No. _____

In the Supreme Court of the United States

MICHIGAN GAMING CONTROL BOARD, RICHARD KALM, GARY POST, DARYL PARKER, RICHARD GARRISON, BILLY LEE WILLIAMS, JOHN LESSNAU, AND AL ERNST, PETITIONERS

v.

JOHN MOODY, DONALD HARMON, RICK RAY, AND WALLY MCILLMURRAY, JR.

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

While investigating tips that licensed harness-racing drivers were accepting money to fix horse races, gambling regulators from the Michigan Gaming Control Board interviewed the drivers. Each driver had previously agreed to cooperate in investigations as a licensing condition but asserted his Fifth Amendment privilege and refused to answer questions. Gambling regulators suspended the drivers' licenses for failure to cooperate and later issued orders excluding them from racetracks, but no criminal charges were filed against the drivers. In this § 1983 action, the Sixth Circuit denied qualified immunity on the drivers' Fifth Amendment claim that the regulators violated their clearly established self-incrimination rights by suspending their licenses and excluding them. It also denied qualified immunity on the drivers' due-process claim that two of the regulators deprived them of a timely hearing about the later orders excluding them from entering racetrack grounds, a claim that the district court refused to allow the drivers to raise on remand because it was not in the complaint.

1. Whether government licensees who were never charged with a crime can demonstrate a violation of a Fifth Amendment right to refuse to answer regulatory-related questions without threat of a regulatory penalty, unless they were offered immunity.

2. Whether the licensees demonstrated a violation of clearly established law as to a right against self-incrimination and as to a due-process right to a timely post-exclusion hearing.

PARTIES TO THE PROCEEDING

The caption reflects all the parties to the proceeding. Although the lower courts incorrectly added the Criminal Division of the Department of Attorney General to the case caption after that division responded to a subpoena, the Criminal Division was never named in a complaint or joined as a party. See Comp. ¶¶ 1–10, Docket No. 1 (listing parties); see also Order at 13, Docket No. 92 (denying leave to file a first amended complaint).

TABLE OF CONTENTS

Questions Presented i
Parties to the Proceeding ii
Table of Authorities vii
Opinions Below 1
Jurisdiction 1
Constitutional and Statutory Provisions Involved 1
Introduction 2
Statement of the Case 5
A. Strictly regulated gambling 5
B. The race-fixing investigation 5
C. District-court proceedings 6
D. Sixth Circuit proceedings—*Moody I* 7
E. District-court proceedings—remand 10
F. Sixth Circuit proceedings—*Moody II* 11
Reasons for Granting the Petition 13
I. The Sixth Circuit's conclusion that the drivers demonstrated a violation of a self-incrimination right conflicts with other circuits and a state's highest court. 14
A. Eight circuits and California's highest court hold that *Garrity* immunity attaches automatically 14
B. The Sixth Circuit's anti-*Garrity* rule requiring an offer of immunity is unworkable. 18

C. Consistent with *Chavez*, nine circuits hold that a self-incrimination violation does not arise absent a criminal case..... 20

D. The Sixth Circuit failed to follow *Chavez*. .. 23

II. The Sixth Circuit's decision that the self-incrimination and due-process rights were clearly established conflicts with this Court's qualified-immunity cases and other circuits..... 26

A. The law was not clearly established against the regulators on the Fifth Amendment issues. 28

B. The law was not clearly established on the due-process issue either. 31

Conclusion 36

PETITION APPENDIX TABLE OF CONTENTS

United States Court of Appeals
for the Sixth Circuit
16-2244/2369
Opinion
Issued September 11, 2017..... 1a–34a

United States District Court
Eastern District of Michigan
4:12-cv-13593
Judgment
Issued September 20, 2016..... 35a–36a

United States District Court
Eastern District of Michigan
4:12-cv-13593
Opinion and Order Denying Plaintiffs'
Motion For Summary Judgment [138] and
Granting In Part Defendants' Motion
For Summary Judgment [144]
Issued August 15, 2016..... 37a–52a

United States Court of Appeals
for the Sixth Circuit
14-1511
Opinion and Judgment
Issued June 16, 2015 ..... 53a–77a

United States District Court
Eastern District of Michigan
4:12-cv-13593
Order Granting Defendants' Motion for
Summary Judgment…and Dismissing Case
Issued November 27, 2013..... 78a–98a

United States Court of Appeals
for the Sixth Circuit
16-2244/2369
Order (to stay mandate)
Issued December 8, 2017 ..... 99a

United States Court of Appeals
for the Sixth Circuit
14-1511
Order denying motion to stay
Issued August 25, 2015..... 100a

United States Court of Appeals
for the Sixth Circuit
16-2244/2369
Order (denying petition for rehearing en banc)
Issued November 14, 2017..... 101a

United States Court of Appeals
for the Sixth Circuit
14-1511
Order denying petition for rehearing en banc
Issued August 12, 2015..... 102a

U.S. Constitution
Amendment 5..... 103a

TABLE OF AUTHORITIES

Constitutional Provisions

U.S. Const. amend. V 1, 3, 20

Cases

Aguilera v. *Baca*,
510 F.3d 1161 (9th Cir. 2007) ..... passim

Anderson v. *Creighton*,
483 U.S. 635 (1987) 35

Ashcroft v. *al-Kidd*,
563 U.S. 731 (2011) 27, 34

Barry v. *Barchi*,
443 U.S. 55 (1979) 9, 10, 12, 33

Benson v. *Allphin*,
786 F.2d 268 (7th Cir. 1986) 34

Burrell v. *Virginia*,
395 F.3d 508 (4th Cir. 2005) 22

Chavez v. *Martinez*,
538 U.S. 760 (2003) ..... passim

City & Cty. of San Francisco, *Calif.* v. *Sheehan*,
135 S. Ct. 1765 (2015) 26

Columbian Financial Corp. v. *Stork*,
811 F.3d 390 (10th Cir. 2016) 14, 34

Confederation of Police v. *Conlisk*,
489 F.2d 891 (7th Cir. 1973) 17

District of Columbia v. *Wesby*,
583 U.S. —— (2018)..... passim

Gardner v. *Broderick*,
392 U.S. 273 (1968) 21

Garrity v. *New Jersey*,
385 U.S. 493 (1967) ..... passim

Gulden v. *McCorkle*,
680 F.2d 1070 (5th Cir. 1982) 15, 16, 30

Hester v. *Milledgeville*,
777 F.2d 1492 (11th Cir. 1985) 17

Higazy v. *Templeton*,
505 F.3d 161 (2d Cir. 2007)..... 22

Hill v. *Johnson*,
160 F.3d 469 (8th Cir. 1998) 17

Hill v. *Rozum*,
447 F. App'x 289 (3d Cir. Oct. 12, 2011)..... 25

Humphries v. *Cnty. of Los Angeles*,
554 F.3d 1170 (9th Cir. 2008) 34

Hunter v. *Bryant*,
502 U.S. 224 (1991) 27

Jeffries v. *Las Vegas Metropolitan Police Dep't*,
2017 WL 4653434 (9th Cir. Oct. 17, 2017) 26

