No. 17-1142

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

HUGH M. DAVIS, JR.
CYNTHIA M. HEENAN
Constitutional Litigation Associates, P.C.
450 W. Fort St., Ste. 200
Detroit, MI 48226
(313) 961-2255

EUGENE R. FIDELL
Yale Law School Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
ANDREW J. PINCUS
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

Counsel for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

BRIEF IN OPPOSITION

STATEMENT

Petitioner Michigan Gaming Control Board (the Control Board) licenses and regulates horse-racing jockeys and drivers. The Control Board accused respondents, harness-racing drivers, of fixing races. But petitioners have never presented any evidence that respondents engaged in misconduct, and respondents deny wrongdoing.

Soon after the Control Board instituted its investigation, it partnered with the Michigan State Police. The Control Board said repeatedly that it anticipated its investigation would yield criminal charges. That is why it shared its records with state police, why its investigator interrogated respondents alongside police, and why its officials and state police both told respondents that they would be arrested and prosecuted after testifying at Control Board licensing hearings. At those hearings, respondents accordingly invoked their Fifth Amendment rights, and the Control Board terminated respondents' licenses as a result.

This course of conduct is flatly prohibited by *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973).

As a general rule, agencies may investigate administrative issues and may coerce testimony through the threat of terminating public employment or licensure. But agencies cannot use that coercive power to aid a criminal proceeding. *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967), establishes that when an agency coerces its employees or licensees to testify by threatening termination, the evidence derived may not be used in a criminal proceeding.

Turley supplies an additional, essential safeguard that is particularly relevant here: the State may not use the threat of termination to extract from public employees or licensees a waiver of their Fifth Amendment rights. When a State violates this prohibition, it may cure its violation—and resume the use of administrative coercion—only by expressly granting the immunity that the State had earlier tried to coerce away. Otherwise, having merged its administrative and criminal proceedings, a State may not penalize employees or licensees who exercise their Fifth Amendment rights.

Petitioners assume repeatedly that this is a run-of-the-mill *Garrity* case. It is not. As the court of appeals concluded, petitioners' course of conduct here—merging administrative and criminal proceedings—is precisely the sort of conduct that triggers *Turley*'s tailored protections against coerced waivers of Fifth Amendment rights. When the issue decided below is accurately identified, petitioners' claims of circuit splits and arguments on the merits all unravel.

While there are several additional reasons to deny review, one in particular stands out. Petitioners frame the petition as presenting a question of qualified immunity. But the Control Board is ineligible to invoke qualified immunity. And qualified immunity cannot shield any individual petitioner from respondents' injunctive relief claims, which are essential to respondents' request for reinstatement of their licenses.

The Court should deny certiorari.

A. Legal background.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

In *Garrity* v. *New Jersey*, the Court held that when the government coerces an employee on threat of termination to provide self-incriminating statements, it may not use those same statements in a criminal proceeding. 385 U.S. at 500. This turned on the principle of unconstitutional conditions: "Where the choice is between the rock and the whirlpool, duress is inherent in deciding to 'waive' one or the other." *Id*. at 498 (quotation omitted). State officials, like "policemen," "teachers," and "lawyers," "are not relegated to a watered-down version of constitutional rights." *Id*. at 500.

In *Lefkowitz* v. *Turley*, the Court addressed a different, complementary issue: whether a State may use threats of termination to coerce a public employee (or licensee) into waiving his or her *Garrity* rights. 414 U.S. at 71-74. There, two state-licensed architects "were summoned to testify before a grand jury investigating various charges of conspiracy, bribery, and larceny." *Id*. at 75-76. They refused to waive their immunity against use of their testimony in a criminal prosecution. *Id*. at 76. When they later invoked their right against self-incrimination at the administrative proceedings, the State disqualified them from contracting privileges. *Ibid*.

The Court held this conduct unconstitutional. The Court recognized that "[a] waiver secured under threat of substantial economic harm cannot be termed voluntary." *Turley*, 414 U.S. at 82-83. This protection goes beyond *Garrity*: "the State may not insist that [public employees or licensees] 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." *Id*. at 84-85.

When, as in *Turley*, a State has breached that right by attempting to coerce a waiver of immunity, a State

may proceed with the administrative mechanism (and its attendant coercion) only if it provides "a grant of immunity" to cure the State's earlier misconduct. *Turley*, 414 U.S. at 84. That is, "if answers are to be required" *after* a State has attempted to coerce employees (or licensees) to "waive their Fifth Amendment privilege against self-incrimination," then the State "*must offer* to the witness whatever immunity is required to supplant the [Fifth Amendment] privilege and may not insist that the employee or contractor waive such immunity." *Id.* at 85 (emphasis added).

This was true even though the architects were licensees rather than public employees. *Turley*, 414 U.S. at 83-84. The Court "fail[ed] to see a difference of constitutional magnitude between the threat of job loss to an employee of the States, and a threat of loss of contracts to a contractor." *Id.* at 83.

Garrity thus precludes the use of coerced statements in criminal proceedings. *Turley* precludes a State from coercing an individual to waive his or her *Garrity* rights. *Turley*, moreover, holds that when a State breaches that right by attempting to coerce testimony for use in a criminal proceeding, it may cure the violation and resume its use of coercive powers by making an offer of immunity.

B. Factual background.

Respondents John Moody, Donald Harmon, Rick Ray, and Wally McIllmurray, Jr. were licensed harness-racing drivers. Pet. App. 2a-3a. All had worked with horses since childhood; Moody, for one, participated in more than 25,000 horse races from 1977 to 2010. Moody Dep. 15:4-5, 16:22 (D. Ct. Dkt. No. 98-24).

