No. 17-1142

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

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

INTRODUCTION

The Sixth Circuit created a prophylactic requirement that, to avoid liability under § 1983, regulators must expressly offer government licensees self-incrimination immunity. And it then held that its new rule and the due-process right in this case were clearly established. These decisions created circuit splits worthy of this Court's review and violated this Court's self-incrimination and qualified-immunity precedent.

The drivers' brief in opposition does not demonstrate otherwise. Instead, their self-incrimination arguments all rest on a flawed premise: they think someone who has *received* immunity by virtue of being required to cooperate under threat of a job-related penalty is situated just like someone who is required to *waive* that immunity. Because of this mistake, they misunderstand *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973), and the Sixth Circuit's opinions. But even their flawed theory necessitates considering whether immunity under *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), applies automatically, because they incorrectly assert that the Sixth Circuit recognized its automatic application. Further, their theory still bases § 1983 damages on violating a prophylactic rule, making it necessary to consider whether that is sufficient under *Chavez* v. *Martinez*, 538 U.S. 760 (2003).

Also failing to show that the self-incrimination and due-process rights were clearly established, the drivers ignore the Sixth Circuit's failure to consider conflicting precedent in its decision.

Finally, their vehicle objections lack merit. Only monetary claims against the individual regulators remain; the drivers have been licensed and the exclusions lifted since 2014. Certiorari is appropriate now because qualified immunity is effectively lost if the case proceeds to trial. *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). And governments circuit-wide are currently bound by *Moody I*'s burdensome requirement that they grant immunity before penalizing uncooperative employees or licensees.

ARGUMENT

I. The drivers' self-incrimination claims hinge on their misunderstanding of *Turley* and the Sixth Circuit's holdings.

A. The drivers do not accurately describe *Turley*.

The drivers characterize this case as a "straightforward application of *Turley*." Br. in Opp. 25. *Turley*, they argue, permits the government to cure an attempt to coerce an immunity waiver by offering immunity. *Id*. at 2, 18, 25–26. And in such cases where the government has merged administrative and criminal proceedings, it must, they continue, *offer* immunity before penalizing employees who exercise their Fifth Amendment rights. *Id*. at 18, 22 ("[T]he *Turley* violation . . . is what required the State to make an offer of immunity as a cure to the specific violation.").

But *Turley* says no such thing.

The architects in *Turley* did not, as the drivers aver, refuse to waive immunity in an administrative proceeding. Br. in Opp. 3, 25. *Turley* did not involve any *administrative* proceedings. Rather, the architects were called before a *grand jury*, where they refused to waive "their right not to be compelled in a criminal case to be a witness against themselves." *Turley*, 414 U.S. at 76. They also were not punished with license revocation. Contra Br. in Opp. 25. The challenged statutes imposed contracting, not licensing, consequences. *Turley*, 414 U.S. at 71–72 & n.1. The State in *Turley* therefore did not *merge* administrative and criminal proceedings, a feature central to the drivers' theory. And *Turley* nowhere prescribes offering immunity as a "cure" for a violation, allowing the state to "continue with the administrative proceeding." Contra Br. in Opp. 3–4, 18, 25–26.

B. The drivers also misunderstand the Sixth Circuit's reliance on *Turley*.

Continuing down the wrong path, the drivers incorrectly view *Turley* as underlying the Sixth Circuit's decision that their self-incrimination rights have been violated—and incorrectly attribute that finding to *Moody II*. But *Moody II* recognized that *Moody I* had already held that the regulators had violated the Fifth Amendment, Pet. App. 5a, and thus addressed only whether that right was clearly established, *id*. at 5a, 12a. The drivers contend that *Moody II* found a triable issue of fact on whether the drivers were coerced to waive their *Garrity* rights. Br. in Opp. 12–13, 18–19, 24–25. But the violation's existence is not an issue for trial for a simple reason: *Moody I* already held that a violation occurred.

