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No. 13-1636

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In the  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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PETER SHAREEF ARABO,

Plaintiff-Appellant,

v.

GREEKTOWN CASINO, LLC, LEE HOWES, JOHN DOE  
#1, JOHN DOE #2, JOHN DOE #3, JOHN DOE #4,  
WAYNE GALLAGHER, JOHN H. AUTREY, JOHN DOE,  
#5, JANE DOE, #1, JOHN DOE, #6, JOHN DOE #7, CITY  
OF DETROIT, TERRY BONDS, WILLIAM BREWSTER,  
REBECCA GAJESKI, MGM GRAND DETROIT, LLC,  
JANE SMITH #1, JAMES ROGERS, MICHIGAN GAMING  
CONTROL BOARD, JOHN JONES #1, AMY BRANNAN,  
STEPHEN FORD, JOHN DOES #8 TO 100, RICHARD  
ROES, #1 TO 100, JOHN SMITHS #2 TO 100, JOHN  
JONES #2 TO 100,

Defendants-Appellees.

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Appeal from the United States District Court  
Eastern District of Michigan, Southern Division  
Honorable Avern L. Cohn

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**BRIEF FOR DEFENDANTS-APPELLEES**  
**MICHIGAN GAMING CONTROL BOARD AND AMY BRANNAN**

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## **STATEMENT IN SUPPORT OF ORAL ARGUMENT**

Defendants-Appellees Michigan Gaming Control Board and Amy Brannan (the Board Defendants) suggest oral argument is unnecessary because the dispositive issues have been authoritatively decided, and the arguments will be adequately presented in the Briefs and Authorities cited by the parties thereby negating any need for oral argument. Fed. R. App. P. 34. Alternatively, if the panel believes oral argument should be conducted, then the attorneys on behalf of the Board Defendants would request the opportunity to appear before the panel.

## **JURISDICTIONAL STATEMENT**

Plaintiff-Appellant, Peter Shareef Arabo, brought this civil rights action pursuant to 42 U.S.C. § 1983. (R. 1, Complaint, ID# 1-40). On September 21, 2012, the district court granted the Board Defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6). (R. 33, Memorandum and Order, ID# 263-276). On April 17, 2013, the district court entered the Final Stipulated Order dismissing the allegations against the remaining Defendants. (R. 41, Final Stipulated Order, ID# 387-392). Within 30-days of the entry of the Final Stipulated Order, Arabo filed his Notice of Appeal in this Court. (R. 42, Notice of Appeal, ID# 393-394). Thus, this Court has jurisdiction over Arabo's timely filed Notice of Appeal pursuant to 28 U.S.C. § 1291 and Fed. R. App. P. 4.

## STATEMENT OF ISSUES PRESENTED

1. To support a claim under 42 U.S.C. § 1983, the plaintiff must demonstrate that the defendants acted under color of state law. A private party's actions are not fairly attributable to the state merely because the state extensively regulates the private party. Arabo claims that private parties' actions are attributable to the state because the Board regulates the gaming industry in Michigan. Has Arabo adequately alleged state action to support his §1983 claims?
2. To adequately state a due process violation, the plaintiff must demonstrate that the state deprived him of a protected liberty or property interest without due process. Arabo failed to identify a protected property or liberty interest and failed to demonstrate that the Board defendants committed the deprivation. Has Arabo failed to state a due process violation?
3. To support an equal protection violation, a plaintiff must show that the state burdened a fundamental right or irrationally applied a law in a discriminatory manner. Arabo does not claim that the state burdened a fundamental right or treated him differently from any other individual. Has Arabo failed to state an equal protection claim?
4. Qualified immunity protects government officials from liability unless their conduct violated a clearly established constitutional right. Arabo alleged that Amy Brannan violated his rights when she responded to his question by explaining to him that Greektown Casino had barred him because he removed chips from the table and ran away. Is Brannan entitled to qualified immunity?

## INTRODUCTION

Through this appeal, Arabo continues his persistent effort to force a square peg into a round hole. In a Hail Mary attempt to create an actionable claim, Arabo continues to assert that Defendant Greektown Casino (which has been dismissed from this action) and Defendant-Appellee MGM Grand Detroit Casino should be considered state actors based solely on the Board's authority to regulate the gaming industry in Michigan. He seeks injunctive relief against the Board and damages against one of its employees, Amy Brannan, despite the fact that they had no involvement in any of the incidents that form the basis for this suit.