Kastigar v. *United States*,
406 U.S. 441 (1972) 25

Koch v. *City of Del City*,
660 F.3d 1228 (10th Cir. 2011) 23

Lefkowitz v. *Cunningham*,
431 U.S. 801 (1977) 2, 8, 29, 30

Lefkowitz v. *Turley*,
414 U.S. 70 (1973) ..... passim

Lingler v. *Fechko*,
312 F.3d 237 (6th Cir. 2002) 7, 12, 23, 30

Livers v. *Schenck*,
700 F.3d 340 (8th Cir. 2012) 22

Manness v. *Meyers*,
419 U.S. 449 (1975) 25

McKinley v. *Mansfield*,
404 F.3d 418 (6th Cir. 2005) ..... passim

Morrissey v. *Brewer*,
408 U.S. 471 (1972) 34

Murray v. *Earle*,
405 F.3d 278 (5th Cir. 2005) 22

Plumhoff v. *Rickard*,
134 S. Ct. 2012 (2014) 28, 35

Reichle v. *Howards*,
566 U.S. 658 (2012) 27

Renda v. *King*,
347 F.3d 550 (3d Cir. 2003)..... 22

Rodic v. *Thistledown Racing Club*, *Inc.*,
615 F.2d 736 (6th Cir. 1980) 4, 32, 33

Salinas v. *Texas*,
133 S. Ct. 2174 (2013) 20

Sher v. *Dep't of Veteran Affairs*,
488 F.3d 489 (1st Cir. 2007)..... 15, 16

Sornberger v. *City of Knoxville*,
434 F.3d 1006 (7th Cir. 2006) 22

Spielbauer v. *County of Santa Clara*,
45 Cal. 4th 704 (2009) ..... passim

Tinney v. *Richland Co.*,
678 F. App'x. 362 (6th Cir. Feb. 6, 2017)..... 31

Uniformed Sanitation Men Ass'n v. *Comm'r of Sanitation of City of New York*,
426 F.2d 619 (2d Cir. 1970)..... 15, 16

Uniformed Sanitation Men Ass'n, Inc. v. *Comm'r of Sanitation*,
392 U.S. 280 (1968) 29

United States v. *Allen*,
864 F.3d 63 (11th Cir. 2017) 23

United States v. *Veal*,
153 F.3d 1233 (11th Cir. 1998) 16

Vogt v. *City of Hays, Kan.*,
844 F.3d 1235 (10th Cir. 2017) 31

Weston v. *U.S. Dep't of Housing & Urban Dev.*,
724 F.2d 943 (Fed. Cir. 1983)..... 17

White v. *Pauly*,
137 S. Ct. 548 (2017) 36

Wiley v. *Mayor & City Council of Baltimore*,
48 F.3d 773 (4th Cir. 1995) 17

Ziglar v. *Abbasi*,
137 S. Ct. 1843 (2017) 27, 30

Ziglar v. *Abbasi*,
582 U.S. ___ (2017)..... 35

Statutes

28 U.S.C. § 1254(1) 1
42 U.S.C. § 1983 2
Ky. Rev. St. Ann. § 230.215 5
Ky. Rev. Stat. Ann. § 230.990(5) 5

Rules

Mich. Admin. Code r. 431.1035(2)–(3) 6
Mich. Admin. Code r. 431.1035(2)(d) 5
Mich. Admin. Code r. 431.1130 5
Mich. Admin. Code r. 432.1601 5
Ohio Admin. Code 3769-12-26(A)(12) 5
Ohio Rev. Code § 3772.031 5
Sup. Ct. R. 10(a) 17

OPINIONS BELOW

The Sixth Circuit's opinions, App. 1a–34a and 53a–77a, are reported at 871 F.3d 420 and 790 F.3d 669. The district court's first opinion, App. 78a–98a, is not reported but is available at 2013 WL 6196947. Its opinion on remand, App. 37a–52a, is reported at 202 F. Supp. 3d 756.

JURISDICTION

The court of appeals issued its opinion after remand on September 11, 2017. App. 1a. It issued an order denying rehearing en banc on November 14, 2017, and an order staying the mandate on December 8, 2017. App 101a, 99a. The petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment's Self-Incrimination Clause provides:

> No person shall be . . . compelled in any criminal case to be a witness against himself. [U.S. Const. amend. V.]

The Fifth Amendment's Due Process Clause provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. [U.S. Const. amend. V.]

42 U.S.C. § 1983 provides:

> Every person who, under color of [state law] subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

INTRODUCTION

This case involves two circuit splits about the Fifth Amendment's Self-Incrimination Clause and how it applies to individuals whose livelihood depends on a governmental job or an occupational license.

First, eight circuits and California's Supreme Court have interpreted *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), to hold that immunity from the use of self-incriminating statements in criminal cases arises *automatically* if those statements are compelled by a threat to one's livelihood. But the Sixth Circuit held that regulators must *offer* immunity before asking occupational licensees about their work-related conduct because immunity does not arise automatically and that, without an affirmative offer, suspending a license violates the Fifth Amendment. It concluded this even though the drivers were never asked to waive their immunity and had counsel present. This holding undermines "[t]he important public interest of securing from public employees an accounting of their public trust," *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806 (1977), and creates a burdensome (and pointless) prophylactic requirement—a regulator cannot suspend a license until he has persuaded another set of

officials (state and federal prosecutors) to offer immunity, even though immunity arises automatically.

Second, nine other circuits have recognized that under *Chavez* v. *Martinez*, 538 U.S. 760 (2003), "it is not until [the] use [of compelled statements] in a criminal case that a violation of the Self-Incrimination Clause occurs." *Id.* at 767 (plurality); accord *id.* at 777 (Souter, J. concurring in judgment) (rejecting the argument that "questioning alone was a completed violation," without the use of compelled statements in a criminal case); accord *id.* at 780 (Scalia, J., concurring in judgment). But here, the Sixth Circuit held (adopting a Ninth Circuit dissent) that § 1983 claims based on the Fifth Amendment could proceed even though no criminal case was initiated against any driver and so no statements were ever used "in any criminal case." U.S. Const. amend. V.

In addition to these circuits splits, the Sixth Circuit's qualified-immunity analysis independently warrants this Court's review. As Judge Batchelder noted in dissent, the right to be offered immunity was not clearly established before it was announced in this case; to the contrary, she explained, the issue whether government officials must offer immunity or advise the individual of *Garrity*'s automatic immunity "is the subject of a circuit split." App. 33a. And there was also "binding precedent from [the Sixth Circuit]" holding that it was "*not* a constitutional violation for a police chief to exact statements from police officers concerning their employment when they were *not required to waive* their privilege against self-incrimination and the statements were *not used* against them in a *criminal* proceeding." App. 26a (emphasis added).

On that last point, there is also compelling proof that the law is not settled as to whether a Fifth Amendment violation can occur where no criminal case was ever initiated. This Court granted certiorari this term in *City of Hays, Kansas* v. *Vogt* (No. 16-1495), to determine in a § 1983 case "[w]hether the Fifth Amendment is violated when statements are used at a probable cause hearing but not at a criminal trial." If it is not clearly established that use at a probable-cause hearing violates the Fifth Amendment, then it is *a fortiori* not clearly established that considering a refusal to answer in a non-criminal licensing decision violates the Amendment.

The Sixth Circuit also misapplied the requirement that the law be clearly established when evaluating the due-process claim relating to the drivers' exclusion from racing grounds. Circuit precedent had held it did *not* violate due process to exclude an individual permanently from a racetrack without affording him a hearing. *Rodic* v. *Thistledown Racing Club, Inc.*, 615 F.2d 736 (6th Cir. 1980). Here, the Sixth Circuit concluded that the drivers received due process for the license suspensions; thus under *Rodic* the law affirmatively allowed the regulators to ban the no-longer-licensed drivers from racetrack grounds without any hearing at all. As a result, the post-exclusion hearing that they now concede they received went above and beyond what due process required.

