Id*. at 491 n.6. *See also Loudermill*, 470 U.S. at 541; *Valmonte*, 18 F.3d at 1003. Moreover, procedural due process law looks to "substance, not to bare form," *Bell*, 402 U.S. at 541, lest government actors evade its requirements through resort to state-law labels. As in *Loudermill,* the Constitution's safeguards would "would be reduced to a mere tautology," 470 U.S. at 541, if those depriving persons of property or liberty could nullify them by the expedient of "interpretation," such as by "construing" a "clear and convincing" evidence standard to "mean" a preponderance or by creating an irrebuttable presumption that serves in lieu of evidence. *See Clark*, 602 F.3d at 147 (agency may not treat lower "probable cause" determination supporting issuance of a warrant as establishing a fact by a preponderance of evidence).

The post-Findings orders turn the trial almost on its head. Calling a practice an "interpretation," this Court now suggests that the Due Process cannot require a state agency to do more than what it actually does. In effect, it converts the limited *de facto* practice into a *de jure* standard. By this logic, less truly is more: The less the TLC does the less it is required to do. But

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New York law. Likewise, the fact that a decision is made by a chair designee might violate New York law only. Other violations of state law might not be constitutional violations by themselves, but have constitutional significance.

that is not how the Due Process Clause works. To paraphrase *Vitek*, a procedural due process right is conferred, not by a TLC chair's predilections, but by constitutional guarantee.

E. A *De Facto* Practice Is Not An 'Interpretation' Entitled To 'Deference'

Moreover, courts deciding federal constitutional claims do not defer to state agency "interpretations," even to agency interpretations whose *bona fides* are far less dodgy than here. On the contrary, federal courts reject administrative regulations that violate the Constitution or even raise serious constitutional questions that might be avoided through a different interpretation. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 576 (1988); *Anderson v. Recore*, 446 F.3d 324, 330 (2d Cir. 2006) (finding procedural due process violation based on *the court's* own close reading of the law and rejecting government's proffered interpretation of prison regulation).

In any event, the practice described in the Court's findings is no "interpretation." It is rather a truth exposed after all defendants' diversions, evasions, and misrepresentations (to the Court of Appeals and to this Court) have been stripped away. *See* 644 F.3d at 160-161 (Court of Appeals recognition of potential gap between the TLC's "*de jure*" rules and "*de facto*" practice and between the claimed "real opportunity" and "an oft-quoted nullity"). To use a phrase with resonance in this case, defendants have never put any supposed interpretation "in writing." Nor have defendants explained what public law they would be "interpreting" and how. They have formally re-codified Rule 8-16 multiple times since this lawsuit was filed, without ever changing its language to convey the central features of the "interpretation," that is, the complete disregard of individual evidence; conclusive presumptions of guilt and danger triggered by an arrest for a listed offense; and an exquisitely narrow or non-existent "nexus" check on the suspension power.

As the Court of Appeals wrote in *Gen. Signal Corp. v. C.I.R.*, "An agency interpretation of a statute is not entitled to deference when the agency's position is a *post hoc* rationalization advanced in litigation to defend its action against attack. 142 F.3d 546, 548 (2d Cir. 1998) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate") (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988).[13] It would be extraordinary to grant "deference" to an "interpretation" (actually an unwritten rule based on an unpublished list) that the agency's former general counsel and its now-chair disavowed under oath at the recent trial, and which its litigators disavowed in the Court of Appeals. Findings 13-14.[14] If there were any special due process solicitude for "interpretations" (there is not), it would not be available to defendants here.

[13] Likewise, under New York law, unwritten policies that are enacted without public notice and comment are void and entitled to no deference at all. *E.g.*, *Matter of Cordero v. Corbisiero*, 80 N.Y.2d 771 (N.Y. 1992); *Matter of Miah v. TLC*, 306 A.D.2d 203 (1st Dep't 2003) (TLC policy on the accumulation of "points" toward license suspension or revocation void). In *Matter of Cordero*, for example, the New York Court of Appeals voided the state horse-racing agency's so-called "Saratoga policy," governing where a jockey's license suspension could be served, on the ground that it had "the attributes of a 'rule'" and therefore could not be enforced absent notice and comment.