Michigan horse racing is regulated by the Control Board. Pet. App. 2a. In 2010, the Control Board initiat-

ed an investigation into possible race-fixing after receiving an anonymous tip. *Id*. at 3a. Robert Coberley, a Control Board steward,[1] investigated on behalf of petitioners. Coberley Dep. 11:10-12:9 (D. Ct. Dkt. No. 98-32).

The Control Board involved the Michigan State Police "right from the beginning" so that—according to Control Board Executive Director Richard Kalm—respondents "would be investigated and subsequently charged" upon any finding of criminal activity by the Control Board. Kalm Dep. 37:4-9 (D. Ct. Dkt. No. 98-33). See also Coberley Dep. 25:15-19 (Michigan State Police became involved "[v]ery shortly after we started the investigation").

Detective DeClercq of the Michigan State Police led the criminal side of the investigation. Moody Police Interview 2:9-10 (D. Ct. Dkt. No. 91-19). See also Coberley Dep. 25:15-19. Coberley and DeClercq subsequently worked together closely during the investigation; this included sharing and discussing "the records that [the Control Board] had." *Id.* at 31:11.

In early 2010, DeClercq obtained warrants and searched multiple homes in the course of the investigation. Pet. App. 79a. In particular, DeClercq unearthed a warrant for overdue child support for respondent Moody. See Moody Police Interview 2:23-3:19. Moody's children were all then adults. Moody Dep. 6:16-19. Coberley joined DeClercq on the execution of these warrants. Coberley Dep. 33:18-20.

On May 12, 2010, DeClercq and Coberley together searched for Moody at his family farm. Coberley Dep.

---

[1] Stewards are Control Board officials who supervise aspects of the racing industry.

53:9-10. Upon discovering he was not home, the team entered a dental office where Moody was in the middle of an appointment. *Id.* at 54:24-55:2. The detective ordered a highly medicated Moody out of the dental office; DeClercq placed him in the back of a police car, threatened him with arrest, and proceeded to interrogate and record him. Moody Dep. 43:8-44:3.

Detective DeClercq began the impromptu interrogation by informing Moody that he "represent[s] the criminal side of this" and that "Bob Coberly [sic] is assisting me with the investigation." Moody Police Interview 2:9-13. DeClercq told Moody, "We know what you've done. * * * I mean, we pretty much have our—our ducks in a row. We have—pretty much tied you up with a bow on it." *Id.* at 4:10-12. Detective DeClercq also informed Moody that he might go to jail "this weekend." *Id.* at 9:2-5.

DeClercq and Coberley later teamed up to interrogate another harness racer, respondent Wally McIllmurray, and they made similar threats to him. McIllmurray Dep. 37:20-38:14 (D. Ct. Dkt. No. 98-24). Again, Detective DeClercq threatened arrest "if you guys don't cooperate" with their joint investigation. *Id.* at 38:23-24.

Later that month, the Control Board ordered respondents to appear for investigatory stewards' hearings. Pet. App. 80a. The day before the hearings, Detective DeClercq called respondents' counsel and stated that the drivers should be "ready to be fingerprinted and to be processed because we're arresting them." Harmon Dep. 45:11-14 (D. Ct. Dkt. No. 98-24). DeClerq made clear that the Control Board hearings and the criminal investigation were linked; as the district court explained, respondents' evidence is that, "on several occasions prior to their appearance at the [Control

Board] hearings, [DeClerq] of the [Michigan State Police] advised [respondents' lawyer] that the [respondents] * * * would be arrested at the conclusion of the hearings." Pet. App. 80a.

The Control Board also confirmed that the hearings were tied to the criminal investigation. Immediately before the hearings, its Executive Director, Richard Kalm, released a statement indicating that respondents would be "arrested within 48 hours for racketeering." Ray Dep. 39:22-23 (D. Ct. Dkt. No. 98-24). Deputy Racing Commissioner Post also said that the drivers were going to be criminally charged after the hearings. McIllmurray Control Board Hr'g 10:9-11 (D. Ct. Dkt. No. 98-4).

The hearings were held on May 20, 2010. Respondents, the three presiding stewards, Coberley and Post (representatives from the Control Board), and two Michigan Assistant Attorneys General were all present. See Control Board Hr'gs (D. Ct. Dkt. No. 98-4). Respondents took an oath and responded to basic questions. *Ibid.* Control Board officials then asked them incriminating questions. *Ibid.* The Control Board did not present any testimony or other evidence suggesting that respondents were involved in race-fixing. *Ibid.*

On the advice of counsel, respondents invoked their rights against self-incrimination and refused to answer several questions. Pet. App. 81a-82a. Their counsel explained that he advised his clients not to answer because of the repeated indications that they would be arrested after the hearings. McIllmurray Control Board Hr'g 24:11-14.

The Control Board took the position that, notwithstanding its having linked the administrative and criminal proceedings, Michigan Administrative Code

Rule 431.1035 required respondents to testify—and thus to waive their Fifth Amendment rights. See Pet. App. 17a. That provision obligates licensees to "cooperate in every way with the commissioner or his or her representatives during the conduct of an investigation, including responding correctly, to the best of his or her knowledge, to all questions pertaining to racing matters." Mich. Admin. Code R. 431.1035.

At the hearings, the Control Board communicated that, in accordance with the rule, respondents were obligated to waive their immunity: "these are our racing rules"; "specifically [with] R431.1035, failure to cooperate could cause a suspension." Moody Control Board Hr'g 8:4-7. See also McIllmurray Control Board Hr'g 8:18-20 ("The licenses are a privilege, not a right. And this application may be a consent to provide us and cooperate with us.").

