No. 06-38

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,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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INTRODUCTION

Petitioners Detroit Entertainment, L.L.C. d/b/a MotorCity Casino (hereafter "Casino") and Marlene Brown have shown no compelling reasons for their Petition for a Writ of *Certiorari* to be granted ("Petition"). This case involves the limited issue as to whether private "security police officers" certified by statute in Michigan with full police powers to make an arrest are state actors for 42 U.S.C. § 1983 purposes.

This case, contrary to the representations in the Petition, is limited to private "security police officers" who are trained, supervised, regulated, disciplined and subject to the control of the Michigan State Police under M.C.L. § 338.1079(1) unlike private "security guards," who are not subject to the authority of the Michigan State Police but are merely "employed for the purpose of protecting the property and employees of their employer." M.C.L. § 338.1079(2)[1].

Petitioners' initial argument that the Sixth Circuit does not follow Supreme Court precedent is illusory, given that, in 32 of the 36 cases cited by Petitioners, or over 88% of the time, § 1983 cases are summarily dismissed by the courts in the Sixth Circuit for lack of state action. Petitioners have also failed to establish any circuit conflict. The Third, Sixth and Seventh Circuits agree that a private party, with plenary police power to arrest, who is also trained, licensed, supervised and controlled by a public police agency is a "state actor" for 42 U.S.C. § 1983 purposes. The cases cited by Petitioners in a half-hearted attempt to create a conflict involve private citizens exercising common law rights and not individuals regulated by the state police and delegated with state statutory authority to arrest.

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1. Petitioners now recognize the distinction between a "security police officer" authorized to make an arrest and a "security guard." In their papers in the district court, they properly refer to Petitioner Brown and her colleagues as "security police officers." After the Sixth Circuit issued its opinion, they began referring to them as "security guards" starting with the petition for rehearing *en banc* even though Petitioner Brown testified at trial she was a security police officer and her supervisor testified the Casino does not employ "security guards."

Finally, this court should not hold this case pending its decision in *Phillip Morris, U.S.A. v. Williams*, No. 05-1256. The punitive damage issue raised by Petitioners in the Sixth Circuit was whether the jury properly deviated from the 10-1 ratio of punitive damages to actual damages. In *Phillip Morris*, the questions presented do not involve the ratio, but rather whether the jury may consider a defendant's harm to other individuals and whether that conduct was analogous to a crime. Although the jury exceeded the court's ratio, as the district court remarked, the facts in this uniquely reprehensible and egregious case fall "squarely within [the Supreme Court's] exception to the ratio." The Petition should be denied.

STATEMENT OF THE CASE

On August 7, 2001, Respondent Stella Romanski, then 72 years old, visited the MotorCity Casino as part of a "senior package" that for $9.00 provided a bus ride from the northern suburbs of Detroit, Michigan, on a MotorCity Casino "senior" bus to the Casino in Detroit and back, as well as an "all you can eat" lunch at the Casino's buffet.

While playing the nickel slot machines, she innocently picked up a nickel token[2] left behind by a prior successful bettor in the tray of a slot machine. She was immediately surrounded by Petitioner Marlene Brown, as well as three other security police officers, at least one in uniform.[3] A uniformed security police officer "ordered" her to come with him. Although the Petitioners refer to the officers in the Petition as security guards, the Casino does not employ security guards, but rather security police officers. Both Ms. Brown and her supervisor, Joetta Stevenson, repeatedly corrected Ms. Romanski's counsel during depositions when he referred to them as security guards. At trial, Ms. Stevenson stressed "our officers are officers, we don't have any security guards."

2. The Casino does not use nickels, but rather tokens, in various denominations. The token at issue had a value of 5 cents and has been variously described as a token, nickel or coin.

3. Ms. Romanski testified one was in uniform and Ms. Brown testified two security police officers in uniform took Ms. Romanski to the security office.

Ms. Brown testified she told Ms. Romanski she was a "security police officer."

Petitioner Brown has given conflicting accounts of what happened in her written report, her deposition testimony, and her testimony at trial[4]. Although Ms. Brown now claims Ms. Romanski was "belligerent," her written report, which is required to be filled out immediately after an arrest pursuant to Michigan Gaming Control Board (hereinafter "MGCB") regulations, states that Ms. Romanski "was escorted to security office without incident or injury."[5] Ms. Romanski was taken to the security office by Ms. Brown and two uniformed security police officers and held for over an hour in a small room without windows. Ms. Stevenson, the Casino's security shift manager, testified that a uniformed officer stood outside the door so that Ms. Romanski could not "escape." Ms. Brown testified that upon arriving at the security office with Ms. Romanski, she immediately notified Sergeant Haneley of the Michigan State Police pursuant to the requirement that she has to "report everything we do" to the Michigan State Police.

Ms. Romanski testified that someone from the Casino asked her for her driver's license and her Social Security card. Ms. Romanski did not want to give her Social Security card, but did so because Ms. Brown told her "she was a policewoman" and she saw Ms. Brown's badge and handcuffs. At trial, Ms. Brown admitted that Ms. Romanski did not want to give her the Social Security card.

Ms. Brown confiscated Ms. Romanski's ticket from the Casino that entitled her to eat lunch at the "all you can eat" buffet as well as the nickel token. Ms. Romanski was told to "stand up" and someone took her "mug shot." She was told she could not eat lunch and she could not return to the Casino for six months because she had committed a crime by picking up the nickel based on an unwritten and unpublished rule

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4. At one point during her testimony at trial in the district court, Judge Zatkoff commented "I am confused."

5. Joetta Stevenson, the Casino's security manager, when asked if Ms. Romanski was belligerent, stated "not to my knowledge."

which was contrary to Michigan law regarding abandoned property, that tokens found on the floor of the Casino belong to the finder but tokens left behind in a slot machine tray remain the property of the Casino[6]. MGCB regulations, promulgated with input from the Casino, do not address the situation as admitted by Deborah Robinson, a manager at the Casino.

