

No. 17-1617

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 Writ of Certiorari to the
United States Court of Appeals for the Second Circuit*

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

- I. Whether the Court should grant certiorari to review whether the Town violated ACE's Fourteenth Amendment right to procedural due process of law when ACE's precious metals license was not renewed?
- II. Whether the Court should grant certiorari to review which party bears the burden of proving whether a due process violation caused injury, notwithstanding that the issue was moot when the Second Circuit determined that there was no procedural due process violation?

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STATEMENT OF THE CASE

A. Introduction

For more than 50 years Connecticut municipalities have held a “right to regulate a business, pursuant to its police power, in the interest of protecting the public safety or the welfare of its inhabitants.” Blue Sky Bar, Inc. v. Town of Stratford, 203 Conn. 14, 22, 523 A.2d 467 (1987), citing C.G.S. § 7-148(c)(7)(H)(ii); see also Caldor’s, Inc. v. Bedding Barn, Inc., 177 Conn. 304, 317, 417 A.2d 343 (1979). “The police power is not confined narrowly within the field of public health, safety and morals. It is within the police power to regulate occupations or businesses which, owing to their nature or the manner in which they are conducted, may be detrimental to the general welfare.” Franklin Furniture Co. v. City of Bridgeport, 142 Conn. 510, 515, 115 A.2d 435 (1955). One of the tools used by municipalities to achieve this goal is embodied in C.G.S. § 21-100, which prohibits anyone from operating a precious metals purchasing business without first obtaining a license from the municipality.

The Connecticut statute regarding the issuance of a license to purchase precious metals provides, in part, that the licensing authority “shall refuse to issue a license under this subsection to a person who has been convicted of a felony....” C.G.S. § 21-100(a). The District Court erred in its interpretation of this statute, finding that it entitled all applicants except convicted felons to the issuance of a precious metals license. The Court of Appeals corrected this error making it clear that the issuing authority had discretion whether to issue a precious metals license, and that discretion was limited by the statute so that in no event could a

convicted felon receive a precious metals license. The lack of a clear entitlement to a precious metals license was fatal to the plaintiffs' due process claim, and judgment entered, accordingly, for the defendant. There is nothing about the Court of Appeals decision that conflicts with the decisions of other Circuit courts of appeals, and there is no reason why certiorari should be granted. Plaintiffs have sought to invent a justiciable controversy by suggesting that a conflict exists among the courts of appeals regarding which party holds the burden of proof in a due process claim, but that issue was mooted in the pending case by the fact that there was no constitutionally protected property interest in the subject license, and thus no triggering of due process protection. Accordingly, the petition for writ of certiorari should be denied.

B. Facts Giving Rise To Suit

In 2008, East Hartford Police Chief Mark Sirois issued to ACE a one-year pawnbroker and precious metals and stones licenses. [Pet'r App. 4.] These licenses were valid until their expiration date of August 9, 2009, and were subject to the conditions set forth in C.G.S. §§ 21-39 through 21-47 (Pawnbrokers) and C.G.S. § 21-100 (Precious Metals and Stones). [Id.] The relevant statutory sections are as follows:

Sec. 21-39. License required. Loans on intangible property excepted. No person, corporation, limited liability company or partnership shall, in any city or town of any state, engage in or carry on the business of loaning money upon deposits or pledges of wearing apparel, jewelry, ornaments, household good or other personal property, or of purchasing

such property on condition of selling the same back again at a stipulated service, unless such person, corporation, limited liability company or partnership is licensed as a pawnbroker; but the provisions of this chapter shall apply only if such property is deposited with a lender, and shall not apply to loans made upon stock, bonds, or other written or printed evidence of ownership of property or of indebtedness of the holder or owner of any such securities.

