No. _____

In the
Supreme Court of the United States

MATTHEW EDWIN GRONDA and
PHILIP LEE ELLISON,
Petitioners

v.

TITLE CHECK, LLC,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

An attorney must never be sanctioned under 28 U.S.C. § 1927 for good faith arguments in areas of first legal impression. Even isolated breaches of that principle will "stifle the enthusiasm or chill the creativity that is the very lifeblood of the law." *Mone v. Comm'r*, 774 F.2d 570, 574 (2d Cir. 1985) (observing that the statute must be "narrowly construed and with great caution."). Here, the lower courts breached that critically important principle by granting and later upholding a sanction under 28 U.S.C. § 1927 based upon a clear misunderstanding of the law and without any finding of subjective bad faith or objective recklessness. The questions presented are:

I. May attorneys be sanctioned pursuant to 28 U.S.C. § 1927 for filing a complaint which raises a good faith and legally supportable issue of first impression?

II. Is subjective bad faith or objective recklessness a mandatory requirement before imposing any sanctions on attorneys pursuant to 28 U.S.C. § 1927?

RELATED PROCEEDINGS

United States District Court (W.D. Mich.):
Garcia v. Title Check, LLC, No. 1:20-cv-724

United States Court of Appeals (6th Cir.):
Garcia v. Title Check, LLC,
Nos. 21-1449; 22-1574; and 22-1578

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PETITION

Petitioners Matthew E. Gronda and Philip L. Ellison respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the court of appeals (App. 4a-10a) is available at 2023 U.S. App. LEXIS 8244. The court's order denying rehearing en banc (App. 1a-2a) is available at 2023 U.S. App. LEXIS 12142. The district court's opinion and order granting sanctions (App. 11a-19a) is unpublished but available at 2021 U.S. Dist. LEXIS 82079.

JURISDICTION

The court of appeals entered judgment on April 5, 2023, App. 4a-10a, and denied a timely petition for rehearing on May 17, 2023, App. 1a-2a. On August 8, 2023, Justice Kavanaugh extended the time to file a petition for a writ of certiorari to and including October 14, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1927 of Title 28, United States Code, provides:

> Any attorney or other person admitted to conduct cases in any court of the

> United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

INTRODUCTION

This petition asks the Court to correct a serious threat to vigorous advocacy and in turn reaffirm commitment to the American Rule. That rule, so entrenched that it needs no introduction, is the "bedrock principle" of our nation's litigation practices" with "roots in our common law reaching back to at least the 18th century." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252-253 (2010); *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 126 (2015) (citing *Arcambel v. Wiseman,* 3 Dall. 306, 1 L.Ed. 613 (1796)). Its erosion or evasion should be jealously guarded against. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 59 (1991) (Scalia, J., dissenting).

The two solo attorneys here presented a complaint on behalf of their client built upon one central legal question that both lower courts agreed was one of first impression. App. 9a, 19a. On motion to dismiss filed in lieu of an answer, the District Court interpreted the controlling statute in Defendant Title Check LLC's favor and dismissed the case. Nothing dramatic or unusual about that—somebody has to win, and somebody has to lose. Or at least that was

the case until the District Court thereafter sanctioned those attorneys $73,752.45 for the mere filing of the complaint under 28 U.S.C. § 1927; or, in other words, they forfeited more than the median annual American household income just for filing a complaint. U.S. Census Bureau, *Income in the United States 2021, Report No. P60-276* (Sept. 13, 2022), https://bit.ly/3NdwndN.

Sanctions under 28 U.S.C. § 1927 are never permissible in response to good faith and supported arguments in areas of first legal impression. *Suazo v. NCL (Bahamas), Ltd.*, 822 F.3d 543, 556 (11th Cir. 2016). And regardless of frivolity, in some circuits the initial pleadings alone can never justify the imposition of sanctions under the statute. *In re Keegan Mgmt. Co., Sec. Litig.*, 78 F.3d 431, 435 (9th Cir. 1996). Because even one errant decision of a circuit court can chill advocacy of the bar, correction is necessary. *Edwards v. Gen. Motors Corp.*, 153 F.3d 242, 246 (5th Cir. 1998). Furthermore, the Sixth Circuit stands alone amongst the 12 circuits in not requiring a finding of either subjective bad faith or objective recklessness as a prerequisite for the grant of sanctions under 28 U.S.C. § 1927.