Before leaving the Casino, Ms. Romanski asked to use the restroom. Ms. Brown accompanied her into the restroom and stood immediately outside the restroom stall while Ms. Romanski, who was suffering from diarrhea, relieved herself. Three other security police officers waited outside the restroom door.

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6. Judge Zatkoff, in his opinion, commented: "This rule can be described as a 'secret' rule, which is kept secret until the time someone violates the rule. For instance, during her deposition, Defendant Joetta Stevenson stated the following:

Q: Now, is there a written casino policy that prohibits [taking tokens from the tray of an abandoned slot machine]?

A: No.

Q: Is there a sign anywhere in the casino that notifies patrons that they are not allowed to pick up coins they find in trays?

A: No.

Q: How is that policy at the casino communicated to patrons?

A: We tell them.

Q: And when do you tell them, as they enter the casino?

A: No.

Q: Do you tell them before they pick a coin out of the tray?

A: No.

Q: Do you tell them after they've been found picking a coin out of a tray?

A: Yes."

Dep. of J. Stevenson, 46-47, *Romanski v. Detroit Entertainment, LLC*, 265 F. Supp. 2d 835, 846, footnote 7 (E.D. Mich. 2003).

While the four security police officers were escorting Ms. Romanski out of the Casino, she told them she could not go anywhere because she came on the Casino's "senior bus." She was then escorted to an air conditioned room, but was not allowed to eat lunch[7]. She was told by the Casino security police officers that her bus would arrive at 3:00 p.m. and where to pick it up. She was also told by the Casino's security police officers when her bus arrived she was "to get on it." Around 3:00 p.m. Ms. Romanski did as she was told and negotiated walking across a major six lane highway during the start of rush hour traffic. When she got to the bus the Casino told her would take her home, she noticed a sign indicating a destination over 100 miles from her home and she did not get on the bus.

By this time, weather reports introduced into evidence indicated the temperature was 95°. Ms. Romanski testified she was "wringing wet." Ms. Romanski, who had not eaten since 9:00 a.m., again crossed the street, went back to the Casino, sat on the sidewalk outside the Casino and "just cried." Ms. Romanski's two elderly companions, who had been looking for her for since 1:30 p.m., found her on the street "shaking" and about to "pass out."

Her companions physically escorted her into the air conditioned vestibule of the Casino (but not the Casino itself) when all three were surrounded by Ms. Brown and two other security police officers. When one of Ms. Romanski's companions remarked that this whole situation was "stupid," Ms. Brown, age 39 at the time, (who stands 5'9" and weighs 204 pounds) went "ballistic" and physically threatened the 5'1", 145 pound Ms. Romanski and her elderly companions until her supervisor, Ms. Stevenson, commanded her to "stand

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7. When questioned about what Ms. Romanski could have eaten until the Casino's bus returned her home sometime after 7:00 p.m., Ms. Brown testified she could have walked in the 95° heat to a nearby gas station to buy some "chips." Ms. Brown also testified she "probably would have gotten fired" if she brought Ms. Romanski something to eat from the Casino snack shop.

down."[8] Ms. Romanski's bus eventually arrived and she "cried all the way home."

Ms. Romanski filed an action in state court alleging various theories including false arrest, false imprisonment, defamation and intentional infliction of emotional distress. She was permitted to file an amended complaint alleging § 1983 violations when, Ms. Brown testified during discovery she was not merely a "security guard," but was a licensed security police officer under M.C.L. § 338.1080 (commonly known as PA 330) and had the same authority as a police officer under Michigan law to make an arrest while on Casino property and in uniform.[9] Ms. Brown also testified she reported to the Michigan State Police.

Ms. Brown testified that she had previously arrested patrons, carries handcuffs and a badge, and before she approaches someone will "flip her jacket" to reveal both the handcuffs and badge. As a result of her PA 330 certification, Ms. Brown is permitted to carry a handgun while on duty, unlike a security guard.

Ms. Brown, and the other licensed security police officers underwent several weeks of rigorous training by the Michigan State Police at the Police Academy in Detroit, Michigan. She testified her training included a knowledge of the law, how to

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8. The Casino, which maintains an elaborate audio and visual surveillance system pursuant to MGCB regulations, did not preserve any tapes of the incident regarding the alleged felony theft of the nickel, Ms. Romanski's interrogation, or the incident in the vestibule of the Casino, even though it reported Ms. Romanski's arrest to the Michigan State Police and the MGCB for violations of the state gaming statutes.

9. Until now, as the Sixth Circuit remarked, although Brown was not wearing a uniform "Defendants have never contended that this rendered Brown out of uniform for purposes of M.C.L. § 338.1080." *Romanski v. Detroit Entertainment, LLC*, 428 F.3d 629, 633 (6th Cir. 2005). Indeed, up until now, Petitioners have always maintained Ms. Brown had probable cause to make an arrest due to Ms. Romanski's alleged misdemeanor/felony in attempting to defraud the Casino out of the nickel. Ms. Brown testified she did not have to be in uniform to make an arrest. In state court, and district court, the Casino took the position the arrest was privileged because Ms. Brown, although not in uniform, was PA 330 certified to make arrests.

effectuate an arrest, how to apply force to effectuate an arrest, how to apply pressure points to subdue someone resisting an arrest and how to apply handcuffs. She also attended a one week firearms training course.

Ms. Brown is subject to fingerprinting and a background check by the Michigan State Police and must meet its requirements related to age, security or law enforcement experience and an absence of felony and certain misdemeanor convictions.

Ms. Brown, unlike a security guard, also is required to be trained in criminal law and procedure, civil law and diversity, firearms proficiency and defensive tactics, CPR/first aid, non-violent intervention and emergency preparedness, and patrol operations. A licensed security police officer is regulated by the Michigan State Police, unlike a security guard who is regulated by the Michigan Department of Consumer and Industry Services. The Michigan State Police promulgate regulations under PA 330 and is responsible for training licensed security police officers. As of August, 2006, according to the Michigan State Police website, only nine business entities in Michigan use licensed private security police officers.[10]

In addition to regulating the Casino's security police officers, the Michigan State Police maintains an office and officer at the Casino. The Detroit Police Department and MGCB also have offices and an officer at the Casino, 24 hours per day, 7 days per week. As a licensed security police officer at the Casino, Ms. Brown reported to the Michigan State Police.

