10-4411-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

SAUL ROTHENBERG, individually and on behalf of all others similarly situated, EBRAHIM ABOOD, individually and on behalf of all others similarly situated, TOBBY KOMBO, individually and on behalf of all others similarly situated, KONSTANTINOS KATSIGIANNIS, individually and on behalf of all others similarly situated, BOUBACAR DOUMBIA, individually and on behalf of all others similarly situated, ROBERT DYCE, individually and on behalf of all others similarly situated, MOUSTACH ALI, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York (New York City)

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
I. THE ACTUAL RECORD FACTS ARE UNDISPUTED AND EVINCE A SYSTEMIC DENIAL OF DUE PROCESS	2
II. DEFENDANTS' REPEATED REFERENCES TO CHARACTER DO NOT CURE THE TLC'S FUNDAMENTAL DENIAL OF FAIR WARNING	8
III. DEFENDANTS' ASSERTION THAT CABDRIVERS "WERE ALREADY THOROUGHLY AWARE" DOES NOT EXCUSE THE TLC'S FAILURE TO PROVIDE CONSTITUTIONALLY ADEQUATE NOTICE	13
IV. DEFENDANTS' FACTUAL ASSERTIONS DO NOT UNDERMINE PLAINTIFFS' RIGHT TO SUMMARY JUDGMENT ON THEIR TRIBUNAL BIAS CLAIM	15
V. THE REVOCATION HEARINGS, WHERE THE TLC PREVAILS EVERY TIME, ARE NOT MEANINGFUL AND DO NOT COMPORT WITH DUE PROCESS	19
A. The Likelihood of Error is Great	19
B. *Mathews*, *Zynger* and *Nnebe* all Demonstrate a Denial of Due Process	22
VI. PLAINTIFFS-APPELLANTS DID NOT WAIVE THEIR OPPOSITION TO THE IMPOSITION OF AN EXHAUSTION-OF-REMEDIES REQUIREMENT	25
CONCLUSION	28

TABLE OF AUTHORITIES

Case	Page(s)
Bell v. Burson, 402 U.S. 535 (1971)	20
BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996)	8
Bouie v. City of Columbia, 378 U.S. 347 (1964)	8
Burka v. New York City Transit Authority, 739 F. Supp. 814 (S.D.N.Y. 1990)	21
Caperton v. A.T. Massey Coal Company, Inc., 129 S. Ct. 2252 (2009)	7
Ciambriello v. County of Nassau, 292 F.3d 307 (2d Cir. 2002)	25
Crawford v. Washington, 541 U. S. 36 (2004)	22
D'Alessio v. S.E.C., 380 F.3d 112 (2d Cir. 2004)	8
Dalton v. Ashcroft, 257 F.3d 200 (2d Cir. 2001)	10
Erdman v. Stevens, 458 F.2d 1205 (2d Cir. 1972)	9
Fung v. Daus, 45 A.D.3d 392 (1st Dep't 2007)	21
Galvin v. New York Racing Ass'n, 70 F.Supp.2d 163 (E.D.N.Y.), *aff'd*, 166 F.3d 1200 (2d Cir. 2000)	21

Glicksman v. New York City Env. Control Bd., 2008 WL 282124 (S.D.N.Y. 2008), *summarily aff'd*, 2009 WL 2959566 (2d Cir. 2009) 4

Gordon v. Brown, 84 N.Y.2d 574 (N.Y. 1994) 21

Griffin v. LIRR, 1998 U.S. Dist. LEXIS 19336 (E.D.N.Y. 1998) 21

In re Gault, 387 U.S. 1, 33 (1967) 14

In re Pomerantz, 2010 WL 3632201 (1st Dep't 2010) 10

In Re Ruffalo, 390 U.S. 544 (1968) 9

Kapps v. Wing, 404 F.3d 105 (2d Cir. 2005) 15, 16

Kaytor v. Electric Boat Corp., 609 F.3d 537 (2d Cir. 2010) 7

Krimstock v. Kelly, 306 F.3d 40 (2d Cir. 2002) 25

Krimstock v. Kelly, 464 F.3d 246 (2d Cir. 2006) 24

Mario v. P&C Food Markets, Inc., 313 F.3d 758 (2d Cir. 2002) 26

Mathews v. Eldridge, 424 U.S. 319 (1976) 22, 25

Matter of Johnston, 75 N.Y.2d 403 (N.Y. 1990) 11

Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2537 (2009) 22

Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950) 14

N.A.A.C.P. v. Town of E. Haven, 70 F.3d 219 (2d Cir. 1995) 18

Nash v. Bowen, 869 F.2d 675 (2d Cir.), *cert. denied*, 493 U.S. 813 (1989) 18, 19

Nnebe v. Daus, __ F.3d __, 2011 WL 1338119 (2d Cir. April 7, 2011 (as amended) *passim*

Padberg v. McGrath-McKechnie, 2006 WL 4057155 (E.D.N.Y. 2006) 16

Padberg v. McGrath-McKechnie, 203 F. Supp. 2d 261, 288-89 (E.D.N.Y. 2002), *aff'd*, 60 Fed. Appx. 861 (2d. Cir.), *cert. denied*, 540 U.S. 967 (2003) 7, 14, 16, 21

