UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SAUL ROTHENBERG, EBRAHIM ABOOD, TOBBY KOMBO, KONSTANTINOS KATSIGIANNIS, BOUBACAR DOUMBIA, ROBERT DYCE and MOUSTACH ALI, individually and on behalf of all others similarly situated,

08-CV-00567 (SHS)

Plaintiffs,

-Against-

MATTHEW DAUS, DIANE MCGRATH-MCKECHNIE, JOSEPH ECKSTEIN, ELIZABETH BONINA, THOMAS COYNE, THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION, AND THE CITY OF NEW YORK,

Defendants.

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR RENEWED MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

This action is by former New York City taxi drivers whose licenses were revoked by the NYC Taxi and Limousine Commission (TLC) even though none of them harmed a passenger and not one violated any TLC rule. Some of these drivers' licenses were revoked after the river was convicted of a crime committed while off duty, not while driving a taxicab and not involving any passenger or TLC official. Other drivers were permanently deprived of their licenses after testing positive for an illegal drug, even if none of them was accused of being addicted to any drug or of ever being intoxicated while on duty. As there is no genuine dispute as to any material fact, which are established by TLC documents and through testimony by TLC witnesses, based on the law of the case established by the Court of Appeals in this action, the taxi driver plaintiffs are entitled to summary judgment pursuant to Fed.R.Civ.P. 56(a).

Under this law of the case, the TLC's mandatory revocation regime is unauthorized by statute or by rule. The "hearings" that ostensibly protected the drivers' valuable property rights were meaningless because the TLC's judges always ruled for the agency, regardless of circumstance, and without considering mitigating factors or the driver's record. Indeed in 843 straight cases where the TLC prosecutor sought revocation, the TLC administrative law judge (ALJ) recommended it and the TLC chairman ordered it. Even after the hearings were transferred from the TLC's own tribunal to the Office of Administrative Trials and Hearings (OATH) this pattern persisted. These factors, individually and collectively, amount to a denial of due process of law.

Plaintiffs bring this 42 U.S.C. § 1983 action on behalf of themselves and other taxi drivers subject to the same TLC policies and practices. The drivers allege that the TLC policies-in-fact were never announced by any duly enacted NYC Administrative Code (NYC Code) provisions or by any TLC rule, so the de facto rules denied them fair warning of the law, which

is a denial of due process. They allege further that the hearing notices filed by the TLC denied them fair notice of the allegations. They allege that the hearings in the TLC tribunal were meaningless and thus denied them a fair hearing. They allege that the TLC court was systemically biased in the agency's favor by the fact that the TLC hired, fired and directed the ALJs as to deny the drivers an impartial tribunal. Finally plaintiffs allege various violations of the NYC Code and of TLC Rules.

This Court, adopting a Report and Recommendation by Magistrate Judge Ellis (the Report), dismissed the complaint in its entirety. By summary order dated June 4, 2012, the Court of Appeals vacated in large part the district court order. The Court of Appeals reinstated plaintiffs' federal due process claims, plaintiffs' state claims, and plaintiffs' claims against the individual defendants. It found errors in the Report as to each of plaintiffs' federal claims, provided legal guidance on remand, and allowed for "such further discovery and briefing as the district court may order." It specifically mandated, *inter alia*, that the district court: (1) consider plaintiffs' arguments that based on the text, context and history of the relevant codes and rules the drivers were denied fair warning of the law; (2) determine which alleged rule violations the TLC actually relied on in its hearing notices; (3) weigh the drivers' property interests in their licenses and whether the hearings did anything more than confirm the identity of the driver and the offense for which he was convicted; and (4) account for "evidence in the record that it did not previously address or mischaracterized" regarding the systemic bias of the TLC tribunal.[1]

[1] The Court of Appeals also affirmed the district court's dismissal of the TLC as a defendant and deemed plaintiffs' Fourth Amendment claim forfeited on appeal. The Summary Order is reported at 481 Fed.Appx. 667 and at 2012 WL 1970438 (2d Cir. June 4, 2012). This memorandum will cite to the Slip Opinion.

STATEMENT OF UNDISPUTED FACTS[2]

A. The New York Taxi Industry and the TLC: A taxicab driver in New York City, whether he drives a yellow (or medallion) taxi or a for-hire vehicle, must be licensed by the TLC, an agency of the City of New York. NYC Code § 19-505(a). Though the city licenses taxi drivers, it does not employ them. They are, rather, independent businessmen unprotected by civil service rules, without any labor union, and who cannot engage in collective bargaining. A-1385; *See Hecht v. Monaghan,* 307 N.Y. 461, 468 (N.Y. 1954); G.R.G. Hodges, TAXI! A SOCIAL HISTORY OF THE NEW YORK CITY CABDRIVER 147-48 (Johns Hopkins Univ. Press 2007). The political voice of taxi drivers is likewise muted, as 91% are first generation immigrants. B. Schaller, "The New York City Taxicab Fact Book," 53, PX A.

Taxi drivers and their licenses are governed by statutes collected in the NYC Code, enacted by the City Council, and by TLC Rules, which are enacted by the TLC commissioners. Rules pertaining to taxi drivers were set forth in Chapters 2 and 6 of the TLC rules, which govern yellow cab and FHV drivers, respectively. Chapter 8 contained rules relating to adjudications by the TLC tribunal.[3]

Unlike agencies under the direct control of the mayor, the TLC, established in 1971, is composed of nine commissioners, appointed by the mayor subject to the advice and consent of the City Council. NYC Charter § 2301(a)-(b). One of the commissioners serves as chair and has

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[2] This statement is supported by a Local Rule 56.1 statement filed herewith, which states the facts in somewhat greater detail. Evidence already reproduced in the Appendix filed on appeal will be cited A-__. Other evidence is annexed to the Declaration of Daniel L. Ackman, dated __, and will be cited PX __.

[3] These citations are to the TLC rules as numbered when the Complaint was filed and when the original summary judgment motions were filed. Effective April 1, 2011, the TLC revised and renumbered the TLC Rules. *See* 35 R.C.N.Y. 70–01 ("Transition Rules"). With some exceptions, the TLC has stated that the newly numbered rules are supposed to be the same in substance as the old rules. This memorandum will cite the new version of the rules when pertinent. Pertinent sections of the Charter, the NYC Code and the TLC Rules are reproduced at A-258-369.

executive responsibilities. § 2301(c). But the chair has no authority to make rules on his own or without a vote by his fellow commissioners.

The Charter defines and limits the Commission's powers. §§ 2300, 2303. It vests the TLC with responsibility for "the regulation and supervision of the business and industry of transportation of persons by licensed vehicles," § 2303, and for "the issuance, revocation [and] suspension of licenses for drivers, chauffeurs, owners or operators of vehicles." § 2303(b)(3). It further states: "The commission shall have power to act by a majority of its members." § 2301(e). *See generally Padberg v. McGrath-McKechnie*, 203 F. Supp. 2d 261, 267-68 (E.D.N.Y. 2002), *aff'd* 60 Fed.Appx. 861 (2d Cir.), *cert. denied*, 540 U.S. 967 (2003).

B. Revocations Permitted by TLC Rules: As the Court of Appeals summarized, the TLC Rules contain various "prohibitions and penalties … which 'specifically permit[ted] or require[d] revocation for criminal acts committed while the driver is on-duty, offenses specific to taxi driving, and repeated traffic violations.'" Slip. Op. 5 (quoting Appellants' Brief at 5). Under these rules, for example, a taxi driver may have his license revoked if he "threaten[s], harass[es] or abuse[s] any passenger or any governmental or Commission representative, public servant or other person *while performing his duties and responsibilities as a driver*." TLC Rule 2-60A.[4] His license may be revoked if he uses or attempts "any physical force against a passenger, Commission representative, public servant or other person *while performing his duties and responsibilities as a driver*." TLC Rule 2-60B. The same penalty may apply where a "driver, *while performing his duties and responsibilities as a driver* [commits or attempts] … any act of fraud, misrepresentation or larceny against a passenger, Commission representative, public servant or any other person." TLC Rule 2-61A1. A driver's license is subject to revocation if he,

[4] In all cases, the penalty applicable to violations of the substantive rules are listed in TLC Rules 2-86 or 2-87. Chapter 6 of the TLC rules has a parallel scheme for FHV drivers at Rule 6-22.

"*while performing his duties and responsibilities as a driver,*" distracts, harms or attempts to harm a service animal. TLC Rules 2-60A&B (emphasis added in all cases).

In addition, a driver shall have his license revoked if he "offer[s] or give[s] any gift, gratuity or thing of value to any employee, representative or member of the Commission, or any public servant, or any [taxi] dispatcher…." TLC Rule 2-62A. TLC Rules likewise require revocation where a driver overcharges a passenger by more than $10. TLC Rule 2-34. More generally, the TLC may revoke a taxi driver's license if he, "*while performing his duties and responsibilities as a taxicab driver*, [commits or attempts] … any willful act … which is against the best interests of the public." TLC Rule 2-61A2 (emphasis added).

In short, these rules provide for revocation of a taxi driver's license whenever the taxi driver commits any crime—from harassment to attempted assault to bribery to fraud—but only if the crime occurs while the cabdriver is "performing his duties and responsibilities as a driver."

TLC Rules also specifically contemplate off-duty criminal convictions. Rule 2-04B, which concerns probationary (first year) licenses, bars renewal if the driver is "convicted of a crime in any jurisdiction," if he is "convicted of driving while impaired by alcohol or drugs," or if he is "convicted of leaving the scene of an accident." But none of these prohibitions apply to non-probationary drivers. In addition, Rule 2-63 requires any driver to "notify the Commission in writing of his conviction of a crime within fifteen (15) days of such conviction." But that rule likewise offers no indication that an off-duty conviction by itself carries any penalty at all (beyond that mandated by the criminal law).

