

No. _____

**In The
Supreme Court of the United States**

—◆—
ACE PARTNERS, LLC D/B/A
TC'S PAWN COMPANY,

Petitioner,

v.

TOWN OF EAST HARTFORD AND
MARK SIROIS, CHIEF OF POLICE,

Respondents.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

—◆—
PETITION FOR A WRIT OF CERTIORARI

—◆—
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QUESTIONS PRESENTED

1. Does a municipality's refusal to renew the operating license of an established business, thereby causing the destruction of the business, constitute a deprivation of property under the Due Process Clause of the Fourteenth Amendment?

2. If a municipality violates an established business's procedural due process rights, which party bears the burden of proving whether the due process violation caused injury?

PARTIES TO THE PROCEEDING

Petitioner ACE Partners, LLC d/b/a TC's Pawn Company was the plaintiff/appellee in the court below. Respondents Town of East Hartford, Connecticut and Mark Sirois, Chief of Police, in his official capacity, were the defendants/appellants in the court below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Ace Partners, LLC d/b/a TC's Pawn Company is a privately held Connecticut Limited Liability Company. None of its shares is held by a publicly traded company. There are no parent corporations or publicly held companies owning 10% or more of Petitioner's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING.....	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVI- SIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	2
A. Introduction	2
B. The Parties And Their Dispute	5
C. ACE’s Lawsuit And The District Court’s Decision	8
D. The Second Circuit’s Decision	10
REASONS FOR GRANTING THE PETITION ...	12
I. THE SECOND CIRCUIT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A DE- CISION OF A STATE COURT OF LAST RESORT	12

TABLE OF CONTENTS – Continued

	Page
II. THE FEDERAL COURTS ARE DIVIDED ABOUT WHICH PARTY HAS THE BUR- DEN OF PROVING CAUSATION IN A PROCEDURAL DUE PROCESS CASE	14
CONCLUSION.....	16
APPENDIX	
Court of Appeals Opinion filed February 28, 2018	App. 1
District Court Ruling and Order filed Septem- ber 30, 2011	App. 31
District Court Motion for Reconsideration filed November 3, 2011.....	App. 48
District Court Recommended Ruling After Hear- ing in Damages filed July 14, 2014.....	App. 49
District Court Docket Entry per Recommended Ruling filed September 18, 2014	App. 94
District Court Judgment filed September 22, 2014	App. 95
District Court Recommended Ruling on Plain- tiff’s Motion for Attorney’s Fees filed March 15, 2016	App. 97
District Court Docket Entry Per Order Adopting Recommended Ruling filed April 21, 2016	App. 112
District Court Docket Entry Per Order Granting in Part Motion for Attorney Fee filed April 21, 2016	App. 113

TABLE OF CONTENTS – Continued

	Page
District Court Ruling and Order filed August 10, 2016	App. 114
District Court Amended Judgment filed August 11, 2016	App. 118
1998 Conn. Gen. Stat. § 21-39	App. 120
2002 Conn. Gen. Stat. § 21-40	App. 120
2002 Conn. Gen. Stat. § 21-100	App. 122
Plaintiff's Local Rule 56(a)1 Statement filed Oc- tober 1, 2010	App. 125

TABLE OF AUTHORITIES

Page

CASES

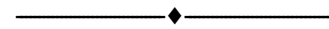
<i>Alexander v. Polk</i> , 750 F.2d 250 (3d Cir. 1984).....	15
<i>Anderson v. Utah County Bd. of County Comm'rs</i> , 589 P.2d 1214 (Utah 1979).....	4, 11, 13
<i>Barry v. Barchi</i> , 443 U.S. 55, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979).....	2, 12
<i>Bell v. Burson</i> , 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971).....	2, 12
<i>Brewer v. Chauvin</i> , 938 F.2d 860 (8th Cir. 1991)	15
<i>Hart Twin Volvo v. Comm'r of Motor Vehicles</i> , 165 Conn. 42, 327 A.2d 588 (1973)	2
<i>Kendall v. Board of Education of Memphis City Schools</i> , 627 F.2d 1 (6th Cir. 1980)	15
<i>McClure v. Independent School District No. 16</i> , 228 F.3d 1205 (10th Cir. 2000).....	15
<i>Piphus v. Carey</i> , 545 F.2d 30 (7th Cir. 1976), <i>re- versed on other grounds</i> , 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978)	15
<i>Spinelli v. City of New York</i> , 579 F.3d 160 (2d Cir. 2009)	2
<i>Tillinghast, et al. v. Town of Glocester</i> , 456 A.2d 781 (R.I. 1983)	4, 11, 12, 13, 14