Additionally, the *Moody II* majority did not construe *Turley* as the drivers do; it made no mention of curing a violation by offering immunity and did not describe *Turley* or this case as involving combined criminal and administrative proceedings. Contra Br. in Opp. 19. Instead, the *Moody II* majority concluded that *Turley* permits public employees and licensees to refuse to answer questions until expressly provided immunity, that the required immunity does not attach automatically, and that *Turley* protects against coercion itself. Pet. App. 15a–17a. As the petition explains, those conclusions are incorrect and conflict with holdings of this Court, the Sixth Circuit, and other courts.

Even the *Moody I* panel, in finding the self-incrimination rights violated, did not rely on *Turley*; it cited it only twice, *id*. at 60a, 62a n.10, and without construing it as the drivers do now. The violation *Moody I* found rested on the regulators not *offering* the drivers immunity—not on compelling them to *waive* immunity. Pet. App. 58a, 65a.

C. *Turley* echoes *Garrity*.

Despite the drivers' (and the *Moody II* majority's) views, *Turley* flows from *Garrity* and does not create a separate Fifth Amendment right. *Garrity* found testimony that police officers provided under a threat of dismissal compelled and, therefore, inadmissible in criminal proceedings against them. 385 U.S. at 500. (*Garrity* does not prohibit administrative agencies from sharing information with criminal authorities, contra Br. in Opp. 17.) And *Garrity*'s pre-*Turley* progeny, *Gardner* v. *Broderick*, 392 U.S. 273, 274–75 (1968), when considering demands to waive the Fifth

Amendment right, also recognized that public employees may be fired for refusing to answer job-related questions: If a public employee "refuse[s] 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*], the privilege against self-incrimination would *not* [be] a bar to his dismissal." *Gardner*, 392 U.S. at 278 (footnote omitted, emphasis added). In *Turley*, this Court declared those cases controlling. 414 U.S. at 82. *Turley* thus did not establish a new right. It applied *Garrity*'s progeny to a new set of people—governmental contractors. *Garrity* immunity is the only immunity at issue here.

These cases make plain what the drivers and the Sixth Circuit confuse: compelling testimony is factually and constitutionally different from requiring an immunity waiver. The government may require someone to answer job-related questions because the person will be automatically immune from use of the testimony against him in a criminal case, but it may not require someone to give up that immunity. Simply put, requiring the drivers to cooperate did not "thus [require them] to waive their Fifth Amendment rights," Br. in Opp. 8; cf. *Gulden* v. *McCorkle*, 680 F.2d 1070, 1071, 1073–76 (5th Cir. 1982) (rejecting theory that requiring cooperation in an investigation impliedly required a Fifth Amendment waiver).

The drivers now allege that the regulators required them to waive immunity. *Id*. at 12–13, 18–19, 25. But that ship has sailed. The district court expressly stated that the "Plaintiffs were not . . .

required to waive their Fifth Amendment rights," Pet. App. 95a, and the *Moody I* panel, in finding the self-incrimination violation, did not say that anyone asked them to waive immunity. Moreover, the drivers did not dispute the prior petition's assertions that no one had asked them to waive immunity. See Pet. Reply, No. 15-623, at 3. And in *Moody II*, Judge Batchelder likewise concluded that the drivers had not "pointed to anything in the record suggesting that [the regulators] asked them to sign away their Fifth Amendment rights." Pet. App. 28a. Even now, they cite requests that they cooperate in the investigation, not requests that they waive immunity. Br. in Opp. 8.

II. The Sixth Circuit created circuit splits concerning *Garrity* and *Chavez*.

A. *Garrity* provided the drivers automatic immunity.

The drivers, attempting to negate the circuit split, incorrectly state that the *Moody II* majority recognized that *Garrity* immunity arose automatically. Br. in Opp. 17. To the contrary, the *Moody II* majority expressly rejected automatic immunity: "To assume, as the [regulators] would have us do, that immunity applied automatically is to say that there is no right at all." Pet. App. 15a. Further, *Moody I* specifically condemned the regulators for not offering immunity, basing the self-incrimination violation on the regulators' failure to do so. Pet. App. 58a, 65a. Thus, whether the drivers automatically had *Garrity* immunity remains a central issue.