Sanctions are serious business with serious consequences for individual lawyers, the bar, and the law. No lawyer should suffer the often profound personal and professional effects of an incorrectly meted sanction, as Petitioners surely have here. Lawyers should also not be subject to drastically differing standards of conduct between the circuits

under one statute that has effectively been in force for 210 years. 28 U.S.C. § 1927; 3 Stat. 21 (1813). Because the specter of sanctions being meted incorrectly or under conflicting standards can "stifle the enthusiasm or chill the creativity that is the very lifeblood of the law," *Mone v. Comm'r*, 774 F.2d 570, 574 (2d Cir. 1985), Petitioners ask that this Court grant certiorari.

STATEMENT OF CASE

Under Michigan's General Property Tax Act, MICH. COMP. LAW § 211.1 et seq., failure to pay one's real property taxes results in the government's foreclosure upon and sale of said property. Title Check, the private company that was Defendant in this case, is hired and paid by many Michigan county treasurers to facilitate that process. Title Check was fully paid for those services at a fixed rate by each respective county contracting with it. At the conclusion of this process, Title Check, as agent for the county treasurers, sells the foreclosed properties at a public auction.

Despite not being referenced anywhere in the controlling contract, and otherwise already being paid to sell the property by its principal, Title Check - at its own behest - imposes what it calls "10% Buyer's Premium" upon successful buyers at the public auction. Said another way: if a successful bidder at public auction purchases a tax-foreclosed property for $50,000, it first must pay Title Check a separate post-sale fee of $5,000 to close the transaction (in addition

to what Title Check is already charging to and collecting from the taxpayers by contract).

Plaintiff Garcia was one such buyer who had to pay this separate post-sale fee to Title Check as a condition of purchasing the public's property at auction. He, represented by Petitioners, filed a complaint against Title Check alleging that the "10% Buyer's Premium" was unlawful. The complaint advanced one federal claim under the Racketeer Influenced and Corrupt Organizations Act (predicated by wire fraud and/or the Hobbs Act), 18 U.S.C. § 1961 et seq., and one under a state law claim of unjust enrichment.

Title Check moved to dismiss in lieu of filing an answer. Addressing the viability of Garcia's claims, the District Court fairly found that the premise of both claims was one and the same:

> The heart of Garcia's [complaint] is simple: because the GPTA does not explicitly authorize the 10% buyer's premium as part of the statutory "minimum bid," it prohibits Title Check from charging such a fee.

App. 30a. The lynchpin of Garcia's theory of the case is that the Michigan General Property Tax Act (GPTA) establishes a "minimum bid" price for the sale of tax-foreclosed property. More precisely, the version of MICH. COMP. LAW § 211.78m(16)(a) in effect at the time the complaint was filed stated:

The minimum bid shall include all of the following:

> (i) All delinquent taxes, interest, penalties, and fees due on the property. If a city, village, or township purchases the property, the minimum bid shall not include any taxes levied by that city, village, or township and any interest, penalties, or fees due on those taxes.
>
> (ii) The expenses of administering the sale, including all preparations for the sale. The foreclosing governmental unit shall estimate the cost of preparing for and administering the annual sale for purposes of prorating the cost for each property included in the sale."

MICH. COMP. LAW § 211.78m(16)(a)(i)-(ii). The statute further provided, and continues to provide, that a property "*shall* be sold to the person *bidding the minimum bid*, or if a bid is greater than the minimum bid, the highest amount above the minimum bid. MICH. COMP. LAW § 211.78m(2) (emphasis added).

By Title Check conditioning completion of the sale upon payment of an additional post-sale fee,

Garcia alleged that it was violating the GPTA for two reasons.

First, he argued that Title Check's charge was not a permitted under the plain language of MICH. COMP. LAW § 211.78m(16). While the definition of minimum bid expressly entails the pass-on of Title Check's charge to the county treasurer, it does not permit the agent to pile on a separately self-created fee charged direct to the buyer. In other words, Title Check simply just cannot demand more money given the language of the statute.

Second, alternatively, and even if MICH. COMP. LAW § 211.78m(16)(a) permits a private party to unilaterally impose a sale charge upon buyers of public property, Garcia argued that the statutory language required any sale expense to be included within the minimum bid - which Title Check also did not do. Otherwise, Title Check is in violation of the clear command of MICH. COMP. LAW § 211.78m(2) by not selling the property for the minimum bid or highest bid thereafter.

