

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

COURT OF APPEALS  
STATE OF NEW YORK  
-----  
SUNRISE CHECK CASHING AND PAYROLL  
SERVICES, INC., et al.,  
  
Respondents,  
  
-against-  
  
TOWN OF HEMPSTEAD,  
  
Appellant.  
-----

No. 12  
  
20 Eagle Street  
Albany, New York 12207  
January 7, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

MATTHEW W. GRIECO, AAG  
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK  
Attorneys for Amicus Curiae  
120 Broadway  
New York, NY 10271

PETER SULLIVAN, ESQ.  
BERKMAN, HENOCH, PETERSON, PEDDY & FENCHEL, P.C.  
Attorneys for Appellant  
100 Garden City Plaza  
Garden City, NY 11530

JEFFREY G. STARK, ESQ.  
FORCHELLI, CURTO, DEEGAN, SCHWARTZ, MINEO & TERRANA, LLP  
Attorneys for Respondent  
333 Earle Ovington Boulevard  
Suite 1010  
Uniondale, NY 11553

Penina Wolicki  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 12, Sunrise Check.  
2 Counselor, would you like any rebuttal  
3 time?

4 MR. GRIECO: Since we're here as amicus,  
5 Your Honor, I'll defer any rebuttal to Mr. Sullivan,  
6 who represents the town.

7 CHIEF JUDGE LIPPMAN: Okay.

8 MR. GRIECO: May it please the court - - -

9 CHIEF JUDGE LIPPMAN: Yes, go ahead.

10 MR. GRIECO: May it please the court,  
11 Matthew Grieco on behalf of the Superintendent of  
12 Financial Services.

13 We've before the court today as amicus,  
14 because the Appellate Division misunderstood the  
15 limited nature of the determinations that DFS makes  
16 when it grants an application for a check-cashing  
17 license. And therefore the court erred in relying on  
18 DFS's past issuance of licenses to the plaintiffs.

19 CHIEF JUDGE LIPPMAN: Do you get into the  
20 location of a particular cash-checking (sic)  
21 operation?

22 MR. GRIECO: We get into it to a limited  
23 extent. Every - - -

24 CHIEF JUDGE LIPPMAN: How does that differ  
25 from the zoning that the local town does?

1                   MR. GRIECO: To answer the first part of  
2 your question, every application is granted for one  
3 specific location. But DFS's determinations with  
4 respect to community need and the convenience and  
5 advantage for the area, are limited to assessing - -  
6 - are limited to its role as a financial regulator.

7                   JUDGE PIGOTT: So you require them to tell  
8 you that they are in compliance with the zoning  
9 ordinances as a condition of getting their license?

10                  MR. GRIECO: That's exactly right. And I -  
11 - -

12                  JUDGE PIGOTT: So if, in this case, they  
13 zone them out of the commercial, and they put it in  
14 light industry, and they - - - and you then look at  
15 that and say well, you don't need check cashing in  
16 light industry districts, and therefore we're not  
17 going to give you a license to be a check casher,  
18 that would be your role.

19                  MR. GRIECO: Our role would be to assess  
20 whether there's a community need in the district for  
21 which the applicant - - -

22                  JUDGE SMITH: But if the - - - why is - - -  
23 I'm having trouble seeing how it could not be  
24 inconsistent for you to say there's a community need  
25 for financial - - - obviously, as a financial

1 regulator, you say this is a valuable service, and  
2 the community needs this service. And for them to  
3 say this service is forbidden in this community,  
4 isn't there some tension there?

5 MR. GRIECO: Well, two points, Judge Smith.  
6 First of all, the determination of community need  
7 does not mean need in the sense of the word that  
8 means must exist. It means that there is a consumer  
9 demand, such that there are consumers there who could  
10 benefit from it. And - - -

11 JUDGE SMITH: And your purpose as a  
12 regulator is to protect those consumers and see they  
13 get what they demand?

14 MR. GRIECO: It is - - - that is part of  
15 it. But part of it is also ensuring that there is  
16 not destructive competition between two - - -

17 JUDGE SMITH: Okay - - - -

18 MR. GRIECO: - - - check cashers.

19 JUDGE SMITH: - - - but what about the  
20 first - - - it is part of your job to protect the  
21 people in the community who want and need check-  
22 cashing services. How is that not interfered with by  
23 a zoning ordinance that say all cash checking  
24 services get out?

25 MR. GRIECO: The check - - - the local

1 zoning ordinance is - - - it is the policy of DFS to  
2 deny a check-cashing application if they're not in  
3 compliance with the local zoning ordinance, because  
4 the assumption is - - -

5 JUDGE SMITH: I can understand if this was  
6 a zoning ordinance that said this is only a  
7 residential district, or no buildings over two  
8 stories. But a zoning ordinance that says we forbid  
9 the precise - - - yes, the precise activity that you  
10 license?

11 MR. GRIECO: The best way to analyze that  
12 question, if that's what the court were to conclude  
13 that a particular ordinance does - - -

14 JUDGE SMITH: Well, it's not - - - it  
15 doesn't take much concluding. I was quoting the  
16 ordinance.

17 MR. GRIECO: The ordinance is limiting it  
18 to two districts.

19 JUDGE SMITH: Okay.

20 MR. GRIECO: But it's not stating - - -

21 JUDGE SMITH: Okay, but - - -

22 MR. GRIECO: - - - it's not stating - - -

23 JUDGE SMITH: - - - within the area for  
24 which you have licensed these people, they say they  
25 are forbidden.

1                   MR. GRIECO: But at the time that the  
2 plaintiffs in this case were issued their licenses,  
3 there was not yet an ordinance in place. We were not  
4 making any determination contrary to a determination  
5 - - -

6                   JUDGE SMITH: Well, weren't you making a  
7 determination that the community had a financial  
8 need, or as you put it, a demand - - - that there was  
9 a community demand for this service?

