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 IN OPPOSITION

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QUESTIONS PRESENTED

As part of an ongoing criminal investigation into harness racing, Respondents were summoned to appear at an investigatory hearing before the Michigan Gaming Control Board. The Michigan State Police advised Respondents that they would be arrested following the hearing. Respondents invoked their Fifth Amendment rights, and declined to provide potentially incriminating testimony. As a result, the state withdrew Respondents' racing licenses, thereby depriving Respondents of their livelihoods for several years. Respondents never gave any statements and were never charged with a crime.

The questions presented are:

1. Whether *Garrity v. New Jersey*, 385 U.S. 493 (1967), permits a state agency to punish licensees with the loss of their livelihood for refusing to waive their Fifth Amendment rights against self-incrimination.

2. Whether the state may penalize individuals for refusing to make incriminating statements on the rationale that no statements were ever introduced in evidence in a criminal case.

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INTRODUCTION

The Michigan Gaming Control Board and the Michigan State Police conducted a months-long joint investigation into the harness racing activities of the Respondents ("the Drivers"). The Control Board summoned the Drivers to appear at an investigatory hearing. The police advised the Drivers that they would be arrested following the hearing. On the advice of counsel, the Drivers refused to waive their Fifth Amendment rights against compelled self-incrimination, instead invoking their privilege to decline to provide potentially incriminating statements. The state suspended the Drivers' racing licenses because they "elected to assert [their] Fifth Amendment rights against self-incrimination." Dkt. 85-11. The state later excluded the Drivers from racetracks throughout Michigan, effectively depriving them of their livelihoods for almost four years.

The Court of Appeals evaluated these circumstances and properly concluded that Petitioners, the Control Board and specified state officials, violated the Drivers' Fifth Amendment rights. The court explained that, under nearly 50 years of this Court's decisions, the "option to lose [one's] means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967).

The petition distorts the Court of Appeals' opinion in an effort to convert an unremarkable decision into a candidate for certiorari. The Sixth

Circuit did not require the Control Board to offer immunity that it did not have the authority to grant. And it did not require regulators to notify persons of their immunity rights. Instead, the court held that "[t]o ban [the Drivers] from horse racing for refusing to answer was exactly the sort of 'grave consequence solely because [t]he[y] refused to waive immunity from prosecution and [to] give self-incriminating testimony' that the Supreme Court has said unconstitutionally compels self-incrimination." Pet. App. 9a (quoting *Lefkowitz v. Cunningham*, 431 U.S. 801, 807 (1977)).

The Court of Appeals also properly rejected Petitioners' position that the Fifth Amendment is violated only when statements are actually used in court, even when no statements are ever made. That position misstates the law. Indeed, *Chavez v. Martinez,* on which Petitioners rely, states that "[t]he government may not … penalize public employees and government contractors to induce them to waive their immunity from the use of their compelled statements in subsequent criminal proceedings." 538 U.S. 760, 768 n.2 (2003).

The petition's skewed portrayal of the Court of Appeals' ruling is not the only reason the petition should be denied. The interlocutory posture of the case confirms that certiorari is unwarranted. The Court of Appeals has issued its mandate, remanding the matter to the district court. Since then both sides have filed renewed summary judgment motions. On remand, Petitioners maintain that they are entitled to judgment as a matter of law on grounds wholly independent of the issues raised in the petition.

Those and other important and potentially dispositive issues remain pending for the district court to resolve in the first instance. The petition thus invites piecemeal review.

STATEMENT OF THE CASE

The Criminal Investigation Begins

The Drivers—John Moody, Donald Harmon, Rick Ray, and Wally McIllmurray, Jr.—earn their living as harness racing drivers. Like many professionals in Michigan, the Drivers cannot do their jobs without a license from the state.