In light of these circuit splits on important questions of constitutional law that will affect local, state, and federal officials, and in light of the importance of qualified immunity, this Court should grant certiorari.

STATEMENT OF THE CASE

A. Strictly regulated gambling

Michigan law permits, but strictly regulates, gambling on horse racing. In addition to regulating wagering, Michigan also requires race participants to hold occupational licenses.

The authority to require licensees to cooperate in investigations is one of a gambling regulator's most valuable tools. Michigan horse-racing licensees agree to "cooperate in every way . . . [in] an investigation, including responding correctly . . . to all questions pertaining to racing matters." Mich. Admin. Code r. 431.1035(2)(d); *see also* Ohio Admin. Code 3769-12-26(A)(12), & Ky. Rev. Stat. Ann. § 230.990(5). The license application expressly states: "I agree to fully cooperate with the MGCB Horse Racing Section regulatory investigations and law enforcement investigations relating to racing."

Many jurisdictions' gambling regulations also permit excluding a person—regardless of licensing status—from gambling facilities to help ensure gambling's integrity. See Mich. Admin. Code r. 431.1130, 432.1601; Ky. Rev. St. Ann. § 230.215; Ohio Rev. Code § 3772.031.

B. The race-fixing investigation

John Moody admitted that he had "[taken] some dives" at a gambler's request while harness racing. R. 144-1, John Moody Statement 3/12/10, p. 27:11–13, Page ID #3752; see also App. 80a ("Moody admitted that in fifteen to twenty races he did 'not drive very,

very aggressive.' "). Presented with this admission and other tips implicating the drivers in accepting money to fix races, three racing stewards (regulators who officiate races) conducted stewards' hearings to question each driver; a parallel criminal investigation also proceeded. App. 79a–80a.

Each driver, with counsel present, asserted his Fifth Amendment privilege, refused to answer questions (even some non-incriminating ones), and failed to produce requested bank records. App. 81a–82a. The stewards reminded the drivers that they were obligated to cooperate and that failing to cooperate could result in license suspension. App. 82a; Mich. Admin. Code r. 431.1035(2)–(3). No regulator asked the drivers to waive immunity from use of statements in a criminal prosecution. Still, the drivers refused to answer. App. 81a–82a. Thereafter, the stewards suspended their licenses for failure to cooperate. App. 4a. As to the criminal investigation, no criminal charges were brought against any of the drivers. App. 61a n.9.

Months later, shortly before the suspensions and licenses expired, the MGCB's Executive Director issued exclusion orders barring the drivers from MGCB-regulated tracks and facilities. App. 4a.

C. District-court proceedings

In their § 1983 complaint, the drivers contended that the regulators violated their Fifth Amendment rights by requiring them to surrender their right against self-incrimination in exchange for maintaining licensure. App. 93a. The drivers also asserted that the regulators violated due process by not providing hearings on the suspensions. App. 91a. The complaint

did not contain a due-process claim regarding the *exclusions*.

The district court granted summary judgment, deciding that the regulators merited qualified immunity. App. 88a. The court held that the regulators did not violate the drivers' self-incrimination rights because the Sixth Circuit had concluded in *McKinley* v. *Mansfield*, 404 F.3d 418, 430 (6th Cir. 2005), based on *Chavez*, that coercion alone does not violate the Self-Incrimination Clause; thus, a § 1983 claim fails if compelled statements were not used in a criminal case. App. 96a (also citing *Lingler* v. *Fechko*, 312 F.3d 237 (6th Cir. 2002)). The court also recognized that *Garrity* and its progeny did not support the drivers because they were not required to waive their Fifth Amendment rights. App. 93a–95a.

The district court also granted qualified immunity on the due-process claim regarding the suspensions. App. 92a–93a. It did not address the due-process claim that the drivers raised in their motion for summary judgment (but not in their complaint): that they had been denied a hearing on their *exclusions* from racing grounds.

D. Sixth Circuit proceedings—*Moody I*

In *Moody I*, the Sixth Circuit reversed the grant of qualified immunity on the self-incrimination claims based on the first prong of qualified immunity, holding that it violated the Constitution for the State to suspend the drivers' racing licenses and exclude them from racing grounds based on their refusal to answer potentially incriminating questions relating to their

work unless the State affirmatively offered them immunity. App. 58a.

The panel reached this conclusion although recognizing that the drivers had faced no criminal charges. App. 61a & n.9 (citing *Cunningham*, 431 U.S. at 807). Despite observing that the plurality opinion in *Chavez* distinguished the Fifth Amendment right from the prophylactic privilege to assert the Fifth Amendment when questioned, the panel regarded his conclusion—that mere compulsion does not violate the Fifth Amendment—as non-binding in distinguishable situations, deeming Justice Souter's concurrence in the judgment fact-dependent. App. 62a–63a.

The panel distinguished *Chavez* because the drivers made no incriminating statements. Quoting the dissent in a Ninth Circuit decision, *Aguilera* v. *Baca*, 510 F.3d 1161 (9th Cir. 2007), the panel held: " '*Chavez* only applies where a party actually makes self-incriminating statements. . . . [T]he Fifth Amendment would be violated if a public employee were fired for refusing to make self-incriminating statements, even though no self-incriminating statement could ever have been used against the employee.' " App. 63a–64a (quoting *Aguilera*, 510 F.3d at 1179 (Kozinski, J., dissenting)).

The panel further opined that *Chavez* requires the government to offer immunity to employees before it can penalize them to induce them to answer questions; the regulators, who had not offered immunity to the drivers, had thus impermissibly penalized them. *Id*. The court also distinguished its decision in *McKinley*, stating that the plaintiff there had been promised use immunity. App. 64a.

The panel affirmed qualified immunity on the suspension-related due-process claim. App. 71a. But it "reversed" on the due-process question that the district court had not addressed: whether the drivers were denied a post-*exclusion* hearing. App. 74a. Equating exclusion from visiting racing grounds with the prior license suspension, the Court relied on *Barry* v. *Barchi*, 443 U.S. 55 (1979), to find that the drivers were entitled to a post-exclusion hearing. App. 72a. The panel (mistakenly, as the drivers later conceded) stated that the drivers "did not receive" a post-exclusion hearing—and that it was unclear from the record whether they requested one. App. 72a. Nevertheless, the panel suggested that a jury might find that the regulators "should have construed" the drivers' post-exclusion license applications as hearing requests. App. 74a. If the MGCB had construed those applications accordingly, the drivers were entitled to hearings. *Id*. Thus, the panel questioned whether the drivers were denied due process or had "failed to seek that process." *Id*.

The panel remanded for further proceedings on whether the drivers requested a post-exclusion hearing and on the clearly established prong of qualified immunity as to both the self-incrimination claim and post-exclusion hearing-denial claim. App. 75a.

The Sixth Circuit denied the regulators' subsequent petition for rehearing or consideration en banc and their motion to stay the mandate while pursuing certiorari in this Court. App. 102a, 100a. This Court denied the regulators' petition for a writ of certiorari concerning the self-incrimination holding. See Order

Denying Pet. for Writ. of Cert., *MGCB* v. *Moody* (U.S. Sup. Ct. No. 15-623), April 25, 2016.

E. District-court proceedings—remand

On remand, the parties filed cross-motions for summary judgment. The district court again granted qualified immunity on the self-incrimination claim, reasoning that, before *Moody I*, the law did not clearly establish a right to be immunized before being punished for refusing to answer regulatory questions. App. 45a. The court reviewed *Garrity*'s progeny and recognized this Court's rulings prohibiting the government from penalizing employees for refusing to *waive* immunity, but it determined that it was previously unclear that the government had to first *offer* immunity. App. 44a.