The Control Board subsequently banned respondents from their chosen profession. Pet. App. 55a-56a. The Control Board further issued "orders of exclusion," preventing respondents from reapplying for new licenses and barring them from racetracks throughout the state. Pet. App. 4a, 56a; Orders of Exclusion (D. Ct. Dkt. No. 85-12).

Each suspension order states that the respondent was suspended because he "failed to fully cooperate in answering the stewards' questions" and "elected to assert his Fifth Amendment right against self-incrimination." Stewards' Rulings (D. Ct. Dkt. No. 85-11). The suspension orders do not cite any evidence of race-fixing. *Ibid.* Rather, "[the Control Board] took the position that it would not lift the exclusion orders unless [respondents] answered questions without legal representation." Pet. App. 56a. See also *id.* at 82a-83a, 85a.

Because of these orders, respondents were effectively banned from racing anywhere in the United States and Canada due to reciprocity agreements. Pet. App. 55a n.3. No criminal charges were ever filed—and petitioners have never presented evidence connecting respondents to any race-fixing. See Pet. App. 61a n.9. Respondents all deny fixing races. See, *e.g.*, Moody Dep. 59:15-16; Harmon Dep. 45:17-21; Ray Dep. 48:9; McIllmurray Dep. 38:15-17.[2]

Respondents subsequently applied for relicensure in 2011, 2012, and 2013; each request was denied. Pet. App. 4a. Petitioners told respondents that their license applications would not be processed so long as they were represented by counsel. See, *e.g.*, Moody Dep. 67:9-12 ("Not only was there a memo from Mr. Ernst stating as long as I was represented by counsel that my license application would not be processed, he also told me that verbally by phone twice."); Harmon Dep. 58:10-11 (relaying letter he wrote to the Control Board: "As requested by your office, I'm writing to inform you

---

[2] Petitioners suggest that respondent Moody admitted to fixing races on March 12, 2010. See Pet. 5-6. See also Pet. App. 79a-80a. But petitioners omit the district court's recognition that respondents "have since repudiated these statements[,] claiming they were coerced by the [Michigan State Police] into admitting wrongdoing." *Id.* at 80a. For good reason: these statements were made in the back of a police car while Moody "was highly medicated" as a result of the dental procedure that DeClercq and Coberley interrupted. See Moody Dep. 43:24-25. In fact, Moody does not remember most of the interview as a result of the medication. *Ibid.* Because there have been no factual findings contradicting respondents' contention, and all factual inferences must be drawn in *respondents*' favor at this stage (Pet. App. 7a), petitioners' assertion—presented as matter of fact—that Moody admitted to violations is misleading.

that as of today, * * * I do not have legal representation."); McIllmurray Dep. 48:20-23; Ray Dep. 50:14-23.

Almost two and a half years after the exclusion orders were originally issued, respondents finally received administrative hearings on April 25, 2013. Pet. App. 84a.

C. Proceedings below.

Respondents sued under Section 1983. They allege that petitioners violated their Fifth Amendment rights against compelled self-incrimination and, separately, their due process rights. Pet. App. 4a. In addition to requesting damages, respondents seek declaratory and injunctive relief that will restore their licenses and ability to participate in the racing industry. *Id*. at 39a-40a.

1. The district court initially granted summary judgment for petitioners as to respondents' Fifth Amendment self-incrimination claim (Pet. App. 93a-96a) and due process claims (*id*. at 89a-93a).

2. A unanimous panel of the Sixth Circuit reversed as to the claims at issue here. Pet. App. 53a-75a. With respect to the Fifth Amendment compelled-testimony claim, the court explained "[the Control Board] did not offer the harness drivers—state licensees—immunity before the hearing." *Id.* at60a-61a. Given the backdrop of this case, respondents "had reason to fear that, had they responded to questions during the 2010 hearing with incriminating answers, prosecutors would use those answers as evidence." *Id.* at 61a. The court, moreover, distinguished *Chavez* v. *Martinez*, 538 U.S. 760 (2003), as that case did not involve circumstances where the State imposed severe sanctions on an individual as a consequence of invoking his Fifth Amendment rights. See Pet. App. 61a-64a.

As to the due process claims, the court found that respondents sufficiently alleged a property interest. Pet. App. 67a-68a. In particular, due process rights attach to administrative orders excluding individuals from their chosen profession, as well as to agency action revoking state-issued licenses. *Id.* at 68a-70a. While the court affirmed dismissal of the claims focusing on the suspension orders (*id.* at 71a), it held that the exclusion orders raised "a disputed issue of material fact as to whether [petitioners] denied [respondents] the process they were due." *Id.* at 74a.

3. Petitioners then sought certiorari, raising questions materially similar to those here. See *Michigan Gaming Control Bd.* v. *Moody*, No. 15-623. The Court denied review. See 136 S. Ct. 1711 (2016).

4. On remand, petitioners again moved for summary judgment, and the district court agreed in part. See Pet. App. 37a-52a. As to the Fifth Amendment claim, the court granted summary judgment to petitioners. See *id.* at 41a-45a. It held that, while it was clear that employees could not be "required to waive immunity, else face termination," it was "not clearly established in this Circuit" that "the State was required to *offer* immunity in the first place." *Id.* at 44a.

The court denied petitioners' request for summary judgment as to the due process claim: "it has been clearly established that a horse-driver is entitled to a post-exclusion hearing upon request." Pet. App. 47a-48a.