[14] Defendants have never argued that their "interpretation" of Rule 8-16 is entitled to deference. They argued in the Second Circuit that the TLC hearing process complies with the "regulatory standard" as written. 644 F.3d at 161. The district court case the September 11 Order cites on deference, *Bldg. Trades Employers' Educ. Ass'n v. McGowan*, No. 98-cv-4998 (MBM), 2000 WL 1471557 (S.D.N.Y. 2000), is one where the agency interpreted whether it had affirmative duty to register an apprenticeship program, a complex question of federal and state law, and has no application here.

V. GIVEN ITS POSITION IN THE SECOND CIRCUIT, THE CITY IS BARRED FROM PURSUING ANY ARGUMENTS REGARDING SUBSTANTIVE DUE PROCESS OR THE CONSTITUTIONAL SUFFICIENCY OF AN ARREST-PLUS-NEXUS HEARING

A. Defendants Assured the Court of Appeals that the TLC Post-Deprivation Hearings Assessed whether there was a Threat to Public Safety, not the Existence of a 'Nexus'

As the Second Circuit's detailed statement of defendants' position makes clear, in arguing the appeal, defendants never maintained that the TLC pursued a "nexus" standard. They never defended that standard, insisting instead that they permitted at least a denial of the presumed threat to public safety. Indeed, the term "nexus" does not appear in the Court of Appeals decision. Nor does the Court of Appeals discuss "nexus" in concept. Instead, it noted the City's position that the post-suspension hearings did more that confirm the driver's identity and that a charge was pending. It allowed a remand specifically to determine if there was factual support for the City's claim.

B. Defendants Are Judicially Estopped from Contending that a Arrest-Plus-Nexus Hearing is Constitutionally Adequate and Have Waived that Claim

Having taken its position, and having, based on their assurances, secured a remand and the opportunity to supplement the summary judgment record, defendants may not now argue that an arrest-plus-philosophical-nexus hearing (as opposed to an arrest-plus-threat hearing) is constitutionally adequate. Policies designed to protect the integrity of courts and prevent parties from "playing fast and loose with the courts," *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (citations omitted), preclude defendants from reviving their prior position. Judicial estoppel will generally apply if (1) a "party's later position is clearly inconsistent with its earlier position," (2) the former position was "adopted in some way by the court in the earlier proceeding," and (3) "party asserting the two positions would derive an unfair advantage against

the party seeking estoppel." *DeRosa v. Nat'l Envelope Corp.,* 595 F.3d 99, 103 (2d Cir. 2010). "Judicial estoppel is designed to prevent a party who plays fast and loose … from gaining unfair advantage through the deliberate adoption of inconsistent positions in successive suits." *Wight v. BankAmerica Corp.,* 219 F.3d 79, 89 (2d Cir. 2000). Defendants claimed that there was an arrest-plus-threat standard and secured a remand based on that position. They must, therefore, be required to defend that position.

C. Any New Argument Centered on Nexus Would be Barred by the Court of Appeals' Mandate

In addition to being estopped, defendants have waived any claim that an arrest-plus-nexus hearing is constitutionally sufficient. As the Second Circuit has emphasized, "Where a case has been decided by an appellate court and remanded, the court to which it is remanded must proceed in accordance with the mandate and such law of the case as was established by the appellate court." *Kerman v. City of New York*, 374 F.3d 93, 109-110 (2d Cir. 2004) (citing and quoting *United States v. Fernandez*, 506 F.2d 1200, 1202 (2d Cir. 1974) (internal quotations omitted). The mandate rule, a particular aspect of the Law of the Case doctrine, "'compels compliance on remand with the dictates of the superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court.'" *U.S. v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (quoting *United States v. Bell*, 5 F.3d 64, 66 (4th Cir.1993)); *see also United States v. Quintieri*, 306 F.3d 1217, 1229 (2d Cir. 2002). Critical here, where an issue was ripe for review at the time of an initial appeal but was nonetheless foregone, "The mandate rule generally prohibits the district court from reopening the issue on remand unless the mandate can reasonably be understood as permitting it to do so." *Id*. (citing *United States v. Stanley*, 54 F.3d 103, 107 (2d Cir. 1995) and other cases).