Rumors that races were being "fixed" prompted the Control Board to request an investigation by the Michigan State Police. Dkt. 98-31 at 16:20-24.[1] The Control Board requested the Michigan State Police to get involved "right from the beginning" so that any criminal activity "would be investigated and subsequently charged." Dkt. 98-33 at 37:4-9. Detective Thomas DeClercq led the investigation. Dkt. 67 at 2.

In March 2010, the police obtained warrants and searched multiple residences, including the home of Respondent Wally McIllmurray's brother, Arthur McIllmurray. Dkt. 98-31 at 25:1-2. Detective DeClercq asked a Control Board representative to

[1] "Dkt." citations refer to the district court's docket in this case, No. 4:12-cv-13593 (E.D. Mich.).

accompany the police when executing the warrants. *Id.* at 25:13-19; Dkt. 98-32 at 33:18-22.

The police questioned Arthur twice. The first time, Control Board Deputy Chief Gary Post was present. Dkt. 98-25. The second time, Detective DeClercq and Control Board Steward Bob Coberley were present. Dkt. 98-26. (Stewards are Control Board officials who supervise harness racing). After interrogating Arthur, the police turned their sights on the Drivers.

The Drivers Become Targets of the Criminal Investigation

The next day, Detective DeClercq dug up an outdated child support warrant on Moody. (Moody's youngest child was 33 by that time.) Dkt. 91-19 (Moody Interview) at 3:18-19. With the warrant in hand, Detective DeClercq and Steward Coberley drove to Moody's farm only to find that Moody was away at a dental appointment. Dkt. 98-32 (Coberley Dep.) at 53:9-21. The two immediately proceeded to the dentist's office. The detective "ordered" Moody out of the office, threatened to arrest him, put him "in the back of a police car," and began questioning him. Dkt. 98-24 (Moody Dep.) at 43:21-44:25.

Detective DeClercq began the interrogation by informing Moody that he "represent[s] the criminal side of this" and that "Bob Coberly [sic] is assisting me with the investigation." Dkt. 91-19 (Moody Interview) at 2:10-13. Detective DeClercq told Moody, "We know what you've done.… I mean, we pretty much have … our ducks in a row. We have …

pretty much tied you up with a bow on it." *Id.* at 4:10-12. Detective DeClercq further specified that the investigators sought Moody's testimony but "no one's making any promises," and Moody might go to jail "this weekend." *Id.* at 9:22-10:3.

Detective DeClercq also interrogated Respondent Wally McIllmurray sometime in the spring. Steward Coberley was again present. Dkt. 98-24 (McIllmurray Dep.) at 37:20-38:14. Detective DeClercq threatened McIllmurray and the other Drivers with arrest "if you guys don't cooperate." *Id.* at 38:23-24.

The Control Board Holds Investigative Hearings

About six weeks later, on May 5, 2010, the Control Board issued summonses to the Drivers ordering them to appear for investigatory Stewards' hearings and to produce bank records. Dkt. 98-2 (Summonses). The hearings were set for May 20, 2010.

The day before the hearing, Detective DeClercq called the Drivers' then-counsel, Joseph Niskar. Dkt. 98-3 (Niskar Ltr.). The Drivers were present in Niskar's office during the call. Dkt. 98-24 (Harmon Dep.) at 46:7-10. Detective DeClercq informed Niskar that the Drivers should be "ready to be fingerprinted and to be processed because we're arresting them." *Id.* at 45:11-14; Pet. App. 28a. The Drivers knew they "were being threatened by" Detective DeClercq. Dkt. 98-24 (McIllmurray Dep.) at 37:22. Deputy Racing Commissioner Post also

indicated that they were going to be criminally charged. Dkt. 98-4 (Control Board Hearing) at 24:9-13 (Niskar: "[B]oth yourself [i.e. Post] and Det/Sgt. DeClereq [sic] have communicated to me that Mr. McIllmurray is going to be charged").

The Drivers appeared for the hearings, took an oath, and answered basic questions. The three presiding stewards were present, as were Coberley and Post—the Control Board representatives who were working with Detective DeClercq. *Id*. So were two Michigan assistant attorneys general. *Id.* By this point, there was no doubt that the Drivers were targets of a criminal investigation. Dkt. 67 (Mot. to Quash) at 2.