Sec. 21-40. Issuance of licenses. Fees. The selectmen of any town and the chief of police of any city may grant licenses to suitable persons to be pawnbrokers and to rely on the business of lending money on the deposit or pledge of personal property, and purchasing such property on condition of selling it back again at a stipulated price, or of purchasing such property from a person who is not a wholesaler, in such town or as respectively, and may revoke such licenses for cause; but the selectmen shall not grant such licenses for the carrying on of such business within the limits of any city. The person so licensed shall pay, for the benefit of any such city or town, respectively, the authority granting such license a license fee of fifty dollars, and twenty-five dollars and thereafter for renewal of such license, and shall, at the time of receiving such license, file, with the mayor of such city or the first selectman of such town, a bond to such city or town, with competent surety, the penal sum of two thousand dollars, to be approved by such licensing authority, and conditioned for the

faithful performance of the duties and obligations pertaining to the business so licensed. Each such license shall designate the place where such business is to be carried on and shall continue one year unless sooner revoked. No license shall be issued under this section by the selectmen or chief of police to any person who has been convicted of a felony. The selectmen or chief of police may require any applicant for a license under this section to submit to state and national criminal history records checks. If the selectmen or chief of police require such criminal history records checks, such checks shall be conducted in accordance with section 29-17a.

PURCHASERS OF PRECIOUS METALS AND STONES

Sec. 21-100. License required. Fee. Record of transactions. (a) No person may engage in or carry on the business of purchasing gold or gold-plated ware, silver or silver plated ware, platinum ware, watches, jewelry, precious stones or coins unless that person is licensed by the chief of police or, if there is no chief of police, the first selectman of the municipality in which such person intends to carry on such business; except that the provisions of this subsection shall not apply to the purchase of such items from a wholesaler by a manufacturer or retail seller whose primary place of business is not in this state. Such person shall pay an annual fee of ten dollars for such license. The license may be revocable for cause, which shall include, but not

be limited to, failure to comply with any requirements for licensure specified by the licensing authority at date of issuance. 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. A chief of police or first selectman may require any applicant for a license to submit to state and national criminal history records checks. If the chief of police or first selectman requires such criminal history checks, such checks shall be conducted in accordance with section 29-17a. For the purposes of this subsection “wholesaler” means a person in the business of selling tangible personal property to be resold at retail or raw materials to be manufactured into suitable forms for use by consumers.

On August 13, 2008, owner Christa Matuschkowitz applied for a precious metals and stones license. [2 J.A. 0438.] Ms. Matuschkowitz was issued a pawnbroker and a precious metals licenses for a period of one year, both set to expire on August 9, 2009. [2 J.A. 0438-0439, 0380-0381.] On July 20, 2009, Ms. Matuschkowitz applied for renewal of her precious metals license, and on July 21, 2009 she applied for renewal of her pawnbroker license. [2 J.A.0376-0378.]

On the applications, Ms. Matuschkowitz was listed as the applicant [id.], and owners and officers were listed as Vanja Dizdarevic of Vienna, Austria and Jay Sargent. [Id.] This was the first application submitted to the Town on which Mr. Sargent was listed as an owner/officer. [1 J.A. 0249.]

On August 7, 2009, Chief Sirois, as the licensing official in East Hartford, (see C.G.S. § 21-40), sent Ms. Matuschkowitz, the applicant for TC's Pawn Company, a letter informing her that the licenses *would not be renewed* due to "recent occurrences." [2 J.A. 00379.]

ACE admits that pursuant to an investigation into area pawn shops headed up by the State's Attorneys' Office, two of its employees were arrested on charges of attempting to commit larceny, and Mr. Sargent, the General Manager and identified owner/officer on the 2009 application, was arrested and charged with larceny in the sixth degree. [1 J.A. 0023.] Although Mr. Sargent was not arrested until after the non-renewal letter was sent out by Chief Sirois, at the time of the letter Chief Sirois had knowledge that two employees had already been arrested, and he was aware that another arrest was imminent.¹ [1 J.A. 0262-0264.] Mr. Sargent was arrested pursuant to warrant on August 11, 2009 [2 J.A. 0425] and the two employees had been arrested for larceny in June of 2009. [2 J.A. 0430.]