Just as it is axiomatic that new arguments made for the first time will not normally be considered on appeal (e.g., *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008) (*per curiam*)) a party may not offer new arguments on remand following an appeal. As Judge Friendly wrote in *Fogel v. Chestnutt*, "It would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost." 668 F.2d 100, 108-09 (2d Cir. 1981), *cert. denied*, 459 U.S. 828 (1982); *see also Omni Outdoor Adver., Inc. v. Columbia Outdoor Adver., Inc.*, 974 F.2d 502, 505 (4th Cir.1992) ("The most rudimentary procedural efficiency demands that litigants present all available arguments to an appellate court on the first appeal."). Thus, in this case, the City may not argue that an identity-plus-arrest hearing or an arrest-plus-nexus hearing is sufficient to satisfy due process. This argument, though approved by the District Court, was expressly waived.

D. Defendants Have Also Forfeited Any 'Substantive Due Process' Argument

By the same token, defendants have forfeited the argument that plaintiffs' claims in this action sound in "substantive due process." Even if defendants believe such a position has merit, as noted, they did not argue it in the Second Circuit. Despite the fact the "district court construed some of the plaintiffs' claims pertaining to state law as substantive due process claims," 644 F.3d at 154 n.2, defendants did not pursue even this limited argument in the Court of Appeals. Indeed, defendants' appeal brief contained just one brief statement on substantive due process and that was in a footnote that merely noted that the district court had held that "plaintiffs had failed to show a substantive due process violation." It did not contend that plaintiffs' central claim (that the TLC's hearings failed to require proof of or permit effective denial that the driver's

continued licensure posed a threat to public safety) was a substantive due process claim. Thus, based on the rule of *Fogel v. Chestnutt,* defendants may not advance that argument now.

VI. THERE IS NO EVIDENCE THAT THE TLC ACTUALLY CONSIDERED NEXUS AS A SEPARATE ASPECT OF ITS SUSPENSION STANDARD

Even if there had been a validly promulgated "interpretation," there is actually no evidence that the TLC actually complied with it or considered nexus as a separate standard. The Findings state that TLC ALJs "determined … whether there was a 'nexus' between the charged crime and public health or safety." Findings 9 (citing testimony by ALJ Coyne and TLC prosecutors Green and Hardekopf). The Findings reach the same conclusion about the TLC chairs. Findings 12.

But, contrary to the Findings, there was no proof at trial that the TLC ALJs or the chairs considered nexus. In fact, defendants made no attempt to make that point at trial. Indeed, as the Findings note, defendants did not call any ALJs to the stand. And their proposed findings of fact do not assert that the ALJs considered nexus. ECF # 313.

First, Coyne never testified that he determined that there was a nexus. He merely acknowledged that the TLC prosecutor made rote arguments about nexus, testifying that "Marc [Hardekopf] did say that." Tr. 258, 310, 313. Green did not discuss nexus at all.

As for the TLC chairs, to the extent they considered nexus a factor at all, Daus made it clear that it was established not by any factual showing, but by argument (and one that would be foreclosed at a hearing). He testified: "The evidence is the charges, the crime itself and the fact that it's being charged. The elements of that crime and the nexus is established by argument, the nature of the crime versus the act of driving the cab, hypothetically." Tr. 413. Asked whether there was "a factual basis" for a nexus finding, Daus admitted, "Well, I believe the factual basis is really the charges." Tr. 412. Thus Daus admits that the nexus and the charges are the same

thing, not separate inquiries. Joshi agreed that "for every crime that's on this [TLC] list, there's some nexus between the arrest charges and the driver's ability to safely transport members of the public." Tr. 556. No fact established at the hearing could alter this conclusion that all list crimes have a "nexus" with public safety. Thus, there is no evidence that the chairs or designees actually considered "nexus" separate from the fact of arrest. The two factors are one and the same.