At the hearings, the Control Board presented no testimony or other evidence to support its belief that the Drivers were involved in race fixing. Instead, the stewards peppered the Drivers with a series of incriminating questions. On the advice of counsel, the Drivers invoked their rights against self-incrimination under the Fifth Amendment. Counsel explained that he advised his clients not to answer questions because Detective DeClercq and Deputy Racing Commissioner Post had "communicated to [him] that [the Drivers were] going to be charged" criminally. Dkt. 98-4 (Control Board Hearing) at 24:10.

The Drivers Lose Their Licenses Because They Refuse To Waive Their Fifth Amendment Rights

After the hearings, the stewards deliberated for "fifteen, 20 minutes, a half hour" before suspending

the Drivers from racing. Dkt. 85-6 (Parker Dep.) at 27:8-9. Each suspension order states that the Driver was suspended because he "failed to fully cooperate in answering the stewards' questions" and "elected to assert his Fifth Amendment rights against self-incrimination." Dkt. 85-11 (Stewards' Ruling).

The orders do not rely on any evidence of race fixing, as no such evidence was presented. The Control Board subsequently issued exclusion orders preventing the Drivers from reapplying for new licenses and barring them from racetracks throughout Michigan. Dkt. 85-12 (Exclusion Order). Due to reciprocity agreements, the Drivers were thereby prevented from racing anywhere in the United States and Canada. No criminal charges were ever filed.[2]

The District Court Enters Summary Judgment For Petitioners

In 2012, the Drivers filed this § 1983 suit seeking damages and injunctive relief. The Drivers allege violations of their due process and self-incrimination rights. Dkt. 1 (Compl.). The petition implicates only the Fifth Amendment self-incrimination claims.

The district court entered summary judgment for Petitioners. Pet. App. 46a. On the Fifth Amendment

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[2] In 2014, the Control Board finally allowed the Drivers to reapply for licenses. Currently each of the Drivers is either licensed or eligible to be licensed in Michigan.

claim, the court recognized that *Garrity v. New Jersey*, 385 U.S. 493 (1967), is "the leading case concerning the use of statements during an investigation." Pet. App. 41a. But the court concluded that *Garrity* did not apply and that coerced statements must be used in a criminal case to violate the Fifth Amendment. *Id.* at 42a. On the due process claim, the court held that the Drivers had no protected interest in their racing licenses and that due process was in any event satisfied.

The Court of Appeals Reverses And Remands, And The Litigation Resumes In District Court

A unanimous panel of the Court of Appeals reversed in part, vacated in part, and remanded. As to the Fifth Amendment claim, the Court of Appeals concluded that, under the circumstances, "the harness drivers had reason to fear that, had they responded to questions during the 2010 hearing with incriminating answers as evidence, prosecutors would use those answers as evidence." Pet. App. 9a. "To ban [the Drivers] from horse racing for refusing to answer was [thus] exactly the sort of 'grave consequence solely because [t]he[y] refused to waive immunity from prosecution and [to] give self-incriminating testimony' that the Supreme Court has said unconstitutionally compels self-incrimination." *Id.* (quoting *Cunningham*, 431 U.S. at 807).

The Court of Appeals distinguished *Chavez v. Martinez*, 538 U.S. 760 (2003), on the ground that there "the underlying plaintiff did answer the police officer's questions." *Id.* at 11a. "Here," by contrast,

"the harness drivers declined to answer questions, standing on their rights not to incriminate themselves." *Id.* Accordingly, "[i]n this situation," Petitioners violated the Drivers' Fifth Amendment rights because "the Constitution entitled the harness drivers to assert the privilege against self-incrimination and thus to refuse to answer the [Control Board's] questions." *Id*. at 9a.