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) 7, 17

Scotto v. Almenas, 143 F.3d 105 (2d Cir. 1998) 7

Spinelli v. City of New York, 579 F.3d 160 (2d Cir. 2009) 13, 14, 23, 24

Taylor v. Rodriguez, 238 F.3d 188 (2d Cir. 2001) 15

Terry v. Ashcroft, 336 F.3d 128 (2d Cir. 2003) 16

U.S. ex rel. Mongiovi v. Karnuth, 30 F.2d 825 (2d Cir. 1929) 10

U.S. v. Lanier, 520 U.S. 259 (1997) 9

Withrow v. Larkin, 421 U.S. 35, 47 (1975) 7

Zynger v. Department of Homeland Security, 2010 WL 1170348 (2d Cir. 2010) (summary order) 22, 23

Statutes, Rules and Other Authorities

NYC Code § 19-507.2	12
NYC Code § 19-512.1	1, 3, 11
Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 2005 University of Pennsylvania Law Review 33	9
TLC Rule 2-60B	12
TLC Rule 2-61B	10
TLC Rule 2-62A	12
TLC Rule 8-15B	13

PRELIMINARY STATEMENT

Defendants' appeal brief is an effort to re-invent the record. Defendants repeatedly cite the good moral character standard for obtaining a taxi driver's license. But they omit the fact that the Taxi and Limousine Commission (TLC) prosecutors never pleaded a violation of that standard. Nor did any TLC ALJ make any finding concerning character. Defendants make a half-hearted claim that Section 19-512.1 of the NYC Code applies to taxi drivers. Again, they ignore completely that the TLC never pleaded or mentioned this provision in any of the plaintiff taxi drivers' administrative hearings. They claim, without evidentiary support, that no TLC judge was fired, at least not recently, because of his rulings. But they ignore contrary evidence and sidestep the critical fact that the TLC ALJs knew that the agency could have fired any one of them at any time, as well as that every ALJ ruled in revocation cases as the TLC wished. They emphasize the TLC's discretion to enact rules. But they utterly ignore the fact that when the TLC commissioners did enact rules, those rules permitted revocation for on-duty misconduct, but never for off-duty misconduct.

Rather than reckon with the TLC's actual practices, defendants invite this Court to uphold the district court's judgment based on purported violations of law that have never been alleged. But even if the court accepts defendants'

conjectures, the denial of due process at every turn remains evident. Even given the fact defendants create on appeal, the TLC has still denied the plaintiff cabdrivers Due Process everywhere from the invention of unenacted rules, to the defective hearing notices, through the so-called hearings where evidence is replaced by presumptions and where the TLC wins every time.

I. THE ACTUAL RECORD FACTS ARE UNDISPUTED AND EVINCE A SYSTEMIC DENIAL OF DUE PROCESS

The actual facts at issue are undisputed and can be simply stated: When a taxi driver is convicted of a crime that appears on an unpublished list maintained by the TLC, the TLC seeks revocation of his license. An agency lawyer sends a hearing notice. The agency then holds a hearing—which the TLC calls a "fitness hearing"— presided over by a TLC judge. At the end of that hearing the TLC judge issues a recommendation that the driver's license should be revoked. The TLC chairman accepts that recommendation every time. The same process unfolds where the TLC determines that the taxi driver has failed a suspicionless drug test. None of the hearing notices, none of the ALJ rulings and none of the chairman's orders mention any good moral character standard; none mentions NYC Code § 19-512.1 either.[1]

[1] The hearing notices for the named plaintiffs are at A521, 562, 599, 911, 941, 978 & 987. Additional notices for other drivers in the putative class are collected at A119-127.

Defendants' statement of facts posits a parallel universe in which the TLC pleads, proves and finds a lack of good moral character. Indeed, defendants' brief mentions the never-alleged requirement 15 times. The TLC Driver Rules are set forth over 59 pages and contain specific rules relating to harassment, the use (or attempted use) of physical force, fraud, misrepresentation, drunk driving and bribery, to say nothing of ordinary traffic offenses. But defendants' brief renders all of these rules pointless nullities, subsumed by an all-encompassing good moral character standard.

Defendants do admit that in criminal conviction cases, "[T]here were approximately 177 decisions by TLC ALJs between January 2005 and August 2007, and *all of them* recommended revocation." Def. Br. 16. They admit further that in drug test cases, "[T]here were approximately 494 decisions by TLC ALJs between January 2005 and August 2007, and *all of them* recommended revocation." Def. Br. 20 (emphasis added).[2] But they deny that this 671-and-0 record is in any way connected to the fact that TLC judges are naturally concerned for their jobs and are subject to both general and particular *ex parte* directives. Instead, they attribute this record to the "TLC's exercise of prosecutorial discretion in selecting cases," and to the TLC never failing to demonstrate "how the

[2] In discovery, the TLC produced at least 843 revocation letter orders and 647 ALJ rulings, all in favor of the TLC. A-30-31.

conviction has a sufficient nexus to the driver's fitness to operate a taxi." (Defendants' argument below was different: That revocation was appropriate because the offense in question appeared on a list of offenses maintained, but not published, by TLC officials. *See* R&R 12; A193-194; A210; A133.) On the drug test side, defendants say their record is perfect because the TLC's selected laboratory (Labcorp) is "certified" and because "urine testing technology is highly reliable." Def. Br. 11, 18. They do not deny, however, that the TLC-selected laboratory does not, *in its TLC testing*, follow federal drug testing guidelines in that it does not use split samples, which allow a testing facility to confirm with an untested 'B' sample that the test result for the 'A' sample was correct.