Garrity immunity, despite the drivers' dispute of its sufficiency, Br. in Opp. 12, 18, extends as far as *Turley* requires. The *Moody II* majority suggested that *Garrity* immunity "may not" satisfy *Turley*'s requirement of " 'whatever immunity is required to supplant the privilege' " because *Kastigar* v. *United States*, 406 U.S. 441, 458 (1972), requires protection from "use and the *derivative use* of coerced statements at trial." Pet. App. 14a (quoting *Turley*, 414 U.S. at 84–85). But this Court has viewed *Garrity* immunity as coextensive with *Kastigar*. In *Gardner*, this Court relied on *Garrity* to condemn requiring a waiver of "immunity with respect to the use of [the appellant's] answers *or the fruits thereof* . . . ." 392 U.S. at 278 (citing *Garrity*, 385 U.S. at 500) (emphasis added). And, in *Chavez*, the plurality recounted that this Court has "recognized that governments may penalize public employees . . . to induce them to respond to inquiries, so long as the answers elicited (and their fruits) are immunized from use . . . ." 538 U.S. at 768. Circuit courts of appeals likewise extend *Garrity* immunity to derivative use. See, e.g., *Wiley* v. *Mayor & City Council of Baltimore*, 48 F.3d 773, 778 (4th Cir. 1995) (stating that *Garrity*'s immunity would apply "if the state had attempted to make direct or derivative use of the officers' statements against them"); *Sher* v. *United States Dep't of Veterans Affairs*, 488 F.3d 489, 501 (1st Cir. 2007) (stating that *Garrity* and *Gardner* require "immunity from the use of [ ] statements or their fruits in subsequent criminal proceedings").

Because *Garrity* immunity is automatic and is sufficient to supplant the privilege, the drivers had the immunity that *Turley* required while they were threatened with regulatory consequences. They were

thus not privileged to decline answering the regulators' questions. See Pet. App. 15a (recognizing that *Turley*, 414 U.S. at 78, permits enjoying the privilege not to testify "unless and until" protected from use or derivative use of testimony).

The drivers criticize the petition's cases supporting the circuit split on this issue as not involving coercing a public employee or licensee into *waiving* their right against self-incrimination. But as discussed above, neither does this case. The petition properly relies on those cases to support *Garrity* immunity's automatic application, and the drivers do not deny that they do.

B. The Sixth Circuit created circuit splits concerning *Chavez*.

The drivers also fail to overcome *Chavez*'s importance to this case. Initially, they argue that the regulators waived review of whether *Chavez* bars relief by not raising the question again in *Moody II*. Br. in Opp. 22–23. But raising the issue again was unnecessary; *Moody I* had already decided that *Chavez* did not bar the drivers' self-incrimination claim. *Moody II* had no reason to address that question, examining only whether the right was clearly established. Both opinions give rise to this petition, and *Chavez* remains significant.

The drivers also attempt to dismiss the circuit splits by arguing that *Turley* was an unconstitutional-conditions case and, thus, did not require a facial Fifth Amendment violation. Br. in Opp. 23–24. They disregard that *Turley* was not a § 1983 case and that this

Court, in its reference to *Turley* in *Chavez*, 538 U.S. at 768 n.2, did not state that a coerced immunity waiver is remediable by § 1983 damages. Rather, the plurality in *Chavez* viewed a coerced immunity waiver as "a prospective waiver of the core self-incrimination right in any subsequent criminal proceeding." *Id*. Thus, the waiver in *Turley* still implicated the core Fifth Amendment right against use of testimony in a criminal case, unlike the coercion without such use in *Chavez*, 538 U.S. at 769, and the questioning without such use here.

As they attempted with the *Garrity* split, the drivers dismiss the *Chavez*-related cases because they are not *Turley* cases and some are unrelated to public employment. Br. in Opp. 24. Their objection fails here as it did above; *this* is not a *Turley* case (because the drivers were not required to waive immunity), and the cited cases still support the *Chavez*-related split. The drivers also wrongly contend that *Moody I* distinguished *Chavez* because it was not a *Turley* case, Br. in Opp. 10. On the contrary, *Moody I* distinguished *Chavez* because the dissent in *Aguilera* v. *Baca*, 510 F.3d 1161, 1179 (9th Cir. 2007) (Kozinski, J., dissenting), said that *Chavez* applies only when the plaintiff speaks. Because the drivers remained silent at the stewards' hearings, *Moody I* found a self-incrimination violation despite *Chavez*. Pet. App. 63a–64a.

