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

BRIEF OF MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND PUBLIC CORPORATION LAW SECTION OF THE STATE BAR OF MICHIGAN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER AND REVERSAL

Marcelyn A. Stepanski
Counsel of Record
JOHNSON, ROSATI, SCHULTZ & JOPPICH, P.C.
27555 Executive Drive, Ste. 250
Farmington Hills, MI 48331
(248) 489-4100
mstepanski@jrsjlaw.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTERESTS OF THE *AMICI CURIAE*[1]

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 about 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 complying with this Court's precedent, in public accountability, and in educating its officers and employees.

The International Municipal Lawyers Association (IMLA) is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. The membership is comprised of local government entities, including cities, counties and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal

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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.

matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

The Public Corporation Law Section of the State Bar of Michigan is a voluntary membership section of the State Bar of Michigan, comprised of approximately 672 attorneys who generally represent the interests of 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 Public Corporation Law Section provides education, information and analysis about issues of concern to its membership and the public through meetings, seminars, the State Bar of Michigan website, public service programs and publications. The Public Corporation Law Section is committed to promoting the fair and just administration of public law. In furtherance of this purpose, the Public Corporation 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 Public Corporation Law Section only and is not the position of the State Bar of Michigan.

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*, yet when they were questioned by regulators, each asserted his Fifth Amendment privilege against self-incrimination 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. The Sixth Circuit held that the licensing sanctions violated the Respondents' Fifth Amendment right against self-incrimination. It further held that Petitioners 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.

Legions of 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 conflict with other circuits. For the reasons discussed herein, the Petition for Writ of Certiorari should be granted and the Sixth Circuit's decision should be reversed.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW WHERE THOUSANDS OF PUBLIC EMPLOYERS AND REGULATORS HAVE FOLLOWED THIS COURT'S PRECEDENT IN BALANCING PUBLIC TRUST IN PERFORMANCE OF DUTIES WITH PUBLIC EMPLOYEE AND CONTRACTOR RIGHTS AGAINST SELF-INCRIMINATION, ONLY TO HAVE THAT BALANCE THWARTED AND SUCH PRECEDENT DEBASED BY THE SIXTH CIRCUIT'S DECISION.

The Sixth Circuit's aberrational 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.

The *Moody*[2] panel, with relatively short shrift, failed to heed the import of *Garrity* in immunizing public employees, contractors, and licensees from use of their statements or the fruits thereof in a criminal prosecution against them. Instead, 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 at a rather precarious time, and imposes an unrealistic and impractical burden on public employers and regulators.

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. Further, the erroneous decision's broad language and its mandated requirements to procure immunity agreements from all potential prosecutorial agencies permeates and wreaks havoc on virtually

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[2] *Moody v. Mich. Gaming Control Bd.*, 790 F.3d 669 (6th Cir. 2015)

every aspect of public sector employment and regulation.

A. The evolution of *Garrity* and decades of precedent

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.

Notably, 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. As such, *Garrity* lends no support to the Sixth Circuit's decision.

The *Moody* panel also referenced this Court's decision in *Gardner v. Broderick*, 392 U.S. 273 (1968). However, as with *Garrity*, the *Gardner* case offers no support. There, a New York City patrolman was discharged after he refused to waive his privilege against self-incrimination before a New York County **grand jury** that was investigating alleged bribery and corruption of officers in connection with unlawful gambling operations. He was asked to sign a 'waiver of immunity' (thereby suggesting 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.

The Sixth Circuit next cited *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of City of New York*, 392 U.S. 280 (1968). In that case, 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.

Nor does *Lefkowitz v. Turley*, 414 U.S. 70 (1973) further the Respondents' cause or advance the Sixth Circuit decision. Unlike *Lefkowitz*, where 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, the Michigan Gaming Control Board (MGCB) did not require the harness drivers to waive their immunity under *Garrity* or to testify before a grand jury. *Lefkowitz*, at 75-76.

Moreover, this Court clarified the resolution of 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." *Lefkowitz*, 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").