Despite the comprehensive nature of the regulations, neither the City Council nor the TLC commissioners has ever adopted *any* rule that authorizes revocation for off-duty criminal acts where neither a passenger nor a TLC official is a victim. Indeed, of four senior TLC policy

and licensing officials questioned at pre-trial depositions, *not one of them knew* the TLC's policy with regard to revocations for criminal convictions or for positive drug tests. Chhabra 25-27; Schechter 26-29; Weiss 26, 30-34; Salkin 20-22, 31-33, 38-39. At his deposition, then-Chairman Daus first testified that there was a rule that authorized the TLC's conviction practice, but he was unable to find it. Then he said it would "take some time" for him to review the rules. Given time, he admitted that no rule that permits revocations in response to off-duty convictions "specifically" or "generally." A-168-73. Nevertheless, despite the pervasive practice of regulating only on-duty misconduct, the TLC routinely revokes taxi drivers' licenses upon conviction for off-duty crimes. A-1361-66.[5]

C. The Phantom Menace of the Violent Taxi Driver: None of the named plaintiffs in this case was accused of assaulting, cheating, or harming any passenger or TLC official. There has been no allegation or evidence that any of the plaintiffs (or any member of the plaintiff class) whose licenses were revoked presented any danger to any passenger or TLC official. Defendants have not cited a single instance of any plaintiff class member being convicted of assaulting or attempting to harm a passenger. To the contrary, TLC General Counsel Fraser admitted in a sworn declaration that just *two* taxi drivers in three years were convicted of a violent crime. A-448-49 (Chart 1). Even in these rare cases, Fraser uttered no allegation that the crime was committed on-the-job or against a passenger or TLC official.

D. Hearing Notices and Putative Grounds for Revocation: The hearing notices served on the named criminal conviction plaintiffs cited only Rule 8-15A, which was part of the TLC Adjudication Rules, and which referred generally to "qualifications for licensure" and

[5] The TLC will likely note that it does not seek revocation for all offenses, but "only" for those included on a list of offenses. This list is drafted not by the commissioners, but by TLC's general counsel. The list is not published, and is not available to the driver or even to the TLC ALJs. A-193-94, 210, 133. In any event, there is no law authorizing revocation for the crimes on the list either.

allowed for a "fitness hearing." These hearing notices made no reference to NYC Code § 19-505(b), the statute that defines fitness for licensure, with "good moral character" being among the standards, or to TLC Rule 2-02A, which mirrors § 19-505(b). Even if the citation of Rule 8-15 could be said to raise the "good moral character" standard, the notices alleged no facts that would indicate a defect of character, and none of the plaintiffs was ever found to lack good moral character. (Later, after the revocation hearings were shifted to OATH, the TLC would change its hearing notices to include other Rule and Code citations, as discussed below.)

Though the TLC never cited § 19-512.1 in hearing notices issued to any of the plaintiffs, the Report relied on it. But, as the Court of Appeals stated, the Report failed to consider "plaintiffs' argument that the [public health or safety standard] is inapplicable here because § 19–512.1(a) applies only to revocation of *vehicle* licenses, not *driver's* licenses." Slip Op. 5. By its terms § 19–512.1, titled "Revocation of taxicab licenses," provides:

> (a) The commission may, for good cause shown relating to a threat to the public health or safety and prior to giving notice and an opportunity for a hearing, suspend a taxicab or for-hire vehicle license…. The commission may also … issue a determination to seek suspension or revocation of such license and after notice and an opportunity for a hearing suspend or revoke such license.

Not only was this section left unmentioned in the hearing notices, it was never cited by any TLC judge in his or her recommendation to revoke or by Chairman Daus in ordering revocation. That it remained unmentioned makes perfect sense: As discussed below, the provision pertains to "taxicab licenses" and has no bearing on the taxicab *drivers'* licenses at issue here.

E. Revocation Hearings For Criminal Convictions: When pursuing revocation of plaintiffs' licenses, the TLC practice was to hold a session with one of its ALJs, which, as Judge Ellis put it, "take[s] the form of a 'fitness hearing.'" The TLC has conceded that these "fitness hearings" were not based on the alleged violation of any TLC rule or statute. A-168-73, 1345-46.

The notices ordering the hearings were form letters, identical except for inserted details, such as the hearing date. These notices alleged nothing of substance except the fact of the conviction. They never mentioned good moral character or § 19-512.1, and alleged no facts suggesting a threat to public health or safety going forward. A-597, 599, 909, 939, 941.

At the hearings themselves, the TLC, as its prosecutor admitted, presented no evidence apart from documentation of the conviction. A-1157-58. While the TLC judges heard testimony, they did not consider whether the crime was committed off-duty, or in the heat of passion, the sentence imposed by the criminal court, or that it was a first offense. Mitigating evidence such as the cabdriver's record on-the-job or as a citizen was also systematically disregarded. A-201, 1157-58 (¶ 22), 1312-13, 1351. In most cases, the TLC never even attempted to learn the facts underlying the conviction. A-1312, 1359-63. Thus, even if defendants may *now* claim to have been acting on a threat to public health or safety, they alleged no facts and presented no evidence pertinent to any such finding. As one TLC ALJ testified, once the TLC proved the conviction, it was "[g]ame over." Gottlieb 51. Thus it is beyond dispute that the TLC enforced what the Court of Appeals termed an "unpublished … policy [that] imposed revocation as a *per se* penalty for conviction for certain offenses, including the offenses of which plaintiffs were convicted, with a hearing only to confirm the correct identity and nature of the offense." Slip Op. 5 (citing testimony by the TLC witnesses).

Following the hearing, the TLC ALJ invariably recommended revocation.[6] In the course of discovery, defendants produced at least 843 letter rulings by Chairman Daus dating back to 2002, relating to both conviction revocations and drug-test revocations. The chairman accepted

[6] Marc Hardekopf, the TLC's chief prosecutor, testified that the TLC prevailed in every criminal conviction case brought in the TLC tribunal since 2003. In drug cases, he testified that the TLC prevailed in every case except one since 2002. A-1338-39; *see also* decisions at A-103-118.

the recommendation to revoke every time. A-30-31, 177. The chairman's order is final, with no appeal to the commissioners. A-1248-49.

F. The TLC Drug Testing Program: The NYC Code § 19-505(b)(6) provides that a taxi driver may not be "addicted to" drugs or alcohol. TLC Rule 2-20 requires revocation where a driver "operate[s] a taxicab while his driving ability is impaired," whether by alcohol or drugs. The same rule bars drivers from consuming intoxicants "for six hours prior to driving or occupying such taxicab."

No statute authorizes the drug testing of taxi drivers. Despite the absence of legislative authority, TLC Rule 2-19A permits a drug test where the TLC "has reasonable suspicion to believe that a driver has a drug or controlled substance impairment that renders him or her unfit for the safe operation of a taxicab." Rule 2-19B requires annual drug tests, even absent cause or suspicion. Just as there is no history of violent taxi drivers preying on passengers, the TLC implemented this program without any evidence of a drug problem in the industry. Indeed, the longtime TLC prosecutor conceded that in nine years the agency never had cause to test a driver based on even reasonable suspicion of drug use. Even among taxi drivers who did test positive, not one was found to have been impaired while on duty. A-221, 444. And, as the TLC's general counsel and defendants' drug testing expert both concede, a positive drug test in no way demonstrates either addiction or on-duty intoxication. A-444-45; Swotinsky 99.

As to the possible penalty for a positive test, TLC Rule 2-19B2 provides: "If the results of said test are positive, the driver's license *may be* revoked after a hearing in accordance with §8-15 of this title." (Emphasis added). Rule 2-86, the penalty section of the Driver Rules—while mandating revocation for a violation of Rule 2-20A—did not provide for *any* penalty as to Rule

2-19B2. The penalty section is simply blank.[7] Despite the discretionary language of Rule 2-19B2 and the absence of the penalty in Rule 2-86, the TLC's de facto policy has been to revoke for *any* positive drug test. As the TLC's general counsel admitted, there was "no mitigation, no exceptions." A-199.

The TLC program requires review of lab test results by a medical review office (MRO). But the MRO does not check that the drug testing was accurate—he presumes it was accurate—but only that the paperwork is in order. Dash 30-31; Swotinsky 84-85. If the MRO finds that there is a legitimate medical cause for a positive test result,[8] such as use of a prescription drug, he changes the "fail" to a "pass." Swotinsky 75-76.[9] This reversal occurs apart from the hearing process and does not involve an ALJ ruling at all.[10]

G. Drug Test Revocation Hearings; Possible Errors: Where a drug test result remained positive, the TLC would seek revocation. The notices ordering these hearings cited TLC Rule 8-16A (an adjudication rule that allows for a summary suspension where "emergency action is required"). The notices alleged a positive test, and informed the driver his license had been suspended even prior to any hearing. But they did not cite either Rule 2-19 or any fitness rule; nor did they even indicate what drug was found or the quantity. A-119-22.

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[7] As the Court of Appeals noted, FHV Driver Rule 6-16V2 at one time included a provision stating, "A finding that a driver has failed said test will result in the revocation of the driver's license." This language was inserted as part of a reciprocity accord between the City and neighboring counties without notice and comment and is therefore void under CAPA. It was later removed. Also, as with the medallion driver rules, the penalty section corresponding to Rule 6-16V2 is blank. FHV Rule 6-22, PX W. Currently, FHV Driver Rule 55-14C and Taxi Driver Rule 54-14C are the same, with a variation in the penalty language. PX X. As discussed below, the current versions of the rules, which became effective in 2011, do include a penalty provision.