Although concluding that the Board and Brannan violated his due-process and equal-protection rights, Arabo's complaint failed to allege any facts that could legitimately support the Board's or Brannan's liability. Recognizing this deficiency, the District Court dismissed all claims relating to the Board Defendants. In its findings, the District Court accurately determined that Arabo had failed to establish state action because the actions of Greektown and MGM could not be attributed to the Board. Additionally, the court determined that

the Board could not be found liable for the casinos' actions or because it had not adopted regulations Arabo desired. Finally, it stated that Brannan could not be held liable because Arabo did not allege that she had personal involvement in the incidents and, therefore, did not violate his constitutional rights.

### **STATEMENT OF FACTS AND PROCEEDINGS**

Arabo styles himself as a skilled blackjack card counter capable of obtaining an advantage over a casino under certain conditions. (R. 1, Complaint, ID# 8). He bases his claims against the Board Defendants on two incidents. First, he contends that, while he was playing blackjack at Greektown Casino on March 6, 2010, a dispute arose between Greektown and an unknown player regarding whether the unknown player had requested an additional card. (R. 1, Complaint, ID# 9-11). Casino personnel determined that the card had been dealt properly, and Arabo objected. (R. 1, Complaint, ID# 13-14). The hand was continued, and the dealer won. (R. 1, Complaint, ID# 14). Arabo took back the chips that he had wagered and attempted to leave. (R. 1, Complaint, ID# 15). At that point, casino personnel detained him and contacted the local police. (R. 1, Complaint, ID# 15-21). Arabo was

subsequently charged with larceny but was ultimately acquitted. (R. 1, Complaint, ID# 22-23).

The second incident underlying his claims occurred at MGM Grand Detroit Casino. Arabo alleges that on June 8, 2011, he was playing blackjack at the MGM Grand Detroit Casino when MGM personnel informed him that he had to reduce his bet. (R. 1, Complaint, ID# 23). Arabo protested, and MGM personnel returned his bets and asked him to leave the premises and not return. (R. 1, Complaint, ID# 23). Arabo filed a complaint with the Board regarding his ejection from MGM, which constituted his first contact with the Board. (R. 1, Complaint, ID# 24). The Board conducted an investigation and determined that MGM had acted within its rights when it ejected Arabo from the casino. (R. 1, Complaint, ID# 24).

The only other Board contact the Complaint mentions purportedly occurred on July 1, 2011, when Arabo contacted the Board to see if, in light of his acquittal on the larceny charge, he could return to Greektown. (R. 1, Complaint, ID# 24). Arabo contends that he spoke with Brannan that day and she told him Greektown had barred him

because he stole chips and he was an advantage player. (R. 1, Complaint, ID# 24-25).

Based on these events, Arabo filed an eleven-count complaint under 42 U.S.C. §§ 1983, 1985(3), and 1986 alleging various constitutional violations against numerous defendants. (R. 1, Complaint, ID# 1-40). Of the eleven counts, only counts 1-4 related to the Board or Brannan. (R. 1, Complaint, ID# 25-32). In particular, Arabo alleged that the Board and Brannan violated his right to due process under the Fourteenth Amendment of the United States Constitution and deprived him of equal protection of the law pursuant to 42 U.S.C. § 2000a. (R. 1, Complaint, ID# 25-32). Arabo did not allege that the Board or Brannan took any specific action against him, but instead claimed that the Board and Brannan were liable based on the Board's authority to regulate casinos. (R. 1, Complaint, ID# 8-32).

In response to these allegations, the Board Defendants filed a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). (R. 18, Motion to Dismiss by Brannan, MGCB, ID# 169-184). The Board Defendants contended that Arabo's claims should fail because (1) no state action was taken against him, (2) the Board

Defendants did not deny him due process, (3) the Board Defendants did not deny him equal protection, and (4) Brannan was entitled to qualified immunity. (R. 18, Motion to Dismiss by Brannan, MGCB, ID# 169-184).

After hearing oral arguments, the District Court granted the Board Defendants' motion to dismiss. (R. 33, Memorandum and Order, ID# 263-276). It agreed that the actions of the casinos could not be attributed to the Board based solely on the Board's authority to regulate the gaming industry. (R. 33, Memorandum and Order, ID# 272-275). It further concluded that Arabo had not alleged that Brannan did anything to violate his rights in the performance of her duties. (R. 33, Memorandum and Order, ID# 275-276).

