# 14-405

## United States Court of Appeals
## for the Second Circuit

HASSAN EL-NAHAL,
individually and on behalf of all others similarly situated,

*Plaintiff-Appellant,*

v.

DAVID YASSKY, COMMISSIONER MATTHEW DAUS,
MICHAEL BLOOMBERG, CITY OF NEW YORK,

*Defendants-Appellees.*

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

# BRIEF FOR PLAINTIFF-APPELLANT

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# TABLE OF CONTENTS

## TABLE OF CASES AND AUTHORITIES

Page(s)

**STATUTES**

## JURISDICTION

This Court has jurisdiction based on 28 U.S.C. § 1291. The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(4), 1367 and 2201. A notice of appeal of the district court's final order, entered on January 29, 2014, was filed on February 10, 2014.

## PRELIMINARY STATEMENT

Plaintiff-Appellant Hassan El-Nahal is a New York City taxi driver. Using a Global Positioning System (GPS) monitoring device that the TLC mandated be installed in his taxicab, the NYC Taxi and Limousine Commission (TLC) tracked the movement of Mr. El-Nahal's taxicab over a period of months. Based on the evidence it gathered by this GPS tracking, the TLC prosecuted El-Nahal, alleging that, in the course of a three-month period, he had employed the so-called Rate Code 4 button on his taximeter to overcharge passengers on nine occasions. For these alleged overcharges (which, if they occurred, netted El-Nahal less than $20) the TLC sought to revoke, and for a time did revoke, El-Nahal's hack license.

Before gathering evidence by GPS, the TLC had not obtained any search warrant to engage in such monitoring. And, prior to its GPS tracking, the agency had harbored no suspicion, and certainly claimed no probable cause, that El-Nahal had committed any crime or any violation of the TLC rule.

El-Nahal was ultimately exonerated of the overcharge allegations by the TLC's own tribunal. But this exoneration came only after he had endured four hearings and prevailed on three separate appeals. In the interim, El-Nahal's hack license was temporarily revoked three times, causing him monetary loss and serious emotional pain. El-Nahal alleges that, following the U.S. Supreme Court's decision in *United States v. Jones*, 565 U.S. __, 132 S. Ct. 945 (2012), and the New York Court of Appeals' decision in *People v. Weaver*, 12 N.Y.3d 433 (N.Y. 2009), the TLC's use of a GPS device to track his movements was a search for purposes of both the Fourth Amendment and the New York Constitution. He alleges further that the search was unconstitutional because, as the Supreme Court and this Court have held, "[T]he general rule [is] that an official nonconsensual search is unconstitutional if not authorized by a valid warrant." *Ferguson v. City of Charleston*, 532 U.S. 67, 70 (2001). Here, the TLC had no warrant and it cannot establish any of the recognized exceptions to the warrant requirement that would render its warrantless search constitutional.

Plaintiff-appellant brought this 42 U.S.C. § 1983 action on behalf of himself and other cabdrivers subject to same TLC practices and conduct, contending, among other things, that the defendants' conduct was unconstitutional under the Fourth Amendment, the Fourteenth Amendment and the New York Constitution and that defendants fraudulently induced taxi drivers into accepting settlements by

which they surrendered their taxi drivers licenses or paid substantial fines. This appeal is from the district court's grant of summary judgment to defendants.

## STATEMENT OF ISSUES

1. Whether the TLC's use of GPS technology to track the location of taxicabs over a period of months and years constitutes a search for purposes of the Fourth Amendment under *U.S. v. Jones*.

2. Whether the TLC's use of GPS to track the location of taxicabs over a period of months and years constitutes a search for purposes of the New York Constitution under *People v. Weaver*.

3. Whether the TLC's warrantless use of GPS tracking can be justified by any of the well-delineated exceptions to the warrant requirement such as knowing consent or the "special needs" exception even if the tracking was intended to gather evidence for prosecutions.

4. Whether, on the current record, plaintiff-appellant should be granted partial summary judgment as to his claims under the Fourth Amendment and the New York Constitution.

## STANDARD OF REVIEW

On all issues, the district court's rulings are subject to de novo review.

## FACTS AND PROCEEDINGS BELOW

### 1. The TLC Mandates GPS Tracking for All Taxicabs

In 2003, the TLC proposed a new mandatory technology system for all NYC medallion taxis (also known as yellow cabs). The Taxi Technology System or

TTS, as it was called, would include a GPS tracking device. According to Garmin Ltd., a leading manufacturer of GPS devices, GPS "is a satellite-based navigation system made up of a network of 24 satellites placed into orbit by the U.S. Department of Defense.… GPS works in any weather conditions, anywhere in the world, 24 hours a day." Garmin website at http://www8.garmin.com/aboutGPS/. The New York Court of Appeals has described GPS as a "sophisticated and powerful technology that is easily and cheaply deployed and has virtually unlimited and remarkably precise tracking capability." *People v. Weaver*, 12 N.Y. 3d at 441.

No state law or city ordinance authorized the TLC's technology mandate or its GPS component. But acting by rules issued in 2004 and taking effect after the technology was actually developed, the TLC mandated installation of its TTS system in all taxicabs by mid-2007. JA-220-223, 108, 115-117. TLC Rule 1-11G provided: "The owner of any taxicab required to be equipped with a taxicab technology system shall contract to procure such equipment on or before August 1, 2007." The technology must include "hardware and software that provides … (iii) trip data collection and transmission required by section 3-06 of this title, and (iv) data transmission with the passenger information monitor required by section 3-07 of this title." TLC Rule 3-06 required that each taxicab be capable of transmitting to the commission "at pre-determined intervals established by the Chairperson …

the location of trip initiation; the time of trip initiation; the number of passengers; the location of trip termination; the time of trip termination; the metered fare for the trip; and the distance of the trip." In addition, the TLC 3-07 required that taxicabs include a display monitor that indicates "the current location of the vehicle as well as the route the vehicle had traveled from the point of trip initiation to the point of trip destination."[1] By its rules, the TLC required (and still requires) that all TLC-licensed taxis continuously transmit by GPS their locations to the TLC or to its agents. The installation and use of this technology in all taxicabs is mandatory regardless of the consent of the cab owner or the taxi driver. At the same time, the TLC required the addition of various "rate code" buttons, corresponding to different types of fares, on the taximeter. JA-171.The same technology allowed the TLC to know (for most cabs, depending on which vendor had installed the technology) where during a trip the taxicab was at the time a rate code button, such as the Rate Code 4 button was engaged. JA-157 (Royter).

### 2. The TLC Assures the Federal Court, the Public at large, and Taxi Drivers in Particular that it Will not Use GPS Tracking as a Prosecutorial Tool

While TLC rules mandated the installation of GPS tracking technology, nothing in those rules, or in any state or city law, permitted (or even suggested as a

[1] The pertinent rules in effect at the time, which have since been re-numbered, are collected at JA-97-106. Since this enactment, the TLC Rules have been re-codified. The Taxicab Technology System (T-PEP) requirements are now stated in TLC Rule 67-15.

possibility) that the TLC would use its capability to investigate or prosecute individual taxi drivers whether criminally or administratively. Indeed that prospect had sufficiently alarmed taxi drivers at the time the rules were being proposed that a group of drivers (not including Mr. El-Nahal) and the New York Taxi Workers Alliance filed a lawsuit in federal court in which they advanced federal privacy claims and sought to enjoin the proposed rules from taking effect. That case was captioned *Alexandre v. New York City Taxi and Limousine Comm'n*, No. 07 Civ. 8175 (RMB).

In response to those concerns and to the *Alexandre* action, the TLC assured the federal court, taxi drivers and the public at large that the mandated GPS system and related technology would be used only for limited purposes and would not raise privacy concerns or result in prosecutions. Also in response to the *Alexandre* action, the TLC argued successfully that the use of GPS tracking was not a search for purposes of the Fourth Amendment or the New York Constitution. In briefs submitted to the federal district court, the TLC said, "The potential benefits of centralized data can include complex analysis of taxicab activity in the five boroughs for policy purposes, as well as the additional benefit of aiding in the recovery of lost property." JA-115. Nowhere in its court papers did the TLC ever suggest it would or might use GPS data to track or investigate particular cabdrivers or to procure evidence in support of prosecutions.

Along the same lines as its assurances in federal court, before the technology mandate took effect, the TLC issued a "Statement of Basis and Purpose" describing the proposed rule. The statement noted that the technology could "assist in the recovery of lost property"; that it would allow for "centralized data" to permit the "complex analysis of taxicab activity in the five boroughs for policy purposes"; that it would "enable passengers to follow their route on a map"; and that it would "provide a valuable resource for statistical purposes." A-129. Again, the TLC made no mention of using GPS for investigations or prosecutions.

