No. 15-623

In The Supreme Court of the United States

MICHIGAN GAMING CONTROL BOARD, *ET AL.*,

Petitioners,

v.

JOHN MOODY, *ET AL.*,

Respondents.

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

BRIEF OF CALIFORNIA STATE SHERIFFS' ASSOCIATION, CALIFORNIA POLICE CHIEFS' ASSOCIATION, CALIFORNIA PEACE OFFICERS' ASSOCIATION, MICHIGAN SHERIFFS' ASSOCIATION AND MICHIGAN ASSOCIATION OF CHIEFS OF POLICE, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF CALIFORNIA STATE SHERIFFS' ASSOCIATION, CALIFORNIA POLICE CHIEFS' ASSOCIATION, CALIFORNIA PEACE OFFICERS' ASSOCIATION, MICHIGAN SHERIFFS' ASSOCIATION AND MICHIGAN ASSOCIATION OF CHIEFS OF POLICE, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

The California State Sheriffs' Association ("CSSA"), California Police Chiefs' Association ("CPCA"), California Peace Officers' Association ("CPOA"), Michigan Sheriffs' Association ("MSA") and Michigan Association of Chiefs of Police ("MACP") respectfully submit this brief as Amici Curiae in support of the Petition for Writ of Certiorari made by Petitioners Michigan Gaming Control Board, Richard Kalm, Gary Post, Daryl Parker, Richard Garrison, Billy Lee Williams, John Lessnau, and Al Ernst.[1]

[1] No party or counsel for a party authored this brief, in whole or in part. No person or entity other than Amici Curiae, its members, or its counsel made any monetary contribution to the preparation or submission of this brief. This representation is made in compliance with Rule 37.6 of the United State Supreme Court Rules.

I. AMICI CURIAE INTEREST AND BENEFIT TO COURT OF AMICI CURIAE BRIEF.

Amici endeavor to provide this Court with a broad law enforcement perspective, including as public employers, as to the issues in this matter. Specifically, Amici are directly impacted by, and concerned with, the automatic attachment of Fifth Amendment protections to compelled statements during investigations. This is of critical importance to Amici in their everyday activities, and the Sixth Circuit's Opinion in this matter below has far-reaching and potentially disastrous consequences to Amici's interests.

California State Sheriffs' Association

The CSSA is a nonprofit professional organization that represents each of the fifty-eight (58) California Sheriffs. It was formed to allow the sharing of information and resources between sheriffs and departmental personnel, in order to allow for the general improvement of law enforcement throughout the State of California.

California Police Chiefs' Association

CPCA represents virtually all of the more than 400 municipal chiefs of police in California. CPCA seeks to promote and advance the science and art of police administration and crime prevention, by developing and disseminating professional administrative practices for use in the police

profession. It also furthers police cooperation and the exchange of information and experience throughout California.

California Peace Officers' Association

CPOA represents more than 2000 peace officers, of all ranks, throughout the State of California. CPOA provides professional development and training for peace officers, and reviews and comments on legislation and other matters impacting law enforcement.

Michigan Sheriffs' Association

The 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, as well as 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 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 great 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.

II. SUMMARY OF ARGUMENT.

The Sixth Circuit Court of Appeal's opinion departs from this Court's precedent, beginning with *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967), which recognized that the Fifth Amendment automatically protects compelled statements from later being used against that person in criminal proceedings. This rule of law has long been relied upon by pubic employers, including law enforcement agencies, as well as other governmental agencies, in a multiplicity of circumstances. Where testimony is validly *compelled*, the resulting testimony is protected by the Fifth Amendment. More importantly, where a governmental agency may compel testimony, such as in the employment or licensing context, it may penalize witnesses for failing to provide the required testimony, so long as

the witness is not required to *waive* his or her Fifth Amendment right against later use of such testimony.

Even if this Court were to find that the Sixth Circuit's opinion does not directly conflict with this Court's precedent, there is sufficient uncertainty as to the applicability of the Fifth Amendment to administrative questioning of public employees, or in other contexts such as licensing, that this Court's review is still warranted. The implications of the Sixth Circuit's opinion are potentially far reaching, and governmental agencies, particularly those employing law enforcement personnel, must have firm assurance that they can continue questioning employees in the same manner as they have been for many decades.

