09-4305-cv

United States Court of Appeals

for the

Second Circuit

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

Plaintiffs-Appellants,

– v. –

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

Defendants-Appellees.

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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

Defendants' brief is most remarkable for what it omits. It makes no attempt to show how the TLC's suspension-on-arrest policy might be squared with directly relevant decisions of this Court. It postpones until its waning pages its discussion of *Krimstock* and *Spinelli*, giving greater prominence to decisions that are out-of-jurisdiction, often unpublished, and off-point.

The brief largely repeats without defending the signature error of the decision below: that due process scrutiny ends if the state has a legitimate interest and the deprivation is not entirely baseless. Time and again defendants' argument rests emphatic, but implausible assertions about "safety" and "administrative burden" by the *TLC's general counsel*.

That defendants only meekly defend the district court's reasoning is to be expected. There is not that much that could be said. The constitutional infirmities of the TLC practices are not subtle, but basic. The TLC policy fares worse on all three prongs of the *Mathews* test than others recently held unconstitutional by this Court. Indeed, the policy is in open violation of the most basic Due Process principle: It denies cabdrivers their livelihoods without giving them *any meaningful* opportunity to be heard, before or after.

What the brief offers in place of constitutional argument is also remarkable. It flogs immaterial disputes, but still admits that the TLC reinstates the vast majority of suspended drivers. It presents a lengthy "facts" section that details accusations about the named plaintiffs that have already been dismissed. This catalogue is so comprehensive that it includes allegations that post-date the filing of this suit, and others drawn from documents placed under court seal. See Br. 14-16.

But this is no ordinary instance of "pounding the facts" when the governing law is unavailing. What distinguishes these efforts is that the purported "facts" and supposed "factual disputes" are neither facts nor disputes. But worse still for defendants, shifting the focus even to unsubstantiated accusations does not cast the TLC policy in a better light. On the contrary, defendants' effort proves further the policy's deep constitutional flaws and its senselessness in every case.

I. THE UNDISPUTED FACTS – INCLUDING IRRELEVANT FACTS DEFENDANTS INTERJECT – CONDEMN THE TLC'S SUSPENSION-UPON-ARREST POLICY

A. Defendants Do Not Dispute that the TLC Itself Ultimately Determines that the Vast Majority of Suspended Drivers Pose No Threat to Public Safety

Though defendants attempt to obscure the facts, they **do not actually dispute that the TLC reinstates the overwhelming majority of taxi drivers it**

suspends, including all the named plaintiffs, after criminal charges are dismissed or dropped. Defendants do quarrel with the plaintiffs' survey that revealed a 91% reinstatement rate. But they cannot hide that the TLC lawyer who runs the program testified that the conviction rate is "very low." JA-64-66, 263. They even admit elsewhere in their brief that the licenses are reinstated in "most cases." Br. 40. The fact that the TLC knows it has no cause, and likely will have no cause, to revoke condemns the TLC's initial decision to suspend.

These facts foreclose any argument that the process for making the initial determination is fair or accurate, let alone "risk-free." As this Court stated in *Valmonte v. Bane*, "If 75% of those challenging their inclusion on [a list of potential child abusers] are successful, we cannot help but be skeptical of the fairness of the original determination." 18 F.3d 992, 1004 (2d Cir. 1994).

Unable to deny this reality, defendants labor to obscure it by directing attention to a distinct question on which there may be some dispute: *Exactly how* overwhelming are the odds against ultimate revocation? Defendants refuse to accept that the reinstatement rate topped 90%. They attack this statistic as calculated by "deliberately omit[ing]" cases where TLC records do not show the final disposition. They direct the Court's attention to "evidence" that in five of eight such cases there was a conviction. Indeed, their brief depicts this skirmish as

the central focus of the proceedings below – implying that plaintiffs' case stands or falls on the 91% figure. Br. 19-20.

But this effort is both pointless and misleading. Plaintiffs reviewed 140 cases, including 24 "omitted" ones. Even *assuming* (against the evidence) that *every* "omitted" case was a conviction, the reinstatement rate would still top 75% (106 of 140). Nor did defendants, despite what their brief implies, catch plaintiffs in any statistical sleight of hand. On the contrary, plaintiffs' district court submission carefully and forthrightly explained that the 91% result (106 of 116) was reached by making no assumption about the outcome where the TLC files recorded no disposition. If the omitted cases were evenly divided, the rate would be 84% (118 of 140). JA-87, 889-94.

Despite defendants' efforts to place this "dispute" at center stage, plaintiffs' claim does not depend on the 91% figure. Viewing the undisputed, objective evidence in the light most favorable to the TLC—that is, assuming that *at least three out of four* (if not nine of ten) drivers suspended pose no danger to the public— is constitutionally damning enough.