Defendants concede, as they must, that the TLC judges "work on an 'at-will' and 'per-diem' basis to preside over hearings as ALJs [and that] they are paid hourly." Def. Br. 25. This means a TLC judge is subject to termination without cause. It means also that if a TLC ALJ is denied a requested assignment, he suffers a loss of income without recourse. Defendants take pains to assert that "[s]ince at least March 2005, no ALJ has been terminated without the agency having found good cause." Def. Br. 25. Of course, this finding is unilateral and unchallengeable. *Glicksman v. New York City Env. Control Bd*., 2008 WL 282124 (S.D.N.Y. 2008), *summarily aff'd*, 2009 WL 2959566 (2d Cir. 2009). Moreover, the assertion is not based on admissible evidence, but on a statement by the TLC's

general counsel that was not on personal knowledge. A-432. Indeed, contradicting the counsel's statement, former ALJ Chinn, who does have personal knowledge, denied there was cause to dismiss him. A-879.48-879.53. Also, former ALJs Bonina and Coyne have both alleged in state court lawsuits that they were forced out of the agency without valid cause. Pl. 56.1 Resp. to ¶ 237 (Docket # 101).

Defendants now claim that an ALJ's prior rulings were not considered in doling out assignments. Def. Br. 25. But because they admit that every ALJ ruled for the agency every time in revocation cases, it is an empty boast. In their brief, defendants claim that one ALJ (Fioramonti) ruled in favor of driver, albeit just once and back in 2002. Def. Br. 28. But at his deposition Fioramonti was asked if he ever ruled in favor of a driver in a revocation case. He testified: "Um, I'm not sure, but I can't remember any, specifically." A-1306. Defendants, meanwhile, have never produced a copy of the purported 2002 decision that their brief mentions and never included the decision as an exhibit below, so it is not in the record.

Defendants aver that a new ALJ Manual was issued in 2007. Def. Br. 26. But they cannot and do not deny that the directives in the old manual, for which Matthew Daus was the primary author, continued to guide the ALJ rulings. This fact is shown by the ALJ rulings, which repeatedly restate the rules-in-fact propounded in the manual (but not in duly enacted laws). Nor do defendants even

acknowledge testimony by the TLC ALJs, including Deputy Chief ALJ Coyne, who admitted, "[W]e were told we had to abide by the manual." A-1276-79; see also A-1277-1279; A-1305; A-1307; A-1317; A-1255; A-1258.

Defendants' brief does not acknowledge that the one ALJ (Gottlieb) who even suggested that he might rule in favor of the cabdriver in a revocation case was ordered not to do so. "I tried to obtain a result that I thought was proper. I was told to do it a different way," he testified. "Therefore I did it the way I was told it should be done." A-203.18-203.19. Gottlieb, defendants say, continued to receive work, but that was after he agreed to rescind his draft decision and issue one favoring the TLC instead. Most fundamentally, defendants simply ignore the legal standard for determining bias. The question is not whether a judge ruled because of a financial inducement. It is not whether there was a specific *quid pro quo*. The issue is, rather, "whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton v. A.T. Massey Coal Company, Inc*., 129 S. Ct. 2252, 2263 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Finally, defendants refuse to acknowledge that the taxi drivers' systemic bias claim was sustained not just in *Padberg v. McGrath-McKechnie*, 203 F. Supp. 2d 261, 288-89 (E.D.N.Y. 2002), *aff'd*, 60 Fed. Appx. 861 (2d. Cir.), *cert. denied*, 540 U.S.

967 (2003), but implicitly by this Court in *Nnebe v. Daus,* __ F.3d __, 2011 WL 1338119 (2d Cir. April 7, 2011 (as amended)).

All told, defendants' brief shows in vivid color that their claim to summary judgment rests on unsubstantiated speculation and on the disregard of critical evidence favorable to plaintiffs, which is impermissible. *See Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 150 & 152 (2000); *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998). As this Court has stated repeatedly and recently, "In determining [whether a moving party is entitled to summary judgment] the district court may not properly consider the record in piecemeal fashion, trusting innocent explanations for individual strands of evidence; rather, it must 'review all of the evidence in the record.'" *Kaytor v. Electric Boat Corp*., 609 F.3d 537, 545 (2d Cir. 2010) (quoting *Reeves,* 530 U.S. at 150). But in their relating of the facts, defendants review just a fraction of the record, while inventing supposed facts not in the record at all. Defendants, and the district court, fail to follow this Court's and the Supreme Court's cases. And they ignore most of the evidence as to how the TLC actually and unfailingly pleads, prosecutes, and ultimately orders the revocation of taxi drivers' licenses.[3] Finally, in defendants' own statement of

[3] Defendants attack plaintiffs for "refus[ing]" to include their Local Rule 56.1 statement in an appendix. In reality, plaintiffs offered to include it (and any other document) if defendants would share the cost of production pursuant to FRAP 30(b)(2). Defendants refused to pay any of the cost, or to cull their demands.

facts, they repeatedly cite their Local Rule 56.1 statement as if it contained undisputed facts. It does not. In reality, most of the statement is legal argument. Much of it is false and denied by plaintiffs' counter-statement (Docket # 101).[4] As discussed below, disputed facts cannot form the basis for summary judgment.