10                  MR. GRIECO: We made a determination that  
11 that prerequisite, of there being adequate consumer  
12 demand, was met. That is - - -

13                  JUDGE PIGOTT: Let's put it the other way,  
14 then. Let's assume for a minute that the license now  
15 comes to you and you ask are they in compliance with  
16 zoning, and they say, yes, because they're in light  
17 manufacturing and industrial. Is it part of your  
18 determination to say, well, there's no need for check  
19 cashing in the light manufacturing and industrial  
20 areas of this community, and therefore, we're denying  
21 your application?

22                  MR. GRIECO: If, in fact, that were the  
23 determination that were made, then yes. If the  
24 community need - - -

25                  JUDGE PIGOTT: You would take that into

1 consideration?

2 MR. GRIECO: It would be taken into  
3 consideration.

4 JUDGE GRAFFEO: Where - - - I can't find  
5 compliance with local zoning in the statute or in the  
6 regs. All I see is the inquiry and the compliance  
7 affidavit.

8 MR. GRIECO: Right. And that's actually an  
9 important - - -

10 JUDGE GRAFFEO: So what's the basis for  
11 your inquiring about local zoning?

12 MR. GRIECO: The reason that it's in the  
13 application form and that we require certification -  
14 - - DFS is not requiring compliance with local  
15 zoning. DFS is requiring certification of compliance  
16 with local zoning. Because the assumption has always  
17 been, and this is what the fact that it's always been  
18 on our application form demonstrates, is that DFS has  
19 always assumed that the local zoning laws provide a  
20 basic infrastructural requirement for all land use  
21 concerns that an applicant has to comply with. And  
22 DFS is not going to take the time to consider an  
23 application from someone who's not in compliance.

24 CHIEF JUDGE LIPPMAN: So you're not  
25 preempting the local entity from doing basically

1           whatever they want on zoning in relation to these  
2           cash-checking (sic) operations.

3                       MR. GRIECO:   Our position is that if the  
4           court concludes that this was a valid exercise of the  
5           zoning power, that it was done for proper land use  
6           considerations that are - - - that underlie proper -  
7           - -

8                       CHIEF JUDGE LIPPMAN:   What if, in Judge  
9           Smith's hypothetical, what if they did say before it  
10          got to you, no check cashing - - - the zoning is no  
11          check cashing anywhere within the town; does that  
12          change the situation?

13                      MR. GRIECO:   If that happened before it  
14          came to us, and they told us that in an application,  
15          it is not impossible that DFS would look at that  
16          ordinance and say notwithstanding this ordinance,  
17          we've concluded that there's a community need for a  
18          check casher at this location.   That's not what  
19          happened here, because there was no ordinance at the  
20          time - - -

21                      JUDGE READ:   Well, what happens - - - what  
22          happens then?

23                      MR. GRIECO:   What happens then is that, I  
24          mean, we might issue a license.   But it would be up -  
25          - - it would then be up to the plaintiffs to - - -



1 JUDGE SMITH: You mean - - - you mean  
2 you're telling me the licensee - - - they're in a  
3 better position if they shut down existing businesses  
4 than if they prohibit new ones from coming in? That  
5 doesn't make sense.

6 MR. GRIECO: Any perceived unfairness with  
7 respect to shutting down existing businesses is best  
8 handled through - - -

9 JUDGE SMITH: Well, but you say that if the  
10 ordinance was already in place, the licensee - - -  
11 someone might still come to you and ask for a  
12 license. That would not stop him.

13 MR. GRIECO: I don't think that it is  
14 necessarily true that the license would be granted.  
15 I mean, I've been at - - -

16 JUDGE SMITH: Okay. But you're saying it's  
17 not necessarily true it would be denied either?

18 MR. GRIECO: That's correct. It would not  
19 necessarily be denied.

20 JUDGE SMITH: Okay, so - - - yes. Well,  
21 can - - - when you've already issued a license, the  
22 licensee, because you've already issued it, has no  
23 recourse. He can't even ask you?

24 MR. GRIECO: Our position is that the court  
25 should decide whether this was a proper exercise of

1 the zoning power. And DFS's position has always been  
2 that if the courts uphold an ordinance as an  
3 otherwise appropriate exercise of - - -

4 JUDGE SMITH: Okay. Well, maybe you're  
5 saying less than I think you're saying. You take no  
6 position on whether it's a proper ordinance - - -  
7 exercise of zoning power to say all check-cashing  
8 institutions get out of town?

9 MR. GRIECO: That's correct.

10 JUDGE SMITH: Okay.

11 CHIEF JUDGE LIPPMAN: Okay.

12 MR. GRIECO: Thank you.

13 CHIEF JUDGE LIPPMAN: Thank you, counselor.

14 Counselor, would you like rebuttal time?

15 MR. SULLIVAN: Yes, I would, Your Honor.

16 If I might have three minutes?

17 THE COURT: Three minutes. Sure.

18 MR. SULLIVAN: My name is Peter Sullivan,  
19 and I'm with the firm of Berkman, Henoch, Peterson,  
20 Peddy & Fenchel, in Garden City, for the Town of  
21 Hempstead. With me at counsel table is Todd  
22 Steckler, my partner.

23 I'm pleased, I suppose, that the great  
24 thunder of my appeal has been stated already by Mr.  
25 Grieco on behalf of the State. The issue, I think,

1 comes down to the effect of the State's position in  
2 American Broadcasting v. Siebert and whether this is  
3 a legitimate zoning issue in the first place - - -  
4 whether this is a proper - - -

5 CHIEF JUDGE LIPPMAN: What's the town  
6 trying to accomplish here?

7 MR. SULLIVAN: What the town is trying to  
8 accomplish.

9 CHIEF JUDGE LIPPMAN: What is - - - what  
10 are they trying to accomplish?

11 MR. SULLIVAN: I think - - - I've not  
12 spoken to each individual town councilman. No, I  
13 don't think it would be - - -

14 CHIEF JUDGE LIPPMAN: Then what's the  
15 thrust of what you're trying to - - -

16 MR. SULLIVAN: - - - but I don't think - -  
17 -

18 CHIEF JUDGE LIPPMAN: - - - accomplish?

19 MR. SULLIVAN: - - - I think what - - -

20 CHIEF JUDGE LIPPMAN: You think check  
21 cashing is bad, right?

22 MR. SULLIVAN: I don't know that I think  
23 that, nor do I think that the members of - - -

24 CHIEF JUDGE LIPPMAN: Or sleazy, or we  
25 don't want it in the better areas of town. Is that

1 what's happening?