VII. BECAUSE THE TLC FAILED TO PROVIDE A FAIR OR MEANINGFUL POST-DEPRIVATION HEARING, THE DENIAL OF ANY PRE-DEPRIVATION HEARING IS UNCONSTITUTIONAL

The Second Circuit did not overturn this Court's conclusion that the TLC's failure to afford drivers any pre-suspension hearing was permissible, principally because "the risk of erroneous deprivation [would be] mitigated by the availability of a prompt post-deprivation hearing." 644 F.3d at 159. It did so despite its more recent conclusion that "'[W]here the State feasibly can provide a predeprivation hearing,' however, 'it generally must do so regardless of the adequacy of a postdeprivation ... remedy.'" *Bailey*, 708 F.3d at 401 (quoting *Zinermon v. Burch*, 494 U.S. at 132). And the Court of Appeals, given its uncertainty about what the TLC process entailed, further instructed that "[i]n the event … the post-suspension hearing does not comport with due process," this Court should "reconsider its ruling in its entirety." *Id.* at 163.

Although, as the Second Circuit noted here, Due Process does not always require a hearing prior to the initial deprivation of property, that course of proceeding is "condoned only in 'extraordinary situations,'" *Fuentes v. Shevin*, 407 U.S. at 90 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)). It is permitted "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)). But defendants offered no evidence at trial why this situation is "extraordinary" or why very prompt action is necessary.

Moreover, the constitutionality of peremptory action depends also on the availability of prompt and adequate post-deprivation procedures. *Barry v. Barchi*, 443 U.S. at 66. As we have seen, however, the post-suspension hearings are not adequate. Nor are they particularly prompt in practice. The chair decisions following those hearings, could take weeks, even months, to be announced—and, in any event, always continued the initial suspensions. In this critical sense, there was, as a matter of fact if not theory, no mitigation at all.

Finally, precedent has long stressed the importance of "narrowly drawn" statutory standards in cases where government actors act summarily. *U.S. v. Monsanto*, 924 F.2d 1186, 1192 (2d Cir 1991) (*en banc*) (citing *Fuentes*, 407 U.S. at 91). As Justice Rehnquist, writing for the Court in *Securities and Exchange Comm'n v. Sloan*, a case involving the suspension of securities trading, admonished: "[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." 436 U.S. 103, 112 (1978).

Here, to say the least, no statute draws a narrow standard. Defendants cast aside the terms of limitation—"direct and substantial"—that *do* appear in the lone provision they claim grants authority, NYC Code § 19-512.1(a). It is, moreover, doubtful that § 19-512.1 confers *any* authority for these suspensions, let alone a clear mandate. Just recently, the district court in *Rothenberg v. Daus* held, in a ruling involving the same defendants, "Section 19-512.1(a) is facially inapplicable," because it only governs "licenses for *vehicles* and not to licenses *for drivers*." 2014 WL 3765724 (S.D.N.Y. July 31, 2014) (Stein, J.) (emphasis added). This ruling is binding on the City of New York and the TLC chair. *Parker v. Blauvelt Volunteer Fire Co*., 93 N.Y.2d 343, 349 (N.Y. 1999) (collateral estoppel).

VIII. A CONSTITUTIONALLY LEGITIMATE HEARING MUST REQUIRE THE TLC TO PROVE THAT THE TAXI DRIVER'S LICENSURE IS A PRESENT THREAT

As the Court of Appeals said, normally, in a procedural due process case, the court sets forth the minimum protections that must be afforded at a post-deprivation hearing. While the Court of Appeals refrained from doing so here based on its residual uncertainty about the record, now the fact-finding process is more complete. At a minimum, to permit continuation of a suspension, the TLC should be required to demonstrate by a preponderance of the evidence that a driver's licensure pending resolution of criminal charge represents a genuine, substantial and ongoing threat to public health or safety. An arrest report, without more, should be not be sufficient. A driver who establishes that the criminal charges against him are likely to be favorably resolved or that his license is unlikely to be revoked in any event should be reinstated absent an extraordinary showing of danger to taxi passengers.

The ALJ should be required to consider as relevant evidence each of the factors listed in the Jury Verdict Form promulgated in this case, including the facts and circumstances underlying the arrest. Three of the Jury Verdict Form factors—if the arrest was for off-duty conduct, if the driver was issued a DAT, and if the driver was released on his own recognizance—should militate against a finding of dangerousness, arrest notwithstanding.