The above cases can be reduced to distinct rules. First, where a public employee's participation is completely voluntary and he can refuse to answer questions without penalty, but his answers may be used against him in a criminal proceeding, the employee can invoke the Fifth Amendment privilege and decline to participate without repercussion. Second, where a public employee is ordered to answer questions, subject to termination if he refuses, and the employee makes incriminating statements, he can be discharged but his compelled statements cannot be used against him in a criminal proceeding. Third, where a public employee or licensee is ordered to answer questions, subject to termination if he refuses, and the employee or licensee asserts the Fifth Amendment privilege and refuses to cooperate, he can be terminated. Once the employer or regulator compels the statements, they are immunized by *Garrity* and the employee/licensee cannot refuse to answer. This latter rule applies here.

In reaching its desired result, the Sixth Circuit disregarded decades of precedent promulgated by this Court. It disrupted the balance struck by legions of public employers and regulators in attempting to maintain public trust and confidence while honoring employee and licensee rights against self-incrimination. The *Moody* panel's decision is erroneous and, as detailed by Petitioners, it conflicts not only with other circuits, but with cases within its own circuit. *Amici Curiae* urge this Court to grant review to resolve the conflict driven by the Sixth Circuit and restore the balance created by carefully crafted precedent.

B. Procuring immunity agreements – what fresh hell is this?

The Sixth Circuit faulted the MGCB for not offering the state licensees immunity before the May 20, 2010 hearing. It is beyond cavil that most regulators, such as the MGCB, and the vast majority of public employers, lack authority to grant immunity in criminal proceedings. Accordingly, 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.

Here, the *Moody* panel concluded that Respondents were "forced" to answer the stewards' questions. It stated, "to subject plaintiffs to the choice between self-incrimination, perjury, or dismissal *is*, at least for Fifth Amendment purposes, to *force* them to answer." Op, p. 9, emphasis in original. As detailed above, *Garrity* immunizes forced or compelled statements. Had Respondents - who were represented by counsel - rendered compelled statements, by operation of law they could not have been used against them in subsequent criminal proceedings. The panel below recognized as much in observing that "a court would have been unlikely to admit those answers, given the law laid out in *Garrity* and its sequellae." Op, p. 6.

However, Respondents opted to refuse to answer the regulator's questions and thereby forfeited their licenses.

Instead of following years of established precedent, the Sixth Circuit opined that Petitioners could be liable for monetary damages – a scenario which could have been avoided if: 1) they had not revoked the Respondents' licenses at all, or 2) they revoked them "only on account of and only after … proving their involvement in illegal gambling." Op, p. 7. This passage highlights the untenable burden imposed on public employers and regulators. For example, a police officer may be accused of unlawful conduct. Although the action may or may not be justified, the police chief may be stonewalled from conducting an investigation and precluded from taking action under *Moody* unless he can "prove" illegal activity without compelling the officer's participation.

The other option suggested by the decision is to procure immunity agreements from all potential prosecutorial agencies. Some allegations could easily trigger the necessity of obtaining agreements from local, state, federal, *and* administrative agencies. Meanwhile, *Moody* provides that the officer can refuse to cooperate, in the absence of those immunity agreements, and the police chief is hamstrung from imposing sanctions for that refusal.

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 first sought and obtained immunity agreements from the 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. 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.

Contrary to *Moody*, 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).

Where *Garrity* immunity arises by operation of law when a public employer is threatened with termination or a licensee is threatened with loss of license or revocation, the Sixth Circuit erroneously created a conflict by opining that a public employer or regulator could not compel statements without first obtaining necessary immunity agreements or proving illegal or improper conduct.

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,

Marcelyn A. Stepanski
Counsel of Record
JOHNSON, ROSATI, SCHULTZ
& JOPPICH, P.C.
27555 Executive Drive, Ste. 250
Farmington Hills, MI 48331
(248) 489-4100
mstepanski@jrsjlaw.com

Counsel for Amici Curiae

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