No. 17-1142

In the Supreme Court of the United States

MICHIGAN GAMING CONTROL BOARD, *et al.*,
Petitioners,

v.

JOHN MOODY, *et al.*,
Respondents.

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

Brief of Michigan Municipal Risk Management Authority, Government Law Section of the State Bar of Michigan, Michigan Sheriffs' Association, and Michigan Association of Chiefs of Police as *Amici Curiae* in Support of Petitioners and Reversal

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Michigan Municipal Risk Management Authority

The Michigan Municipal Risk Management Authority (MMRMA) is a pool of over 300 self-insured municipalities and governmental agencies throughout the State of Michigan, consisting of cities, counties, townships, villages, and other governmental entities. The MMRMA provides information on issues of importance to its members and the public through meetings, seminars, public service programs, and publications. The MMRMA supports the Petitioners' position in this matter and offers a collective public-employer perspective. The MMRMA submits this brief because its agencies and members have a substantial interest in the issues presented in promoting public accountability, educating member employers and employees, and complying with legal precedent.

Government Law Section of the State Bar of Michigan

The Government Law Section of the State Bar of Michigan is a voluntary membership section of the State Bar of Michigan, comprised of approximately 701 attorneys who generally represent the interests of

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[1] In accordance with Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and no such counsel or party made any monetary contribution to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties received timely notice of *amici*'s intention to file this brief, and consent to file was granted by all parties. Correspondence reflecting the parties' consent has been filed with the Clerk.

government corporations, including cities, villages, townships and counties, boards and commissions, and special authorities. Although the Section is open to all members of the State Bar, its focus is centered on the laws, regulations, and procedures relating to public law. The Government Law Section provides education, information and analysis on issues of concern to its membership and the public through meetings, seminars, the State Bar of Michigan website, public service programs and publications. The Section is committed to promoting the fair and just administration of public law. In furtherance of this purpose, the Government Law Section participates in cases that are significant to governmental entities throughout the State of Michigan. The Section has filed numerous Amicus Curiae briefs in state and federal courts. The position expressed in this Amicus Curiae Brief is that of the Government Law Section only and is not the position of the State Bar of Michigan.

Michigan Sheriffs' Association

The Michigan Sheriffs' Association (MSA) was formed in 1877. It is the oldest law enforcement organization in Michigan and the only organization officially representing the Office of Sheriff in Michigan. The MSA represents 83 Sheriffs' Offices and focuses its efforts, among other endeavors, on supporting the development of legislation and legal requirements that best serve the Sheriffs and the citizens of Michigan. The MSA monitors pending legislation, court decisions and state funding resources that affect jail and department operations and local services.

Michigan Association of Chiefs of Police

The Michigan Association of Chiefs of Police (MACP) is a dynamic association, forever changing through the influence and actions of individual members who bring their expertise and an impetus for improvement in the criminal justice system. Their concerted efforts are aimed at improving the police profession and the quality of life for the citizens of the state of Michigan. Founded in 1924, the MACP is governed by an 18 member Board of Directors. The association is guided by its Constitution, and Article I, Sec. 2 provides for the purposes of the MACP, which include, in relevant part, to advance the science and art of police administration and crime prevention and to seek legislation of benefit to the citizens of the state or law enforcement in general. The MACP has over 1100 members representing over 500 Municipal, County, State, College, Tribal, Railroad, and Federal police agencies.

SUMMARY OF ARGUMENT

The Michigan Gaming Control Board (MGCB) had evidence that licensed harness-racing drivers were accepting money to "fix" results of horse races. The Board sought to interview Respondents, the driver licensees.

Respondents were represented by counsel at the May 20, 2010 stewards' hearings. They were advised of their obligation under the law to cooperate with the investigation as a condition to licensure. They also were advised that failure to cooperate could result in license suspension. They had been directed to provide bank records which they failed to produce. Respondents were not asked to surrender or waive their immunity afforded by *Garrity v. New Jersey*, 385 U.S. 493 (1967), which recognized that the Fifth Amendment automatically protects compelled statements from later being used against that person in criminal proceedings. Nonetheless, when they were questioned by regulators during the race-fixing investigation, each asserted the Fifth Amendment privilege and refused to answer.