[8] The MRO is supposed to contact the donor to ask if he has any explanation for the positive result. But the MRO retained by the TLC was not sure how often their efforts to speak to the donors were successful. Dash 45-46.

[9] The report by the defendant's drug testing expert, who also works as an MRO, indicated that the "reversal rate" in TLC testing was three-to-five times the national average. Swotinsky Report at 8, PX C.

[10] In their appeal brief, defendants wrote; "In a drug test hearing, the fitness hearing serves to ensure that there is no medically valid explanation for the positive drug test." Appellee Br. at 10. But as the City's own witnesses admit, the reversal of a fail to a pass is by the MRO, with the ALJ playing no role. Swotinsky 75; Salzman 90-91. Thus, the only real function of the drug test hearing is to assure that "there was no mistaken identity, i.e. that TLC has the right person." Appellee Br. at 10.

At the hearings themselves, the TLC presented no evidence apart from the putative test result. A-1172-73. Indeed, the TLC did not ordinarily even send a lawyer to drug test hearings. PX B. There was no testimony from anyone involved in the testing process, whether the specimen-intake, the chain of custody, or the testing itself. Instead, the TLC relied on unauthenticated documents totaling two pages summarizing the test results and the MRO's certification. Hardekopf 49-51; Coyne 142-43; Fioramonti 47-48. TLC ALJs admit that they were trained to accept by rote the "representation" that the drug test was conducted properly and they were provided "boilerplate language" to that effect for insertion in their decisions. A-1265-71. Yet, LabCorp, the TLC's drug-testing vendor, has made no such representation and it does *not* comply with federal guidelines in its TLC testing.[11]

At the hearing, there was no way a driver could challenge the putative drug test result as there were no witnesses to cross-examine. The TLC has suggested that no cross-examination is necessary because its drug testing was flawless. Indeed, after this case was remanded, defendants offered a report by a putative expert, Dr. Swotinsky, which stated that the false positive rate in testing is "essentially zero." Swotinsky Report at 7.[12] But when Dr. Swotinsky was cross-examined, he admitted that he could cite no peer-reviewed article—nor any statement by LabCorp—that supported his assertion. Swotinsky 148-150. Dr. Swotinsky further admitted that his statement was premised on a narrow definition of testing error, and did not account at all for possible errors in the handling, labeling, transferring or storage of the drug sample. Swotinsky

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[11] Despite submitting hundreds of pages of affidavits, defendants offered no statement by LabCorp that it complied with federal standards *in its TLC testing*. In fact, they do not comply with those standards, which require, among other things, the use of split samples to allow testing of a 'B' sample if the 'A' sample tests positive. LabCorp does not do use split samples for taxi driver tests. Woodford Report, A-1386. Indeed, defendants' own witness admitted, however reluctantly, that federal rules require split samples. Swotinsky 60.

[12] Though he was presented as an expert in drug testing, Dr. Swotinsky admitted he had never conducted a laboratory drug test in his entire professional career and that he had never visited or inspected any LabCorp facility. Swotinsky 43, 62, 141.

44-46. Plaintiffs' expert, Dr. Woodford, meanwhile, stated in testimony cited by the Court of Appeals: "[E]rrors can occur in the intake of the specimen; the handling of the specimen within a given facility; and the transfer of the specimen from the intake center to a distant testing facility. Errors can also occur in the testing process itself." A-1386-93; Slip Op. 9. Of course, with roughly 100,000 taxi drivers being tested annually, even an overall error rate as low as 0.5% would impact 500 drivers every year.

Even if a driver presented an expert toxicology witness, there was no chance of upsetting the finding because, as Coyne testified, "[T]hat was beyond something I could rule on as a judge because the TLC always accepted whatever was in that document was valid." A-1272. By the same token, the ALJs' unfailing practice was also to reject any innocent ingestatation defense (per TLC policy) or any evidence in mitigation. Fioramonti 52-54; Schwecke 78, 102.

As in the conviction context, the TLC judge invariably recommended revocation and Chairman Daus accepted these recommendations without fail. Like the ALJs, the chairman required no evidence of on-the-job impairment or addiction. A-177, 1338-39, 444 ¶ 25. Again, the chairman's revocation order was final. A-131-32.

H. The TLC Tribunal:

ALJs May be Fired At-Will: The TLC judges who adjudicated at revocation hearings, always ruling for the TLC, were at-will employees of the agency. They worked on a *per-diem* basis, enjoying no fixed term in office, and had no contractual or civil service protections. A-1383, 1253-54. Chairman Daus had the ultimate authority in hiring. A-174, 241. Once hired, ALJs were required to apply for work assignments each month; those assignments could be denied without cause. A-138, 250. Thus, if a particular ALJ fell from favor, the TLC would not even need to fire him or her; it could have simply left the ALJ unassigned.

The TLC tribunal has four locations and a staff of 50-80 ALJs at any given time. A-254. Most ALJs worked in Long Island City, adjudicating ordinary citations. Bonina 112-13. A much smaller cohort presided over the so-called fitness hearings, which were conducted at the TLC headquarters. In these revocation cases, just five ALJs presided 63% of the time. A-31.

From the time Daus joined the agency, initially as "special counsel," the agency fired at least 30 ALJs. A-1193-94, 1232-43. Daus personally fired at least one judge, Eugene Glicksman, who issued rulings against the agency. A-33-43, 1288. He also fired Dominic Pistone, a former director of adjudications, who challenged his practices. A-44-47. The TLC has insisted that it has the right to fire ALJs without cause and has litigated successfully in defense of that right. *Glicksman v. NYC Env. Control Bd.,* 2008 WL 282124 (S.D.N.Y. 2008)*, summarily aff'd,* 2009 WL 2959566 (2d Cir. 2009). Thus there is no dispute that the TLC ALJs knew they could be fired—or simply left unassigned—without cause at any time. A-136, 203-14, 1383, 879.48-.53.

Demotion or Reprimand for 'Incorrect' Rulings: TLC ALJs are also subject to reprimands and threats from superiors. For example, in early 2006, ALJ Gottlieb recommended in three "summary suspension" hearings (another form of fitness hearing) that a driver's suspension be lifted. *See Nnebe v. Daus*, 644 F.3d 147, 152-53 (2d Cir. 2011). In these rulings, Gottlieb stepped out of line: In hundreds of prior cases, every other TLC ALJ ruled that the suspension should remain in effect. A-48-49, 203.10-.11.

The agency responded to Gottlieb with aggression and alarm: Deputy Chief ALJ Coyne phoned Gottlieb and e-mailed him. He told Gottlieb his rulings were "improper." A-1228. He instructed Gottlieb to inform him before issuing another pro-driver recommendation. *Id.* Gottlieb testified that he was told his rulings had angered TLC executives, and that he was worried he

would be sent back to Long Island City. A-203.14. As a result, he promised to change, and he never again ruled in favor of a cabdriver on summary suspension again. A-203.10-.11.

Like his colleagues, Gottlieb *never* ruled against the agency in a drug test or criminal conviction revocation hearing. But shortly before he quit the agency he prepared a draft recommendation that favored a taxi driver named Devon Elliot. (Elliot had tested positive, but Gottlieb found that his drug use was unintentional.) Gottlieb offered the Elliot ruling in draft form because, he testified, "I knew that my supervisors would be very upset had I done that. They would probably consider that to be insubordination." Gottlieb 18. Gottlieb asked Coyne for "permission" to issue the decision "due to the unorthodox nature of the result"—meaning that it was in favor of the cabdriver. A-1144, 203.18-.19.

Coyne circulated Gottlieb's draft to a TLC deputy commissioner and to his fellow supervisors. The supervisors denounced the draft, with Chief ALJ Bonina stating that while "we can't tell an ALJ how to decide a case … we as supervisors do have an obligation to point out to an ALJ when a decision is blatantly wrong." A-1147. Coyne then ordered Gottlieb to change his decision. A-203.16-.19. As a result, Gottlieb reversed course and ruled for the agency. Gottlieb testified: "I tried to obtain a result that I thought was proper. I was told to do it a different way. Therefore I did it the way I was told it should be done." Gottlieb 88-89.

Ex Parte Instructions: The TLC judges enforced the agency's unwritten rules-in-fact in compliance with pervasive *ex parte* directives. These directives were communicated through training and via an internal manual. The Manual, issued in 2000 and whose lead author was Matthew Daus, was not available to taxi drivers or their lawyers (if they had lawyers) or to the public. It was not reviewed or voted on by the commissioners. It was not even published on the

TLC website. A-96, 188; Def. Rule 56.1 Statement ¶ 268, PX P. Still, the ALJs were told to consider the Manual binding and to make it their "Bible." A-157, 162, 181.

It was the Daus Manual— not any regulation enacted by the commissioners— that provided for revocations upon and criminal conviction and sets forth the rule of decision in revocation cases. A-100-101, 161. It was the Manual, not any rule, that stated: "Any driver who fails to rebut the positive test results is no longer fit to be licensed." It was the Manual that barred any consideration of the cabdriver's DMV record at drug test hearings. A-102.

TLC judges conceded that they follow TLC policies stated in the Manual, even when that policy has not been enacted by rule. A-1277, 1305, 1307, 1317, 1255, 1258. Coyne testified: "[W]e were told we had to abide by the Manual" and that he felt no less bound by the Manual as compared to enacted rules. A-1276-79. ALJ Schwecke, another supervisor, described her training for fitness hearings as observing and "reviewing the Manual that was in place at that time. That was basically it." A-1380. ALJ Fioramonti, who conducted more revocation hearings than anyone, summarized the practice: "You're going to be doing fitness hearings, you watch somebody doing them and you do them." A-1321. Of course, any new ALJ watching his colleagues would surely note that, as night follows day, when the TLC seeks revocation, the ALJ so recommends. And the Manual's *ex parte* dictates were repeatedly and directly reflected in the ALJs' decisions always recommending revocation. A-64-95.