Prior to this incident, Ms. Brown, testified she had previously arrested patrons and turned them over to the Michigan State Police or Detroit Police Department for transportation to jail. More importantly, however, Ms. Brown and the Casino's security police officers are subject to the control of the Michigan State Police. The Casino's security manager, Ms. Stevenson, testified she and her officers, including Ms. Brown, would be required to make an arrest if

10. At trial, Ms. Brown testified she was no longer licensed. At oral arguments in the Court of Appeals, the Casino's counsel indicated that all Casino employees are no longer licensed under PA 330.

the Michigan State Police instructed them to do so. Additionally, during the interrogation of a suspect, Ms. Brown will contact the Michigan State Police to "run a check on them."

After the amended complaint was filed in state court, the Petitioners removed the case to federal court. The district court issued an order to show cause why it had jurisdiction. Petitioners filed a response alleging that the federal court did not have jurisdiction because its security officers were not "state actors."

The district court retained jurisdiction because of the § 1983 claim stating

> under Michigan law, an employer may maintain private security guards in order to protect its property, however, it may also employ private security police. *See* M.C.L. § 338.1079. A private security police office who is licensed has the authority to arrest a person without a warrant when that private security police officer is on the employer's premises. *See* M.C.L. § 338.1080. This authority to make a warrantless arrest is the same authority that is granted a peace officer. *See id.*

(Order dated September 19, 2002, pg. 2.)

Petitioners then filed their motion for summary judgment alleging that they were not state actors and alternatively, even if they were, Ms. Romanski's alleged "conduct in taking a token which did not belong to her constituted a misdemeanor or a felony," and therefore they "had probable cause to detain her for admittedly violating the [Michigan Gaming Regulations]." (Brief in support of motion for summary judgment, pgs. 24-25.)

The district court denied the motion, ruling that Ms. Brown was not simply a security guard but rather a private security police office "vested with the powers of a police officer – which are powers that are only vested in the State, and those private individuals to whom the State has given such powers – [and was] a state actor acting under color of state law for purposes of § 1983." *Romanski v. Detroit Entertainment, LLC*, 265 F. Supp. 2d 835, 842 (E.D. Mich. 2003).

The district court further found there was a question of fact as to probable cause for Ms. Romanski's arrest because "... a jury could find that she never actually stole anything from the casino." *Id.* at 844. Since [the token] was found in the tray of the slot machine, accepting "the facts in the light most favorable to plaintiff it was won by another patron who failed to claim it, and under Michigan law it was abandoned property found by Ms. Romanski." *Id.* at 845.

At trial, the jury found the Casino had falsely arrested and imprisoned Ms. Romanski and that both the Casino and Ms. Brown violated her right to be free from an unreasonable seizure under the Fourth Amendment. The jury awarded actual damages of $279.05, punitive damages[11] of $500.00 as to Ms. Brown, and punitive damages of $875,000.00[12] as to the Casino.

The Sixth Circuit affirmed the trial court's finding that the Petitioners were "state actors" but reduced the punitive damage award as to the Casino to $600,000.00. The Sixth Circuit denied the Petitioners' motion for rehearing and rehearing *en banc*.

REASONS FOR DENYING THE PETITION

I. *CERTIORARI* IS NOT WARRANTED SINCE THE SIXTH CIRCUIT OPINION FOLLOWS SUPREME COURT PRECEDENT

A. Petitioners Waived This Argument When Both Failed To Raise It In The District Court And The Sixth Circuit.

Petitioners contend that *certiorari* should be granted because the Sixth Circuit failed to properly apply the "fair attribution" test. In their brief in support of motion for summary judgment, at page 16, Petitioners direct the district

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11. Punitive damages were awarded under Ms. Romanski's § 1983 claims. Michigan law does not permit punitive damages.

12. The evidence at trial showed the Casino averages $1 million per day in gross revenues.

court to the very test Petitioners now claim the Sixth Circuit erred in applying. Petitioners reiterated this test in their motion for judgment notwithstanding verdict.

In their "statement of questions presented," and in the body of their brief to the Sixth Circuit, the failure of the district court to apply the "fair attribution" test is not raised by Petitioners. Petitioners also failed to mention the "test" in their reply brief in the Sixth Circuit. Finally, Petitioners again did not raise the Sixth Circuit panel's failure to apply the "fair attribution" test before the full Sixth Circuit in their petition for rehearing *en banc*.

The Supreme Court has held on numerous occasions that it will not decide questions not raised or resolved in the lower courts. *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Taylor v. Freeland & Kronz, et al.*, 503 U.S. 638 (1992).

Petitioners contend the excuse for their tardiness in not even mentioning this issue in the state court, in their three briefs filed in the district court, and in their three briefs filed in the Sixth Circuit, is a "wall of on-point, settled circuit precedent" against them in the Sixth Circuit. (Petition, pg. 18, footnote 5.) This assertion is somewhat surprising considering that a review of the cases cited in footnote 3, pages 14-15 of the Petition to support the "wall of on-point, settled circuit precedent" shows that in 32 of 36 cases, or 88% of the time, the courts in the Sixth Circuit summarily dismiss § 1983 claims for lack of state action[13]. It is more likely, however, Petitioners failed to raise this issue in the lower courts because they argued Ms. Romanski "stole" the nickel and therefore, Ms. Brown had probable cause to arrest her, a fundamentally inconsistent position than the one they now argue, i.e., that Ms. Brown misused a state statute because she did not have probable cause to arrest Ms. Romanski.

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13. The Supreme Court was recently invited to review this "wall" of Sixth Circuit precedent in *Chapman v. The Higbee Co.*, 319 F.3d 825 (6th Cir. 2003) and declined to do so. *Higbee Co. v. Chapman*, 542 U.S. 945 (2004).