2 MR. SULLIVAN: I think what the town  
3 council would be presumed to understand is what the  
4 State had said - - - what the banking department had  
5 said in American Broadcasting v. Siebert - - -

6 JUDGE SMITH: The opinion of the town's  
7 council, given shortly before the passing of the  
8 ordinance, is completely irrelevant?

9 MR. SULLIVAN: I think so. Yes. And it's  
10 interesting. A similar issue came up in - - -

11 JUDGE SMITH: You don't - - - you don't  
12 defend that, then, as a possible rationale for the  
13 zoning?

14 MR. SULLIVAN: I don't. I haven't given a  
15 great deal of thought to it. A similar issue came up  
16 in the Adult Use Ordinance cases, where a member of  
17 the city council had actually spoken out in a way  
18 that made it look like the Adult Use Ordinance would  
19 be a violation of the First Amendment. And as this  
20 court properly said, the issue is not the individual  
21 thoughts of members of the legislative body. Indeed,  
22 it's not the thoughts of the - - -

23 CHIEF JUDGE LIPPMAN: So what is it?  
24 What's the thought here?

25 MR. SULLIVAN: I think the thought would

1 have to be American Broadcasting, where the State  
2 Banking Department has said that the adverse impact  
3 of check-cashing is significant. And if I can  
4 conjure or - - -

5 JUDGE GRAFFEO: Do we - - - do we have to  
6 decide that issue?

7 MR. SULLIVAN: No, you don't.

8 JUDGE GRAFFEO: I thought the Appellate  
9 Division here found the statute was preempted. If we  
10 agree with your position that it's not preempted,  
11 right - - -

12 MR. SULLIVAN: I think that's true.

13 JUDGE GRAFFEO: - - - then don't we send it  
14 back to the Appellate - - - don't we send it back to  
15 the lower court?

16 MR. SULLIVAN: I'm going to leave that to  
17 the court. As I understand the research, you have  
18 the power to address it, should you wish. However,  
19 there's no record in the Appellate Division as to how  
20 they addressed - - -

21 JUDGE GRAFFEO: We could - - -

22 MR. SULLIVAN: - - - those particular  
23 issues.

24 JUDGE GRAFFEO: - - - just determine the  
25 preemption issue and then let it go for a hearing to

1           decide the other claims.

2                   MR. SULLIVAN: It was all fully briefed in  
3           the Appellate Division, all of the issues: the equal  
4           protection, the - - -

5                   JUDGE GRAFFEO: Right. But they didn't  
6           address the other issues, because they found  
7           preemption.

8                   MR. SULLIVAN: They found a preemption.  
9           Arguing, I think, fundamentally incorrectly, that  
10          there was a head-on collision between the banking  
11          department, as its rules and regulations are now set  
12          - - -

13                   CHIEF JUDGE LIPPMAN: But if it's not  
14          preempted, we could easily just send it back to them  
15          and say now deal with it, right?

16                   MR. SULLIVAN: Deal with - - -

17                   JUDGE GRAFFEO: Let them do - - -

18                   MR. SULLIVAN: - - - the issues - - -

19                   JUDGE GRAFFEO: - - - their fact finding.

20                   MR. SULLIVAN: - - - of equal protection -  
21          - -

22                   CHIEF JUDGE LIPPMAN: Yes.

23                   MR. SULLIVAN: - - - substantive due  
24          process, whether there's a taking. I think counsel  
25          will probably speak to those issues here. I think

1           it's improperly stated at this point, because that  
2           wasn't what the Appellate Division had decided.

3                   JUDGE SMITH:   So in - - - well, I'm a  
4           little confused about where the line is, though.  If  
5           there's - - - if your ordinance says all check-  
6           cashing - - - let me - - - let me start my question  
7           again.

8                   The question that you suggest, or that  
9           maybe we should send back to the Appellate Division,  
10          is a question of whether if the State had no  
11          regulation in place on the subject at all, would this  
12          be valid.  Is that what you're saying?

13                   MR. SULLIVAN:  The State issues its license  
14          subject to valid zoning.

15                   JUDGE SMITH:  Okay.  Try my question.

16                   MR. SULLIVAN:  Yes.

17                   JUDGE SMITH:  If the - - - I can understand  
18          that if they - - - that the hypoth - - - that if you  
19          assume that the State's laws and regulations on the  
20          point are irrelevant, then you have a separate  
21          question as to whether this is a valid zoning  
22          regulation, and that that question is one that the  
23          Appellate Division did not address.  Okay so far?

24                   MR. SULLIVAN:  That's right.  They did not  
25          address it.

1                   JUDGE SMITH: But the question of the  
2 relationship between this zoning and the state  
3 legislation and regulations is before us?

4                   MR. SULLIVAN: Yes, it is. So to some  
5 extent - - -

6                   JUDGE SMITH: Okay. So that if - - - I  
7 mean, because it seems to me there's got - - - we do  
8 have a state that has said - - - that has passed a  
9 law saying we approve of check-cashing  
10 establishments. If you passed a law that is designed  
11 to ban check-cashing establishments, I guess I just  
12 don't see how there's not some little tension between  
13 the two.

14                   MR. SULLIVAN: There certainly is a  
15 tension. And as this court has said in all of its  
16 preemption cases, the fact that the two matters touch  
17 or overlap does not indicate that there's preemption.  
18 The - - -

19                   JUDGE SMITH: Well, it's more than overlap.  
20 Doesn't one say this is good and the other say this  
21 is bad?