Addressing due process, the court rejected the regulators' contention that they merited summary judgment on the claim the Sixth Circuit had remanded because the drivers admitted—contrary to their earlier statements—that they had received a post-exclusion hearing in April 2013. The court also decided that the right to a post-exclusion hearing was clearly established (based in part on *Moody I*'s reference to *Barry*) and so denied summary judgment to Ernst and Lessnau, the only two regulators it deemed sufficiently involved in the due-process claim. App. 48a–50a.

But the court rejected the *new* due-process claim that the drivers tried to raise in their summary-judgment motion—that the post-exclusion hearing violated due process because it was constitutionally untimely. The district court agreed with the regulators

that this new due-process claim was improper, noting that it was not in the complaint and the complaint had not been amended. App. 48a.

The district court subsequently issued a judgment and stayed the proceedings. App. 35a–36a.

F. Sixth Circuit proceedings—*Moody II*

Ernst and Lessnau appealed the denial of qualified immunity on the due-process claim that they denied the drivers a post-exclusion hearing, and the drivers cross-appealed the grant of qualified immunity on the self-incrimination claim.

In a divided opinion, the majority concluded that the Fifth Amendment right at issue—"to refuse to answer self-incriminating questions without threat of punishment, unless immunity was offered"—was clearly established in *Lefkowitz* v. *Turley*, 414 U.S. 70, 78 (1973). App. 13a. It emphasized *Turley*'s statement that " 'if answers are to be required in such circumstances[,] States *must offer* to the witness whatever immunity is required to supplant the privilege and may not insist that the employee or contractor waive such immunity.' " App 14a (quoting *Turley*, 414 U.S. at 84–85, and adding emphasis)).

The majority rejected the regulators' argument that *Garrity* provided immunity automatically. App. 15a. It found in *Turley* "a separate Fifth Amendment right" that requires a "different set of procedural steps," including offering immunity. App. 16a (citing *Turley*, 414 U.S. at 84–85).

The majority did not mention *Chavez*, or the Sixth Circuit's holdings in *Lingler* or *McKinley*.

Judge Batchelder, dissenting in part, opined that *Turley*'s distinguishable facts rendered it an inappropriate source of clearly established law. Specifically, she observed a critical distinction: in *Turley*, statutes required *waiving* immunity from the use of the statements in a criminal trial, whereas here the regulatory matters required no such waivers. App. 28a. She also recognized that the majority had "fail[ed] to grapple with" conflicting circuit precedent, referencing *Lingler*'s holding that no constitutional violation resulted when no waiver was required and no statements were used in a criminal case. App. 25a–26a (citing *Lingler*, 312 F.2d at 239–40).

On the due-process issue, the majority refused to "revisit [the] prior [panel's] ruling that the right at issue was clearly established." App. 10a. It then applied the reasoning of *Barry* (which recognized that suspending an occupational license implicated a property interest) to the orders excluding the no-longer-licensed drivers from racetrack grounds. App. 11a. Judge Batchelder "question[ed] whether the right was clearly established prior to *Moody I*," which she recognized "extend[ed] *Barry* to cover 'exclusions' in addition to 'suspensions,' " and she wondered about "the effect of our opinion in *Rodic* v. *Thistledown Racing Club*, *Inc.*, 615 F.2d 736, 739 (6th Cir. 1980)," on the issue; nevertheless she "assume[d] that the [due-process] right was clearly established." App. 20a & n.1. She also recognized that "[t]he majority allow[ed] the drivers to modify their claim from one of no-due-process to one of untimely-due-process." App. 21a.

The panel denied the regulators' subsequent motion for rehearing or consideration en banc, but it granted their motion to stay the mandate while pursuing certiorari in this Court. App. 101a, 99a.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decisions conflict with the decisions of multiple circuits and of a State's highest court on multiple aspects of Fifth Amendment law. *Moody II* also conflicts with decisions of this Court and other circuits concerning qualified immunity.

As to the Fifth Amendment, requiring the regulators to grant immunity conflicts with numerous circuits and the California Supreme Court, all of which recognize that *Garrity* immunity attaches automatically. By imposing an unnecessary prophylactic requirement, the Sixth Circuit has burdened government agencies' ability to obtain necessary information. Further, *Moody I* conflicts with nine circuits that have understood *Chavez* to hold that mere compulsion does not violate the self-incrimination right; rather, that right is violated only if coerced statements are used in a criminal proceeding.

As to qualified immunity, these conflicts, *Turley*'s dispositive distinctions, and this Court's grant of certiorari in *Vogt* show that the alleged self-incrimination right was not clearly established. See *District of Columbia* v. *Wesby*, 583 U.S. ——, slip op. 14 (2018) ("To be clearly established . . . [t]he rule must be 'settled law.' "). And the Sixth Circuit's conclusion that the due-process right was clearly established conflicts with this Court's holdings on clearly established

rights and with the Tenth Circuit's holding that overcoming qualified immunity on an untimely hearing claim requires identifying precedent closely similar to the case at issue. *Columbian Financial Corp*. v. *Stork*, 811 F.3d 390, 401 (10th Cir. 2016).

I. The Sixth Circuit's conclusion that the drivers demonstrated a violation of a self-incrimination right conflicts with other circuits and a state's highest court.

A. Eight circuits and California's highest court hold that *Garrity* immunity attaches automatically.

In faulting the regulators for not offering the drivers immunity, the *Moody I* panel neglected that statements provided in a *Garrity* situation are immunized automatically from use in a criminal proceeding, so formally granting immunity is unnecessary. In their brief in opposition to the regulators' previous petition for a writ of certiorari, the drivers attempted to negate this conflict by asserting that the *Moody I* panel had recognized *Garrity* immunity's automatic application. Brief in Opp. at 12–13, *Moody* v. *MGCB*, No. 15-623 (Feb. 10, 2016). But *Moody II*'s express rejection of automatic *Garrity* immunity, App. 14a, confirms that was not the case.

These opinions create a split worthy of this Court's review because numerous circuits and California's highest court hold that *Garrity* immunity applies automatically. App. 33a (Batchelder, J., dissenting) ("[L]ooking to the other circuits demonstrates precisely why I cannot find that the right announced in

Moody I was clearly established, for it is the subject of a circuit split among the various United States Courts of Appeals."); see *Sher* v. *Dep't of Veteran Affairs*, 488 F.3d 489, 503 (1st Cir. 2007) ("The circuits have taken different approaches to the issue of whether a government employer is required to provide such notice [of the consequences of *Garrity* immunity] to an employee.").

The Second Circuit, for example, upheld the dismissal of public employees who refused to answer employment-related questions after being told that they could be disciplined if they refused to answer. *Uniformed Sanitation Men Ass'n* v. *Comm'r of Sanitation of City of New York*, 426 F.2d 619, 627 (2d Cir. 1970) (*Sanitation Men II*). The court recognized that public employees cannot refuse to account for their actions and retain their jobs, although their statements cannot be later used against them in a criminal case. *Id.* Addressing whether "the City lacked authority to grant immunity," *id.* at 622, Judge Friendly reasoned that, in *Garrity*, "the very act of the attorney general in telling the witness that he would be subject to removal if he refused to answer was held to have conferred [use] immunity," *id.* at 626.

