APPENDIX

APPENDIX A- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED AUGUST 26, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 22-1514
Non-Argument Calendar

ERROLL TYLER, NAUTICAL TOURS, INC., ALLENA TABB-HARPER

Plaintiffs-Appellants

versus

MICHAEL COX, THOMAS LEMA

Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Massachusetts

D.C. Docket No. 1:18-cv-10677-IT

August 26, 2024, Filed

Before Kayatta, Gelpi and Montecalvo, Circuit Judges

PER CURIAM:

Now before the court are Plaintiffs-Appellants petition for panel rehearing and other post-judgment filings. Regarding Plaintiffs-Appellants' "Motion to Request the Court to Write an Opinion"... is DENIED. The petition for panel rehearing is DENIED. See Fed. R. App. P. 40(a)(2) (governing petitions for panel rehearing).

In reviewing the denial of the motion for panel rehearing petitioners contend;

In accordance with Fed. R. App. P. 40(a)(2) governing petitions for panel rehearing, which refers to the time limit for filing a petition for a panel rehearing is 14 days after the entry date of the judgment. Petitioners contend they did adhere to the rules set forth in said guidelines specified in accordance with this rule.

Whereas the First Circuit Court of Appeals entered its judgment June 25, 2024. Petitioners entered their request for panel rehearing on July 9, 2024, exactly

14 days from the date of the Appeals Court's decision date. As verification of said action, petitioners possess a date and time stamped copy of their motion entered by the appeals court's intake clerk on the appointed date.

Despite this fact, Petitioners' motion for a panel rehearing was denied citing Fed. R. App. P. 40(a)(2) governing petitions for panel rehearing. If petitioners had been granted an opportunity for panel rehearing, they would have clearly presented compelling evidence which may have affected that panel's opinion.

APPENDIX B – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED JUNE 25, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 22-1514

Non-Argument Calendar

ERROLL TYLER, NAUTICAL TOURS, INC., ALLENA TABB-HARPER
Plaintiffs-Appellants

versus

MICHAEL COX, THOMAS LEMA
Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Massachusetts

D.C. Docket No. 1:18-cv-10677-IT

Filed June 25, 2024

Before Kayatta, Gelpi and Montecalvo, Circuit Judges

PER CURIAM:

Now before the court are Plaintiffs-Appellants petition for panel rehearing and other post-judgment filings. Regarding Plaintiffs-Appellants' "Motion to Request the Court to Write an Opinion"... is DENIED. The petition for panel rehearing is DENIED. See Fed. R. App. P. 40(a)(2) (governing petitions for panel rehearing).

In reviewing the denial of the motion for panel rehearing petitioners contend; In accordance with

Fed. R. App. P. 40(a)(2) governing petitions for panel rehearing, which refers to the time limit for filing a petition for a panel rehearing is 14 days after the entry date of the judgment. Petitioners contend they did adhere to the rules set forth in said guidelines specified in accordance with this rule.

Whereas the First Circuit Court of Appeals entered its judgment June 25, 2024. Petitioners entered their request for panel rehearing on July 9, 2024, exactly 14 days from the date of the Appeals Court's decision date. As verification of said action, petitioners possess a date and time stamped copy of their motion entered by the appeals court's intake clerk on the appointed date.

Despite this fact, Petitioners' motion for a panel rehearing was denied citing Fed. R. App. P. 40(a)(2) governing petitions for panel rehearing. If petitioners had been granted an opportunity for panel rehearing, they would have clearly presented compelling evidence which may have affected that panel's opinion.

PER CURIAM:

Plaintiffs-Appellants appeal the district court's decision granting in favor of Defendants-Appellees in the underlying action involving federal due process and equal protection claims. Our review is de novo. See Suzuki v. Abiomed, Inc., 943 F. 3d 555, 561 (1st Cir. 2019) (citation omitted). Upon reviewing relevant portions of the record and the parties' submissions, we AFFIRM, for substantially, the reasons cited by the district court. See Swarthout v. Cooke, 562 U.S. 216, 219 (2011) (elements of a procedural due process claim): Buchanan v. Maine, 469 F.3d 158, 177-78 (1st

Cir. 2006) (elements of a "class of one" equal protection claim).

Regarding the procedural due process claim, Plaintiffs-Appellants do not suggest in their opening brief that there was a genuine issue of fact relevant to the claim, and we agree with the district court that, based on the specific content of the summary judgment record, Defendants-Appellees were entitled to judgment in their favor as a matter of law, Plaintiffs-Appellants' refusal to complete the forms and process generally required for entities or individuals in their position- that is, entities or individuals seeking license for the first time – was fatal to their claim that they were constitutionally were entitled to procedure they did not receive. See Bos. Env't Sanitation Inspectors Assn's v. City of Bos., 794 F.2d 12, 13 (1st Cir. 1986) (explaining that appellants could not "bootstrap themselves into a federal court by failing to" access procedures actually made available); see also Kirkland v. St. Vrain Valley Sch. Dist. No. Re IJ, 464 F.3d 1182, 1195 (10th Cir. 2006) (rejecting procedural due process claim where plaintiff had failed to avail himself of procedures available to him); Luellen v. City of E. Chicago, 350 F.3d 604, 616 (7th Cir. 2003) (rejecting procedural due process claim based, in part, on the fact that plaintiff "was provided with the opportunity for additional procedures to vindicate his rights but did not avail himself of those opportunities").