I. Revocation Hearings at OATH: The TLC's 800-plus case "winning streak" continued even after the hearings were transferred from the TLC tribunal to OATH, albeit with a few wrinkles. Indeed, in their brief to the Court of Appeals, defendants admitted: "[From June 2007 to] May 25, 2010, OATH ALJs … issued 34 decisions in criminal conviction fitness cases, and recommended license revocation in all of them." In drug test cases, "OATH judges … issued

124 decisions … and recommended license revocation in 120 of those cases." In the rare case where the OATH ALJ ruled for the driver, the chairman simply rejected the recommendation and revoked the license anyway. Appellee Br. at 16, PX J. Afterwards, OATH judges continued to rule as the TLC requested in every case but one. And the TLC chair accepted every OATH ruling, except, of course, in the few cases where they favored the driver.[13]

The Transfer from TLC to OATH: Before the TLC allowed for the transfer, there was a negotiation—all non-public and *ex parte*—between TLC officials and the tribunal. Indeed, initially Chairman Daus "flat out refused" to transfer cases to OATH because he feared OATH judges would not rule quickly enough. PX D. OATH was concerned, as the TLC General Counsel explained, about the impact on its docket. But, in an e-mail to Charles McFaul, a supervisor at OATH, Fraser assured him that the drug test cases are "very fast—we don't actually appear in those." PX D. The hearings based on criminal convictions would also be quick and easy:

> The [criminal conviction] revocations based on convictions are also very fast. We wave a document in the air, say the magic words 'collateral estoppel,' and both sides argue nexus to the license. Maybe the respondent testifies to his personal circumstances, his need for employment, that sort of thing. The decision would be short as well, since the criminal charges aren't subject to re-litigation. PX D.

OATH Hearing Notices: The criminal conviction hearing notices (or petitions) filed with OATH differed in some respects from those filed with the TLC tribunal. OATH notices alleged violations of § 19-505(b)(5) (fitness) and of § 19-512.1 in addition to invoking TLC Rule 8-15A. PX E. In drug test cases, they would identify the drug allegedly found in the driver's

[13] The new chairman, however, has in his tenure abdicated from his responsibility under TLC Rules 8-14(j) and 8-15(d) to review the ALJ rulings. Instead he "delegated" that responsibility to the general counsel. PX H & I. It was not until December 2012, after the Court of Appeals ruled in this action, that an OATH ALJ ruled in favor of a driver in a drug test case and saw his recommendation accepted.

urine and the amount. PX F. Though the notices invoked § 19-512.1, the TLC, as before, alleged no facts that would indicate the driver presented any threat to the public going forward.

OATH Hearings and Decisions: At OATH, similar to the TLC tribunal, not one driver in 20 was represented by counsel at revocation hearings. Ackman Decl. ¶ 10; *see* Salzman 17, 170. As before, the agency called no witnesses and relied solely on documentation of the conviction or the drug test—the same presentation it made at the TLC. Appellee Br. 21. Early on, in a few drug test cases, OATH judges ruled for the driver, but each time the TLC chair ordered revocation regardless. In criminal conviction cases, OATH judges recommended revocation every time, continuing to apply the TLC policy that off-duty convictions merited revocation.

According to Fraser, who served as an OATH judge before joining the TLC, it was the practice of OATH ALJs to treat the agency chair's rulings and policy to be binding precedent. A-889-90. Thus after Chairman Daus reversed several OATH rulings in favor of drivers the OATH judges followed his direction, as well as his policy view in criminal convictions—"just wave a document in the air, say the magic words"—all regardless of whether there was an enacted statute or rule authorizing that policy. Indeed, in the few cases where a driver did argue that a policy was not duly enacted, the OATH ALJ refused to decide, saying the issue "would more appropriately be reviewed in an Article 78 proceeding in Supreme Court, and not by this tribunal." TLC v. Chaudhry, OATH Index No. 1012/08 (Nov. 30, 2007). Thus, OATH ALJ rulings relied on the drug test result or the criminal conviction without more, perhaps referencing § 19-512.1, though not requiring any allegation (or evidence) that the driver posed any threat to public health or safety.[14]

[14] Several years after the revocation hearings were moved to OATH, the tribunal published a guidebook called "Taxi and TLC-Licensee Cases: A Guide to Your Hearing at the OATH Tribunal." PX L. This guidebook suggested that the taxi driver submit "evidence," that he might call witnesses, and he might tell his "side of the story." But it

The 2011 Rule Changes: In April 2011, after the appeal brief in this action was filed, the TLC promulgated a new set of rules (which included a re-drafting and re-numbering of all the rules). The new rules included a new driver Rule 54-14C3, which provides: "*Results of Drug Test*. Driver must pass every drug test, including 'For Cause' drug tests under §54-14(c)(1) and 'Annual' drug tests under §54-14C2. If the results of either test are positive, or if the sample cannot be tested, the Driver's License can be revoked after a hearing." This was the first reference in any TLC rule to a penalty possibly being imposed for a sample that "cannot be tested." It added also for the first time a penalty provision: "Fine: *Suspension* or revocation of license." (Emphasis added). Rule 8-15(a) was amended substantively by new Rule 68-20A. PX X. The amended rule provided— for the first time— an explicit statement that a criminal conviction or a positive drug test might be grounds for a "fitness hearing."[15] After its enactment, the TLC's OATH petitions cited this rule.

OATH Surrenders and Stipulations: Over time, as the outcome of the OATH proceedings became certain, contested hearings became rare events. The practice at OATH was to hold a pre-trial settlement conference, attended by the driver, the TLC prosecutor and an OATH ALJ. As Hardekopf explained in an affidavit, at these conferences, the driver was urged to surrender his license as he had little or no chance of prevailing:

> At these conferences, the OATH judges would inform the driver that even if they prevailed at a hearing, the TLC Chairman could and would likely order

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offered no suggestion as to what evidence or what kind of witness might (even in theory) impact the outcome of the hearings. The guidebook advised that the TLC would be required to "persuade the judge" that the driver's continued licensure made him a "risk to the public safety," never intimating that, once the criminal conviction or the drug test had been presented, the TLC had never in years failed to "persuade the judge"—even if it never presented any other evidence. At her deposition, OATH ALJ Salzman, the author of the guidebook, explained, "What I had in mind really … was they really need to get a lawyer." Salzman 44-45. As to what evidence or witness the lawyer might helpfully introduce, Ms. Salzman replied, "That's up to the lawyer." Salzman 46.

[15] New Rule 68-20A specifies: "Charges that a Licensee is not Fit to Hold a License may be as a result of, but are not limited to: (1) A criminal conviction [or] (2) A failed drug test as a result of illegal drug use or a sample which cannot be tested."

> revocation. This information led many drivers to surrender their licenses rather than proceed with a hearing. Surrendering their licenses allowed them to reapply [later for a new license] without a revocation on their record or having the recommendation [noting a conviction or a drug test result] published on the internet. Hardekopf Decl, PX M, ¶ 10; *see also* Godinger Decl., PX N, ¶ 6.

In fact, of the 232 OATH decisions produced by the TLC in discovery, 91% of them came not after a contesting of the charges, but after a default hearing. Ackman Decl. ¶ 9. After these default hearings, without exception, the ALJ issued a recommendation to revoke. When the driver did appear, he was informed that contesting the charges would be futile, and the vast majority agreed to surrender. Hardekopf Decl. ¶ 10; Godinger Decl. ¶ 6; Ackman Decl. ¶ 9.

J. The Individual Plaintiffs:

Plaintiffs Tobby Kombo, Robert Dyce, and Moustach Ali were all longtime taxi drivers whose licenses were revoked following criminal convictions. In each case, the crime was off-duty. Kombo's crime was assault, a class D felony, committed in his kitchen against his ex-wife, who, Kombo testified, entered his apartment uninvited, refused to leave, and deliberately broke his dishes. A-658. A first-time offender, Kombo was sentenced to five years probation, and was granted a Certificate of Relief against Disabilities. A-598, 654. Dyce was convicted of a misdemeanor, criminal possession of a forged instrument, specifically a parking pass, which he used to park in front of his church. He was sentenced to two days of community service. A-910. Ali was convicted of a non-criminal DWAI violation, which occurred while he was off-duty in upstate New York. His N.Y. State (DMV) driver's license was suspended for 90 days, as is mandatory under the Vehicle and Traffic Law § 1193, and he was required to pay a $300 fine and to complete an alcohol and drug program. A-940. As with hundreds of other revocations, the TLC never alleged the violation of any Code provision or rule pertaining to taxi drivers. A-114-18. Plaintiffs Saul Rothenberg, Ebrahim Abood, Konstantinos Katsigiannis, and Boubacar

Doumbia, all longtime drivers, had their taxi drivers' licenses revoked after testing positive for drugs. None of them was accused of being impaired while on duty or of being addicted to drugs. R. 56.1 Statement ¶¶ 146-160.

ARGUMENT

A taxi driver's license is a form of property to which the driver may not be denied without due process of law. *Bell v. Burson*, 402 U.S. 535, 539 (1971). While "[a]ny significant taking of property by the State is within the purview of the Due Process Clause," *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972), the permanent denial of a license is an urgent matter. *Kuck v. Danaher*, 600 F.3d 159, 164 (2d Cir. 2010). "The Supreme Court has 'repeatedly recognized the severity of depriving someone of his or her livelihood.'" *Spinelli v. City of New York*, 579 F.3d 160, 171 (2d Cir. 2009) (quoting *FDIC v. Mallen*, 486 U.S. 230, 243 (1988)). Nevertheless, defendants' practices and policies denied the plaintiff taxi drivers due process, including by depriving them of fair warning of the law, of adequate notice of charges filed against them, and of the right to a meaningful hearing before an unbiased tribunal.

