No. 15-623

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 FOR PETITIONERS

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 373-1124

Melinda A. Leonard
Assistant Attorney General
Alcohol and Gambling
Enforcement Division

Attorneys for Petitioners

TABLE OF CONTENTS

Table of Authorities ii

Introduction 1

Argument 2

I. The drivers were never required to waive their Fifth Amendment immunity. 2

II. The Sixth Circuit created splits concerning *Garrity* immunity. 5

A. The Sixth Circuit did not view *Garrity* immunity as automatic and so created conflicts with other circuits and a state supreme court 6

B. The Sixth Circuit's requirement that notice be given creates a split 8

III. The Sixth Circuit created a circuit split concerning a self-incrimination claim's viability absent criminal charges. 9

IV. This case's interlocutory nature does not discourage certiorari. 12

Conclusion 13

TABLE OF AUTHORITIES

Page

Cases

Aguilera v. *Baca*,
510 F.3d 1161 (9th Cir. 2007) 8, 11

Chavez v. *Martinez*,
538 U.S. 760 (2003) .... passim

City & Cty. of San Francisco, Calif. v. *Sheehan*,
135 S. Ct. 1765 (2015) 12

Garrity v. *New Jersey*,
385 U.S. 493 (1967) .... passim

Gulden v. *McCorkle*,
680 F.2d 1070 (5th Cir. 1982) 8

Hill v. *Johnson*,
160 F.3d 469 (8th Cir. 1998) 8

Lefkowitz v. *Cunningham*,
431 U.S. 801 (1977) 4

Lefkowitz v. *Turley*,
414 U.S. 70 (1973) 3, 7, 9

McKinley v. *City of Mansfield*,
404 F.3d 418 (6th Cir. 2004) 7

Minnesota v. *Murphy*,
465 U.S. 420 (1984) 4

Mitchell v. *Forsyth*,
472 U.S. 511 (1985) 12

Mullenix v. *Luna*,
136 S. Ct. 305 (2015) 12

Plumhoff v. *Rickard*,
134 S. Ct. 2012 (2014) 12

Salinas v. *Texas*,
133 S. Ct. 2174 (2013) 4

Sher v. *U.S. Department of Veterans Affairs*,
488 F.3d 489 (1st Cir. 2007)................................. 9

Spielbauer v. *County of Santa Clara*,
45 Cal. 4th 704 (2009) 8

Wiley v. *Mayor & City Council of Baltimore*,
48 F.3d 773 (4th Cir. 1995) 8

Rules

Mich. Admin. Code, R. 431.1035(2)(d) 4

Constitutional Provisions

U.S. Const. amend. V... 1, 5

INTRODUCTION

The Sixth Circuit has imposed a new, unsupported burden on any governmental entity that attempts to root out criminal misconduct, in conflict with the decisions of other circuits. Governmental entities must now either provide notice of immunity or somehow grant immunity before requiring employees and licensees to answer questions about possible criminal misconduct discharge or loss of license. But the Fifth Amendment does not require these new rules. And this burden applies when the State is investigating any possible misconduct (such as the failure to ensure safe drinking water).

The drivers do not contest the importance of the petition's issues to effective government, as the amicus support confirms. Instead, they misunderstand the Self-Incrimination Clause: they conflate an automatic *grant* of immunity (which arose here under *Garrity* v. *New Jersey*, 385 U.S. 493 (1967)) with a compelled *waiver* of immunity (which did not occur here—indeed, the drivers do not dispute that the regulators did not require them to waive their immunity). No driver waived his immunity from being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Rather, they were informed they could forfeit their licenses if they did not answer questions, without being told that immunity arose by operation of law. Nothing in the Fifth Amendment requires this new *Miranda*-like notice.

Because the drivers miss the point in a basic way, their efforts to dispute the circuit splits identified in the petition also fail. The Sixth Circuit did not recognize that immunity arises automatically and instead

created these requirements that conflict with other courts. The drivers also challenge the *Chavez*-related split, depicting *Chavez* v. *Martinez*, 538 U.S. 760 (2003), as supporting a Fifth Amendment violation not just when self-incriminating statements are used in a criminal case but also when public employees and government contractors are induced to waive their immunity. Not so. Under *Chavez*, a viable § 1983 claim requires more than compulsive questioning.

Finally, the interlocutory nature of this case (where proceedings have been stayed until February 20) does not render it unworthy of certiorari, because it involves the qualified-immunity right to be free from trial.

ARGUMENT

I. The drivers were never required to waive their Fifth Amendment immunity.

The brief in opposition's basic theme is that the drivers were "forced to choose between waiving their Fifth Amendment rights and losing their racing licenses." Br. in Opp. 16; see also *id*. at 11, 18. This theme rests on the premise that the drivers were penalized for refusing "to waive" their Fifth Amendment rights against self-incrimination. *Id*. at i, 1, 2, 6, 8, 16, 17, 19, 20, & 21. This is inaccurate both factually and legally.

