No. 06-___

IN THE

Supreme Court of the United States

Detroit Entertainment, L.L.C.,
d/b/a MotorCity Casino, and
Marlene Brown,
Petitioners,

v.

Stella Romanski.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners are a private casino and one of its security guards. A jury found that the guard arrested respondent, a guest of the casino, without probable cause. It awarded her compensatory and punitive damages under 42 U.S.C. 1983. The Sixth Circuit held, as a matter of law, that petitioners' conduct constituted "state action" subjecting petitioners to liability under Section 1983. The court rested its decision on a provision of Michigan law authorizing a licensed private security guard with probable cause to arrest an individual on her employer's premises.

The Questions Presented are:

1. Has the Sixth Circuit fundamentally departed from this Court's state action jurisprudence, faithfully applied by other circuits, holding that private conduct that is contrary to state policy does not constitute "state action" for purposes of 42 U.S.C. 1983?

2. Did the Sixth Circuit err in holding, contrary to decisions of other circuits and the Michigan Supreme Court, that an arrest by a private party constitutes state action?

In the event the Court determines not to review the court of appeals' state action holding, the case presents a further question:

3. Should this case be held pending the disposition of No. 05-1256, *Philip Morris USA* v. *Williams*?

PARTIES TO THE PROCEEDINGS BELOW

All the parties to the proceedings below are identified in the caption.

RULE 29.6 STATEMENT

Petitioner Detroit Entertainment, L.L.C., is partially owned by Atwater Casino Group, L.L.C., which in turn is partially owned by Z.R.X., L.L.C., and IH Gaming, Inc., which in turn are partially owned by CCM Merger, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Detroit Entertainment L.L.C., d/b/a MotorCity Casino, and Marlene Brown respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a-38a) is reported at 428 F.3d 629. The opinion of the district court (Pet. App. 39a-62a) is reported at 265 F. Supp. 2d 835.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2005. The court denied a petition for rehearing and rehearing en banc on February 6, 2006. Pet. App. 63a-64a. Justice Stevens subsequently extended the time to file this petition to and including July 6, 2006. App. 05A961. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in the Appendix (at 65a-70a).

STATEMENT

The lower courts in this case held as a matter of law that a private security guard authorized by state law to make an arrest engaged in "state action" for purposes of 42 U.S.C. 1983 when she arrested respondent without probable cause. That holding followed from settled circuit precedent that finds state action notwithstanding that respondent's claim is that the guard acted *contrary* to state policy, which permits arrest only with probable cause. The court of appeals also upheld an award of $600,000 in punitive damages to respondent on compensatory damages of less than $300.

1. 42 U.S.C. 1983 provides a cause of action against any person "who, under color of any statute, ordinance,

regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution."

Section 1983 liability for violation of the Fourth Amendment attaches only to "state actors." *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 924 (1982) (explaining that the Bill of Rights is incorporated as applying to the states by the Fourteenth Amendment, which requires state action). This requirement "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Id.* at 936-37. Conduct attributable to the state for purposes of the Fourteenth Amendment also is "under color of state law" for purposes of Section 1983. *Id.* at 935.

Conduct is "fairly attributable to the State" only if it satisfies two criteria:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. * * * Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

Lugar, 457 U.S. at 937.

The content of the first element depends on the nature of the defendant. For governmental employees with the apparent authority to undertake the challenged act, the first element is satisfied even if the defendant violates state policy. *Monroe* v. *Pape*, 365 U.S. 167 (1961).

For private defendants such as petitioners, by contrast, this "abuse of authority" doctrine does not apply. *Lugar*, 457 U.S. at 940. Rather, the elements of the "two-part" test "diverge when the constitutional claim is directed against * * * a private party." *Id.* at 937. In such cases, the first prong of the test requires that the private conduct be

authorized by state law or policy. Mere "private misuse of a state statute does not describe conduct that can be attributed to the State." *Id.* at 941. Thus, in *Lugar*, the plaintiff's Section 1983 suit alleged that the private defendant had seized the plaintiff's property through a misuse of state attachment procedures. This Court held that the defendant's conduct was not "state action" because "the conduct of which petitioner complained could not be ascribed to any governmental decision. * * * That respondents invoked the statute without the grounds to do so could in no way be attributed to a state rule or a state decision." *Id.* at 940.

2. Respondent Stella Romanski brought this suit against petitioners Detroit Entertainment, L.L.C. (a private Detroit casino), Marlene Brown (a casino security guard), and two other security guards. The gravamen of her complaint is that she was wrongfully arrested and detained when she visited the casino on August 7, 2001.

On the date in question, respondent traveled with two friends to the casino to gamble and eat lunch. During a break from playing slot machines, respondent found a five-cent token at an unoccupied machine and brought the token back to the machine that she had been playing earlier. One uniformed male security guard approached her and asked that she accompany him to the office. Petitioner Marlene Brown and two other female security guards – none of whom were uniformed – also approached respondent. After respondent became belligerent, the guards escorted her to the casino security office, where they told her that patrons were prohibited from "slot walking," or taking tokens from machines they had not been playing. This policy had not been posted at the casino. Brown then removed a nickel from respondent's earnings. After guards photographed respondent and photocopied her driver's license and social security card, she was excluded from the casino for six months.

The casino permitted respondent to use the restroom before leaving, accompanied by a security guard who waited

outside the stall, but not to return to the casino floor or eat lunch at the casino's buffet. Instead, the casino directed her to an air-conditioned valet area to wait for her bus. Respondent left the valet area when she mistakenly believed her bus had arrived, and ran into her friends outside. She remained outside in hot and humid weather until her friends persuaded her to reenter the casino. Given her exclusion, casino employees directed her back to the valet area, where she waited with her friends until their bus arrived.

At no time during respondent's detention was she handcuffed, touched, physically threatened, or told she could not leave. While respondent testified that she provided identification and agreed to be photographed because she believed the guards to be police officers, Marlene Brown stated (in testimony that is presumed to be true in the procedural posture of the case) that she showed respondent her casino badge and identified herself as a "security police officer." (Michigan law uses the name "private security police officer" to refer to licensed private guards.) As the dissent below summarized, "[T]he security guards neither threatened nor actually invoked the authority of the state during the incident." See Pet. App. 37a (Farris, J., dissenting) (footnote omitted).

Respondent's initial complaint – removed by petitioners to federal district court – claimed that her detention violated state law and constituted false arrest and imprisonment. The premise of those torts is that the defendants were without legal authority to restrain the plaintiff. See Pet. App. 57a.