B. The Facts of Individual Plaintiffs' Cases—Relevant and Otherwise—Further Demonstrate the Senselessness of the TLC's Suspension Practice

Defendants offer no explanation for their exhaustive canvas of the particulars of the criminal allegations against each individual plaintiff. A legitimate purpose for this exercise is elusive. The "facts" about the individual plaintiffs extensively catalogued in defendants' brief played no part in the decision below. Nor do they surface in the "argument" section of defendants' brief. And it goes almost without saying that the accusations that fill the "facts" section of defendants' brief are not "facts" at all—but rather a retelling of *ex parte* allegations, ones that failed to withstand testing in the criminal justice process. Cf. *Connecticut v. Doehr*, 501 U.S. 1, 14 (1991) ("In a case like this involving an alleged assault, even a detailed affidavit would give only the [complainant's] version of the confrontation.")

But objections as to relevance and propriety are just the beginning. First, as defendants obliquely acknowledge, the TLC knew none of this information when it suspended these individuals. Indifference to the facts at the time of suspension is not a bug, but a feature of the TLC's regime. To this day, the TLC insists that individual circumstances of the sort it details on appeal are irrelevant to its suspension decisions. That Karmansky's arrest arose from an (alleged) violation of an order of protection, rather than from, say, displaying a placard in too close

proximity to a courthouse, was immaterial to the TLC: Either could support a charge of criminal contempt in the second degree, NY Penal Code § 215.50. And a report of an arrest on that offense—or any offense on the TLC's unpublished "list" — would trigger summary suspension no matter the factual context.

Hypotheticals aside, one need only consider the circumstances of the cases that persuaded TLC ALJ Gottlieb to recommend lifting suspensions. These were the decisions that provoked such a firestorm within the agency.[1]

The TLC not only disregards the specifics in ordering suspensions. It ignores them, pursuant to policy, again at the point of reinstatement. See Br. 7 ("It is TLC's practice to lift the summary suspension … upon confirmation that the charges have been … favorably resolved"). Compare *Gilbert v. Homar*, 520 U.S. 924, 932 (1997) (criminal charges dismissed but police officer demoted based on the underlying conduct). Nor, despite emphasizing here that "plea bargains in

[1] Gottlieb was told he was wrong to consider the fact that one driver (190) had no record of committing even a traffic violation; that the arresting officer had issued a Desk Appearance Ticket, indicating the officer's belief that "the circumstances did not warrant" immediate "transfer … to Criminal Court;" and the "overwhelming likelihood that this prosecution will result in a non-criminal disposition." ALJ Gottlieb further erred, according to TLC directives, by considering that that the charge—menacing in the 2d degree— had apparently arisen out of the driver's efforts to break up fight between two other drivers. And he also had no business considering that another driver (186) charged with 3rd degree assault had a clean driving and criminal record; had been driving for 38 days between incident and arrest; had been found to have no anger issues; and was overwhelmingly likely to receive a non-criminal disposition (and thus to be reinstated). JA-185-192.

misdemeanor cases are offered for many reasons other than factual innocence or even insufficiency of evidence," (Br. 41), does it inquire into the circumstances of the dismissal. Thus, whatever doubts defendants would like to sow about these cabdrivers, the fact is the TLC reinstated them all in 2006, albeit after months of depriving them of their livelihoods. And that action, defendants stress, constitutes TLC's determination that these individuals' driving posed no danger to passengers.

The "facts" that defendants strain to put before the Court concerning plaintiff Karmansky's 2007 revocation make the same, unintended point. That the latter arrest and the conviction both post-date this litigation adds an particularly flagrant element of irrelevance. That his license was revoked obviously puts Karmansky in the small subset of drivers ever convicted, not the "generality of cases," *Mathews*, 424 U.S. at 344.

While Karmansky's case is factually unrepresentative, his experience is nonetheless illustrative: He was suspended based on a "danger" determination made without any information about the circumstances of the allegations against him. He was afforded elaborate post-suspension "process," that had no prospect of affecting the TLC's decision. The presiding ALJ, who would days later "notify" him of his "determination" that Karmansky was a threat, advised the driver how he could "get [his] license back earlier." JA-550. Karmansky in fact went months unable to earn a living—until the expected dismissal of the charges came to pass.

At that point, the TLC reinstated him again without any inquiry into the underlying accusations -- or his prior record. Whatever "character evidence" defendants are entering through the back door, it is hard to see what interests of "public safety," let alone "public confidence," such a regime could actually advance. The final irony is that defendants acknowledge that under their current iteration of their list of offenses, Karmansky would not have been suspended in the first place. Br. 15 n.7.