Arabo now appeals, seeking a reversal of the District Court's findings and requesting that the matter be remanded for further proceedings in the trial court.

### **STANDARD OF REVIEW**

This Court reviews a district court's order granting dismissal under Rule 12(b)(6) *de novo*. *Courie v. Alcoa Wheel & Forged Prods.*, 577 F.3d 625, 629 (6<sup>th</sup> Cir. 2009). Although a court views the complaint



in a light most favorable to the plaintiff, accepting its allegations as true and drawing all reasonable inferences in the plaintiff's favor, the reviewing court does not accept "conclusory legal allegations that do not include specific facts necessary to establish the cause of action." *New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046, 1050 (6<sup>th</sup> Cir. 2011).

### SUMMARY OF ARGUMENT

Arabo's claims fare no better on appeal than they did below because they lack factual and legal foundation. Despite his 40-page, 211-paragraph complaint, Arabo fails to identify any constitutional deprivation that can be attributed to the Board or Brannan. Instead, he continues to insist that the casinos' acts constitute state action based solely on the Board's authority to regulate the gaming industry and that the Board's regulations (or absence of regulation) deprive him of his constitutional rights.

The District Court properly dismissed each count against the Board Defendants. First, Arabo failed to allege any state action that would allow him to pursue his claims against the Board Defendants. Second, he failed to allege that the State deprived him of a

constitutionally protected property interest sufficient to support his due-process claim. Third, he failed to adequately allege an equal protection violation. The complaint does not assert that the Board Defendants burdened a fundamental right or treated him differently than similarly situated individuals.

Finally, Brannan's statements to Arabo did not violate clearly established statutory or constitutional rights of which a reasonable person should have known, and she played no role in the alleged constitutional deprivations. As such, she was entitled to qualified immunity.

## ARGUMENT

### **I. Arabo failed to allege any state action that would allow him to pursue his claims against the Board Defendants.**

To state a claim for relief in a §1983 action, a plaintiff must establish that he was deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law. *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999). Here, Arabo primarily condemns the actions of private parties and attempts to hold those private parties

liable as state actors; he also attempts to hold the Board Defendants liable, in part, for the actions of the private parties.

The actions of a private party constitute state action only when they are fairly attributable to the state. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982). The Supreme Court has outlined three tests for evaluating whether private action constitutes state action: “(1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test.” See *Romanski v. Detroit Entertainment, LLC*, 428 F.3d 629, 636 (6<sup>th</sup> Cir. 2005). Arabo argues that the casinos qualify as state actors under both the public-function test and the close-nexus test. These contentions fail when examined under the light of existing precedent.

**A. Conducting legalized gambling is not a power that has been traditionally exclusively reserved to the state.**

Arabo contends that the casinos are private entities that have been delegated a public function. Without providing any reasonable support, he argues that the common law did not recognize gambling as legal unless it was conducted by the state. From there, Arabo makes an untenable inferential leap to conclude that legalized gaming constitutes

a public function. This contention constitutes a gross overextension of the public-function doctrine. As articulated by the District Court, “[t]he public function test applies to a private party exercising ‘powers traditionally reserved exclusively to the state,’ such as ‘holding elections, exercising eminent domain, and operating a company-owned town.’” (R. 33, Memorandum and Order, ID# 271), citing *Chapman v. Higbee Co.*, 319 F.3d 825 (6<sup>th</sup> Cir. 2003). As the Supreme Court noted in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 158 (1978), “[w]hile many functions have been traditionally performed by governments, very few have been ‘exclusively reserved to the State.’”

Arabo has not established that legalized gaming constitutes a power that has been exclusively reserved to the state. Consequently, the public-function doctrine does not support concluding that the casinos acted under color of state law.

**B. Arabo has failed to articulate a sufficiently close nexus between the Board and the actions of the casinos.**

“Under the symbiotic relationship or nexus test, the action of a private party constitutes state action when there is a sufficiently close nexus between the state and the challenged action of the regulated

entity so that the action of the latter may be fairly treated as that of the state itself.” *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6<sup>th</sup> Cir. 1992).