Regarding the class-of-one equal protection claim, again Plaintiffs-Appellants do not point out any genuine issue of fact relevant for purposes of the claim, and we agree with the district court's conclusion that the claim failed as a matter of law because Plaintiffs-Appellants failed to identify an

appropriate comparator and, in any event, failed to demonstrate the absence of a rational basis for the disparate treatment alleged, See Buchanan, 469 F.3d 177-78 (explaining that plaintiff pursuing class-of-one claim must "identify and relate *specific instances* where persons *situated similarly in all relevant aspects* were treated differently" and must demonstrate "that there is no rational basis for the difference in treatment" alleged) (internal quotes omitted; emphasis in original). All pending motions, to the extent not mooted by foregoing, are denied.

Affirmed, See 1st Cir. Local R. 27.0(c).

In reviewing the Appeals Court's affirmation of the District Court's judgment, the panel fails to recognize that according to the Plaintiffs-Appellants civil action, No. 1:18-cv-10677-IT entered on April 6, 2018, Petitioners action was not a claim against the City's arbitrary "new company" application policy, which Plaintiffs-Appellants have clearly disputed, Plaintiffs-Appellants cite in Count I & II that the Defendants-Appellees deprivation of the Plaintiffs guaranteed protections under the Fourteenth Amendment of the United States Constitution; in that the controversy arises under the United States Constitution's XIV Amendment pursuant to 42 U.S.C § 1983.

Plaintiffs-Appellants "objection" to submitting additional forms, based on specific content of the summary judgment record, Defendants-Appellees never established their claim that said process is or was ever required of entities or individuals seeking license for the first time. In accordance with Commonwealth of Massachusetts laws; *Chapter 399 of the Acts of 1931* cite Boston Police Commissioner *shall only* have authority to regulate sightseeing

vehicles and the operators of said vehicles on the streets of Boston, as a matter of law. The district court has vested powers unto Boston Police Commissioner that obviously are not cited nor authorized under said legislative statute.

Plaintiffs-Appellants aforementioned "objection" is based on the fact that in accordance with [s]tate law, Defendants-Appellees had failed to act on their previously filed pending nine sightseeing vehicle applications for a period of sixty-days, as a result petitioners then chose to avail themselves to the *only* applicable, adequate [s]tate procedural due process remedy, M.G.L. 159A, § 1.

In accordance with said Massachusetts statute which clearly states in part,

> *"If [a]ny application for a license under this section is not acted upon within a period of sixty-days after the filing thereof, the applicant may appeal to the commission within five-days... the commission [s]hall hold a hearing on [e]ach such appeal requiring due notice to be given to all interested parties".*

Based on the content of the district court record the City of Boston, Hackney Carriage Unit, BPD mail intake clerk signed for and received the plaintiffs-appellants petition package for nine Boston sightseeing automobile permits on the morning of April 13, 2015. Whereas no action was taken on Plaintiffs-Appellants petition for sixty-days, subsequently on June 17, 2015, sixty-five days after the filing thereof they entered a petition unto the BPD, Inspector of Carriages, Hackney Carriage Unit requesting a hearing pursuant to M.G.L. 159A, § 1. To date petitioners have not received notice nor hearing.

The district court's May 31, 2022, ruling failed to cite any statutory grounds for dismissing the defendants-appellees failure to act on plaintiffs-appellants license petition in accordance with M.G.L. 159A, §1. In fact, this same district court highly rebuked the defendants-appellees "stonewalling" of the plaintiffs-appellants license petition on its August 1, 2019, Memorandum & Order.

That previous ruling was in complete contrast with this same district court's latter conflicting May 31, 2022, Memorandum & Order, whereby finding the summary judgment in favor of the same faulted defendants-appellees. This same district court has previously ruled that the plaintiffs-appellants have liberty interest... "in their right to earn a living in their chosen profession". *See Appendix D, District Court's Mem. & Order entered Aug. 1, 2019*

Lt. Thomas Lema, Jr., Inspector of Carriages, BPD Hackney Carriage Unit has acknowledged under oath in his deposition testimony that despite the plaintiffs-appellants pleadings and their written requests for a hearing, he did nothing, nor did he instruct his staff, to address the plaintiffs' petition. *See Appendix G, Lema Tr., Id at 98-2 thru 105-3*

As a general matter procedural due process requires an opportunity for a meaningful hearing to review a deprivation of protected interest. The Supreme Court has held that "some form of hearing is required before an individual is finally deprived of a property or *[liberty]* interest. *Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)*

The Petitioners contend they're not filing additional applications, which the First Circuit cited was "fatal to the petitioners claim" does not qualify as

a form of a procedural due process hearing in any manner. This right is a "basic aspect of the duty of the government to follow a fair process of decision making when it acts to deprive a person of his possessions." *Matthews v. Eldridge 424 U.S. 319, 333 (1976)*

Whereby notice of hearing and the opportunity to be heard must be granted at a meaningful time and in a meaningful manner. *Fuentes v. Shevin 407 U.S. 67, 80-81 (1972) Without a final decree by the Boston Police Commissioner the plaintiffs-appellants had no other legal recourse but to seek relief through the only adequate procedural due process remedy available under state law, M.G.L. 159A, § 1. Bos. Env't Sanitation Inspectors Assn's v. City of Boston* Commander Lt. Thomas Lema's deposition testimony admission that he did nothing to address plaintiffs-appellants City of Boston, sightseeing automobile license applications for more than four years is profoundly persuasive evidence in itself, clearly revealing their malicious intent.