Similarly, in *Gulden* v. *McCorkle*, 680 F.2d 1070, 1074 (5th Cir. 1982), the Fifth Circuit held that use immunity attaches automatically when a public employee must answer questions or face penalties. There, the employees argued that the defendants' failure to tender immunity "implicitly required them to waive such immunity in contravention of the [F]ifth [A]mendment right against self-incrimination." *Id.* at 1071. The Fifth Circuit disagreed: "An employee who

is compelled to answer questions (but who is not compelled to waive immunity) is protected by *Garrity* from subsequent use of those answers in a criminal prosecution." *Id.* at 1075. It is the testimony's compelled nature that "prevents its use in subsequent proceedings, *not any affirmative tender of immunity*." *Id.* (emphasis added).

The First Circuit followed course in *Sher*. There, a VA hospital pharmacist refused to cooperate in an investigation, contrary to a federal regulation, and so he was suspended and demoted. 488 F.3d at 493, 496. In his lawsuit, he argued that he had legitimately refused to answer questions because the letter he received from the VA about the investigation "stated only that the U.S. Attorney had declined to prosecute as of a certain date, not that it conferred immunity." *Id.* at 499–500. The court rejected that argument, following the Second and Fifth circuits. *Id.* at 502 (citing *Sanitation Men II*, 426 F.2d at 626, and *Gulden*, 680 F.2d at 1075). *Garrity* immunity, the court explained, is " 'self-executing; it arises by operation of law; no authority or statute needs to grant it.' " *Id.* (quoting *United States* v. *Veal*, 153 F.3d 1233, 1239 n.4 (11th Cir. 1998)). The First Circuit also observed that the circuits are split as to whether governmental employers must *notify* employees of *Garrity*'s automatic immunity (which is a lesser burden than the Sixth Circuit's requirement that governmental employers must *offer* immunity). *Id.* at 503. But even as to notice, the First Circuit noted that "no circuit has held that an employee who is represented by counsel"—as the drivers here were—"is entitled to notice from his employer of his *Garrity* immunity." *Id.* at 504.

Other circuits agree that *Garrity* immunity arises automatically. *Wiley* v. *Mayor & City Council of Baltimore*, 48 F.3d 773, 777 n.7 (4th Cir. 1995) ("The *Garrity* immunity is self-executing."); *Confederation of Police* v. *Conlisk*, 489 F.2d 891, 895 n.4 (7th Cir. 1973) (the investigating entity needed no power to grant immunity because "[i]n *Garrity* the Supreme Court indicated that the Fifth Amendment itself prohibited the use" of compelled statements or their fruits); *Hill* v. *Johnson*, 160 F.3d 469, 471 (8th Cir. 1998) ("the mere failure to offer immunity is not an impermissible attempt to compel a waiver of immunity"); *Hester* v. *Milledgeville*, 777 F.2d 1492, 1496 (11th Cir. 1985) ("[M]andatory polygraph examination [results] cannot be used in a criminal proceeding even without an explicit grant of use immunity. . . . [T]he privilege against self-incrimination affords a form of use immunity which, absent waiver, automatically attaches. . . . [Granting use immunity] would have been duplicative."); *Weston* v. *U.S. Dep't of Housing & Urban Dev.*, 724 F.2d 943, 948 (Fed. Cir. 1983) ("[T]he threat of removal from one's position constitutes coercion which renders any statements elicited thereby inadmissible in criminal proceedings against the party so coerced.").

The Sixth Circuit's decisions also conflict with the California Supreme Court's decision in *Spielbauer* v. *County of Santa Clara*, 45 Cal. 4th 704 (2009), "a decision by a state court of last resort." Sup. Ct. R. 10(a). There, a deputy public defender sued the county for reinstatement after being fired for declining to answer job-related questions; he claimed that he should have been provided, "in advance, a formal grant of immunity" from later use of his answers in a criminal case.

Id. at 709. The court concluded that the Fifth Amendment did not require the employer to "seek, obtain, and confer a formal guarantee of immunity before requiring its employee to answer questions related to [its] investigation." *Id*. at 710, 714.

In its analysis, the *Spielbauer* court recognized this Court's declaration that, if a public employee is not required to "forfeit the privilege against self-incrimination and [to] agree that the answers thus compelled may be used in a criminal prosecution against the employee," the employer may terminate the non-cooperative employee. *Spielbauer*, 45 Cal. 4th at 718. The court continued that this Court "has never held, in [this] context . . . , that an employee must be offered *formal immunity* from criminal use before being compelled, by threat of job discipline, to answer questions on [job performance.]" *Spielbauer*, 45 Cal. 4th at 718.

Had this case arisen in any of these jurisdictions, the court would have recognized that the drivers already had the immunity referenced in *Turley* throughout the MGCB proceedings. But because of the Sixth Circuit's decisions in this case, local, state, and federal officials are subject to a different version of the Fifth Amendment than exists elsewhere in the country. Certiorari is warranted here to restore national uniformity by resolving this circuit split.

B. The Sixth Circuit's anti-*Garrity* rule requiring an offer of immunity is unworkable.

The Sixth Circuit's rule also suffers from a practical problem: many officials cannot grant immunity in

criminal proceedings, because they are not prosecutors; instead, regulators in governmental agencies in the Sixth Circuit will have to obtain immunity from state and federal prosecutors before they will be able to penalize those who refuse to answer questions about their public responsibilities.

Consider, for example, a state-licensed physician who is suspected of sexually abusing patients while treating them. When questioned by a disciplinary board, he refuses to answer based on the Fifth Amendment. Without facing § 1983 liability, the state regulator cannot suspend him for refusing to answer before obtaining immunity from the relevant prosecutors. Or consider a public water-safety employee who is asked whether he skewed contaminant-testing results. He refuses to answer, and as a result his employer faces liability if she suspends him before a prosecutor grants immunity.

This obligation to offer immunity not only causes a regulatory logjam, it burdens prosecutors with requests for immunity agreements in matters that might not merit prosecution. And if the prosecutor delays responding or declines immunity, public harm and regulatory disorder could result.

Policies underlying this Court's cases favor instead applying *Garrity* immunity automatically. Governments must be empowered to promptly, even urgently, investigate whether licensees and employees are satisfying the public's trust, without investigations being delayed while immunity agreements are obtained. *Spielbauer* agreed: "The employer's ability to investigate . . . cannot be hamstrung, as a matter of

constitutional law, by such concerns." *Spielbauer*, 45 Cal. 4th at 726.

And this burden will apply in every interview where potentially incriminating statements might be made, as the licensees and employees do not have to invoke the privilege for it to apply. See *Salinas* v. *Texas*, 133 S. Ct. 2174, 2180 (2013) (Alito, J., for a three-justice plurality) ("[E]xercis[ing] the privilege [in *Garrity* situations is] so costly that it need not be affirmatively asserted."). If the privilege does not have to be asserted, government regulators and employers must obtain immunity agreements before knowing if they are needed. Especially in emergency circumstances, this roadblock defeats regulation.

C. Consistent with *Chavez*, nine circuits hold that a self-incrimination violation does not arise absent a criminal case.

The Sixth Circuit held that compelling the drivers to answer regulatory-related questions without offering them immunity violated their Fifth Amendment right against being "compelled in any criminal case to be a witness against [themselves]," U.S. Const. amend. V, even though no criminal case ever began. App. 61a n.9; App. 16a–17a. This holding creates a circuit split and conflicts with the Constitution's text and this Court's precedents.