MGCB officials suspended the drivers' licenses for failure to cooperate and they were later excluded for a period of time from MGCB-regulated tracks. The drivers sued the Petitioners, claiming that the licensing sanctions violated the Fifth Amendment and the Due Process Clause.

The district court granted summary judgment in favor of the Petitioners, but the Sixth Circuit reversed in part and held that the licensing sanctions violated the Respondents' Fifth Amendment right against self-

incrimination. It further held that the regulators could be liable for monetary damages and opined that they would be required to refrain from acting unless they could prove illegal activity or procure immunity agreements from prosecutorial agencies.

On remand, the district court held that qualified immunity applied to the regulators on the self-incrimination claim where at the time of the challenged conduct the law did not clearly establish a duty to procure immunity agreements from prosecutors before penalizing licensees for refusing to answer regulatory questions. The court also granted in part and denied in part a Due Process claim premised upon a post-exclusion hearing. However, where the focus of *Amici* is on the Fifth Amendment claim, its briefing will be limited to that issue.

The Sixth Circuit again reversed. In a divided panel, the majority rejected that *Garrity* automatically provided immunity and further held that the right to refuse to answer incriminating questions unless immunity was "offered" was clearly established in *Lefkowitz v. Turley*, 414 U.S. 70 (1973). The dissent observed that *Turley* did not constitute clearly established law in the proper context where here, unlike *Turley*, there were no statutes or regulations requiring waiver of immunity in criminal proceedings.

For decades, public employers and regulators have followed this Court's precedent in striking a balance between maintaining the public trust and honoring public employee and contractor rights against self-incrimination. The Sixth Circuit's decision disregards this Court's precedent and creates a division among circuits. The Petition for Writ of Certiorari should be

granted and the Sixth Circuit's decision should be reversed.

ARGUMENT

I. THE PUBLISHED SIXTH CIRCUIT DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS, CREATING UNCERTAINTY AND PERILOUS BARRIERS TO A PUBLIC EMPLOYER'S OR LICENSOR'S ABILITY TO INVESTIGATE ALLEGED IMPROPRIETY AND HOLD PUBLIC EMPLOYEES, LICENSEES, AND CONTRACTORS ACCOUNTABLE IN THE EMPLOYMENT CONTEXT. REVIEW SHOULD BE GRANTED TO RESOLVE THE CIRCUIT SPLIT AND PROPERLY APPLY QUALIFIED IMMUNITY.

A. The State regulators did not violate the Fifth Amendment and the conflict-creating decision below is destined to erode public trust and accountability

In *Plumhoff v. Rickard,* 134 S. Ct. 2012 (2014), this Court reiterated that "qualified immunity is 'an immunity from suit rather than a mere defense to liability.'" Id., at 2018-2019. It is 'both important and completely separate from the merits of the action, and cannot be effectively reviewed on appeal from a final judgment because by that time the immunity from standing trial will have been irretrievably lost.' Id., citations omitted. As a result, resolution of immunity issues "at the earliest possible stage" is favored to avoid erroneously permitting a case to proceed to trial. *Pearson v. Callahan*, 555 U.S. 223, 231-232 (2009).

Government officials performing discretionary functions generally are shielded from liability for damages insofar as 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 (1992). The contours of the right must be sufficiently clear so that an objectively reasonable officer would understand that what he or she is doing violates that right. *Anderson v. Creighton*, 483 U.S. 635, 639-640 (1987). Qualified immunity is broadly construed to shield "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In *Malley*, this Court extended the *Harlow* rule and held that government officials are entitled to qualified immunity unless, on an objective basis, it is obvious that no reasonably competent official would have concluded that the conduct was lawful; but if officials of reasonable competence could disagree on the legality of the action, immunity should be recognized. *Malley*, at 341.