Plaintiffs-Appellants respectfully ask this honorable court how these compelling material facts do not suffice criteria to support the genuine issues of fact, relevant to the plaintiffs-appellants § 1983 deprivation claim under color of law and, not to be recognized as a constitutional violation by the District Court and the First Circuit is perplexing.

Petitioners indicate these details are well-established, well-documented genuine issues of fact relevant to their procedural due process violation claim which are indisputably established in court records. *See Appendix D, District Court's Mem. & Order entered Aug 1, 2019, See also Appendix E, Plaintiffs Statement of Material Facts, Jan 27,2022*

See also Appendix F, Aff. Erroll Tyler filed January 27, 2022

APPENDIX C – OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, FILED MAY 31, 2022

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MASSACHUSETTS

Civil Action No. 1:18-cv-10677-IT

ERROLL TYLER, ALLENA TABB-HARPER, NAUTICAL TOURS, INC.
Plaintiffs

versus

GREGORY LONG, ACTING COMMISSIONER OF BOSTON POLICE, THOMAS LEMA, INSPECTOR OF CARRIAGES, HACKNEY CARRIAGE UNIT
Defendants

MEMORANDUM & ORDER,

Case No. 1:18-cv-10677-IT

Document 125, Filed May 31, 2022

Before United States District Court Judge, Indira Talwani

PER CURIAM:

To prove a procedural due process violation, a plaintiff must demonstrate (1) a deprivation of a protected interest and (2) that the deprivation was accomplished without due process law. Perez-Acevedo v. Rivero-Cubano, 520 F.3d 26, 30 (1st Cir. 2008) The court concluded, however, that Tyler and Tabb-Harper had a protected interest in "the right to earn a living in their chosen profession for which there sought-after license is a prerequisite," and that Nautical Tours' Amended Complaint[Doc. No. 46]

stated a claim for relief where the city officials' alleged failure to act on their applications deprived them of the right to judicial review of an adverse decision. Id. Appx. C, Id. 10-11

The court further stated; In any event, even if the court were to conclude that the city's failure to formally deny the April 2015 applications violated Nautical Tours' right to due process, the remedy would be limited to a court order to city officials to issue a decision on the applications. See Carey v. Piphus, 435 U.S. 247, 264-265 (1978). Where Nautical Tours has now received that decision, the court is unable to provide further relief.

Plaintiffs-Appellants contend that the District Court's summary judgment ruling is not grounded in fact or law, whereby the First Circuit's decision is egregiously wrong. The Defendants did eventually issue a final decision on Plaintiffs pending sightseeing automobile license applications in Oct 2019, which is definitively in default four years after their initial filing thereof in April 2015. In any event, the Defendants' Oct 2019 issuance of said final decision was accomplished without due process of law. Appx. C, Id. 10 *Mullane v. Centra Hanover Bank & Trust Co. 339 U.S. (1950)*

Therefore, the District Court's May 31, 2022, judgment should be rendered void, vacated and remained to trial. According to the court record Plaintiffs-Appellants civil action complaint No. 1:18-cv-10677-IT filed on April 6, 2018, was not an action against the City's arbitrary "new company" application policy as the district court has indicated and subsequently ruled upon in its May 31, 2022 summary judgment conclusion and opinion.

Plaintiffs-Appellants above mentioned Civil Action No. 1:18-cv-10677-IT, [Doc. 1] filed April 6, 2018, was a complaint pursuant to the Defendants-Appellees violation of 42 U.S.C. § 1983, deprivation of due process under the Fourteenth Amendment of the United States Constitution derived from a violation of M.G.L. 159A, § 1.

The complaint in **COUNT I** allege that Defendants-Appellees have deprived the Plaintiffs of their right to due process guaranteed by the Fourteenth Amendment of the United States Constitution. The Defendants acted under the color of state law when the Defendants deprived the Plaintiffs of their federal rights.

Accordingly, court records established Defendants authority to regulate [only] sightseeing vehicles and the vehicle operators on the streets of City of Boston pursuant to Massachusetts legislative law, **Chapter 399, Acts of 1931,** as in accordance with SJC order Nautical Tours v. Department of Public Utilities, SJC-11455, filed August 20, 2014

Plaintiffs' complaint in **COUNT II** allege violation of 42 U.S.C. § 1983, whereby, deprivation of due process by Defendant Lt. Lema, acted under of state law when he deprived the Plaintiffs' of their federal rights. Lt. Lema acted with malice and/or reckless disregard for the Plaintiffs' federal rights, as stated in his deposition testimony admission that he did nothing to address Plaintiffs' license petition.