With respect to the due process claim, the Court of Appeals ruled that there had been adequate process for the suspension orders but not the exclusion orders. The Court of Appeals ultimately remanded the case for the district court to determine whether the pertinent self-incrimination and due process rights were clearly established and whether, for qualified immunity purposes, a reasonable officer would have known of those rights. Pet. App. 23a.

The Court of Appeals proceeded to issue its mandate. Additional proceedings have transpired in the district court. On remand, the Drivers have moved to compel additional discovery. Dkt. 129. Both sides have also filed renewed summary judgment motions. Dkt. 138 (Drivers); Dkt. 144 (Petitioners). Petitioners' motion asserts that they are entitled to judgment as a matter of law on multiple grounds wholly independent of the issues raised in the petition, including quasi-judicial immunity and lack of personal involvement. Dkt. 144. The district court has not ruled on those motions. For now, it has stayed the case until February 20, 2016. Dkt. 154.

REASONS TO DENY CERTIORARI

Petitioners cannot seem to decide what they think the Court of Appeals did in this case. They contend that this case is worthy of this Court's review because the Court of Appeals misapplied *Garrity v. New Jersey*, 385 U.S. 493 (1967), or maybe because it misapplied *Chavez v. Martinez*, 538 U.S. 760 (2003). Both assertions are based on dueling mischaracterizations of the Court of Appeals' analysis. The Court of Appeals did not violate either *Garrity* or *Chavez*. More importantly, it did not reach a conclusion at odds with the holding of any other circuit. All of this is reason enough to deny certiorari even apart from the case's interlocutory posture. But the interlocutory nature of this case makes it even less worthy of review.

The petition should be denied.

I. The Court Of Appeals' Treatment Of *Garrity* Provides No Basis For This Court's Review.

Petitioners assert that the Court of Appeals issued an ambiguous decision with one of two possible holdings. On the one hand, the opinion "indicates" that the Court of Appeals did not treat *Garrity* immunity as applying automatically. Pet. 11. Under this reading, the Court of Appeals thus required regulators to affirmatively "offer" immunity to the Drivers in order for immunity to attach.

On the other hand, the opinion "suggests" that the Court of Appeals "could have been making a

different" holding—"creating a new prophylactic rule by requiring regulators to *notify* the drivers of their automatic *Garrity* rights." *Id.* Which of these alternative holdings reflects the actual holding of the Court of Appeals is, according to the petition, anyone's guess. Petitioners urge this Court to step in either way, on the ground that no matter which legal conclusion the Court of Appeals actually reached, the decision conflicts with decisions of other circuits.

But the petition's portrayal of the ruling below is inaccurate. The Sixth Circuit did not require regulators to "offer" the Drivers immunity. Nor does its decision require regulators to "notify" persons of any *Garrity* immunity. The Court of Appeals concluded instead that the state could not force the Drivers to choose between forfeiting their racing licenses and waiving their Fifth Amendment rights. That conclusion is correct, is not at odds with any decision of this Court or of any other Court of Appeals, and does not warrant this Court's review. Indeed, the petition's entire focus on *Garrity* is a new development. Despite the district court's reference to *Garrity* as "the leading case" on Petitioners' immunity issue, Pet. App. 41a, Petitioners' brief in the Court of Appeals did not cite, much less discuss, *Garrity*.

A. The Court of Appeals did not require the Control Board to offer a formal grant of immunity.

Petitioners posit that the Court of Appeals may have fundamentally misapplied *Garrity* by requiring the Control Board to confer immunity upon the

Drivers. Pet. 11-14. Petitioners argue that such a holding would lead to a parade of horribles because regulators often do not have authority to grant immunity. Pet. 18. And, the petition continues, it would also create a conflict with every other circuit to have considered the question, *id.*, a state supreme court, *id.* at 15, and indeed, with Sixth Circuit precedent. *See McKinley v. City of Mansfield*, 404 F.3d 418, 427 (6th Cir. 2005) ("As a matter of Fifth Amendment right, *Garrity* precludes use of public employees' compelled incriminating statements in a later prosecution for the conduct under investigation."); *see also* Pet. App. 12a (discussing *McKinley*).