II. DEFENDANTS' REPEATED REFERENCES TO CHARACTER DO NOT CURE THE TLC'S FUNDAMENTAL DENIAL OF FAIR WARNING

According to defendants' rendering, plaintiffs cite *Bouie v. City of Columbia*, 378 U.S. 347 (1964), "in an attempt to distinguish" the cases which, defendants suggest, plaintiffs should have cited. Def. Br. 40. But *Bouie* is not an afterthought: This Supreme Court decision, along with *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), *D'Alessio v. S.E.C.*, 380 F.3d 112 (2d Cir. 2004), states the "fundamental principle" underlying plaintiffs' claim: That the state must announce the law before applying it to punish its citizens. *Bouie*, 378 U.S. at 354; *see also* Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 2005 University of Pennsylvania Law Review 335. This is not a void-for-vagueness claim. The constitutional violation is of a "related manifestation[]

They also refused to agree to the use of a deferred appendix. *See* 2/28/11 Motion Order. Finally, plaintiffs evenhandedly did not include their own Rule 56.1 statement in the appendix. Defendants, of course, could have filed their own appendix, but did not.

[4] A few examples: These paragraphs are pure argument: 1, 5-6, 11-15, 18-27. These paragraphs are denied as false: 44, 112-33, 134-49, 237.

of the fair warning requirement" where neither a statute nor any case law has "fairly disclosed [the conduct] to be within its scope." *U.S. v. Lanier*, 520 U.S. 259, 266 (1997).

It is true that the TLC revocation hearings are not criminal trials. But the Supreme Court and this Court have characterized proceedings that can result in a loss of license on which a livelihood depends as "quasi criminal." *In Re Ruffalo,* 390 U.S. 544, 551 (1968); *Erdman v. Stevens*, 458 F.2d 1205, 1210 (2d Cir. 1972). In any event, *BMW* and *D'Alessio* are not criminal cases, either, but the fair warning principle still applies. Certainly, for the cabdriver, the loss of his license is a "greater punishment than a monetary fine." *Erdman*, 458 F.2d at 1210.

Below, Judge Ellis found fair warning based on the requirement that a taxi driver notify the TLC of any conviction, the requirement that drivers be fingerprinted, and a decision by an OATH judge. R&R at 12. Judge Stein noted a TLC rule that a driver shall not use his taxicab for any unlawful purpose (TLC Rule 2-61B) and a code provision that, he asserts, provides for the summary *suspension* of a license. Order at 3.

On appeal, defendants do not defend either analysis. Instead they rely primarily, as they do throughout, on the good moral character standard (which Judge Stein cites as well). This standard, they claim is "ubiquitous" and "has been upheld by the Courts." Def. Br. 38. But whether that standard might have been or

could have been used as grounds for revocation is academic. The fact, which bears repeating, is that the TLC never alleged a violation of the good moral character requirement as to any of the plaintiffs. Defendants' brief not only re-imagine the administrative charges; it imagines hearings and convictions on good moral character, none of which ever occurred, to say nothing of a legal standard that does not exist.

This Court has made clear that not every criminal act demonstrates a defective character. *Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001) (multiple drunk driving offenses not evidence of moral turpitude); *U.S. ex rel. Mongiovi v. Karnuth*, 30 F.2d 825, 826 (2d Cir. 1929) (second degree manslaughter not a crime of moral turpitude). Just recently, the Appellate Division stated, "The sanctions generally imposed for forgery offenses" when committed by an attorney "range from a short suspension to disbarment depending upon the repetitiveness of the misconduct and the desire for personal profit." *In re Pomerantz,* 2010 WL 3632201 (1st Dep't 2010). For attorneys generally, New York law requires that they notify the bar of any convictions. But it provides for automatic disbarment only for felonies, not for all misdemeanors. *Matter of Johnston*, 75 N.Y.2d 403, 405 (N.Y. 1990).

Defendants cite secondarily NYC Code § 19-512.1, which the TLC also never invoked in its administrative process. While in *Nnebe*, this Court referred to

that provision in the context of suspensions, it certainly made no finding that it applies to taxi drivers. Indeed *Nnebe* reinstated the plaintiffs' state claims, including the claim based on the contention that § 19-512.1 does not so apply. 2011 WL 1338119 at *13. Defendants refer to the "preamble" to the law. But that preamble is to several code sections enacted contemporaneously. Some of these sections, such as § 19-507.2 (the "Critical driver program") refer to taxicab "driver's" licenses. But Section 19-512.1 itself refers to "taxi*cab*" licenses, not driver's licenses. (Emphasis added). Section 19-512.1 is about taxis, not drivers. Nothing in the preamble suggests the City Council did not understand the difference.

Thus it is without any authority whatsoever that defendants announce in their brief: "A licensee of ordinary intelligence should know that a conviction for felony assault (plaintiff Kombo), criminal possession of a forged instrument (plaintiff Dyce), or driving while ability impaired (plaintiff Ali) does not constitute good moral character in light of the objectives of TLC." Def. Br. 38. But how would any taxi driver, no matter how intelligent, have gained such insight? The TLC rules certainly do not define good moral character in this way. Indeed we submit that the TLC rules (and the related code provisions) are better evidence of "the objectives of TLC" than are pronouncements by litigators in appellate briefs. These ordinances and rules repeatedly demonstrate that the TLC's concern is not

enforcement of criminal laws, or enhancing criminal penalties. It is, rather, the regulation of on-duty conduct where the conduct is "against a passenger" and where the driver is "performing his duties and responsibilities as a driver." *See*, *e.g.*, TLC Rule 2-60B (relating to the use of physical force) and TLC Rule 2-62A (relating to bribes and gratuities).[5]