As a direct and proximate cause of Defendants violation of 42 U.S.C § 1983, the Plaintiffs have sustained injuries and damage, Plaintiffs still continue to suffer damage including but not limited to, lost economic opportunity, lost financial support of

investors, humiliation and emotional injury, as well as harm to their professional and commercial reputation.

For these reasons, under the proper application of the doctrine of due process law and the law on void judgments, other acts evidence is basically irrelevant. Because the doctrine of procedural due process law mandates due notice and hearing before the government may deprive a person of life, liberty or property.

Brandon L. Garrett, Professor of Law at Duke University School of Law, is the Author of the Book, Defending Due Process: Why Fairness Matters in a Polarized World.

A leading scholar of criminal justice outcomes, evidence and constitutional rights, he is the author of several books and has published numerous articles in leading reviews and scientific journals. His work has been highly cited by courts, including the U.S. Supreme Court, lower federal courts, state supreme courts, and courts in other countries. He is the founder and faculty director of the Wilson Center of Science and Justice at Duke.

In his above published book, the author states: "We all feel unfairness deeply when treated in rash ways. We expect, and the law requires, government officials to take fairness seriously, giving us notice and an opportunity to be heard before taking our rights away. That is why the U.S. Constitution commands, twice, that no one shall be deprived of life, liberty, or property without due process of law."

The author further states: "Common ground matters now more than ever to mend political

polarization, cool simmering mistrust of government, prevent injudicious errors, and safeguard constitutional rights, A revival of due process is long overdue."

This is a significant case in which a United States court of appeals has departed from the usual and accepted course of judicial proceedings and circumvented the commonly held precedents of the Fourteenth Amendment of the United States Constitution and the doctrine of procedural due process law.

Petitioners call for an exercise of this Court's utmost "supervisory power" within Supreme Court Rule 10(a)(c). Summary correction is especially necessary where, as in this case, a lower court clearly contravenes this Court's precedents on this subject matter. *Goss v. Lopez, 419 U.S. 565 (1975) See also Goldberg v. Kelley, 397 U.S. 254 (1970)*

APPENDIX D - OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, FILED AUGUST 1, 2019

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MASSACHUSETTS

Civil Action No. 1:18-cv-10677-IT

ERROLL TYLER, ALLENA TABB-HARPER, NAUTICAL TOURS, INC.
Plaintiffs

versus

WILLIAM GOSS, COMMISSIONER BOSTON POLICE, THOMAS LEMA, INSPECTOR OF CARRIAGES, HACKNEY CARRIAGE UNIT
Defendants

MEMORANDUM & ORDER,

Case No. 1:18-cv-10677-IT

Document 50, Filed August 1, 2019

Before United States District Court Judge, Indira Talwani

PER CURIAM:

Taking all of the Plaintiffs' well-pled factual assertions as true, Lt. Lema has failed to establish that he is entitled to qualified immunity from suit. See DiMarco-Zappa v. Cabanillas, 238 F.3d 25, 35-36 (1st Cir. 2001) (because qualified immunity is an affirmative defense, defendant has the burden of proof). [1]

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[1] Defendants again argued at the hearing on this motion that it was not clearly established that they had to respond to Plaintiffs'

The overwhelming undisputed facts, and the deposition testimony established in discovery by plaintiffs in this case are compelling evidence sufficient to establish genuine issues of fact that defendants did, in fact, commit the cited violations defined in plaintiffs "Complaint and Demand for Jury Trial" [Case No. 1:18-cv-10677-IT; [Doc. No. 1], Filed April 6, 2018.

COUNT I & II of the Plaintiffs' complaint alleges the Defendants' violation of 42 U.S.C § 1983, for deprivation of the Plaintiffs' due process rights under the Fourteenth Amendment of the United States Constitution. Paragraphs 1-45 are incorporated therein by reference in their entirety. [Doc. No. 1]

In discovery, Plaintiffs clearly established the undisputed genuine issues of fact relevant to the above claims as defined in Plaintiffs "Statement of Material Facts" and corroborated by "Affidavit of Petitioner Erroll Tyler," Appendix F, [Case No. 1:18-cv-10677-IT] [Doc. No. 117] filed January 27, 2022, See "Plaintiffs Local Rule 56.1, Statement of Material Facts" Appendix E, [Case No. 1:18-cv-10677-IT] [Doc. No. 118] filed January 27, 2022.

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incomplete applications. But again, the premise upon which they rely, that Plaintiffs' applications were incomplete, is a factual dispute that must be viewed in the light most favorable to Plaintiffs. As the facts surrounding the license applications are developed through discovery, it is possible that Lt. Lema will be able to re-raise the issue of qualified immunity at the summary judgment stage, Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) ("Even if plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendants in fact committed those acts.")

Defendants failed to establish that the Plaintiffs applications were, in fact, incomplete to any degree. Defendants also failed to provide any evidence in discovery that would support defendants lack of due process on Plaintiffs completed sightseeing automobile applications, as a matter of law.