The TLC further disavowed that intention in statements on its website. Responding to "Driver Frequently Asked Questions," the TLC assured that its new technology would not be used for individual tracking or prosecutions, and that it was largely for customer service and the driver's convenience:

> Is the TLC going to use this technology to track drivers?
>
> No, the TLC will only use this technology to provide those customer service improvements described here. Even more importantly for drivers, the TLC is replacing the current hand-written trip sheets with automatic electronic trip sheets which are limited to collecting pick-up, drop-off, and fare information, all of which are already required. This technology will also provide TLC with credit card tip information.
>
> Will my trip/fare information be transmitted to the Internal Revenue Service (IRS)?
>
> No, your fare information will not be automatically sent to the IRS. There will be no changes to the current

> system, in which the IRS must send a subpoena to the TLC requesting trip sheet information.
>
> Will the systems be used to issue speeding tickets or other similar infractions?
>
> No, there are no plans to issue tickets for speeding or other similar infractions using the systems. JA-131-132.

Thus assured the district court ultimately rejected the drivers' claims and held that GPS tracking was not a search for purposes of the Fourth Amendment. *Alexandre*, 2007 WL 2826952 at *9. In his ruling, Judge Berman emphasized that the new technology "will obviate the need for written records and will ... enable the TLC to respond to the thousands of consumer [lost property] requests." *Id*. at *2. The court also concluded that drivers had no expectation of privacy and thus could not state a Fourth Amendment claim. As to the drivers' state constitutional claims, the court concluded that New York courts would recognize "no greater privacy interest" to "a vehicle traveling upon a public roadway under the New York Constitution, than that which is afforded under the United States Constitution." *Id*. at *10. In another case brought by a single driver *pro se*, Judge Cote reached the same conclusion, *Buliga v. New York City Taxi and Limousine Comm'n*, 2007 WL 4547738, *2-3 (S.D.N.Y. 2007), *aff'd by summary order*, 324 Fed. Appx. 82 (2d Cir. 2009).

### 3. The Court of Appeals Decides *People v. Weaver*

The district courts' predictions as to New York law proved incorrect. On May 12, 2009, the New York Court of Appeals concluded in *People v. Weaver* that GPS tracking *is* a search for purposes of the New York Constitution regardless of how the federal courts might rule. *Weaver* held: "Under our State Constitution, in the absence of exigent circumstances, the installation and use of a GPS device to monitor an individual's whereabouts requires a warrant supported by probable cause." 12 N.Y.3d at 447. In 2012, of course, the Supreme Court would reach the same conclusion in *Jones*. Nevertheless, rightly or wrongly, the drivers' challenges pre-enactment facial challenges had been rejected and the technology rules were in effect.

### 4. The TLC Receives an Overcharge Complaint about a Single Cabdriver, and Responds with A Dragnet for All Drivers

On July 16, 2009, the TLC received a complaint from a passenger alleging that the fare in a taxi with medallion 6V11 "increased very rapidly." Upon investigation, the TLC determined that a taxi driver named Wasim Khalid Cheema had persistently overcharged passengers by pressing the "Rate 4" button on his taxi meter. Rate 4 is associated with trips into Nassau or Westchester County and it is double the ordinary "Rate 1" rate used for in-city trips. According to the TLC's investigation of Cheema, he had charged "$11,499 for 642 trips while the other driver who drove the same taxi that month earned $4,803 for 439 trips. The

average fare for respondent was $17.31 while the other driver averaged $10.90 per fare." The TLC investigator "estimated that in the six-month period investigated, respondent earned approximately $40,000 more than the average driver by improperly using rate 4." Cheema had also been found guilty of overcharging another passenger just one year earlier. Thus Cheema was charged, failed to appear, was convicted in a default hearing, and had his license revoked pursuant to the recommendation of administrative law judge dated January 21, 2010 and accepted by TLC Chairman Daus on February 24, 2010.[2]

**5. The TLC Proceeds to Use GPS to Initiate Administrative and Criminal Prosecutions**

At this point, the TLC had ample opportunity to request a warrant if it wanted to investigate other drivers. But it did not do so. Instead, following the revocation of Wasim Cheema, the TLC proceeded to investigate *all* drivers, including those like El-Nahal for whom it had received no passenger complaint and who had no prior overcharge allegations on their record. Renouncing its assurances to the federal court, to the public at large, and to taxi drivers in particular that it would not exploit its technology to track or prosecute individual cabdrivers, the TLC proceeded to do just that. The TLC used its GPS monitoring capability to obtain evidence that it intended to use and did use to prosecute

[2] Reported at Taxi & Limousine Comm'n v. Cheema, OATH Index No. 1450/10 (Jan. 21, 2010), modified on penalty, Comm'r Dec. (Feb. 24, 2010), appended. Available at http://archive.citylaw.org/oath/02_Cases/10-1450.pdf.

drivers. It did so without seeking or obtaining a warrant or establishing probable cause. And it did so despite the fact that the New York Court of Appeals had already decided *People v. Weaver*, holding that the use of GPS tracking was a search for purpose of the state Constitution.

On March 12, 2010, just weeks after it accepted the ALJ's ruling in Cheema, (and just two weeks before Chairman Daus would leave office) the TLC issued an e-mail press release under the subject heading "Taxi Scammers." The statement announced that "Using GPS technology installed in taxi cabs," the TLC had "discovered" that "35,558 [taxi] drivers" had "illegally overcharged at least one passenger" over a 26-month period. The cabdrivers, according to the press statement caused the overcharges by "manually switching the taxi meter from Rate Code 1 (default setting used for trips inside NYC) to Rate Code 4." Rate Code 4 (or Rate 4) is the rate that applies to out-of-city trips. The release specified that the overcharges had occurred on precisely "1,872,078 trips" and that the "total" overcharge was "$8,330,155, or an average of $4.45 per trip." JA-135-136. The press statement quoted Mayor Bloomberg's radio address of the same day, where he said, "[Y]ou know, some of these people could face serious charges." *Id*. In this initial announcement, and many times since then, the TLC admitted that it had made this discovery by "using the GPS tracking capability installed in taxicabs" by rules that became effective in 2007. JA-135.

The media eagerly ran with the TLC's story. The New York Post headline shouted: "Taxi drivers scammed passengers to the tune of $8M by rigging meters." The Daily News ran its story under the headline, "36,000 city cabbies overcharged passengers by $8.3M in widespread meter scam." The New York Times announced: "New York Cabs Gouged Riders Out of Millions." JA-137-142. The soon-to-be-departing Chairman Daus, told the Times, "We have not seen anything quite this pervasive. It's very disturbing." JA-140. To the Post, Daus opined, "I think these people are criminals." JA-142.

The scandal, however, had at best been vastly overstated. Soon after its announcement, the TLC backtracked. On March 22, just 10 days after its initial release, Daus told the New York Times, "[A] fairly significant number" of the incidents resulted in no additional charges, suggesting they might have been simple mistakes. JA-143. TLC Chairman Yassky, who replaced Daus on March 24, testified that on many occasions Rate 4 was engaged through "inadvertent errors." JA-153.

By May 14, the TLC had issued another statement in which it admitted that the account it had aggressively marketed was wildly inaccurate. The agency's May 14 press release offered a revised version of the story. It now stated: "21,819 taxicab drivers overcharged passengers a total of 286,000 times … for a total estimated overcharge of almost $1.1 million"—not "$8,330,155." These

overcharges came during a period where yellow cabs completed 361 *million* trips. So if the re-stated 286,000 figure is indeed accurate, it means that Rate 4 was used to overcharge passengers on less than one trip out of a thousand. JA-146. This same press release announced: "The TLC referred the issue to the New York City Department of Investigation, which is investigating the matter with the Manhattan District Attorney's Office, with an eye toward potential criminal charges for the most egregious offenders." JA-147. Several months later, the district attorney indeed announced indictments and arrests, thanking the TLC for its ability to do so. JA-150.

**6. The TLC Admits it Used GPS Tracking to Investigate and Prosecute Cabdrivers even Absent Suspicion that Any Individual Driver was Guilty of an Overcharge Violation**

Beyond its initial press release, TLC officials have admitted several times that they gathered the evidence needed to prosecute Rate 4 violations using GPS. The TLC conducted this electronic dragnet even though it had no reason to suspect (let alone probable cause) that any individual had committed a Rate 4 violation. Serge Royter, a TLC computer systems manager, who would file the charges against El-Nahal, signed an affirmation in 2010 in which he swore, "The Rate Code 4 overcharges came to my attention after [the Cheema decision] was rendered by [the] Office of Administrative Trials and Hearings." JA-156. Following Cheema, Royter was "asked by [his] supervisors to see if any other

taxicab drivers had also overcharged passengers by illegally using the Rate Code 4 fare." To do so, Royter "accessed the raw trip record data from the three [taxi technology] vendors and began setting up parameters to extrapolate the trips where Rate 4 was illegally used." *Id*. In another sworn affidavit, Pansy Mullings, the former TLC director of enforcement, admitted the TLC discovered the alleged violations by "[u]sing electronic trip data that had been collected via GPS devices and transmitted to TLC." JA-109. Royter, for his part, admitted he had no familiarity with the taxi technology system being used for statistical or policy purposes. JA-167. His gathering of GPS data was purely an evidence-gathering operation.