I. THE TLC'S DE FACTO PRACTICES DENIED TAXI DRIVERS FAIR WARNING OF THE LAW

Rejecting the district court's grant of summary judgment to defendants on plaintiffs' fair warning claim, the Court of Appeals cited its own decision in *Piscottano v. Murphy*, in which it wrote, "[A] law or regulation whose violation could lead to [a deprivation of life, liberty, or property] must be crafted with sufficient clarity to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited and to provide explicit standards for those who apply them." 511 F.3d 247, 280 (2d Cir. 2007). Two weeks later, the U.S. Supreme Court re-affirmed this principle even more broadly in *F.C.C. v. Fox Television Stations, Inc*., 132 S. Ct. 2307, 2317-18 (2012). Writing for a unanimous Court, Justice Kennedy stated, "A fundamental

principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required…. [This principle] requires the invalidation of laws that are impermissibly vague. " 132 S. Ct. at 2317.

By enforcing de facto policies and practices by which it revoked plaintiffs' licenses, the TLC violated this fundamental principle. Thus defendants denied cabdrivers "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictat[ing] that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 574 (1996). As the Court of Appeals also noted, even in a civil regulatory context,[16] a court "cannot defer to [an agency's] interpretation of its rules if doing so would penalize an individual who has not received fair notice of a regulatory violation." *Upton v. S.E.C.*, 75 F.3d 92, 98 (2d Cir. 1996).[17] Imposing a penalty without law is not a minimal or technical violation. It is one of "the basic protection against 'judgments without notice' afforded by the Due Process Clause." *BMW*, 517 U.S. at 575 n.22 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 217 (1977)).

Plaintiffs' fair warning claim is not what the Supreme Court has called "the typical 'void for vagueness' situation" where the question is whether "men of common intelligence must necessarily guess at [the law's] meaning." *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) (internal quotation omitted). Plaintiffs' claims are grounded in a distinct but "related manifestation of the fair warning requirement." *U.S. v. Lanier*, 520 U.S. 259, 266-67 (1997).

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[16] Both the Supreme Court and the Second Circuit have termed license disbarment proceedings "quasi-criminal." *In Re Ruffalo*, 390 U.S. 544, 551 (1968); *Erdman v. Stevens*, 458 F.2d 1205, 1210 (2d Cir. 1972).

[17] *See also Marrie v. S.E.C.*, 374 F.3d 1196, 1206-1207 (D.C. Cir. 2004) ("Fair notice of the standards against which one is to be judged is a fundamental norm of administrative law: [t]here is no justification for the government depriving citizens of the opportunity to practice their profession without revealing the standard they have been found to violate") (internal quotation omitted).

This is, rather, a case where the written law is clear, but the prosecuting authority has imposed a different rule, not based in law. As the Court explained in *Bouie*:

> When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. 378 U.S. at 352.

The TLC's practices violate the Due Process clause in precisely this fashion: The duly enacted regulations are precise, and they give no indication that the TLC would seek, and obtain, revocation for off-duty crimes outside the scope of the TLC rules. Rather than comply with the code and rules, the TLC has enforced a law you cannot see and that is fundamentally wrong.

A. The TLC's *Per Se* Criminal Conviction Revocation Policy Is Not Announced by Any Law

New York's penal law defines crimes and prescribes sanctions.[18] There is, however, nothing in any TLC rule—and nothing in New York law—that states or suggests that a taxi driver's license shall, or even might, suffer a separate and additional penalty for an off-duty crime. As the Court of Appeals noted, and as detailed above, the TLC rules are replete with "specific prohibitions and penalties" that speak to practically every possible criminal act where it is "committed while the driver is on-duty." Slip Op. 5. That revocation was permitted or required for on-duty conduct (but not off-duty) is what the Court of Appeals refers to as the "core meaning" of the TLC rules, both in whole and in part. *See Cunney v. Bd. Trs.*, 660 F.3d 612, 615

[18] Certain driving-related crimes are defined by the Vehicle and Traffic Law (VTL). The VTL, for example, requires a six-month suspension of a driver's license for a first driving-while-intoxicated offense. § 1193(2)(a)(2). A first driving-while-ability-impaired offense (which is not a crime, but a traffic infraction) carries a three-month suspension. § 1193(2)(a)(1). Thus, the VTL already insures that the offender will be off the road for a six- or three-month period. The VTL also has a specific provision relating to driving a taxicab while intoxicated, which requires additional civil and criminal penalties and a license suspension of one year. § 1193 (1)(d)(1); § 1193(2)(a)(4).

(2d Cir. 2011). Beyond specifying the conduct, including criminal conduct, that merits revocation, the commissioners, in enacting the rules, specified when off-duty crimes permitted revocation—that is, for probationary drivers. Thus, reading the rules as a whole or applying the *canon expressio unius est exlusio alterius*, there is simply no room for the TLC executive arm to create an unpublished, unenacted policy-in-fact by which it applies "a *per se* penalty for conviction for certain offenses." *See* Slip. Op. 5

That a *per se* policy was in effect de facto is demonstrated by the testimony of the presiding TLC ALJs, the TLC prosecutor, and the TLC general counsel, all of which was cited by the Court of Appeals. A-1312–14 (Fioramonti), A-445 (Fraser), A-1366 (Hardekopf). Testimony by other ALJs reinforces this conclusion. As another testified, once the agency showed the conviction, it was "Game over." Gottlieb 51. That the TLC enforced this de facto rule is demonstrated beyond peradventure by the fact that for more than a decade no TLC ALJ nor OATH ALJ failed to recommend revocation, and the chairman never failed to order it. A-30-31, 177, 1338-1339. Thus the constitutional violation occurs because TLC executives, acting by fiat, ignore the lines drawn by law and insist on revocation "based on a single factor not mentioned" in the rules. *Deegan v. City of Ithaca*, 444 F.3d 135, 145-46 (2d Cir. 2006).

As the Court of Appeals noted, the district court "analyzed whether the conviction plaintiffs had fair warning not under the 'good moral character' standard but under a 'threat to the public health or safety' standard," citing § 19–512.1(a). Slip Op. 4-5. In fact, the hearing notices served on plaintiffs, while arguably alluding to "fitness," did not cite *either* standard. Even if § 19–512.1 had been invoked, the Report, as the Court of Appeals noted, failed to "address plaintiffs' argument that [§ 19–512.1] is inapplicable here because … by its terms [the section] applies only to revocation of *vehicle* licenses, not *driver's* licenses." Slip Op. 4-5.

That § 19–512.1 has no bearing on taxi driver's licenses is evident from the language, structure and context of the provision. First, on its face, the provision refers to "taxicab or for-hire *vehicle*" licenses," not to "taxicab or for-hire vehicle *driver's* license[s]," a term used elsewhere in the same chapter of the Code. *See* § 19-507.1. Indeed, "vehicle license" and "driver's license" are defined terms in the Code, with *different* definitions. §§ 19-502(d) & (e). Second, § 19-512.1 is appended to § 19-512, which concerns the "Transferability of taxicab licenses." Taxi driver's licenses are, by contrast, not transferable. Third, § 19-512.1(b) sets forth affirmative defenses—"due diligence in the inspection, management and/or operation of the taxicab" and lack of knowledge of "acts of any other person with respect to that taxicab"—that make sense when applied to taxicab owners. But they have no relevance whatsoever to *drivers*.

Even if—ignoring its language, context and structure—§ 19–512.1 had been invoked, there would have been no factual premise for it. By its terms, the provision requires a finding of "good cause … relating to a threat to the public health, or safety." The hearing notices claimed no cause and cited no facts indicating that the plaintiffs posed any threat; the same is true of the ALJ rulings. Later, after the hearings were transferred to OATH, the hearing notices did cite this section, but still without alluding to evidence or finding any threat. And even if the notices had cited the section, the drivers would still have been denied constitutional fair warning because § 19–512.1 does not provide that an off-duty criminal conviction is *possible* grounds for revocation. Even with the new Rule 68-20, to this day, which does mention convictions, there has been no fair warning of the de facto *per se* rule.