While the symbiotic relationship test centers on the state’s overall relationship with a private actor, the nexus test examines the state’s link to the challenged action. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

Arabo argues that the Board’s pervasive regulatory control satisfies the close-nexus test, making the casinos state actors. However, the Supreme Court specifically refuted this contention in *Jackson*, stating “[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment.” *Id.* at 350. The inquiry must be whether there is a sufficiently close nexus between a state and the challenged action of the regulated entity so that the action of the regulated entity may be fairly treated as that of a state itself. *Id.* at 351. The symbiotic or close nexus test does not lend itself to formulaic applications. *Hadges v. Yonkers Racing Corporation*, 918 F.2d 1079, 1081 (1990). Instead the Court must sort through and weigh the facts “to determine whether the alleged ties between the State and the

private actor are sufficiently strong to attribute the private actor's conduct to the state." *Id.*

Examining a fact pattern similar to the instant case, the Second Circuit in *Hadges* highlighted examples of connectivity that failed to establish private-party state action. *Id.* at 1081-1082. There, the plaintiff brought a § 1983 action against a racetrack that had excluded him. The plaintiff claimed that the state's pervasive regulatory control over the racetrack, the state's alleged delegation of its authority to exclude individuals from the racetracks, the racetrack's occasional monopoly over harness racing, and the state's receipt of significant tax revenues satisfied the symbiotic relationship and nexus test. *Id.* at 1083.

Consistent with the Supreme Court's decision in *Jackson*, the court in *Hadges* held that the state's involvement was insufficient to create a close nexus between the New York Racing Board and the racetrack for multiple reasons. *Id.* at 1082-1084. First, the presence of state regulation alone did not transmute the racetrack's conduct into state action, especially in light of the fact that there was no evidence that a state official participated in any of the incidents that formed the

basis for the suit. *Id.* Second, the plaintiff's delegation argument was an unsuccessful "attempt to transform a private proprietary right into a State regulatory power" because the Racing Board's rule allowing the racetrack to exclude patrons was simply a codification of a private property owner's common law right to exclude undesirable persons from their property. *Id.* Third, the existence of a monopoly did not satisfy the close nexus test without establishing a relationship between the private actor's actions and its monopoly status. Finally, the receipt of substantial revenues from a private actor's business does not create a symbiotic relationship between a private actor and the state. If this were the case "the actions of every successful corporation within the State would qualify as state action." *Id.*

Similar to *Hedges*, Arabo's arguments aggregate to the untenable conclusion that the Board's regulatory authority not only makes the casinos state actors, it makes the Board liable for any and all conduct of the casinos. And as was the case in *Hedges*, Arabo's recipe for a case that meets the close nexus test "lacks a basic ingredient-a nexus." *Id.*

Moreover, to the extent that Arabo seeks to hold the Board responsible for the casinos' actions, his claims fail. A plaintiff in a §

1983 case cannot rely on *respondeat superior* or vicarious liability, *Monell v. Department of Social Serv.*, 436 U.S. 658 (1978), much less a theory that a regulatory agency is responsible for the acts of those it regulates.

## **II. Arabo failed to adequately state a procedural due process claim.**

The Fourteenth Amendment provides that states cannot “deprive any person of life, liberty, or property without due process of law.” U.S. Const. amend. XIV, § 1. Arabo’s due-process claim fails for three reasons: (1) he cannot demonstrate he had a protected property interest; (2) he concedes that a private entity, Greektown Casino, was responsible for the deprivation; and (3) he cannot show that the Board owes him any “post-deprivation” process.

For a due process claim to succeed, the plaintiff “must first demonstrate the existence of a protected liberty or property interest.” *Joelson v. United States*, 86 F.3d 1413, 1420 (6th Cir. 1996). Property and liberty interests protected are not infinite, “for the words ‘liberty’ and ‘property’ in the Due Process Clause . . . must be given some meaning.” *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). If the



plaintiff can establish the existence of a protected liberty or property interest, courts then balance the nature of the government function involved against protection of the private interest to determine whether adequate procedural due process exists. *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975). Inherent within this procedure is the tenet that due process rights “are protected only against infringement by the government.” See *Flagg Brothers, Inc.*, 436 U.S. at 156.