5. The case then returned to the court of appeals. See Pet. App. 1a-18a. As to the Fifth Amendment claim, petitioners' "argument is belied by precedent." Pet. App. 13a. *Turley* held that "a witness protected by the Fifth Amendment privilege may rightfully refuse to

answer potentially self-incriminating questions from his employer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant." *Ibid.* (alterations omitted) (quoting *Turley*, 414 U.S. at 78).

For at least two reasons, the court held that the immunity conferred by *Garrity* did not suffice in the context of this case. *First*, applied here, what *Turley* requires is broader: it protects against the State using *derivative* evidence obtained from the interview. See Pet. App. 14a. "That grant of immunity exceeds the grant articulated in *Garrity*." *Ibid.*

Second, "*Turley* articulated a separate Fifth Amendment right that applies when potentially self-incriminating questions are posed in a public-employment setting." Pet. App. 14a. In particular, "*Garrity* immunity prohibits the use of coerced statements in criminal proceedings, but it does not protect against the act of coercion itself." *Id.* at 16a. *Turley*, by contrast, prohibits the State from asking employees "to waive their right to immunity." *Id.* at 17a.

When a State does engage in such coercion, the State may cure its violation and proceed with the administrative interrogation by making an affirmative offer of immunity. That is, after having engaged in coercion, "States *must offer* to the witness whatever immunity is required to supplant the [Fifth Amendment] privilege and may not insist that the employee or contractor waive such immunity." Pet. App. 14a (quoting *Turley*, 414 U.S. at 84-85).

Examining the particular facts of this case, the court held that the "record" supplies a basis to conclude that respondents *were* coerced to waive their *Garrity*

rights—which is what triggers *Turley*. Pet. App. 17a. Rule 431.1035, "as applied" in this case, "left [respondents] with only two choices: to waive their privilege [against self-incrimination] and cooperate with an investigation, or to be punished." *Ibid*. *Turley* "clearly held this choice to be coercion, which constitutes an illegal action until an offer of immunity is made." *Ibid*.

As for the due process claims, the court concluded that the mere provision of a hearing is not in all cases sufficient. Pet. App. 11a. Because the post-exclusion hearings took place nearly two and a half years after the deprivation, respondents "have identified a violation of clearly established right." *Id*. at 12a.

Judge Batchelder agreed as to the due process claim. Pet. App. 19a. She dissented as to the Fifth Amendment claim. *Id*. at 19a-34a.

REASONS FOR DENYING THE PETITION

Further review of this interlocutory petition is not warranted. For petitioners to prevail—and avoid a trial—they must convince the Court to review and reverse two independent claims. Petitioners cannot make that tall showing here.

In the main, the petition asks the Court to review an alleged split of authority regarding the Fifth Amendment and *Garrity* immunity. Petitioners presented essentially this same argument two years ago in *Michigan Gaming Control Board* v. *Moody*, No. 15-623. The Court denied certiorari then. It should do so again.

This remains a poor case for review, both because petitioners' argument is fundamentally at odds with their underlying conduct and because they violated the law even as they would construe it. Moreover, this case does not actually present the issue of which the peti-

tion seeks review; as the court of appeals repeatedly held, this case turns on *Turley* immunity, not *Garrity*. Nor does it implicate the issue decided in *Chavez* v. *Martinez*, 538 U.S. 760 (2003). And petitioners' request for qualified immunity error correction is insubstantial for many reasons, not least of which is that the Control Board is categorically unable to invoke a qualified immunity defense.

Review is separately unwarranted because respondents will go to trial on their due process claims regardless. That is why petitioners attempt to tack on a request for qualified immunity error correction. Not only is that an improper basis for further review, but there was no error below.

A. The Fifth Amendment claim does not warrant review.

1. Petitioners' conduct contradicts their current legal position.

Petitioners' essential contention is that respondents had "immunity" from criminal prosecution "throughout the [Control Board] proceedings." Pet. 18. See also *id*. at 2 ("[I]mmunity from the use of self-incriminating statements in criminal cases arises *automatically* if those statements are compelled by a threat to one's livelihood."); *id*. at 13 ("*Garrity* immunity attaches automatically."). Thus, in petitioners' telling, respondents should have known that whatever statements they made to the Control Board could not be used for purposes of a criminal proceeding—and therefore respondents did not need an affirmative offer of immunity to protect their Fifth Amendment rights. Petitioners assert that the court of appeals erred by failing to recognize this point.

We will respond to that legal point, which is deeply flawed on its own terms, in the pages below. But, whatever one may think about petitioners' legal argument, *this* case is decidedly not an appropriate one to review the issue.

Here, the criminal investigation proceeded *jointly* with the Control Board investigation. The Control Board involved the Michigan State Police "right from the beginning" so that respondents "would be investigated and subsequently charged" upon any Control-Board-produced finding of criminal activity. Kalm Dep. 37:4-9.

Detective DeClercq, who said that he "represent[ed] the criminal side of this," conducted the investigation hand-in-hand *with* the Control Board investigator, Coberley. Moody Police Interview 2:9-13. In fact, DeClercq told respondent Moody that Coberley "is assisting me with the investigation." *Ibid.* As DeClercq explained it, his criminal "investigation" was the very same thing as Coberley's investigation on behalf of the Control Board. *Ibid*.

DeClercq and Coberley thus jointly interviewed the respondents. See, *e.g.*, Moody Police Interview 2:9-13; McIllmurray Dep. 37:20-38:10. They asked questions together throughout, conveying that the criminal and administrative proceedings were the same. See, *e.g.*, Moody Police Interview. When, for example, Coberley and DeClercq interviewed respondent Ray, DeClercq threatened that he "was looking at 20 years for racketeering." Ray Dep. 40:9. Thus, *at the very moment* that the Control Board was investigating, respondent Ray was threatened with prison by a police officer.