Ms. Brown, in her initial report[14] which she was required to prepare and send to the Michigan State Police and MGCB, pursuant to state regulations, acknowledged that Ms. Romanski was arrested for taking a "$0.05 coin" out of a slot machine tray. In state court, Petitioners claimed that since Ms. Brown was licensed to make an arrest under M.C.L. § 338.1080, Ms. Romanski's false arrest/false imprisonment claims should be dismissed because she admitted she took the token, and therefore, Ms. Brown had probable cause to make the arrest.

Similarly, in their motion for summary judgment in the district court, Petitioners argued that since Ms. Romanski admitted she took the token, Ms. Romanski's false arrest/false imprisonment claims should be dismissed because the "security officers clearly had probable cause." More importantly, however, Petitioners argued that the "security officers were certified under the strictures of Public Act 330. Therefore even if Plaintiff's actions constituted a misdemeanor according to M.C.L. § 338.1080, the Defendant officers had authority to detain her." (Brief in support of defendants' motion for summary judgment, pg. 7.) In support of their claim that Ms. Romanski's § 1983 claim should be dismissed, Petitioners similarly argued "probable cause" because the taking of the token was either a misdemeanor or felony (*Id.* pg. 25).

The district court, in rejecting the Petitioners' probable cause arguments, determined that since the token was found in the tray of the slot machine, a prior patron had won the token and abandoned it. Therefore, under Michigan law, Ms. Romanski as the finder of abandoned property, could not have stolen the token from the Casino. At trial, and in the Sixth Circuit, Petitioners also argued certain jury instructions should have been given on lost or abandoned property to support

14. At trial, Ms. Brown argued she merely detained Ms. Romanski. It is undisputed that Ms. Brown's report referred to Ms. Romanski as a "suspect." The security manual instructs the security police officers at the Casino to refer to patrons as "suspects" only if the employee arrested the patron and otherwise refer to the patrons as subjects. The manual also cautions to use the proper choice of words in order to avoid litigation. The Casino's security manager, Ms. Stevenson, approved the report.

the "probable cause" theory. It should be apparent that Petitioners failed to raise this issue in the lower courts because they argued "probable cause" and not because of the purported "wall" of Sixth Circuit precedent.

B. The Sixth Circuit's Opinion Follows The First Part Of The "Fair Attribution" Test

Contrary to the assertions in the Petition, the Sixth Circuit properly followed the two part approach to "fair attribution" set forth in *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982):

> 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. This may be because he is a state official, because he has acted together with or has significant aid from state officials, or because his conduct is otherwise chargeable to the state. *Lugar*, 457 U.S. at 937.

It is clear from the Sixth Circuit's opinion, that the court determined that Petitioners were "exercising a right or privilege created by the state," when it concluded that "Brown ha[d] the authority to arrest a person without a warrant as set forth for public police officers . . ." M.C.L. § 338.1080, *Romanski*, 428 F.3d at 638. The licensed security police officers are "person[s] for whom the state is responsible" based on their statutory authority to arrest as well as the training, certification, control, discipline and regulation by the Michigan State Police.

1. Petitioners Were Not Private Actors

The district court and Sixth Circuit properly determined Ms. Brown and the Casino's security police officers were state actors when they became licensed to make an arrest pursuant

to the same statutory authority in Michigan that permits police officers to make an arrest. When private individuals or groups are endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the state and subject to its constitutional limitations. *Evans v. Newith*, 382 U.S. 296, 299 (1965). When private actors obtain state certified police power and exercise this authorized police power, they lose their status as private actors and become state actors amenable to suit under 42 U.S.C. § 1983. *Williams v. United States*, 341 U.S. 97 (1951); *Thompson v. McCoy*, 425 F. Supp 407 (D.S.C. 1976); *Rojas v. Alexander's Dept. Store, Inc.*, 654 F. Supp 856 (E.D.N.Y. 1986); *Henderson v. Fisher*, 631 F.2d 1115 (3rd Cir. 1980); *Payton v. Rush-Presbyterian-St. Luke's Medical Center*, 184 F.3d 625 (7th Cir. 1999). Petitioners failed to raise this issue in the lower courts because neither was a "private actor" under *Lugar*, by virtue of the certification of the security police officers under PA 330.[15]

In support of the claims that Ms. Brown was a private actor, Petitioners rely on a number of cases cited that can be fairly categorized into two groups: (1) private citizens misusing state statutes such as garnishment, attachment, etc., to satisfy debts; and (2) private citizens effectuating common law citizens arrests, neither of which is an exclusive public function.

Not one case cited by Petitioners involved a security police officer obtaining and using state statutory powers to make an arrest. Petitioners' argument fails because, when she was at the Casino, Ms. Brown was a police officer under the control of the Michigan State Police, unlike a security guard exercising a common law shopkeepers privilege to detain, such as the store security guards in the cases cited by Petitioners. Ms. Brown had, and exercised, Michigan statutory authority to

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15. Petitioners claim the lower courts failed to properly apply the *Lugar* test. However, *Lugar* has suggested that these tests may be simply "different ways of characterizing the necessary fact-bound inquiry that confronts the Court [when resolving state actor questions]". *Lugar*, 457 U.S. at 939.

make an arrest under PA 330, which is the same authority as a police officer in Michigan under M.C.L. § 764.15.

Ms. Brown was at all times supervised by and subject to discipline review by the Michigan State Police. She had to follow orders from the Michigan State Police at the Casino. She and the other officers attended a rigorous training program under the direction of the Michigan State Police at the Police Academy. Ms. Brown testified her training included knowledge of the law, how to effectuate an arrest, how to apply force in order to effectuate an arrest, how to apply "pressure points" to subdue someone resisting an arrest and how to apply handcuffs.

Ms. Brown was subject to an application and background check, similar to that of a police officer, by the Michigan State Police. Her fingerprints were filed with the Michigan State Police. She was obligated to meet minimum requirements related to age, security or law enforcement experience, and an absence of felony and certain misdemeanor convictions.