III. The Sixth Circuit violated this Court's standards for demonstrating clearly established rights.

A. The self-incrimination right was not clearly established.

The drivers have not shown that the Sixth Circuit properly applied this Court's precedent on clearly established rights. In fact, their construction of *Turley* shows that *Turley* did *not* clearly establish the right identified in *Moody I*. It would strain reason to conclude that *Turley* clearly established the right at issue when the drivers' interpretation differs so significantly from the *Moody II* majority's interpretation and from the right the *Moody I* panel found violated.

The drivers also disregard Judge Batchelder's dissenting view that *Turley* did not clearly establish the *Moody I* right and ignore the conflicting precedent that informed the regulators that they would not be violating the drivers' self-incrimination rights. And like the *Moody II* majority, they identify no case applying *Garrity* (or *Turley*) in a licensing context, such that the regulators would have had notice, as is necessary to overcome qualified immunity, that any testimony they received would be considered coerced.

Although they dispute the relevance of this Court's certiorari grant in *City of Hays*, *Kansas* v. *Vogt*, No. 16-1495, 138 S. Ct. 55 (2017), because *Vogt* does not concern the unconstitutional-conditions doctrine, they do not explain why this Court would grant review in *Vogt* if the law clearly established that Vogt could prevail in his § 1983 action even if his alleged *Garrity* testimony was never used in a criminal trial.

B. The due-process right was not clearly established.

The drivers likewise fail to show that the Sixth Circuit properly found the due-process right clearly established. First, they do not demonstrate a more legally cognizable interest in visiting racetracks than the spectator had in *Rodic* v. *Thistledown Racing Club*, *Inc.*, 615 F.2d 736 (6th Cir. 1980), because the drivers lacked licenses when they were excluded. *Barry* v. *Barchi*, 443 U.S. 55 (1979), does not, as they assert, provide a property interest in *obtaining* a license, only in a license actually held. See *Bd. of Regents* v. *Roth*, 408 U.S. 564, 577 (1972) (stating that having "a unilateral expectation of" a benefit does not constitute a property interest). They identify no case advising the regulators of a due-process right to a post-exclusion hearing, and *Rodic* advised them to the contrary.

Barry also does not require a prompt post-*exclusion* hearing—or show that the drivers were entitled to a hearing earlier than the one they received. The Sixth Circuit ignored the test for determining due-process timeliness in *FDIC* v. *Mallen*, 486 U.S. 230 (1988); analyzed no cases examining timeliness; and, conflicting with the Tenth Circuit in *Columbian Financial Corporation* v. *Stork*, 811 F.3d 390 (10th Cir. 2016), ignored the need to determine whether untimeliness was clearly established at a high level of specificity. Ernst and Lessnau, whose actual circumstances the Sixth Circuit refused to consider, cannot be deemed plainly incompetent or knowing lawbreakers, as required to overcome their qualified immunity, *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1867 (2017).

IV. The drivers raise no legitimate vehicle issues.

The drivers raise several unpersuasive vehicle objections to certiorari. Most drastically, they contend that granting certiorari will require the Court to reconsider qualified immunity's ongoing viability. Br. in Opp. 27–28, 33. Qualified immunity benefits society as a whole, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982), and the drivers' passing request provides no basis for overruling years of precedent. Granting certiorari will require the Court to consider the doctrine's application, not its viability, which the drivers never challenged in the lower courts.

The drivers' procedural objections similarly fail. First, there is no injunctive relief to be granted; as the drivers advised the court in *Moody I*, the exclusions were lifted and the drivers were relicensed in 2014. Appellants' Br. 5 (C.A. Dkt. No. 21); see also Pet. App. 57a, n.5. Second, the MGCB has received Eleventh Amendment immunity, Pet. App. 87a, and is not seeking qualified immunity. Finally, qualified immunity protects against having to proceed to trial, and the individual petitioners will effectively lose it if this case goes to trial. *Forsyth*, 472 U.S. at 526. Particularly here, where governments are already bound by *Moody I*'s immunity requirement, review is appropriate now.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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