II. DEFENDANTS DO NOT – AND COULD NOT – ESTABLISH THE TLC POLICY'S CONSTITUTIONALITY

A. No Plausible Due Process Rule Could Uphold the TLC Suspension-Upon-Arrest Practice

Rather than attempt any showing that their policy could be sustained under the *Mathews* test, let alone reconciled with this Court's recent decisions, defendants posit a parallel constitutional universe in which the state may effect irreversible deprivations without any notice or meaningful hearing, so long as the policy implicates an important interest and is not "baseless." Worse, that is not only defendants' position: It is their policy.

But the constitutional principle is precisely the opposite: It requires that deprivations grounded on legitimate and important interests *still* be pursued through procedures that promote fairness and accuracy. Indeed, not one of the

Supreme Court's or this Court's decisions finding procedural due process violations rests on a conclusion that the government action challenged was "baseless." Rather, the cases recognize that the risk of error is "inherent in the truth-finding process," *Mathews*, 424 U.S. at 344, and that the object of the Due Process inquiry is to determine whether, considering the importance of the deprivation, the government's interests justify its refusal to provide a more thorough process. See *id.*.

Nor, the case law makes clear, does the presence of a "probable cause" determination end the inquiry. *Krimstock* found a due process violation where the deprivation had been based on the probable cause determination of trained officers present at the scene. The *Krimstock* plaintiffs were nevertheless held entitled to "a prompt post-seizure, pre-judgment hearing before a neutral judicial or administrative officer," 306 F.3d at 67, where they could contest the initial "probable cause" finding as well as the "probable validity" for continuing the seizure of their cars. Similarly, the regime in *Doehr*, which required a *judicial* finding of "probable cause," was held invalid because "the risk of erroneous deprivation … [was too] substantial. " 501 U.S. at 12. And in *U.S. v. Abuhamra*, 389 F.3d 309 (2d Cir. 2004), the Court vindicated the procedural due process rights of a person convicted under the "beyond a reasonable doubt" proof standard.

These cases teach that even a valid "probable cause" finding is not equally reliable for all purposes. Thus, in *Doehr*, confidence that the plaintiff would likely prevail in a lawsuit did not speak to the "ultimate … contingency," that would justify a pre-trial deprivation, *i.e.*, the likelihood that the defendant would lose *and* be unable to satisfy a judgment. 501 U.S. at 12. *Krimstock* and *Abuhamra* are even more on point. In *Krimstock*, the police determined they had probable cause to arrest the driver. But that did not establish that they would "probably prevail" under the ultimate (forfeiture) standard. Nor did it show that the defendant was dangerous going forward because most of the individuals affected would "regain[] sobriety on the morrow." 306 F.3d at 66. While *Abuhamra* recognized that the defendant's conviction resolved his guilt on criminal charges and gave rise to a presumption of dangerousness, this Court still found a Due Process violation in denying him a fair opportunity to show that releasing him would present no danger.

Krimstock emphasized that "probable cause" determinations are not all alike. The Court highlighted the critical distinction between felony and misdemeanor charges: A misdemeanor suspect does not have a right to a post-arrest hearing. 306 F. 3d at 34. And it explained that the determinations at issue were more reliable than others because they were based on an officer's direct observation. But the fact that the TLC suspension policy goes further in both dimensions than any

policy that, to our knowledge, has been upheld (or even considered) by a court still understates the problem. Even in instances involving felonies, defendants cite no case where the government authority suspends without even knowing the circumstances or the alleged facts underlying the charges.

The case law likewise directly refutes defendants' premise that ultimate reversals of initial deprivations are somehow irrelevant to whether there was "risk of erroneous deprivation." Indeed, *Brown v. DOJ*, the case *defendants* continue to cite as controlling, explained, "The final disposition of the charges is vitally important," because "a suspension based solely on the fact of an employee's indictment on job-related charges" is "[un]justified" when it does not "ripen into a termination." 715 F.2d at 668-69. In *Loudermill*, 470 U.S. at 544, the Supreme Court stated, "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." In *Valmonte*, this Court found that where "nearly 75% of those who seek expungement of their names from the list [of suspected child abusers] are ultimately successful … indicates that the initial determination made by the local [agency] is at best imperfect." 18 F.3d at 1004. 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"). Here, of course, the evidence shows that the rate of reversals is *at least* as high as that found unacceptable in

Valmonte. Worse, in this case, unlike in *Valmonte*, there is no conceivable argument that the deprivations are harmless or inconsequential.