But the Court of Appeals held no such thing. The Court of Appeals' opinion at no point states that the Control Board was required to offer immunity in order to properly compel answers from the Drivers. The opinion notes, correctly, that immunity was at no point offered. But by pointing out that the Control Board, the police, and the state's assistant attorneys general who attended the hearings declined to offer the Drivers immunity, the Court of Appeals did not impose any affirmative obligation on regulators to obtain formal grants of immunity from prosecutors. The Court of Appeals was simply reinforcing its conclusion that "the harness drivers had reason to fear that, had they responded to questions during the 2010 hearing with incriminating answers, prosecutors would use those answers as evidence." Pet. App. 9a.

The Sixth Circuit's understanding that *Garrity* immunity applies automatically is evident. Its

opinion recognizes that "a court would have been unlikely to admit [the Drivers'] answers, given the law laid out in *Garrity*." Pet. App. 9a. The Court of Appeals fully understood that the Control Board lacked authority to offer immunity. The court inquired at oral argument: "Under Michigan law, is there a statute that allows the racing commission to grant immunity?"—and followed up with, "[t]hey don't have that power do they?" Oral Argument at 20:52-21:15.[3]

Petitioners make much of the fact that, as quoted above, the court's opinion uses the word "unlikely." Pet. 10. But that is because *Garrity* immunity is not cut and dry. Even where compulsion (a prerequisite for *Garrity* immunity) is clear, the Courts of Appeals have explained that "the Fifth Amendment permits the government to use compelled statements obtained during an investigation" with respect to "a prosecution for collateral crimes such as perjury or obstruction of justice." *McKinley*, 404 F.3d at 427; *see also United States v. Apfelbaum*, 445 U.S. 115, 131 (1980) ("[T]he Fifth Amendment [does not] preclude[] the use of respondent's immunized testimony at a subsequent prosecution for making false statements.").

And this Court has used "offer" language similar to the Sixth Circuit's when referring to "automatic"

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[3] http://www.ca6.uscourts.gov/internet/court_audio/audio/03-11-2015%20-%20Wednesday/14-1511%20John%20Moody%20et%20al%20v%20Michigan%20Gaming%20Control%20Board%20et%20al.mp3

Garrity immunity. In *Lefkowitz v. Turley*, the Court held that "if answers are to be required in such circumstances *States must offer to the witness whatever immunity* is required to supplant the privilege and may not insist that the employee or contractor waive such immunity." 414 U.S. 70, 85 (1973) (emphasis added). Likewise in *Chavez,* the Court recognized that "governments may penalize public employees and government contractors (with the loss of their jobs or government contracts) to induce them to respond to inquiries, so long as the answers elicited (and their fruits) *are immunized* from use in any criminal case against the speaker." 538 U.S. at 768 (emphasis added). No court has interpreted these statements as mandating that regulators affirmatively grant immunity.

Petitioners ultimately acknowledge that the Court of Appeals at no point stated that regulators in the position of the Control Board here are under an obligation affirmatively to provide a grant of immunity. If the Court of Appeals had intended to require the Control Board to offer immunity that it knew the Control Board had no authority to provide, it would have said so explicitly. Petitioners' and their amici's rhetoric notwithstanding (*see* Pet. 18-20), this Court's review is not properly invoked to pass upon a holding that the court below never made.