22                   MR. SULLIVAN: No. Because - - - I think  
23 that's the fundamental problem with what the  
24 Appellate Division said. It's reversed. The State  
25 doesn't say - - - under the present statute and



1 regulations, they don't say there is a need for  
2 check-cashing, and we will find a licensee to fill  
3 that need. That's not what it says. I think what  
4 Mr. Grieco - - -

5 JUDGE SMITH: It does say check-cashers  
6 perform a valuable service?

7 MR. SULLIVAN: Yes, it does.

8 JUDGE SMITH: But could every community in  
9 the state out-and-out prohibit check-cashing?

10 MR. SULLIVAN: No, I don't believe so. But  
11 that - - -

12 JUDGE SMITH: How come - - - could yours?

13 MR. SULLIVAN: I don't believe so, no.

14 JUDGE SMITH: So your - - - so the validity  
15 of your ordinance depends on the fact that you allow  
16 it in light manufacturing and whatever other zone it  
17 is?

18 MR. SULLIVAN: Yes. I haven't - - -

19 JUDGE SMITH: And industrial?

20 MR. SULLIVAN: - - - thought all the way  
21 through whether there are other issues and  
22 exclusionary rules and equal protection, all that  
23 sort of thing, because that's not the facts before  
24 us. This isn't a - - -

25 JUDGE SMITH: Well, I mean, does - - - do

1 we have any - - - is there anything in the record  
2 that indicates whether this is - - - whether  
3 authorizing it in the light manufacturing zone and  
4 the industrial zone is even meaningful?

5 MR. SULLIVAN: No, there - - -

6 JUDGE SMITH: I mean, most people don't  
7 want to run retail businesses in an industrial zone.

8 MR. SULLIVAN: The record is just silent.  
9 There was no maps put in.

10 JUDGE SMITH: Okay, but I mean - - -

11 MR. SULLIVAN: There was no - - -

12 JUDGE SMITH: - - - then why don't we have  
13 to view this as though it were an out-and-out  
14 prohibition?

15 MR. SULLIVAN: Because it isn't. It simply  
16 is a - - -

17 JUDGE SMITH: I mean, the - - - certainly,  
18 council's memo seems to say this is a bad - - - and  
19 even your argument, you say these things are crime  
20 prone. Well, if they're crime prone - - - if they're  
21 magnets for crime, maybe you shouldn't be having them  
22 even next to your factories.

23 MR. SULLIVAN: Yes, but that's not a point  
24 before us, and it wasn't presented by - - -

25 JUDGE PIGOTT: Well, but your town attorney

1           said young people and those of lower incomes are - -  
2           - is what this is aimed at. And it just seems so  
3           incongruous to governmental function. I mean it - -  
4           - let's assume - - - let's make something up and say  
5           that's where the buses run is downtown. And if all  
6           of a sudden you're going to say that the check-  
7           cashers have to be out where there's no buses, it's  
8           going to be hard to get to the check-cashing place.

9                         MR. SULLIVAN: I - - -

10                        JUDGE PIGOTT: So aren't questions like  
11           that going to have to be addressed somewhere,  
12           somehow?

13                        MR. SULLIVAN: I don't think so. This  
14           court has set the rule that when testing a  
15           legislative enactment, one looks to whether there's  
16           any conceivable, rational basis for the - - -

17                        JUDGE READ: So what is the conceivable  
18           rational basis here?

19                        MR. SULLIVAN: American Broadcasting alone  
20           - - -

21                        JUDGE PIGOTT: Well, explain what that  
22           means.

23                        MR. SULLIVAN: - - - would give me a  
24           rational basis.

25                        JUDGE PIGOTT: That's about the - - - tell

1 me what you say American Broadcasting says that  
2 applies to this case.

3 MR. SULLIVAN: The then-superintendent of  
4 banking indicated in refusing to turn over the names  
5 of the licensees, that check-cashing - - - that she  
6 couldn't and wouldn't turn over those names, for the  
7 fear that the crimes sponsored by the secondary  
8 adverse - - - primary adverse impacts of check-  
9 cashing would follow people home to their residential  
10 districts.

11 JUDGE READ: Yes, well - - -

12 MR. SULLIVAN: I don't know if that's - - -  
13 I don't even know if - - -

14 JUDGE READ: - - - they seem to - - - they  
15 seem to have had a change of mind, though, since  
16 then, at the - - -

17 MR. SULLIVAN: I don't - - -

18 JUDGE READ: - - - Department of Financial  
19 Services, because they say it's a necessary function.

20 MR. SULLIVAN: I don't think so. As a  
21 matter of fact, Mr. Grieco cites in his brief,  
22 American Broadcasting, for the very proposition that  
23 the State leaves it up to the local municipality to  
24 zone those matters for - - -

25 JUDGE PIGOTT: That makes sense to me. But

1 I just don't get where you say we don't want poor  
2 people hanging around doing this. We want to  
3 encourage them to get savings accounts. And those  
4 lower income and young people, you know, we've got to  
5 somehow straighten them out. I don't know where that  
6 fits into land use.

7 MR. SULLIVAN: It does not. And I can't  
8 speak to that. And as I've said in my brief, I don't  
9 think the town board is bound by the statements of a  
10 mere staffer. As - - -

11 JUDGE PIGOTT: But we don't know the basis  
12 then upon which it made its determination, is the  
13 point.

14 MR. SULLIVAN: Yes. But as this court has  
15 said, if we can even conjure a rational basis for it,  
16 the court's power to inquire is over, and the statute  
17 - - -

18 JUDGE READ: And the - - -

19 MR. SULLIVAN: - - - is upheld. And I  
20 simply look at American Broadcasting as bringing - -  
21 -

22 JUDGE READ: - - - that's the - - -

23 MR. SULLIVAN: - - - it clearly.

24 JUDGE READ: - - - that's the rational  
25 basis you've conjured?

1                   MR. SULLIVAN: American Broadcasting, where  
2                   the State Banking Department, the department that  
3                   issues these licenses, is saying these places foster  
4                   a certain amount of crime, and therefore that's a  
5                   problem - - -

6                   CHIEF JUDGE LIPPMAN: Okay, counselor.  
7                   You'll have your rebuttal. Let's hear from your  
8                   adversary.