While, the TLC encouraged overcharged passengers to call 311 and seek reimbursement (JA-147), to this day, the TLC has produced less than a handful of claims by any actual passenger that he or she was overcharged.[3] In sworn testimony, Mullings admitted that there were few complaints by actual passengers. This is despite the hundreds of thousands of purported overcharges. Yet, if just one out of a thousand overcharged passengers came forward, the TLC would have a long list.[4] Rather in virtually every case, its allegations are based solely on

[3] Mullings stated that before the Rate 4 scandal was publicized, "a couple" of passengers had come forward alleging Rate 4 overcharges. JA-87. Royter testified he had heard of "several" passengers coming forward. *Id*.

[4] The paucity of passenger complaints powerfully suggests that the scope of the problem remained overstated. When Rate 4 is engaged, it is evident to anyone

evidence gathered through of GPS technology. And the absence of passenger complaints cannot be attributed to the passengers' reluctance or shyness: The TLC receives roughly twenty thousand complaints from passengers and civilians annually. JA-175. Mullings also admitted that the TLC's prosecution of individual drivers would have been a practical impossibility without GPS tracking. *Id.*

Ultimately, the TLC announced its intention to file quasi-criminal administrative charges.[5] The agency also announced plans to refer cases to criminal prosecutors. The TLC would seek to revoke the licenses of at least 633 taxi drivers, and possibly more. JA-147. The agency would offer settlements of administrative charges by monetary fines ranging from $1,000 to $5000 to 1,671 additional drivers based on a schedule of penalties. *Id.*; JA-176-177. Possibly thousands more would be prosecuted on a "case-by-case basis." El-Nahal was one of these cabdrivers.

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looking at the meter, which would rise in 80-cent increments (rather than the ordinary 40-cent increments). The TLC admitted as much in its May 14, 2010 press release, where it said, "Passengers can currently see what rate they are being charged by looking at the meter, which displays a number '1' or a number '4.'" JA-136. Also, the use of Rate 4 appeared on most of the receipts available to passengers. Finally, anyone who takes taxis on the same route on a regular basis would be able to notice that the fare charged was more than normal. If even one out of a thousand of the supposed victims had complained, the TLC would have a thick file containing hundreds of passenger complaints. But there is no such file.

[5] 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).

### 7. The TLC Charges El-Nahal, and Urges a Settlement

On or around January 3, 2012, a TLC prosecutor sent El-Nahal a "directive to appear" at a conference "in reference to allegations" that he had "deliberately and intentionally" overcharged passengers on ten occasions between November 20, 2009 and February 2, 2010. JA-178-179. At that time, El-Nahal had been a licensed taxi driver for 20 years, who had no significant violations on his record. Indeed, he had received a commendation from the TLC chairman for volunteering his services by offering free rides in the wake of the September 11 attacks. JA-180-181.

While the TLC's directive did not account for the context, it is nonetheless undisputed that a full-time driver such as El-Nahal would complete more than 9,000 trips per year. Thus, even if the charge in the directive was entirely accurate, it would mean that the Rate 4 button had been engaged during this three-month period on roughly one trip out of 225 or once every five or six days. JA-182-183 (El-Nahal Aff.). The initial settlement letter did not state the amount of the alleged overcharges, but the sum-total of the six overcharges later formally alleged was about $10.[6]

[6] The initial directive does not state the sum total of the alleged overcharges, but the five overcharges at issue at the TLC court hearing held on September 14, 2012 totaled $8.40, or $1.68 per overcharge. JA-192-194.

The directive advised El-Nahal that he could settle the charges by paying $1,000 (based on $100 per occurrence) or more than 50 times the amount he supposedly gained.[7] If he chose "not to accept," the letter advised that the "TLC will proceed with a revocation hearing at the New York City Office of Administrative Trials and Hearings ('OATH'), in which TLC will seek to revoke your license and impose a substantial fine." The letter added: "OATH has already decided many similar rate 4 overcharge cases which have resulted in license revocation and substantial fines." It cited TLC v. Ajoku, Index No. 408/11, and TLC v. Gueye, Index No. 354/11. JA-178.

In truth, there were no "similar cases." When the TLC issued its directive to El-Nahal, few, if any, Rate 4 overcharge cases had been truly contested and decided by OATH. Ajoku, a driver appearing *pro se*, had contested the charges. But the Gueye ruling, like the Cheema ruling and nearly all the others "decided" at OATH, followed a default hearing where the charges were uncontested because the driver did not appear. Other letters to drivers cited Cheema as a "similar case" that had resulted in "permanent license revocation." JA-185. These letters omitted the fact that Cheema was accused of engaging Rate 4 on nearly every trip, that his income far exceeded that of other drivers, and that passengers had filed complaints

[7] Under the NYC Administrative Code, the penalty for three overcharges of a passenger within an 36-month period is license revocation. JA-52-53.

against him. The TLC had no similar evidence about El-Nahal or hundreds of other drivers who it would accuse.

El-Nahal appeared for the settlement conference without counsel. There, the TLC prosecutor advised him that there had been a "careful investigation" so that they knew that he was guilty of the charges. If El-Nahal insisted on a hearing, the prosecutor told him that he would certainly be found guilty and that his license would be revoked. The prosecutor also said it would allow him to settle the case by paying $900. JA-182-183.

**8. El-Nahal Found Guilty and his License is Revoked, but the Rulings are Thrice Reversed**

El-Nahal refused the offer and appeared for a hearing (again without counsel) on May 7, 2012. (By this time, these hearings had been moved from the OATH tribunal, as was stated in the directive, to the TLC's own court.) At the hearing, the TLC relied solely on electronic GPS-based trip records and a generic affidavit by Royter, a TLC computer systems manager, which did not mention El-Nahal and made no claim regarding intent to overcharge. Based solely on the trip records, El-Nahal was found guilty of six TLC Rule 2-34 overcharge violations. The TLC ALJ imposed fines totaling $550 and revoked his license. JA-186.

On appeal by counsel (hired at El-Nahal's expense), the TLC Tribunal appeals board reversed the convictions. By an order dated June 1, 2013, the appeals board held that the evidence against El-Nahal, consisting of electronic trip

sheets, was insufficient to demonstrate intent, which is a critical element of an overcharge violation. The appeals board held:

> The elements of an overcharge include among other things, what the overcharged fare was, what the correct fare was, the nature of the trip involved, and whether or not there was an intent on the part of the person charged with an overcharge to do so. Here, the ALJ failed to set forth which trips resulted in an overcharge and on what basis he decided that the respondent intentionally caused the overcharges. Moreover, the ALJ did not state which party he found credible. Under these circumstances, the ALJ's decision is reversed as it is not supported by substantial evidence. JA-187-188.

El-Nahal's license was reinstated.

Soon after, however, the TLC re-issued one of its six charges, never explaining why it did not allege all six violations as it had just before. A second hearing was held on July 13, 2012, at which the TLC offered the same evidence that the appeals board had already found insufficient. TLC ALJ Lee found El-Nahal not guilty and concluded that the TLC's evidence was not even enough to make a prima facie case:

> I find that the Commission has not proven the respondents' intent to overcharge in this case. I find that the Commission's single piece of evidence, the trip record, is insufficient to prove that the respondent intentionally charged the passenger a Rate 4 code. Based on Mr. Royter's affirmation, I find that the Commission has not discounted or eliminated the possibility of human error or mechanical error as the Source of a Rate 4 charge.… Accordingly I find that a prima facie case has

> not been established and the summons is dismissed. JA-195.

Though the TLC adjudication rules allow the TLC to appeal an adverse ruling (which it often does) to the TLC Tribunal appeals board, the TLC did not appeal. *See* TLC Rule 68-15. Thus ALJ Lee's ruling became a final judgment, binding on the agency.

ALJ Lee's ruling did not, however, stop the TLC from re-filing against El-Nahal the remaining five charges, which it had filed originally, but had inexplicably not re-filed before the second hearing. These five alleged overcharges totaled eight dollars and forty cents. At a third hearing held on September 13, 2013, the TLC prosecutor offered no new or different evidence. The TLC's evidence was exactly the same: electronic trip records and the Royter affidavit. Nevertheless, this time the TLC ALJ found Mr. El-Nahal guilty on all five counts and revoked his license once again. JA-196-210.