B. The Court of Appeals imposed no *Garrity* notice requirement.

Petitioners contend in the alternative that "some of the Court of Appeals' language suggests that it was imposing a new notice requirement on the

regulators." Pet. 16. "*If* the Sixth Circuit imposed a notice requirement," they say, then that would "create[] a circuit split." *Id.* (emphasis added). Again, however, the Court of Appeals imposed no such notice requirement and its decision implicates no such circuit split.[4]

The "suggestive" language to which Petitioners allude does not include the words "notice" or "notify," which never appear in the opinion with reference to any immunity. Rather, Petitioners point to the Court of Appeals' discussion of *McKinley v. City of Mansfield*, a case that "does not apply here." Pet. App. 13a. Petitioners also cite a tangential reference to notice in a footnote commenting on the level of punishment necessary to trigger *Garrity* in other circuits. *Id.* at n.11. The court there did not engage in any analysis regarding notice or what form that notice might take, much less reach a holding on that issue.

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[4] To the extent that a circuit split exists on the *Garrity* notice issue, it has existed since at least 1982. *See Gulden v. McCorkle*, 680 F.2d 1070, 1074-75 (5th Cir. 1982), *cert. denied* 459 U.S. 1206 (1983) (holding that *Garrity* notice is not required, but recognizing that the Seventh Circuit requires notice, citing *Confederation of Police v. Conlisk*, 489 F.2d 891 (7th Cir. 1973)). Several certiorari petitions have presented the *Garrity* notice question since then, and the Court has denied them all. *See, e.g., Spielbauer v. Santa Clara Cty., Cal.*, 557 U.S. 921 (2009); *Aguilera v. Baca*, 555 U.S. 993 (2008); *Sher v. Dep't of Veterans Affairs*, 552 U.S. 1309 (2008); *Matt v. Larocca*, 486 U.S. 1007 (1988). Circumstances in the interim have not changed, and certiorari would thus be unwarranted on this issue even apart from the fact that this case does not present it.

The Court of Appeals thus imposed no new notice requirement or prophylactic "*Garrity* warning." Again, the holding of which Petitioners complain does not exist, and the purported basis for this Court's intervention is illusory.

C. The Court of Appeals correctly held that the Drivers could not be forced to waive their Fifth Amendment rights or lose their jobs.

Petitioners disregard the actual basis for the Court of Appeals' decision. Applying settled principles to the facts of this case, the Court of Appeals held here that the Drivers could not be forced to choose between waiving their Fifth Amendment rights and losing their racing licenses.

The Court of Appeals explained that "[i]t is clearly established … that public employers may not coerce their employees to abdicate their constitutional rights on pain of dismissal." Pet. App. 7a-8a (quotation marks omitted). Citing decisions of this Court, the Court of Appeals elaborated that those "cases stan[d] for the proposition that a governmental body may not require an employee [or licensee] to waive his privilege against self-incrimination as a condition to keeping his job." *Id.* at 8a (quotation mark omitted).

Applying those principles to the circumstances presented, the Court of Appeals concluded that Petitioners had violated the Drivers' Fifth Amendment rights. That conclusion is correct. The Control Board and Michigan State Police were

jointly investigating the Drivers' harness racing activities. The Control Board summoned the Drivers to appear at an investigatory hearing, and "Michigan State Police Detective Thomas DeClercq informed the harness drivers' then-attorney that the harness drivers would be arrested, criminally charged, and arraigned following [the] hearing." Pet. App. 3a. The Drivers thus "had reason to fear that, had they responded to questions during the … hearing with incriminating answers, prosecutors would use those answers as evidence," Pet. App. 9a, and, on the advice of counsel, invoked their privilege against compelled self-incrimination. Petitioners then withdrew the Drivers' racing licenses because they "elected to assert [their] Fifth Amendment rights against self-incrimination." Dkt. 85-11 (Stewards' Ruling).

Against this backdrop, the Court of Appeals properly concluded that "[t]o ban [the Drivers] from horse racing for refusing to answer was exactly the sort of 'grave consequence solely because [t]he[y] refused to waive immunity from prosecution and [to] give self-incriminating testimony' that the Supreme Court has said unconstitutionally compels self-incrimination." Pet. App. 9a (quoting *Cunningham*, 431 U.S. at 807 (alterations in opinion)). Indeed, the state may not "attempt[] to coerce a waiver on the penalty of loss of employment" even though "under *Garrity* any waiver executed may have been invalid and any answers elicited inadmissible in evidence." *Turley*, 414 U.S. at 80-81.