Respondent subsequently amended her complaint to allege as well that her unlawful arrest violated Section 1983. Respondent's amended complaint did *not* allege that petitioners' conduct was pursuant to a state policy. To the contrary, as noted, the essence of her "false arrest" claim is that petitioners' conduct was contrary to the requirement that arrests be conducted only upon probable cause. But the omission of such an allegation was consistent with settled

Sixth Circuit case law, under which a Section 1983 suit against a private party need *not* allege that the defendant's conduct was pursuant to a state policy. See, *e.g.*, *Ellison* v. *Garbarino*, 48 F.3d 192, 195 (1995); *Wolotsky* v. *Huhn*, 960 F.2d 1331, 1334-35 (1992); see also *Chapman* v. *The Higbee Co.*, 319 F.3d 825, 833 (2003) (en banc) (ratifying this approach six months after respondent amended her complaint and three months before the district court ruled on the state action question).

Respondent accordingly simply alleged that petitioners' actions were under color of state law because Michigan law confers the power of arrest on petitioner Brown. A properly licensed private security police officer on his employer's premises "has the authority to arrest a person without a warrant" in circumstances that an actual police officer would be permitted to make such an arrest. Mich. Comp. Laws 338.1080. There are limits on that power, however. "Such authority is limited to his or her hours of employment as a private security police officer and does not extend beyond the boundaries of the property of the employer and while the private security police officer is in the full uniform of the employer." *Ibid*. Casino security guards are moreover prohibited from carrying firearms or other weapons on casino premises. Michigan Gaming Control and Revenue Act (MGCRA) Rule 432.1212.

3. Petitioners sought to dismiss respondent's Section 1983 claim on the ground that the casino and its employees were not state actors. The district court disagreed, holding that petitioners were state actors as a matter of law because petitioner Brown initiated respondent's detention while on duty as a licensed guard with the same arrest authority as a police officer. Pet. App. 47a-53a. The district court relied upon Sixth Circuit precedent holding that the conduct of private party deemed to be a "state actor" constitutes state action, without regard to whether the challenged conduct was in fact pursuant to a state policy. See *id.* 48a (citing *Chapman*, 319 F.3d at 833).

On this basis, and over petitioners' objections, the judge instructed the jury to find that petitioners had acted under color of law during the incident. The court instructed, "'Acting under color of law in this case simply means acting in one's capacity as a licensed security officer with powers to make an arrest on the casino premises.'" Pet. App. 8a. The judge further instructed the jury that petitioners could be found liable for false arrest and violating respondent's Fourth Amendment rights only if petitioners lacked probable cause to detain respondent. *Id.* 20a.

The jury returned a verdict for respondent. It found that the casino had falsely arrested and falsely imprisoned respondent in violation of state law. In turn, it ruled for respondent on the ground that the casino had violated respondent's Fourth Amendment rights under color of state law. It awarded respondent compensatory damages of $279.05. Based solely upon the Section 1983 claim, the jury also awarded $875,000 in punitive damages against the casino and $500 in punitive damages against petitioner Brown.

4. Petitioners appealed the state action finding. Constrained by a line of settled precedent (including the *en banc* ruling in *Chapman*, *supra*), petitioners did not maintain that the district court's ruling was erroneous on the ground that their conduct was contrary to state policy. Rather, they made the only argument available to them under Sixth Circuit law: that they were not "state actors." The Sixth Circuit affirmed in a divided disposition.

The court of appeals first noted that this Court has expressly left open the question of when private security guards qualify as state actors on the theory that they are exercising powers traditionally reserved to the state, and that the issue has given rise to a "growing body of case law" in the lower courts. Pet. App. 10a (citing *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 163 (1978)).

The Sixth Circuit rested its decision on its settled circuit precedent holding that private conduct is fairly attributable to

the State, and is actionable under Section 1983, so long as the conduct satisfies any one of "three tests for determining the existence of state action in a particular case: (1) the public function test, (2) the state compulsion test, or (3) the symbiotic relationship or nexus test." Pet. App. 9a (internal quotation marks omitted) (citing *Chapman*, 319 F.3d 833). Applying the public function test in this case, the Sixth Circuit held that because "at all times relevant to this case," Brown had "the authority to make arrests at [her] discretion and for any offenses, she "was a state actor as a matter of law." *Id.* 13a (footnote omitted). The court afforded no weight to the facts that security guards possessed this arrest power only at limited times and places and that detention under the circumstances of this case was not solely a state prerogative at common law. The court explained that the relevant question was simply whether the casino guards possessed plenary arrest power at the time of respondent's detention. The court stated that it

> focused on the specific powers that Brown, in her capacity as an on-duty and licensed private security officer, had at her disposal. Because at least one of these powers, the plenary arrest power, is "traditionally the exclusive prerogative of the state," and because it is undisputed that Brown was in fact licensed under M.C.L. § 338.1079 and was in fact on duty at all times relevant to this case, the district court correctly held that Brown was a state actor as a matter of law.

Id. 17a (quoting *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)).

The Sixth Circuit also agreed that substantial punitive damages were warranted, but directed the district court to order a remittitur of $600,000 in punitive damages against Detroit Entertainment, L.L.C. (Respondent accepted the remittitur on remand.) The court described the 3135-to-1 ratio of punitive-to-compensatory damages below as

"unusually high," and noted that analogous cases elsewhere had found that seemingly more serious conduct could support only significantly smaller punitive awards. Pet. App. 25a, 28a (citing remittitur of $75,000 for malicious prosecution in *Lee* v. *Edwards*, 101 F.3d 805 (CA2 1996) and remittitur of $75,000 in *Disorbo* v. *Hoy*, 343 F.3d 172, 187 (CA2 2003), involving severe beating by police officer). It also held that petitioners did not have fair notice that a penalty as great as $875,000 could result from their conduct. Further, it noted that respondent did not suffer physical injury and there was no evidence the casino had engaged in similar detentions previously. Nevertheless, the court deemed $600,000 in punitive damages – 2150 times the amount of compensatory damages – appropriate because Detroit Entertainment is a wealthy business entity, respondent's injuries lacked ready monetary value, and the court deemed petitioners' treatment of respondent to be egregious and reprehensible. *Id.* 21a-34a.