TABLE OF AUTHORITIES – Continued

	Page
<i>Trumbull Division, Owens-Corning Fiberglass Corp. v. City of Minneapolis</i> , 445 F. Supp. 911 (D. Minn. 1978).....	4, 11, 13
<i>West Farms Associates v. State Traffic Comm’n of State of Conn.</i> , 951 F.2d 469 (2d Cir. 1991)	2
CONSTITUTIONAL PROVISIONS	
U.S. Const. Amend. XIV, § 1.....	2, 13, 14
FEDERAL STATUTES	
28 U.S.C. § 1254(1).....	1
28 U.S.C. § 1331	1
42 U.S.C. § 1983	1, 15
STATE STATUTES	
Conn. Gen. Stat. § 21-40 (Rev. 2009).....	9, 10
Conn. Gen. Stat. § 21-100(a) (Rev. 2009)	9, 10
OTHER AUTHORITIES	
James R. Burnham, <i>Preserving Procedure: Requiring the Government to Disprove Causation in Procedural Due Process Claims</i> , 76 U. CHI. L. REV. 441 (2009)	15
<i>Plaintiff’s Local Rule 56(a)(1) Statement of Undisputed Facts</i>	5

PETITION FOR A WRIT OF CERTIORARI

ACE Partners, LLC d/b/a TC's Pawn Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.



OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 883 F.3d 190 (2d Cir. 2018) and is reproduced in the appendix hereto ("App.") at App. 1. The decision of the District Court for the District of Connecticut, which the court of appeals overruled, is unreported and is reproduced at App. 31.



JURISDICTION

The original action was brought pursuant to 42 U.S.C. § 1983 for violations of substantive and procedural due process. The district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331.

The judgment of the court of appeals was entered on February 28, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Due Process Clause of the Fourteenth Amendment to the Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”



STATEMENT OF THE CASE

A. Introduction.

This Court has long held that occupational, business and other licenses issued by the state or a municipality create a property interest entitled to due process protections under the Fourteenth Amendment. *E.g.*, *Barry v. Barchi*, 443 U.S. 55, 64, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979); *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971). The United States Court of Appeals for the Second Circuit and the Connecticut Supreme Court have repeatedly acknowledged these precedents. *E.g.*, *Spinelli v. City of New York*, 579 F.3d 160, 169 (2d Cir. 2009) (“[O]nce the government has granted a business license to an individual, the government cannot ‘depriv[e] [the individual of] such an interest . . . without appropriate procedural safeguards.’”); *West Farms Associates v. State Traffic Comm’n of State of Conn.*, 951 F.2d 469, 473 (2d Cir. 1991); *Hart Twin Volvo v. Comm’r of Motor Vehicles*, 165 Conn. 42, 45, 327 A.2d 588 (1973).

Petitioner ACE Partners, LLC d/b/a TC’s Pawn Company (hereinafter “ACE”) was an established

precious metals and pawnbroker business in East Hartford, Connecticut. ACE was forced to close its doors and ceased to exist as an ongoing enterprise when the Respondent Town of East Hartford (hereinafter “Town”) refused to renew ACE’s business license—and *did so without affording ACE notice and an opportunity to be heard about why the Town was refusing to renew the license.*

Unfortunately, legislatures around the country have attempted to whittle away at the constitutional protection that ongoing businesses enjoy with respect to the deprivation of their operating licenses by including expiration dates in the licenses and then requiring the businesses to renew their license if they want to continue to operate. Further, the legislatures make the renewal of the license subject to the broad discretion of a local government official. According to the court of appeals below, Connecticut has such a statutory scheme with respect to the licenses on which ACE relied to operate.