The Drivers were in a particularly precarious position because a person must affirmatively claim

the privilege to benefit from the protections of the Fifth Amendment when faced with a criminal investigation, *Salinas v. Texas,* 133 S. Ct. 2174, 2178 (2013), and "an individual may lose the benefit of the privilege without making a knowing and intelligent waiver," *Minnesota v. Murphy*, 465 U.S. 420, 428 (1984) (quoting *Garner v. United States*, 424 U.S. 648, 654 n.9 (1976)). It was thus especially prudent for the Drivers to assert their Fifth Amendment rights.

II. The Court Of Appeals' Treatment Of *Chavez* Provides No Basis For This Court's Review.

A. The Court of Appeals' interpretation of *Chavez* is correct.

The petition likewise errs in arguing that the decision of the Court of Appeals is unfaithful to *Chavez*. *Chavez* holds that the failure to give a *Miranda* warning does not on its own violate the Fifth Amendment. 538 U.S. at 767. *Chavez* did not silently overrule almost 50 years of Supreme Court precedent holding that a state may not force a person to choose between his Fifth Amendment rights and his livelihood. *See Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Spevack v. Klein*, 385 U.S. 511 (1967); *see also Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.").

Here, unlike in *Chavez*, the Control Board did not simply subject the Drivers to "the mere use of compulsive questionings, without more." 538 U.S. at

767. After the Drivers refused to waive their Fifth Amendment rights, the Board suspended them from harness racing and then excluded them from the profession for nearly four years. Under Petitioners' interpretation of *Chavez*, the state could condition employment or licensure on waiver of one's Fifth Amendment rights, and the Drivers would have no claim unless and until their statements were actually used in a criminal case. That reading of the Fifth Amendment would gut the rule laid out in *Spevack* and *Turley*, and conflicts with *Chavez* itself. *Chavez* recognized that punishing a state licensee for refusing to waive his Fifth Amendment rights would be a constitutional violation, because a "waiver of immunity is therefore a prospective waiver of the core self-incrimination right in any subsequent criminal proceeding, and States cannot condition public employment on the waiver of constitutional rights." *Id.* at 769 n.2.

The Court of Appeals thus properly explained that "[t]his case presents a situation different from that presented by *Chavez*. In *Chavez*, the underlying plaintiff *did answer* the police officer's questions; the state did not use those answers to incriminate him; the Court held that this state of affairs did not violate the plaintiff's constitutional rights. Here, the harness drivers *declined* to answer questions, standing on their rights not to incriminate themselves." Pet. App. 11a.

B. There is no circuit conflict over whether a Fifth Amendment violation requires statements to be used in a criminal proceeding when no statements were made.

Petitioners mistakenly argue that eight circuits have relied on *Chavez* to hold that "statements must be used in a criminal case to implicate the Fifth Amendment," even when no statements are actually made. Pet. 23.

Petitioners fail to appreciate that the Fifth Amendment can be violated in two different ways when someone is forced to give incriminating statements or lose his livelihood. First, if the person makes a statement under compulsion, then the Fifth Amendment is violated if and when the compelled statements are "use[d] in a criminal case." *Chavez*, 538 U.S. at 767. Second, if no such statement is made, "[t]he government may not … penalize public employees and government contractors to induce them to waive their immunity." *Id.* at 769 n.2 (emphasis omitted).

Petitioners admit that nearly all the cases they invoke as part of the cited circuit split involve the first circumstance: where statements are actually made. Pet. 24. None of those cases conflicts with the Court of Appeals' decision here, because this case involves the imposition of adverse consequences for declining to speak.

Petitioners assert that in two cases—*Hill v. Rozum*, 447 F. App'x 289 (3d Cir. 2011), and

Aguilera v. Baca, 510 F.3d 1161 (9th Cir. 2007)—the court denied the plaintiff's claims even where "plaintiff had remained silent." Pet. 24. Neither case is apposite.