El-Nahal appealed a second time and the appeals board again reversed. In a decision dated October 19, 2012, the appeals board wrote that the agency had still failed to offer any direct or even circumstantial evidence of intent. Nor was there any evidence that the technology system—the sole basis for the charges against El-Nahal—had been functioning properly:

> Here, the ALJ found that intent was inferred from the circumstance of the respondent's 'trip sheets taken together of various days.' However, the ALJ's decision

> fails to explain how a group of trip sheets of various unspecified days established intent on the part of the respondent to overcharge passengers without even pointing to any particular trip numbers.… The ALJ failed to explain how five alleged instances of overcharges totaling $8.40 stated on five separate trip sheets spanning 4 months for a driver who has been licensed since 1998 and who testified he averaged approximately 40 trips per day proved intent…. JA-195.

Though the charges were reversed, El-Nahal had already suffered a second revocation of his license.

After the second reversal, the TLC re-filed the same charges. And, at a hearing on February 19, 2013, the agency prosecutor offered the same evidence—trip sheets, Google maps and the Royter affidavit. The prosecutor made no effort to come to terms with the appeals board decisions, saying only that he was permitted to re-file the charges, and still offered no proof of intent. Nevertheless, a different TLC ALJ, in five verbatim decisions, found El-Nahal guilty and ordered his license revoked. JA-195-210.

El-Nahal appealed a third time, and the conviction was again reversed, this time with prejudice, for "failure to make a prima facie case." In a ruling dated March 6, 2013, the appeals board wrote:

> [T]he Royter affirmation and the Google maps … do not supply evidence of the respondent's intent to overcharge.… This information establishes nothing beyond what the trip sheets establish, which was found insufficient.…

> Royter does not state that this respondent intended to overcharge, only that he did overcharge. Thus, the Royter affirmation does not prove that this respondent intended to overcharge…. [T]he Commission did not prove intent…. JA-215.

El-Nahal's license was again restored, but not before he had suffered a third period of revocation, and not until he had endured four hearings and three appeals. Meanwhile, El-Nahal had lost considerable wages and suffered substantial emotional and physical pain. The March 6, 2013 TLC appeals board decision, of course, came well after many other drivers had been induced to pay fines in settlement of substantially identical allegations.

**9. The TLC's Own Remedial Action Precludes Future Abuse of the 'Rate 4' Button**

Going forward, the TLC admitted it could, and indeed already had, solved the problem of potential Rate 4 abuse without requiring administrative or criminal prosecutions or the GPS tracking of individual drivers. At the time of its original announcement of the Rate 4 "scam," the TLC said that its taxi technology vendors would "implement a system whereby a highly visible alert would appear on the passenger screen advising the passenger that Rate Code 4 has been activated and should only be used in Nassau or Westchester Counties…. Each vendor's solution would also include some combination of a sound alert to the passenger and/or the driver and require an acknowledgement by the passenger before the message would disappear from the screen." JA-135. Two months later, on May 14, 2010,

the TLC announced that all taxis had been equipped with "Rate Code 4 passenger alerts." JA-148. TLC Chairman Yassky, who replaced Chairman Daus just days after the announcement of the Rate 4 scandal, confirmed this statement in testimony to the City Council on April 7, where he said, "Today I am pleased to inform you that the TLC has secured a fix to this problem." JA-151. Longer term, the TLC said is was "exploring the development of a geo-fencing solution that can remove manual Rate Code 4 activation by the driver. Rate Code 4 would be automatically activated upon crossing into Nassau or Westchester Counties." *Id.*[8]

While the Rate 4 abuse problem, whatever its true extent, had been solved, the TLC also said it would "be moving forward on administrative enforcement, which [would] include … revocation for the most serious offenders and fines for any driver that illegally charged the higher rate code." JA-136. Chairman Yassky admitted that the TLC was "prob[ing] trip data from the past two years," that it was employing "sophisticated devices that use GPS," and was "working closely with the Department of Investigation and with the Manhattan District Attorney's office" who were conducting "ongoing investigation[s]." JA-153. As noted, these prosecutions, all based on GPS tracking, proceeded apace.

[8] Before the advent of the T-PEP system, there was no Rate 4 button. Instead, the out-of-town rate was applied manually by the cabdriver, who simply noted the meter charge when the cab crossed into Nassau or Westchester and then doubled the price charged for the out-of-town portion of the trip. With the T-PEP system, the driver could press a button and the meter would adjust to Rate 4. JA-171 (Mullings).

**10. Proceedings Below**

This action was filed on May 31, 2013 and, after an extension of time to answer, defendants moved to dismiss on August 20. By order of September 13, the motion to dismiss was converted to a motion for summary judgment. On September 24, plaintiff cross moved for partial summary judgment as to Counts I and II of the complaint, alleging violations of 42 U.S.C. § 1983 and the N.Y. Constitution. The motions were fully briefed by December 6.

On January 29, 2014, the district court granted defendants' motion and denied plaintiff's motion. The court held that the TLC's "collection of data regarding plaintiff through the T-PEP system was not a search within the meaning of the Fourth Amendment" because plaintiff had "no reasonable expectation of privacy." Slip Op. 8, 17. The district court further held that if the GPS tracking of cabdrivers was a search, it "was reasonable as a matter of law," falling within the "special needs" exception to the warrant requirement. *Id*. at 15, 17. Thus the court below dismissed plaintiffs federal constitutional claim. The court also dismissed plaintiff's state law claims for lack of supplemental jurisdiction. *Id*. at 19.

## SUMMARY OF ARGUMENT

In *U.S. v. Jones*, the Supreme Court held "that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search,'" for purposes of the Fourth

Amendment. 132 S. Ct. at 949. Just last year, in *United States v. Aguiar*, this Court stated, "*Jones* settled the issue of whether the warrantless use of a GPS device to track a suspect's movements constitutes a search within the meaning of the Fourth Amendment." 737 F.3d 251, 258 (2d Cir. 2013). Nevertheless, the court below held just the opposite: that the TLC's employment of GPS tracking "was not a search within the meaning of the Fourth Amendment." Slip Op. 17. Because the district court's holding is directly contrary to the Supreme Court's decision, this Court should reverse the judgment below.

Instead of following the Supreme Court in *Jones*, the district court relied on two earlier district court decisions, *Alexandre* and *Buliga*, both of which were overruled by *Jones* and both of which relied on an expectation-of-privacy test that the Supreme Court in *Jones* explicitly disavowed. These pre-*Jones* decisions, even if one was affirmed by a non-precedential summary order of this Court, are not good law. Nor were they accurate predictions of New York law since the Court of Appeals later held in *Weaver*, "Under our State Constitution, in the absence of exigent circumstances, the installation and use of a GPS device to monitor an individual's whereabouts requires a warrant supported by probable cause." 12 N.Y.3d at 447.

Rather than follow Supreme Court precedent, the district court purported to distinguish *Jones* on the facts. It did so by emphasizing that the TLC's installation

of a GPS tracking device was not "surreptitious." But this distinction has no relevance in the Supreme Court's Fourth Amendment jurisprudence. Nothing in *Jones* or in the Supreme Court's cases generally requires that the target of a search be unaware in order for the state action to implicate the Fourth Amendment. A police officer who sneaks inside a home in the dead of night and looks around when no one is home is engaged in a search—but so is the officer who intrudes on a home and hunts for evidence while the homeowner looks on.

But even if surreptitiousness were a factor in the law of search and seizure, the undisputed facts would support plaintiff's constitutional claims: The TLC repeatedly assured taxi drivers—including by statements made to a federal court—that it would not use the GPS capability whose installation it mandated as an investigatory or prosecutorial tool, and then it did precisely that. Any expectation-of-privacy analysis must account for these assurances. The district court, however, found them irrelevant.

Under *Jones*, as under *Weaver*, if the TLC wished to use GPS devices to track and prosecute taxi drivers, it was required either to obtain a warrant, or to demonstrate one of the "few specifically established and well-delineated exceptions" to the warrant requirement. *Aguiar*, 737 F.3d at 259. The district court, first finding that there was no search at all, held in the alternative that, if there was a search, it was "reasonable" even though none of these well-delineated exceptions

was, or could be, established. There was no consent here; there was no exigent circumstance; and neither the "administrative search" nor the "special needs" exception applies where a state agency conducts a search with the plain intention of gathering evidence for use in administrative and criminal prosecutions.

The TLC's tracking of taxi drivers like El-Nahal, which was part of a general dragnet conducted despite the absence of probable cause or even suspicion, violated both the Fourth Amendment and Article I, § 12 of the state Constitution. Thus the judgment below should be reversed. And, based on the undisputed facts, plaintiff should be granted partial summary judgment as to his federal and state constitutional claims.