Put another way "officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Rudlaff v. Gillispie*, 791 F.3d 638, 644 (6th Cir. 2015), quoting *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992).

In determining whether qualified immunity applies, our courts consider: (1) whether a constitutional right has been violated, and (2) whether that right was clearly established such that the official's conduct was objectively unreasonable in light of such clearly established law. *Everson v. Leis*, 556 F.3d 484, 494 (6th Cir. 2009). Courts may address these prongs in any

order, and any one may be dispositive. *Pearson*, *supra* at 236.

Here, the State regulators did not violate the Fifth Amendment where they had the duty to investigate the allegations of race-fixing by its licensees, and *Garrity* immunity applied to prevent the use of statements in any subsequent, possible criminal proceedings. The Sixth Circuit's erroneous decision appears to arise from a fundamental misapplication of *Garrity v. New Jersey*, 385 U.S. 493 (1967) and its progeny. Where a public employee, contractor, or licensee is compelled, ordered, or directed to provide information to his public employer or licensor, *Garrity* provides that any such statements, testimony, or information cannot be used against him in a criminal prosecution. As the Petition astutely demonstrates, the overwhelming majority of circuits having addressed the application of *Garrity* have concluded that immunity arising therefrom is automatic.

In *Garrity*, former police officers were convicted of obstruction of justice in connection with "fixing" traffic tickets. When questioned by the attorney general, they were warned that their answers might be used against them. They were told that they could refuse to answer, but if they did, they would be dismissed. *Id*., at 495. The officers answered, and their answers were subsequently used against them in criminal prosecutions. This Court reversed their convictions and expressly held as follows:

> We now hold the protection of the individual under the Fourteenth Amendment against coerced statements ***prohibits use in subsequent criminal proceedings*** of

> statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic. *Id*., at 500, emphasis added.

No promise of immunity or written agreement from a prosecutorial agency was required. Rather, immunity occurred automatically, prohibiting statements made under the threat of loss of employment from being used in subsequent criminal proceedings. While a public employee no longer had to fret that his statements rendered under the threat of dismissal could be used in criminal proceedings, he could no longer erect a barrier to insulate himself from his employer's employment-related investigatory questions or disciplinary action.

In *Gardner v. Broderick*, 392 U.S. 273 (1968), a New York City patrolman was discharged after he refused to waive his privilege against self-incrimination before a New York County **grand jury** investigating alleged bribery and corruption of officers in connection with unlawful gambling operations. He was asked to sign a 'waiver of immunity' (given that such immunity preexisted) after being told that he would be fired if he refused. Following his refusal, he was discharged. *Id*., at 274-275.

Importantly, the petitioner there was terminated for 1) refusing to *waive* the immunity afforded him by *Garrity* while 2) he was before a *grand jury* - not his employer. Those salient facts carried the day in *Gardner*:

> If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity v. State of New Jersey*, *supra*, the privilege against self-incrimination would **not** have been a bar to his dismissal.
>
> The facts of this case, however, do not present this issue. Here, petitioner was summoned to testify before a grand jury in an investigation of alleged criminal conduct. He was discharged from office, not for failure to answer relevant questions about his official duties, but for refusal to waive a constitutional right. … He was dismissed solely for his refusal to waive the immunity to which he is entitled if he is required to testify despite his constitutional privilege. *Garrity v. State of New Jersey, supra*.
>
> …It is clear that petitioner's testimony was demanded before the grand jury in part so that it might be used to prosecute him, and not solely for the purpose of securing an accounting of his performance of his public trust. If the latter had been the only purpose, there would have been no reason to seek to compel petitioner to waive his immunity.

Gardner, *supra* at 278-279, emphasis added.

Similarly, in *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of City of New York*, 392 U.S. 280 (1968), the petitioners were not discharged merely for

refusal to account for their conduct as city employees. Rather, three were asked to sign waivers of immunity *before a grand jury* and refused, and twelve were told that their answers to questions by the Commissioner of Investigation *could* be used against them in subsequent proceedings. *Id*., at 283-284. Consequently, the petitioners could not answer the questions posed without fear of their statements being used against them *in subsequent criminal proceedings*.