5. Judge Farris dissented, reasoning that security guards' plenary arrest authority does not render them state actors. The dissent noted that respondent had "presented no evidence that the State of Michigan has traditionally and exclusively reserved the power to make warrantless arrests." Pet. App. 36a. To the contrary, citizens with arrest authority are not necessarily state actors when their authority is limited to particular times and places, and when the citizens at issue possess far narrower powers than police officers. Judge Farris found it noteworthy that the majority's state action holding conflicted with a decision of the Michigan Supreme Court, and that a contrary result also appeared warranted under Seventh Circuit jurisprudence. Pet. App. 34a n.7, 35a (Farris, J., dissenting) (citing *City of Grand Rapids* v. *Impens*, 327 N.W.2d 278 (Mich. 1982); *Wade* v. *Byles*, 83 F.3d 902, 904 (CA7 1996)).

After the Sixth Circuit denied rehearing and rehearing en banc, this petition followed.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's State Action Jurisprudence Is Fundamentally Inconsistent With This Court's Precedents.

The court of appeals rested its decision in this case on settled Sixth Circuit precedent holding that a private defendant engages in "state action" if any of the three tests for identifying a "state actor" is satisfied. The precedent writes out of existence the first element of the "state action" inquiry adopted by this Court. This Court's precedents dictate the conclusion that, because the very essence of respondent's suit is that the private petitioners in this case were acting in violation of state law when they arrested respondent without probable cause, petitioners' conduct was not pursuant to a state policy and does not constitute "state action."

1. Private conduct that causes the deprivation of a federal right constitutes actionable "state action" only if it is "fairly attributable to the State." See *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). As correctly described by one court of appeals, the "fair attribution test has two components: a state policy and a state actor." *Roudybush* v. *Zabel*, 813 F.2d 173, 176 (CA8 1987). The first component focuses on whether the challenged *conduct* was attributable to a state policy whereas the second component focuses on whether the *defendants* are fairly affiliated with the State.

Specifically, the "[f]irst" requirement is that "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937. "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be [i] because he is a state official, [ii] because he has acted together with or has obtained significant aid from state officials, or [iii] because his conduct is otherwise chargeable to the State." *Ibid*.

Lugar stressed that these two components, though related, are distinct in cases involving private defendants. The two "collapse into each other when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his decisions," but "[t]he two principles diverge when the constitutional claim is directed against a party without such apparent authority, *i.e.*, against a private party." 457 U.S. at 937.

In *Lugar*, one of the debtor-plaintiff's claims was that the creditor-defendants had attached his property in violation of the state's prejudgment attachment statute. See 457 U.S. at 940. This Court held that the claim did not satisfy the state policy component of the "fair attribution" inquiry:

> Count two alleged that the deprivation of property resulted from respondents' "malicious, wanton, willful, opressive [sic], [and] unlawful acts." By "unlawful," petitioner apparently meant "unlawful under state law." To say this, however, is to say that the conduct of which petitioner complained could not be ascribed to any governmental decision; rather, respondents were acting contrary to the relevant policy articulated by the State. Nor did they have the authority of state officials to put the weight of the State behind their private decision, *i.e.*, this case does not fall within the abuse of authority doctrine recognized in *Monroe* v. *Pape*, [365 U.S. 167 (1961)]. That respondents invoked the statute without the grounds to do so could in no way be attributed to a state rule or a state decision. Count two, therefore, does not state a cause of action under § 1983 but challenges only private action.

Lugar, 457 U.S. at 940 (last alteration added).

This Court has repeatedly reiterated the distinct components of the state action inquiry. See, *e.g.*, *Georgia* v. *McCollum*, 505 U.S. 42, 50-51 (1992); *Edmonson* v. *Leesville*

Concrete Co., 500 U.S. 614, 620 (1991). Thus, in *American Manufacturers Mutual Insurance Co.* v. *Sullivan*, 526 U.S. 40 (1999), this Court was confronted by an attempt to avoid the second component of the *Lugar* inquiry. This Court chastised the respondents for

> ignor[ing] our repeated insistence that state action requires *both* an alleged constitutional deprivation "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," *and* that "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar*[, 457 U.S. at 937.]

Sullivan, 526 U.S. at 50 (emphasis in original).

Other circuits faithfully apply the principle that the private misuse of a state statute does not create state action for purposes of Section 1983. See generally *Wyatt* v. *Cole*, 994 F.2d 1113, 1117-18 (CA5 1993) (collecting cases). Those courts regularly reject claims for failure to satisfy the first element of the state action inquiry. *Yanaki* v. *Biomed, Inc.*, 415 F.3d 1204, 1207-10 & n.11 (CA10 2005); *Federer* v. *Gephardt*, 363 F.3d 754, 759 (CA8 2004); *Gonzalez-Morales* v. *Hernandez-Arencibia*, 221 F.3d 45, 49-51 (CA1 2000); *Gene Thompson Lumber Co.* v. *Davis Parmer Lumber Co.*, 984 F.2d 401, 403-04 (CA11 1993); *Collins* v. *Womancare*, 878 F.2d 1145, 1153 (CA9 1989); *Roudybush* v. *Zabel*, 813 F.2d 173, 176-78 (CA8 1987); *Greco* v. *Guss*, 775 F.2d 161, 165-66 (CA7 1985); *Dahlberg* v. *Becker*, 748 F.2d 85, 90-91 (CA2 1984); *Kolinski* v. *Lubbers*, 712 F.2d 471, 477-78 (CADC 1983).

Illustrative is the Ninth Circuit's holding that private parties are not amenable to suit under Section 1983 for exceeding their authority under a California citizen's arrest statute, relying expressly upon *Lugar*'s holding that private misuse of a state statute does not satisfy the state policy component of the "fair attribution" requirement. See

Womancare, 878 F.2d at 1150-53. *Womancare* emphasized that the Supreme Court "ha[d] made it clear * * * that [the] 'abuse of authority' doctrine does not apply if the challenged action is one undertaken by a *private party* rather than a state official." *Id*. at 1152 (citing *Lugar*, 457 U.S. at 940).[1]

2. By contrast, for over a decade, the Sixth Circuit has nonetheless consistently refused to apply the distinct first element of the state action inquiry in Section 1983 suits against private defendants. The Sixth Circuit instead consistently equates the second component of the state action inquiry with the ultimate question of whether private conduct is "fairly attributed" to the state, abrogating the required inquiry into whether the alleged deprivation of the plaintiff's rights was "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937.