Ms. Brown, unlike a security guard, was also required to be trained in criminal law and procedure, civil law and diversity, firearms proficiency and defensive tactics, CPR/first aid, non-violent intervention and emergency preparedness and patrol operations. A security police officer in Michigan is subject to the regulation of the Michigan State Police, unlike a security guard who is subject to regulation by the Michigan Department of Consumer and Industry Services. Moreover, the Michigan State Police promulgates the regulations under PA 330 and is responsible for training security police officers.

Ms. Brown testified she has previously exercised her PA 330 authority and arrested patrons. Ms. Brown testified at trial she is not required to be in uniform to make an arrest,[16]

16. Even if Ms. Brown is required to be in uniform, she certainly intended to make an arrest in this instance as evidenced by her written report. Moreover, she called for two uniformed security police officers to assist her and, while Ms. Romanski was in the interrogation room, a uniformed officer stood guard outside the door to prevent the 72 year old's "escape."

and she is authorized, under the PA 330 statute, to carry a handgun. She also carries a badge and handcuffs. She further testified when she approaches someone to arrest them, she will "flip her jacket" to reveal both the handcuffs and badge. She identifies herself to suspects as a "security police officer" and not as a security guard.

When she approached Ms. Romanski, she testified "I flashed my badge" and told her "I am a security police officer." Ms. Brown admitted the Casino issued her a security manual which included a chapter on avoiding liability under 42 U.S.C. § 1983. More importantly, she acknowledged the security manual listed four levels of force in making an arrest. The first level on the continuum "is to persuade by a show of authority of an officer in uniform, or by communicating with verbal and/or non-verbal dialogue. Verbal and non-verbal commands must be given to direct and let the subject know what authority you have to detain/arrest, and what the subject must do to comply." For purposes of the security manual "arrest means to take a person into custody."

Petitioners rely on a number of cases involving store security guards exercising a shopkeepers common law privilege in support of their erroneous contention that Ms. Brown was a private actor misusing a state statute. It is clear from the foregoing that Ms. Brown, while she was at the Casino, was exercising her statutory authority to arrest, and met the first part of the fair attribution test which is "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. It is also clear Ms. Brown, while on the Casino premises had the same authority as a police officer in Michigan and therefore met the second part of the test because her conduct is chargeable to the state. She is a "police officer" at the Casino. She has the statutory power of a police officer to carry a handgun, and full authority to arrest. She is subject to certification, training, control, discipline, and regulation by the Michigan State Police, unlike a security guard or for that matter, a private citizen requesting a sheriff to execute a garnishment or effectuating a

citizen's arrest. She would be required to arrest a patron if ordered to do so by the Michigan State Police officer assigned to the Casino. She unquestionably used this statutory authority to arrest Ms. Romanski pursuant to a Casino policy that violated Michigan law. She used the authority of the state when she identified herself as a "police woman," flashed her badge and handcuffs, demanded Ms. Romanski's drivers license and Social Security card, took her "mug shot" and told her she had committed a crime. Moreover, before she and the Casino filed this Petition, both maintained in the state and federal court that the arrest was made pursuant to her PA 330 authority upon probable cause.

2. Petitioners Work Together With And Obtain Significant Aid From State Officials And Are Therefore State Actors Under The "Joint Participation" Test.

The Casino and Ms. Brown's "joint participation with state officials" is sufficient to characterize both as "state actors" for purposes of the Fourteenth Amendment. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970); *Lugar, supra* 457 U.S. at 941. A private party may act under color of law if she is a "willing participate in a joint activity with the state as its agents." *United States v. Price*, 383 U.S. 787 (1966). State action can exist when the state is a joint participant in the enterprise. The inquiry is fact-specific and is determined on a case-by-case basis. *Barton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). This is more commonly known as the symbiotic relationship or nexus test. *Lugar*, 457 U.S. at 947.

The Michigan State Police, City of Detroit Police Department and MGCB all have officers and offices at the Casino. While Ms. Romanski was being processed, Ms. Brown immediately notified Sergeant Haneley, the Michigan State Police officer assigned to the Casino, and John Trafely of the MGCB, pursuant to State regulations that require the Casino to report "everything we do" anytime the Casino security offices move, detain or apprehend someone. Ms. Brown, also

contacts the Michigan State Police during interrogation of patrons to "run a check on them."

Ms. Stevenson, the Casino's security shift manager testified the Michigan State Police "work and communicate together" with the Casino's security police officers. Additionally, the Casino provides evidence and cooperates with the Michigan State Police in the decision to prosecute someone.

Ms. Stevenson testified her office and officers are required to report to the Michigan State Police and if the Michigan State Police directed her to, she would be required to direct her security police officers to detain a suspect and physically remove them to a security office. Ms. Stevenson specifically testified that if ordered to do something by the Michigan State Police, she "would not have the discretion" to tell the Michigan State Police, "No."

The MGCB regulations require the Casino to maintain a detention area. These regulations also require the Casino to maintain surveillance equipment and permit the Michigan State Police and MGCB to use it. The surveillance must visually record all observed criminal activity, arrests or evictions, detention of persons and security.

Essie Brooks, the Casino's surveillance director, testified that the Casino communicates daily with the MGCB. If Casino personnel, "rightly or wrongly" think someone has committed a crime, they are required to notify both the Michigan State Police and MGCB. The Casino is "officially" involved with the Michigan State Police from the beginning of their investigation. Mr. Brooks testified "they come to us and speak to us about what their needs are."

Deborah Robinson, a manager at the Casino and a retired Detroit Police Officer, testified the MGCB and Michigan State Police have unfettered access in the surveillance room and can "walk wherever they want to." The Michigan State Police and MGCB can monitor any location in the Casino, except the restrooms, from their private offices. The security policy at

the Casino is approved by the MGCB with the knowledge of the Michigan State Police. The Casino actively participates with the Michigan State Police in the decision to prosecute a suspect.

The Casino regularly meets with the MGCB, the Michigan State Police and the Michigan Attorney General's Office and has entered into "memoranda of understanding" concerning the jurisdiction of the Detroit Police Department and the Michigan State Police.