Given that the Control Board and the police in fact conducted the investigation together, it is little sur-

prise that they also shared their evidence. As the Control Board investigator Coberley explained, he shared records with the state police. See Coberley Dep. 31:9-12.

Not only that, but respondents were repeatedly and overtly told that their testimony *would* be used in criminal proceedings. The day before the May 2010 Control Board hearings, DeClercq called respondents' counsel and stated that the drivers should be "ready to be fingerprinted and to be processed because we're arresting them." Harmon Dep. 45:11-14. See also McIllmurray Dep. 37:23-38:24. Indeed, DeClercq repeatedly informed respondents that, following respondents' testimony, they "would be arrested at the conclusion of the hearings." Pet. App. 80a.

Also prior to the hearings, the Control Board's Executive Director released a statement announcing that respondents would be "prosecuted, processed within 48 hours for racketeering." Ray Dep. 39:22-23. Deputy Racing Commissioner Post likewise said that respondents were going to be criminally charged as a result of their testimony. See McIllmurray Control Board Hr'g 10:9-10. Two state assistant attorneys general attended the Control Board hearings. See Control Board Hr'gs 1.

In sum, petitioners conducted virtually every aspect of their investigation in tandem with the police—they interviewed witnesses together and shared their records. Petitioners did so with the stated expectation that the Control Board investigation would lead to criminal charges. Petitioners, moreover, *told* respondents that their statements before the Control Board would result in their immediate arrest and prosecution. Against this backdrop, it takes real chutzpah for petitioners now to contend that respondents should

have known, all along, that whatever they said to the Control Board categorically would not have been used in a criminal prosecution.

Besides all that, the outcome of this case would be the same regardless of the governing legal framework. In petitioners' view, *Garrity* supplies the sole immunity at issue, and it prevents petitioners (or any other state actor) from using respondents' testimony coerced by threat of termination in criminal proceedings. Even under petitioners' mistaken framework, respondents *still* would prevail. That is because petitioners shared information they gathered in the administrative proceeding (using administratively coercive tools) with the police, and they sought to use the coercive threat of terminating respondents' licenses as a means to further the criminal proceedings. Even as petitioners would read the law, *Garrity* forbids that conduct.

Further review is not warranted where the petition rests on a litigating position fundamentally inconsistent with petitioners' own conduct, and where respondents would prevail even under petitioners' construction of the law.

2. This case turns on Turley, *not* Garrity.

The crux of the petition is petitioners' contention that several courts have said that *Garrity* immunity attaches automatically. See Pet. 14-18. But that point is not relevant to this case. The issue on which this case was actually decided—whether a State may coerce a public employee or licensee to *waive* his *Garrity* rights—is not the subject of any disagreement.

a. The essential argument of the petition is not that *Garrity* immunity applies automatically. The court of appeals below did not disagree. Rather, petitioners' core argument—offered without analysis—is

that, by virtue of *Garrity*, respondents "already had the immunity referenced in *Turley*." Pet. 18. But, as the court of appeals explained, *Garrity* immunity alone could not satisfy *Turley* in the factual context of this case.

Turley protects against a State using the threat of termination to *coerce* an employee or licensee into waiving her *Garrity* rights. A State may not use its coercive administrative tools *when* it has combined the administrative and criminal proceedings. If a State does engage in such coercion, the method by which it may cure its violation and proceed with the administrative proceeding is to offer an affirmative grant of immunity. *Turley*, 414 U.S. at 84-85.

The court of appeals made a case-specific determination that, in view of this record, a finder of fact could conclude that petitioners violated the *Turley* right. Petitioners forced respondents to choose between waiving their *Garrity* rights or "be[ing] punished." Pet. App. 17a.[3] That conclusion was correct—and it certainly is not an issue that this Court can or should review in an interlocutory posture.

The state law that petitioners invoked—Rule 431.1035—is exceedingly broad. It requires licensees to "cooperate in every way with the commissioner or his or her representatives during the conduct of the *investigation*." *Ibid.* (emphasis added). Here, the evidence is

---

[3] *Turley* also requires a public employee to have criminal immunity as to evidence derived from statements made in an administrative proceeding. *Turley*, 414 U.S. at 84-85. That is, an employee "may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant." *Id.* at 78.

overwhelming that petitioners merged the Control Board "investigation" with the parallel criminal proceedings. See pp. 4-8, 15-17, *supra*. Detective DeClercq admitted as much, telling respondent Moody that Control Board officer Coberley was assisting him in the "investigation." Moody Police Interview 2:12-13.

Petitioners therefore cannot plausibly claim that the Control Board investigation was purely administrative—and they certainly cannot rest the petition on that factual assumption. The court of appeals held to the contrary (see Pet. App. 17a), and the record must be construed in respondents' favor (*id.* at 7a).

To the extent that petitioners wish to argue otherwise (see, *e.g.*, Pet. 28-29), they may attempt to do so on remand, where factual disputes are properly resolved. Since the core of petitioners' argument now is really nothing more than a dispute over what the evidence in this case may ultimately show, review in this interlocutory, pre-trial posture is decidedly not appropriate.

b. In view of the issues actually presented, petitioners' claim of a circuit conflict involving *Garrity* rings hollow. None of petitioners' cases involved efforts to coerce a public employee or licensee into waiving the right against self-incrimination. See Pet. App. 15a (noting that petitioners "fail to recognize" that "the right articulated in *Turley* is separate and distinct from the one articulated in *Garrity*, one which carries separate entitlements, protects against different infringements by the government, and, importantly, one whose contours are shaped by very different considerations").