Had Tobby Kombo, the only plaintiff with a felony conviction, been charged with lacking good moral character, it is unlikely—certainly an open question—that such a charge could have been sustained at a fair trial under New York law. But he was not charged. On this appeal, defendants attempt to interject imagined charges (resolved at non-existent hearings) into the record. They announce what taxi drivers "should know" without reference to any law. This *post hoc* backfill does not offer plaintiffs fair warning of the penalty the TLC would impose. It remains the case that nothing in the TLC rules, the NYC code, or the state penal law put taxi drivers on notice that off-duty convictions would lead to the revocation of their licenses. The same is true as to off-duty drug use. Without fair

[5] Defendants add: "[A] licensee of ordinary intelligence should understand that either a criminal conviction or a drug test revealing illegal drug use would likely be deemed evidence of a lack of fitness sufficient to warrant revocation." Def. Br. 38. But again they do not say why: The NYC code and the TLC rules speak to addiction and driving a taxi while impaired, not use; the rule that refers to testing says "may" be revoked, not "will" or "shall." Of course, at the administrative hearings, there were no allegations of either addiction or intoxication on the job.

warning of the penalty that would be imposed, the imposition of the revocation penalty denied plaintiffs Due Process of Law.

III. DEFENDANTS' ASSERTION THAT CABDRIVERS "WERE ALREADY THOROUGHLY AWARE" DOES NOT EXCUSE THE TLC'S FAILURE TO PROVIDE CONSTITUTIONALLY ADEQUATE NOTICE

As defendants note, TLC Rule 8-15B requires that the agency allege "the basis for the Commission's charge that the respondent fails to meet the minimum requirements for licensure." This requirement is similar to the regulation that governed in *Spinelli v. City of New York*, 579 F.3d 160, 172 (2d Cir. 2009), and had the TLC complied, it likely would have met the constitutional notice requirements as well. But, as in *Spinelli*, the TLC now tacitly admits it failed to comply with either the rule or the Due Process clause. Beyond the statement that the purpose of the hearing was "to determine your fitness to maintain a TLC license," there was no specific allegation concerning *why* the driver was not fit. In short, the TLC makes no attempt to provide useful notice even though the cabdriver's "interest in [his] taxicab license is profound." *Padberg*, 203 F. Supp. at 277.

In their brief, defendants argue nevertheless that constitutional notice mandates should not apply because in drug test cases "the relevant plaintiffs had already been contacted by the MRO, at which time the drug test results were

disclosed to them." Def. Br. 41. In conviction cases, "plaintiffs had already provided the notices of disposition to TLC and were aware of the circumstances that led to their convictions." Def. Br. 42. Whatever the TLC believed the plaintiffs knew already, the agency was still required to "set forth the alleged misconduct with particularity." *In re Gault,* 387 U.S. 1, 33 (1967). The prosecuting agency still had an obligation to " 'reasonably ... convey the required information' that would permit [them] to 'present [their] objections'" to the agency. *Spinelli*, 579 F.3d at 172 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950)).

Defendants offer no authority for the "already knew" exception. It is an extraordinary notion, as well as unprecedented. If a thief, knowing what he stole, were charged with "a crime" that "might lead to imprisonment," would that be constitutional notice? Certainly, in *Spinelli* the police had visited and searched the gun shop, so the shop owner would have been likewise "aware of the circumstances" that led to the suspension of her license. 579 F.3d at 164.

Moreover, the premise is contrary to the facts. While the drivers knew about their convictions and the drug tests, they remained uninformed about how those facts related to their licensure. They had no way to know, for example, that the TLC considered character the issue (as defendants now say was the case, albeit long after the hearings). They were not informed that it would have been possible

(as defendants now claim) to argue whether their conviction had a "sufficient nexus to the duties and responsibilities of a TLC licensee." In drug test cases, defendants assert in their brief that "the MRO *attempts to* contact the driver." Def. Br. 19 (emphasis added). They offered no proof that these attempts are always or even normally successful. The notices themselves fail to identify what drug was found or how much or who was in charge of the testing. In every case, the TLC offers no information that would allow the driver facing a loss of his livelihood "to prepare an adequate defense to the charges." *Taylor v. Rodriguez*, 238 F.3d 188, 193 (2d Cir. 2001). It may be that no defense was possible and that the result was preordained, as TLC's 671-and-0 record attests. Nonetheless, adequate notice, "like the right to a fair hearing, is a basic requirement of procedural due process," *Kapps v. Wing,* 404 F.3d 105, 123 (2d Cir. 2005), and here that notice was clearly denied.

IV. DEFENDANTS' FACTUAL ASSERTIONS DO NOT UNDERMINE PLAINTIFFS' RIGHT TO SUMMARY JUDGMENT ON THEIR TRIBUNAL BIAS CLAIM

Defendants argue that "Plaintiffs fail to establish ALJ bias at the fitness hearings." Def. Br. 53. First, defendants refuse even to acknowledge this Court's recent decision in *Nnebe v. Daus*. In *Nnebe*, this Court vacated a district court's judgment and reinstated plaintiffs' claim that the TLC tribunal was infected with a systemic pro-agency bias. 2011 WL 1338119 at *13. Defendants ignore as well

that Judge Dearie denied the TLC summary judgment on this issue not once, but twice. *Padberg*, 203 F. Supp. 2d at 288-89; *Padberg,* 2006 WL 4057155 (E.D.N.Y. 2006).

Beyond the contrary case law, defendants' assertion that *plaintiffs* have failed to establish bias misses the point completely. The district court granted summary judgment *for defendants*. Such a judgment "is only appropriate where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law." *Kapps,* 404 F.3d at 112. For *defendants* to be entitled to judgment as a matter of law it is defendants' burden to establish the *absence* of facts pointing to bias, and that "it appears beyond doubt that the plaintiff can prove no set of facts in support of [their claims] which would entitle [them] to relief." *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir. 2003). In addition, the district court "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves*, 520 U.S. at 151.