## ARGUMENT

### I. UNDER *JONES*, THE TLC'S DRAGNET GPS TRACKING OF TAXI DRIVERS WAS A SEARCH FOR PURPOSES OF THE FOURTH AMENDMENT

In *Jones*, police officers attached a GPS device to a car driven by a suspected drug dealer. (The government had actually applied for a warrant to allow its use of the device, but the term of the warrant had lapsed.) Based in part on its GPS tracking, Jones was indicted for conspiracy to distribute cocaine, convicted and sentenced to life imprisonment. The D.C. Circuit Court of Appeals reversed the conviction because of the admission of evidence obtained by GPS tracking, which, absent a valid warrant, violated the Fourth Amendment.

The Supreme Court affirmed and stated: "We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search,'"132 S. Ct. at 949 (footnote omitted), thus triggering the requirement that the state obtain a warrant based on probable cause or present some valid exception to the warrant requirement. In reaching its conclusion, the Court engaged in what it described as a traditional analysis of the Fourth Amendment tied to common law trespass: "It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information." *Id*.

In such a case the Supreme Court disavowed the need for the reasonable-expectation-of-privacy analysis that the Court had employed in certain cases such as *Katz v. United States*, 389 U.S. 347 (1967), and which the government had contended would lead to the conclusion that there was no search because Jones' vehicle had been tracked on public roads. The Court rejected the government's argument:

> [W]e need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation…. As explained, for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates.co footnote B00432026902885 1 *Katz* did not repudiate that understanding…. *Katz* did not erode the principle 'that, when the Government does engage in physical intrusion of a constitutionally protected area in

> order to obtain information, that intrusion may constitute a violation of the Fourth Amendment.' 132 S.Ct. at 951 (quoting Justice Brennan's concurrence in *United States v. Knotts*, 460 U.S. 276 (1983)).

In short, the Court noted, "[T]he *Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test." *Jones*, 132 S.Ct. at 952.

The case at bar is no different: The TLC mandated the physical placement of tracking devices in privately owned taxicabs and then (after promising it would not) used the devices to investigate and obtain information about drivers' movements over weeks, months and years. It matters not at all that the automobiles in this case were taxicabs, which are regulated by the city, as opposed to the jeep used by a drug dealer and belonging to his wife.[9] Physical placement of a tracking device on a private vehicle in order to obtain information is, under *Jones*, a search.

If there were any doubt that the "expectation" question is unnecessary to the *Jones* rationale, the Court reiterated its view just last year in *Florida v. Jardines*, 133 S.Ct. 1414 (2013). In *Jardines*, the Court stated: "The [Fourth] Amendment establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When the Government obtains information by physically

[9] In any event, while taxis are regulated, so are automobiles and drivers of all stripes. Any driver must be licensed and is subject to myriad fines and penalties for traffic violations. All vehicles, no matter the driver, must be registered with and inspected by the state.

intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred." 133 S.Ct. at 1414 (quoting *Jones*, 132 S.Ct. 945, 950–951, n.3) (internal quotation marks omitted).

The district court, however, refused to follow *Jones*' holding or its rationale. Although the Supreme Court stated clearly that an individual's Fourth Amendment right do not require an invasion of "privacy" rights, the judgment below is directly contrary, having rejected plaintiff's claim as failing the reasonable-expectation-of-privacy test. Thus the district court wrote: "A search within the meaning of the Fourth Amendment of the U.S. Constitution 'occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.'" Slip Op. 8-9 (quoting *Maryland v. Macon*, 472 U.S. 463, 469 (1985). On this point, in addition to *Maryland v. Macon*, the district court relied on *Knotts*, a case that the *Jones* Court discussed and specifically distinguished in that *Knotts* raised *only* a privacy concern, not a property-based violation of the target's rights. The district court then noted that "the Second Circuit has already ruled, plaintiff had no reasonable expectation of privacy in the T–PEP data at issue." Slip op. 9 (citing *Buliga*, 324 F. App'x 82). Putting aside that the *Buliga* affirmance was by summary order and thus is not deemed precedential under Circuit Rule 32.1.1(a), *Buliga*, decided five years before Jones, also relied on the reasonable-expectation-of-privacy

formulation. Thus, the district court ruling is erroneously based on 2007 district court cases that the Supreme Court has since rejected.

### A. The District Court Mischaracterized Plaintiff's Claim as Based on 'Privacy' Rights

In order to reject plaintiff's position, the district court necessarily misstated it. The district court wrote: "Essentially, plaintiff alleges, based on a set of facts involving defendants' statements about the T–PEP system (see Pl.'s 56.1 ¶ ¶ 16, 19), that he reasonably expected that defendants would 'not use GPS tracking as a prosecutorial tool.' (Pl.'s Mot. 18.)." But this was not the "essence" of plaintiff's claim at all.

To the contrary, plaintiff alleged unmistakably that the mandated installation of a tracking device on plaintiff's car was the basis for his Section 1983 and Fourth Amendment claim. Pl. Br. at 15-16. Indeed, plaintiff explicitly "rejected the premise" of defendants' argument below that he was required to demonstrate an invasion of privacy because in *Jones*, the Supreme Court held that such a showing was not required. *Id.* at 18. It is true that plaintiff did make allegations (as he does on this appeal) concerning the TLC's "statements about the T–PEP system." But these allegations (which are, at this point, undisputed allegations) are not necessary to support a Fourth Amendment claim, a point plaintiff made clear on pages 18-19 of his brief below, citing *Jones* and *Jardines*.

Thus, plaintiff-appellant's Fourth Amendment claim (both below and on appeal) does not depend on whether his expectation of privacy was violated (though as detailed, the facts of this case also support such a claim). The claim is, rather, based on the allegation, supported by *Jones*, that when the government physically intrudes on a privately owned and operated vehicle for the purposes of tracking its movements that is, as the district court itself put it, "a search within the meaning of the Fourth Amendment… regardless of whether the individual maintains a reasonable expectation of privacy in the item searched." Slip Op. 12 (citing *Jones*).

While the district court acknowledged *Jones*' holding in passing, it insisted that it must be distinguished on its facts. It found that "[t]his case is not factually on all fours (or even close) with *Jones*" because the attachment of the GPS device in *Jones* was "surreptitious," because the decision "was highly fact-specific," and because it "hinged heavily on the fact that the property in question was private," which—notwithstanding the district court's contrary *factual* assertion—NYC taxicabs are as well. Slip Op. 12-13.

### B. The Supreme Court's holding in *Jones* Does Not Depend on the Placement of the GPS Device Being Surreptitious

In truth, the decision in *Jones* is no more fact-specific than any other. And the purported facts that are supposedly so different from this case are either irrelevant or not facts at all. First, while the placement of the GPS device on Jones'

car was likely surreptitious, nothing in the decision rested on this apparent aspect. Indeed, the majority opinion did not even mention the covert nature of the installation. (The concurring opinions did, but not as a point of emphasis.) To the contrary, Justice Scalia's opinion for the Court rested on the infringement on property, and that infringement would be the same whether open or secret.

In describing *Jones* and its holding, neither this Court nor other courts have noted that the GPS monitor was placed surreptitiously, much less relied on it. In *Aguiar*, this Court said that *Jones* held that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search for Fourth Amendment purposes." 737 F.3d at 254 (internal quotations omitted). The Sixth Circuit and the Eleventh Circuit described *Jones* just the same way. *United States v. Fisher*, 745 F.3d 200, 202 (6th Cir. 2014); *United States v. Ransfer*, 743 F.3d 766, 773 (11th Cir. 2014). The First Circuit likewise characterized *Jones* as deciding "that the installation and use of a GPS tracker on a car constitutes a Fourth Amendment search." *United States v. Oladosu*, 744 F.3d 36, 37 (1st Cir. 2014). And just last week, the New York Court of Appeals wrote, "Under *Weaver* and the United States Supreme Court's subsequent holding in *United States v. Jones*, the use of the GPS device to monitor a vehicle's movements constitutes a search under our State and Federal Constitutions." *People v. Lewis*, __ N.Y.3d __, 2014 WL 1697024 (N.Y. May 1,

2014).[10] Given the Supreme Court's own characterization of its holding, as well as the characterizations by this Court, its sister circuits and the New York Court of Appeals, there is simply no basis for the district court's view that "surreptitious physical trespass on a private vehicle was the determining factor" in the decision. *See* Slip Op. 14, n.3. While the search in *Jones* may have been secretive, that fact was not critical or even necessary to the decision.