9                   MR. SULLIVAN: Thank you.

10                  MR. STARK: Your Honor, it's Jeffrey Stark  
11                  for the plaintiffs.

12                  CHIEF JUDGE LIPPMAN: Counsel, why don't  
13                  they have a right in the - - - just public welfare,  
14                  to do a zoning ordinance that says where you can do  
15                  it and where you can't?

16                  MR. STARK: Only because - - -

17                  CHIEF JUDGE LIPPMAN: Why can't there be a  
18                  rational basis for that?

19                  MR. STARK: Only because the state  
20                  legislature had said that the public policy is in  
21                  favor of check-cashers. That's the only reason they  
22                  can't do that.

23                  JUDGE READ: Well, they didn't - - - the  
24                  state legislature didn't say anything about what - -  
25                  - where or a location or a zone - - - zoning.

1                   MR. STARK: Oh, yes, they did. They said  
2 the superintendent of banks is going to have to  
3 determine the precise site for any check-cashing  
4 facility in the State of New York, and is going to  
5 have to find that there's a community need at that  
6 site for - - -

7                   JUDGE PIGOTT: Are you disagreeing, then -  
8 - -

9                   MR. STARK: - - - the facility.

10                  JUDGE PIGOTT: - - - with DFS's position on  
11 what they say they're supposed to be doing?

12                  JUDGE READ: Or do you think they've  
13 changed it?

14                  MR. STARK: I think they've changed it  
15 during this argument. When counsel says oh, well, if  
16 they banned all check-cashing facilities, maybe the  
17 superintendent would have a problem, there's the  
18 preemption. In fact, they did ban all check-cashing.  
19 Because, as Judge Smith's question brought out from  
20 counsel, what is the only stated ground in this  
21 record for passing this ordinance? It's because the  
22 town board hates check-cashing facilities. And the  
23 words that the policy memo uses is, we're going to  
24 relegate them to light industrial and - - -

25                  CHIEF JUDGE LIPPMAN: But why isn't that -

1 - -

2 MR. STARK: - - - manufacturing.

3 CHIEF JUDGE LIPPMAN: - - - why isn't that  
4 a prerogative of the town to say they can be here but  
5 not there? And why couldn't there, again, be a  
6 rational basis for doing that in terms of their  
7 general right to oversee the welfare of their  
8 citizens?

9 MR. STARK: Judge, we haven't talked - - -  
10 spoken about rationality in our briefs. In one  
11 sentence, rationality is not our issue. It's  
12 preemption. And the - - -

13 CHIEF JUDGE LIPPMAN: What is - - - what is  
14 in conflict between the two? Why is it an overlap -  
15 - -

16 MR. STARK: Listen - - -

17 CHIEF JUDGE LIPPMAN: - - - rather than in  
18 conflict?

19 MR. STARK: Well, the author of the policy  
20 memo may have been right that check-cashing  
21 facilities are bad for black people; they're bad for  
22 poor people; they're bad for young people. He may  
23 have been right. But the state legislature said,  
24 they're good for people: for black people, for  
25 minorities, for young people. And - - -





1 hearing or a trial here where this factual record was  
2 developed?

3 MR. STARK: Well, there were affidavits - -  
4 -

5 JUDGE GRAFFEO: So if we find that the  
6 state statute does not preempt local zoning, couldn't  
7 this go back for a hearing, and then you could make  
8 all the arguments you want - - -

9 MR. STARK: Well - - -

10 JUDGE GRAFFEO: - - - attacking the local  
11 zoning ordinance?

12 MR. STARK: First of all, Your Honor, the  
13 whole issue of whether this is a proper use of zoning  
14 is a legal issue. And if you disagreed on the  
15 preemption issue, I think this court has the power to  
16 address those legal issues. They're fully briefed in  
17 our briefs. They were briefed in the Appellate  
18 Division.

19 JUDGE GRAFFEO: Well, that's - - -

20 MR. STARK: In fact the Appellate - - -

21 JUDGE GRAFFEO: - - - why I asked you if  
22 the facts were developed here.

23 MR. STARK: I don't think that - - -

24 JUDGE GRAFFEO: I mean, we don't - - - I  
25 don't think the record tells us how far from the

1 existing check-cashing establishments a light  
2 industrial - - - I don't even know how many of the  
3 twenty-five businesses are still in business.

4 MR. STARK: No, but, Your Honor, what you  
5 do know is that the superintendent of banks, who was  
6 delegated the responsibility for determining where  
7 there's a community need, has not found a need in the  
8 industrial or light manufacturing districts. Not a  
9 single - - -

10 JUDGE GRAFFEO: Well, but that's - - - but  
11 it's not unusual for the State to say something's a  
12 benefit, but then the local governments decide where.  
13 I mean, we do it with community residences, don't we?

14 MR. STARK: That often happens - - -

15 JUDGE GRAFFEO: I mean, they say hospitals,  
16 medical care is important to residents of the state.  
17 But you can't put a - - - you can't build a hospital  
18 wherever you want to build a hospital.

19 MR. STARK: No, but in this case, the  
20 statute requires the superintendent, not the local  
21 zoning board, the superintendent to decide where to  
22 site these facilities, just like that ConEd case.

23 JUDGE SMITH: Let me - - - I'm going to try  
24 to rephrase Judge Graffeo's question - - -

25 MR. STARK: Sure.

1 JUDGE SMITH: - - - in procedural terms.  
2 As I understand it, this was a - - - this came on  
3 cross motions for summary judgment. They granted  
4 your adversary's motion, denied yours, below.