In response to the letter from Chief Sirois, Mr. Sargent sought to speak to the Chief. [2 J.A. 0424.] Following the receipt of the non-renewal letter, the meaningful opportunity to be heard that ACE sought was a meeting between Chief Sirois and Mr. Sargent.

¹ The East Hartford Police Department was not the arresting agency. [1 J.A. 0257.] A "task force" arrested the two employees and Mr. Sargent. [2 J.A. 0481.] The "task force" was spearheaded by the Chief State's Attorney and involved municipalities including Glastonbury, West Hartford, Wethersfield, and East Hartford. [1 J.A. 0259-0260.]

[2 J.A. 0424, 0429.] It stands to reason that a license would not have been issued even if Mr. Sargent met face-to-face with Chief Sirois, given that Mr. Sargent was managing ACE's business during a larceny sting. [2 J.A. 0430.]

C. Procedural History Of The Subject Federal Action

ACE brought this action against the Town by way of a two count complaint dated August 12, 2009. Therein ACE alleged that the Town arbitrarily, capriciously, and unlawfully violated its substantive and procedural due process rights when the Town failed to renew its pawnbroker and precious metals licenses. The parties filed cross Motions for Summary Judgment. On September 30, 2011, the District Court filed its Memorandum of Decision [Pet'r App. 31], granting in part and denying in part the Defendants' Motion for Summary Judgment [1 J.A. 0059] and the Plaintiff's Motion for Summary Judgment. [1 J.A. 0062.] The District Court found that the Town did not violate the substantive due process rights of ACE when it declined to renew the pawnbroker and precious metals licenses. The District Court also found that the Town did not violate the procedural due process rights of ACE with respect to renewal of ACE's pawnbroker license. The District Court, however, held that the Town violated the procedural due process rights of ACE, even though it had not acted in an arbitrary manner and was not liable for a substantive due process violation, with respect to the failure to renew ACE's precious metals license. [Pet'r App. 47.]

The parties, thereafter, appeared for a hearing on damages in front of the Honorable Magistrate Judge

Martinez. This hearing took place on February 26 and 27, 2013, and April 11, 2013. On July 14, 2014, the Magistrate Judge issued her Recommended Ruling, awarding \$352,660 in compensatory damages to ACE. [Pet'r App. 49, 86.] The Town submitted objections to certain portions and aspects of the Recommended Ruling on July 28, 2014. [1 J.A. 0012.] ACE opposed the objections. [*Id.*] On September 18, 2014, the District Court approved and adopted the Recommended Ruling, and Judgment entered in favor of ACE on September 22, 2014. [Pet'r App. 94—95.] The Town timely filed a notice of appeal on October 10, 2014. [2 J.A. 0382.] On October 15, 2014, ACE filed a Motion to Alter or Amend Judgment to Award Prejudgment and Post-judgment Interest. [2 J.A. 0386.] The Town objected to the motion. [1 J.A. 0015.] On January 8, 2015, ACE filed a Motion for Attorneys' Fees. [3 J.A. 0593.] The Town objected to the motion. [1 J.A. 0015.] On March 15, 2016, Magistrate Martinez ruled on the fees motion, awarding ACE \$490,831.75 in attorneys' fees and \$3,505.27 in costs. [Pet'r App. 97.] This Recommended Ruling was adopted by the District Court on April 21, 2016. [Pet'r App. 112.] On August 10, 2016, the District Court ruled on ACE's Motion to Alter Judgment, awarding \$5,022 in pre-judgment interest. [Pet'r App. 114.] Amended Judgment entered on August 11, 2016 [Pet'r App. 118], and an Amended Notice of Appeal was filed on August 29, 2016. [3 J.A. 0595.]