In its amicus brief, The Association of the Bar of the City of New York summarizes well the facts that support plaintiffs' claim:

> ALJs who presided over [the drivers'] revocation hearings were at-will employees of the TLC with no security of tenure. These ALJs were allegedly paid on a case-by-case basis and had to apply each month to receive case assignments, which were doled out at the discretion of the TLC. Appellants allege that the ALJs understood that if they ruled against the TLC, they would not be assigned cases in the future. Those who most

> frequently ruled in the TLC's favor would allegedly receive more cases and [be] possibly promoted to salaried status. ALJs who have ruled against the TLC in other contexts have allegedly been reprimanded and even fired, and apparently no ALJ has ever ruled against the TLC in a fitness hearing involving a criminal conviction or drug test. Amicus Br. at 2-3 (citations omitted).

Defendants make no effort to dispute these allegations, which are established by testimony of the ALJs, TLC documents and defendants' admissions. Nor do defendants make any effort to defend Judge Ellis's reasoning that plaintiffs were required to name particular ALJs as defendants. R&R 21.

Instead, they forward assertions that, one assumes, are meant to be not contradictory, but countervailing: That OATH judges have also tended to rule against taxi drivers; that ALJ Gottlieb was not actually in fear of termination at the particular moment when he reversed himself and ruled in favor of the TLC; that some cases are settled before hearings; that it was proper that TLC judges ruled in favor of the agency more that 600 times straight because it evinced "a reasonable degree of uniformity among ALJ decisions." Def. Br. 54-55.

These assertions are, we submit, irrelevant. None of the plaintiffs here had hearings at OATH; all were tried by TLC judges, or, more precisely, a select cohort of TLC judges.[6] Moreover, that some cases never reached the tribunal says

[6] Defendants also admit that four OATH rulings were in favor of the drivers, unlike those of TLC judges. Def. Br. 20. So there was in fact a difference between

nothing about whether a system bias affected the hearings that were tried. Defendants purport to rely on *Nash v. Bowen*, 869 F.2d 675 (2d Cir.), *cert. denied*, 493 U.S. 813 (1989), as did Judge Ellis. But in *Nash*, an action brought by an ALJ asserting a right to decisional independence, the "Peer Review Program" at issue was entirely above-board and akin to appellate review. This Court specifically noted that such efforts did not "directly interfere with 'live' decisions." *Id*. at 680. Here, by contrast, the directives were not part of anything like an appeal process. They were *ex parte* directives from a manual issued to ALJs but not to cabdrivers and through reprimands and "advice" from supervisors, which did affect live decisions. When ALJ Gottlieb was told he was "blatantly wrong" (A-1147) and ordered to change his decision (A-203.16-203.19), that was hardly comparable to the process described in *Nash*. *See Nnebe*, 2011 WL 1338119 at *3.

OATH judges and TLC judges, who *never* ruled for the drivers. *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"). Of course, the rulings of OATH judges have no bearing on whether *the TLC tribunal* was systemically biased. Furthermore, TLC General Counsel Fraser, a former OATH judge, explained in large part why OATH judges have ruled as they have. Fraser testified that OATH's practice is to deem the agency chairman's rulings to be binding precedent. A-889-90. Thus when Chairman Daus reversed several OATH rulings in favor of drivers, as defendants admit he did, the OATH judges thereafter would follow the chairman's directive that there can be no defense to a positive drug test. Of course, defendants admit as well that they offered far more detailed evidence in drug test hearings at OATH than they ever did at TLC hearings. Def. Br. 21; A-1172-73.

Even if relevant, these assertions do not dispute the facts demonstrating bias. The TLC controlled its judges' continued employment, status and assignments — what Hamilton called their "subsistence." The TLC judges' rulings, guided by extra-judicial directives, were always for the TLC, never for the driver. Certainly, these facts raise a triable issue so that summary judgment for defendants must be reversed. Indeed these facts, which are admitted, entitle plaintiffs to summary judgment.

V. THE REVOCATION HEARINGS, WHERE THE TLC PREVAILS EVERY TIME, ARE NOT MEANINGFUL AND DO NOT COMPORT WITH DUE PROCESS

Defendants confuse the hearings presided over by TLC judges with preliminary pre-deprivation hearings and argue that the requirements for the hearings are "minimal." Def. Br. 42. In fact, the TLC Rule that defendants cite states that the chairman's decision based on the ALJ recommendation is "the final determination of the Commission." TLC Rule 8-15D. Chairman Daus's orders were final revocations of the taxi drivers' licenses. The Due Process they afford is indeed minimal— and insufficient.