III. ARGUMENT.

As set forth in the Petition for Writ of Certiorari, there are compelling reasons for this Court's review, and thus Amici respectfully urge this Honorable Court to grant the Petition. The decision of the Sixth Circuit Court of Appeal in this matter directly conflicts with relevant decisions of this Court and other Courts of Appeal, as well as the California Supreme Court and, at a minimum, severely undermines and erodes the Fifth Amendment principles upheld by this Court in *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967).

The critical implication of *Garrity* is its provision for questioning of individuals in administrative

investigations, and the fact that interrogators are able to compel testimony from such individuals, where there is some outside authority for the compelling of such testimony. As long as an individual's compelled responses may not be, and are not, used against the individual in a subsequent criminal proceeding, there is no violation of the United States Constitution in compelling such answers.

This Court rejected the notion, in *Chavez v. Martinez*, 538 U.S. 760, 767 (2003) (italics in original; bold added), that "the mere use of compulsive questioning, without more, violates the Constitution," and this Court thus found that, as to compelled statements, "it is not until their **use** in a criminal case that a violation of the *Self-Incrimination Clause* occurs."

Indeed, the Constitutional protection against subsequent *use* of such testimony stems *automatically* from the compelled nature of the testimony, not from the granting of formal use immunity. This has long been recognized to be the proper analysis of how Fifth Amendment rights are protected in non-criminal contexts. If there are subtle nuances to this widely recognized principle of law, then this Court must provide guidance, or else the Sixth Circuit's opinion may be the death knell of any compelled administrative statements. This would have potentially dire consequences to public employers throughout the nation and, particularly, in the State of California. Public employers regularly rely upon their ability to compel public

employee testimony in administrative investigations. Where employees are not required to waive their constitutional rights, the United States Constitution protects the later *use* of such compelled testimony against the employee in any subsequent criminal prosecution arising out of that event.

Therefore, public employers, and other governmental investigators, are free to question, on pain of penalty for refusing to cooperate, an individual who they may compel to provide a response. This can be validly done, without violation of the constitution, because the United States Constitution provides the protection automatically.

A. The Sixth Circuit's Opinion is Contrary to this Court's Precedent.

As the California Supreme Court recognized in *Spielbauer v. County of Santa Clara*, 45 Cal. 4th 704, 710, 199 P.3d 1125, 1128 (2009), "United States Supreme Court decisions, followed for decades both in California and elsewhere, establish that a public employee may be compelled, by threat of job discipline, to answer questions about the employee's job performance, so long as the employee is not required, on pain of dismissal, to *waive* the constitutional protection against criminal use of those answers."

Similarly, the *Spielbauer* Court noted that "many lower federal court cases have since held that the Fifth Amendment does not require a formal, affirmative grant of immunity before a public

employee may be dismissed for his or her blanket refusal to answer official questions about performance of the employee's public duties, so long as the employee is not required to surrender the constitutional privilege against the direct or derivative use of his or her statements in a subsequent criminal prosecution." *Id.* at 722, 199 P.3d at 1136.

However, this rule is not limited to an employee-employer circumstance. As this Court recognized in *Garrity v. New Jersey*, 385 U.S. 493 (1967) (quoting *Slochower v. Board of Education*, 350 U.S. 551, 557-558 (1956)), "[t]he [Fifth Amendment] privilege [against self-incrimination] serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances.'" In addition, the Fifth Amendment protects compelled statements *automatically*. *See, e.g.*, *Uniformed Sanitation Men Ass'n. v. Commissioner of Sanitation of the City of New York*, 426 F.2d 619, 626 (2d Cir. 1970) (there is no reason why there must be a statute conferring use immunity); *Kinamon v. United States*, 45 F.3d 343, 347 (9th Cir. 1995) ("[A] witness who is compelled to give testimony over objection derives his protection against self-incrimination from the Fifth Amendment and need not seek any other statutory basis for such protection."); *Adams v. Maryland*, 347 U.S. 179, 181 (1954) ("[A] witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection.

The Fifth Amendment takes care of that without a statute.")

Notably, in *Adams*, an individual provided testimony regarding an illegal gambling business to a Senate Committee investigating crime; since the testimony was under compulsion of a subpoena, this Court held that the testimony was necessarily protected from disclosure because the witness *did not testify voluntarily*. Although there may be some factual distinction on the basis that the witness in *Adams* actually provided incriminating testimony, as opposed to the witnesses in this matter who refused to answer questions, the real key is the *compulsory* nature of the testimony, not whether a witness speaks or not, and not whether the witness is an employee or not. As this Court emphasized in *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977) (italics added), "the touchstone of the Fifth Amendment is *compulsion*."

