

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 A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

**REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

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ARGUMENT

Notwithstanding the arguments advanced by the Respondents in their opposition brief, this Honorable Court should grant the petition for a writ of certiorari to consider the two important questions presented: (1) whether a municipality's refusal to renew the license of an established business, thereby causing the destruction of the business, constitutes a deprivation of property under the Due Process Clause; and (2) if a municipality does violate an established business's procedural due process rights, which party bears the burden of proving whether the due process violation caused injury.

I. Respondents' Argument in Opposition to the Granting of the Writ of Certiorari as to the First Question Fails.

As to the first question, Respondents Town of East Hartford, Connecticut and Mark Sirois, Chief of Police (collectively "Town") assert that there is no property interest protectable by the Due Process Clause at issue here because any property interest expired upon expiration of the license allowing Petitioner ("ACE") to operate. The Town claims that the question of whether any protectable property right existed is purely a question of state law, and, insofar as Connecticut law purportedly recognizes no property right in the renewal of a license, ACE's property interest in its ongoing business expired upon the expiration of its license; ACE was purportedly left with nothing but an inconsequential hope of renewal. The Town argues that the decision

of the Rhode Island Supreme Court in *Tillinghast, et al. v. Town of Glocester*, 456 A.2d 781, 784-85 (R.I. 1983), is of no moment because that court simply applied its state law to determine whether a protectable property interest existed. Therefore, the Town asserts, despite the opposite outcome in that state court of last resort, there is no conflict with the holdings of the Second Circuit on the issue of whether a protectable property interest exists when an ongoing business applies for renewal of its operating license. The Town relies upon decisions of the Second Circuit and selective references to the holdings of this Court to support this argument. This argument fails for at least the following four reasons.

First, by focusing solely on the narrow issue of the renewal of the license and the state law regarding that process, the Town misses the fundamental issue at stake: the deprivation by the municipality of ACE's ongoing business. This is not merely an issue of ACE's interest in continuing to hold a license, or not; ACE, and others in similar situations, have made significant investment in their business, and, as the Rhode Island Supreme Court stated, under such circumstances, "one expects to be able to continue to operate it," and deserves due process before denial of that property by the non-renewal of its license. *Tillinghast, et al. v. Town of Glocester*, supra, 456 A.2d at 784. "The reasonableness and justice of such a rule is apparent when one reflects on the practicalities of the situation where the business has been established and operating for some years and thus represents a substantial commitment

in the time, effort and expense by the owner.” *Anderson v. Utah County Bd. of County Comm’rs*, 589 P.2d 1214, 1216 (Utah 1979) (due process protection arises with respect to non-renewal of an ongoing business’ operating license). The Court should decline the Town’s invitation to elevate form over substance, and instead recognize the very real property interest of which the Town deprived ACE, without any notice or an opportunity to be heard.

Second, despite the contrary suggestion by the Town, this Court has recognized that a property interest entitled to protection under the Due Process Clause of the Fourteenth Amendment can arise from various sources. The Court has stated that “[w]e have made clear . . . that ‘property’ interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, ‘property’ denotes a broad range of interests that are secured by ‘existing rules or understandings.’” *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 571-72, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)). The Court noted the same in the very Supreme Court decision upon which the Town primarily relies, *Board of Regents v. Roth*, supra, 408 U.S. at 577 (“[p]roperty interests . . . are created and their dimensions are defined by . . . rules or understandings that secure certain benefits and that support claims of entitlement to those benefits”), and the Court observed broadly that “[i]t is a purpose of the ancient institution of property to protect those claims

upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.” *Id.* at 577.

Indeed, in the same decision, the Court observed that a protectable property interest could arise even absent any state law or contractual guaranty to an ongoing government benefit, based, for example, upon “a clearly implied promise of continued” receipt of that benefit. *Id.* (citing *Connell v. Higginbotham*, 403 U.S. 207, 208, 91 S. Ct. 1772, 29 L. Ed. 2d 418 (1971)); *see also Perry v. Sindermann*, *supra*, 408 U.S. at 602 (embracing the proposition that “the existence of . . . understandings . . . fostered by state officials . . . may justify [a] legitimate claim of entitlement to continued” receipt of a benefit, even after the period of its nominal duration). In this regard, although the Town has omitted the pertinent facts from their recitation of the background of the case, it is worth noting, as the district court did, that the one-year license at issue here had been renewed in the past, that the Town initially (upon the unjustified arrest of ACE’s employees) intended to revoke the license and provide for a hearing but decided to await the expiration of the license and refuse renewal without providing any process, and that the Town’s employees repeatedly represented to ACE’s agents that there were no issues with its renewal application and that its license would be renewed. App. 32-34. Particularly against this background, the precedents of this Court leave the door open to recognizing in this case that non-renewal of the operating license of an ongoing business requires proper notice and an appropriate hearing, insofar as the non-renewal

literally destroyed the business owner's property, given that the owner of the business had a reasonable and legitimate expectation of continuing its operation, given that the expectation here was based in part on the Town's implied and explicit representations, and insofar as the Town's own conduct shows the functional equivalence between revocation and non-renewal of an operating license.