The Sixth Circuit's departure from *Lugar* began with *Wolotsky* v. *Huhn*, 960 F.2d 1331 (1992), which recited its understanding of the law as follows:

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[1] In a leading case pre-dating *Lugar*, the Ninth Circuit, sitting en banc, held that a private bail bondsman could not be sued under Section 1983 for arresting the plaintiff in violation of the relevant California laws governing bail bondsmen, concluding that the actions of private parties were "clearly not under the color of California law" when that law did not "authorize, permit, encourage or tolerate the conduct of the" bail bondsman. See *Ouzts* v. *Maryland Nat'l Ins. Co.*, 505 F.2d 547, 553-55 (1974) (en banc). Anticipating *Lugar*'s recognition that private parties do not "have the authority of state officials to put the weight of the State behind their private decision," *Lugar*, 457 U.S. at 940, *Ouzts* rejected the plaintiff's invocation of the "abuse of authority" doctrine, distinguishing cases in which the doctrine had been applied as cases in which "the offenders were either actual state officials * * * or they were jointly engaged in activity with actual state officials," 505 F.2d at 554.

> The principal inquiry in determining whether a private party's actions constitute "state action" under the Fourteenth Amendment is whether the party's actions may be "fairly attributable to the state." *See Lugar*[, 457 U.S. at 937]. The Supreme Court has set forth three tests to determine whether the challenged conduct may be fairly attributable to the state in order to hold the defendants liable under section 1983. These tests are: (1) the public function test; (2) the state compulsion test; and (3) the symbiotic relationship or nexus test.

960 F.2d at 1334-35 (citations omitted).

The three tests cited by the court in *Wolotsky* are, in fact, merely different formulations of the second component of the *Lugar* test. See *Lugar*, 457 U.S. at 938-39 (explaining that this Court has articulated several different formulations of the second component of the "fair attribution" inquiry, including all three tests listed in *Wolotsky*). In other words, these tests are directed at the question whether the defendants are fairly affiliated with the State, *not* at whether the challenged conduct is authorized by state law or policy. Thus, by equating the ultimate state action inquiry with these various tests, the Sixth Circuit in *Wolotsky* abrogated the distinct inquiry into whether the challenged conduct is authorized by state law or policy.

In the fourteen years since *Wolotsky*, an uninterrupted line of published Sixth Circuit precedent has applied the same rule. Soon after *Wolotsky*, the Sixth Circuit stated that it "recognize[d] three tests for determining whether private conduct is fairly attributable to the state: the public function test, the state compulsion test, and the nexus test." *Ellison* v. *Garbarino*, 48 F.3d 192, 195 (1995) (citing *Wolotsky*, 960 F.2d at 1335); see also *Wittstock* v. *Mark A. Van Sile, Inc.*, 330 F.3d 899, 902 (2003); *Tahfs* v. *Proctor*, 316 F.3d 584, 591 (2003); *Lansing* v. *City of Memphis*, 202 F.3d 821, 828 (2000); *Collyer* v. *Darling*, 98 F.3d 211, 231-32 (1996).

These decisions culminated in an en banc Sixth Circuit decision:

> A private party's actions constitute state action under section 1983 where those actions may be "fairly attributable to the state." *Lugar*[, 457 U.S. at [937]]. The Supreme Court has developed three tests for determining the existence of state action in a particular case: (1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test.

Chapman v. *The Higbee Co.*, 319 F.3d 825, 833 (2003) (en banc) (citing *Wolotsky*, 960 F.2d at 1335). The en banc court in *Chapman* reversed the district court's grant of summary judgment for the defendants on the state action question and remanded for further proceedings simply because there were material issues of fact pertaining to the so-called nexus test, see 319 F.3d at 834-35, without any regard for whether the state policy component of *Lugar* had also been satisfied.[2] Relying upon the court of appeals' settled precedent, district courts within the Sixth Circuit similarly do not apply the first element of the state action inquiry.[3]

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[2] Three published Sixth Circuit decisions since *Wolotsky* acknowledge that *Lugar*'s "fair attribution" inquiry has two parts. But those decisions nonetheless explicitly state that the two elements are embodied in the three "tests" that are, in fact, the *second* element of the *Lugar* inquiry. See *Wittstock*, 330 F.3d at 902; *Tahfs*, 316 F.3d at 590-91; *Lansing*, 202 F.3d at 828.

[3] See *Eckmeyer* v. *Brimfield Twp. Bd. of Trs.*, 2006 WL 1644377, at *3-*6 (N.D. Ohio June 12, 2006); *R.R.* v. *Bd. of Educ. of Kingsport City*, 2006 WL 1211163, at *3-*4 (E.D. Tenn. Apr. 28, 2006); *Hopson* v. *Wal-Mart*, 2006 WL 939004, at *2-*3 (W.D. Ky. Apr. 10, 2006); *Daniels* v. *Retired Senior Volunteer Program*, 2006 WL 783438, at *3-*6 (S.D. Ohio Mar. 27, 2006); *Boykin* v. *Van Buren Twp.*, 2006 WL 305751, at *8-*11 (E.D. Mich. Feb. 9, 2006); *Saalman* v. *Reid*, 2006 WL 278412, at *3-*4 (S.D. Ohio Feb. 3, 2006); *Wilcher* v. *City of Akron*, 2005 WL 3338378, at *2-