We submit further that the hearing officer must be allowed to rule, not just recommend, as the OATH ALJs do in *Krimstock* hearings, and that the hearing officer's ruling be put into immediate effect absent additional legal action by the TLC. The ALJ should be required to consider alternatives short of suspension that might adequately address any legitimate safety concerns and that he may consider the hardship that suspension would cause. Finally, drivers should be provided with clear and sufficient notice of the governing standards.

IX. EVIDENCE NOT ADMITTED AT TRIAL WOULD ALSO BAR JUDGMENT FOR DEFENDANTS

The evidence at trial and the law as outlined here are more than enough to require judgment for plaintiffs. In addition, evidence that was not admitted at trial would be additional ground for denying judgment for defendants. Plaintiffs had proffered expert testimony by Professor John King that would be relevant to the *Mathews* analysis. Professor King would have testified, *inter alia*, that if ALJs in fact applied to the standard the TLC claimed in the Second Circuit, few of the suspended drivers would be determined to pose a threat to the health or safety of the public. He would have explained (1) that there are established ways that civil and criminal authorities determine whether a particular individual charged with a crime poses an ongoing public danger; (2) that they can do so even without questioning the truth of charges; (3) that judges, including administrative judges, perform this function in pre-forfeiture hearings; (4) that many of the factors that have been shown to establish low safety risk are in fact present in many cases where taxi drivers attempt, unsuccessfully, to obtain provisional reinstatement, but are disregarded, *de facto*, by the TLC.

This evidence would have been particularly relevant to the second *Mathews* factor (the risk of error and the probable value of additional or substitute safeguards). By this Court's order, Professor King was precluded from testifying. ECF # 265. This evidence, however, would have been relevant, and would have powerfully undermined the notion that the results of the post-suspension hearings, uniformly extending the suspensions, are generally "correct."

X. PLAINTIFFS' TRIBUNAL BIAS AND STATE LAW CLAIMS ARE INDEPENDENT GROUNDS FOR RELIEF AND ARE PRESERVED

Per the Court's orders, the trial, the Findings and this memorandum focus on the "narrow question" of whether the post-suspension hearings afforded taxi drivers Due Process of Law. *See* Order dated December 18, 2013 (ECF # 245). While we will not address our tribunal bias claim

or our state law claims in any detail, we do note that they are preserved and that they provide independent grounds for relief and for damages. Plaintiffs' tribunal bias claim is premised on the fact that the TLC and its chair hired the TLC ALJs, controlled the ALJs work assignments and therefore their income, supervised the ALJs, including by *ex parte* directives, reprimanded the ALJs for discordant rulings, and could fire the ALJs. While the TLC does not hire and fire OATH ALJs, the TLC chair has unfettered discretion to reject their recommendations, which the OATH ALJs know he does every time an ALJ recommends lifting a suspension on arrest. Thus, the systemic bias was not cured by moving the post-suspension hearings to OATH. Plaintiffs' state law claims closely track their federal claims and are not substantive due process claims. These claims assert violations of the NYC Charter in that the TLC's *de facto* suspension policy was enacted without notice and comment and without a majority vote by the TLC commissioners, both of which are required. Though the trial did not focus on the tribunal bias or state law claims, the established facts are more than sufficient to prove them.

CONCLUSION

The Findings establish that the TLC suspends drivers based on an arrest report without more and that it continues those suspensions without regard for the driver's record or for the facts and circumstances underlying the arrest. Apart from an inquiry about nexus that is both philosophical and phantom, defendants neither consider nor attempt to determine whether the suspended driver poses any direct or substantial threat to public health or safety. These facts contradict defendants' representations to the Court of Appeals and their position since the remand. All told, the TLC's post-suspension review is a Potemkin Village of Due Process, nothing behind it, crumbling to the touch. The late-breaking notion that plaintiffs' claims sound in "substantive" due process is belied by the law of the case, the prior statements by the parties, by the Court of Appeals, and by this Court. It is equally weightless and has, in any event, been

waived. For the reasons stated, judgment on liability as to the Procedural Due Process claims must be for plaintiffs.

Dated: October 3, 2014
New York, New York

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