Some courts—but not all—have construed such discretion-based statutory schemes to mean that the owner of an established business, which depends on a license to operate, does not have a property interest in the renewal of the license. Rather, the business has only a mere hope or expectancy of renewal. Therefore, some courts maintain that an established business does not have a Due Process Clause right to notice and an opportunity to be heard if the local government official declines to renew its operating license, and thereby effectively destroys the business.

Other courts have rejected this facile reasoning as based on a meaningless distinction. In particular, the Rhode Island Supreme Court has held that the revocation of a business license and the refusal to renew a license is a legally meaningless distinction. Revocation and failure to renew both lead to the same result: destruction of an ongoing business, *i.e.*, deprivation of a property interest. Accordingly, that the owner of a business is entitled to due process of law under the Fourteenth Amendment regarding a local official's reasons for refusing to renew its license. *See Tillinghast, et al. v. Town of Glocester*, 456 A.2d 781, 784 (R.I. 1983). The Rhode Island Supreme Court expressly rested its ruling on the decisions of several other courts. *See Anderson v. Utah County Bd. of County Comm'rs*, 589 P.2d 1214, 1216 (Utah 1979) (county could not refuse to renew beer license without affording license due process protections); *Trumbull Division, Owens-Corning Fiberglass Corp. v. City of Minneapolis*, 445 F. Supp. 911 (D. Minn. 1978) (asphalt manufacturer had property interest in renewal of its business license).

In this case, the Second Circuit rejected ACE's argument that it had a property interest in the renewal of its business licenses. Accordingly, the court of appeals reversed and vacated the judgment of the district court, which had reached the contrary conclusion and had awarded ACE substantial damages and attorney's fees.

ACE petitions this Court to resolve a conflict on an important issue of federal law between the Second Circuit and the Rhode Island Supreme Court concerning

the due process rights of an ongoing business with respect to a renewable license. ACE also asks the Court to grant this petition to resolve a conflict between the Second Circuit and other federal courts of appeals concerning the burden of proof on the issue of causation in procedural due process claims.

B. The Parties And Their Dispute.

At all relevant times, ACE was a limited liability company which consisted of TC's Pawn Company—a precious metals and pawnbroker business with locations in East Hartford and Waterbury, Connecticut. *See Plaintiff's Local Rule 56(a)(1) Statement of Undisputed Facts* at ¶ 1 (Reproduced at App. 125.) ACE opened its East Hartford location in October 2007.

From that date through August 9, 2009, ACE operated a profitable business in accord with the pawnbroker and precious metal licenses the Town had issued to it, as well as in accord with all other relevant state and local laws and ordinances. App. 126-128 at ¶ 2-12.

In 2009, the State of Connecticut Division of Criminal Justice formed a task force to investigate Connecticut pawnbroking businesses (the "Task Force"). App. 128 at ¶ 13. On or about June 2, 2009, the Task Force obtained and executed search warrants at pawn companies across the state, including ACE's East Hartford location. *Id.* at ¶ 15. Two of ACE's East Hartford employees were arrested on misdemeanor larceny

charges. *The State declined to prosecute them.* App. 129 at ¶ 16.

ACE's East Hartford pawnbroker and precious metals licenses were due to expire on August 9, 2009. App. 129 at ¶ 18. ACE applied to renew those licenses on July 20, 2009. App. 129-130 at ¶ 19-20.