B. 'Public Safety' Interests do not Mandate a Different Due Process Analysis

Defendants contend that this case is different because the interests it seeks to pursue relate to public safety. But the Supreme Court and this Court have held precisely the opposite. As *Kuck v. Danaher*, 600 F.3d 159, 164 (2d Cir. 2010), explained, "due process analysis" looks to the "reason … that justifies" the challenged *procedure*, not the interest served by the regulatory regime as a whole. See *James Daniel Good Real Prop. v. United States*, 510 U.S. 43, 56 (1993) ("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"). And procedural due process rights were vindicated in *Krimstock*, which implicated the interest "in removing dangerous drivers from the road," 306 F.3d at 66; in *Valmonte*, which concerned protecting children against abuse; and in *Spinelli*, in the context of a licensing regime protecting the public from unsecured firearms.

Even in cases involving the gravest national security concerns, the Supreme Court has held that the Constitution demands a meaningful opportunity to be heard. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Court held unconstitutional the

procedures used by the U.S. military to detain a citizen captured in Afghanistan and designated an "enemy combatant," holding he was entitled to challenge his classification, "to receive notice of [its] factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Id.* at 533. See *Boumediene v. Bush*, 553 U.S. 733 (2008) (applying *Mathews* analysis and concluding that process afforded accused terrorists had unacceptably high risk of error).

Indeed, the *Hamdi* court affirmed "'The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies.… [F]or it is … under the pressing exigencies of crisis, that there is the greatest temptation to dispense with guarantees which, it is feared, will inhibit government action.'" 542 U.S. at 532 (quoting *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 164-65 (1963)). As these cases show, the central question here is not the legitimacy or importance of preventing direct and substantial threats to passenger safety. The issue is the fairness and accuracy of the procedures by which individuals are determined to pose such threats – and what reasons, if any, the TLC has for not making highly consequential determinations in a minimally fair and accurate manner.

C. The TLC Denies Cabdrivers *Any* Meaningful Process Before Suspension or After Suspension

While the pre-deprivation hearing requirement is not "categorical," *Gilbert*, 520 U.S. at 930, this Court has recently reaffirmed that notice and a pre-deprivation hearing are "generally required." *Spinelli*, 579 F.3d at 170. Even if public safety concerns might, in cases involving true emergencies, permit the government to act without a hearing, there is no support at all for the continuing that deprivation indefinitely without a meaningful assessment of whether the danger persists. The TLC, of course, imposes suspensions without any advance notice (and without learning the facts). This practice, notably, distinguishes the TLC regime from the one its brief repeatedly cites: The statute in *Brown* afforded law enforcement officials indicted for violent abuses of power both notice and an opportunity to meet with their employer before suspension was imposed.

Defendants cite cases holding that Due Process does not always require pre-deprivation process and attempt to explain how this one fits. As we explain below, their claimed analogies fail on their own terms. But defendants' argument rests on a more basic error: The decisions they invoke apply the principle that the right to a meaningful opportunity to be heard may be *postponed* in extreme cases. They never suggest that it may be *canceled altogether*. As *Spinelli* explained, the denial of a pre-deprivation hearing depends on the granting of meaningful *post-*

deprivation process. 579 F.3d at 170. (It depends also on the "necessity of quick action by the State or the impracticality of providing any meaningful pre-deprivation process." *Id*.) Defendants' policy is therefore unconstitutional *per se*, unless the post-suspension hearings are "meaningful" in the constitutional sense.

Given these stakes, it is unsurprising that defendants attempt to distinguish the instant TLC Rule 8-16 summary suspension hearings from the TLC Rule 8-16 summary suspension hearings held unconstitutional in *Padberg v. McGrath-McKechnie*, 203 F. Supp. 2d 261, 267-68 (E.D.N.Y. 2002). They struggle to avoid Judge Dearie's conclusion that the hearings considered there were "'little more than a pro forma verification that the summons was properly filled out,'" Br. 44 (quoting 203 F. Supp. 2d at 278). But the cases, and the hearings, are indistinguishable.

The hearings the TLC conducts can only be described as pro forma. Despite the outward trappings of judicial process, the TLC attorney appears to make the same opening "argument" in every case; no matter what evidence the driver or his attorney offer, the TLC ALJ "issues" the same boilerplate "recommendation," and, whatever "objections" the individual raises, the Chair affirms by letter order with the text "provide[d]" by TLC lawyers. JA-870.

Defendants claim the hearings offer three "opportunities." The first two—to show that there was a clerical error in identifying the driver or recording the charge— is no different from *Padberg* drivers' "opportunity" to show that "the summons was [not] properly filled out." As for the third "opportunity," to persuade the ALJ that the "charges, even if true, do not warrant suspension," Br. 45, defendants cannot supply even one case where a driver has managed such a showing. See *N.A.A.C.P. v. Town of E. Haven*, 70 F.3d 219, 225 (2d Cir. 1995) (recognizing special evidentiary significance of "inexorable zero") (citation omitted).