D. The Second Circuit's Decision

The Second Circuit Court of Appeals heard argument on June 23, 2017 and issued its decision on February 28, 2018. The Court emphasized that state

law informs the analysis as to whether a legally cognizable property interest exists and, after performing a thorough analysis of Connecticut law, concluded that it did not provide a constitutionally protected property interest in the renewal of its precious metals license. Therefore, ACE was not entitled to summary judgment on the procedural due process claim and the Town was entitled to judgment on this claim. [Pet'r App. 3.] The Court reversed that part of the judgment in favor of ACE and remanded the matter to the district court to enter judgment in favor of the Town on all claims. [Id.] The Court specified that this reversal was to extend to the award of attorney's fees, as ACE could not be considered a "prevailing party" for an award of fees under 42 U.S.C. § 1988(b) given the Court's ruling on the merits. [Id.] The Court declined to address the Town's proximate cause challenge to the award of compensatory damages or its reasonableness challenge to the award of fees. [Id.]

In the absence of a relevant ruling by the Connecticut Supreme Court concerning the degree of discretion that General Statutes § 21-100(a) grants local authorities in issuing or renewing a precious metals license, the Court looked to the plain meaning of the statute at issue. [Id. at 10—11.] It noted that the first words of § 21-100(a) sound in prohibition, not entitlement, as they state that "[n]o person" can operate either a precious metals or pawnbroker business in Connecticut unless licensed to do so by the appropriate authorities of the relevant municipality. [Id. at 14.] The Court also noted that, although § 21-100(a) does not set forth specific requirements for obtaining a license, it does prohibit the issuance of

licenses to convicted felons, plainly contemplates “requirements,” and provides police chiefs with “virtually unfettered discretion to specify [these requirements.]” [*Id.*]

The Court did recognize that even broad licensing authority cannot be exercised arbitrarily, invidiously, or discriminatorily. [*Id.* at 16.] However, that does not mean that an applicant has a property interest in the issuance of the license, as these potential abuses are checked by substantive due process and equal protection regardless of whether the applicant has a property interest protected by procedural due process. [*Id.*] The Court noted that the one Connecticut Superior Court case addressing § 21-100(a) concluded, from the lack of statutory guidance provided to an issuing agent to determine whether to issue a precious metals license, that the legislature intended to leave the issuance of these licenses to the agent’s “sound discretion.” [*Id.* at 17, citing *Aurilio v. Sweeney*, 1999 WL 171414, at *4 (Conn. Super. Ct. Mar. 11, 1999), *aff’d* 60 Conn.App. 908, 761 2.d 801 (2000)]. The District Court ruled in its summary judgment decision that the Town did not violate the substantive due process rights of ACE when it declined to renew the precious metals license, and this ruling was not appealed by the Petitioner. [*Id.* at 42.]

The Second Circuit rejected the Petitioner’s argument that police chiefs lack the discretion to deny the issuance of precious metals licenses to non-felons because § 21-100(a) does not contain language similar to that of § 21-40, which states that police chiefs “may grant [pawnbroker] licenses to suitable persons,” a determination that the Connecticut Supreme Court has

held as requiring the exercise of “judgment and reasoned discretion.” Id. at 22, citing Ballas v. Woodin, 155 Conn. 283, 231 A.2d 273, 275 (Conn. 1967).] The Petitioner argued that the absence of that “suitable persons” language, coupled with § 21-100(a)’s bar against issuing precious metals licenses to felons, means that the statute must be read as denying police chiefs the discretion to deny precious metals licenses to non-felons. Id. at 23.] The Court rejected this argument, reasoning that § 21-100(a)’s language regarding police chiefs’ authority to specify “any requirement for licensure” requires the exercise of “judgment and reasoned discretion” as much as the “suitable persons” language. Id. at 23—24.]

Importantly, the Court also focused on the fact that § 21-100(a) allows licensing requirements to be identified up to the time of issuance of the precious metals license. Id. at 25.] As these requirements may pertain to issues that become known only upon review of the application and the relevant circumstances, “the applicant for a precious metals license can be no more certain than the applicant for a pawnbroker license that its application will be granted and the requested license issued.” Id.] Therefore, although the language in these two statutes is different, the functional effect of each is essentially indistinguishable.