Here, Respondents were not asked to waive the immunity afforded by *Garrity*, nor were they threatened with use of their statements against them in subsequent criminal proceedings. Given these significant distinctions, Respondents could not thwart the stewards' investigative efforts into the allegations of wrongdoing. Indeed, this Court said as much almost 50 years ago in *Uniformed Sanitation*:

> At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights. *Id*., at 284-285.

Because use immunity under *Garrity* applies, Respondents would not have been required to relinquish their constitutional rights in fulfilling their obligation to respond to the stewards' questions and production directives. Any incriminating statements and fruit therefrom could not have been used against them in subsequent criminal proceedings when faced with the loss of their licenses for failure to cooperate.

The majority's reliance on *Turley*, *supra*, is woefully misplaced where it failed to heed the context of that decision. In *Turley*, challenged New York statutes imposed sanctions on government-contracted architects for refusing to testify before a *grand jury* or for refusing to *waive* immunity against subsequent *criminal prosecution*. Id., at 75-76. Conversely, the Michigan Gaming Control Board (MGCB) did not require the harness drivers to testify before a grand jury or waive their immunity under *Garrity* from use of their statements in a criminal prosecution. Where the statutes in *Turley* sought to strip the contractors of *Garrity* immunity before a grand jury or in a criminal prosecution, it made complete sense for the Court to indicate that such immunity had to be "offered" or restored. Unlike the statutes in *Turley*, nothing here required the alleged wrongdoers to testify before a grand jury or in a criminal prosecution. *Garrity* immunity applied, rendering it wholly unnecessary to "offer" it before compelling cooperation in an employment or licensee context.

The regulators' position also comports with *Chavez v. Martinez*, 538 U.S. 760 (2003). The respondents were not required to waive their privilege against self-incrimination, nor were their statements used against them in a criminal proceeding (or at risk of being used based on *Garrity*). Rather, the regulators sought to investigate the allegations of wrongdoing in a licensor/licensee context to maintain public trust and confidence.

Indeed, the panel majority below also failed to acknowledge that this Court resolved the tension between the public employer/regulator's need to secure

testimony and the employee/licensee's right against self-incrimination. Under *Garrity*, an employee who is compelled to testify under the threat of dismissal (or, by parity of reasoning, loss of license) is immune from use of such compelled testimony in a criminal proceeding. At the same time, the public employer or regulator has means at its disposal to "insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment." *Turley*, at 84.

"By like token, the State may insist that the architects involved in this case ***either respond to relevant inquiries about the performance of their contracts or suffer cancellation of current relationships and disqualification from contracting with public agencies for an appropriate time in the future***. But the State may not insist that appellees waive their Fifth Amendment privilege against self-incrimination and consent to the use of the fruits of the interrogation in any later proceedings brought against them. Rather, the State must recognize what our cases hold: that answers elicited upon the threat of the loss of employment are compelled and ***inadmissible in evidence***." *Id*., at 84-85, emphasis added. See accord, *Lefkowitz v. Cunningham*, 431 U.S. 801, 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").

In reaching its desired result, the Sixth Circuit disregarded decades of precedent promulgated by this Court, created a division among circuits, and disrupted

the balance struck by public employers and regulators in attempting to maintain public trust and confidence while honoring employee and licensee rights against self-incrimination. The Sixth Circuit mandated a cumbersome and ill-conceived requirement that public employers and regulators must procure immunity agreements from any and all potential prosecutorial agencies – local, state, federal, and administrative – before a public employee, contractor, or licensee can be disciplined or penalized for refusal to answer questions regarding the performance of their public duties or regulated activities.