The question of whether the buyer's premium is lawful under the GPTA was one both the District Court and the Court of Appeals found to be of first impression. App. 9a, 19a. The District Court ruled in favor of Title Check and dismissed the complaint. In doing so, the District Court opined:

> The GPTA is clear that the minimum bid is just that: a minimum. It sets a floor,

> rather than a ceiling, price. Properties may not be sold under the minimum bid amount, but the GPTA does not forbid property to be sold for a price larger than the minimum bid.

App. 32a. In support of that position, the District Court indicated that the Michigan Legislature's use of the language "shall include all of the following" in MICH. COMP. LAW § 211.78m(16)(a) was not one of limitation and thus would allow Title Check to charge Garcia the additional fee. How that interpretation comports with MICH. COMP. LAW § 211.78m(2), which strictly requires the sale of property for a winning bid at or above the minimum bid price, was left unexamined.

Garcia unsuccessfully appealed and following issuance of the mandate, Title Check moved the District Court for Petitioners to be sanctioned for the filing of a frivolous complaint under 28 U.S.C. § 1927. That motion was granted, again unsuccessfully appealed, ultimately leading to the present petition.

REASONS FOR GRANTING THE PETITION

For this case, Petitioners carefully researched the applicable caselaw and uncovered no federal or state authority on point, which nobody disputes. *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1213 (6th Cir. 1997) (sanctions are unavailable where the central issue is one of first impression, absent an improper purpose). The District Court nonetheless sanctioned

Petitioners under 28 U.S.C. § 1927 on the sole basis that Michigan law generally constructs the statutory phrase "shall include" as one of enlargement, unless the context clearly indicates a contrary legislative intent citing to *Skillman v. Abruzzo*, 88 N.W.2d 420 (Mich. 1958), and *Mich. Bell Tel. Co. v. Dep't of Treasury*, 518 N.W.2d 808 (Mich. 1994).

The District Court and Sixth Circuit, however, clearly misinterpreted Michigan's law of statutory construction. Michigan courts have long since dropped *Skillman*'s presumption of enlargement. The modern rule of construction is that "the word 'include' can be used as a term of enlargement or of limitation, and the word in and of itself is not determinative of how it is intended to be used." *Belanger v. Warren Consol. School Dist. Bd. of Ed.*, 443 N.W.2d 372, 377 fn.25 (Mich. 1989); *San Marino Iron, Inc. v. Haji*, 991 N.W.2d 828, 832 (Mich. Ct. App. 2022), lv denied, 987 N.W.2d 205 (Mich. 2023) (observing that "when used in a statute, the word 'includes' can be used as a term of enlargement or limitation, with the context of the word's use helping determine whether it is used in a limiting or enlarging manner" and finding it to be one of limitation in that specific context). In other words, *Skillman*'s rule of statutory construction is no longer the law. See *Frame v. Nehls*, 550 N.W.2d 739 (Mich. 1996).

On appeal, party briefing and the opinion of the Sixth Circuit implicitly recognize the District Court's error of law. The Sixth Circuit nevertheless affirmed, casting a wider net to uphold the exercise of discretion finding that Petitioners never made a plausible

argument that the context of controlling statute signifies that "shall include" is a limit rather than a baseline of what the minimum bid must contain." But with due respect, Petitioners did – early and often.

First, textually, the version of MICH. COMPL. LAW § 211.78m(16) existing at the time of the complaint does provide for recoupment of auction expenses but does not even arguably specify the right of a private seller's agent to assess an additional fee direct to the successful bidder. Later argued to the District Court, Michigan recognizes the principle of statutory construction known as "*expressio unius est exclusio alterius*" – express mention in a statute of one thing implies the exclusion of other similar things." *Stowers v. Wolodzko*, 191 N.W.2d 355, 362 (Mich. 1971). Giving much credence to the plausibility of Petitioners' argument is the Michigan Legislature's amendment to MICH. COMP. LAW § 211.78m(16) after the commencement of this suit. As amended, MICH. COMP. LAW § 211.78m(16) today expressly includes reference to "outside contractors." The Legislature's own published analysis of this amendment indicates that "the bill would expand the definition of "minimum bid" to allow the inclusion of additional expenses." Michigan House Fiscal Agency, Senate Bills 676/1137 of 2020, https://bit.ly/3PRfdlV.