REASONS FOR DENYING THE PETITION

This action is not an appropriate case upon which to grant certiorari. The Second Circuit thoroughly considered the language of the statute at issue and the interplay between Connecticut and federal law to arrive at a sound, well-reasoned decision. As is more thoroughly addressed below, the Petitioner's reliance upon decisions from other jurisdictions encountering similar issues is misplaced, as the outcome depends upon the law of the particular state at issue. The mere fact that a court in a different state ruled in a different manner is meaningless to this analysis.

The heart of the Petition is primarily grounded upon the Petitioner's claim that it had a legitimate property interest in the *renewal* of its precious metals license and, therefore, has an actionable claim against the Respondents under the Due Process Clause of the Fourteenth Amendment for the Respondents' refusal to renew this license and their actions with regard to processing the application. This argument is not an appropriate basis for review, as examining the Respondents' actions in the context of the relevant state and federal laws makes it clear that no such property interest existed.

Finally, regarding the Petitioner's alternative ground for review pertaining to which party has the burden of establishing that a due process violation caused injury, that argument is moot because the Petitioner cannot prevail on the underlying due process violation claim. However, for the sake of analysis, the Petitioner cannot establish that the burden is on the government to prove that it would have taken the same

action had it provided the alleged necessary due process.

I. THE PETITIONER’S ARGUMENT THAT CERTIORARI IS APPROPRIATE BECAUSE THE SECOND CIRCUIT’S RULING IS IN CONFLICT WITH A RHODE ISLAND SUPREME COURT RULING DOES NOT SUPPORT GRANTING CERTIORARI IN THIS MATTER.

The Petitioner relies heavily upon a 1983 ruling by the Rhode Island Supreme Court to support its Petition, Tillinghast, Et Al. v. Town of Glocester, 456 A.2d 781 (R.I. 1983), and several cases cited therein. The Petitioner argues, as held by the Tillinghast Court, “that the revocation of a business license and the refusal to renew a license is a legally meaningless distinction,” as revocation and failure to renew have identical results of the destruction of an ongoing business. While the result may be the same, i.e., the business may cease to operate, that does not compel the conclusion that this is a “legally meaningless distinction” as argued by the Petitioner. Revocation, in this context, involves a governmental body rescinding an active license that has already been granted. In contrast, refusing to renew a license does not function to deprive an individual or entity of the benefits of an active license that it legitimately holds. The Petitioner’s argument ignores the fact that a due process claim based upon a property interest turns on a claim of entitlement, not whether the end result (here, destruction of a business) is the same.

In evaluating a procedural due process claim, courts “analyze . . . whether plaintiffs possessed a protected

... property interest ... “ Adams v. Suozzi, 517 F.3d 124, 127 (2d Cir. 2008) (internal citations omitted; internal quotations omitted). “To have a property interest in a benefit, a person ... must have more than a unilateral expectation of it. He must, instead, have *a legitimate claim of entitlement to it.*” Bd. of Regents v. Roth, 408 U.S. 564, 577, 33 L.Ed.2d 548 (1972) (emphasis added). Such a legitimate claim may be found to exist in a situation where, “*under applicable state law*, absent the alleged denial of due process, *there is either a certainty or a very strong likelihood that the application would have been granted.*” Harlen Assocs. v. Inc. Vill. of Mineola, 273 F.3d 494, 504 (2d Cir. 2001) (emphasis added) (internal citations omitted; internal quotations omitted). It is beyond dispute that the analysis of the Petitioner’s claims must be performed through the lens of Connecticut law, not that of other jurisdictions, as relied upon by the Petitioner. The Second Circuit did just that in its thorough examination of the relevant Connecticut statutes, case law, and even the legislative history. [Pet’r App. 9—27.]