The Ninth Circuit, for example, would have decided this case differently. In *Aguilera*, a similar § 1983 action, sheriff's deputies claimed that their supervisors violated their self-incrimination rights by requiring them to choose between giving potentially

incriminating statements and suffering adverse employment consequences. *Id.* at 1171. On counsel's advice, each deputy declined to answer job-related questions, although their employment manual imposed "an affirmative duty to cooperate during such an investigation." *Id.* at 1165–66. Because they failed to cooperate, they were reassigned. *Id.* The Ninth Circuit held "that the supervisors did not violate the deputies' Fifth Amendment rights . . . , given that the deputies were not compelled to answer the investigator's questions or to waive their immunity from self-incrimination." *Id.* at 1172.

The court recognized that "public employees cannot be compelled to choose between providing unprotected incriminating testimony or losing their jobs." *Id.* at 1171. But a constitutional violation does not arise, it said, until the employee is "required to waive his privilege against self-incrimination while answering his employer's legitimate job-related questions." *Id.* (citing *Gardner* v. *Broderick*, 392 U.S. 273, 278 (1968)). Because a waiver was not requested, the court concluded that the Fifth Amendment was not implicated. *Id.* at 1172. The court also condemned the deputies' claim "because the deputies were never charged with a crime, and no incriminating use of their statements [provided after their reassignment] was ever made." *Id.* at 1173 & n.9 (relying on *Chavez* to support that "since no statement was ever used against the deputies, there is no cognizable Fifth Amendment claim").

Like the deputies in *Aguilera*, the drivers here willingly agreed to cooperate with investigations. App. 4a, 81a–82a. And, like the deputies, the drivers

violated that agreement by refusing to answer misconduct-related questions. Because the drivers, like the deputies, were never asked to waive immunity, never charged with a crime, and never had incriminating statements used against them, the Ninth Circuit would have rejected their claim. Indeed, the ultimate proof that the Ninth Circuit would have reached a contrary result is that the *Moody I* panel expressly relied on the dissent in *Aguilera*. App. 63a–64a.

In fact, every other circuit to address the issue has recognized that the Self-Incrimination Clause is not violated when the individual's statements (or silence) have not been used against him in a criminal proceeding. See, e.g., *Higazy* v. *Templeton*, 505 F.3d 161, 171–72 (2d Cir. 2007) (" 'it is not until [statements compelled by a police interrogation are used] in a criminal case that a violation of the Self-Incrimination Clause occurs' ") (alteration in original); *Renda* v. *King*, 347 F.3d 550, 557–59 (3d Cir. 2003) (a criminal defendant's "right against self-incrimination was not violated" even if "coerced statements" were "obtained from a custodial interrogation" because the criminal charges against him were dropped); *Burrell* v. *Virginia*, 395 F.3d 508, 513–14 (4th Cir. 2005); *Murray* v. *Earle*, 405 F.3d 278, 285 n.11 (5th Cir. 2005) ("The Supreme Court has held that § 1983 plaintiffs do not have a Fifth Amendment claim against law-enforcement officials who have elicited unlawful confessions if those confessions are not then introduced against the plaintiffs in criminal proceedings."); *Sornberger* v. *City of Knoxville*, 434 F.3d 1006, 1023–25 (7th Cir. 2006); *Livers* v. *Schenck*, 700 F.3d 340, 351 n.9 (8th Cir. 2012) ("A Fifth Amendment violation of [an individual's] protection against self-incrimination, based

upon a coerced confession, only arises when the coerced statements are used in the criminal case."); *Koch* v. *City of Del City*, 660 F.3d 1228, 1244–45 & n.9 (10th Cir. 2011) (a self-incrimination violation " 'occurs only if one has been compelled to be a witness against himself in a criminal case' "); *United States* v. *Allen*, 864 F.3d 63, 82 n.81 (11th Cir. 2017) (" '[I]t is not until [a compelled statement's] *use* in a criminal case that a violation of the Self-Incrimination Clause occurs.' ") (alteration in original). These cases, applying *Chavez*, all required some use of the compelled statements to sustain a Fifth Amendment violation.

Thus, federal courts in nine circuits would have rejected the drivers' self-incrimination claim. Only the Sixth Circuit has found a violation under these circumstances. Granting certiorari here will permit the Court to resolve the split that the Sixth Circuit has created by adopting the dissent in *Aguilera*—in conflict with its own precedent. See *McKinley*, 404 F.3d at 430 (citing the *Chavez* plurality's rejection of the § 1983 claim); *Lingler*, 312 F.3d at 239 ("By its terms, the Fifth Amendment does not prohibit the act of compelling a self-incriminating statement other than for use in a criminal case.").

D. The Sixth Circuit failed to follow *Chavez*.

These circuits all reached this proper understanding by following this Court's decision in *Chavez* v. *Martinez*, 538 U.S. 760 (2003). There, six justices agreed that a self-incrimination claim fails if the compelled, incriminating statement is never used against the speaker in a criminal case. *Aguilera*, 510 F.3d at 1173 & n.8. The four-justice plurality opined that

"based on the text of the Fifth Amendment," the defendant in *Chavez* could not even "allege a violation of this right, since [he] was never prosecuted for a crime, let alone compelled to be a witness against himself in a criminal case." 538 U.S. at 766. Concurring in the judgment, Justices Souter and Breyer agreed that "the text of the Fifth Amendment . . . focuses on *courtroom use* of a criminal defendant's compelled self-incriminating testimony." *Id.* at 777 (emphasis added).

The circuits—except the Sixth Circuit—have understood *Chavez* to conclude that merely compelling testimony does not violate the Fifth Amendment right. Accord 538 U.S. at 790 (Kennedy, J., concurring in part and dissenting in part) (interpreting the opinions of Justices Thomas and Souter "to maintain that in all instances a violation of the Self-Incrimination Clause simply does not occur unless and until a statement is introduced at trial"). The Sixth Circuit's analysis strayed by focusing on when the *privilege* against self-incrimination may be asserted, App. 14a–16a; 59a–60a, instead of when the Fifth Amendment right is violated. But this § 1983 suit does not hinge on whether the drivers may assert the Fifth Amendment *privilege* in an administrative proceeding. Indisputably, they can. Rather, this suit hinges on whether the regulators violated the Fifth Amendment *right*. They did not.

Unlike the Sixth Circuit, the *Chavez* plurality distinguished a violation of the Fifth Amendment *right*, which occurs only in a criminal case, from the Fifth Amendment *privilege*, which may be asserted in any type of proceeding. *Id.* at 770 (citing *Turley*, 414 U.S. at 77). That privilege serves as a prophylactic rule

safeguarding the core right against self-incrimination. *Chavez*, 538 U.S. at 770–71 (citing *Kastigar* v. *United States*, 406 U.S. 441, 453 (1972), and *Manness* v. *Meyers*, 419 U.S. 449, 461–62 (1975)).

But prophylactic rules are not protected Constitutional rights and cannot support a § 1983 action. *Chavez*, 538 U.S. at 772 (Thomas, J., joined by Rehnquist, C.J., O'Connor, J., and Scalia, J.) ("Chavez's failure to read *Miranda* warnings to Martinez did not violate Martinez's constitutional rights and cannot be grounds for a § 1983 action."); *id*. at 780 (Scalia, J., concurring in part in the judgment) ("Section 1983 does not provide remedies for violations of judicially created prophylactic rules . . . ."); *id*. at 789 (Kennedy, J., joined by Stevens and Ginsburg, JJ., concurring in part and dissenting in part) ("[F]ailure to give a *Miranda* warning does not, without more, establish a completed violation when the unwarned interrogation ensues."). Even the Sixth Circuit's immunity rule is prophylactic and cannot support this action. See App. 33a (Batchelder, J., dissenting) ("In effect we created a prophylactic rule, but this rule had not been in place before.").