When investigating allegations of illegal activity or wrongdoing, literally thousands of public employers and regulators have followed this Court's precedent in striking a balance between maintaining public confidence in the proper performance of public duties and activities, and honoring public employee and contractor rights against self-incrimination. The Sixth Circuit's decision unhinges that balance, serves to further erode public trust, and imposes an unrealistic and impractical burden on public employers and regulators.

The Sixth Circuit decision not only fuels public mistrust but it affects public safety. For example, a state regulator may be presented with evidence that a builder is using faulty materials and engaging in hazardous practices. The Sixth Circuit decision would prevent the regulator from revoking the builder's license where the builder refuses to cooperate with an investigation based upon an assertion of his right against self-incrimination, unless the regulator could "prove" illegal activity without compelling the officer's

participation or first obtained immunity agreements from various potential prosecutorial agencies.

Similarly, a taxi-cab driver could be accused of misconduct but refuse to cooperate or provide his driver's manifest requested by the licensor in investigating the matter.

A police officer or sheriff's deputy could be involved in a duty-related shooting, where elements of a "hate crime" are alleged. Before a police chief or sheriff could question the officer and compel cooperation at the risk of discipline, that employer would be required by the Sixth Circuit to "prove" illegal activity or seek and obtain use immunity from both state and federal prosecutors, despite that *Garrity* immunity applies automatically.

Likewise, a worker at a government nuclear power plant might be accused of stealing chemicals and confidential materials but could not be disciplined or terminated for failure to cooperate with the investigation without first obtaining use immunity from various prosecutors.

A physician involved in collegiate sports could sexually assault minor athletes, but could not be disciplined or terminated for failure to cooperate unless immunity was first procured from potential prosecuting agencies.

The list goes on and on. Some allegations could easily trigger the necessity of obtaining agreements from local, state, federal, *and* administrative agencies. Innumerable scenarios can be envisioned under the Sixth Circuit's decision which would erode public trust and hobble public employers and regulators from

safeguarding their citizens. Immunity conferred by *Garrity* does not turn on an express grant or denial of an offer. Rather, it arises from compulsion. Where a public employee or licensee is compelled to answer employment-related questions posed by the employer or regulator in lieu of termination of employment, *Garrity* provides that those statements cannot be admitted in a subsequent criminal proceeding. The employer or regulator is able to conduct its investigation, and the employee or, in this case, licensee, retains its privilege against self-incrimination through immunity granted by operation of law.

The Sixth Circuit's contortion not only lacks a legitimate basis in the very cases it cited, but the decision blatantly contravenes this Court's prior rulings and those of the overwhelming majority of other circuits.

B. Where the Sixth Circuit's decision conflicts with precedent from this Court and decisions of other circuits, the right claimed was not clearly established, much less in any particularized sense

For purposes of qualified immunity, a right is "clearly established" when "it would be clear to a reasonable officer – or in this case, regulator – that his conduct was unlawful in the situation that he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). For qualified immunity to be surrendered, "pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*." *Cope v. Heltsley*, 128 F.3d 452, 459 (6th

Cir. 1997). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right." *Anderson*, *supra* at 640; *Brosseau v. Haugen*, 543 U.S. 194, 198-200 (2004).

Our courts must determine whether the right has been recognized in a particularized, relevant sense. *Anderson*, *supra*. In other words, while a generalized right to be free from such things as unlawful searches and self-incrimination is "clearly established," this Court requires a more particularized inquiry, probing "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, at 202.

When conduct is within the 'hazy border' of a constitutional right, it cannot be said that a government officer violated a 'clearly established' right. *Brosseau*, *supra* at 198. Because "reasonable mistakes can be made as to the legal constraints on particular … conduct," qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law." *Dorsey v. Barber*, 517 F.3d 389, 394 (6th Cir. 2008).

In *Pearson*, *supra*, this Court *unanimously* reiterated that "the protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" Id., at 231. In other words, *qualified immunity covers* "*mistakes in judgment, whether the mistake is one of fact or one of law*." Id., emphasis added. "Qualified immunity shields an officer from suit when [he] makes a decision that, even if constitutionally deficient,

reasonably misapprehends the law governing the circumstances [he] confronted." *Brosseau*, *supra* at 198. The ultimate question is "whether a reasonable [officer] *could have believed* the [challenged action] to be lawful, in light of clearly established law and the information [he] possessed." *Anderson*, at 641.