Uniformed Sanitation Men Ass'n v. *Commissioner of Sanitation of City of New York*, 426 F.2d 619 (2d Cir. 1970), predates *Turley*. It thus says nothing material

about this case, which rested extensively on the right later articulated in *Turley*. In any event, there is no indication that the State there sought to coerce the public employees into waiving their rights against self-incrimination.

The circumstances in *Gulden* v. *McCorkle*, 680 F.2d 1070 (5th Cir. 1982), were the opposite of those here. There was a factual finding that the State did *not* "demand[] that [the public employees] expressly waive their rights to invoke the Fifth Amendment's right to be free from self-incrimination and thereby relinquish the right to exclude from evidence in any subsequent criminal proceeding." *Id.* at 1072-1073.

Indeed, *Gulden* recognized the very right the court of appeals applied: this Court "has held that a public employee cannot be compelled to answer questions concerning his or her official duties and also be compelled by threat of loss of job to waive the immunity guaranteed in *Garrity*." *Gulden,* 680 F.2d at 1073-1074. The court expressly distinguished its holding from cases where the public employee's "concerns" regarding a request for a waiver of rights was manifest in "a particularized context." *Id.* at 1075-1076. But that is this case: petitioners' conduct created a "particularized context" that triggered *Turley* rights.

In *Sher* v. *United States Department of Veterans Affairs*, 488 F.3d 489 (1st Cir. 2007), the court did not mention *Turley*, for the simple reason that the *Turley* right was not implicated. To the contrary, the agency had informed the employee that there was *no* criminal proceeding. *Id.* at 495. Since the agency had not attempted to coerce a *Garrity* waiver, there was no *Turley* violation.

The same is true of the balance of petitioners' authority—none of their cases triggered the *Turley* right because none involved an attempt by the State to coerce a waiver of *Garrity* immunity. See, *e.g.*, *Wiley* v. *Mayor & City Council of Balt.*, 48 F.3d 773, 775 (4th Cir. 1995) ("Although the officers were ordered to undergo the polygraph tests, they were not asked to waive their Fifth Amendment privilege against self-incrimination."); *Confederation of Police* v. *Conlisk*, 489 F.2d 891, 894 (7th Cir. 1973) (decided contemporaneously with, and thus not considering, *Turley*); *Hill* v. *Johnson*, 160 F.3d 469, 471 (8th Cir. 1998) (employee was not "required to relinquish immunity from the use of his answers in criminal proceedings"); *Hester* v. *Milledgeville*, 777 F.2d 1492, 1495 (11th Cir. 1985) ("[E]mployees may not be required to waive any rights."); *Weston* v. *United States Dep't of Housing & Urban Dev.*, 724 F.2d 943, 946 (Fed. Cir. 1983) (employee was told, expressly, that her answers "may not be used against [her] in criminal proceedings," and they could be used only "administratively").

Similarly, in *Spielbauer* v. *County of Santa Clara*, 199 P.3d 1125 (Cal. 2009), a public defender being investigated by his office was told "that his refusal to cooperate would be deemed insubordination warranting discipline up to and including dismissal," but was "advised * * * that no use in a criminal proceeding (i.e., criminal use) could be made of his answers." *Id.* at 1127 (emphasis omitted). There was no *Turley* violation.

In fact, *Spielbauer* recognized the precise right implicated here: the Constitution "privileges a person not to answer official questions in any other proceeding, 'civil or criminal, formal or informal,' where he or she reasonably believes the answers might incriminate him

or her in a criminal case." *Spielbauer*, 199 P.3d at 1131. Once more, that is *this* case: respondents were informed that they were going to be arrested following their testimony at the Control Board hearings.

c. Petitioners and their *amici* conjure up the familiar parade of horribles. Pet. 18-20. But their argument rests on a misinterpretation of what the decision below holds. As we have explained, the *Turley* violation that occurred in these unusual circumstances is what required the State to make an offer of immunity as a cure to the specific violation. The decision below did not announce some broad rule delineating procedures that govern every administrative investigation.

One thing is certain: petitioners have no proof that the decision below has any material effect on run-of-the-mill agency investigations. Unless and until the lower courts hold otherwise, review is unwarranted.

3. This case does not implicate Chavez.

Chavez v. *Martinez*, 538 U.S. 760 (2003), is not remotely relevant—and thus the claimed split on that issue (Pet. 20-23) is no reason to grant review.

a. Because petitioners' brief in the court of appeals did not advance this position (see Pet'rs' Step Three Br. (C.A. Dkt. No. 17)), petitioners waived this argument below. That likely explains why the court of appeals did not address this issue. This is yet another, independent reason to deny review of the petition in its entirety: petitioners believe that their *Chavez* argument is important to the consideration of this case, but, be-

cause they did not preserve that issue, this Court would be unable to reach it.[4]

b. Petitioners waived the argument below for good reason: *Chavez* has nothing to do with the issues posed here. *Turley* rests on an unconstitutional conditions analysis; a government may not take action against an individual because that person refused to waive a constitutional right. See *Turley*, 414 U.S at 84-85.

The question in an unconstitutional conditions case is not, therefore, whether the underlying constitutional right was violated; it is whether the State imposed sanctions on an individual for exercising that right. See Pet. App. 63a. That doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). Petitioners' focus on whether a facial violation of the Fifth Amendment self-incrimination claim requires use of statements in a criminal case is not relevant to the question whether petitioners have unconstitutionally penalized respondents for invoking their rights.