Defendants' real argument is not that these hearings are less *pro forma*, but that they are less problematic, because the determination in *Padberg* (as to whether there was an improper service refusal) was multifaceted. But this distinction also makes no sense, because the question the TLC *purports* to determine at summary suspension hearings—whether there is a substantial threat posed by an individual's continued driving — is also multifaceted. It plainly *should* entail consideration of multiple factors such as the nature and circumstances of the offense charged, the weight of the evidence and the defendant's personal history and work record. Cf. 18 U.S.C. § 3132(g) (setting standards for evaluation of dangerousness); see also Acquaviva & McDonough, "How to Win a *Krimstock* Hearing,"18 Widener L.J.

23, 65-66 (2008) (cataloging factors in determining ongoing danger in *Krimstock* hearings).

Nevertheless, the TLC requires its judges to conclusively presume guilt and to disregard relevant evidence. But the "justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Coleman v. Thompson*, 501 U.S. 722, 737 (1991). The point here is not that the TLC is categorically barred from considering either off-duty conduct or the fact of arrest. But "procedures [that] do not allow for" consideration of the circumstances, the lack of prior offenses, the driver's record, and connections to the community are patently in denial of due process. See *Padberg*, 203 F. Supp. 2d at 280 (citing *Bell*, 402 U.S. at 542).

The post-deprivation process in *FDIC v. Mallen*, 486 U.S. 230 (1988), by contrast, was not pro forma. It required a hearing officer to consider overturning the suspension based on a "fair appraisal" of an "extensive evidentiary record" concerning the indicted individual's "continued service" during the pendency of the criminal case. *Id.* at 247. The D.C. Circuit's decision in *Silver v. McCamey*, 221 F.2d 873 (1955), which defendants cite, also supports the plaintiffs. First, the court affirmed an injunction, grounded in Due Process, requiring reinstatement of a taxi driver who had been charged with two rapes and arrested with ammunition and a bayonet in his cab. And even the dictum, which defendants cite in particular,

stated that a suspension would be "extraordinary" and would require "holding a hearing" before "taking action." *Id.* at 875. The California decision defendants cite, *American Liberty Bail Bonds, Inc. v. Garamendi*, 141 Cal. App. 4th 1044 (Ct. App. 2006), also undermines their position. The court emphasized that the "fact that an indictment is considered adequate evidence to effect a suspension does not mean that the indictment is considered conclusive evidence." *Id.* at 1053 Suspended bail bondsmen were entitled a hearing with the "opportunity, for example, to conduct discovery and to call and to cross-examine witnesses." *Id.* at 1066. New York City taxi drivers receive none of these protections or defenses.

D. There is no Support in the Record for the TLC's 'Administrative Burden' Excuse

In denying taxi drivers a meaningful hearing at *any* time, defendants rely on a litany of assertions in a declaration by TLC General Counsel Charles Fraser. Fraser purported to explain that having the TLC "prove independently that the alleged criminal conduct occurred" was "neither required nor appropriate;" that providing process might "interfere with the jurisdiction of the district attorney;" that it might "be burdensome to the witnesses;" and that it "might not be in the licensee's interest, as the necessary defense in the TLC proceedings might disclose the licensee's evidence in advance of [the] criminal trial and prejudice the licensee's defenses." JA-416-17.

Such assertions are a paradigm example of the sort of "evidence" that may not be considered in support of summary judgment. See *Cameron v. City of New York*, 598 F.3d 50, 62 (2d Cir. 2010). In this specific context, both this Court and the Supreme Court have viewed such self-serving claims of impracticality with a jaundiced eye. See *Hamdi*, 542 U.S. at 531-532 (rejecting government claims that providing process would "unnecessarily and dangerously" distract "military officers … engaged in the serious work of waging battle"); *Krimstock II*, 378 F.3d 198, 204 (2d Cir. 2004). And even as self-serving assertions go, these— asserting what "could" occur, what "may" or "might not be"— are notably weak.

The district court's crediting these assertions was all the more remarkable, because *unlike* in *Krimstock*, the TLC could vastly improve fairness and accuracy simply by conducting existing hearings in accord with basic Due Process principles. See *Santosky v. Kramer*, 455 U.S. 745, 767 (1982) ("Unlike a constitutional requirement of hearings, … or court-appointed counsel, [decision requiring] a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State"). And this Court in *Krimstock* rejected all-or-nothing posturing: Following its conclusion that the city's existing practice denied due process, it left it "to the district court, in consultation with the parties," to develop a fair and workable procedure. See also *Bell*, 402 U.S. at 542-543 (holding that "the present Georgia scheme … denied [plaintiff] procedural due

process," but stressing multiplicity of "methods of compliance" with the Constitution's mandate).