The drivers' silence is no reason, despite the Sixth Circuit's view, to distinguish *Chavez* and find a Fifth Amendment violation. App. 63a–64a (citing *Aguilera*, 510 F.3d at 1179 (Kozinski, J., dissenting)). Because the drivers have not even been charged with a crime, neither statements nor their silence has been used as testimony against them in a criminal case. In fact, *Aguilera*, *Hill* v. *Rozum*, 447 F. App'x 289, 290 (3d Cir. Oct. 12, 2011), and *Jeffries* v. *Las Vegas Metropolitan Police Dep't*, 2017 WL 4653434, *2 (9th Cir. Oct. 17,

2017), applied *Chavez* in this manner when the plaintiff had remained silent.

* * *

When these overlapping circuits splits are considered, the drivers' § 1983 claims based on the Fifth Amendment would have failed in the courts of every other circuit. This Court should grant certiorari and reverse the Sixth Circuit.

II. The Sixth Circuit's decision that the self-incrimination and due-process rights were clearly established conflicts with this Court's qualified-immunity cases and other circuits.

"Because of the importance of qualified immunity 'to society as a whole,' the Court often corrects lower courts when they wrongly subject individual officers to liability." *City & Cty. of San Francisco, Calif.* v. *Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015) (citation omitted) (listing five recent examples); see also *District of Columbia* v. *Wesby*, 583 U.S. —— (2018). Correction is warranted here: the Sixth Circuit disregarded controlling circuit precedent on both the self-incrimination issue and the due-process issue and is allowing gaming regulators to face personal liability for conduct that even federal judges cannot agree clearly violates the Constitution.

The Sixth Circuit's decisions that the self-incrimination right and the due-process right were clearly established conflict with this Court's qualified-immunity precedent and reduce qualified immunity to a speedbump. Plaintiffs facing this defense must satisfy

a "demanding standard," *Wesby*, slip op. 13, and demonstrate that the defendants' conduct "violated a federal statutory or constitutional right and [ ] the unlawfulness of their conduct was 'clearly established at the time.' " *Id.* at 13 (quoting *Reichle* v. *Howards*, 566 U.S. 658, 664 (2012)). Because qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law," *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 743 (2011) (internal quotation omitted), plaintiffs must show that defendants fit into one of those two categories, *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1867 (2017). And for the law to be clearly established, "existing law must have placed the constitutionality of the officer's conduct 'beyond debate.' " *Wesby*, slip op. 13 (quoting *al-Kidd*, 563 U.S. at 741).

Further, "[t]he [legal principle being applied] must be 'settled law,' . . . which means it is dictated by 'controlling authority' or a 'robust "consensus of cases of persuasive authority.' " *Wesby*, slip op. 14 (quoting *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991) (*per curiam*), and *al-Kidd*, 563 U.S. at 741–42)). "The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Wesby*, slip op. 14 (citing *Reichle*, 566 U.S. at 666). "The 'clearly established' standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him." *Wesby*, slip op. 14.

The Sixth Circuit's analysis falls far short of this standard.

A. The law was not clearly established against the regulators on the Fifth Amendment issues.

As Judge Batchelder recognized as to the Fifth Amendment issue, the majority "avoid[ed] the crucial question whether the [regulators] acted reasonably in the particular circumstances that [they] faced," App. 42a, (Batchelder, J., dissenting) (quoting *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2023 (2014)). As a threshold matter, the *Moody II* panel cited no precedent applying *Garrity*'s finding of compulsion to the particular circumstance of a regulatory investigative matter, and the *Moody I* panel apparently knew of no such precedent, App. 66a, n.12. Thus, the drivers did not establish that the regulators knew that any testimony they elicited would be deemed coerced.

Moreover, the majority relied extensively on one sentence from *Turley*, even though *Turley* is not factually analogous. *Turley* analyzed statutes requiring an immunity waiver and involved an express refusal to sign an immunity waiver. 414 U.S. at 71–76. Here, conversely, the administrative rule requiring the drivers' cooperation did not require them to waive their immunity from the use of incriminating statements in a criminal case, and the drivers, in fact, were not asked to waive that immunity. These differences are not inconsequential, as the *Moody II* majority would have it, given the distinction that this Court has drawn between permissibly penalizing public employees for refusing to *respond* to job-related questions and impermissibly penalizing them for refusing to *waive* immunity. See *Chavez*, 538 U.S. at 768 (stating that *Turley* permits penalizing public employees "to induce them *to respond* to inquiries") (emphasis

added) & n.2 (stating that *Uniformed Sanitation Men Ass'n, Inc.* v. *Comm'r of Sanitation*, 392 U.S. 280 (1968) (*Sanitation Men I*), prohibits "penaliz[ing] public employees . . . to induce them *to waive* their immunity") (emphasis added).

And the distinction recognized by this Court in *Turley* shows that the majority below was wrong in saying that the drivers faced "only two choices: to waive their privilege and cooperate with an investigation, or to be punished." App. 17a. The choices they really faced were (1) to respond (while retaining immunity under *Garrity* from the use of any compelled statements in a criminal case) and face possibly losing their license for work-related misconduct or (2) to remain silent and face suspension for the work-related misconduct of refusing to cooperate with a racing investigation. The fact that either choice might result in *regulatory* consequences arises from the possibility they engaged in work-related misconduct, but under either choice their statements would not result in any *criminal* consequences. See *Cunningham*, 431 U.S. at 806 (1977) ("Public employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity.").

Further, *Turley* concluded that immunity needed to remain intact, 414 U.S. at 82, but did not analyze how immunity arose. Even the drivers' response to the regulators' previous petition for a writ of certiorari described *Turley*'s use of "offer" as referring to automatic *Garrity* immunity and stated that "[n]o court has interpreted these statements [in *Turley*] as mandating

that regulators affirmatively grant immunity." Brief in Opp. at 13–14, No. 15-623. If no court (and, here, no *plaintiff*) has interpreted *Turley* to establish an express immunity requirement, *Turley* is not "clear enough that every reasonable official would interpret it" that way. See *Wesby*, slip op. 14.

Both state and federal judges have interpreted *Turley* differently from how the Sixth Circuit did. The *Spielbauer* court recognized the language in *Turley*, 414 U.S. at 78, on which the *Moody II* majority relied but, unlike the *Moody II* majority, respected that *Turley* involved a demand for an immunity *waiver*. *Spielbauer*, 45 Cal. 4th at 726 (also citing *Cunningham*, 431 U.S. at 805–06). Likewise, the Fifth Circuit in *Gulden* rejected the employees' reliance on *Turley* and related cases as supporting entitlement to a specific grant of immunity. The court flatly stated that their position "finds no support in those cases." 680 F.2d at 1074–75. This split indicates that *Turley* did not clearly establish the immunity requirement: "Where courts are divided on an issue so central to the cause of action alleged, a reasonable official lacks the notice required before imposing liability." *Ziglar*, 137 S. Ct. at 1868 (citation omitted).

Additionally, the *Moody II* majority ignored *Chavez*, *Lingler*, and *McKinley*, each of which advised the regulators that they could *not* violate the drivers' Fifth Amendment rights absent criminal proceedings. Regulators cannot be described as plainly incompetent when pre-existing precedent tells them their conduct is legal. For example, this Court, in *Wesby*, slip op. 17–19 & n.9, reversed the denial of qualified immunity where existing precedent, including cases

disregarded by the Court of Appeals, permitted reasonable officers to "have interpreted the law as permitting" the conduct in question.