The fitness statute, which the hearing notices also never pleaded, likewise failed to provide fair warning. As the Court of Appeals noted, a "good moral character" standard (*see* § 19-505(b)(5)) may itself be vague, unless narrowed by reference to some clearer standard. Slip

Op. 5. Nor can the conduct at issue be "so clearly within the ambit of the provision that [drivers] had warning that their conduct would lead to revocation." *Id*. This conclusion is inevitable as a matter of law in light of the evidence including "the specific prohibitions and penalties set forth in the TLC Rules" (Slip Op. 5) as well as the fact that these rules allow for revocation (by non-renewal) of probationary drivers convicted of a crime, but say nothing of the kind for non-probationary drivers. These various and specific rules are what define the "norms" of the taxi driver community. *See id*. (quoting *Perez v. Hoblock*, 368 F.3d 166, 175–76 (2d Cir. 2004)). Moreover, it is axiomatic that not every crime demonstrates moral turpitude. For example, the Second Circuit has held that a drunk driving offense is not a crime of moral turpitude, even a third offense, making it a felony. *Dalton v. Ashcroft*, 257 F.3d 200, 206 (2d Cir. 2001). It has also held that a conviction for felony attempted assault is not a crime of moral turpitude. *Gill v. I.N.S.*, 420 F.3d 82 (2d Cir. 2005). Just recently, the Appellate Division held that even where a construction worker was guilty of a federal fraud crime "to secure a job on a construction site," it was not the type of character offense that "adversely reflect[ed] on his fitness to hold a licensed position in the construction industry." *Gallo v. Limandri,* 102 A.D.2d. 621, 624 (1st Dep't 2013).[19]

B. The TLC's Drug Test Policy Has No Basis in Law or Regulatory History

As to the drug test plaintiffs, the fitness statute speaks of "addiction," not use, which can be solitary or occasional. NYC Code § 19-505(b)(6). While no statute authorizes revocation, and while the penalty schedule of the TLC rules lists no penalty for testing positive, there is no dispute that the TLC revokes the license of every taxi driver it asserts has tested positive for

[19] Even if defendants were to argue—which would be an impermissible new argument—that all crimes, even off-duty misdemeanors, demonstrate a defect of character, that position would have no basis in law and it would not justify the TLC's persistent practice of seeking and ordering revocation without any consideration of the facts and circumstances of the crime. *Matter of Principe*, 20 N.Y.3d 963 (N.Y. 2012).

drugs. Thus, the TLC executive established a rule-in-fact, denying drivers fair warning and substituting its caprice for law. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). The Report disregarded the statute and instead focused on what the Court of Appeals called "discrete statements in the regulatory history of the TLC Rules." Slip Op. 3. But even that regulatory history, combined with the language of the NYC Code, demonstrates that there was nothing in the law that afforded cabdrivers fair warning of the TLC executive's rule-in-fact.

When the drug-testing program was enacted, the TLC commissioners, discussing the new rule at their public meeting, focused on the problem of *addiction*, which is not surprising given the statutory standard, which the rules may not override. When the drug-testing program was enacted, then general counsel Daus introduced the proposal at a public meeting of the commissioners by saying that the rule would require all drivers and license applicants to be tested and that it would "authoriz[e] the Commission to direct further drug testing if there is reasonable suspicion that a driver has a drug or control [sic] substance abuse problem, and to prohibit any taxicab or for-hire vehicle driver from operating a vehicle while impaired due to drugs." PX N. In that discussion, there was no suggestion of revocation for a single positive test. New Rule 2-02(i) provided that both new and renewal applicants "shall be tested." It added that "A positive test shall result in the denial of a new application.… In the case of a renewal applicant, a positive test shall result in a hearing." PX R. New Rule 2-20(a) provided that a driver "shall not operate a taxicab while his driving ability is impaired" by either alcohol or drugs. The penalty stated in Rule 2-86 was revocation. Soon after, Rule 2-02(i) migrated to Rule 2-19(b), which provided, "The [driver] shall be afforded the opportunity of a hearing as to the licensee's fitness where a positive result has been reported to the Commission." PX S. As of 2000, the language was changed to provide, "If the results of said test are positive, the driver's license may

be revoked after a hearing in accordance with [Rule] 8-15." This language remained in effect until 2011. PX T.[20] Moreover, until the 2011 amendments, there was never any language in the code or the rules that a "cold sample" would constitute a drug test failure. *See* Slip Op. 4.

Thus, TLC rules, from the beginning, provided that testing was mandatory—drivers "shall be tested"— and that new applicants "shall" be denied. Renewal applicants would, however, be summoned to a "fitness hearing." The Statement of Basis and Purpose dated June 26, 1998 also emphasized that testing was required, that a positive test "would lead" to the denial of a new application and "may lead" to the denial of a renewal application following a hearing. Beyond paraphrasing the rules, the statement noted that the new regulations "are similar in content" to U.S. Department of Transportation regulations. But the USDOT regulations, as the U.S. Supreme Court has noted, did not require termination for a positive drug test. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 632 (1989). The statement claimed that the new Rule 2-20 was similar to § 509-L of the Vehicle and Traffic Law, which provided that a bus driver shall not consume drugs or alcohol while on duty or within four hours of going on duty. But the penalty for violating § 509-L is a fine of $100-$250, not revocation. VTL § 509-O. In the last paragraph of the statement comes the language that the Report quoted not "in context," as the Court of Appeals instructed (Slip Op. 3), but divorced from the language of the Code, the rules, and even the remainder of the statement. This final paragraph provided:

> The purpose of these or proposed amendments … is to promote the safety of passengers and the general public by ensuring that drivers are not operating their vehicles when they are unfit because of impairment caused

[20] As the Court of Appeals noted, as of 2006, the rule for FHV drivers read differently than the one that applied to medallion drivers. Rule 6-16(v)(2) provided: "A finding that the driver has failed said [drug] test will result in revocation of the driver's license." This change was enacted without notice and comment and out of a desire to comply with a reciprocity compact between New York and neighboring counties. This language was never part of Rule 2-19. Under the current rules, the language is again the same, providing that after a positive test a license "can" be revoked. Compare FHV Driver Rule 55-14(e) and Medallion Driver Rule 54-14(c)(3). PX-__. In the latter rule, the penalty provision allows for "Suspension or revocation."

> by drug, controlled substance or alcohol use. The regulations clearly establish a Commission policy of zero tolerance for [drivers] who use illegal substances, or who operate their vehicles while their ability to do so is impaired by substances, whether or not illegal. PX U.

Even this statement, fairly read, applies to drivers who "operat[e] their" taxicabs while under the influence of drugs or alcohol. "Zero tolerance" does not even accurately *describe* Rule 2-19B. Even if it did, the description would be in disregard for the fitness standard—addiction—that governs regardless of what the rules may say.

At all times between 1998 and 2011, the Rule 2-19B stated that a positive test "may" lead to revocation, never that it "must" or that it "shall." A-1198-1213. Indeed, the "statement of basis and purpose" that accompanied 2005 and 2006 amendments noted: "This rule *further clarifies* that if the drug test result is positive, the licensee will undergo a fitness hearing *to determine whether* the license should be revoked." A-879.33; 879.36 (emphasis added). The 1998 statement also refers to the "penalty of mandatory revocation" that applied where a driver is "convicted of operating a vehicle while impaired." There is no such mandate for failing a drug test.

Thus, the statements of purpose, like the rules themselves, distinguish between a mandatory and a discretionary penalty. The Court of Appeals instructed this Court to "consider whether the word 'may' in the mandatory drug-testing rule misleadingly suggested a permissive standard rather than the mandatory one the TLC actually applied." Slip Op. 3-4 (citing *Natural Resources Defense Council v. NYC Dep't of Sanitation*, 83 N.Y.2d 215, 220 (N.Y. 1994) ("[W]hen the City Council intended to impart discretion" it used the word 'may' not 'shall.') This language leaves no doubt that the exercise of discretion is required in determining the appropriate response to a positive drug test. In addition to the N.Y. Court of Appeals case cited by the Second Circuit, the U.S. Supreme Court has held repeatedly that "the word 'may' customarily connotes discretion" and that the "connotation is particularly apt where, as here,

'may' is used in contraposition to the word 'shall.'" *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 346 (2005); accord: *Martin v. Franklin Capital Corp*., 546 U.S. 132, 136 (2005); *Empresa Cubana del Tabaco v. Culbro Corp.*, 541 F.3d 476, 478 (2d Cir. 2008). Given the language of the governing code, the rules, and even the commentary on those rules, taxi drivers were given no constitutional notice of the policy that the TLC in fact applied.

The TLC policy is derived not from the Code or the Rules, but from a desire to punish or from what Fraser termed an exercise in regulatory logic. This logic, while pure argument, is described in Fraser's *factual* declaration, where he contends: "No alternative sanction is provided for … and in fact [sic] it would not be logical to find a licensee unfit to hold the license, and yet impose any penalty other than license revocation, such as suspension or a fine." A-435, ¶ 10.

But the TLC's administrative fiat fails logically as well. It need hardly be said, that a positive drug test can lead to lesser sanctions, or to no sanction. In *Skinner*, 489 U.S. at 632, for example, the U.S. Supreme Court noted that a drug test standing alone could not prove intoxication on-the-job. A positive test, which showed the presence of metabolites that might have been in the driver's system for days or weeks, could "provide the basis for further investigative work" to determine whether an employee was impaired at the time of an accident. In *Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17*, the U.S. Supreme Court, rejected the a rule requiring the discharge of a truck driver who twice tested positive: "The [federal drug testing] Act says that 'rehabilitation is a critical component of any testing program.…' Neither the Act nor the regulations forbid an employer to reinstate in a safety-sensitive position an employee who fails a random drug test once or twice." 531 U.S. 57, 64-65 (2000).[21] Other NYC agencies permit an employee who tests positive to seek counseling

[21] *See also Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 314 (1989) ("An employee

or treatment. Bus drivers, for example, are not terminated for a single positive drug test.[22] Train conductors are given a second chance, and even second-time offenders are permitted to enter a rehabilitation program. *See Kwok v. NYC Transit Authority*, 2001 WL 829876, 3 (S.D.N.Y. 2001). Thus there is nothing in logic, any more than in law, mandating that a positive test lead to revocation, as opposed to counseling, rehabilitation, or suspension. More crucially, the law denies fair warning of the mandatory penalty-in-fact, which is a denial of Due Process. Finally, the new language in TLC Rule 68-20 is an admission that nothing in the old rules may be read to provide that a single positive drug test or an off-duty conviction made a taxi driver unfit.

Related State Claims: Plaintiffs are also entitled to summary judgment on their related state claims alleging that the TLC's policies-in-fact were implemented in violation of the Charter and the City Administrative Procedure Act (CAPA) *without* a majority vote of the commissioners, *without* required public notice and comment, and *without* authorization by statute or by rule. *See*, *e.g.*, *Matter of Cordero v. Corbisiero*, 80 N.Y.2d 771 (N.Y. 1992) (interpreting a parallel state statute); *Matter of Miah v. TLC*, 306 A.D.2d 203 (1st Dep't 2003). As these claims have not been adjudicated on their merits, we refer the Court to the arguments made in plaintiffs' prior Fair Warning summary judgment brief filed on June 30, 2010, at 22-24.