Petitioners "joint participation" with the Michigan State Police, MGCB and Detroit Police Department is sufficient to characterize them as a "state actors" for § 1983 purposes and they are not, as Petitioners contend, simply a private citizen misusing a garnishment statute or making a citizens arrest. *Smith v. Brookshire Bros. Inc.*, 519 F.2d 93, 94 (5th Cir. 1975), *cert. denied*; 424 U.S. 915 (1976); *Duriso v. K-Mart No. 4195, Division of S.S. Kresge Co.*, 559 F.2d 1274, 1277 (5th Cir. 1967); *Murray v. Walmart*, 874 F.2d 555 (8th Cir. 1989).

II. *CERTIORARI* IS NOT WARRANTED BECAUSE THERE IS NO SPLIT AMONG THE CIRCUITS.

A. The Cases Cited By Petitioners Have No Application To This Case.

Petitioners' faulty analysis is premised on the erroneous conclusion that the Casino's licensed security police officers have no more authority than store security guards who possess the common law shopkeeper's privilege to detain a suspected shoplifter but not arrest them. The Sixth Circuit correctly determined that a licensed "private security police officer [under M.C.L. § 338.1079(1)] has the same statutory authority as a police officer in Michigan to effectuate an arrest, unlike a "private security guard" who, under PA 330, does not have this statutory authority to make an arrest but is merely "employed for the purpose of protecting the property and employees of their employer." M.C.L. § 338.1079(2). *Romanski*, 428 F.3d at 638.

A licensed security police officer is subject to the administrative authority of the Michigan State Police, unlike a security guard who is subject to administrative authority of the Michigan Department of Consumer and Industry Services.[17] M.C.L. § 338.1079; M.C.L. § 338.1052(1)(a). Unlike a security guard, an applicant for licensure as a private security police officer must comply with the training requirements of the Michigan State Police. M.C.L. § 338.1081.

The Michigan State Police must conduct an investigation into an applicant's character (M.C.L. § 338.1057) and may only issue a license when it is "satisfied of the good character, competence, and integrity of the applicant." M.C.L. § 338.1059(1). The Michigan State Police may revoke the license of a security police officer for various reasons, including dishonesty and fraud. M.C.L. § 338.1060.

At the time of this incident, the Casino, according to Ms. Stevenson, did not employ security guards. Petitioners' attempt to classify the security police officers at the Casino as security guards is both legally and factually wrong. Ms. Brown testified she was a "security police officer."

Petitioners claim a conflict between the Sixth Circuit and the Fifth, Tenth and Seventh Circuits. None of these "conflict" cases remotely resemble the facts in this case, which is limited to the nine business entities in Michigan that voluntarily employ licensed security police officers.[18] The Fifth Circuit case involved a store's employees invoking a common law shopkeeper's privilege and the Tenth Circuit case involved a common law "citizens arrest" for trespassing. Neither Circuit dealt with an individual who was trained at a police academy by state police officers, whose qualifications were vetted by the state police, was licensed with the same "authority to arrest

17. In addition to regulating security guards, the Michigan Department of Consumer and Industry Services has administrative authority over, among others, accountants, real estate agents, barbers, builders, cosmetologists, cemeteries, collection agencies, interior designers and landscape architects.

18. The statute does not mandate that a particular employer hire licensed security police with arrest authority instead of security guards.

without a warrant as set forth for public peace officers" and was required to follow orders of the state police.

In upholding the district court's determination that PA 330 licensed security police officers in Michigan were "state actors" the Sixth Circuit correctly agreed with the Seventh Circuit's reasoning in *Payton, supra.* In *Payton,* unlike any of the cases cited by Petitioners, the arrest was made by "special police officers" licensed under a City of Chicago ordinance similar to the Michigan statute in this case.

Under the ordinance, special police officers were licensed to make arrests "at the places for which they are respectively appointed or in the line of duty for which they are engaged." 184 F.3d at 625. The ordinance required that the special police be appointed and licensed by the city, that the superintendent of police investigate the character of the applicant, and that the special police wear a "suitable badge." The officers were also required to abide by rules and regulations made by the superintendent of police. *Id.* at 625.

In finding that the ordinance delegated a public function to the officers, the court held "this ordinance delegates police powers otherwise exclusively reserved to the state, thus making those who act pursuant to it potentially liable under § 1983. In effect, for pleading purposes the [ordinance] made [the special police officers] the *de facto* police on Rush's premises." *Id.* at 630.

In this case, Ms. Brown and the other officers were the *de facto* police at the Casino. The Casino's security police officers had full, statutory power to make arrests, wore badges, carried handcuffs, were authorized by the state to carry firearms,[19] and were required to abide by the rules and regulations of the Michigan State Police.

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19. The Casino argues a competing MGCB regulation did not authorize handguns within the Casino. However, this regulation did not apply to Ms. Brown's duties patrolling the outside grounds of the Casino including the garage and, in her words, "perimeter." In any event, as a result of her PA 330 certification, she was required to undergo firearms training and was authorized by the State to carry a handgun.

The Casino's security police officers, as in *Payton*, worked under the auspices of the Michigan State Police, unlike security guards. The Casino's security police officers underwent background checks and were trained for several weeks by the Michigan State Police at the Police Academy. If a Michigan State Police officer ordered the Casino's security police officers to make an arrest, they would be required to comply with that order.

Petitioners argue the Court should ignore the *Payton* analysis in favor of *Wade v. Byles*, 83 F.3d 902 (7th Cir. 1996), the case they claim conflicts with the Sixth Circuit.[20] In *Wade*, the security guards did not have plenary police powers, were not subject to supervision by any police authority and were not authorized to make arrests throughout the entire facility, but only in the lobby area, and only for trespass. They were characterized as "glorified doormen." *Id.* at 905. In *Payton*, the court stated that the authority in *Wade* was so limited that if a crime occurred in a resident's apartment or stairwell, "the security guards presumably would have had to call the police" to make the arrest. *Payton, Id.* at 630. Here, Ms. Brown's plenary arrest authority extended throughout the entire area of the casino, the parking lot and perimeter and was not limited to trespass violations but rather include all misdemeanors and felonies. Moreover, while in the parking lot and perimeter, she was not prohibited from carrying her handgun.