Moreover, experience under *Krimstock* provides a direct rebuttal of defendants' assertions. *Krimstock III*, 464 F.3d at 241 ("[W]itnesses confirm that no undue burden on criminal enforcement results from mandated review by a neutral fact-finder."). Contrary to defendants' projections, "the typical *Krimstock* hearing involves testimony from only the claimant," with police relying on "several exhibits, including the arrest report and criminal complaint." Acquaviva & McDonough, 18 Widener L.J. at 83. Indeed Fraser presumably was aware of this reality because he had previously served as an OATH judge, where his main job was organizing *Krimstock* hearings. JA-163-68.

Struggling to multiply their "burden," defendants note that they suspend from 38 to 58 taxi drivers per month. The totals are inflated by TLC's insistence that non-violent felonies and off-duty misdemeanor charges require automatic suspensions. But even taking the numbers as a given, surely the cost of placing a phone call to an assistant district attorney to learn why the driver was arrested cannot weigh seriously against the lengthy deprivations that such minimal measures might prevent. Indeed, these appeals to fiscal austerity ring especially hollow given the costs the TLC willingly incurs in connection with its current "process." These hearings may be ineffectual; they may never result in the

reversal of a single suspension. But since they employ ALJs, attorneys, transcripts, written decisions, and petitions to the Chairman, they are not inexpensive.

III. THE TLC'S APPEALS TO PUBLIC SAFETY AND PUBLIC CONFIDENCE ARE CHIMERICAL IN ANY EVENT

Although accepting as genuine the TLC's safety concerns would not spare it from Due Process invalidation, the policy's premise is itself untenable. Here again, defendants' submission rests entirely on its general counsel's declaration that warns darkly of the "risk" that the crimes of a "potentially dangerous" driver will "not stop at the taxi door," possibly endangering the "uniquely vulnerable" passenger. But Fraser's declaration is not evidence at all, let alone a basis for summary judgment, and it is contradicted in any event by logic and actual experience. It is hard not to notice what is missing from defendants' brief: It fails to offer a single instance in which a taxi driver harmed a passenger. As the Opening Brief explained, Fraser's conjecture (adopted in the district court opinion) ignores the unique *protections* afforded yellow cab passengers. New Yorkers regularly share elevators, subway platforms, and crowded streets with strangers. They permit others into their homes to deliver groceries and repair appliances. But in contrast to these everyday situations, a taxi passenger can read her cabdriver's name, photograph, and license number. The TLC and police, meanwhile, can track taxis by GPS coordinates and have driver addresses and fingerprint information on

file. Indeed, the TLC is right now busily encouraging New Yorkers to share the back seats of taxis with unlicensed strangers, who may very well have been arrested the day before. See "Taxi Shares Expanding to Airports," The Wall Street Journal (Apr. 30, 2010).

Indeed, the inference of future danger from prior misbehavior is far less intuitive than the one rejected as implausible in *Krimstock*. To make sense, the suspension-on-arrest policy would require not only that a recently-arrested cabdriver poses a direct and substantial danger but that he poses a heightened threat to passengers *during the time criminal charges are pending against him*. Cf. *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48, 58-59 (2d Cir. 1979) (provisional remedy must be justified by likelihood of irreparable harm during pendency of proceeding). In fact, were there any basis for believing in the threat at all, it would likely be reduced at the very time the TLC's practice applies. Cf. *Chambers v. United States*, 129 S. Ct. 687, 692 (2008).

Assertions regarding "public confidence" are equally insupportable. The Supreme Court in *FDIC v. Mallen* did permit a bank president who was indicted on felony charges of making false statements to the FDIC to be suspended without a hearing. But its invocation of "public confidence" was derived from a statute, which was itself "premised on the congressional finding that prompt suspension of indicted bank officers may be necessary to protect the interests of depositors." 486

U.S. at 240-41. This was an "exigent circumstance" of a particular type. But in this case, there is no equivalent legislation, no legislative finding, not even a plausible assertion that permitting a taxi driver merely arrested on misdemeanor charges would cause the loss of public confidence in the taxi industry. Indeed, far from reflecting legislative policy, the TLC practice violates the City Charter and Administrative Code —as we demonstrated and as defendants do not even deny. See App. Br. 56-58.

Any appeal to public confidence as a fount of authority is further and fatally undermined by the TLC's longstanding secrecy regarding the operation of its policy. Thus, while defendants seek to cabin the TLC's blatant failures to seek public comment in devising its list or standards as "mere" state law violations, these are facially inconsistent with claims that public perception is foremost. The TLC never obtained authority from the City Council and never enacted a rule of its own until after this case was filed. Indeed, asked whether the TLC announced the policy to the council or the riding public, Chairman Daus answered, "I don't remember" and "I don't have a specific recollection." JA-952-54.