Unbeknownst to ACE, on June 30, 2009, the Town drafted correspondence to ACE stating that the Town was revoking ACE's licenses. The draft letter offered ACE the opportunity to have a hearing to contest the revocation. App. 130 at ¶ 25. The Town deliberately chose not to send this letter. Instead, it waited until August 7, 2009—just two days before the expiration of ACE's license—to send a different letter announcing the nonrenewal of the licenses. App. 131 at ¶ 27. The letter said only that “recent occurrences at TC's Pawn Co. demonstrates that there exists cause not to renew each license.” App. 132 at ¶ 31. No recitation or explanation of the “cause” referenced in that letter was given. *Id.* at ¶ 32. The letter further stated that “conducting pawnbroker activities or purchasing precious metals without proper licensure may result in, among other things, criminal prosecution.” *Id.* at ¶ 33.

Even though the Town had decided by June 30, 2009 not to renew ACE's licenses, the Town misled ACE about the status of its license renewal application throughout the months of July and early August 2009. Representatives of the East Hartford Police Department assured ACE that its application was in order

and that there should be no problem with the renewal of its licenses. App. 130 at ¶ 22.

The Town's chief of police, Mark Sirois, explained that he decided not to renew ACE's licenses based on information he received from Deputy Chief Murphy, which Murphy had learned from persons involved in the Task Force investigation. App. 132-135 at ¶ 34-39. In short, Chief Sirois, the sole decision maker for the Town concerning licensing applications, based his decision to effectively destroy ACE's East Hartford business on little more than an uninformed cursory discussion with his deputy. App. 135-136 at ¶ 41.

On August 10, 2009, Jay Sargent, the General Manager of TC's Pawn Company, called the East Hartford Police Department and requested a meeting to discuss the nonrenewal of ACE's licenses. App. 136 at ¶ 42. Chief Sirois refused to speak to Sargent. *Id.* at ¶ 43. Although Deputy Chief Murphy spoke briefly to Sargent at that time, Murphy did not know that the nonrenewal letter had been mailed to ACE. *Id.* at ¶ 44.

On August 11, 2009, after the nonrenewal letter was sent, Sargent was arrested and charged with misdemeanor larceny in connection with the Task Force investigation. The Town was aware of Sargent's pending arrest when Chief Sirois denied ACE's license renewal application. *As with the earlier arrests of ACE's two employees, the State declined to prosecute Sargent.* App. 136-137 at ¶ 47.

In sum, the Town of East Hartford, through its chief of police, effectively destroyed ACE as an ongoing

business in East Hartford because of a few misdemeanor arrests so lacking a sound factual basis that the state abandoned any effort to prosecute the arrests.

C. ACE's Lawsuit And The District Court's Decision.

ACE filed the underlying section 1983 action in the district court. ACE argued that the Town's failure to provide ACE with notice and an opportunity to be heard regarding the license renewal decision violated the Due Process Clause of the Fourteenth Amendment.¹

The parties filed cross-motions for summary judgment. Central to ACE's motion were two Connecticut statutes: one for precious metals licenses, the other for pawnbroker licenses. The precious metals license statute provides that "a chief of police or first selectman shall refuse to issue a license under this subsection to a person who has been convicted of a felony." Conn. Gen. Stat. § 21-100(a) (Rev. 2009). By contrast, the pawnbroker license provides that the "selectman of any town and the chief of police of any city may grant licenses to *suitable persons* to be pawnbrokers. . . . No license shall be issued under this section . . . to any

¹ ACE asserted several other claims, including substantive due process claims, against the Town. The district court dismissed those claims. ACE did not appeal their dismissal. They are not at issue in this petition.

person who has been convicted of a felony.” Conn. Gen. Stat. § 21-40 (Rev. 2009) (emphasis supplied).

Both § 21-40 and § 21-100 forbid the issuance of a license to a felon. But, § 21-40 contains an additional and express “suitable person” requirement which is absent from § 21-100. The district court properly determined that this textual distinction was critical. As a matter of statutory interpretation, the district court determined that local officials lack discretion to deny a non-felon a precious metals license, whereas they have discretion, based on the “suitable person” standard, to deny (or refuse to renew) pawnbroker licenses to non-felons. App. 35-40.