Factually, the stewards' ruling for each respective driver states that the driver's license was suspended because he failed to comply with his duty to cooperate with licensing conditions: "While under oath, [the

driver] failed to fully cooperate in answering the stewards' questions." Doc. 85-11; see also Doc. 18-9. The rulings mention the reason each driver provided for his failure to cooperate (that he "elected to assert his Fifth Amendment right against self-incrimination"), but the penalty was imposed because each driver "failed to comply with the conditions precedent for occupational licensing in Michigan as outlined in R431.1035." *Id.*

Significantly, the drivers do not dispute the petition's statements that no one asked them to waive immunity. Pet. 5, 22. The regulators did not "attempt[] to coerce a waiver," but permissibly "insist[ed] that the [drivers] either respond to relevant inquiries about the performance of their [duties] or suffer" licensing consequences, *Lefkowitz* v. *Turley*, 414 U.S. 70, 80, 84 (1973). Even the Sixth Circuit did not say anyone asked the drivers to waive their Fifth Amendment rights. And the district court expressly stated that the regulators did not require the drivers to do so. Pet. App. 41a–43a.

The drivers' premise is legally inaccurate, then, because as a matter of law, their immunity was never at risk. True, they had two choices (either answer questions or remain silent), but under either choice, they retained their Fifth Amendment immunity from having their statements used against them in a criminal case. Under the first option, if they chose to fulfill their duty to cooperate by answering questions, then immunity would have arisen automatically under *Garrity*, because the statements were compelled by the fear of losing their license. See *Garrity*, 385 U.S.

at 500 ("[T]he protection . . . against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office."); accord Br. in Opp. 12 (apparently agreeing that "*Garrity* immunity applies automatically"). And under the second option (which they selected), when they chose to breach their duty to cooperate by refusing to answer questions, that immunity remained intact.

Further, while the drivers assert that under *Salinas* v. *Texas*, 133 S. Ct. 2174 (2013), they "must affirmatively claim the privilege to benefit from the protections of the Fifth Amendment," Br. in Opp. 19, *Salinas* expressly states that *Garrity* situations constitute an exception. *Id*. at 2180; see also *Minnesota* v. *Murphy*, 465 U.S. 420, 434–35 (1984); Pet. 19–20.

That is not to say that the drivers would not suffer consequences as a result of the race-fixing investigation. If any driver admitted to engaging in conduct that violated his license (such accepting money to alter the outcome of a race), he could quite rightly expect to lose his license. And if he refused to answer questions, as here, he could expect to lose his license because failing to cooperate is itself misconduct. Mich. Admin. Code, R. 431.1035(2)(d); see *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.").

But this dilemma arises separately from the Self-Incrimination Clause. If, for example, the misconduct did not involve a crime (say, a government employee

repeatedly shows up late to work, or a licensed driver to races), then the individual would still face the choice of answering questions about his tardiness (and possibly suffering adverse employment or licensing consequences) or of remaining silent (and possibly suffering the same consequences). It is the underlying conduct (the tardiness) that places the individual in this bind, regardless of the Fifth Amendment.

The Self-Incrimination Clause does not protect a government employee or licensee from all compulsive questioning or from all effects of his wrongdoing; it protects him only from having to serve "in any criminal case" as "a witness against himself." U.S. Const. amend. V; Pet. 25–26. In short, the Self-Incrimination Clause protects against use of self-incriminating statements "in any criminal case," not in employment or licensing decisions.

II. The Sixth Circuit created splits concerning *Garrity* immunity.

The drivers attack the petition's *Garrity*-related conflicts, contending that if the Sixth Circuit's opinion is properly understood, there is no circuit split. They state that the Sixth Circuit, while considering *Garrity* immunity to be automatic, concluded that the regulators could not require the drivers to waive their Fifth Amendment rights. Br. in Op. 11–13. Based on this reading, the drivers argue the court did not impose, as a condition on permissibly compelling answers, a requirement that the regulators grant immunity or notify the drivers of *Garrity* immunity. But the court's language belies the drivers' view.

A. The Sixth Circuit did not view *Garrity* immunity as automatic and so created conflicts with other circuits and a state supreme court.

Though they try, the drivers cannot show that the Sixth Circuit considered *Garrity* immunity automatic. From the start, the court of appeals said that the regulators acted "because [the drivers] refus[ed] to self-incriminate without immunity." Pet. App. 6a. The court concluded that the drivers could refuse to answer "unless the state immunized them from prosecution." *Id*. These statements show that the court thought that immunity had to come from the State, rather than coming from the automatic operation of the Fifth Amendment.