Hill is non-precedential and irrelevant. The plaintiff there was a state inmate, and a guard asked him if there was contraband in his cell. The plaintiff refused to answer. In a cursory order, the court explained that there was no Fifth Amendment violation. The court stated that nothing was ever "used against [the inmate] in a criminal setting," but also that there were no material "ramifications to Hill's disciplinary charges." 447 F. App'x at 290. That reasoning is consistent with the decision here, given the entirely different setting and the serious ramifications that the Drivers incurred by virtue of their refusal to waive their privilege against self-incrimination.

In *Aguilera*, the plaintiffs *did* make statements, contrary to Petitioners' assertion that the plaintiffs "remained silent." Pet. 24. That case involved police officers who were investigated for using excessive force. The officers *initially* declined to give statements, and they were reassigned to new positions. *Aguilera*, 510 F.3d at 1166. Later, however, "they provid[ed] their compelled statements to the investigators." *Id.*

The Ninth Circuit concluded that there was no Fifth Amendment violation when the officers were reassigned after remaining silent because the officers "were not compelled to answer the investigator's questions or to waive their immunity

from self-incrimination." *Id.* at 1172. The court also did "not consider re-assignment from field to desk duty as equivalent to losing one's job." *Id.* at 1173. The court then concluded that when the officers did give statements later on, there was still no Fifth Amendment violation because, under *Chavez*, "no incriminating use of their statements has ever been made." *Id.* at 1173. The court stated that "[p]lainly, *Chavez* applies in situations where a party actually makes an incriminating statement." *Id.* at 1174 n.9. Nothing in the Sixth Circuit's decision contradicts *Aguilera*, because the Drivers refused to incriminate themselves, *never* gave statements to the Control Board, and *did* lose their jobs.

III. The Interlocutory Posture Of This Case Weighs Against Certiorari.

This Court's review is unwarranted in light of the case's interlocutory posture. The Court of Appeals has issued its mandate, and the litigation has resumed in district court.

On remand both sides have filed renewed motions for summary judgment. Petitioners' motion asserts among other things that, wholly apart from any question of self-incrimination or due process, they are entitled to judgment as a matter of law on the separate and independent grounds of quasi-judicial immunity and lack of individual involvement. Dkt. 144.

The Drivers have also filed a renewed motion to amend their complaint, seeking to raise, among other things, a First Amendment claim. Dkt. 141.

They also filed a motion to compel, noting that the deposition of Detective DeClercq had not yet been taken. Dkt. 129 at ¶ 10. Despite Detective DeClercq's central role in the underlying events, the district court in conjunction with its earlier summary judgment grant had denied as moot a request to depose him. These motions are currently pending in the district court.

Moreover, unlike in *Camreta v. Greene*, 131 S. Ct. 2020 (2011), *see* Pet. 29, no court has finally decided whether Petitioners are entitled to qualified immunity. *Camreta* did not consider the propriety of taking up an interlocutory petition on only one half of the qualified immunity inquiry. *Camreta* addressed whether the Court had Article III jurisdiction to consider "a petition brought by government officials who have won final judgment on grounds of qualified immunity." 131 S. Ct. at 2028. In *Camreta*, and in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Court was able to consider both prongs of the qualified immunity analysis—whether the right at issue was violated, and whether the right was clearly established—at the same time.

The petition thus invites the prospect of piecemeal review. If the Court were to take up the issue of whether the Drivers suffered a violation of their right against self-incrimination, the Court might later be asked to consider whether that right was clearly established, and also whether the Drivers' due process or First Amendment rights were violated or clearly established. The Court might also be asked to consider the independent issues Petitioners currently raise in their renewed

summary judgment motion. Instead of reviewing this case at such a highly interlocutory stage, the more prudent course is to await conclusion of this litigation in the courts below.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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