As the District Court has previously stated on its Memorandum & Order, [Case No. 1:18-cv-10677-IT] [Doc. 50] filed August 1, 2019, Id. at 17 "Plaintiffs have adequately stated a claim in COUNT II that Lt. Lema denied them procedural due process by refusing to process their sightseeing automobile license applications. See Newman v. Massachusetts, 884 F.2d 19, 23 (1st Cir. 1989) ("Notice and an opportunity to be heard have traditionally and consistently been held to be essential requisites of procedural process.")

PER CURIAM:

"...it is more than reasonable to infer that Lt. Lema was reasonably aware that stonewalling plaintiffs' completed applications by failing to take any action deprived Plaintiffs of the procedural notice and opportunity to be heard that due process demands. See Eves v. LePage, (1st Cir. June 2019)

In its 2019, Memorandum and Order the court put forth more clarification on this issue, as the court stated, "The SJC made clear that plaintiffs had a potential "remedy" in judicial review of an adverse decision, and it is reasonable to conclude at this juncture that Lt. Lema was aware that his failure to act would deprive Plaintiffs of this procedural process. Id at 17, See Nautical Tours, Inc., 14 N.E. 3d at 318.

Defendant Lt. Thomas Lema, Inspector of Carriages, Hackney Carriage Unit, stated an admission in his deposition testimony that despite plaintiff's' numerous pleadings and written request[s] for a hearing, pursuant to M.G.L. 159A, § 1., he did nothing to address the plaintiffs sightseeing automobile license applications. See Appendix G, Lema Deposition Tr., [Case No. 1:18-cv-10677-IT][Doc. No. 111, #3], Lema Tr., 98-2 thru 105-3.

In discovery, Defendants failed to establish any evidence to dispute these compelling undisputed genuine issues of fact relevant to plaintiffs above claims. Plaintiffs designate these points are part of the court record, as well-established, well-documented genuine issues of fact pertinent to their procedural due process claim under 42 U.S.C § 1983.

APPENDIX E, - PLAINTIFFS LOCAL RULE 56.1, STATEMENT OF MATERIAL FACTS, FILED JANUARY 27, 2022

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MASSACHUSETTS

Civil Action No. 1:18-cv-10677-IT

ERROLL TYLER, ALLENA TABB-HARPER, NAUTICAL TOURS, INC.
Plaintiffs

versus

MICHAEL COX, COMMISSIONER BOSTON POLICE, THOMAS LEMA, INSPECTOR OF CARRIAGES, HACKNEY CARRIAGE UNIT
Defendants

STATEMENT OF MATERIAL FACTS,
Case No. 1:18-cv-10677-IT

Document 118, Filed January 27, 2022

Before United States District Court Judge, Indira Talwani

01/27/2022 [Doc. No.] 118 Statement of Material Facts L.R. 56.1 re 106 MOTION for Summary Judgment filed by Nautical Tours, Inc., Allena Tabb-Harper, Erroll Tyler, (Scott Reed, Paige) (Case No. 1:18-cv-10677-IT), (Entered: 01/27/2022)

The Appeals Court for the First Circuit cited that it conducted a *de novo* review of the case. See Suzuki v. Abiomed, Inc., 943 F. 3d 555, 561 (1st Cir. 2019) (citation omitted) The Court cited, (Upon review of the relevant portions of the record, and the parties' submissions, we AFFIRM, for substantially the reasons cited by the district court. See Swarthout

v. Cooke, 562 U.S. 216, 219 (2011) (elements of a procedural due process claim); Buchanan v. Maine, 469 F.3d 158, 177-78 (1st Cir. 2006) (elements of a "class-of-one" equal protection claim)

Plaintiffs-Appellants respectfully assert that the court has erred in its *de novo* review of this case record, for the reasons set forth below. The court erred by overlooking the "Plaintiffs' Local Rule 56.1, Statement of Material *Undisputed Facts* in Support of Their Opposition to Defendants' Motion for Summary Judgment."

I. BACKGROUND

The Plaintiffs-Appellants do not dispute the First Circuit Court's cited precedent *Swarthout v. Cooke, (elements of a procedural due process claim).* Plaintiffs-Appellants contend and highly dispute the First Circuit's analysis and ultimate conclusion of said precedent as not levant to plaintiffs undisputed material facts in this case. Plaintiffs assert they have presented irrefutable evidence which supports the elements of a procedural due process claim as cited in the precedent.