Second, and even with a rebuttable statutory presumption of enlargement, Petitioners alleged that the text of MICH. COMP. LAW § 211.78m compelled a limiting statutory construction. The statute, at Subsection 2, states that a property "*shall* be sold to

the person bidding the minimum bid, or if a bid is greater than the minimum bid, the highest amount above the minimum bid." MICH. COMP. LAW § 211.78m(2) (emphasis added). Interpreting MICH. COMP. LAW § 211.78m(16) to allow for the addition of unenumerated post-sale charges directly conflicts with Subsection 2, which mandates sale at the "minimum bid" (or highest bid thereafter). Along the same vein, even if permissible, the charge would have had to been included within the minimum bid to be consistent with Section 2. Under Michigan law, "it is a well-established, cardinal rule of statutory construction that provisions of a statute must be construed in light of the other provisions of the statute." *Workman v. Detroit Auto. Inter-Ins. Exch.*, 274 N.W.2d 373, 385 (1979).

In conclusion, there was no mandatory rule of statutory construction or prior precedent that strictly compelled Title Check's automatic victory. There was no allegation that Garcia's complaint was not well-grounded in objective fact. See *Century Prod., Inc. v. Sutter*, 837 F.2d 247 (6th Cir. 1988). And the case is also well-grounded in both equity and policy. Thus, the Sixth Circuit's affirmance – essentially on grounds apart from the District Court – runs contrary to the law of essentially every circuit, including its own. It is black-letter law that sanctions are inappropriate in any case built upon a legal question of first impression. *Asai v. Castillo*, 593 F.2d 1222, 1225 (D.C. Cir. 1979) ("Since the court ... had not previously addressed this matter ... [w]e cannot say [the attorney] acted in bad faith in the matter.");

Bercovitch v. Baldwin Sch., Inc., 191 F.3d 8, 11-12 (1st Cir. 1999) ("No serious argument can be made that the [] action was frivolous, unreasonable, or without foundation at the time suit was brought or continued" when one of "first impression"); *Clarendon Nat. Ins. Co. v. Kings Reinsurance Co.*, 241 F.3d 131, 135 (2d Cir. 2001); *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3d Cir. 1987) ("advocating new or novel legal theories" "does not trigger a sanction award"); *Smith v. Detroit Fed'n of Tchrs. Loc. 231, Am. Fed'n of Tchrs., AFL-CIO*, 829 F.2d 1370, 1379 (6th Cir. 1987) (a case "found to lack merit... was not so obviously precluded by existing precedent that the attorney should have known that the claim was frivolous"); *Overnite Transp. Co. v. Chicago Indus. Tire Co.*, 697 F.2d 789, 795 (7th Cir. 1983) ("cases presenting a question of first impression are not frivolous, holding otherwise 'would have a profound chilling effect upon litigants.'"); *Guti v. I.N.S.*, 908 F.2d 495, 496 (9th Cir. 1990) ("A case is not frivolous when there is no controlling authority requiring a holding that the facts as alleged fail to establish even an arguable claim as a matter of law."); *Suazo v. NCL (Bahamas), Ltd.*, 822 F.3d 543, 556 (11th Cir. 2016) ("Where an appeal requires a court to decide an issue of first impression in a circuit court, it is not frivolous."). The circuits are in step with this Court, which has instructed that attorney sanctions are never to be meted out lightly and only with "especial restraint and discretion." *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101, 108, fn. 5 (2017) (citing *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 767 (1980)). The Sixth Circuit erred.

The point here is not to relitigate the case or quibble with its ultimate result, but instead to show that Garcia's claims were not without any arguable basis. See *Yousif v. Lynch*, 796 F.3d 622, 630 (6th Cir. 2015) ("The minimum qualification of a 'frivolous' filing is that it lacked an arguable basis either in law or in fact."). The fact that this case turned not on controlling adverse case law, but rather on general and open-ended principles of statutory construction highlights the crucial point: it presented an arguable novel question. And for that reason alone, it simply cannot be held that raising it represents "a serious and studied disregard for the orderly processes of justice" or that "very temple of justice has been defiled"—the standard that must be surpassed. *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 512 (6th Cir. 2002); *Cook v. Am. S.S. Co.*, 134 F.3d 771, 774 (6th Cir. 1998).