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*4 (N.D. Ohio Dec. 8, 2005); *Gant* v. *Bowles*, 2005 WL 2994443, at *3-*4 (M.D. Tenn. Nov. 3, 2005); *Brewster* v. *Cooper Indus.*, 2005 WL 2403734, at *7 (E.D. Ky. Sept. 28, 2005); *Friedrich* v. *Southeast Christian Church of Jefferson County*, 2005 WL 2333633, at *1-*3 (W.D. Ky. Sept. 22, 2005); *Atkins* v. *Garcia Lab., Inc.*, 2005 WL 2173542, at *2 (E.D. Mich. Sept. 1, 2005); *Piper* v. *R.J. Corman R.R. Group*, 2005 WL 1523566, at *6-*7 (E.D. Ky. June 28, 2005); *Young* v. *City of Sandusky*, 2005 WL 1491219, at *3-*4 (N.D. Ohio June 23, 2005); *Benford* v. *Smith*, 2005 WL 1325003, at *2-*3 (E.D. Tenn. June 3, 2005); *Farmer* v. *Pike County Agric. Soc'y*, 411 F. Supp. 2d 838, 844-45 (S.D. Ohio 2005); *Oliver* v. *City of Memphis*, 2004 WL 3316242, at *4-*5 (W.D. Tenn. Dec. 2, 2004); *Smith* v. *Detroit Entm't LLC*, 338 F. Supp. 2d 775, 786-92 (E.D. Mich. 2004); *Kennedy* v. *Bank One Corp.*, 2002 WL 31008340, at *2 (E.D. Mich. Aug. 15, 2002); *Barbee* v. *Wal-Mart Stores, Inc.*, 2002 WL 1784318, at *2 & n.3 (W.D. Tenn. July 16, 2002); *McCord* v. *City of Columbus*, 225 F. Supp. 2d 804, 810 (S.D. Ohio 2002); *Canter* v. *Hardy*, 188 F. Supp. 2d 773, 795-97 (E.D. Mich. 2002); *Thompson* v. *City of Columbus*, 2001 WL 1681129, at *6-*7 (S.D. Ohio Sept. 26, 2001); *Siskaninetz* v. *Wright State Univ.*, 175 F. Supp. 2d 1018, 1022-27 (S.D. Ohio 2001); *Hayes* v. *Allstate Ins. Co.*, 95 F. Supp. 2d 832, 835-36 (W.D. Tenn. 2000); *Cmtys. for Equity* v. *Michigan High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729, 738-40 (W.D. Mich. 2000); *Williams* v. *Payne*, 73 F. Supp. 2d 785, 798-802 (E.D. Mich. 1999); *Durso* v. *Kentucky Ass'n of Counties, Inc.*, 32 F. Supp. 2d 929, 931-33 (E.D. Ky. 1999); *Kelly* v. *Forest Hills Local Sch. Dist. Bd. of Educ.*, 19 F. Supp. 2d 797, 801-02 (S.D. Ohio 1998); *Black* v. *Barberton Citizens Hosp.*, 8 F. Supp. 2d 697, 700-01 (N.D. Ohio 1998); *Sanders* v. *Prentice-Hall Corp. Sys., Inc.*, 969 F. Supp. 481, 484-86 (W.D. Tenn. 1997); *Rudy* v. *Vill. of Sparta*, 990 F. Supp. 924, 930-31 (W.D. Mich. 1996); *Holley* v. *Deal*, 948 F. Supp. 711, 715 (M.D. Tenn. 1996); *Perdue* v. *Quorum Health Resources, Inc.*, 934 F. Supp. 919, 922-23 (M.D. Tenn. 1996); *Graham* v. *Tennessee Secondary Sch. Athletic Ass'n*, 1995 WL 115890 (E.D. Tenn. Feb. 20, 1995); *Worrall* v. *Irwin*, 890 F. Supp. 696, 702-04 (S.D. Ohio 1994); *Lintz* v. *Skipski*, 807 F. Supp. 1299, 1305-06 (W.D. Mich. 1992).

3. The opinion below represents the latest installment in the Sixth Circuit's abrogation of *Lugar*. Citing *Chapman* and *Wolotsky*, the decision below again equates the "fair attribution inquiry" with only the second element of the state action test. The Sixth Circuit cited this Court's decision in *Lugar*, but applied the Sixth Circuit's settled rule abrogating the first element of the two-part test announced by this Court. The Sixth Circuit held:

> A private actor acts under color of state law when its conduct is "fairly attributable to the state." *Lugar*[, 457 U.S. at [937]]. "The Supreme Court has developed three tests for determining the existence of state action in a particular case: (1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test."

Pet. App. 9a.

The court of appeals' rule affords no weight to the fact that a private defendant's conduct was not "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937. Rather, based only on its determination that petitioners had exercised the public function of arrest, the court concluded that the plaintiffs had satisfied the state action requirement of Section 1983. Thus, as in its en banc decision in *Chapman*, the Sixth Circuit ruled in favor of a Section 1983 plaintiff without regard to whether the state policy component of *Lugar* had been satisfied.

It is clear that unless this Court grants review, the Sixth Circuit will continue to disregard the first prong of *Lugar* in Section 1983 suits against private defendants. This case perfectly illustrates the seriousness of the court of appeals' error. In this case, the "deprivation" of respondent's rights is not "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Ibid*. Mere

"private misuse of a state statute does not describe conduct that can be attributed to the State." *Lugar*, 457 U.S. at 941.

Respondent's complaint, like the complaint in *Lugar*, alleges merely that a private party had misused a state statute. The gravamen of respondent's Fourth Amendment claim is that she was arrested without probable cause because the token she picked up was abandoned property. See Pet. App. 6a. But Michigan undoubtedly did not authorize petitioner Brown to arrest respondent in the absence of probable cause: As a private security police officer, petitioner Brown was authorized, pursuant to Michigan Compiled Laws (MCL) § 338.1080, only "to arrest a person without a warrant as set forth for public peace officers in [MCL § 764.15]." And, unsurprisingly, Section 764.15, while setting forth multiple grounds under which Michigan police officers are authorized to make warrantless arrests, does not authorize the arrest of a person who has not committed a crime and whom the officer has no reasonable cause to believe has committed a crime. Thus, respondent's Fourth Amendment claim challenges no more than the "private misuse of a state statute," *Lugar*, 457 U.S. at 941, as petitioner Brown was "acting contrary to the relevant policy articulated by the State," *id*. at 940. Because her alleged "invoc[ation of] the statute without the grounds to do so c[an] in no way be attributed to a state rule or a state decision," *ibid*., the state policy component of *Lugar* is not satisfied.[4]

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[4] The Sixth Circuit's abrogation of the *first* element of this Court's state action test is not excused on the ground that petitioners were allegedly performing a "public function" under the *second* element. As *Lugar* explains, although claims involving government employees need not satisfy the first element, this "apparent authority" doctrine derived from *Monroe* v. *Pape* does not apply to private defendants. Consistent with *Lugar*, *Womancare*, and *Ouzts*, *supra*, petitioners' review of the post-*Lugar* appellate precedents has not revealed a single published federal circuit court opinion applying the "abuse of authority"

Certiorari accordingly should be granted to correct the Sixth Circuit's consistent abrogation of the first element of this Court's holding in *Lugar*. The Court may wish to consider summary reversal.[5]

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doctrine to hold a private party liable for conduct not involving also governmental entities. Only two cases hold private defendants liable under Section 1983 for misuse of a state statute; in both, the private parties acted jointly with state officials. See *Greco* v. *Guss*, 775 F.2d 161, 165-69 (CA7 1985); *Howerton* v. *Gabica*, 708 F.2d 380, 384 n.9 (CA9 1983). Thus, in both, the private defendants did "have the authority of state officials to put the weight of the State behind their private decision." *Lugar*, 457 U.S. at 940.