It is similarly well-established that Connecticut does recognize a licensee as holding a property interest protected by procedural due process once a license is issued, but that property interest *terminates contemporaneously with the expiration of the license.* Hart Twin Volvo Corp. v. Comm’r of Motor Vehicles, 165 Conn. 42, 46, n. 1, 327 A.2d 588 (Conn. 1973); Rocque v. Conn. Waste Oil, Inc., 2001 WL 1743219, at *2 (Conn. Super. Ct. Dec. 20, 2001). Therefore, as the property interest that the Petitioner did hold in the prior license terminated along with that license, the Plaintiff did not have a constitutionally cognizable

property interest in the precious metals license, and as such, he was not entitled to the protections of the due process clause.

The first inquiry a court must make into the due process question is whether a property interest exists. Kraebel v. New York City Dep't of Hous. Pres. and Dev., 959 F.2d 395, 404 (2d Cir. 1992). It is well settled that "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Roth, 408 U.S. at 577. A person must be entitled to a benefit before it becomes a property interest. Id. The inquiry into whether there is a constitutionally cognizable property interest involves two questions: (i) "whether some source of law other than the Constitution, such as a state or federal statute, confers a property right on the plaintiff" and (ii) "[o]nce such a property right is found, [the question becomes] whether that property right constitutes a property interest for purposes of the Fourteenth Amendment." O'Connor v. Pierson, 426 F.3d 187, 196 (2d Cir. 2005) (quoting Town of Castle Rock v. Gonzales, 545 U.S. 748, 757 (2005)). The Second Circuit, in its well-reasoned decision, properly examined Connecticut law and determined that the Plaintiff did not have a constitutionally cognizable property interest in the precious metals license.

In defining a property interest, the Supreme Court in Roth noted that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Roth, 408 U.S. at

577. “[I]f state law makes the pertinent official action discretionary, one’s interest in a favorable decision does not rise to the level of a property right entitled to due process protection.” RR Vill. Ass’n, Inc. v. Denver Sewer Corp., 826 F.2d 1197, 1201 (2d Cir. 1987) (citing Schwartz v. Mayor’s Comm. on the Judiciary of the City of New York, 816 F.2d 54, 56 (2d Cir. 1987); Sullivan v. Town of Salem, 805 F.2d 81, 84 (2d Cir. 1986)). In order to establish a constitutionally protectable property interest in a permit, a plaintiff must establish that it has “a clear entitlement to the approval sought from the government official or administrative body.” Villager Pond, Inc. v. Darien, 56 F.3d 375, 378 (2d Cir. 1995) (internal quotations omitted); see also Natale v. Town of Ridgefield, 170 F.3d 258, 263 (2d Cir. 1999); Clubsides, Inc. v. Valentin, 468 F.3d 144, 152 (2d Cir. 2006). A strict entitlement test is utilized in assessing whether a plaintiff had a clear entitlement to a permit so as to create a cognizable property right pursuant to the due process clause. See Harlen, 273 F.3d at 503—504 (2d Cir. 2001); Zahra v. Town of Southhold, 48 F.3d 674, 680 (2d Cir. 1995).

The inquiry as to whether a plaintiff has a clear entitlement to a permit “‘focus[es] primarily on the degree of discretion enjoyed by the issuing authority, not the estimated probability that the authority will act favorably in a particular case.’” Villager Pond, 56 F.3d at 378, quoting RRI Realty Corp. v. Inc. Vill. of Southampton, 870 F.2d 911, 918 (2d Cir. 1989); see also Clubsides, 468 F.3d at 152—53. “A clear entitlement, and, in turn, a constitutionally protected property interest, exists only when the discretion of the issuing agency is so narrowly circumscribed that approval of a

proper application is virtually assured.” Villager Pond, 56 F.3d at 378 (internal citations omitted; internal quotations omitted); see also Natale, 170 F.3d at 263; Harlen, 273 F.3d at 504; Crowley v. Courville, 76 F.3d 47, 52 (2d Cir. 1996).