### C. That the Taxi Industry is Subject to Regulation does not Permit Defendants' Warrantless GPS Monitoring

The district court added that, "taxicabs are subject to regulations for public use, unlike the Jeep at issue in *Jones*." Slip Op. 13. But the extent to which an industry is regulated—while possibly relevant to whether a warrant is required—has no bearing on the antecedent question of whether a search occurred. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), illustrates the point. *Skinner* considered post-accident drug testing of railroad workers. And while the railroad industry is as pervasively regulated as any, and while the state action was pursuant to a regulatory scheme, the testing was certainly held to be a search for Fourth Amendment purposes. While the regulatory scheme was a factor, indeed the determining factor, as to whether a warrant was required to justify the search, it

[10] In *Lewis*, the Court of Appeals found there was a search even though "the device was attached to the car for only three weeks (and functional for only two." 2014 WL 1697024, __.

was not deemed pertinent to whether there was a search at all lawful or otherwise. *Skinner*, 489 U.S. at 616.

Finally, the district court claimed that *Jones* is different because it found as a matter of fact (improperly on summary judgment) that taxicabs are not private, citing *Statharos v. New York City Taxi & Limousine Comm'n*, 198 F.3d 317, 324 (2d Cir. 1999), for this proposition. But nothing in *Statharos* changes the fact that taxicabs and taxi medallions are privately owned and operated or that cabdrivers earn their pay from passengers not the city or the state.[11] Indeed, more recently, in *Noel v. NYC Taxi and Limousine Commission*, this Court rejected an Americans with Disabilities Act, saying, "At the risk of being obvious, the New York City taxicab industry is a private industry." 687 F.3d 63, 70 (2d Cir. 2012) (internal citation and quotation omitted). Also quite recently, in upholding a constitutional claim by taxi drivers, this Court wrote, "[T]axi drivers are not City employees—they are private earners who hold a public license." *Nnebe v. Daus*, 644 F.3d 147, 162 (2d Cir, 2012). To that point, this Court cited a New York Court of Appeals

[11]Taxicabs are operated by individual owner-operators, by fleet companies, or by leasing companies. *See* B. Schaller, NYC Taxi Fact Book at 31, available at http://www.schallerconsult.com/taxi/taxifb.pdf; NYC Taxi and Limousine Commission, Taxicab Factbook 2014 at 1, 12, available at http://www.nyc.gov/html/tlc/downloads/pdf/2014_taxicab_fact_book.pdf. All medallions (licenses to operate yellow cabs) are privately owned and may be bought and sold.

ruling handed down in *Hecht v. Monaghan* more than 50 years ago, where the court said:

> The [driver] is not the employee of any public body nor is he the appointee of any municipal officer.… The rules applicable to the disciplining, suspension and discharge of civil employees should not be extended to include the suspension or revocation of licenses of those whose salaries are not paid from public funds." 307 N.Y. 461, 468-469 (N.Y. 1954).

Nothing in *Statharos*, which is not a search and seizure case, contradicts these facts. Its reference to the "nominal private status" of taxi medallion owners pertains to the taxi industry being subject to regulation. This Court did not say that medallion owners lacked all rights to privacy, merely that an asserted against reporting financial information could be overcome by significantly weighty public interests. But the analogy to this case, again, comes into play in assessing whether the search may be lawful even absent a warrant. Nothing in *Statharos* remotely suggests that there was no search at all.

In any event, even a government employee does not forfeit all Fourth Amendment protections. *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987). Indeed, a recent New York Court of Appeals decision involving the GPS tracking of a government *employee* held that the tracking was not just a search, but an unconstitutional search. *Cunningham v. New York State Dep't of Labor*, 21 N.Y.3d

515 (N.Y. 2013). In short, none of the district court's "fact-specific" distinctions between *Jones* and this case is legally meaningful.

### D. *Alexandre* and *Buliga* do not Govern this Action because both Decisions were Overruled by *Jones*

The district court repeatedly cited and followed the 2007 district court decisions in *Alexandre* and *Buliga*. This was error because both decisions have been effectively overruled by *Jones* and by *Weaver* as far as New York law is concerned. Both decisions advanced an expectation-of-privacy test to hold that GPS tracking is not a search, a holding which is directly contrary to *Jones.* Specifically, *Alexandre* states, "[The] applicability [of the Fourth Amendment] depends on whether the person invoking its protection can claim a justifiable, reasonable or legitimate expectation of privacy that has been invaded by government action." 2007 WL 2826952, 12 (internal quotations omitted). *Buliga* follows *Alexandre* and adds, "It is well established that there is no Fourth Amendment protection accorded information about the location and movement of cars on public thoroughfares."

Now the contrary point is well established. As the First Circuit said in *United States v. Sparks*, any ruling that the placement of the GPS device on the vehicle cannot be considered a search "is no longer sound." 711 F.3d 58, 61-62 (1st Cir.) cert. denied, 134 S. Ct. 204 (2013). This is not to say that these district court decisions were not reasonable when issued, two years before *Weaver* and five

years before *Jones*. But it was entirely unreasonable for the TLC to act as it did after *Weaver* and for the district court to rely on those decisions post-*Jones*.

### E. The TLC's Use of the GPS Tracking Data is Pertinent to a Search and Seizure Analysis

The district court erred when it faulted El-Nahal for noting the "subsequent use of [GPS] data" following its collection and in its conclusion that the use of GPS evidence is "legally irrelevant to the Fourth Amendment analysis." Slip Op. 10; *see also id*. at 17. The state's use of evidence it obtains is indeed legally relevant. It is pertinent to both whether a search occurred *and* to whether a warrant is required to permit such a search.

As detailed above, before the taxi technology rules took effect, the TLC made a series of statements that the GPS data it collected would be used for analytical purposes and to help find lost property and that it would *not* be used to "track drivers" or to issue tickets for speeding or other infractions. These promises appear to have been intended to eliminate any privacy concerns that might have given the *Alexandre* and *Buliga* courts pause. The statements had that effect. In *Alexandre*, Judge Berman emphasized the benign uses of the technology such as eliminating written trip records and finding property lost in cabs. 2007 WL 2826952 at *2. The non-prosecutorial uses of GPS technology helped carry the day and led the court to reject the plaintiffs' facial pre-enactment challenge to the proposed rules.

The government's use of GPS data is also pertinent under *Jones*. Indeed, the Court's opinion stated in its holding that it is the "installation of a GPS device on a target's vehicle, *and its use* of that device *to monitor the vehicle's movements* [that] constitutes a 'search.'" 132 S.Ct. at 949 (emphasis added). It emphasized that the "Government physically occupied private property *for the purpose of* obtaining information." *Id*. (emphasis added). Thus even if it was permissible for the TLC to enact its taxi technology rules as a means of general data collection (as the 2007 district court decisions held) the actual use of the technology to "monitor" the movements of particular drivers requires a different analysis and yields different result.

## II. PER *WEAVER*, THE TLC'S USE OF GPS TRACKING ALSO VIOLATED THE NEW YORK CONSTITUTION

While the district court did not reach plaintiff's state constitutional claim, based on the undisputed facts, the TLC's GPS monitoring violated the New York Constitution as well. Even before *Jones*, the New York Court of Appeals held in *Weaver* that GPS tracking is a search for purposes of the New York Constitution. The *Weaver* court held: "Under our State Constitution, in the absence of exigent circumstances, the installation and use of a GPS device to monitor an individual's whereabouts requires a warrant supported by probable cause." 12 N.Y.3d at 447. Distinguishing earlier Supreme Court cases such as *Knotts*, 460 U.S. 276 (1983), the Court of Appeals wrote:

> One need only consider what the police may learn, practically effortlessly, from planting a single device. The whole of a person's progress through the world, into both public and private spatial spheres, can be charted and recorded over lengthy periods possibly limited only by the need to change the transmitting unit's batteries. 12 N.Y.3d at 441.

*Weaver* added, "The massive invasion of privacy entailed by the prolonged use of the GPS device was inconsistent with even the slightest reasonable expectation of privacy." *Id*. at 444. The Court of Appeals reaffirmed its holding less than a year ago in *Cunningham*, where it held that the attachment of a GPS device to a state employee's car was a search "within the meaning of the State and Federal Constitutions." 21 N.Y.3d at 518.

## III. DEFENDANTS' WARRANTLESS SEARCHES ARE NOT PERMITTED BY ANY VALID EXCEPTION TO THE WARRANT REQUIREMENT

The TLC's constitutional violation here was more fundamental that those found in either *Jones* or *Weaver*. The TLC required taxi drivers to install GPS devices, and without any suspicion, much less probable cause, it used those devices to gather evidence against these drivers. It conducted its search targeting not particular individuals suspected of a crime or a violation, but against an entire industry. These searches were not regulatory or to prevent future abuses; they were prosecutorial.