Based on this determination, the district court granted ACE partial summary judgment as to liability on its claim that the Town deprived ACE of procedural due process when it refused to renew its business.

The district court then referred the matter to a magistrate judge for a hearing on damages. The magistrate judge found that ACE had proved \$352,660 in compensatory damages and also awarded ACE, as the prevailing party, reasonable attorney’s fees of \$490,831.75 and costs of \$3,585.27. App. 92, 95-96, 110, 113. The district court adopted the recommended rulings and issued judgment in favor of ACE. App. 118-19. The Town then appealed the district court’s judgment.

D. The Second Circuit's Decision.

On appeal, the Town reiterated its argument that § 21-100 gives local officials broad discretion to refuse to renew a business's precious metals license, even though § 21-100 lacked the "suitable person" standard that the Connecticut General Assembly expressly included in § 21-40. Similarly, ACE argued that the district court properly recognized the importance of the textual distinction between § 21-100 and § 21-40, in particular the absence of a "suitable person" standard in § 21-100.

Unfortunately for ACE, the textual differences between § 21-100 and § 21-40 that were so meaningful to the district court were meaningless to the Second Circuit. In the court of appeals' view, even though § 21-100 does not have a "suitable person" standard, it still affords local officials broad discretion to deny, or refuse to renew, business licenses even to non-felons. App. 14-17, 26. Accordingly, the Second Circuit concluded that ACE did not have a constitutionally protected property interest in the renewal of its precious metals license and, consequently, its due process claim failed. App. 27, 30.

Significantly, ACE also raised as an alternative ground of affirmance the argument that is central to this petition. ACE argued that because the non-renewal of its business license would mean the certain destruction of its business, ACE had a constitutional property interest in the renewal of its precious metals license. In support of this argument ACE relied heavily

upon the Rhode Island Supreme Court's opinion in *Tillinghast, et al. v. Town of Glocester*, 456 A.2d 781 (R.I. 1983). There the Rhode Island Supreme Court explained:

Refusing to renew a license has similar effects on an ongoing business as the revocation of a license. When one makes an investment in a business . . . one expects to be able to continue to operate it.

Id. at 794. *See also Trumbull Division, Owens-Corning Fiberglass Corp. v. City of Minneapolis*, 445 F. Supp. 911, 917 n.4 (D. Minn. 1978) (asphalt manufacturer had property interest in renewal of business license); *Anderson v. Utah County Bd. of Comm'rs*, 589 P.2d 1214, 1216 (Utah 1979) (defendant could not refuse to renew beer license without affording licensee due process protections).

The Second Circuit barely paid lip service to this alternative grounds of affirmance. Ignoring the Rhode Island Supreme Court's opinion in *Tillinghast* entirely, the court of appeals held that Connecticut law does not support the existence of a property right in the renewal of a business license which is renewable at the discretion of a local official. App. 26-27.

Accordingly, the Second Circuit reversed the judgment of the district court and remanded the case with instructions to enter judgment for the defendant. App. 30. The Second Circuit also vacated the order awarding ACE its attorney's fees. *Id.*



REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A DECISION OF A STATE COURT OF LAST RESORT.

This Court has long held that a municipality cannot terminate or revoke the operating license of an ongoing business without affording the business due process. *E.g.*, *Barry v. Barchi*, 443 U.S. 55, 64, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979); *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971). But the Court has never squarely addressed whether an established business has a property interest in the *renewal* of an operating license of an ongoing business, particularly when the failure or refusal to renew the license virtually guarantees the destruction of the business. This is an important constitutional question that should not be left unsettled.

As previously noted, the Rhode Island Supreme Court addressed this issue in *Tillinghast, et al. v. Town of Glocester*, 456 A.2d 781 (R.I. 1983), holding that an ongoing business had a property interest in the renewal of its license. The *Tillinghast* decision arose from a town council's refusal to renew a license to operate a campground. In opposing the owners' due process claim, the town attempted to draw a legal distinction between revocation of a license and a refusal to renew a license. The Rhode Island Supreme Court said, "such an argument misses the mark because the distinctions now being pressed by the town, when considered in light of the guarantees of due

process, amount to a distinction without a difference.” *Id.* at 784.