A. The Likelihood of Error is Great

In their brief, defendants write that the "high rate of revocation" (by which they mean 100%) is a product of the fact that "underlying basis for the sought

revocation has already been proved" and that the TLC only acts when it believes that there is a "nexus" between the crime and the cabdriver's duties. Def. Br. 11, 45. This point might be compelling there was some rule of law that required or allowed license revocation based solely on a conviction. But there is not. Indeed, on appeal defendants claim that the TLC was not acting on the conviction *per se*, but on good moral character, a factor the TLC does not attempt to prove at all. The TLC is not free to assume facts and call the result due process. As the Supreme Court has held, "It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision whether [to revoke a license] does not meet [the] standard [of a meaningful hearing]." *Bell v. Burson*, 402 U.S. 535, 542 (1971). Where the revocation hearings "are as perfunctory as those used in this case, the risk of erroneous deprivation increases exponentially." *Padberg*, 203 F. Supp. 2d at 280.[7]

In the drug test context, the TLC ALJs simply assume without proof that the proffered test results are accurate. As former deputy chief ALJ Coyne testified: "That was boilerplate language that was in every decision that we issued. That had to be there." A-1268. Defendants rely on the Appellate Division's decision in *Fung v. Daus*, 45 A.D.3d 392 (1st Dep't 2007). But contrary to *Fung*, the New

[7] Similarly, there is no law allowing for revocation of a taxi license based on a drug test without more, such as proof of intoxication on-the-job or addiction.

York Court of Appeals and the federal courts in this Circuit have uniformly held that a person accused of failing a drug test must have the *opportunity* to cross-examine someone from the drug lab. *Gordon v. Brown*, 84 N.Y.2d 574, 576-77 (N.Y. 1994) (laboratory supervisor); *Galvin v. New York Racing Ass'n*, 70 F.Supp.2d 163, 178 (E.D.N.Y.), *aff'd*, 166 F.3d 1200 (2d Cir. 2000) (lack of effective cross-examination due to failure to present investigative reports through competent witnesses made these allegations of wrongdoing essentially irrebuttable and not consonant with due process); *Griffin v. LIRR*, 1998 U.S. Dist. LEXIS 19336 (E.D.N.Y. 1998) (plaintiff was free to call employees of the testing lab, though he chose not to do so); *Burka v. New York City Transit Authority*, 739 F. Supp. 814, 838-39 (S.D.N.Y. 1990).[8] Moreover, the Supreme Court in *Melendez-Diaz v. Massachusetts* has recently reiterated the importance of testing this very type of evidence "'in the crucible of cross-examination.'" 129 S.Ct. 2527, 2537 (2009) (quoting *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004)). Defendants do not even mention *Melendez-Diaz*. Because taxi drivers are not afforded the opportunity to cross-examine any laboratory witness, the TLC hearings denied them Due Process.

[8] The cases, to be sure, also say that a party subject to the drug test may not be able to choose *the particular* laboratory technician he would prefer to cross-examine. But since the TLC proceeds without any witnesses at drug test hearings, there was no way for the driver to even identify a witness to call.

B. *Mathews*, *Zynger* and *Nnebe* all Demonstrate a Denial of Due Process

As for defendants' *Mathews v. Eldridge,* 424 U.S. 319 (1976), analysis, defendants claim, in essence, that the TLC never errs because the conviction is readily proved and because drug testing is reliable—again omitting other factors that must be weighed. As to drug test hearings, defendants rely on this Court's summary order in *Zynger v. Department of Homeland Security*, 2010 WL 1170348 (2d Cir. 2010). But they mis-cite *Zynger* in that it concerned "pre-termination procedures." This was adequate because "Zynger was afforded and pursued a full, post-termination adversarial hearing." *Id.* at *2. Here, the taxi drivers received a hearing that may be similar to the *Zynger* pre-termination hearing. But they did not receive anything like a full, post-termination adversarial hearing.

Defendants also mis-cite *Nnebe* (Def. Br. 45), which actually supports plaintiffs' position as to the final revocation hearings at issue here. In *Nnebe*, this Court did permit the TLC to suspend "*in the short term*, prior to any hearing." 2011 WL 1338119 at *9 (emphasis added). Similar to *Zynger*, the *Nnebe* court explained: "In the pre-deprivation context … the risk of erroneous deprivation is mitigated by the availability of a prompt post-deprivation hearing." 2011 WL 1338119 at *9. There was "only the risk that a driver will lose the income he could have earned between the date of arrest and the date of the post-suspension

hearing." Moreover, "[I]n the immediate aftermath of an arrest,… the TLC has minimal information…." *Id*. As this Court held in *Spinelli*, defendants' "logic only explains the absence of a pre-deprivation hearing." 579 F.3d at 175.

Post-suspension, the analysis changes. The loss of income is now permanent. And by this time, the TLC would have access to complete information—assuming the agency cares to learn it. While the *Nnebe* court found there was some confusion about what occurred in the post-deprivation hearings, it "emphasize[d] that it is *not* the City's position that arrest for one of the offenses listed on the TLC's summary suspension chart is *per se* evidence that 'the licensee's continued licensure would pose a threat to public health or safety.'" *Id*. at *11. The Court continued: "The City's defense of the process it affords is premised on a contention that it provides drivers with a real opportunity to show that they do not pose a risk to public safety, arrests notwithstanding." *Id*. at *12. Because "the scope of the summary suspension hearing" was unclear, the Court vacated and remanded for additional fact-finding. *Id*.

Nnebe stands for the proposition that the TLC cannot rest on irrebuttable presumptions. If the ultimate issue is "threat to public health or safety," the TLC would have to allow for a hearing where that threat was actually assessed. It would have to afford the cabdriver "a real opportunity." It is clear in this case that the TLC does no such thing. Even in what is arguably the drivers' worst case

(Kombo, who committed a class D felony) there was no reason to believe the driver, who, under stress, snapped and assaulted his ex-wife who had intruded into his home, posed any threat to taxi passengers. Indeed, the same state court judge who ruled on his conviction awarded Kombo a certificate of relief from disabilities. A-598; A-654.