For any lawyer bringing novel questions before the courts, sanction threats are not the exception; they have become the norm. Responsible counsel can only push such cases forward through this barrage of fire where there is strict adherence to the rules of conduct. If the federal courts are to meaningfully provide a forum for litigants and attorneys to raise novel questions of law,[1] absolutely no deviation from these rules can ever

[1] Petitioners, as attorneys, have long present courts with new and novel questions of law and, where appropriate, requested to modify the law on behalf of their clients. See, for example *Lindke v. Freed*, 2023 U.S. LEXIS 1684 (U.S. 2023) (writ of certiorari

be tolerated. If there is uncertainty, and fear replaces faith, it is untenable for attorneys to keep pushing the boundaries of the law forward. *State Bar v. Corace*, 213 N.W.2d 124, 132 (Mich. 1973) (our legal system "intends, and expects, lawyers to probe the outer limits of the bounds of the law, ever searching for a more efficacious remedy"). This includes your Petitioners. Idealism and zealousness can overcome much, but that is no match for unpredictability when destruction of a lawyer's financial security and the irreversible loss of professional reputation are at play. See *Bowles v. Sabree*, E.D. Mich. No. 2:20-cv-12838, RE 63, PageID.1445-1446 (defendants suggesting that Petitioners are no longer adequate to be class counsel having been sanctioned in *Garcia v. Title Check*); Danielle Ferguson, *6th Circ. Affirms Sanctions In 'Frivolous' Foreclosure Fee Suit*, LEXIS LAW360, Apr. 6,

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granted), appealed from 37 F. 4th 1199 (6th Cir. 2022); *People v. Beck*, 939 N.W.2d 213 (Mich. 2019) (due process prohibits consideration of acquitted conduct in sentencing); *Taylor v. City of Saginaw*, 922 F.3d 328 (6th Cir. 2019) (holding that the use of tire chalk without a warrant is a search subject to the Fourth Amendment); *Kanuszewski v. Mich. Dep't of Health & Hum. Servs.*, 927 F.3d 396 (6th Cir. 2019) (challenging Michigan's permanent retention of newborn blood samples and medical data under the Fourth and Fourteenth Amendments); *Freed v. Thomas*, 976 F.3d 729 (6th Cir. 2020) (holding that plaintiff's Fifth Amendment claim for retention of surplus tax foreclosure proceeds was not barred by the Tax Injunction Act or principles of comity and distinguishing prior precedent); *Freed v. Thomas*, __ F.4th __; 2023 U.S. App. LEXIS 23639 (6th Cir. Sept. 6, 2023) (affirming Fifth Amendment violation); *O'Connor v. Eubanks*, __ F.4th __; 2023 U.S. App. LEXIS 26620 (6th Cir. Oct. 6, 2023) (officials were not entitled to qualified immunity on plaintiff's due process claims under the Fourteenth Amendment).

2023, https://bit.ly/3rVybQi; see also *Pacific Dunlop Holdings, Inc. v. Barosh*, 22 F.3d 113, 118 (7th Cir. 1994) (sanctions are to be to imposed "sparingly," as they can "have significant impact beyond the merits of the individual case" and "can affect the reputation and creativity of counsel").

As to the second issue – the standard of conduct – the District Court and Sixth Circuit granted and affirmed sanctions under 28 U.S.C. § 1927 without a finding of subjective bad faith or objective recklessness. While this is in accord with Sixth Circuit precedent, it stands alone in conflict with the balance of circuits. *Jones v. Cont'l Corp.*, 789 F.2d 1225, 1230 (6th Cir. 1986) (rejecting that sanctions under Section 1927 only lie where an attorney acted with recklessness or in bad faith and instead applying a reasonableness standard). Some circuits only permit sanctions under 28 U.S.C. § 1927 upon a finding of subjective bad faith. See *State St. Bank & Tr. Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 180 (2d Cir. 2004); *LaSalle Nat. Bank v. First Connecticut Holding Grp., LLC.*, 287 F.3d 279, 289 (3d Cir. 2002); *Brubaker v. City of Richmond*, 943 F.2d 1363, 1382 n.25 (4th Cir. 1991); *Schwartz v. Millon Air, Inc.*, 341 F.3d 1220, 1225 (11th Cir. 2003). Others instead hold that an objective showing of recklessness is sufficient. *Cruz v. Savage*, 896 F.2d 626, 631 (1st Cir. 1990); *Mercury Air Grp., Inc. v. Mansour*, 237 F.3d 542, 549 (5th Cir. 2001); *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1107 (9th Cir. 2002); *Miera v. Dairyland Ins. Co.*, 143 F.3d 1337, 1342 (10th Cir. 1998). One blends bad faith and recklessness, *In re*

TCI Ltd., 769 F.2d 441, 445 (7th Cir. 1985), and another is not sure what to do, *United States v. Wallace*, 964 F.2d 1214, 1218 (D.C. Cir. 1992). But again, none other than the Sixth Circuit apply a reasonableness test. An impermissible split exists in an area of law that demands uniformity. This Court is requested to resolve the circuit split.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari. In the alternative, the Court should summarily reverse the decision below.

Respectfully submitted,

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