5 MR. STARK: Correct.

6 JUDGE SMITH: Or the other way around - - -  
7 or, yes. And there's - - - the Supreme Court ruled  
8 in your adversary's favor; the Appellate Division  
9 reversed and granted your motion for summary  
10 judgment.

11 MR. STARK: That's correct.

12 JUDGE SMITH: Is it a possible result to  
13 deny both motions?

14 MR. STARK: I don't think so. I don't  
15 think anybody claims - - -

16 JUDGE SMITH: And if it was - - -

17 MR. STARK: - - - there's any facts in  
18 dispute.

19 JUDGE SMITH: - - - I mean, shouldn't - - -  
20 have they had an opportunity to prove, or should they  
21 have an opportunity to prove that light manufacturing  
22 and industrial zones are just the perfect place for  
23 check-cashing purposes?

24 MR. STARK: No.

25 JUDGE SMITH: The community will thrive

1 with - - - I mean, it sounds odd to me, too. But  
2 don't they have a chance to prove that?

3 MR. STARK: The reason they don't, Your  
4 Honor, is that the legislature didn't say a judge  
5 should decide where's the proper site for a location.  
6 They didn't decide the local zoning board will  
7 decide. They said the superintendent of banks will  
8 decide.

9 And by the way, the superintendent of banks  
10 doesn't have the power to decide where a bank could  
11 put a facility - - -

12 JUDGE SMITH: He says - - - he says he's  
13 deciding only a financial question, and that - - - I  
14 guess he's saying, the land use questions are for - -  
15 - are for the town. Suppose you credit their  
16 rationale, that these things are magnets for robbery,  
17 and we've got to get them out of populous areas.  
18 Would the superintendent's power preempt that?

19 MR. STARK: Yes, it would.

20 JUDGE SMITH: Why?

21 MR. STARK: And let me just say, the case  
22 that they cite, ABC against Siebert, in that case,  
23 which was decided twenty-five years before this  
24 ordinance was passed, and was not cited in this  
25 extensive policy memo, it was counsel who, when we

1 sued them, did their research and said, ah, here's a  
2 case - - -

3 JUDGE SMITH: Well, their - - -

4 MR. STARK: - - - twenty-five years ago,  
5 and - - -

6 JUDGE SMITH: - - - their theory is, even  
7 if it's pretextual - - - and I understand the  
8 argument that it's pretextual - - - that we have to  
9 honor even a pretextual rationale. Is that right?

10 MR. STARK: But what was that case? That  
11 case was ABC wanted the home address of the owners of  
12 check-cashing facilities, and trial term in New York  
13 denied a FOIL request for that based upon submissions  
14 by the superintendent and the Association of Check  
15 Cashers, showing - - -

16 JUDGE SMITH: I don't think anyone  
17 questions - - - the case was - - -

18 MR. STARK: - - - that people were getting  
19 robbed in - - -

20 JUDGE SMITH: - - - the case was  
21 distinguishable - - -

22 MR. STARK: - - - their homes.

23 JUDGE SMITH: The case is distinguishable -  
24 - -

25 MR. STARK: In their homes, Your Honor.

1                   JUDGE SMITH:  Isn't it the - - - but isn't  
2                   it - - - he says look, it says here that these things  
3                   are very robbery prone.  We don't want - - - and it's  
4                   for our - - - it's part of our function to decide  
5                   that we're going to keep the robbery-prone businesses  
6                   in manufacturing and light industrial districts.

7                   MR. STARK:  That wasn't the Siebert case.

8                   JUDGE SMITH:  Why is that not a possibly  
9                   rational legislative decision?

10                  MR. STARK:  Your Honor, the issue here  
11                  isn't rationality, it's preemption.  It's preemption.  
12                  It's not whether - - -

13                  JUDGE SMITH:  So if you - - - you're really  
14                  not making - - - I mean, you said it before.  I just  
15                  want to make sure you're - - - you're abandoning  
16                  every argument except preemption?

17                  MR. STARK:  No.  Absolutely not.  We think  
18                  the strongest argument is that this is not a proper  
19                  subject of zoning, that it's a violation of Town Law  
20                  262.  But - - -

21                  JUDGE SMITH:  That has nothing to do with  
22                  rationality?

23                  MR. STARK:  No, that has to do with  
24                  discrimination.  How can you allow - - -

25                  JUDGE SMITH:  An equal protection - - -

1 MR. STARK: - - - banks - - -

2 JUDGE SMITH: - - - an equal protection  
3 argument?

4 MR. STARK: - - - financial services,  
5 restaurants, bodegas - - -

6 JUDGE PIGOTT: Sounds irrational.

7 MR. STARK: - - - all operate in the  
8 business district, and say the only one who can't is  
9 a fina - - - is a check casher.

10 JUDGE PIGOTT: You - - - maybe we're  
11 fencing over the wrong thing. You said that finan -  
12 - - rationale does not appear in your brief. That's  
13 true. But if we agree with you that there is no  
14 preemption - - - or excuse me, you want to say there  
15 is preemption - - -

16 MR. STARK: Of course.

17 JUDGE PIGOTT: - - - then still, isn't  
18 there the - - - isn't there the issue of whether or  
19 not you can be where you want to be? Because DFS  
20 says, all we do is make them check a box to make sure  
21 that they're in compliance with.

22 MR. STARK: We have substantial arguments  
23 that this was not a proper use of zoning. You can't  
24 zone the operations of a business. You can zone the  
25 use of real estate. Here the town allows real estate



1 in the business district - - -

2 JUDGE PIGOTT: You may be right. But - - -

3 MR. STARK: - - - to be operated for all  
4 these other uses - - -

5 JUDGE PIGOTT: - - - it may be - - -

6 MR. STARK: - - - and says the only one you  
7 can't is check cashing.

8 JUDGE PIGOTT: Right. It may be that you  
9 could make the argument that if they're going to do  
10 that, then they ought to zone banks over there, too,  
11 and churches. Move everybody that collects money  
12 over to light industrial. And that would be, you  
13 know, an interesting argument.