As set forth above, it is well established that a proper due process analysis focuses on whether there is a claim of entitlement. If state law makes an official action discretionary, there is no claim of entitlement. The Second Circuit thoroughly considered the language of the statute at issue and the interplay between the relevant Connecticut and federal law to determine that because the approval of the petitioner’s renewal application was not “virtually assured” by Connecticut law, the Petitioner did not have a constitutionally cognizable property interest in the precious metals license. [Pet’r App. 27.]

The Petitioner, therefore, cannot present a viable claim regarding deprivation of a property interest under any theory. The Petitioner did not have a recognizable property interest in the precious metals license that expired, as that interest ended along with the license. Furthermore, the Petitioner’s mere expectation of license renewal did not rise to the level of creating a legitimate entitlement, especially considering the amount of discretion provided to the licensing authority by § 21-100(a). This is not a statute that practically guarantees the issuance of a license as long as certain criteria are met. Furthermore, the Petitioner has not pointed to any evidence tending to show that if the Petitioner had been given an audience with Chief Sirois, the outcome would be different.

The Petitioner's reliance upon Tillinghast is therefore misplaced. Simply put, a 1983 decision from another jurisdiction addressing the property interests that may exist in a license, or renewal of same, is irrelevant. As the Second Circuit thoroughly explained, Connecticut law does not support the Petitioner's claim of entitlement. The fact that the Tillinghast Court, after its evaluation of a claim subject to the laws of Rhode Island, arrived at a different conclusion is not in the least bit persuasive or instructive in this matter.

The Petitioner has referred to several other cases, also from jurisdictions outside of Connecticut. As outlined above, these cases are also inapplicable to this matter. However, a review of the cases makes it clear that they are factually distinguishable as well. In one, the Supreme Court of Utah vacated the trial court's decision with regard to the Utah County Commission's denial of the plaintiff's Class "B" beer license. Anderson v. Utah County Bd. of County Com'rs, 589 P.2d 1214, 1217 (1979). The Court concluded that the record of the trial court, and its findings upon which the judgment was based, did not demonstrate any reasonable ground for the refusal to renew the license. Id. In contrast, there was clearly reasonable ground to deny the Petitioner's application in this matter, as multiple employees of the pawn shop were facing larceny charges. It was appropriate for Chief Sirois not to issue a license to buy and sell precious metals, given the circumstances.

A Minnesota case cited by the Petitioner is also distinguishable from the issue posed here. In that matter, the plaintiff, an asphalt company, had invested

significant amounts of money in upgrading the plant to satisfy State and City pollution control standards, working with the City's attorney and multiple other municipal and state agencies to bring its plant into compliance. Trumbull Div., Owens-Corning Fiberglass Corp. v. City of Minneapolis, 445 F. Supp. 911, 914 (D. Minn. 1978). In evaluating its procedural due process claim grounded in repeated denials of multiple applications for licenses to operate based, at least in part, upon pollution and/or odors in the vicinity of the plant, the Court noted that by requesting and/or requiring the plaintiff to invest in proper equipment, the City and State "strengthened the natural assumption that once compliance had been achieved, a license would surely be forthcoming." *Id.* at 916. This situation is not comparable to the instant matter, as the Petitioner has not alleged that it made any investments or changes to its pawn shop operation as a result of conferring with any municipal agencies that would have caused it to assume that a license would be forthcoming.

The distinction between the cases cited by the Petitioner and the instant matter is therefore clear. However, even if the facts were more analogous, the outcome would be the same due to the state law analysis. The decisions from other jurisdictions that have addressed similar issues are irrelevant, as they involve statutes, ordinances, and/or case law that are not analogous to § 21-100(a) and the relevant Connecticut case law. Decisions from Rhode Island, or any other state, have absolutely no bearing on this matter. Under Connecticut law, the Petitioner simply cannot maintain a claim for a violation of procedural due process. Any property interest that a licensee

holds in a license ends with the expiration of that license, and a mere expectation of renewal does not represent a legitimate property interest entitled to procedural due process protections unless said renewal was certain or, at the least, very likely. The Petitioner has thus far been unable to point to any Connecticut law justifying a different conclusion or even supporting the argument that the Second Circuit's ruling was improper.