There was no such involvement by any state official in this case. The mere fact that petitioner Brown was licensed as a private security police officer under Michigan Compiled Laws § 338.1079 is insufficient to implicate the "abuse of authority" doctrine, as the license only granted Brown authority to make arrests pursuant to Michigan Compiled Laws § 764.15: if private misuse of a statute is not state action under *Lugar*, neither is private misuse of a license simply granting permission to use a statute; in both cases, the defendant is acting "contrary to the relevant policy articulated by the State." *Lugar*, 457 U.S. at 940.

[5] Petitioners principally argued in the district court and on appeal that their conduct did not constitute state action subject to suit under Section 1983. That argument is sufficient to preserve for review in this Court the subsidiary contention that respondent's claim was precluded by the first prong of the state action inquiry. Petitioners could not reasonably be expected to press that particular argument in the face of a wall of on-point, settled circuit precedent (including the en banc decision in *Chapman*). Indeed, no defendant can be expected to make such an argument in that court. But in any event, this Court may decide the question so long as it was "passed upon" by the court of appeals (*Verizon Comms.* v. *FCC*, 535 U.S. 467, 531 (2002)), which it was. The Sixth Circuit rested its holding squarely on its precedent holding that state action is present so long as one of the three tests for establishing that the defendant is a "state actor" under the second prong of the state action inquiry. See *supra* at 6-8.

II. Certiorari Is Warranted To Resolve The Circuit Split Regarding Whether An Individual Becomes A State Actor Under The Second Prong Of *Lugar* By Virtue Of Possessing Arrest Authority.

A. The Lower Courts Are Divided over Whether the State-Conferred Power to Arrest Transforms Private Security Guards into State Actors.

This Court has left open the question of how, or whether, a private individual is subject to constitutional tort liability based upon state-sanctioned authority to perform police-type functions. See *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 163 n.14 (1978); see also Pet. App. 10a. That question has divided the circuits. The Sixth Circuit holds that "the authority to make arrests at one's discretion and for any offenses" renders the possessor "a state actor as a matter of law," because plenary arrest power is "traditionally reserved to the state alone." Pet. App. 13a-14a (footnote omitted). This holding is squarely at odds with the reasoning and result of decisions of three other circuits and several state courts, including a holding of the Supreme Court of Michigan addressing the very statute at issue here. These other courts hold that the arrest power falls outside the sphere of state action because arrest has also traditionally been the prerogative of private citizens, and that private security guards do not become police officers merely by virtue of statutory arrest authority.

1. Substantial authority in both state and federal courts draws a clear line for state action purposes between arrests by *citizens* (such as petitioner Brown) and arrests by *police officers*. Unlike the ruling below, these decisions recognize that neither possession nor exercise of arrest authority transforms private parties into state actors, and discredit the notion that arrest is a "traditional public function."

The Fifth, Seventh, and Tenth Circuits have all expressly refused to conflate a citizen's power of arrest with that of a police officer. The Fifth Circuit in *White* v. *Scrivner Corp.*

rejected a Section 1983 lawsuit against a grocery-store chain and its employees, holding that the public function test is not satisfied when the employees searched the plaintiffs on suspicion of shoplifting and detained them after the search turned up a handgun, but no stolen property. 594 F.2d 140, 141 (1979). The court held that "[w]hile these actions are usually performed by police officers, private citizens do occasionally engage in them. * * * Once the defendants found the gun, detention of the women until the arrival of the police was * * * not an action outside the realm of common experience." *Id.* at 143.

Likewise, in *Carey* v. *Continental Airlines, Inc.*, the Tenth Circuit held that a citizen's arrest for trespassing did not constitute state action under Section 1983, explaining that "[i]f [defendant Gary] Gilbert himself made a 'citizen's arrest' of [plaintiff Daniel] Carey, as Carey asserts, this does not make Gilbert a state actor." 823 F.2d 1402, 1404 (1987). The Tenth Circuit has furthermore read its decision in *Carey* to support the conclusion that private security guards cannot meet the traditional public function test. See *Gallagher* v. *Neil Young Freedom Concert*, 49 F.3d 1442, 1457 (1995) ("[O]ur conclusion that private citizens making arrests were not state actors because they did not act in concert with state officials suggests that the mere performance of security functions such as those here at issue is not traditionally an exclusive function of the state.").

The Seventh Circuit has similarly stated that arrest authority is not a public function, because it was traditionally shared by private and public actors due to the tradition of citizen's arrests. In *Wade* v. *Byles*, 83 F.3d 902, 906 (1996), the Seventh Circuit held that powers granted by the City of Chicago to a municipal security guard, including the authority to arrest trespassers, did not make him a state actor. The Seventh Circuit noted that such powers had not been "*exclusively* reserved to the police," citing an Illinois statute "providing for citizens' arrests" and caselaw "noting that powers of arrest and self-defense are not exclusively

governmental functions." *Ibid.*; see also *Payton* v. *Rush-Presbyterian-St. Luke's Medical Center*, 184 F.3d 623, 629 (CA7 1999) ("[C]itizen's arrests * * * are available to individuals outside of the law enforcement community * * *.").

The decision below is similarly in conflict with the Supreme Court of Michigan's decision in *City of Grand Rapids* v. *Impens*, 327 N.W.2d 278 (1982), a case involving the same Michigan statute at issue here. In *Impens*, a criminal defendant sought to suppress a statement to licensed security guards on the ground that the guards had not warned him of his *Miranda* rights. *Id.* at 279. The Michigan Supreme Court rejected the defendant's argument – parallel to respondent's argument in this case – that "the licensing statutes which regulate private security guards demonstrate the requisite degree of state action to bring their activities under color of state law." *Id.* at 281. The court explained that the statutes' grant of authority to private security guards is merely "an extension of the commonlaw shopkeepers' privilege to detain for a reasonable period of time a person suspected of theft or failure to pay." *Ibid.*[6]

Several other state courts have reached results in accord with *White*, *Carey*, and *Impens*, and therefore in conflict with the Sixth Circuit's holding here. See *State* v. *Kemp*, 205 So. 2d 411, 415 (La. 1967) (refusing to consider suppressing evidence obtained in citizens' arrest for shotgun assault because "[t]he arrests in question were made by private persons—not by officials"); *Hood* v. *Commonwealth*, 448 S.W.2d 388 (Ky. 1969) (holding *Miranda* warnings were not

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[6] The decision below unpersuasively attempts to distinguish *Impens* by stating that *Impens*, unlike the present case, did not involve involuntary detention. Pet. App. 13a n.2. In fact, *Impens* unequivocally states that the security guards obtained the contested statements "in a *custodial* environment," 372 N.W.2d at 280 (emphasis added), and expressly refers to the suspect's "detention," *id.* at 281.

required when citizens arrested suspects in barn burnings, because citizens were not state actors); *Hubbard* v. *State*, 234 A.2d 775, 779 (Md. App. 1967), cert. denied, 393 U.S. 889 (1968) (holding that no *Miranda* warnings were required when suspected rapist made statements to pharmacists who were detaining him); *Commonwealth* v. *Corley*, 491 A.2d 829 (Pa. 1985) (holding exclusionary rule inapplicable to citizen's arrest due to absence of state action).