II. THE TLC HEARING NOTICES FAILED TO GIVE TAXI DRIVERS CONSTITUTIONALLY ADEQUATE NOTICE OF THE CHARGES

The Court of Appeals wrote: "An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the

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whose first test is positive may go to Conrail's Employee Counseling Service for evaluation. If the evaluation reveals an addiction problem, and the employee agrees to enter an approved treatment program, the employee will be given an extended period of 125 days to provide a negative test.").

[22] Section 17-610 of the NYC Code, which applies to school bus drivers, provides for a second test after an initial failure and states that the medical review officer "may, where appropriate, recommend rehabilitation or other treatment programs." *See also Gomez v. New York City Dep't of Educ.*, 50 A.D.3d 583, 584 (1st Dep't 2008) (first strike revocation held unlawful); *Brown v. Triboro Coach Corp.*, 153 F. Supp. 2d 172, 175 (E.D.N.Y. 2001) (bus driver who tested positive referred for counseling).

nature of the case." Slip Op. 6 (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)). The Court added that "The degree of required specificity ... increases with the significance of the interests at stake." *Id*. (citing *Spinelli*, 579 F.3d at 172). Here plaintiffs faced a permanent loss of livelihood, making their interests in a fair hearing "enormous." *Nnebe*, 644 F.3d at 159. Nevertheless, the notices in both the criminal conviction cases and the drug test cases were three-paragraph form letters that provided even less than the "gesture" of notice that the Court of Appeals condemned in *Spinelli*. 579 F.3d at 171-72.

For criminal conviction cases, the first paragraph stated the time and place of the hearing; the third paragraph told the driver he may bring a lawyer and/or a translator. The second paragraph stated: "The purpose of this hearing will be to determine your fitness to maintain a license in light of your final disposition in your criminal case pursuant to Rule [8-15A]." Rule 8-15A is an adjudicatory rule that does not even arguably provide a standard by which the driver would be judged. As the Court of Appeals found, the letters were vague as to what, if any, provision of the regulations plaintiffs had violated. Slip Op. 6. They did not cite either the fitness standard (Code or Rule) or § 19-512.1. The letters offered nothing as to what facts apart from the conviction (if any) might be considered. Even at OATH, facts that were arguably pertinent to alleged dangerousness or to revocation generally were left unstated.

In drug test cases, the notice stated: "The Commission has been advised that the result of your recent drug test was positive." It tells the driver his hack license has been suspended. But it does not even identify the drug for which the driver tested positive or the quantity of drug residue allegedly found. It cited Rule 8-16A, which has nothing to do with drug testing.

The Court of Appeals concluded, "The district court erred by holding the notices satisfactory without adequately considering the interests at stake and without considering the cost

to the government of improved notice." Slip Op. 6. In fact, the cost to the government of stating the rule of law allegedly violated would have been zero. The same is true of identifying the drug allegedly ingested or the facts that indicated (if there were any such facts) that the driver's licensure presented an ongoing threat to public health or safety. Thus, the notices were constitutionally inadequate under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), and *Kapps v. Wing*, 404 F.3d 105, 124–25 (2d Cir. 2005).

The Court of Appeals reiterated the well known rule that "[t]he guiding inquiry is whether the notices adequately advised plaintiffs of what the hearings would require." Slip Op. 6 (citing *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974)). The transcripts, along with the notices and the ALJ decisions, demonstrate that the TLC prosecutor presented the fact of conviction or the putatively positive drug test and rested his case. The prosecutor may have added some pro forma argument, but he would make no effort to prove or disprove any other fact. A-523-29, 563-65, 600-609, 912-18, 943-48. Though the driver was permitted to "tell his story," and some did, and while the ALJs might listen, nothing the driver says has ever been deemed pertinent to a defense or has led to any other recommendation other than revocation. If the hearings were to be empty rituals or were merely to confirm the identity of the respondent driver, the notices were adequate to that task—albeit while indicating separate constitutional violations. But if the TLC contends and demonstrates that the hearings were actually intended to resolve some legal or factual issue, the notices utterly failed to provide Due Process.

Related State Claims: Plaintiffs are also entitled to summary judgment on their related claims that defendants failed to comply with the New York Constitution, Article 1, § 12, or CAPA. Both require proper notice of the charges, that the TLC sustain the burden of proof, that cabdrivers be permitted to cross-examine relevant witnesses, and that hearings not be tainted by *ex*

parte contacts. As these claims have not been adjudicated on the merits, we refer the Court to plaintiffs' prior summary judgment brief as to Due Process Claims filed on June 30, 2010, at 19-23

III. THE TLC TRIBUNAL, WHERE ALJS COULD BE FIRED AT WILL, WAS SO SYSTEMICALLY BIASED AS TO DENY TAXI DRIVERS ANY CHANCE OF A FAIR HEARING

The Court of Appeals agreed with plaintiffs' argument that "a judge's pecuniary interest in the outcome of a proceeding can create a risk of unfairness that is intolerably high." Slip Op. 8 (internal quotation omitted). It also rejected the Report's conclusion that plaintiffs were required to name a specific adjudicator, finding that neither *Tumey v. Ohio*, 273 U.S. 510, 523 (1927), nor *Ward v. Village of Monroeville*, 409 U.S. 57, 58–59 (1972), create that requirement, especially where, as here, the claim is that an entire adjudicative body is biased systemically. *Id*. The Court of Appeals adopted the standard we have advanced throughout this action: "[T]hat an adjudicator's pecuniary interest in a case violates the due process right to a hearing before an impartial tribunal when the interest would offer a possible temptation to the average man as a judge to forget the burden of proof ..., or which might lead him not to hold the balance nice, clear and true between the state and the accused." *Id*. at 8-9 (quoting *Ward*, 409 U.S. at 60, and *Tumey*, 273 U.S. at 532 (internal quotation mark omitted); *see also*, *e.g*., *Caperton v. A.T. Massey Coal Company, Inc.*, 129 S. Ct. 2252, 2259 (2009). The evidence of possible (and actual) bias in this case far exceeds that in *Ward*, *Tumey* or *Caperton*. It includes evidence cited by the Court of Appeals [Slip Op. 9] such as:

-- "[F]inancial incentives" to the ALJs, specifically that they were subject to termination or could "simply be left off the calendar," both without cause.

-- "[A] history of ALJs ruling for the agency" in every revocation case.

-- Specific testimony by Gottlieb "that if he had issued the recommendation he had wanted to issue it would have been considered insubordination."

-- "[I]nternal e-mails" instructing ALJs how to rule and/or warning them that rulings favoring drivers were wrong.

--"[S]upervisory control by higher-level ALJs, including the ALJ Manual."

This and other evidence is discussed in greater detail above (as well as in plaintiffs' briefs filed on August 5, 2009 and on November 19, 2009).

The idea that it is fundamentally unfair for one side to control the judge's income, as the TLC did, is as old as the Republic. Indeed one of the founders' grievances against the British King listed in The Declaration of Independence was: "HE has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries." Alexander Hamilton expressed the same sentiment in *The Federalist* No. 79, where he wrote, "A power over a man's subsistence amounts to a power over his will." *See also U.S. v. Hatter*, 532 U.S. 557, 568 (2001); *Nash v. Califano*, 613 F.2d 10, 15 (2d Cir. 1980).

Such evidence was alone deemed sufficient to create an inference of bias in *Ward*, where a town mayor presided over criminal cases where guilty parties paid fines that went to the town's general fund. The Supreme Court held the arrangement unconstitutional even if the mayor did not share directly in the fines because the town, and indirectly the mayor, benefitted from findings of guilt. Likewise, in *Gibson v. Berryhill*, the Court held that a state optometry board was unconstitutionally biased because it was "composed solely of optometrists in private practice for their own account" who sat as judges in cases where licensed optometrists were charged with violating state law by working as employees of a corporation. 411 U.S. 564, 578 (1973). In *Brown v. Vance*, the Fifth Circuit invalidated the Mississippi "fee system" where the judges were paid based on the number of cases they heard, and where the prosecutors and plaintiffs could select which of a county's judges would hear a particular case. 637 F. 2d 272 (5th Cir. 1981). Judge Wisdom, writing for the court, stated, "In considering the Mississippi fee system the

relevant constitutional fact is that a judge's bread and butter depend on the number of cases filed in his court." *Id. at* 276. Following *Tumey*, *Ward* and *Gibson*, the court held:

> Because of the relation between the judge's volume of cases and the amount of his judicial income, the fee system creates a possible temptation for judges to be biased against defendants. *There is no getting around this inherent vice in a system* where two judges, dependent on fees for subsistence, have concurrent jurisdiction. 637 F.2d at 281 (emphasis added).

More recently, in *Caperton,* a state supreme court judgment was deemed invalid where the unconstitutional bias was caused by the fact that one judge among several had his election campaign supported by the CEO of a litigant. 129 S. Ct. at 2263-65. And in *Haas v. County of San Bernardino,* 27 Cal. 4th 1017, 45 P.3d 280 (Calif. 2002), the California Supreme Court, citing U.S. Supreme Court cases, invalidated a scheme by which a county bringing charges against a licensed massage parlor selected a local lawyer to serve as the hearing officer on an *ad hoc* basis. This system where the county selected the hearing officer was held rife with conflict:

> A judge has a disqualifying financial interest when plaintiffs and prosecutors are free to choose their judge and the judge's income from judging depends on the number of cases handled. No persuasive reason exists to treat administrative hearing officers differently.… [W]hile the adjudicator's pay is not formally dependent on the outcome of the litigation, *his or her future income as an adjudicator is entirely dependent on the goodwill of a prosecuting agency* that is free to select its adjudicators and that must, therefore, be presumed to *favor its own rational self-interest by preferring those who tend to issue favorable rulings*. 45 P.3d at 285-89 (citations and footnotes omitted, emphasis added).