In short, there is every reason to conclude that no safety or confidence purpose is served by the TLC's policy. But that is not the primary constitutional defect. There is no legitimate reason for the TLC's refusal to determine fairly or accurately *which* individuals, if any, pose an actual threat. Doing so, of course,

would spare individuals whose continued work presents no plausible danger from serious and irreversible hardship.

IV. POST-SUSPENSION HEARINGS MUST BE CONDUCTED BY A NEUTRAL ADJUDICATOR, NOT BY EMPLOYEES HANDPICKED BY THE PROSECUTING AGENCY

Even when invited by the district court defendants did not argue below that the "availability" of an Article 78 action somehow defeated plaintiffs' Due Process and bias claims. Defendants' brief makes only a half-hearted effort to defend the district court's *sua sponte* ruling on the issue. Indeed, myriad decisions affirm that the availability of state remedies cannot excuse a denial of Due Process. See App. Br. 47-48.

Plaintiffs' claim that the TLC tribunal is systemically biased is a federal claim that is properly in federal court. It is grounded on the well-settled right to "a 'fair trial in a fair tribunal,' before a judge with no actual bias against the [individual] or interest in the outcome of his particular case." *Bracy v. Gramley*, 520 U.S. 899, 904-905 (1997), citing *Withrow v. Larkin*, 421 U.S. 35, 46 (1975); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 821-22 (1986); and *Tumey v. Ohio*, 272 U.S. 510, 523 (1927).

Although this Court has indicated that a due process inquiry may take account of the state's provision of a full and complete state court remedy, see

Locurto v. Safir, 264 F.3d 154, 174 (2d Cir. 2001), that principle has no relevance here because the remedy defendants would prefer is inadequate. Requiring taxi drivers to raise claims of ALJ bias by first filing an Article 78 petition would not provide additional protection "at a meaningful time and in a meaningful manner." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (internal citation omitted). It would, rather, add insult to constitutional injury. A taxi driver suspended by the TLC would have to wait months for the TLC's process to run its course before he could even *file* an Article 78 petition. Even *defendants* concede (Br. 48) that an Article 78 court could only grant relief—vacating suspension—that most drivers would have already have achieved by the time an Article 78 action was decided. Thus there is no basis for requiring taxi drivers to endure blatantly unfair proceedings and then incur *additional* time and expense pursuing state remedies that are themselves indisputably inadequate.

On the merits, defendants distort plaintiffs' claim, which is that the evidence establishes that TLC ALJs cannot be expected to, and in fact do not, "hold the balance nice, clear and true." *Ward v. Village of Monroeville,* 409 U.S. 57, 60 (1972). Plaintiffs' claim is not merely that the prosecuting agency employs the judges. Def. Br. 50. The claim is grounded instead on Alexander Hamilton's maxim, stated in *The Federalist* No. 79, and reflected in the Constitution, "that *a power over a man's subsistence amounts to a power over his will.*" See, *e.g.*, *U.S.*

v. Hatter, 532 U.S. 557, 567-68 (2001) (citing Hamilton); *Haas v. County of San Bernardino*, 27 Cal. 4th 1017, 45 P.3d 280 (Cal. 2002) (holding that the county's employment of an administrative judge on an *ad hoc* basis created an unconstitutional risk of bias).

The TLC controls its judges' "subsistence" by the fact that the agency may fire them without cause. JA-326-27, 329-30, 871. TLC ALJs must apply for new work assignments monthly. They can be left off the calendar or given less favorable assignments, and have no recourse if this occurs. JA-320-21, 872. In fact, of the TLC's 80-strong roster of ALJs, it permits just a few to decide summary suspension cases. JA-87. As a result, TLC ALJs readily comply with *ex parte* directives, delivered both through informal "training" and from the TLC ALJ Manual, which the judges are ordered to follow. JA-329-30. And it is the manual, not the statute or the rule, that the ALJ decisions follow. JA-365, 313-14. ALJs who fail to heed wholesale directives face reprimand and specific directives, as in the case of ALJ Gottlieb. JA-185-86; 390-95. On the other hand, an ALJ who performs to the agency's satisfaction might be promoted to a supervisory position, as were Bonina and Coyne, JA-307, or an executive one, as was defendant Eckstein, who became deputy commissioner. JA-430. This is all undisputed and results in the denial of a fair hearing.

Defendants ask the Court to understand ALJ Gottlieb's continued service after issuing the three internally unpopular decisions as "proof" of their even-handedness. Br. 52. But the fact is that Gottlieb's later service was characterized by an unbroken record of doing what the TLC prosecutor asked, a dramatic reversal from his foray into independent judgment. JA-391-92. Last, the best evidence of potential bias may be the actual results: ALJ Gottlieb momentarily aside, the TLC prevailed in summary suspension hearings every time.