**A. Arabo failed to establish a property interest to support his due process claim.**

The Supreme Court has defined a property right as a security interest in a specific benefit to which the person has a legitimate claim of entitlement. *Roth*, 408 U.S. at 569-571. It encompasses far more than an abstract need or desire and entails more than a unilateral expectation. *Id.* The Supreme Court has consistently held that while the Constitution extends various procedural safeguards to certain interests, it does not create property interests. *Id.* Instead, a property interest must derive from federal or state statute, rule of law, or a mutually explicit understanding. *Id.* In order to assert a valid property interest in accordance with the Due Process Clause, the plaintiff must

display a property interest that stems from a non-Constitutional source, such as a statute, rule, or “mutually explicit understanding,” that provides a legitimate claim of entitlement. *Id.* at 576.

Arabo argues that he has a property interest in “winnings” at the casinos. Logic dictates that in order to have an interest in winnings at a casino, the patron must first win. However, in his complaint, Arabo states that he lost. Specifically, as recounted above, he contends that, after Greektown decided that the disputed card had been properly dealt, the dealer won, and Arabo lost the hand. (R. 1, Complaint, ID# 9-14). Therefore, he had no winnings to rely on as his property interest for purposes of this claim. His wager constituted property he willingly risked on the outcome.

**B. Arabo concedes that the Board did not deprive him of property, Greektown Casino did.**

Arabo does not argue that the Board Defendants took any action to deprive him of property. Instead, he states that Greektown Casino took his money. This concession itself defeats his due process claim. A due process claim cannot succeed unless *the state* deprives the individual of property without due process of law.

Arabo argues that, even though the private casino was responsible for the deprivation, the Board has given the casinos the unilateral right to confiscate, without hearing, things of value from a patron and that the Board's failure to provide him with a post-deprivation remedy results in a due process violation. In support of this position he cites *Zinermon v. Burch*, 494 U.S. 113 (1990), for the proposition that a due process violation "is not complete unless and until the State fails to provide due process."

In *Zinermon*, a state mental-health-facility patient alleged that the employees at the facility admitted him as a voluntary patient without taking any steps to determine whether he was mentally competent to sign the admission forms. *Id.* at 114-115. In finding that Burch's complaint was sufficient to state a due process claim the Supreme Court stated, "to determine whether a constitutional violation occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate." *Id.* at 126.

Arabo appears to rely on *Zinermon* to assert that a due-process claim can survive if the state is responsible for failing to provide the post-deprivation remedy. But he stretches *Zinermon* beyond its reach.

That case could proceed because the plaintiff asserted that the state-actor hospital had caused the deprivation and the state had not provided adequate process. *Zinerman* does not support a claim like Arabo's, that a state violates due process unless it provides a remedy to every person who believes that a private party has improperly taken his money.<sup>1</sup>

### **III. Arabo has failed to state an equal protection violation.**

The Equal Protection Clause provides that no "State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This provision "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill*, 521 U.S. 793, 799 (1997). It is designed to "protect against arbitrary classifications, and requires that similarly situated persons be treated equally' . . . thus, '[t]o state an equal protection claim, a party must claim that the government treated

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<sup>1</sup> As argued above, Greektown Casino cannot be characterized as a state actor. This position is further supported by *Harvey v. Harvey*, 949 F.2d 1127 (11<sup>th</sup> Cir. 1992), a case that addressed *Zinerman*. The court in *Harvey* held that none of the parties could be considered state actors because acting in accordance with state law does not automatically convert private actors into state actors. *Harvey*, 949 F.2d at 1134.

similarly situated persons differently.” *Northville Downs v. Granholm*, 622 F.3d 579, 586 (6<sup>th</sup> Cir. 2010) (citations omitted). If a law creates a classification that does not “burden a fundamental right [or] target a suspect class” it will be upheld as long as it is rationally related to a legitimate government interest. *Vacco*, 521 U.S. at 799. This remains true “even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.” *Romer v. Evans*, 517 U.S. 620, 632 (1996). “Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law.” *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 271-272 (1979).

**A. A casino’s discretion to shuffle at will does not infringe upon equal protection rights.**

Arabo claims that the Board’s approval of game rules permitting MGM to shuffle at will resulted in a deprivation of his right to equal protection of the law. He does not claim that the Board’s action burdens a fundamental right or that it targets a suspect class. Therefore, Arabo

is considered a member of a non-suspect class, and the rational-basis test would apply to any classifying actions of the Board.