Third, despite the assertions of the Town, there is no basis for this Court to accept that under Connecticut law the "property interest [arising from the issuance of an operating license to a business that remains ongoing] terminates contemporaneously with the expiration of the license," and that therefore no process is due upon a municipal decision not to renew it. Opp. Br. at 14 (emphasis removed.) The Town, and the Second Circuit, cite two cases for this proposition: *Hart Twin Volvo Corp. v. Comm'r of Motor Vehicles*, 165 Conn. 42, 46 n.1, 327 A.2d 588 (1973); and *Rocque v. Conn. Waste Oil, Inc.*, No. CV010809202S, 2001 WL 1743219, at *2 (Conn. Super. Ct. Dec. 20, 2001). Opp. Br. 14; App. 25-26. However, *Hart Twin Volvo* actually vindicated the right of the plaintiff to due process. *Hart Twin Volvo Corp. v. Comm'r of Motor Vehicles*, *supra*, 165 Conn. at 46. Moreover, the case involved the suspension of a current license, and did not raise any issue with respect to non-renewal of a license. *Id.*

The statement in *Hart Twin Volvo* relied upon by the Town and the Second Circuit reads as follows: a "license, being within the scope of the protection afforded by the [D]ue [P]rocess [C]lause, is indeed a property

right once it has been issued, and it remains such until its expiration date so long as the laws pertaining to its use are obeyed.” *Id.* at n.1. The context, in a footnote to a decision that had nothing to do with renewal or non-renewal of a license or expiration of an existing license, makes clear that the Connecticut Supreme Court intended to simply recite a proposition that had become beyond controversy: that possession of an existing license falls within the protections of the Due Process Clause. To the extent the statement mentioned anything about the expiration of a license, it was mere dicta.

Although the Superior Court in *Rocque* indeed held that non-renewal of an existing license did not trigger the protections of due process because the plaintiff’s property right expired with the term of its existing license, *Rocque v. Conn. Waste Oil, Inc.*, supra, 2001 WL 1743219, at *2, the unpublished decision of a state trial court does not establish the law of the state. *J.M. Lynne Co. v. Geraghty*, 204 Conn. 361, 369, 528 A.2d 786 (1987) (Connecticut trial court cases do not establish binding precedent); cf. *Camreta v. Green*, 563 U.S. 692, 709 n.7, 131 S. Ct. 2020, 179 L. Ed. 2d 1118 (2011) (even “[a] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case” (quoting Moore’s Federal Practice § 134.02(1)(d))). In any event, the authority that *Rocque* relied upon for this holding was the Connecticut Supreme Court’s dicta in *Hart Twin Volvo*; see *Rocque v. Conn. Waste Oil, Inc.*, supra, 2001

WL 1743219, at *2; and therefore is entitled to no more deference than that dicta.

In short, the cases that the Town and the Second Circuit relied upon do not establish that under Connecticut law a property right as to an ongoing business requiring an operating license expires upon the expiration of that license. Furthermore, we are aware of no Connecticut appellate or Supreme Court case holding that an ongoing business was appropriately denied the protections of the Due Process Clause upon non-renewal of an existing operating license. Hence, reversal of this case on the grounds that non-renewal of an ongoing business' operating license triggers the protections of the Due Process Clause would upset no state authority to the contrary.¹ These considerations further reinforce the propriety of this Court's review of this case to settle the question of whether a municipality's refusal to renew the operating license of an established business, causing its destruction, constitutes a deprivation of property under the Due Process Clause.

Fourth, notwithstanding the Town's assertion to the contrary, there exists a cognizable split of authority between the Second Circuit, on the one hand, and the Rhode Island Supreme Court on the other hand. The

¹ Indeed, given the conduct of the Town in connection with the non-renewal, as described above, the reversal of this case would be consonant with the law of Connecticut. *See Contractor's Supply of Waterbury, LLC v. Comm'r of Environmental Protection*, 283 Conn. 86, 925 A.2d 1071 (2007) (plaintiff retained a continued interest in an expired permit due to the defendant's waiver of the deadline for renewal).

Town asserts that the Rhode Island Supreme Court essentially applied the same legal framework as the Second Circuit: a cognizable property right exists if the state law under consideration creates such right. The argument posits that the Second Circuit properly applied this rule, and properly determined that no process was due with respect to the non-renewal because under Connecticut law, purportedly, any such property right expires upon expiration of the license; the argument further posits that the Rhode Island Supreme Court applied the same basic framework, examining whether, under the law of Rhode Island, an ongoing business has such a right, concluding that under the law of its state, such a right does exist. Hence, the Town asserts, there is no genuine split in authority necessitating this Court's review.