In fact, before this case, the Sixth Circuit upheld qualified immunity in an action alleging a self-incrimination violation because "[t]he law . . . was unsettled on whether a violation of the right against self-incrimination can occur without a trial." *Tinney* v. *Richland Co.*, 678 F. App'x. 362, 365 (6th Cir. Feb. 6, 2017) (citing *Chavez*, 538 U.S. 760 at 772–73). And the Tenth Circuit, in *Vogt* v. *City of Hays*, *Kan.*, 844 F.3d 1235, 1248 (10th Cir. 2017), cert. granted, 138 S. Ct. 55, granted qualified immunity to the individual officers involved "because it was not clearly established . . . that *pretrial* use of Mr. Vogt's statements would violate the Fifth Amendment." *Vogt*, 844 F.3d at 1248. Further, this Court's grant of certiorari in *Vogt* confirms that the question here is not well-settled. If it were clearly established that Vogt could prevail without *any* use of his statements against him, as the Sixth Circuit concluded here, this Court would not be reviewing that case.

Granting certiorari here will allow the Court to reinforce qualified-immunity's protections and correct the Sixth Circuit's course on the constitutional differences between this case and *Turley*.

B. The law was not clearly established on the due-process issue either.

When it first analyzed the drivers' due-process claim related to their exclusions from racing grounds, the Sixth Circuit focused on the drivers' property

interest in their occupational licenses. App. 68a, 72a ("The harness drivers were due the process of a post-exclusion hearing for the two reasons that they were due the same for their suspensions . . . ."). Although the Sixth Circuit correctly held that the drivers received all the process due concerning the suspension of their occupational licenses, App 58a, 71a, it failed to follow clearly established law concerning exclusion orders. Once their licenses had been suspended, the drivers no longer had any licenses; that property right had been extinguished by the suspensions. And that meant that the only issue that remained was whether excluding them from visiting racing grounds as spectators deprived them of some property or liberty interest. Only if that was the case were they entitled to due process as to the exclusions.

But while the *Moody I* decision conflated these two very different matters (the right to earn a livelihood via an occupational license versus the opportunity to enter racing grounds as a spectator), it failed to consider binding circuit precedent that held that it did *not* violate due process to exclude someone from racing grounds without any post-deprivation hearing. In *Rodic*, the Sixth Circuit determined that exclusion does not trigger due-process protections because an individual does not have a property interest in being on the grounds of a racetrack, or even a liberty interest (so long as the exclusion did not rest "on some impermissible basis, for example because of his race or his exercise of first amendment rights . . . ."). 615 F.2d at 739–40.

The *Moody II* majority viewed the *Moody I* panel's decision that the drivers had a due-process right to a

post-exclusion hearing, App. 72a, as a decision that such a right was clearly established. App. 10a. And while the majority ignored *Rodic*, Judge Batchelder cited *Rodic* and observed that *Moody I* had "extend[ed] *Barry* to cover 'exclusions' in addition to 'suspensions.' " App. 20 n.1. The fact that the court needed to "extend[ ]" *Barry* and to ignore the directly on-point decision in *Rodic* confirms that the law was not clearly established against the regulators before this case; the law was not settled beyond debate that it would violate due process to exclude a former-driver-turned-spectator from racing grounds when there was precedent allowing the exclusion of a spectator without any hearing at all.

Here, the drivers produced no authority clearly establishing that *exclusion* deprived them of a protected interest, which was essential to give the regulators notice that due-process protections were required. Even so, the mere right to a hearing is no longer the right at issue because the drivers admitted on remand that they received a post-exclusion hearing. Instead, the *Moody II* panel generously allowed the drivers to assert a new claim not found in their complaint—a claim that even though they received a post-exclusion hearing, that hearing was untimely.

Of course, *Moody I* did not examine whether *that* right was clearly established. By relying on *Moody I*'s holding concerning only a right to due process, *Moody II* flouted this Court's frequent admonishment against defining " 'clearly established law at a high level of generality,' " *Wesby*, slip op. 14 (quoting *Plumhoff*, 134 S. Ct. at 2023). "The general proposition, for example, that an unreasonable search or seizure violates the

Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." *al-Kidd*, 563 U.S. at 742. The Sixth Circuit's general due-process proposition is likewise unhelpful.

Moreover, the Sixth Circuit's conclusion conflicts with the Tenth Circuit's qualified-immunity decision in *Columbian Financial*, where that court observed that "the determination of the constitutionality of a delay is a fact-intensive analysis." 811 F.3d at 401. In that case, the State seized a bank's assets, and the delay between the seizure and the conclusion of the post-deprivation hearing was over three years. *Id.* at 395–96. The bank asserted that the delay violated due process. *Id.* The Tenth Circuit affirmed dismissal of the claim. *Id.* at 402. In the face of "inherent uncertainty in how our court or the Supreme Court would apply the fact-intensive balancing test governing the constitutionality of delay in post[-]deprivation hearings," the Tenth Circuit found that the right at issue was not clearly established. *Id.* at 402 (citing *Humphries* v. *Cnty. of Los Angeles*, 554 F.3d 1170, 1202 (9th Cir. 2008); *Benson* v. *Allphin*, 786 F.2d 268, 276 (7th Cir. 1986) ("It would appear that, whenever a balancing of interests is required, the facts of the existing caselaw must closely correspond to the contested action" to defeat qualified immunity.).

The Tenth Circuit's conclusion reflects this Court's longstanding view that "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). It also corresponds with this Court's qualified-immunity analysis in Fourth

Amendment cases, such as *Wesby*. There, this Court observed that the "imprecise nature" of the probable-cause analysis makes it difficult for officers to know how the standard applies in " 'the precise situation encountered.' " *Wesby*, slip op. 15 (quoting *Ziglar* v. *Abbasi*, 582 U.S. ___, ___, slip op. 28 (2017)). Likewise, it is difficult for an official to know what constitutes a "meaningful time" in a precise situation. Thus, as the Tenth Circuit held, finding that the law governing an untimely hearing claim was clearly established necessarily requires reliance on closely analogous precedent. See *Wesby*, slip op. 15 (stressing specificity's importance in Fourth Amendment cases).

Finally, the Sixth Circuit's refusal to consider whether Ernst's and Lessnau's actions even affected the hearing's timing, App. 10a, defeats its conclusion that the right was clearly established. Showing that the constitutional right's contours were "sufficiently definite that any reasonable official in [the regulators'] shoes would have understood that he was violating [the right]," *Plumhoff*, 134 S. Ct. at 2023 (citation omitted), requires knowing what shoes Ernst and Lessnau were standing in. And although this Court in *Wesby* "*start[ed]* by defining 'the circumstances with which [the officers] were confronted,' " *Wesby*, slip op. 15 (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987)) (emphasis added), the Sixth Circuit refused to consider Ernst's and Lessnau's circumstances at all.

Ernst's and Lessnau's predicament epitomizes the concerns qualified immunity is supposed to protect. "[Q]ualified immunity is important to society as whole . . . and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously

permitted to go to trial." *White* v. *Pauly*, 137 S. Ct. 548, 551 (2017) (internal citations and quotations omitted). Ernst and Lessnau have not even had an opportunity to defend against the evolving claim on which they will face trial. Certiorari—even summary reversal—is warranted to preserve qualified immunity's value and to hold the drivers to their burden for overcoming it.

CONCLUSION

The petitioners request that the Court grant the petition and reverse the Sixth Circuit.

Respectfully submitted,

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Dated: FEBRUARY 2018