But Arabo's claim fails at the outset because he does not assert that the Board engaged in any classifying activity. As part of its authority to regulate casino gambling, the Board requires the casinos to submit the rules of its games for approval. Mich. Admin. Code R. 432.1801 (1998-2000). Board approval of game rules helps ensure that casinos conduct their games with integrity. It also provides casino patrons with advance notice of the rules of the game they choose to play. Arabo did not have to play blackjack if he believed that game rules permitting shuffling at will resulted in unfair blackjack. Additionally, consistent game rules encourage consistent treatment of patrons. They do not encourage disparate treatment. Arabo has not suffered a violation of his right to equal protection based on the Board's approval of rules that permit shuffling at will.

**B. The authority to exclude patrons does not infringe upon equal protection rights.**

Arabo also argues that the Board's alleged authorization to exclude patrons resulted in him being treated differently than other

patrons, but he has not alleged any Board action treating him differently than other patrons. Arabo was barred from the casinos *by the casinos*, not the Board. Regardless whether the reasons for his exclusion merit litigation between Arabo and the casinos, his exclusion had nothing to do with Board action. As indicated above, the Board is not liable for the casinos' actions, even if the casinos can be characterized as state actors.

The Board's exclusionary rules do "not preclude a casino licensee from ejecting or barring a person from its casino for reasons deemed necessary by the casino licensee." Mich. Admin. Code R. 432.1601 (1998-2000). Arabo overstates the breadth of this rule by asserting that the Board has given casinos the "unfettered right" to remove individuals. But the Board cannot authorize its licensees, and has not authorized them, to violate the law. This administrative rule simply makes it clear that the Board's exclusionary rules do not abrogate a casino's common law right to exclude patrons. See *Donovan v. Grand Victoria Casino & Resort, L.P.* 934 N.E.2d 1111 (Ind. 2010).

In *Donovan*, a similar case decided under Indiana law, the Indiana Supreme Court held that the Indiana Gaming Commission's

(IGC) regulation governing a casino's right to exclude certain patrons did not abrogate a casino's common law right of exclusion, and that a casino may exclude a blackjack card counter. The Board's rule above and the IGC's rule are quite similar, both providing that the regulatory agency's rules regarding exclusion will not preclude a casino from excluding a person from its casino gambling operation for lawful reasons. *See* 68 Ind. Admin. Code, R. 6-1-1(d) (2010).

Arabo cites the New Jersey Supreme Court case of *Uston v. Resorts Intern. Hotel, Inc.*, 445 A.2d 370 (N.J. 1982), to support his claim that a casino cannot exclude him for being an advantage player. But *Uston* is distinguishable from *Donovan* because the *Uston* Court concluded that, under the New Jersey Casino Control Act, the Commission alone had the authority to exclude patrons. *Id.* at 166. In contrast, the regulatory agencies in Indiana and Michigan have chosen to specifically reserve a casino's right to exclude patrons.

Arabo also cites *Vill. Of Willowbrook v. Olech*, 528 U.S. 562 (2001), in an effort to portray himself as a "class of one." In that case, *Olech* sued the village, alleging an equal protection violation based on the village's demand that she grant a 33-foot easement in order to connect



her property to the municipal water supply. *Id.* at 563. The village had requested only a 15-foot easement from other similarly situated property owners. *Id.* at 565. In finding that *Olech* had sufficiently stated an equal-protection claim, the Supreme Court identified *Olech* as a “class of one” because the village had intentionally treated her differently from others similarly situated without a rational basis for the difference in treatment. *Id.*

*Olech* serves only to highlight the inadequacies of Arabo’s complaint. He describes how MGM Grand Casino allegedly treated him differently but, unlike *Olech*, does not demonstrate that the casino intentionally treated him differently from other similarly situated patrons. Even if Arabo had been able to establish a sufficient nexus between the Board and the MGM, the District Court’s dismissal of the equal protection count was appropriate because Arabo failed to adequately state a claim.

**IV. The Complaint does not support Arabo’s claim that Brannan can be held individually liable for violating his constitutional rights.**

Government officials performing discretionary functions generally are shielded from liability for civil damages where their conduct does

not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To determine if qualified immunity attaches to an official's conduct, the court must employ the two-step analysis set forth in *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The court considers whether: (a) "a constitutional right has been violated" and (b) "that right was clearly established." *Everson v. Leis*, 556 F.3d 484, 494 (6<sup>th</sup> Cir. 2009) (quotation omitted). These questions do not have to be examined in order. *Pearson v. Callahan*, 555 U.S. 223, 242 (2009) (citation omitted).