II. LEGAL STANDARD

The Plaintiffs-Appellants reproduce court records which clearly indicate that petitioners' have established the essential elements of a procedural due process claim, as cited in the court's precedent *Swarthout v. Cooke, U.S. (2011).* In reference to that Supreme Court ruling the court held that, the due process clause standard analysis under that provision proceeds in two steps; whether there is a *liberty or property* interest of which the person has been deprived of, and if so, whether the procedures

followed by the state were constitutionally sufficient. *Kentucky v. Department of Corrections v. Thompson, U.S. (1989)*

In respect to the undisputed material facts in this case the district court held that Plaintiffs-Appellants have a protected liberty in their ability to make a living in their chosen profession. *Greene v. McElroy U.S. (1959)* Appendix D, Memorandum & Order, Aug 1, 2019, Id. at 12 No. 1:18-cv-10677-IT [Doc. 50]

The Plaintiffs'-Appellants further established in court records that the City's flawed final decision on their sightseeing automobile license applications, rendered in Oct 2019, four years after their filing thereof, was constitutionally insufficient. Whereas, said decision was accomplished without due process. See Petitioners' "Reasons for Granting the Writ", Section (a) Pg. 29-48

III. ANALYSIS AND CONCLUSION

As stated above, Plaintiffs-Appellants maintain that court records clearly indicate they have established the essential "elements of a procedural due process claim," as a matter of law. Accordingly, the court records indicate Respondents failed to provide to Petitioners' the essential "elements of procedural due process" which require an opportunity for a meaningful hearing to review a deprivation of protected interest before rendering their decision. Appendix E, Statement of Undisputed Facts, [Doc. 118] [filed 01/27/2022]

The Supreme Court has held that some form of hearing is required before an individual is finally deprived of a property or liberty interest. *Mullane v.*

Central Hanover Bank, U.S. (1950) See also; Fuentes v. Shevin, (1972)

In light of the evidence, Boston City Officials failed to observe the laws of the Commonwealth of Massachusetts in accordance with M.G.L. 159A, § 1. Whereby City Officials failed to provide said Petitioners with a meaningful hearing to review the deprivation of a protected liberty interest before issuing their final decision.

Petitioners respond that the absence of due process in a proceeding which results in a deprivation of that person's protected interest is an obvious violation of that person's guaranteed rights under the Fourteenth Amendment of the United States Constitution. The Petitioners specify the undisputed material facts which support the genuine issues of fact relevant to their § 1983 deprivation claim.

A state denial of this protected liberty interest without the exercise of adequate procedural due process may give rise to a viable § 1983 claim. *Raper v. Lucey, (1973)* The court records clearly indicate that the final decision rendered by Boston City Officials in October 2019 in conjunction with the district court's summary judgment decision in favor of the Respondents entered on May 31, 2022, were both accomplished without due process. *Swarthout v. Cooke (2011) See also; Eves v. LePage (2019)* See Appendix E, Plaintiffs' Statement of Material Facts [Doc. 118] filed 01/27/2022, Id. at 62-67

Defendants argued that Plaintiff's applications were faulty, whether incomplete or wrong, therefore they were not required to act on the Plaintiffs' sightseeing vehicle permit applications. The Plaintiffs disputed the City's baseless allegations. See Appendix

E. Plaintiffs' Statement of Material Facts [Doc 118] filed 01/27 2022, Id.at 69-75

In any event, pursuant to M.G.L 159A, § 1., sixty-five days after the filing thereof, Plaintiffs petitioned the city officials for an appeal hearing on their pending license applications. See Appx. F Tyler Aff. Id at 40. *Bos. Env't Sanitation Inspectors Assn's v. City of Bos. (1986)*

M.G.L. 159A, § 1., reads in part; If [a]ny application for a license under this section is not acted upon within a sixty-day period after the filing thereof the applicant may appeal to the commission... the commission [s]hall hold a hearing on [e]ach appeal requiring due notice to be given to all interested parties.

M.G.L. 159A, § 1. is specific on several crucial points citing; *If [a]ny application filed for a license under this section is not acted upon, clearly meaning regardless of the Defendants alleged wrong, or incomplete application argument, the law mandates ...the commission [s]hall hold a hearing on [e]ach such appeal... Mullane v. Central Hanover Bank & Trust Co., (1950)*

Petitioners argue that the court's arbitrary and capricious ruling clearly conflicts with the language cited in the above-mentioned Commonwealth of Massachusetts Statute. And is in obvious dispute with federal law and the Fourteenth Amendment of the United States Constitution, pursuant to petitioners 42 U.S.C. § 1983 violation claim, under color of law.

(A) The Panel Manifestly Erred in its Opinion

As stated above, the opinion cited by the panel does not decisively corroborate with the evidence presented and the undisputed facts in this case. The elements of a procedural due process claim have been substantially established by the petitioners in this case. *Swarthout v. Cooke, (2011) See; Mullane v. Central Hanover Bank & Trust Co., (1950) See; Eves v. LePage, (2019)*

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any State deprive any person of life, liberty or property without due process of law; "Nor deny to any person within its jurisdiction equal protection of the laws."

Court records indicate City officials chose to disregard Plaintiffs-Appellants sightseeing vehicle license applications without due process, whatsoever. Petitioners formally sought protection from the government's deprivation of their set liberty rights, pursuant to M.G.L. 159A, § 1., City officials eventually issued their faulty final decision on Petitioners license applications, but said decision was accomplished without due process.

This deprivation of the Plaintiffs-Appellants "right to be heard" violates due process, thus subsequently rendering the district court's May 31, 2022, judgment against Petitioners as void. A void judgment must be vacated, as a matter of law.

(B) Class of One Equal Protection Claim Under 42 U.S.C. § 1983

Regarding the class-of-one equal protection claim, Plaintiffs-Appellants claim is based on the local government acting arbitrary and irrationally only against the Plaintiffs-Appellants.