14 But I thought DFS is only saying we just  
15 make sure that they're in compliance with the zoning.  
16 If the zoning changes, as it did here, that doesn't  
17 change their determination. And now you have to  
18 litigate that issue, whether they can change it out  
19 from under your client.

20 MR. STARK: Your Honor, we have a whole  
21 third point on Town Law 262 which says that  
22 properties within the same district have to be  
23 similarly zoned. And only check-cashing facilities,  
24 of all the businesses and residences that are  
25 permitted by the Town of Hempstead in the business

1 district, only cash-checking facilities - - -

2 JUDGE SMITH: That is a rationality  
3 argument, isn't it really?

4 MR. STARK: No.

5 JUDGE SMITH: You're saying it's an  
6 irrational discrimination?

7 MR. STARK: It - - - the distinct - - -  
8 yes. The distinction is not rational. The  
9 distinction is not rational.

10 JUDGE SMITH: Um hum. Okay. But you have  
11 that - - - you have your preemption argument. You  
12 have that argument. You also have an argument which  
13 has some appeal to me that you say it is not the  
14 function of zoning to regulate - - - to protect young  
15 and minority people against predatory check-cashers.

16 MR. STARK: That is correct.

17 JUDGE SMITH: That makes sense. What says  
18 that? What is the - - - is there some case or some  
19 statute or something that says you can't make zoning  
20 decisions for reasons like that?

21 MR. STARK: Well, there are a bunch of  
22 cases - - - for example, this court had the Burger  
23 King case, where the zoning ordinance prohibited - -  
24 - permitted restaurants except for self-service  
25 restaurants, because they wanted to get rid of a

1 Burger King. And this court said sorry, that's not  
2 the purpose of zoning, to rule out Burger Kings.

3 JUDGE SMITH: Did we mention whether that's  
4 the constitution or a statute or something like that  
5 that said that - - -

6 MR. STARK: No - - -

7 JUDGE SMITH: - - - or just came right out  
8 of - - - we just made it up.

9 MR. STARK: It's - - - no. It's - - - well  
10 first of all, Town Law 262, which I keep citing, says  
11 that "Zoning regulations shall be uniform for each  
12 class or kind of buildings throughout such district."  
13 And in this court, in the Augenblick case, you said  
14 "The uniformity requirement is intended to ensure  
15 property owners that all owners in the same district  
16 will be treated alike and there will be no improper  
17 discrimination."

18 And you went on to say, "An ordinance will  
19 be held to uniformity, if the record does not  
20 disclose" - - -

21 JUDGE SMITH: I'm trying to address a  
22 different - - -

23 MR. STARK: Yes.

24 JUDGE SMITH: - - - question, though.  
25 Let's suppose - - - suppose that check cash - - -

1           suppose there's no state legislation on the point.

2                   MR. STARK: Right.

3                   JUDGE SMITH: And suppose a rational  
4 legislature could find that check cashing is an evil,  
5 predatory industry that exploits the poor.

6                   MR. STARK: Yes.

7                   JUDGE SMITH: Can - - - and suppose it  
8 would be undoubtedly true that exercise of the police  
9 power to prohibit check cashing would be valid.  
10 Could a zoning regulation to prohibit it still be  
11 invalid? And if so, why?

12                   MR. STARK: The answer is you can't do it  
13 with zoning.

14                   JUDGE SMITH: Why not?

15                   MR. STARK: Because zoning can - - - all  
16 the commentators - - - and you cited them in the  
17 Augenblick case, for example - - - say that the  
18 purpose of zoning, as distinct from other police  
19 power activities, which might be the subject of other  
20 bodies doing the enactment, zoning ordinance has to  
21 relate to the physical use of land, not the  
22 operations of a business on that land. That's what  
23 zoning does.

24                   Other parts of government can - - - in  
25 using the police power, can address other issues.

1 But the zoning boards and the boards that pass zoning  
2 ordinances, have to consider the physical use of the  
3 land. And this ordinance does not.

4 JUDGE SMITH: And Burger King and  
5 Augenblick are your best cases for that?

6 MR. STARK: Yes. If the court has no other  
7 questions - - -

8 CHIEF JUDGE LIPPMAN: Okay, counselor.

9 MR. STARK: - - - we'll rest.

10 CHIEF JUDGE LIPPMAN: Thank you, counselor.  
11 Counselor, rebuttal?

12 MR. SULLIVAN: Yes. Your Honor, the cases  
13 are St. Onge v. Donovan, NY2d 507; Driesbaugh v.  
14 Gagnon, 71 NY2d 507.

15 JUDGE SMITH: What was the second one?

16 MR. SULLIVAN: Driesbaugh v. Gagnon,  
17 G-A-G-N-O-N, 71 NY2d 507. This court has held that  
18 there's a dichotomy. Zoning, as a principle matter,  
19 under the Home Rule Law, towns can only zone land and  
20 not business detail.

21 JUDGE SMITH: You seem to agree with your  
22 adversary. And I must say, it seems right to me - -  
23 -

24 MR. SULLIVAN: It does seem right, because  
25 - - -

1                   JUDGE SMITH: - - - that you can't zone for  
2 social policy reasons.

3                   MR. SULLIVAN: And that's the problem I  
4 have with the staffer's memo, and why the town's not  
5 bound by that staffer's memo, as well-intentioned - -  
6 -

7                   JUDGE PIGOTT: But they do have to have a  
8 rational basis.

9                   MR. SULLIVAN: Yes, it's simply a - - -

10                  JUDGE SMITH: Shouldn't it cause us concern  
11 that this staffer's memo that you're - - - that you  
12 don't even want to touch - - -

13                  MR. SULLIVAN: I don't, no.

14                  JUDGE SMITH: - - - comes a month - - - is  
15 the only legislative history we have. It's by the  
16 town council, and it's written a month before the  
17 statute - - - the zoning regulation is enacted.