Arabo has the burden of proving that Brannan is not entitled to qualified immunity. *Ghaith v. Rauschenberger*, 778 F. Supp. 2d 787, 797 (E.D. Mich. 2011). In addition to needing to show that she violated his constitutional rights, he must show that Brannan would have understood that she was violating a clearly established right. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (internal quotations omitted). To do so, he must show that "pre-existing law" compelled a conclusion of violation for every similarly situated reasonable public official facing those circumstances. See *Cope v. Heltsley*, 128 F.3d 452, 459 (6<sup>th</sup> Cir.

1997). “We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question *beyond debate*.” *Ashcroft*, 131 S.Ct. at 2083 (emphasis added). If “officers of reasonable competence could disagree on [the issue they are considering] immunity should be recognized.” *Malley v. Briggs*, 475 U.S. 335, 349 (1986). Without notice of clearly unlawful conduct, Brannan was entitled to qualified immunity. See *Ghaith*, 778 F. Supp. 2d at 797.

Here, the District Court properly dismissed Arabo’s due process and equal protection claims against Brannan. It recognized that Brannan’s interaction with Arabo consisted only of responding to his inquiry by explaining to him that Greektown Casino had barred him because he removed chips from the table and ran away, and because he is an advantage player. The Court properly concluded that she simply answered a question; she did not do anything to violate his

constitutional rights.<sup>2</sup>

Moreover, because Arabo has not demonstrated that the specific rights he complains of were clearly established, he fails to overcome that prong of the qualified-immunity test as well. A state officer's conduct violates clearly established law when, at the time of the challenged conduct, “[t]he contours of [a] right [are] sufficiently clear” that every “reasonable official would have understood that what he is doing violates that right.” *Ashcroft*, 131 S.Ct. at 2083. To provide such notice, the right complained of must be stated at a sufficient level of specificity. *Id.* at 2084. Broad articulations of the right involved, such as those Arabo makes, do not suffice. *Id.* Arabo must produce either binding precedent or a robust consensus of persuasive authority sufficient to have put Brannan on notice. *Id.* Arabo’s argument against qualified immunity in this case falls far short of that requirement.

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<sup>2</sup> Similarly, Arabo’s claims against Brannan fail because he has not demonstrated her personal involvement in the asserted constitutional violations. Individual capacity liability under § 1983 must be supported by evidence of personal involvement on the part of each defendant. *Grinter v. Knight*, 532 F.3d 567, 575 (6<sup>th</sup> Cir. 2008); *Greene v. Barber*, 310 F.3d 889, 899 (6<sup>th</sup> Cir. 2002). The allegations in Arabo’s complaint do not support individual liability in relation to Brannan.

In short, Brannan is entitled to qualified immunity because her explanation to Arabo did not violate clearly established statutory or constitutional rights of which a reasonable person should have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Arabo provides neither binding precedent nor a robust consensus of persuasive authority that would have put Brannan on notice that her statement violated his constitutional rights.

## **CONCLUSION AND RELIEF REQUESTED**

Arabo cannot demonstrate that Greektown and MGM engaged in state action such that they are liable to him under 42 U.S.C. § 1983. Moreover, he cannot demonstrate that the Board Defendants are responsible for the casinos' actions or have independently violated his constitutional rights. As such, he has failed to state plausible claims against the Board and Brannan, and the District Court properly dismissed his claims against them.

Based on the foregoing, the Board and Brannan request that this Court affirm the District Court's Memorandum and Order Granting their Motion to Dismiss.

Respectfully submitted,

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Dated: August 16, 2013

## **CERTIFICATE OF COMPLIANCE**

### **Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains no more than 14,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). There are a total of 5,378 words.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14 point Century Schoolbook.

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## **CERTIFICATE OF SERVICE**

I certify that on August 16, 2013, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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## DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Defendants-Appellees Michigan Gaming Control Board and Amy Brannan, per Sixth Circuit Rule 28(c), 30(b), hereby designated the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID Number
Complaint	03/06/2012	R. 1	1-40
Motion to Dismiss by Brannan, MGCB	05/15/2012	R. 18	169-184
Memorandum and Order	09/21/2012	R. 33	263-276
Final Stipulated Order	04/17/2013	R. 41	387-392
Notice of Appeal	05/14/2013	R. 42	393-394