As soon as there is compulsion, whether by an employer or a regulatory agency, the Fifth Amendment protections automatically attach. See, e.g., *Knebel v. City of Biloxi*, 453 So. 2d 1037, 1040 (Miss. 1984) (immunity flows "not from the authority of the interrogator to make such a promise, but the very nature of the Fifth Amendment"); *Jones v. Franklin County Sheriff*, 555 N.E.2d 940, 945 (Ohio 1990) ("the privilege against self incrimination is preserved because a statement by investigators that nothing said at the hearing can be used at a subsequent criminal proceeding effectively immunizes that testimony from later use by a

prosecutor”)); Kate E. Bloch, *Police Officers Accused of Crime: Prosecutorial and Fifth Amendment Risks Posed by Police elicited “Use Immunized” Statements*, 1992 U. ILL. L. REV. 625, 669-70 (1992) (“The protection of the [compelled] statements, however, occurs through *operation of law*. Thus, even in those jurisdictions in which courts refuse to uphold dismissals for failure to instruct on the tripartite admonition, when the statements were taken in the face of *Garrity*-style Hobson’s choice, they *automatically* obtained Fifth Amendment protection.”) (italics added).

Appellants below admitted in their brief that “[t]he stewards told Plaintiffs that their refusal to answer any and all questions put to them could be construed as a failure to cooperate with the stewards and result in the immediate suspension/revocation of Plaintiffs’ racing and trainer licenses.” (Appellants’ Brief, Case No. 14-1511, at 3-4.) Indeed, Appellants in the Sixth Circuit acknowledged that their refusal to testify was during an administrative agency investigation, nothwithstanding the fact that parallel criminal charges may have been simultaneously being pursued by the Michigan State Police.

Just like the employees in cases similar to *Garrity* and its progeny, an individual cannot accept the limitations of a benefit (employment or a license), refuse to comply with the investigatory authority of a governmental agency charged with overseeing such employment or licenses, and at the same time retain the benefits associated therewith.

When an employee or licensee participates in an administrative, regulatory, investigative proceeding, and is told that their failure to cooperate, by the terms of their employment or license, will result in forfeiture of the benefit, they are compelled to testify for purposes of the Fifth Amendment. And even if an employee or licensee is not specifically informed about their constitutional rights, but is *compelled* to testify over their objections, as here, their testimony is automatically protected.

In both circumstances, they are not only subject to such penalties for failure to comply, but any testimony that they do provide under compulsion is automatically protected from *use* in any subsequent criminal proceedings. The Fifth Amendment, then, is self-executing. What the Fifth Amendment does not do, however, is permit someone who is subject to restrictions (by employment or regulation), to ignore those restrictions with impunity.

Perhaps there is no underlying authority to compel testimony. However, this is another question altogether. For Fifth Amendment purposes, based on this Court's precedent, the only relevant inquiry is whether a witness was, at the time of questioning, under compulsion to testify on pain of penalty.

The *Spielbauer* Court recognized that the "federal self-incrimination clause[] say[s] one cannot be made an involuntary witness against himself, or herself, *in a criminal proceeding*. **Thus, they do not prohibit officially compelled admissions of wrongdoing as such.** They only forbid the *criminal*

use of such statements against the declarant." *Spielbauer*, at 727, 199 P.3d at 1139 (bold added; italics in original).

Indeed, the Sixth Circuit Court of Appeal acknowledged that the privilege does not only protect employees, but also "protects a contractor, such as an architect, against the cancellation of state contracts" and "political party officers." 790 F.3d at 674.

Therefore, the Sixth Circuit's Opinion departs from the key underpinnings of *Garrity* and its progeny. The core Fifth Amendment right is triggered by the fact that an individual is *compelled* to provide testimony. This is true for licensees of a regulatory agency no less than employees.

B. Even if the Sixth Circuit's Opinion Could Be Construed as Consistent With this Court's Precedent, this Court's Clarification is Necessary.

The California Supreme Court in *Spielbauer* referenced a multitude of cases wherein this Court, and others, gave varying analyses of factual circumstances involving similar overarching legal questions to those at issue here – namely whether use immunity as to compelled administrative or investigative testimony is automatically protected by the Fifth Amendment. *Spielbauer*, 45 Cal. 4th at 715-717, 199 P.3d at 1131-1133. In fact, the *Spielbauer* Court specifically noted that "[t]he United States Supreme Court has been less than

clear about the minimum circumstances under which one may be officially compelled, over his or her constitutional objection, to give incriminating answers for nonpenal use." Id. at 715, 199 P.3d at 1131.