With respect to the "clearly established" nature of the right, this Court in *Plumhoff*, *supra*, stressed that "existing precedent must have placed the statutory or constitutional question confronted by the official *beyond debate*." Id., at 2023, emphasis added. See also, *Mullenix v. Luna*, 136 S. Ct. 305 (2015). The *plaintiff* bears the burden of showing that defendants are not entitled to qualified immunity.

The Tenth Circuit, in *City of Hays, Kansas v. Vogt*, 844 F.3d 1235 (10th Cir. 2017), cert. granted, 138 S. Ct. 55, granted immunity to the individual officers involved because it was not clearly established that *pretrial* use of Vogt's statements would violate the Fifth Amendment. Id., at 1248. Where pretrial use of statements was not clearly violative, it is beyond cavil that the present case warrants qualified immunity.

Contrary to the *Moody II* majority, public employers and regulators are not precluded from taking action when an employee or licensee refuses to cooperate under the guise of self-incrimination in answering employment-related inquiries. *Garrity* use immunity arises by operation of law, and the Sixth Circuit's decision stands in stark contrast to other cases on this front. See e.g., *Sher v. U.S. Dep't of Veterans Affairs*, 488 F.3d 489, 501-502 (1st Cir. 2007) (threat of removal was sufficient to constitute coercion for purpose of *Garrity* immunity and federal employee had no basis

under Fifth Amendment for refusing to answer employer's questions; no specific grant of immunity is necessary); *Uniformed Sanitation Men v. Comm'r of Sanitation*, 426 F.2d 619, 624 n. 2 (2nd Cir. 1970) (the very act of telling the witness that he would be subject to removal if he refused to answer was held to have conferred such immunity); *Gulden v. McCorkle*, 680 F.2d 1070, 1075 (5th Cir. 1982) (the fact that testimony was compelled prevents its use in subsequent proceedings, not any affirmative tender of immunity); *United States v. Veal*, 153 F.3d 1233, 1239 n. 4 (11th Cir. 1998) ("The Fifth Amendment protection afforded by Garrity to an accused who reasonably believes that he may lose his job if he does not answer investigation questions is Supreme Court-created and self-executing; it arises by operation of law; no authority or statute needs to grant it"); *In re Federal Grand Jury Proceedings*, 975 F.2d 1488, 1490 (11th Cir. 1992) (*Garrity* provides immunity to police officers who witness potentially criminal activity and are asked to provide information to police internal investigation personnel); *Nat'l Acceptance Co. v. Bathalter*, 705 F.2d 924, 928 (7th Cir. 1983) (statements made under threat of termination would be immunized by *Garrity*); *United States v. Friedrick*, 842 F.2d 382, 396 (D.C. Cir. 1988) (FBI employee subject to administrative investigation enjoyed use immunity); and *Hester v. City of Milledgeville*, 777 F.2d 1492, 1496 (11th Cir. 1985) (privilege against self-incrimination affords a form of use immunity which, absent waiver, automatically attaches to compelled incriminating statements as a matter of law).

Likewise, it was respondents' obligation to provide clearly established authority, demonstrating in a particularized sense to the situation confronting the regulators, that they could refuse to answer questions under the protective umbrella of *Garrity* immunity and not face any licensing or exclusion consequences from doing so. This they failed to do. As previously briefed, the challenged conduct does not run afoul of either *Turley* or *Chavez*. Rather, it comports with it. The Sixth Circuit decision contravening precedent from this Court and other circuits must be reversed.

CONCLUSION

For all of the foregoing reasons and those discussed in the Petition for a Writ of Certiorari, *Amici Curiae* respectfully request that this Supreme Court grant review of this matter.

Respectfully submitted,

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