Citing authorities from several jurisdictions,² the Rhode Island Supreme Court held that “[r]efusing to renew a license has similar effects on a going business as the revocation of a license. When one makes an investment in a business . . . one expects to be able to continue to operate it.” *Id.* Accordingly, the court held that the campground owners were entitled to notice and an opportunity to be heard regarding the town council’s reasons for refusing to renew the owners’ license.

The Second Circuit’s decision conflicts with the Rhode Island Supreme Court’s decision in *Tillinghast*.

The Respondent will no doubt argue that the Second Circuit’s decision is consistent with how many other federal courts of appeals have resolved similar questions. Like the Second Circuit here, those courts have held that if a state licensing statute gives a local official broad discretion whether to renew a license, the business owner has only a mere hope or expectancy that its license will be renewed. Such a hope or expectancy does not rise to the level of a protected property interest under the Due Process Clause.

² See *Anderson v. Utah County Board of County Commissioners*, 589 P.2d 1214, 1216 (Utah 1979); *Trumbull Division, Owens-Corning Fiberglass Corp. v. City of Minneapolis*, 445 F. Supp. 911 (D. Minn. 1978).

The flaw in these courts' reasoning is that by focusing on the discretionary nature of the license renewal, they turn a blind eye to the property interest that is truly at stake—the license holder's ongoing business. When a government official makes a licensing decision that is likely to cause the destruction of an established business, *i.e.*, a property interest, the Due Process Clause of the Fourteenth Amendment entitles the business owner to notice and an opportunity to be heard on whether its license should be renewed.

In sum, the Second Circuit's decision in the present case conflicts with the Rhode Island Supreme Court's decision in *Tillinghast*. This Court should grant certiorari to resolve this conflict on an important issue of constitutional law.

II. THE FEDERAL COURTS ARE DIVIDED ABOUT WHICH PARTY HAS THE BURDEN OF PROVING CAUSATION IN A PROCEDURAL DUE PROCESS CASE.

When a court determines that a state or local government has deprived a party of procedural due process, the government often responds by arguing that the party claiming the due process violation bears the burden of proving that the challenging governmental action would not have occurred if the party had received due process first. This argument, however, misstates who bears the burden of proving causation.

With the exception of the Second Circuit, every circuit court that has addressed this issue has held that

the burden is on the government to prove that it would have taken the same action (with respect to a property interest) even if it had provided the necessary due process. See *McClure v. Independent School District No. 16*, 228 F.3d 1205, 1213 (10th Cir. 2000) (holding that once a § 1983 plaintiff establishes a procedural due process violation, the burden shifts to the government to show that the substantive outcome was unaffected by the deprivation of process); *Brewer v. Chauvin*, 938 F.2d 860, 864 (8th Cir. 1991) (same); *Alexander v. Polk*, 750 F.2d 250, 263-64 (3d Cir. 1984) (same); *Kendall v. Board of Education of Memphis City Schools*, 627 F.2d 1, 6 n.6 (6th Cir. 1980) (same); *Piphus v. Carey*, 545 F.2d 30, 32 (7th Cir. 1976) (same), *reversed on other grounds*, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978); James R. Burnham, *Preserving Procedure: Requiring the Government to Disprove Causation in Procedural Due Process Claims*, 76 U. CHI. L. REV. 441 (2009). In burden-shifting circuits, “once the plaintiff proves that he has been deprived of due process, the burden switches to the government to show that the deprivation did not affect the substantive result.” *Id.* at 442.

ACE raised this issue in its brief in the Second Circuit, but the court of appeals did not address the issue because of the way the court resolved ACE’s due process claim. If the Court grants ACE’s petition on the first question presented, however, the Court should also grant ACE’s petition to resolve the conflict among the circuit courts of appeals concerning the burden of proof of causation in procedural due process claims.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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