18                  MR. SULLIVAN: Yes.

19                  JUDGE SMITH: Is it really totally  
20 irrelevant to what you're trying to do here?

21                  MR. SULLIVAN: I wish it doesn't exist, but  
22 it does exist. But as this court has said - - -  
23 again, in Stringfellow's - - - Stringfellow's is  
24 almost exactly the same thing where there was a memo  
25 by one of the city councilmen saying we want to get

1           rid of these people because of their First Amendment  
2           rights. And you - - - this court correctly said, it  
3           is irrelevant.

4                       This case reeks of the rationality test. I  
5           don't know that you could separate all of these  
6           arguments.

7                       JUDGE PIGOTT: Right. But you can't - - -  
8           I mean - - -

9                       MR. SULLIVAN: You can't.

10                      JUDGE PIGOTT: - - - it's hard to find a  
11           rational basis for what they did.

12                      MR. SULLIVAN: Pardon me?

13                      JUDGE PIGOTT: It's hard to find a rational  
14           basis for what they did.

15                      MR. SULLIVAN: Unless you read American  
16           Broadcasting, of course.

17                      JUDGE PIGOTT: Well, let's - - - can we put  
18           that case aside. I find - - -

19                      MR. SULLIVAN: I'm afraid you can't.

20                      JUDGE PIGOTT: - - - it so - - -

21                      MR. SULLIVAN: I'm afraid you can't, Judge.

22                      JUDGE PIGOTT: - - - I find it so  
23           inapposite that it's - - - well, I won't call it  
24           silly. But the fact of the matter is that you can't  
25           say we want all the banks in the industrial section,

1 or we want - - - we think that people who drink are  
2 trouble, so we're zoning bars out. There will be no  
3 bars in our town, period. You can't do that.

4 MR. SULLIVAN: No, that would be violating  
5 - - -

6 JUDGE PIGOTT: Now, you might be able to  
7 say, in Burger King, that while we can't zone out the  
8 restaurant, we can zone out the drive-thru, because  
9 we don't like the way it ties up traffic, and then  
10 you'd have a rational basis for getting rid of that  
11 hamburger stand. But you've got to have a rational  
12 basis, don't you?

13 MR. SULLIVAN: Every time I answer, you  
14 take away the rational basis, the admission by the  
15 banking department - - - and of course we're going  
16 around in circles.

17 JUDGE PIGOTT: Yes.

18 MR. SULLIVAN: It exists. The State - - -  
19 the State has actually cited to the case as the  
20 proper grounds for which the town can rationally zone  
21 and assume that that was the basis that they  
22 followed. And American Broadcasting; I think that's  
23 true.

24 Back to Your Honor's point. I don't - - -  
25 I can see - - -



1                   JUDGE GRAFFEO:  There isn't anything in the  
2                   record that even tells us that the town was aware of  
3                   American Broadcasting.

4                   MR. SULLIVAN:  No.  And as decisions of  
5                   this case indicate, it's irrelevant.  One looks - - -  
6                   one looks to whether - - - in testing the rationale -  
7                   - - in testing the legitimacy of a statute, one  
8                   simply looks to see if one could even conjure a  
9                   rational basis for it.

10                  JUDGE SMITH:  I mean, we have - - - we have  
11                  said that.  But you just used the word "statute".  Is  
12                  there anything that says that as applied to zoning?  
13                  I mean, I understand you're going to say it's  
14                  legislation and all legislation's alike.  But if we  
15                  ever - - - has a court ever applied that very strong  
16                  - - - any imaginable rational basis - - -

17                  MR. SULLIVAN:  Yes.

18                  JUDGE SMITH:  - - - even if it was a  
19                  pretext, to zoning?

20                  MR. SULLIVAN:  Absolutely.  I don't have  
21                  the case - - - it's the Exxon case, Town of  
22                  Hempstead.  Early on, when self-service gas stations  
23                  first came on, remember?  And all of the gas stations  
24                  got together and they brought in all of these  
25                  experts.  It was overwhelming that there was no

1 danger posed by self-service. And one little man,  
2 with a 7-Eleven, and the gas station came and he  
3 says, I've got this witness who says maybe if you  
4 spark and it could be dangerous.

5 And I think the trial court in the  
6 Appellate Division said there's no basis for the  
7 statute. And this court said, no. Exactly. If any  
8 reason can be conjured for this, we don't have any  
9 authority to overrule the local zoning law. And I  
10 don't need to apologize. That's the law of this  
11 state. This is the law established by this court.  
12 And if there's a rational basis - - -

13 CHIEF JUDGE LIPPMAN: Okay, counselor.

14 MR. SULLIVAN: - - - the law stands.

15 CHIEF JUDGE LIPPMAN: Okay, counselor. You  
16 have to finish. You have something more?

17 MR. SULLIVAN: No, I just wanted to clean  
18 up on that St. Onge, because I didn't mean to concede  
19 the point.

20 CHIEF JUDGE LIPPMAN: One minute. Go  
21 ahead.

22 MR. SULLIVAN: Because in St. Onge, the  
23 court went on - - - this court went on to say you  
24 can't regulate details of a business, but if the  
25 details of the business have an adverse impact on

1 neighboring properties, you can, says this court.

2 I can't tell you how many dogs you need in  
3 the kennel. But I can zone your kennel, if the  
4 barking dogs affect adverse - - -

5 CHIEF JUDGE LIPPMAN: Okay, counselor. We  
6 understand the argument. Thank you, both.  
7 Appreciate it.

8 (Court is adjourned)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Sunrise Check Cashing and Payroll Services, Inc., et al. v. Town of Hempstead, No. 12 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Penina Wolicki*

Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 700 West 192nd Street  
Suite # 607  
New York, NY 10040

Date: January 14, 2013