The Sixth Circuit Court of Appeal here found that "[b]ecause the Court's judgment depended on Justice Souter's fact specific view of the law, Justice Thomas's broader suggestion – that mere compulsion of testimony, without more, does not violate constitutional rights against self-incrimination – does not bind us in different situations." 790 F.3d at 675.

This creates, at the very least, an ambiguity regarding the parameters of *Garrity*. Indeed, it raises the potential specter that investigations, even by law enforcement agencies, may not be entitled to the full protections of the use immunity upon which they have come to rely. For instance, if an agency is conducting an investigation of a task force that has both employees and non-employee law enforcement officers, would Fifth Amendment protections automatically apply where the investigating agency is not the *employer* of one of the officers? *See generally*, *California Corr. Peace Officers' Ass'n v. State of Cal.*, 82 Cal. App. 4th 294 (2000) (discussing joint agency administrative investigation).

The applicability of use immunity might also be impacted in other circumstances. Because the Sixth Circuit's opinion discusses extensively case authorities relating to public employees, it injects uncertainty into the procedures used by law

enforcement agencies all over the country; the opinion at least implies that its rule requiring a formal granting of immunity applies in all instances, even as to public employees.

Unlike many public employees, peace officers necessarily occupy highly sensitive positions, having access to enormous amounts of confidential and private information, as well as being able to wield force, including *deadly* force, against the general public. They are even held to a higher standard of conduct, both on and *off* duty.

These and other potential ambiguities counsel in favor of this Court's review, and clarification of the parameters of *Garrity* and its progeny, as well as the general circumstances under which compulsion of testimony will result in use immunity stemming *automatically* from the Fifth Amendment.

The importance of a clear understanding of any limitations on the use immunity that flows from the Fifth Amendment cannot be overstated in the law enforcement context. As the *Spielbauer* Court noted, "the public employer must be able to act promptly and freely, in its administrative capacity, to investigate and remedy misconduct and breaches of trust by those serving on the public payroll." *Spielbauer*, at 729, 199 P.3d at 1125.

In particular, peace officers, more so than any other public employee, are likely to regularly be involved in situations in which they could be charged criminally. In point of fact, peace officers are required, as part of their daily duties, to engage in actions that would, themselves, be criminal if

engaged in by anyone else in society, such as the use of force against another and the carrying and use of a gun. Peace officers are also more likely to have direct contact with the public in circumstances that can involve (albeit lawful) infringement of an individual's constitutional rights, such as laying on of hands, detainment, incarceration, and direct physical harm or even death.

In California for instance, peace officers are required to " [b]e of good moral character." Cal. Govt. Code § 1031 (d). In addition, the California Court of Appeal has recognized that "[t]he unique position of peace officers subjects them to a higher standard of conduct than other [public] employees." *Bailey v. City of National City*, 226 Cal. App. 3d 1319, 1328 (1991) (citing *Unruh v. City Council*, 78 Cal. App. 3d at 24-25; *Kelley v. Johnson*, 425 U.S. 238 (1976) (upholding grooming regulations applying to police officers)); *Strahan v. Kirkland*, 287 F.3d 821, 825 (9th Cir. 2002) ("on our off duty time, all of us have the freedom to association [sic], the freedom to be involved in reasonable activities that don't bring discredit upon the agency") (emphasis added).

Peace officers can be prohibited from continuing their employment if married to certain individuals or from even simply associating with particular individuals. *Keeney v. Heath*, 57 F. 3d 579, 581 (7th Cir. 1995) (upholding dismissal of female correctional facility guard after marrying former inmate because of possible concern of favored treatment toward inmates); *Arellanes v. Civil Svc. Comm'n. of Los Angeles County*, 41 Cal. App. 4th

1208 (1995) (sheriff's department employee prohibited from associating with someone known to have a criminal record).

Even an employee of a private, non-profit association that managed and administered employee benefits for the Los Angeles Police Department could be terminated for a continued romantic relationship with a felon serving a sentence in State prison for burglary, due to the confidential nature of information to which she had access as part of her employment. *Ortiz v. Los Angeles Police Relief Ass'n.*, 98 Cal. App. 4th 1288 (2002). If the high standards of peace officers extend even to those *private* employees, as in *Ortiz*, who manage and/or have access to sensitive law enforcement agency information, then the potential implications of the Sixth Circuit's opinion must be fully assessed by this Court.