Finally, defendants try to minimize Judge Dearie's decision in *Padberg*, which upheld a claim that the TLC tribunal was unconstitutionally biased and, citing *ex parte* directives and "potential systemic incentives," and permitted it to go forward. 203 F. Supp. 2d 261, 288-89. Defendants observe that this decision was made prior to discovery. But the *Padberg* defendants moved for—and Judge Dearie denied—summary judgment a second time, 2006 WL 4057155 (E.D.N.Y. 2006), *after* discovery was complete, on the ground that evidence of bias in "TLC's adjudicative process" presented a triable claim. If there is a distinction to be drawn, it is that the evidence of bias here is more fully developed and more dramatic.

V. THE DISTRICT COURT'S RULINGS ON STANDING AND SUABILITY MUST BE REVERSED

As noted in our opening brief, the "rule" the district court relied on in denying NYTWA standing is at odds with decades of Supreme Court decisions, which have decided § 1983 actions brought by organizations asserting violations of their members' constitutional rights. The Court's landmark decisions in *Warth v. Seldin*¸ 422 U.S. 500, 513 (1975), and *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), are, in both reasoning and result, irreconcilable with the supposed limitation, as are many more recent ones. See *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 719 (2007). Defendants' answer (Br. 58) — that "*some* of the cases cited by plaintiffs" did not expressly address standing— is beside the point: The "issue of standing" is present in "every federal case," *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11 (2004), and others of the cited decisions did resolve it, expressly. See, *e.g.*, *Northeastern Florida Chapter, Associated General Contractors v. Jacksonville*, 508 U.S. 656, 668-669 (1993).[2]

[2] Even if this Court's decision in *League of Women Voters v. Nassau County Bd. of Supervisors*, 737 F.2d 155, 160 (2d Cir. 1984), is read the way defendants suggest, it would be no bar to deciding this issue consistently with subsequent Supreme Court cases. To the extent that there are doubts as to a panel's authority to recognize this abrogation, Circuit precedent establishes that the proper course is not to enforce the discredited rule, but rather to consult with the entire Court— and then apply the correct one. *See, e.g., Adeleke v. United States*, 355 F.3d 144, 155 n.9 (2d Cir. 2004).

Although of limited practical importance in this case, where the city is also a defendant, this Court should settle that Section 396 does not—and could not—establish that the TLC is not "suable" under Section 1983. By its terms, that provision addresses the circumstances in which a city agency may "*bring* an action" to "recover a penalty." The question whether an agency of a city is a proper *defendant* under Section 1983 is one of federal law, which has been resolved by the Supreme Court, most definitively in a case involving an agency of this city. *Monell v. New York City Dep't Social Servs.*, 436 U.S. 658 (1978). The untold number of federal court actions where city agencies have been defendants, including in Section 1983 actions, further demonstrate the point. The two decisions the TLC cites hardly require the serious and destabilizing ruling they seek. The quoted language of the footnote in *Jenkins v. City of New York*, 478 F.3d 76, 93 n.19 (2d Cir.2007), was dictum: The plaintiff had sued the city as well, and it is not clear he asked the Court to overturn the district court's dismissal of the NYPD as a defendant. And *Ximines v. George Wingate High Sch.*, 516 F.3d 156, (2d Cir. 2008), while holding that the plaintiff had wrongly named the particular public school where she worked and noting the Section 396 argument, *reinstated* her claims against the City Department of Education. *Id.* at 160.

VI. NO DEFENDANT IS ENTITLED TO QUALIFIED IMMUNITY

Defendants' invitation to rule in their favor on "qualified immunity" grounds should be rejected because qualified immunity is not a defense to § 1983 claims against the city, its agencies or official capacity defendants. See *Leatherman v. Tarrant County NICU*, 507 U.S. 163, 166 (1993). Nor can it bar awarding injunctive relief. See, *e.g.*, *African Trade & Info. Ctr., Inc. v. Abromaitis*, 294 F.3d 355, 360 (2d Cir. 2002). In any event, the summary judgment record describes government actions that are not "objectively reasonable," but rather wholesale violations of constitutional rights whose relevant contours have been clearly established for decades.

CONCLUSION

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

Dated: New York, New York
May 28, 2010

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-Point Times Roman proportional font and contains 6,877 words and thus is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

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

On May 28, 2010

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the attorney(s) in this action by delivering **2** true copy(ies) thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein, also by electronic service via e-mail.

Sworn to before me on May 28, 2010

MARIA MAISONET
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