However, this reasoning is flawed not only because the Town (and the Second Circuit) mischaracterized Connecticut law, as explained above, but also because of its mischaracterization of the holding in *Tillinghast*. The Rhode Island Supreme Court in *Tillinghast*, in rendering the holding at issue here, gave no sign of basing it upon Rhode Island authority; rather, it rested its decision more broadly, on the reality of the interests of a business in its ongoing operation, in conjunction with general principles of fairness and the general principle established by this Court that the rights of a licensee are protected by due process:

When one makes an investment in a business,
... one expects to be able to continue to

operate it. To deny this privilege arbitrarily would work an injustice upon the business owner.

* * *

[T]he Tillinghasts' property interest in their business and its continuation entitles them to the benefits of due process. The rights of a licensee are generally protected by due process. *See Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971). . . .

Tillinghast, et al. v. Town of Glocester, *supra*, 456 A.2d at 784-85; *see also id.* at 784 (so holding despite the fact that the pertinent Rhode Island statute and municipal ordinance appear to require the opposite outcome, insofar as “neither the enabling act that allows the regulation of campgrounds in Glocester . . . nor the Glocester campground ordinance refers to the requirements of notice and hearing prior to the refusal to renew a license. Both do, however, provide such protective measures to one whose license is being suspended or revoked”).² Despite the Town’s contention, there is a genuine split of authority between the Second Circuit, in the instant decision and the numerous decisions cited by the Town, and the Supreme Court of Rhode Island, as to the issue before the Court. We respectfully submit that the approach of the Rhode

² *See also Anderson v. Utah County Bd. Of County Comm’rs*, *supra*, 589 P.2d at 1216; *Women’s Medical Prof. Corp. v. Baird*, 438 F.3d 595, 613 (6th Cir. 2006); *Trumbull Division, Owens-Corning Fiberglass Corp. v. Minneapolis*, 445 F. Supp. 911 (D. Minn. 1978); *Manos v. Green Bay*, 372 F. Supp. 40, 48-49 (E.D. Wis. 1974).

Island Court is superior to that of the Second Circuit, insofar as it recognizes the realities of the expectations associated with operating a business, is more just and fair, and creates an ordered legal framework more conducive to business development. In any event, though, this Court should grant the writ of certiorari here to settle the split in authority described above.

II. Respondents' Argument in Opposition to the Granting of the Writ of Certiorari as to the Second Question Also Fails.

Regarding the second question – which party should bear the burden of proof on the question of whether the due process violation caused injury – the Town's arguments against review are also unsuccessful. They argue that the issue is moot in this case because ACE cannot prevail on its underlying due process violation claim, that the issue is not ripe for review because it has not yet been addressed by all circuits, and that, in light of the arrests of its employees resulting from the “sting” operation, ACE could not in any event establish causation. These arguments fail.

The Town's first assertion falls with its arguments addressed in Part I, above. As explained there, ACE can, and will, prevail on the question of whether its due process rights have been violated. Accordingly, it would be appropriate for this Court to reach the question of who bears the burden of proof as to the issue of causation, and to resolve the split in authority on this issue.

The Town's contention that review of the burden of proof issue should await decisions by further circuits is also clearly without merit. Significantly, the Town does not deny that of the circuits to address this issue, only the Second Circuit has held the burden to be on the petitioner – a tacit admission that bolsters ACE's position that this issue is ripe for Supreme Court review. Numerous jurisdictions have addressed the issue, as set forth in ACE's opening brief, and there is a sharp split of authority (with the Second Circuit's view constituting a minority of one). This Court should reject the Town's proposition that review should be delayed until further circuits have addressed this issue.

Finally, the Town's contention that the issue should not be addressed because ACE could not succeed in an adjudication of causation also need not detain this Court. The question of whether the Town's improper denial of due process at the time it rejected ACE's license renewal application caused ACE's harm has not yet been litigated – much less litigated under the proper allocation of the burden of proof upon the Town. Submission of briefs to this Court on the question of whether a writ of certiorari should issue is not the proper means of addressing whether causation can be established; rather, after the Court clarifies who bears the burden of proof, the issue should be remanded to the district court for determination.

In any event, in light of the circumstances of this case, including another significant fact omitted by the Town – that the State ultimately dropped every last one of the charges against all of ACE's employees; App.

at 32; it stands to reason that the district court would indeed find that, had due process been given, ACE's damages would have been avoided. This outcome is all the more probable if the burden of proof on the causation question were properly placed – upon the Town.

◆

CONCLUSION

In light of the foregoing, and the reasons further described in ACE's opening brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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