2. In addition to the conflict over whether arrest power is an exclusively public function, the Sixth and Seventh Circuits moreover exhibit a deep and intractable conflict regarding the separate question whether a private individual must also have *other* police powers besides arrest in order to be considered a state actor. The Seventh Circuit has determined that security guards qualify as state actors based upon the public function test only when – unlike petitioners here – they are "entrusted with *all* the powers possessed by the police." *Payton*, 184 F.3d at 630 (emphasis added). Thus, the Seventh Circuit has held that guards merely "authorized to carry a handgun, arrest people for criminal trespass pending arrival of the police, and use deadly force in self-defense" could not qualify as state actors, because as a result of these limitations and the spatial confinement of their authority to the lobbies in which they worked, the court was not "faced with a situation where a state has delegated its entire police power to a private police force." *Wade*, 83 F.3d at 905-06. Petitioners here would have prevailed under the Seventh Circuit's test, as it cannot be disputed that their authority is substantially more limited than that of a fully vested officer of the law.

The decision below, relying primarily on *Payton* v. *Rush-Presbyterian-St. Luke's Medical Center*, erroneously purports to be in accord with the jurisprudence of the Seventh Circuit. *Payton*, however, found state action only in the extreme circumstances in which "*no legal difference exist[ed]*" between a private security guard and a "regular Chicago police officer." 184 F.3d at 630 (emphasis added). In particular, *Payton* involved city ordinances designating the

defendants as "special police officers." See *id.* at 624-25. They were subject to all the rules and regulations applicable to ordinary police officers, reported to the superintendent of police as the superintendent required, wore police-issued badges, and "possess[ed] the powers of the regular police patrol at the places for which they are respectively appointed or in the line of duty for which they are engaged." *Id*. at 625.

Petitioner Brown, by contrast, unquestionably did not possess the full panoply of police authority. Her arrest power was expressly limited to the boundaries of her employer's property and her hours of employment. Mich. Comp. Laws 338.1080. Thus, she could not, for example, pursue a fleeing suspect outside the casino or arrest anyone during her off-hours. The statute moreover expressly seeks to differentiate her authority from that of an ordinary police officer by requiring that she be in a special uniform when making an arrest. *Ibid.* The uniform cannot be one that would "deceive or confuse the public or be identical with that of a law enforcement officer," and must include shoulder patches at least three inches by five inches in size that clearly designate the name of the private employer. *Id.* § 338.1069(1). Petitioner Brown was also prohibited by state regulation from carrying or wielding a weapon during the exercise of her security duties. See MGCRA Rule 432.1212. Unlike in *Payton*, therefore, there exist significant "legal difference[s]" between petitioners' authority as private citizens and police officers' authority as public officials. 184 F.3d at 630.

Indeed, the Seventh Circuit itself, in a subsequent decision, rejects the notion that even the extensive regulatory scheme present in *Payton* is per se sufficient to subject private security personnel to constitutional liability. In *Johnson* v. *LaRabida Children's Hospital*, 372 F.3d 894, 897-98 (2004), the court found that a hospital guard made a special police officer under the Chicago ordinance was not, in fact, a state actor for purposes of Section 1983. The court based its holding on the limited nature of the defendant's hospital-patrol duties, concluding that "this is not a case where the

state had delegated its entire police power to a private police force." *Id.* at 898 (internal alterations and quotation marks omitted). Neither is the present case, and the Seventh Circuit would consequently have barred respondent's Section 1983 suit.

The conflict presented by this case has important practical dimensions that call for this Court's intervention. The split of authority between Michigan and the Sixth Circuit as to the effect of the Michigan statute is intractable. Though the highest court of the state would not consider petitioners to be state actors, respondent and others similarly situated can avoid the effect of this conclusion by suing under Section 1983 and invoking federal question jurisdiction.

Additionally, the split among the circuits creates great unfairness for a substantial number of potential defendants. The private security industry is large and growing, employing a significant segment of the American workforce. See, *e.g.*, *Impens*, 327 N.W.2d at 681 (Kavanagh, J., dissenting). As this case well illustrates, security guards and their employers in the Sixth Circuit can be subjected to massive constitutional tort liability, including prohibitive punitive damage awards that might be unavailable under state law. Those in the Fifth, Seventh, and Tenth Circuits cannot. Those in circuits yet to resolve the question face the specter of such liability. Only this Court can bring resolution to this important and recurring issue.

B. The Sixth Circuit's Decision Is Incorrect Under This Court's Precedents Governing State Action.

The decision below cannot be reconciled with this Court's precedents limiting private parties' liability for constitutional violations. In order to violate the Fourteenth Amendment and therefore be held liable under Section 1983, "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). The court below held that petitioners are state actors as a matter of law because they perform a

public function through their arrest authority. See Pet. App. 13a-14a.

That conclusion is irreconcilable with this Court's precedents. As this Court stated in *Jackson* v. *Metropolitan Edison Co.*, private parties are state actors on the basis of the public function test only if they exercise a power that has "traditionally" been "exclusively reserved to the state." 419 U.S. 345, 352 (1974). This category is limited: "While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'" *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 158 (1978). Arrest power lies far afield of the limited set of functions that this Court has recognized as "public" for state action purposes. Compare, *e.g.*, *Evans* v. *Newton*, 382 U.S. 296 (1966) (municipal park); *Terry* v. *Adams*, 345 U.S. 461 (1953) (election); *Marsh* v. *Alabama*, 326 U.S. 501 (1946) (company town); *Nixon* v. *Condon*, 286 U.S. 73 (1932) (election).