II. CERTIORARI SHOULD NOT BE GRANTED TO RESOLVE THE SPLIT OF AUTHORITY AMONG THE CIRCUITS ALLEGED BY THE PETITIONER REGARDING WHICH PARTY HAS THE BURDEN OF PROOF AS TO ACTUAL INJURY ONCE A DEPRIVATION IS ESTABLISHED. THIS COURT'S REVIEW IS THEREFORE UNNECESSARY, AND THIS ALTERNATIVE GROUND FOR REVIEW IS MOOT.

In its Petition, the Petitioner asserts an alternative ground for review. ACE asks the Court to grant its 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. The Respondents submit that this alternative ground should not be reviewed because the Petitioner cannot prevail on the underlying due process violation claim. The Petitioner asserts that with the exception of the Second Circuit, every circuit court *that has addressed this issue* has concluded that, in the context of a procedural due process violation claim involving a property interest, the burden is on the government to prove that it would

have taken the same action had it provided the necessary due process. [Pet., pp. 14—15.] In support of this, the Petitioner points to cases from the Third, Sixth, Seventh, Eighth, and Tenth Circuits. [*Id.* at 15.] The sole fact that five circuits, out of twelve, have ruled in a certain manner does not compel the conclusion that placing this burden upon the Respondents is proper. The Petitioner has not raised any arguments as to why the Second Circuit’s approach to the allocation of the burden of proof is inappropriate, rather, the issue seems to be the sole fact that there is a split of authority among the circuit courts that have had the opportunity to address this issue.

The facts of this case do not present an appropriate opportunity to resolve this split. The consideration is moot, as the relevant analysis necessarily follows the conclusion that there was in fact some deprivation of due process. That is not the situation in the case at bar, so the Court’s determination as to the appropriate allocation of the burden of proof in due process cases is irrelevant. However, the Respondents will address it for the sake of a complete analysis of the issues raised by the Petitioner.

This Court previously rejected “the . . . contention that damages should be presumed to flow from every deprivation of procedural due process.” Carey v. Phipus, 435 U.S. 247, 263, 55 L.Ed.2d 252 (1978). The Carey Court also noted that the ambiguities that can arise while analyzing the causation of damages allegedly resulting from a deprivation of procedural due process rights “provide additional need for requiring the plaintiff to convince the trier of fact that

he actually suffered distress because of the denial of procedural due process itself.” Id.

In line with this reasoning, the Second Circuit previously addressed the issue of which party bears the burden in a procedural due process matter, holding that the task falls to the plaintiff wishing to recover compensatory, not just nominal, damages. “Carey. . . clearly establishes that [the plaintiff] has an obligation to prove how the constitutional deprivations he suffered caused his injury.” McCann v. Coughlin, 698 F.2d 112, 126 (2d Cir. 1983). The Second Circuit did recognize a limited exception to this rule in cases where the defendant takes action that makes it impossible for the plaintiff to satisfy this burden. “[E]ven as to an issue on which the plaintiff normally has the burden of proof, it would be inappropriate to rule that the defendants should prevail where they have made proof impossible.” Patterson v. Coughlin, 905 F.2d 564, 570 (2d Cir. 1990) This exception is inapplicable to the case at bar, as the Petitioner has not claimed, at any point, that the Respondents took any action(s) preventing the Petitioner from accessing information that would allow it to meet this burden of proof.

Under the approach to the allocation of burdens as articulated in McCann, if the Petitioner were able to prove a deprivation of its constitutional rights, it would then need to prove that but for said deprivation, the result of the application process would have been different, meaning that the Petitioner suffered an injury of some sort as a result. This distribution of the burden of proof is logical and does not put the Petitioner at a disadvantage. It is axiomatic that the party bringing an action bears the burden of proof, and

it makes sense that, if a party is able to clear the first hurdle of establishing that there was a procedural due process violation, the burden to prove that it was in fact injured by said violation is again appropriately placed upon that same party.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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