Not long before Plaintiffs had filed its sightseeing automobile license applications, the Boston Duck Tours (for example) had used exactly the same application form to successfully acquire sightseeing vehicle licenses for its sightseeing vehicles in that same year. *See Defendants Statement of Undisputed Facts* ¶¶

Over the next several months, Plaintiffs-Appellants repeatedly asked the city to act on its applications. *Appx. F, Tyler Aff.* City of Boston officials issued no response to their pending applications. *Appx. G, Lema Tr. at 102-103, 104, 106-107, Appx F, Tyler Aff., Tyler Tr.* [Doc. No. 111,] 12/23/2021

After their applications had been pending for some time, a City of Boston police officer gave Nautical Tours a different "new company" application form to complete. *Tyler Aff.*

The singular amendment on this "new company form" asked the applicants to supply the social security number of their corporate officers, President, Vice President and Treasurer.

Lt. Lema has testified in his deposition, at that time, to the best of his recollection, Nautical Tours was the only *"new company"* applying for Boston sightseeing vehicle licenses. *See Appx. G, Lema Tr. at*

94-23 thru 108; Appx. E, Plaintiffs Statement of Material Facts, Disputed Facts 69-75

The fact that the city seemingly changed its application form for supposed new companies, requiring the submission of the social security numbers of said petitioners' corporate officers provides a clear illustration of the city's illicit, arbitrary intent.

There is no regulation, nor even the term of "new company application form," cited in the City's Rule 404, Sightseeing Automobile Rules and Regulations issued January 5, 2010.

Petitioners declined to complete the new form. *See Appx. F, Tyler Aff.* Petitioners instead renewed their request that the City act on their existing pending applications. *Tyler Aff.*

Plaintiffs had significant concerns, as small business owners, in surrendering their protected information of, their social security numbers to an unprotected source such as the Hackney Carriage Unit, where civilian employees also had unrestricted access to this information.

Plaintiffs became further concerned when they discovered there actually was no cited regulation in Rule 404 to do so. City of Boston has provided no rational explanation as to why a social security number was needed for these three particular corporate officers of a supposed "new company" but not for any of the companies the city had previously licensed. *Appx. G, Lema Tr. at 62, 66; Appx. G, Susi Tr. at 30, 33-36, 38. See also Appx. E, Plaintiffs Statement of Undisputed Facts, 55-68*

No "existing" company was ever asked to submit a social security number or required to have its officers undergo background checks in order to receive a sightseeing automobile license for a tour bus or amphibious vehicle. Appx. G, *Lema Tr. at 36, Appx. G, Susi Tr. at 34-36*

Plaintiffs-Appellants evoke Chapter 399, Acts of 1931, the limited authority vested unto the Boston Police Commissioner to regulate only the [vehicles and the operators of said vehicles on the streets of Boston]

If an "existing company" hired a new corporate officer, the new officer was not required to undergo a background check. *Appx. G, Susi Tr. 34-36* [Doc. No. 111, 2] 12/23/2021

And there were no standards cited to determine whether the results of a background check on a corporate officer disqualified that company from licensing its vehicle. *Appx. G, Susi Tr. at 39*

Owner and President of Boston Duck Tours, Cindy Brown (for example) whom is similarly situated and was issued numerous sightseeing vehicle licenses each year since 2003, according to deposition testimony has never been asked to undergo a background check. *Appx. G, Susi Tr. 34-36,* [Doc. No.111, 2]

Whereas, similarly situated Boston licensed sightseeing tour companies Old Town Trolley and Beantown Trolley's corporate officers have never been required to submit their social security numbers to undergo background checks, as well. *Appx. G, Susi Tr. 34-36*

On numerous occasions, the Plaintiffs asked the City of Boston, Hackney Carriage Unit officials to

act on their pending license applications, or issue a hearing pursuant to M.G.L. 159A, § 1.,

For more than three years, the Boston Police Commissioner, and the Hackney Carriage Unit steadily refused to act on Nautical Tours applications. *Appx. F, Tyler Aff.* [Doc. No. 119, 120] 02/10/ 2022; *Tyler Tr.* [Doc. No. 111, #1] 12/23/2021

The City of Boston did not act on the Plaintiffs' applications until 2019. *See Defendants Statement of Undisputed Facts* ¶ The City's refusal to act prevented Nautical Tours from operating its sightseeing tour business. *Appx. F, Tyler Aff.*

The Plaintiffs contend they have established a class-of-one equal protection clause violation by clearly demonstrating they have been singled out and treated differently from similarly situated persons without any rational basis for the difference in treatment. *Buchanan v. Maine (2006) See also; Village of Willowbrook v. Olech, U.S. (2000)*

The city points to, as an excuse, the fact that they viewed "new" companies as different from supposed "existing" companies, but established no rational reason. The city clearly must do more to survive constitutional scrutiny. The city must obviously connect the supposed difference between a "new" and "existing" company to reasonably effect the difference in treatment, showing not only that the two categories differ, but also that the difference in treatment rationally serves a permissible end based solely on the difference identified. *Yick Wo v. Hopkins, (1886)*

Defendants have failed to present any genuine issues of fact to support the court's summary

judgment ruling in favor of said Respondents. Instead, the Defendants have presented an argument based on unsubstantiated details. Defendant Lema's deposition testimony admission that he did nothing to address plaintiffs license applications, obviously a willful and malicious act in violation of the plaintiffs' constitutional rights should be extremely disturbing to this court.