In fact, Justice Thomas's plurality opinion in *Chavez* recognized precisely this point: "The 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." *Chavez*, 538 U.S. at

---

[4] It does not alter the analysis that the issue was considered in the *first* appeal to the court of appeals. See Pet. App. 61a-67a. If petitioners wished to preserve their argument for review now, they had to raise it in the appeal that gives rise to *this* petition. See *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2083 (2015).

768 n.2. The plurality explained that "this is true even though immunity is not itself a right secured by the text of the Self-Incrimination Clause, but rather a prophylactic rule we have constructed to protect the Fifth Amendment's right from invasion." *Ibid*. That is another way of saying this is an unconstitutional conditions case—"States cannot condition public employment on the waiver of constitutional rights." *Ibid*.

Petitioners do not wrestle with the unconstitutional conditions doctrine. Their argument (see Pet. 23-26) is wholly incompatible with this foundational principle.

c. It is not surprising, therefore, that not one of the cases petitioners cite (Pet. 20-23) involved the sort of coercion and unconstitutional conditions at issue here. Once again, none of these cases involved a *Turley* violation.

Aguilera v. *Baca*, 510 F.3d 1161, 1172 (9th Cir. 2007), turned on the factual conclusion that "the deputies were not compelled to answer the investigator's questions or to waive their immunity from self-incrimination." There is no difference in the law here—just an enormous difference in fact. Petitioners are simply wrong to *assume* that respondents "were never asked to waive immunity." Pet. 22. The court below held otherwise (see Pet. App. 17a), and respondents have a substantial basis to prove these facts at trial. See pp. 4-8, 15-17, *supra*.

Petitioners' other cases are unrelated to the public employment and licensing context, much less the unconstitutional conditions doctrine. See *Higazy* v. *Templeton*, 505 F.3d 161 (2d Cir. 2007); *Renda* v. *King*, 347 F.3d 550 (3d Cir. 2003); *Burrell* v. *Virginia*, 395 F.3d 508 (4th Cir. 2005); *Murray* v. *Earle*, 405 F.3d 278 (5th Cir. 2005); *Sornberger* v. *City of Knoxville*, 434 F.3d

1006 (7th Cir. 2006); *Livers* v. *Schenck*, 700 F.3d 340 (8th Cir. 2012); *Koch* v. *City of Del City*, 660 F.3d 1228 (10th Cir. 2011); *United States* v. *Allen*, 864 F.3d 63 (2d Cir. 2017).

4. The decision below is correct—and there is no basis for qualified immunity.

Review is also unwarranted because the decision below is a straightforward application of *Turley*. For this, and other reasons, qualified immunity is unavailable—not least because a trial is certain to take place on injunctive relief no matter what.

a. In *Turley*, during the administrative proceeding, the architects were asked to waive their immunity rights; when they refused to do so and instead asserted the Fifth Amendment, the State revoked their licenses. *Turley*, 414 U.S. at 75-76. The Court held that such underlying coercion is unconstitutional; when it occurs, to cure the violation and continue with the administrative proceeding, the State "must offer to the witness whatever immunity is required to supplant the privilege." *Id*. at 85. Because the State in *Turley* had earlier merged the criminal and administrative proceedings and had not offered the architects immunity, the State could not penalize them for having invoked their Fifth Amendment rights. *Id*. at 84-85.

The lower court held that the evidence adduced here provides a record on which a finder of fact could conclude that this case is indistinguishable from *Turley*. Pet. App. 17a. Petitioners compelled respondents not just to testify at the administrative hearings, but *also* "to waive their privilege." *Ibid*. That was because, at petitioners' own doing, the Control Board merged the administrative and criminal proceedings. See pp. 4-8, 15-17, *supra*. As a result, petitioners could

use their coercive administrative mechanism only after curing their earlier violation through an offer of immunity. See Pet. App. 18a. Because this case is governed squarely by *Turley*, it follows that qualified immunity is unavailable.

Petitioners' reliance on alleged circuit splits are of no help. See Pet. 30-31. As we have shown, petitioners fail to demonstrate any conflict with the actual holding below. Petitioners' Sixth Circuit case (Pet. 31) similarly does not address the question posed here, which arises in the public employment and licensing context. See *Tinney* v. *Richland Cty.*, 678 F. App'x 362 (6th Cir. 2017). *City of Hays* v. *Vogt*, No. 16-1495, also does not address the unconstitutional conditions doctrine, which is at the heart of *Turley*.

b. While petitioners' qualified immunity argument fails on its own terms, petitioners are additionally wrong for a more elementary reason. Qualified immunity is categorically unavailable to the Control Board, as well as with respect to the injunctive relief claims against all petitioners.

The lead defendant, the Control Board, is a government entity—not an individual person.[5] It is axiomatic that qualified immunity "is not available" in "[Section] 1983 cases against a municipality." *Pearson* v. *Callahan*, 555 U.S. 223, 242 (2009). See also *Owen* v. *City of Indep.*, 445 U.S. 622, 650 (1980) (rejecting "a

---

[5] The lower courts held that the Eleventh Amendment shields the Control Board from *damages* claims. See Pet. App. 39a, 41a. But respondents *also* request injunctive and declaratory relief against the Control Board—they seek reinstatement of their licenses and reversal of their expulsion orders. *Id.* at 39a. Those claims against the Control Board remain present, which is why it is the lead petitioner in this Court.

construction of [Section] 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations"); *Leatherman* v. *Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993) ("[M]unicipalities do not enjoy immunity from suit—either absolute or qualified.").