This GPS monitoring was also unnecessary, the TLC admits, to rectify any harm going forward. After TLC officials learned about Cheema's overcharges in July 2009, they could have installed the same technical and regulatory safeguards to prevent Rate 4 abuse that they would announce eight months later. Also at that time, the TLC had every opportunity to apply for a warrant as to any taxi driver about whom it had probable cause. *See Jones*, 132 S. Ct. at 964 (J. Alito, concurring) ("[W]here uncertainty exists … the police may always seek a warrant."). Instead the agency delayed implementation of their solution until they had collected and collated GPS data in service of prosecutions. The electronic dragnet that defendants employed is just the kind of sweeping search or general warrant that the Fourth Amendment was enacted to prevent. *Berger v. State of New York*, 388 U.S. 41, 58 (1967); *Steagald v. United States*, 451 U.S. 204, 220 (1982).

### A. A Warrantless Search Conducted with Prosecutorial Intention and Result Cannot Be Constitutional

As this Court has stated on many occasions, "Warrantless searches 'are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.'" *United States v. Howard*, 489 F.3d 484, 492 (2d Cir. 2007) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971)); *see also Arizona v. Gant*, 556 U.S. 332, 338 (2009) ("basic rule [is] that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment….")

(internal quotation omitted); *United States v. Casado*, 303 F.3d 440, 443-44 (2d Cir. 2002) ("warrantless searches and seizures are per se unreasonable … unless they fall within one of several recognized exceptions").

Defendants here cannot establish any of the delineated exceptions. There was no consent. There was no exigent circumstance. Because widespread GPS monitoring was in service of ordinary law enforcement, defendants cannot meet the requirements for the "special needs" exception that the district court invoked. And it need hardly be said that a police agency's desire to gather evidence despite the absence of probable cause has never permitted an exception to the warrant requirement.

### B. Taxi Drivers Never Consented to GPS Tracking

For consent to be an exception to the warrant requirement, it must be informed, knowing and voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218, 223-24 (1973). The burden of proving that consent was free and voluntary is on the state and "[t]his burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968); *see also Anobile v. Pelligrino*, 303 F.3d 107, 124 (2d Cir. 2002) ("The official claiming that a search was consensual has the burden of demonstrating that the consent was given freely and voluntarily"). Mere acquiescence to the search being conducted, of course, is not consent. *U.S. v.*

*Deutsch*, 987 F.2d 878, 883 (2d Cir. 1993). It certainly cannot be said that working as a taxi driver or accepting a license constitutes consent to an otherwise unconstitutional search. *Anobile*, 303 F.3d at 124. Indeed, employment cannot be deemed consent even where the employees had been notified by a rulebook that they are subject to search. *Security and Law Enforcement Employees v. Carey*, 737 F.2d 187, 202 n.23 (2d Cir.1984).

The TLC did not ask for or obtain consent either from El-Nahal or from other drivers. To the contrary, as a group, taxi drivers vehemently opposed the taxi technology mandate and its possible use for tracking and prosecution, going so far as to file a federal lawsuit to block its taking effect. And in its support of the rules, the TLC repeatedly assured the federal court, the public, and taxi drivers that it would not use GPS to track individual drivers. With these facts in the record, the TLC has not even attempted the argument that drivers consented.

Moreover, when a state agency gathers evidence for the specific purpose of incriminating individuals, "they have a special obligation to make sure" that those individuals "are fully informed about their constitutional rights, as standards of knowing waiver require." *Ferguson*, 532 U.S. at 85. "Phrased somewhat differently, critical to the question of [voluntary consent to a search is] the antecedent question of whether" the target "understood that the request was not being made" for general regulatory analysis "but rather by agents of law

enforcement for purposes of crime detection." *Ferguson v. City of Charleston*, 308 F.3d 380, 397 (4th Cir. 2002). Here, the TLC never informed drivers that it would use its GPS device to obtain evidence for criminal and quasi-criminal prosecutions. It said the opposite. *Cf. Stoner v. California*, 376 U.S. 483, 489-90 (1964) (that a hotel guest may have given implied consent for entry by maids or janitors did not extend to entry by police officers to search for evidence of crime). In actual fact, the TLC admits it did use GPS to collect evidence against individuals. It organized information in databases created especially for that purpose. JA-156. It was all designed and executed as part of an evidence-gathering project, which was unannounced until after the fact. In that sense, it was indeed surreptitious.

### C. Even if a Taxi Driver Knew a GPS Monitor was in his Cab, Knowledge is not Consent and Is Not Relevant to the Application of the Fourth Amendment

Some searches are conducted inherently in secret, such as a wiretap. Others, such as a search coincident with an arrest, are done openly. But nothing in the Supreme Court's Fourth Amendment jurisprudence turns on this distinction. A search is a search regardless of whether it is aboveboard or below. A search is a search whether its target is ignorant or aware.

While the point is self-evident, it is also illustrated by the Supreme Court's decisions. In the landmark case *Mapp v. Ohio*, the police arrived at a residence and were met by "Mapp and her daughter … [who] refused to admit them without a

search warrant." 367 U.S. 643, 644 (1961). The police entered anyway and the search was held to be unconstitutional, even though Ms. Mapp knew full well it was underway at the time. *Terry v. Ohio* involved a policeman stopping and frisking a passerby: That is a search, which may or may not be lawful, though the target is certainly aware as it happens. *Terry v. Ohio*, 392 U.S. 1 (1968). In *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), the city installed checkpoints so it could search stopped cars for illegal drugs. This was a search even if any motorist would know his or her car had been stopped and was being inspected. In *Arizona v. Gant*, 556 U.S. 332, police searched a car while its owner was under arrest at the scene. That the search was done in plain sight of the car's owner (or driver) was immaterial. In any search involving urine testing, the target would certainly be aware. *E.g.*, *Chandler v. Miller*, 520 U.S. 305 (1997). Similarly, *People v. Scott*, 79 N.Y.2d 474 (N.Y. 1992), involved an administrative search where the police announced their presence to the business owner and explored the yard out front. Though there was nothing surreptitious about it, the search was still held in violation of the state constitution. There are many other examples that need not be rehearsed here of searches that are open and notorious, and unconstitutional nonetheless. But there are no cases holding the opposite or the converse, that a search was unconstitutional simply because it was surreptitious, or that a search is lawful if done openly, but unlawful if secretive.

In this case, some taxi drivers may have known that there was a GPS device in their cabs. But it is undisputed that all cabdrivers had also been told that the GPS capacity would be used for policy-making, for data collection and the like—*not* to track individuals. None were informed of or could have known that the TLC would use the GPS as an evidence-gathering tool. Thus, if surreptitiousness is required to establish a Fourth Amendment violation, plaintiff's claim should still be upheld.

### D. A State Agency that Uses GPS to Investigate and Obtain Evidence for Prosecution, Cannot Establish the 'Special Needs' Exception to the Warrant Requirement

The district court wrote, "Even assuming *arguendo* that a search occurred because plaintiff had a reasonable expectation of privacy in the collected data or because defendants physically trespassed on plaintiffs property, plaintiff's Fourth Amendment claim still must fail, because any such search was reasonable under the circumstances." Slip Op. 14. The district court defined the search as reasonable because there were "'special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.'" *Id*. at 15 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995)). In reaching this conclusion, the district court relied again on the district court decision in *Buliga*, which had emphasized the non-law enforcement uses of the GPS monitoring and the TLC's assurances, circa 2007, that theses non-prosecutorial goals were its sole intent.

But in actual fact, the TLC's conduct was specifically for law enforcement, which voids any claim to the 'special needs' exception. The Supreme Court has refused to allow the identification of "special needs" as a pretext for warrantless searches for law enforcement purposes. The doctrine may be "used to uphold certain suspicionless searches performed *for reasons unrelated to law enforcement*, is an exception to the general rule that a search must be based on individualized suspicion of wrongdoing." *City of Indianapolis*, 531 U.S. at 54 (emphasis added); *see also Ferguson*, 532 U.S. at 79; *Skinner*, 489 U.S. at 619. In order to invoke it, as a threshold matter, the search must "serve as [its] immediate purpose an objective distinct from the ordinary evidence gathering associated with crime investigation." *Nicholas v. Goord*, 430 F.3d 652, 663 (2d Cir. 2005); *see also Tenenbaum v. Williams*, 193 F.3d 581, 603 (2d Cir. 1999). Moreover, the state agency invoking the exception must show that the proffered special need was "substantial." *Chandler v. Miller*, 520 U.S. at 318. Here, the TLC conducted its dragnet purely for ordinary evidence gathering associated with a criminal and administrative investigation. And far from being substantial, the problem of Rate 4 overcharges had gone unnoticed until the TLC announced it to the media, and was able to prevent it going forward.