Indeed, the drivers' reading requires deeming much of the opinion irrelevant. Throughout, the Sixth Circuit accorded significant weight to the lack of an immunity offer. It said this omission caused the drivers to fear use of their statements against them: "[T]he MGCB did not offer the harness drivers . . . immunity before the hearing." Pet. App. 8a–9a. "So the harness drivers had reason to fear" that "prosecutors would use those answers as evidence." *Id*. at 9a. In context, the court was not referencing the possibility that compelled statements would be used in a prosecution for collateral crimes, such as perjury or obstruction of justice. Contra Br. in Opp. 13. Rather, the court of appeals was relying on the lack of an offer to suggest that the drivers would "use those answers as evidence" against them on race-fixing charges.

The drivers also submit that this Court has twice used "offer" language while recognizing automatic

Garrity immunity. But *Lefkowitz* v. *Turley*, 414 U.S. 70, 80 (1973), is inapposite because the Court was not addressing whether immunity was automatic. And the *Chavez* quotation does not even use "offer" or a similar term. Rather, it uses the passive "are immunized" and so does not shed any light on what creates the immunity (i.e., an offer or the operation of law). The drivers have failed to negate the circuit split concerning *Garrity* immunity's automatic application.

The drivers characterize the emphasis on the post-*Garrity* cases as "new" because the regulators did not explicitly mention *Garrity* in their Sixth Circuit brief. But, of course, the regulators seek review of the Sixth Circuit's opinion, not their own brief. The regulators' brief on appeal requested affirmance based on *McKinley* v. *City of Mansfield*, 404 F.3d 418 (6th Cir. 2004), a *Garrity* case that would have disposed of the drivers' claims because *Chavez* prohibits awarding § 1983 damages for a Fifth Amendment violation grounded only in compulsive questioning.

Despite the drivers' criticisms, the vagueness in the Sixth Circuit's requirements does not discourage certiorari; rather, it highlights the need for this Court to bring clarity to the law. Whether the court required formal immunity agreements or immunity notices, a cert-worthy split exists. In either case, the requirement is imposing a prophylactic measure not required by the Fifth Amendment's text. See *Chavez*, 538 U.S. at 768 n.2 (plurality).

In arguing that the Sixth Circuit recognized *Garrity* immunity as automatic, the drivers ignore the court's emphasis on an offer of immunity as a necessary step to make the questioning permissible. Pet.

App. 6a ("[T]he Constitution entitled the harness drivers to refuse to answer potentially incriminating questions, *unless the state immunized them from prosecution*.") (emphasis added). By emphasizing that the regulators "did not offer . . . immunity" and "declined to offer immunity," Pet. App. 8a–9a, 13a, the Sixth Circuit suggested that the regulators could offer immunity but failed to. If the court required an affirmative grant of immunity, then its opinion conflicts with *Spielbauer* v. *County of Santa Clara*, 45 Cal. 4th 704 (2009), and with multiple circuits that have followed this Court's post-*Garrity* decisions. See, e.g., *Gulden* v. *McCorkle*, 680 F.2d 1070, 1071, 1075 (5th Cir. 1982) (failure to tender immunity does not implicitly require a waiver); *Hill* v. *Johnson*, 160 F.3d 469, 471 (8th Cir. 1998); *Aguilera* v. *Baca*, 510 F.3d 1161, 1172 (9th Cir. 2007); *Wiley* v. *Mayor & City Council of Baltimore*, 48 F.3d 773, 777 (4th Cir. 1995).

B. The Sixth Circuit's requirement that notice be given creates a split.

The court's opinion may require regulators to provide notice to licensees that they will have immunity if they make statements before regulators may penalize them for refusing to answer. Pet. App. 13a n.11. The drivers downplay the court's reference to the notice-related circuit split, but cannot deny that the Sixth Circuit identified a conflict between "the Ninth Circuit's position" and the positions of the Second, Seventh, and Federal Circuits." Pet. App. 13a n.11.

Recognizing the need for an alternative argument, the drivers also contend any notice-related split is not cert-worthy because the split is longstanding and the Court has denied other petitions raising the issue. But

three of the cases the drivers cite were decided before this Court's 2003 decision in *Chavez*. And *Sher* v. *U.S. Department of Veterans Affairs*, 488 F.3d 489 (1st Cir. 2007), declined to expressly decide the notice issue.

Now that the split has percolated further, it warrants review because the Sixth Circuit's opinion presents no other options to the governments it obligates. Either governments must provide immunity or immunity notices, or they must allow employees and licensees to stonewall investigations related to their public duties. "[T]he accommodation between the interest of the State and the Fifth Amendment requires that the State have means at its disposal to secure testimony if immunity is supplied and testimony is still refused." *Turley*, 414 U.S. at 84.