The Casino and its security police officers were certified under M.C.L § 338.1080 as security police officers, and not, as the Casino's security manager pointed out at trial, security guards. They had the authority, as in *Payton*, granted to them by the State of Michigan and the Michigan State Police to, among other things, arrest without a warrant everywhere in the Casino, something a security guard or private individual cannot do. Ms. Brown abused this

20. The *Wade* court also did not engage in the pinpoint analysis of the "fair attribution" test that Petitioners argue was not performed by the Sixth Circuit.

authority with impunity. The Petitioners were not required to seek the benefits afforded by M.C.L § 338.1080 to become certified to make arrests. In fact, the Casino and its personnel are no longer certified to make arrests under PA 330. However, once the Casino's security police officers did become certified to make arrests, they should be subject to § 1983 liability when they overstep the bounds the Constitution places on them, just as a police officer would.

Contrary to the statements on page 24 of the Petition, there is no split among the Circuits on the issue of whether a state certified security police officer (and not a security guard) licensed to make an arrest is a state actor. The dearth of cases on this limited issue is underscored by the fact that Petitioners, with the exception of *Wade*, (whose arrest powers were limited to the lobby and for the sole infraction of trespassing), can not point to one case in which a security police officer, licensed by the State with plenary power to make an arrest, and vetted by and subject to state police department authority, was not held to be a state actor. On the other hand, several federal courts have held private security police with arrest authority to be state actors. *See* Section II, B, *supra*.

Similarly, the so-called conflict with Michigan law in *City of Grand Rapids v. Impens*, 327 N.W.2d 278 (1982) is equally fallacious. The entire Sixth Circuit, when it denied Petitioners' motion for rehearing *en banc*, understood the distinction under Michigan law between a security police officer, under M.C.L. § 338.1079(1) who has the same authority to make an arrest that a police officer has, unlike a security guard who does not have any statutory authority to make an arrest but is merely "employed for the purpose of protecting the property and employees of their employer." M.C.L. § 338.1079(2).

Petitioners fail to point out that the "security guards" in *Impens* were in fact traditional store security guards and not licensed security police officers as that term is described in M.C.L. § 338.1079. The security guards in *Impens*, unlike

Ms. Brown and her cohorts, did not have any authority to make an arrest under PA 330 and were simply security guards employed at a Meijers store (a mid-western version of a typical Wal-Mart) for the sole purpose of guarding the property of the store pursuant to M.C.L. § 381.1079(2).

Unlike Ms. Romanski, whom the jury found was arrested, the security guards in *Impens* detained a suspected shoplifter under a shopkeepers privilege and did not make an arrest. This shopkeepers privilege is codified in Michigan at M.C.L. § 600.2917 and specifically provides it is limited to "a library or merchant" and applies only to "goods held for sale in a store" and "library materials." [21]

The Casino was the product of years of legislation, numerous regulations, and memoranda of understanding between the Casino, the Michigan Attorney General and the Michigan State Police. Despite all of this, there is simply no legislation or regulation to support Petitioners' initial proposition that it owned the token, that it was a merchant or that the shopkeepers privilege in *Impens* applied to it. *Impens* simply does not apply to the Casino or to security police officers in Michigan.

Finally, Petitioners' argument that "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" is unfounded. Ms. Brown was a licensed security police officer and not a security guard. This case applies to nine employers in Michigan, who can avoid § 1983 by

21. Although the Casino has changed its position in its Petition, it argued up through and including its petition for rehearing *en banc* that there was "probable cause" and the shopkeepers privilege should apply because it still owned the token even though it was paid out to a successful prior bettor who failed to claim it. District Judge Zatkoff, who concluded, under Michigan Law, the token was lost property found by Ms. Romanski, refused to apply the shopkeepers privilege set forth in M.C.L. § 600.2917 because "MotorCity never demonstrated that it was a "merchant" and never demonstrated the token was a "good held for sale."

simply not licensing their employees to arrest as the Casino has since done.

At least two federal courts since *Romanski* have recognized that the Sixth Circuit has not subjected every security guard in the midwest to § 1983 liability. In *Boykins v. VanBuren Township*, 2006 W.L. 305751 (E.D. Mich. Feb. 9, 2006), the District Court dismissed a § 1983 action against two Meijer shopping center security guards finding no state action. In determining the guards were exercising the "shopkeepers privilege" *Boykin* held that *Romanski* was "distinguishable on it facts" because in *Romanski*, Ms. Brown was "licensed under state law as a private security police officer," "carried a badge," "wore handcuffs" and "had authority to effect warrantless arrests."

Similarly, in *Padlo v. VG's Food Center*, 2005 W.L. 3556245 (E.D. Mich., Dec. 29, 2005), the court held that store employees who detained two suspected shoplifters pursuant to the shopkeepers privilege found in M.C.L. § 600.2917 were not state actors and refused to apply *Romanski* for the reason that store employees were not private security police officers.

B. The Sixth Circuit's Decision Is Correct Because The Plenary Power To Arrest Is An Exclusive Power Reserved To The State

The police function is "one of the most basic functions of government" and an arrest is "the function most commonly associated with the police." *Foley v. Connelie*, 435 U.S. 291, 297 (1978). "The exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals." *Id.* at 298. Numerous Federal courts have agreed that the plenary power to make an arrest has been a power traditionally reserved to the State alone and those to whom it delegates this authority. *Payton*, 184 F.3d at 630; *Henderson*, 631 F.2d at 1118; *Rojas*, 645 F. Supp. at 858; *Thompson*, 425 F. Supp. at 409-10. *See also United States v. Hoffman*, 498 F.2d

879, 881 (7th Cir. 1973) (holding that private railroad police possessing the same powers as public police officers were state actors). *Screws v. United States*, 325 U.S. 91, 109-10 (1945) (observing that one has the power to arrest only when one is "clothes with the authority of state law") (citation omitted); *Rodriguez v. Smithfield Packing Co., Inc.*, 338 F.3d 348, 355 (4th Cir. 2003). "Underlying all of these cases is the notion that if the state cloaks private individuals with virtually the same power as public police officers, and the private actors allegedly abuse that power to violate a plaintiff's civil rights, that plaintiff's ability to claim relief under § 1983 should be unaffected." *Payton, Id.* at 630. Petitioners were exercising an exclusive state function when they arrested Ms. Romanski.