The same is true for the TLC. What Judge Wisdom called the "inherent vice in the system" was that the agency determined, directly *and* indirectly, whether, where, when and how often an ALJ sat—and thus how much he or she was paid. In *Caperton*, one litigant influenced, albeit via an election, a judge's hiring. Here the evidence is much more: The TLC had the power to hire *and* fire, which is something no campaign contributor could do. That the TLC issued *ex parte* instruction to its ALJs, including by its Manual, is a separate violation of due process.

Orangetown v. Ruckelshaus, 740 F.2d 185, 188 (2d Cir. 1984). There is, then, no need to inquire about the ALJs' personal honesty or integrity. Here "a realistic appraisal of psychological tendencies and human weakness … poses such a risk of actual bias or prejudgment." *Caperton*, 129 S. Ct. at 2263. That risk— made manifest by the ALJs' rulings—"must be forbidden if the guarantee of due process is to be adequately implemented." *Id.* (internal quotation omitted).

The cases cited by the Court of Appeals (Slip Op. 9), as well as many other U.S. Supreme Court and Second Circuit cases, thoroughly undermine the Report's vacated conclusion that the potentiality of an Article 78 proceeding cured the unconstitutional bias. In *Ward*, the village argued that "any unfairness at the trial level can be corrected on appeal and trial de novo in the County Court of Common Pleas." But the U.S. Supreme Court disagreed emphatically:

> This 'procedural safeguard' does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. *Petitioner is entitled to a neutral and detached judge in the first instance*. 409 U.S. at 61–62 (emphasis added)

In *Concrete Pipe & Products of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, the Supreme Court followed *Ward*, writing, "Even appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator." 508 U.S. 602, 618 (1993).

More generally, as then Judge Sotomayor wrote in *Roach v. Morse*, "Plaintiffs suing under 42 U.S.C. § 1983 normally need not exhaust their administrative remedies." 440 F.3d 53, 56 (2d Cir. 2006) (citing *Patsy v. Bd. of Regents*, 457 U.S. 496, 516 (1982)). The federal civil rights statute "assigned federal courts a 'paramount' role in protecting federal rights … and was intended 'to provide dual or concurrent forums in the state and federal system.'" *Id*. (quoting *Patsy*, 457 U.S. at 506). The hearings here were based on procedure that was not random or unauthorized, but was repeated hundreds of times, and presided over by the agency's highest

officer. The Court of Appeals has "reconfirmed the long-standing and well settled proposition that an ex post, as opposed to a pre-removal hearing is inadequate to satisfy the dictates of due process where the government actor in question is a high-ranking [state] official with final authority over significant matters." *Velez v. Levy*, 401 F.3d 401 F.3d 75, 91 (2d Cir. 2005). Of course, the Court of Appeals did indicate that the availability of an Article 78 proceeding "is a relevant factor in the *Mathews* analysis." Slip Op. 8. But even as to the *Mathews* test, the Court of Appeals required this Court to "consider the timing and scope of review available under this procedure." It then noted that "Article 78 review of quasi-judicial administrative proceedings, like those at issue here, is limited in scope to 'certiorari to review,' *see* Siegel, N.Y. Practice § 560 (5th ed.), in which the court reviews the agency decision under the deferential substantial evidence standard, and may not substitute its view of the evidence for the agency's." Slip Op. 9. *See generally* NYC Bar Ass'n Amicus Brief filed to Second Circuit, PX P. Finally, in *Nnebe* the Second Circuit rejected the very same "Article 78" argument that defendants have advanced here. 644 F.3d at 155; *see also Padberg*, 108 F. Supp. 2d 177, 183 (E.D.N.Y. 2000).

In short, as the Court stated in *Krimstock v. Kelly*, the "onus" is not on the taxi driver, now minus his livelihood, to somehow retain a lawyer at his own expense to litigate in state court. 306 F.3d 40, 59-60 (2d Cir. 2002). This is especially true where an Article 78 proceeding "does not provide a prompt and effective means" for challenging the revocation. *Id*. at 49. It is rather, the TLC's obligation to provide what the *Ward* Court termed "a neutral and detached judge in the first instance." 409 U.S. at 62.

IV. THE TLC 'FITNESS HEARINGS' WERE HEARINGS IN FORM ONLY

Beginning without warning of the law or notice of the charges, the "fitness hearings," are empty of substance. While allowing for testimony and argument, they are charades that violate the "fundamental … right … to be heard in a meaningful manner." *Hamdi v. Rumsfeld*, 542 U.S.

507, 533 (2004). Reinstating plaintiffs' claims that their hearings were inadequate, the Court of Appeals cited *Nnebe*, 644 F.3d at 155–56, and mandated that this Court weigh the *Mathews* factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation ... through the procedures used, and the probable value, if any, 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 procedural requirement would entail." Slip Op. 7 (citing *Mathews*, 424 U.S. at 335).

In *Nnebe*, where the loss of the driver's license was only temporary, the Court of Appeals held that "[b]alancing the *Mathews* factors in the post-deprivation context against the relative value of additional process could lead to the conclusion that the plaintiffs' interests outweigh the burden on the City of providing additional procedural protections beyond mere confirmation of identity and charge." Slip Op. 7. Here the loss is permanent, so the driver's interest is at its ultimate. Nevertheless, the hearings provided no protection against the risk of erroneous deprivation because the ALJs simply rubberstamp the agency. Thus, the evidence here "is of the type that the Supreme Court has labeled the 'inexorable zero'" (*N.A.A.C.P. v. Town of E. Haven*, 70 F.3d 219, 225 (2d Cir. 1995))—no taxi driver ever prevailed.

Given a second chance, despite defendants' producing 40,000 pages of additional documents, the record is even more overwhelming, that, as the Court of Appeals summarized, "whether *de facto* or *de jure,* an ALJ is strictly prevented from considering anything other than the identity of the driver and the offense" for which he was convicted. Slip Op. 7 (quoting *Nnebe*, 644 F.3d at 161). Rather, as Fraser put it, the TLC would "wave a document in the air" and the result was assured. Because there is no law requiring or even permitting revocation on a conviction alone, basing the revocation on "collateral estoppel" is certain to lead to error and

renders the process constitutionally inadequate. *Connecticut v. Doehr*, 501 U.S. 1, 12-13 (1991) ("obscure" standards and minimal pleading requirements makes the risk of error impermissibly great). Even under the theory that the never-pleaded § 19-512.1 governs, the TLC must prove "a threat to the public health or safety." Yet the TLC and its ALJs gave no weight to evidence that might speak to threat—such as the nature of the misconduct, whether it was on-duty, whether or not the sentence involved jail time, or whether the crime was a first offense. Instead, the TLC accepted as conclusive the very same inference that the *Krimstock* court rejected as implausible: that an individual acting unlawfully one day (in his kitchen) will necessarily be dangerous the next day (in his taxicab). 306 F.3d at 66.

Nor have defendants adduced any evidence that the ALJs ever considered "the accuracy of the TLC's testing procedures." Slip Op. 8. In fact, the TLC ALJs admit they never did. Instead they commissioned a so-called expert report that attempted to claim—without authority of any kind—that drug-testing mistakes are somehow impossible. But their putative expert conceded, just as plaintiffs' expert plainly stated, that errors in the drug testing process are quite possible. It is for this reason that the Supreme Court has held that laboratory witnesses must be made available for cross-examination, which the TLC has steadfastly refused. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2537 (2009). While *Melendez-Diaz* is a criminal case, the right to cross-examination exists in quasi-criminal and civil settings as well. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).[23]

[23] *See also Vlandis v. Kline,* 412 U.S. 441, 452 (1973) ("The State's interest in administrative ease and certainty cannot, in and of itself, save the conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practicable means of establishing the pertinent facts on which the State's objective is premised… Rather, standards of due process require that the State allow such an individual the opportunity to present evidence."); *Galvin v. New York Racing Ass'n*, 70 F.Supp.2d 163, 178 (E.D.N.Y. 1998) (In licensing

But even where the drug test is accurate, or if drug use is admitted, the largest risk of error was in the ALJ's irrebuttable presumption that a positive drug test must require revocation. This presumption pervaded every hearing, including those at OATH, despite the fact that the statutory standard is addiction and the rule's language is discretionary. By mandating a *per se* rule that is contrary to law, the TLC "exclude[d] consideration of an element essential to the decision." *Bell v. Burson*, 402 U.S. at 542. This mandate made the risk of an error not just possible, but certain. Simply permitting the ALJs to consider the driver's record (on the job or in the community or both) would have caused no additional burden. Because defendants refused to consider contrary or mitigating evidence, ignored the lawful fitness standard, and refused to exercise discretion, the *Mathews* balance tips overwhelming in favor of the drivers.

CONCLUSION

The TLC has acted lawlessly, imposing its most severe punishment without affording taxi drivers fair warning of the law, and without adequate notice or meaningful hearings before an impartial tribunal. Pursuant to Fed R. Civ. P. 56(a), based on the law of the case established by the Court of Appeals, and because the material facts are undisputed, plaintiffs are entitled to summary judgment.

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hearing, "failure to present its investigative reports through competent witnesses made … allegations of wrongdoing essentially irrebuttable [and] is not consonant with due process.").