In fact, if the drivers' depiction is accurate, the potential for harm skyrockets. Consider a public-health crisis in which the government needs information about the water supply's safety. The public employee responsible for water safety asserts the Fifth Amendment and refuses to provide information. Her employer cannot grant immunity, and, following the drivers' logic, cannot even use an immunity agreement or notice to require her to speak.

III. The Sixth Circuit created a circuit split concerning a self-incrimination claim's viability absent criminal charges.

The drivers argue that *Chavez* recognizes two compensable Fifth Amendment violations. They state first that *Chavez* recognizes a remedy for using someone's statements against him *in a criminal case*, pur-

portedly applicable when the plaintiff *has* made compelled statements, and second that *Chavez* recognizes § 1983 relief for conditioning public employment on a Fifth Amendment *waiver*, purportedly applicable when the plaintiff has *not* made compelled statements. Br. Opp. 20. But that second category—forced waiver—is not at issue in this case, because (as already explained) the drivers retained their immunity whether they spoke or remained silent. Since neither category applies, no violation occurred.

The drivers fail to appreciate that the waiver category does not depend on the plaintiff remaining silent. An employee could make statements and *still* claim that the state had conditioned employment on a waiver of the right not to have the statements used in a later *criminal* proceeding. Nevertheless, the drivers contend that the Sixth Circuit's application of *Chavez* centered on the waiver category and thus that no circuit split exists because most cases cited in the petition addressed the first category. The drivers again miss the mark.

Chavez recognized that "[s]tates cannot condition public employment on the waiver of constitutional rights." 538 U.S. at 768 n.2. But the plurality opinion did not describe this prohibition as a Fifth Amendment violation compensable under § 1983; that issue was not before the Court. The issue was whether "questioning alone was a completed violation of the Fifth and Fourteenth Amendments subject to redress by an action for damages under § 1983." *Id*. at 777 (Souter, J., joined by Breyer, J.).

The drivers also insist that the Sixth Circuit distinguished *Chavez* based on the waiver category, rather than on *Chavez*'s holding requiring use of compelled testimony against the plaintiff in a criminal case. Br. in Opp. 20. But the court distinguished *Chavez* by contrasting the *Chavez* plaintiff's statements with the drivers' silence, Pet. App. 11a, not by saying *Chavez* involved a different kind of Fifth Amendment violation.

In fact, the drivers even dispute that the Sixth Circuit split with the Ninth Circuit's decision in *Aguilera*, describing *Aguilera* as involving claims arising from the plaintiffs' statements. Br. Opp. 21. This argument does not survive *Aguilera*'s first paragraph, which says the deputies alleged that they were "punished for failing to give non-privileged statements." 510 F.3d at 1161. Although the *Aguilera* plaintiffs eventually provided statements, 510 F.3d at 1166, their Fifth Amendment claim concerned only the action against them after they initially remained silent. *Id*. at 1164.

Moreover, the Sixth Circuit relied on the *Aguilera* dissent, which declared, "*Chavez* only applies where a party actually makes self-incriminating statements." Pet. App. at 11a–12a. The *Aguilera* majority recognized that *Chavez* applies when the plaintiff speaks, but did not, like the dissent, state that *Chavez* applies *only* when the plaintiff speaks. 510 F.3d at 1174 n.9. The Sixth Circuit agreed with the *dissent* that " 'the Fifth Amendment would be violated if a public employee were fired for refusing to make self-incriminating statements, even though no self-incriminating

statements could ever have been used against the employee.' " Pet. App. 11a–12a (quoting the dissent). The split the Sixth Circuit created concerning *Chavez* persists.

IV. This case's interlocutory nature does not discourage certiorari.

The petition's interlocutory posture does not make certiorari inappropriate. For one, the district court stayed proceedings, Doc. 154, two weeks after the regulators filed this petition in November. (Because the petitioners consented to respondents' requests for 60 days of extra time to prepare the brief in opposition, the petitioners expect that the respondents will similarly consent to extending the stay beyond February 20.)

For another, interlocutory review is necessary to preserve qualified immunity's benefits. "[I]mmunity from suit" "is effectively lost if a case is erroneously permitted to go to trial." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). Qualified-immunity denials have the special status of being immediately appealable, *id*. at 527, and this Court has granted certiorari of multiple petitions requesting interlocutory review of qualified-immunity denials. See, e.g., *Plumhoff* v. *Rickard*, 134 S. Ct. 2012 (2014); *Mullenix* v. *Luna*, 136 S. Ct. 305 (2015); *City & Cty. of San Francisco*, *Calif*. v. *Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015). Even though only one prong of qualified immunity has been decided against the regulators at this point, it is the most damaging because it shapes their conduct going forward. And government officials are bound by the Sixth Circuit's rule now, causing an immediate harm to governmental authorities in the Sixth Circuit.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 373-1124

Melinda A. Leonard
Assistant Attorney General
Alcohol and Gambling
Enforcement Division

Attorneys for Petitioners

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