III. THE PUNITIVE DAMAGE AWARD IS NOT EXCESSIVE IN LIGHT OF THE PETITIONERS' "PARTICULARLY EGREGIOUS" CONDUCT

This case should not be held pending the decision in *Philip Morris* because the 10-1 ratio suggested by Petitioners is not applicable in this uniquely egregious case. This Court has stated that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." *BMW of North America v. Gore*, 517 U.S. 559 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

This case, as the district court pointed out, "falls squarely within this exception" (Opinion and order denying motion for new trial, pg. 18). Moreover, unlike *State Farm*, *Gore*, and *Philip Morris*, which involved large compensatory awards to redress state law torts, "where injuries are without a ready monetary value, such as invasions of Constitutional rights unaccompanied by physical injuries or other compensable harm, higher ratios between the compensatory or nominal award and the punitive damage award are to be expected." *Argentine v. United Steel Workers of Am., AFL-CIO, CLC*, 287 F.3d 476, 488 (6th Cir. 2002). Since

"actions seeking vindication of Constitutional rights are more likely to result in only nominal damages, strict proportionality would defeat the ability to award punitive damages at all." *Williams v. Kaufman County*, 352 F.3d 994, 1016 (5th Cir. 2003). Moreover, in § 1983 cases, Congress has not imposed a cap on damages such as the $300,000 cap on punitive damages set forth in Title VII cases. Congress "has not seen fit to impose any recovery caps in cases under § 1983, although it has had ample opportunity to do so." *Swinton v. Potomac Corp.*, 270 F.3d 794, 820 (9th Cir. 2001).

Both the district court and Sixth Circuit thoroughly analyzed the jury's punitive damage award in this case which was tethered to the evidence that the Casino's average daily revenues were $1 million per day.[22] The district court in concluding the Casino acted with "at least indifference to the health or safety of [Ms. Romanski], an elderly woman" found the Petitioners' conduct to be "particularly reprehensible."

The Sixth Circuit described the Petitioners' conduct as "particularly egregious," "inexplicable," and agreed with the district court that a jury could properly "exclaim outrageous." The Sixth Circuit concluded the

> "detention itself and the manner in which it was carried out . . . were so egregious in light of the circumstances that malice naturally comes to mind. What other motivation, a reasonable observer might ask, would cause Brown and her colleagues to detain and interrogate a 72-year old woman in a windowless room over five cents?
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22. The Casino resisted discovery of its daily expenses. Magistrate Judge Pepe denied the Casino's motion for a protective order and ruled that if the Casino did not "open its books" it could not provide evidence of its expenses at trial to offset the $1 million (now $1.2 million), it averages in daily revenues.

> "The fact that the [Petitioners] knew that the Casino's own patrons had not been provided with notice of the slot-walking prohibition only makes the [Petitioners'] conduct more reprehensible." [23] *Romanski*, 428 F.3d at 644.

The Sixth Circuit further found however the

> remarkable abuse of power did not end there. It is undisputed that the Casino revoked Romanski's lunch ticket and, having been ejected, she was not permitted to eat anywhere in the Casino. In other words, the rather inhospitable outside (it was humid and over 90 degrees) was the 72-year old Romanski's only choice for lunch.

Romanski at 644. Finally, the Sixth Circuit recognized that the Petitioners would not let Ms. Romanski use the restroom by herself but "callously forced her to endure the indignity of having Brown stand guard outside the stall." [24] *Id.* at 644.

The Supreme Court in granting *certiorari* limited the questions presented in *Phillip Morris* to conduct in State court tort cases "analogous to a crime" and whether a jury could punish for "conduct on non-parties." Petitioners did not raise these issues in the Sixth Circuit. The 10-1 ratio the Petitioners asked the Sixth Circuit to apply is not the issue in *Phillip Morris*. It has no applicability to this § 1983 case which involves conduct personal to Ms. Romanski, which, although not criminal, was outrageous, reprehensible, and egregious.

The Sixth Circuit in closing its discussion of reprehensibility found it

> appropriate to quote the district court again '. . . [T]his case was not about the loss of a five-cent

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23. The Casino has since changed this policy to conform to Michigan law, as instructed by the District Court, that the tokens are "lost or abandoned property and not the property of the Casino."

24. Ms. Romanski testified at trial "I didn't want to come out [of the stall]. Because I was a mess. I was crying and I was shaking."

> token or a nine-dollar meal ticket: it was about [Romanski's] right not to be unreasonably seized [and] unreasonably detained. . . . [Petitioners] acted with at least indifference to the health or safety of [Romanski], an elderly woman.'[25] *Id.* at 645.

The district court judge sat through the trial, and the Sixth Circuit, presumably, read the trial transcript. As the Court stated in *Sherman v. Kasotakis*, 314 F. Supp. 2d 843 (N.D. Iowa 2004), when approving a ratio of 12,500 - 1, "while compensatory damages were difficult to calculate the egregiousness of defendant's conduct was obvious to everyone in the courtroom." *Id.* at 875. This case is not similar to, and should not be held pending *Philip Morris*. After five years, it is finally time to vindicate Ms. Romanski's civil rights.

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25. It should be noted that Ms. Romanski ate a light breakfast early in the morning, anticipating her "all you can eat" lunch buffet. She arrived home sometime after 7:00 p.m. The Casino's attorney, when he deposed Ms. Romanski, asked her "the MotorCity Casino is not in the best section of Detroit, is it?" Ms. Romanski responded "no." The Casino's counsel further asked "And it's kind of built so that it's kind of like an island around, I'll use the term, desolation around it, isn't it?" To which Ms. Romanski responded "I don't know."

CONCLUSION

The Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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