Critically, the power to effect arrest has not historically been "exclusively reserved to the state." *Jackson*, 419 U.S. at 352. "[N]o aspect of policing, neither patrol nor detection, has ever been 'exclusively' performed by the government, and all have at one point or another been left largely to private initiative." David A. Sklansky, *The Private Police*, 46 UCLA L. Rev. 1165, 1259 (1999). First, many jurisdictions have long protected by statute the right of guards or others to make arrests under some circumstances, as Michigan does. *Id.* at 1184. Second, in other jurisdictions, the authority of officers and citizens has traditionally been virtually identical with respect to warrantless arrests. *Ibid.* "The difference between the arrest powers of police officers and private citizens, then, comes down to this: a private citizen, unlike a police officer, is liable for false arrest if he or she arrests someone based on probable cause to believe the arrestee committed a felony, but it turns out that the felony had not actually been committed." *Id.* at 1185. Finally, even this minimal distinction between the arrest powers of officers and ordinary citizens "was not always drawn, and not all states draw it today." *Id.* at 1185.

Because arrest authority has been and remains a function shared by citizens and police officers, certiorari is warranted to correct the Sixth Circuit's erroneous holding that private citizens are state actors simply because they possess arrest authority.

III. The Punitive Damages Imposed By The Decision Below Violate Due Process.

In the event that this Court concludes that the state action issues presented above do not warrant review, it should at the very least hold the petition pending its decision in *Philip Morris USA* v. *Williams*, No. 05-1256, as the judgment of the Sixth Circuit also raises a serious question about the constitutionality of the punitive damages award imposed and *Philip Morris* will provide guidance for answering that question.[7]

The Sixth Circuit, although reducing the $875,000 punitive damage award imposed by the jury, nevertheless gave respondent the option (which she subsequently accepted) of a $600,000 remittitur. See Pet. App. 34a. Because the compensatory damages in this case were only $279.05, see *id.* 8a, the Sixth Circuit sanctioned an award of punitive damages that was more than 2150 times the damages actually suffered by respondent.

The court justified its extraordinary holding based on essentially four factors: First, it emphasized what it perceived to be an "inexplicable and egregious" temporary detention, interrogation, and humiliation of an elderly woman following her use of an abandoned five-cent token. See Pet. App. 23a-25a. Second, it quoted this Court's passing statement that higher ratios may be permissible when particularly egregious conduct causes only minimal actual damages. See *id*. 27a

[7] In the event the Court grants certiorari to decide the state action question, it could simply note in its opinion if appropriate that on remand the court of appeals should reconsider its punitive damages holding in light of this Court's decision in *Philip Morris*.

(quoting *BMW of North America* v. *Gore*, 517 U.S. 559, 582 (1996)). Third, it compared punitive damage awards in similar cases. See *id*. 26a-31a. Fourth, it relied upon the fact that the defendant was a wealthy casino. See *id*. 29a-30a, 33a.

It is certainly true that this Court has twice noted in dicta that "ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'" See *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 425 (2003) (quoting *Gore*, 517 U.S. at 582). That this Court stated only that some higher ratios *may* comport with due process, however, signals that even in cases with low compensatory damages, the constitutional requirement remains intact that "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Campbell*, 538 U.S. at 426; see also *Gore*, 517 U.S. at 580 (noting the "long pedigree" of the requirement that punitive damages bear a "reasonable relationship" to compensatory damages).

But in this case, the Sixth Circuit essentially abandoned its responsibility to ensure that there was a reasonable relationship between the two damage awards, once it had concluded that some higher ratio was permissible because of what it perceived to be particularly egregious conduct causing minimal actual damages. First, aside from cases involving nominal damages, the relatively small ratios in the cases that the Sixth Circuit cited to justify multiple-digit ratios actually underscore how grossly excessive a 2150-to-1 ratio is. See Pet. App. 26a (citing *Argentine* v. *United Steel Workers of Am., AFL-CIO, CLC*, 287 F.3d 476, 488 (CA6 2002) (42.5-to-1 ratio); and *Dean* v. *Olibas*, 129 F.3d 1001, 1007 (CA8 1997) (14-to-1 ratio)). Second, aside from cases involving police brutality, $600,000 vastly exceeds the amount of punitive damages imposed in all but one of the false arrest or malicious prosecution cases that the Sixth Circuit cited for

purposes of comparison, even though many of those cases involved conduct far more egregious than that present in this case. See Pet. App. 26a-31a (citing cases involving strip searches or criminal arrest and prosecution). Indeed, in the only case affirming an award as large as $600,000, a wealthy corporate defendant, Wal-Mart, had wrongfully caused a pregnant woman shopping on Christmas Eve with her children to be arrested, jailed, and tried for shoplifting; even on those facts, a $600,000 punitive award was the maximum permitted by due process. See *id*. 30a-31a (discussing *Wal-Mart Stores, Inc.* v. *Goodman*, 789 So. 2d 166, 171 (Ala. 2000)). Perhaps offended by what it perceived to be the "inexplicable and egregious" treatment of respondent and certainly insufficiently attentive to this Court's admonition that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award," *Campbell*, 538 U.S. at 427-28, the Sixth Circuit ultimately failed to ensure that the punitive damages it imposed were reasonable and proportionate when it consciously chose an award that was "sixty per cent of the casino's daily intake at the time of the verdict," Pet. App. 33a.

Philip Morris USA v. *Williams*, No. 05-1256, will provide substantial guidance on the propriety of the punitive damages imposed below. On May 30, 2006, this Court granted the writ of certiorari in *Philip Morris*, limited to the first two questions presented in the petition. One of those questions is "[w]hether, in reviewing a jury's award of punitive damages, an appellate court's conclusion that a defendant's conduct was highly reprehensible and analogous to a crime can 'override' the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm." Pet. (I). In *Philip Morris*, the Oregon Supreme Court affirmed a punitive damages award that was ninety-seven times the compensatory damages, *ibid*., in light of conduct by the defendants perceived to be extraordinarily reprehensible, *see id*. at 5-6. This Court's resolution of whether the reprehensibility guidepost can "override" the ratio guidepost

will have obvious relevance to whether the Sixth Circuit was justified in allowing a 2150-to-1 ratio based largely on the perceived egregiousness of petitioners' conduct. More generally, in light of the fact that this Court has only two precedents interpreting *Gore*'s ratio guidepost, the analysis and discussion in *Philip Morris* will inevitably inform and improve the Sixth Circuit's analysis given that the court of appeals was previously forced to rely upon appellate jurisprudence that the petitioners in *Philip Morris* properly characterized as exhibiting an intolerable level of conflict and confusion. *See id*. at 14. For this reason, in the event that this Court decides that the state action issues in this case do not warrant granting review, the petition should at the least be held pending the decision in *Philip Morris* and then disposed of accordingly.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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