The Supreme Court cited a profound statement in their decision of *Yick Wo v. Hopkins, (1886) it reads in part; Whatever may have been the intent of the ordinances adopted, they are applied by the public authorities charged with their administration and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment of the United States Constitution, denial of equal justice is still in the prohibition of the Constitution. Pg.118, U.S. 373*

APPENDIX F – AFFIDAVIT OF PETITIONER ERROLL TYLER, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MASSACHUSETTS, FILED FEBRUARY 10, 2022

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MASSACHUSETTS

Civil Action No. 1:18-cv-10677-IT

ERROLL TYLER, ALLENA TABB-HARPER, NAUTICAL TOURS. INC.
Plaintiffs

versus

MICHAEL COX, COMMISSIONER BOSTON POLICE, THOMAS LEMA, INSPECTOR OF CARRIAGES, HACKNEY CARRIAGE UNIT
Defendants

AFFIDAVIT OF PETITIONER ERROLL TYLER, Case No. 1:18-cv-10677-IT

Document 119,120, Filed February 10, 2022

Before United States District Court Judge, Indira Talwani

02/10/2022 [Doc. No. 119] REPLY to response to 109 MOTION for Summary Judgment filed by Nautical Tours, Inc., Allena Tabb-Harper, Erroll Tyler, (Attachments: 1 Affidavit, Affidavit of Erroll Tyler (corrected) (Scott Reed, Paige)(entered 02/10/2022 [Doc. No. 120] Affidavit Erroll Tyler (Attachment #1 replaced on 4/14/2022 (Attachment was replaced as document was filed upside down)

APPENDIX G – RESPONDENTS LT LEMA, & JULIE SUSI DEPOSITION TRANSCRIPT, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MASSACHUSETTS, FILED DECEMBER 23, 2021

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MASSACHUSETTS

Civil Action No. 1:18-cv-10677-IT

ERROLL TYLER, ALLENA TABB-HARPER, NAUTICAL TOURS, INC.
Plaintiffs

versus

MICHAEL COX, COMMISSIONER BOSTON POLICE THOMAS LEMA, INSPECTOR OF CARRIAGES, HACKNEY CARRIAGE UNIT
Defendants

DEPOSITION TRANSCRIPTS, Case No. 1:18-cv-10677-IT

Document 111, Filed December 23, 2021

Before United States District Court Judge, Indira Talwani

12/23/2021 [Doc. No. 111] Statement of Material Facts L. R. 56.1 re 109 MOTION for Summary Judgment filed by Nautical Tours, Inc. Allena Tabb-Harper, Erroll Tyler (Attachments: #1 Exhibit Erroll Tyler Transcript, #2 Exhibit Juliana Susi Transcript, #3 Exhibit Lema Transcript, #4 Exhibit Erroll Tyler Affidavit) (Scott Reed, Paige)(Entered 12/23/2021)

APPENDIX H - STATUTORY AND REGULATORY PROVISIONS INVOLVED

Procedural Due Process: Civil Rights - Fourteenth Amendment ...

(A) Procedural Due Process concerns the procedures that government must follow [before] it deprives an individual of life, [liberty] or property.

(1) Permitted application: [P]rocedural due process rules are meant not to protect a person from deprivation, but to protect from mistakes or unjustified deprivation of life [liberty] or property.

(a) Notice: An elementary and fundamental requirement of due process, which is to accord finality is [n]otice reasonably calculated, under circumstances to appraise interested parties the pendency of the action and afford them the opportunity to present objections.

(b) Hearing: Some form of [h]earing is required before an individual is finally deprived of property, or [liberty] interest.

(c) Impartial Tribunal: An impartial decision maker is an essential right in [a]ny civil proceeding.

The Law of Void Judgments and Decisions: Supreme Court Decisions on Void Orders ...

(A) A Judgment or Final Decision may not be rendered in violation of constitutional protections. The validity of a judgment may be affected by failure to give constitutionally required due process, notice and an opportunity to be heard. Fed. R. Civ. P. Rule 60(b)(4)

(1) Applicable limitations: The limitations inherent in the requirements of due process and equal protection of the law extend to judicial as well as political branches of government, so that a judgment may [not] be rendered in violation of those constitutional limitations and guarantees.

Summary Judgment Guidelines ...

(A) Summary judgment may not be decided on disputed facts. When there is a genuine dispute as to the material facts, the motion for summary judgment will be denied, as the evidentiary conflict must be resolved in a trial. Fed. R. Civ. P. 56(a)

(1) Procedure for granting summary judgment; moving party must show that there is [no] genuine issue as to [any] of the material facts, to prevail, as a matter of law. Fed. R. Civ. P. 56(c)