The special needs exception may not be invoked "whenever it appears that compliance with the normal restraint on governmental searches is inconvenient or

poses an obstacle to the legitimate goals of fighting crime." *Nicholas*, 430 F.3d at 679 (D.J. Lynch, concurring). As this Court said just last year, "'Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, ... reasonableness generally requires the obtaining of a judicial warrant' supported by probable cause." *Lynch v. City of New York*, 737 F.3d 150, 157 (2d Cir. 2013) (quoting *Veronia*, 515 U.S. at 653). There is no reason to deviate from the general requirement here.

The Supreme Court's decisions in *Skinner* and *Ferguson* illustrate where the special needs exception may and may not be invoked. In *Skinner*, the Court allowed a warrantless search, the drug-testing of railway workers, but only after the Federal Railroad Administration (FRA) had proffered detailed and well-researched legislative findings about the role of alcohol and drugs in rail accidents and only after the agency met the threshold test that it was performing the search for reasons unrelated to law enforcement. 489 U.S. at 619-620. *Skinner* emphasized, "The FRA has prescribed toxicological tests, *not to assist in the prosecution of employees*, but rather to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs." *Id*. at 620-21 (emphasis added; internal quotation omitted). In *Ferguson*, by contrast, where a hospital shared its drug tests of pregnant mothers with the police, leading to arrests, the Court rejected the state's claim to a special needs exception and held

the program in violation of the Fourth Amendment. "Because the hospital [justified] its authority to conduct drug tests and to turn the results over to law enforcement agents without the knowledge or consent of the patients," the case "differ[ed] from" previous drug test cases where the special needs doctrine applied. 532 U.S. at 77. Because "the immediate objective of the searches was to generate evidence *for law enforcement purposes*," the special needs exception could not apply. *Id.* at 83 (emphasis in original); *see also Lynch*, 737 F.3d at 158; *Nicholas*, 430 F.3d at 662-64.

In this case, as in *Ferguson* and in contrast to *Skinner*, the TLC used its technology in search of evidence, which it then used to prosecute El-Nahal and others. It did so without any prior finding that driver overcharges were a pervasive problem. The TLC admits its post-Cheema review of the GPS tracking data was for purposes of filing charges. Its investigator, Royter, testified that he was tasked with discovering whether "any other taxicab drivers had also overcharged passengers by illegally using the Rate Code 4 fare" and this is what he did. JA-156. TLC Chairman Yassky admitted the same point. JA-153. The prospect of "serious charges," both quasi-criminal or administrative and criminal, was announced from the outset and the matter was referred to the Department of Investigation for a joint investigation with the Manhattan District Attorney, which quickly announced arrests and criminal charges. JA-150. They used GPS as an ordinary law

enforcement tool, not for a special, or non-law enforcement, need. Thus, there was no special need and the exception does not apply.

### E. The TLC Cannot Establish the 'Administrative Search' Exception to the Warrant Requirement

The TLC's investigation, geared to the discovery of alleged criminal and quasi-criminal violations, does not qualify for the so-called administrative search exception to the warrant requirement either. As construed by both the Supreme Court of the New York Court of Appeals, for the 'administrative search' doctrine to apply it is not enough that the search was conducted by an administrative agency. Under the Supreme Court's decision in *New York v. Burger*, 482 U.S. 691 (1987), the state must satisfy three additional criteria in order to invoke the exception. But in this case, defendants cannot satisfy any.

First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made. *Burger*, 482 U.S. at 702. Here, there is no such interest. While overcharging is unlawful—and the state certainly has some interest in preventing it— there was no evidence that overcharging was a pervasive problem. Indeed, even after the TLC publicized the "taxi scammers," few putative victims came forward. That problem went unnoticed by the public even after it was advertized certainly casts some doubt on its scope. But even if there were as many overcharges as the TLC claims, the agency admits

that they occurred less than one trip out of a thousand (286 thousand out of 361 million). PX 9.

Moreover, even as it announced the putative scandal, the TLC also announced a solution though the "implement[ion of] a system whereby a highly visible alert would appear on the passenger screen advising the passenger that Rate Code 4 has been Activated." Additional solutions such as "geo fencing" were also in the works. *Id*. A problem that is rare, unnoticed by its supposed victims, and which is readily solved cannot be said to create a substantial interest. *Cf. Scott*, 79 N.Y.2d at 517 (calling New York's auto theft problem an "economic debacle," but still finding the search used to combat the problem unconstitutional).

Second, a warrantless inspection must be "necessary to further [the] regulatory scheme." *Burger*, 482 U.S. at 702-03. But as noted, the TLC—which created the Rate 4 button in the first place—could have prevented the abuse of the Rate 4 button simply by eliminating the button (which it invented) or by disabling it within the five boroughs. And if prosecutions were required, defendants could have applied for a warrant, and done so *ex parte*, thus maintaining the element of surprise.

Third, the *Burger* Court held: "[T]he statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant." In other words, the statute (or regulation) must

perform the warrant's two basic functions: It must advise the targets that the searches are being conducted pursuant to law and within a properly defined scope; and it must limit the discretion of the inspecting officers. To perform the first function, the statute must be sufficiently comprehensive and definite so that the search target "cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." 482 U.S. at 703 (internal citations and quotations omitted).

Again, in this case, the facts are essentially the opposite of what the rule requires. There was no rule of law advising of the search and nothing to define its scope. No TLC regulation, certainly no statute, advised cabdrivers they would be tracked by the devices installed in their cabs for other purposes. To the contrary, in passing its technology rule, the TLC assured time and again that it would not use GPS to "track" drivers even to issue speeding tickets. But the TLC actually did much more, using the GPS monitoring to prosecute charges that could lead to the revocation of a driver's license and thus his loss of livelihood. *See generally Nnebe*, 644 F.3d at 159 (taxi driver's "private interest [in his continued licensure] is enormous"); *Padberg v. McGrath-McKechnie*, 203 F. Supp. 2d 261, 277 (E.D.N.Y. 2002), *aff'd*, 60 Fed. Appx. 861 (2d. Cir.) (cabdriver's interest in his license is not merely "sufficient to trigger due process protection," it "is profound").

Nothing in the TLC rules provides "a constitutionally adequate substitute for a warrant," making the administrative search exception wholly inapplicable. The TLC rule may arguably require the installation of GPS devices; the rule may be proper on its face. But as the Supreme Court has said, "It is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence." *United States v. Karo*, 468 U.S. 705, 712 (1984). Thus, even more clearly, the TLC's dragnet fails this "certainty and regularity" prong of the *Burger* test.

## IV. THE UNDISPUTED FACTS SUPPORT GRANTING PLAINTIFF PARTIAL SUMMARY JUDGMENT ON HIS CONSTITUTIONAL CLAIMS

Along with granting defendants' motion for summary judgment on plaintiffs' federal claims, the district court denied plaintiff's cross motion as to his federal and state constitutional claims. Based on the undisputed facts, this Court should order that summary judgment be granted to plaintiff. *See Critchlow v. First UNUM Life Ins. Co. of Am.*, 378 F.3d 246, 265 (2d Cir. 2004) (reversing grant of summary judgment for defendant and remanding for entry of judgment in favor of plaintiff). Under Rule 56(c) of the Federal Rules of Civil Procedure a moving party is entitled to summary judgment "when after viewing all the facts in the record in a light most favorable to the non-moving party, there is no genuine issue of material fact present, 'so that the moving party is entitled to judgment as a matter of law.'"

*Forsyth v. Federation Employment and Guidance Serv.*, 409 F.3d 565, 569 (2d Cir. 2005) (quoting Rule 56(c)). Once the moving party has made a properly supported showing sufficient to suggest the absence of any genuine factual issue, to defeat the motion the opposing party must come forward with evidence that would be sufficient to support a jury verdict in its favor. *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995).

Defendants have offered no such evidence. El-Nahal has, however, demonstrated facts that are admitted or otherwise undisputed concerning the TLC's use of the technology that drivers were mandated to install, the actual use being very different from what the agency promised. These undisputed facts are more than sufficient to conclude as a matter of law that defendants violated plaintiff-appellant's rights under the Fourth Amendment and Article I, Section 12 of the New York Constitution.

## CONCLUSION

For the reasons stated, *Jones* requires reversal of the judgment below, which is directly contrary to the Supreme Court's holding and its rationale. *Weaver* likewise necessitates the conclusion that defendants conducted an unconstitutional search under New York law. *Jones* and *Weaver*, coupled with the absence of any established exception to the warrant requirement, mandate that summary judgment

be granted to plaintiff-appellant on Counts I and II of the complaint and that his state law claims be reinstated.

Dated: New York, New York
May 8, 2014

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CERTIFICATION PURSUANT TO
Fed. R. App. P. 32(a)(7)(B) and (C)

The undersigned hereby certifies that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and (C) because the brief contains 13,286 words of text.

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Dated: May 8, 2014

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*db*