The TLC's actions in presuming a threat or that a conviction defines character are not supported by any law (including TLC rules) and are "unsupported by past events or by hypotheticals regarding the future." *Krimstock v. Kelly*, 464 F.3d 246, 255 (2d Cir. 2006). Unlike in the immediate aftermath of an arrest, the TLC is not, as *Nnebe* put it, acting with "minimal information." The agency and its ALJs are capable of assessing whether the criminal act harmed or endangered passengers. They can determine whether it truly evinced character (if that is the standard) as opposed to a temporary absence of judgment. The TLC did neither.

The question under *Mathews* is not whether the TLC has some generalized interest in protecting the public. To be sure, the TLC has this interest, but that is not what *Mathews* weighs. The question is whether the TLC has an interest in "not providing" a hearing where it at least attempts to assess whether the cabdriver has or will threaten the public safety. *Spinelli*, 579 F.3d at 174; *see also Krimstock v. Kelly*, 306 F.3d 40, 70 (2d Cir. 2002); *Ciambriello v. County of Nassau*, 292 F.3d 307, 320 (2d Cir. 2002). There would be little or no burden on the TLC in

providing such an assessment even in the context of its existing hearings. Thus, as in *Ciambriello*, "[The government] interest is minimal." 292 F.3d at 320.

In short, given that the taxi drivers' interests are, as *Nnebe* put it, "enormous," and the likelihood of error in refusing to consider the facts, all three prongs of the *Mathews* test strongly favor requiring the TLC to adopt procedural safeguards in order to satisfy the Due Process Clause. These safeguards must at a minimum require the TLC to show facts that demonstrate that the driver presents an ongoing threat to the public.

VI. PLAINTIFFS-APPELLANTS DID NOT WAIVE THEIR OPPOSITION TO THE IMPOSITION OF AN EXHAUSTION-OF-REMEDIES REQUIREMENT

Defendants argue that "Plaintiffs did not preserve their argument" that they were not required to file an Article 78 action as a pre-requisite to a Section 1983 action because it was only discussed it in a footnote. This is false. And even if it were true, there would be no waiver. It is accurate that, owing to space limitations, in the initial objections to the R&R (# 115), plaintiffs limited their discussion of the purported exhaustion requirement to a footnote that referred to an argument in a related case. But defendants omit the fact that plaintiffs also filed a response to defendants' objections to the R&R (Docket # 116). In that document, as defendants know, plaintiffs included a section headed "THE POSSIBILITY OF A STATE REMEDY, IF ANY, DOES NOT UNDERMINE PLAINTIFFS'

FEDERAL CIVIL RIGHTS CLAIM." This section argues the point over three pages. Certainly it was sufficiently detailed to preserve the issue.[9]

Even if plaintiffs had not filed this document, defendants' waiver argument rests on a mistaken reliance on *Mario v. P&C Food Markets, Inc*., 313 F.3d 758 (2d Cir. 2002). Right after this Court states that failure to object specifically to a magistrate's report could mean an issue was not preserved, it also stated, "Where a district court conducts *de novo* review of an issue that was not raised in objection to magistrate's report, this court may disregard the waiver and reach the merits." *Id*. at 766. And in this case, Judge Stein did just that at page 2 of his September 30 order.

On the merits, in addition to the many cases cited in our appeal brief — cases that post-date the cases that defendants cite[10]—*Nnebe* actually settles the issue. (In addition, the amicus brief filed by the NYC Bar Association provides a more scholarly refutation of defendants' and the district court's position. Tellingly, defendants do not engage the Bar Association's arguments at all.) In

[9] Plaintiffs filed their timely response to defendants' objections on September 30, 2010. Judge Stein issued his order later the same day. Because plaintiffs believed that Judge Stein likely did not consider this document in his *de novo* review of the R&R, we asked that he withdraw and reserve his order. In response, on October 21, Judge Stein issued a second order in which he stated that he reviewed plaintiffs' September 30 submission.

[10] *See* Pl. Br. at 52-54.

Nnebe, the defendants made precisely the same argument as defendants advance here: That the onus was on each taxi driver to file a lawsuit against the city and the highest TLC official in state court. The district court accepted it in a limited way (only as to the tribunal bias claim). But this Court, while noting the argument, vacated every aspect of the district court's judgment except for its finding on pre-deprivation hearings. *Nnebe*, 2011 WL 1338119 at *6 & *13.

Defendants' other waiver arguments are no better. As defendants know, plaintiffs, with defendants' consent, asked Judge Stein for leave to file a 43-page objections brief, more than the 25 pages allowed by the judge's standing rule. This was in light of the fact that the parties had submitted more than 180 pages of briefs and the R&R itself was 31 pages. Judge Stein rejected the request and indeed limited plaintiffs to 20 pages. Endorsed Letter at Docket # 112. Thus some of our objections were necessarily truncated. Even so, as the R&R noted, plaintiffs state law claims were "part and parcel" of their federal claims. We asked, albeit briefly, that the claims be reinstated if the federal claims were, as is normally done and as this Court did in *Nnebe.* 2011 WL 1338119 at *13; *see also Spinelli*¸ 579 F.3d at 175. By the same token, the Report's conclusion as to qualified immunity rested entirely on its rejection of plaintiffs' federal claims. Thus we objected on the ground that the qualified immunity ruling should be reversed if plaintiffs' federal claims were reinstated. This objection preserved plaintiffs' argument.

CONCLUSION

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

Dated: New York, New York
June 1, 2011

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Reply Brief for Plaintiffs-Appellants

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