These principles are widely known and accepted because

> police officers are the guardians of the peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them. Among the duties of police officers are those of preventing the commission of crimes, of assisting in its detection, and of disclosing all information known to them which may lead to the

> apprehension and punishment of those who have transgressed our laws.

Christal v. Police Comm'n. of the City and County of San Francisco, 33 Cal. App. 2d 564 (1939) (holding that officers had duty to answer questions of grand jury and did not have right to remain police officers in face of clear violation of duty).

Clearly,

> a member of the police force must be above suspicion of violation of the very laws he is sworn and empowered to enforce. The efficiency of our system of administration of justice depends, in large part, upon police officers' faithful discharge of the trust reposed in them. Neither their number nor their arms will long sustain them in upholding the law if only the ultimate sanction of force is available to them. Rather, they perform their duties only if they merit the trust and confidence of the mass of law-abiding citizens. Whatever weakens that trust tends to destroy our system of law enforcement.

McCain v. Sheridan, 324 P.2d 923 (1958), *overruled as to compulsory polygraph tests as to Peace Officers' Procedural Bill of Rights Act by Long Beach City Employees' Ass'n. v. City of Long Beach*, 41 Cal. 3d 937 (1986).

Peace officers, then, are in a unique position of awesome authority over the rest of the citizenry.

The Sixth Circuit's opinion, and its impact on a wide body of law that is oft-used by public agencies and particularly by law enforcement departments, is in need of this Court's full analysis. The ramifications of the Sixth Circuit's opinion below requires this Court's clarification, especially as to law enforcement, which is a significant sub-group of public employees.

If there is any uncertainty in the application of immunity, such uncertainty could wreak havoc in law enforcement investigations. Full investigations are simply not possible without a firm guarantee under the law that an employee's statements cannot be used against the officer in any subsequent criminal proceeding. Many legal counsel throughout the State of California, for instance, who represent peace officers and peace officer associations, regularly advise their clients not to voluntarily cooperate with the employee's employing agency in any investigation of the officer or relating to a critical incident, particularly use of force incidents or officer-involved shootings in which the employee is involved. As counsel to law enforcement management throughout the State of California for several decades, counsel for Amici knows this to be true from personal experience.

In point of fact, this legal position rang true during the time before the *Spielbauer* Court granted review of the Court of Appeal's opinion, which required a formal granting of immunity similar to that invoked by the Sixth Circuit Court of Appeal in this matter. While the Court of Appeal opinion in

Spielbauer was in effect prior to the California Supreme Court's grant of review, legal counsel for peace officers and peace officer associations throughout the State were regularly advising their clients not to cooperate in any management questioning, even with admonishments that their testimony could not be used against them. This issue is of such importance to public employees, especially law enforcement personnel, as well as others whose testimony is compelled under many varying circumstances, that the validity of long-standing practices is in need of this Court's review.

IV. CONCLUSION.

Because of the foregoing fundamental principles, law enforcement agencies must be able to continue doing as they have done for decades, swiftly investigating their employees and imposing discipline when necessary, without delay occasioned by the erosion and ambiguity that may now undermine automatic use immunity or which may require agencies to obtain a formal granting of immunity.

In fact, counsel for Amici participated as Amici Curiae, and oral argument, before the California Supreme Court in *Spielbauer*. During oral argument, Justice Corrigan referenced her experience as a former prosecutor, and acknowledged the virtual impossibility of securing any immunity from prosecutors during an administrative investigation. Amici detailed

concerns in its brief to the California Supreme Court in *Spielbauer* about the difficulty and practical barriers to obtaining any formal grants of immunity. These concerns can be addressed by Amici, and considered by this Court, upon a grant of review.

In brief, a rule that would require, as the Sixth Circuit opinion does, a formal granting of immunity could force law enforcement agencies, or other public agencies and regulators, to consult with, and be governed by, prosecutors and the courts as to how to conduct wholly their wholly administrative and investigative proceedings. In fact, it could preclude the successful completion of an administrative investigation into alleged officer misconduct, if such granting of immunity were denied.

Fundamentally, it is the *compelling* of a public employee's testimony which triggers Fifth Amendment use immunity. This same compelling of testimony, under the regulatory authority of a governmental entity such as the Michigan Gaming Control Board, provides the same protections. More importantly, since there is ambiguity in this area of the law, this Court's review is both necessary and warranted. Amici Curiae respectfully and emphatically urge this Court to grant the within Petition for Writ of Certiorari.

Dated: December 14, 2015

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