Moreover, qualified immunity is not available where "injunctive relief is sought instead of or in addition to damages." *Pearson*, 555 U.S. at 242. Here, though, respondents seek injunctive relief with respect to all petitioners. See Pet. App. 39a-40a.

The petition is framed as turning on qualified immunity (see Pet. i), but that defense is not available as to a substantial portion of the claims at issue. That the petition rests on an incorrect premise is significant reason to deny review. See *Smith* v. *Phillips*, 455 U.S. 209, 215 n.6 (1982) ("Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted.").

c. Alternatively, the Court should reverse the doctrine of qualified immunity entirely. While that argument was not available to the court of appeals—and thus was not one that could be pressed there—it is available as a means for this Court to resolve the case.

As Justice Thomas explained in concurrence, there is significant and "growing concern" with the validity of the Court's "qualified immunity jurisprudence." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment). See also William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 46-49 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 11-12 (2017).

Review of this case would, therefore, require determination of whether qualified immunity should continue to apply in cases like this. For all the reasons we have explained, however, this is not an appropriate vehicle for further review of any kind.

B. The due process claims are an independent reason to deny certiorari.

In addition to their Fifth Amendment claim, petitioners also seek error correction with respect to the lower courts' denial of qualified immunity as to due process. See Pet. 31-36. That claim focuses on whether petitioners provided adequate process when they issued exclusion orders against respondents—and then held post-deprivation hearings approximately two and a half years later. See Pet. App. 12a.

At the outset, the pendency of this claim is an independent reason to *deny* interlocutory review. This case has yet to go to trial; a verdict in favor of petitioners on some or all claims would narrow—or obviate entirely—the issues presented here. The Court should therefore await a final judgment. If any of the issues posed here prove outcome-determinative, petitioners may seek review with the benefit of factual findings, a full record, and knowledge of what legal questions ultimately mattered to the final outcome.

1. Petitioners' request for error correction on qualified immunity, even if granted by this Court, would not foreclose trial in this case because qualified immunity does not apply to respondents' claims against the Control Board or the injunctive and declaratory claims against the individual petitioners. See pp. 26-27, *supra*. This case *cannot*, accordingly, be resolved on the basis of qualified immunity—the only issue petitioners ask this Court to review with respect to the due process

claim. See Pet. i. Either way, this case is heading to trial. There is no reason for review now when a trial is inevitable.

2. In any event, the decision below does not warrant further review because there is no disagreement among the circuits.

Petitioners invoke (Pet. 34) *Columbian Financial Corp.* v. *Stork*, 811 F.3d 390 (10th Cir. 2016). There, the Tenth Circuit determined that the inquiry about whether the FDIC's delay in providing a post-deprivation hearing for a seizure of bank assets was too fact-intensive to be a clearly established right for qualified immunity purposes. *Id.* at 401. But that says nothing about this case; petitioners do not so much as attempt to show that the considerations at issue in that analysis model those here. Rather, this Court has already addressed the specific analysis that governs in this context, thus clearly establishing the contours of the right. See Pet. App. 11a-12a.

3. Review is additionally unwarranted because the decision below is correct. Because the exclusion orders at issue deprived respondents of constitutionally protected interests, due process required that respondents be offered a hearing on their deprivation at a meaningful time and place. Pet. App. 12-13a. The April 25, 2013 administrative hearings were not timely, and they did not therefore constitute due process. *Ibid.*

a. Petitioners misstate the issue. They contend that the only due process question is whether the respondents had a constitutionally protected interest in being physically present on the grounds of a Control-Board-controlled racetrack. Pet. 32. Not so. Respondents *acknowledged* below that, if physical presence on the grounds of a Michigan racetrack was the only interest

at issue, then the State "would be correct that no constitutionally protected interest was implicated." Resp'ts' Step Two Br. 46 (C.A. Dkt. No. 16). Since the court of appeals agreed with respondents on their due process claim (Pet. App. 12a), it follows that its conclusion rests on broader constitutional interests.

As respondents explained below (see, *e.g.*, Resp'ts' Step Two Br. 38-39, 44, 46), the exclusion orders petitioners issued implicate respondents' rights to relicensure and to participate in the horse-racing industry in general. Indeed, petitioners sent respondents letters explaining that because "an Exclusion Order was entered against you," "you are excluded indefinitely from licensure and from Michigan tracks." See, *e.g.*, Pedersen Letters (D. Ct. Dkt. No. 98-17). Separate letters informed respondents that because "an Order of Exclusion was issued against you," "you should be deemed ineligible for licensure and excluded from horse racing tracks in the State of Michigan." Ernst Letters (D. Ct. Dkt. No. 85-16). Petitioners' current characterization of the orders as simply "excluding [respondents] from visiting racing grounds as spectators" (Pet. 32) is flatly inconsistent with the record, including petitioners' own representations to respondents otherwise.[6]

It is well established that there is a property interest in obtaining occupational licenses. See *Barry* v. *Barchi*, 443 U.S. 55, 64 (1979). There is likewise a liberty interest in the right to pursue a lawful occupation. See *Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 572 (1972). It follows that the exclusion orders

---

[6] For this reason, *Rodic* v. *Thistledown Racing Club, Inc.*, 615 F.2d 736 (6th Cir. 1980), on which petitioners rely (Pet. 4), is inapposite.

implicated constitutionally protected interests in both property and liberty by depriving respondents of the ability to request relicensure and to participate in their occupation of choice.

Michigan's robust hearing requirement for exclusion orders further underscores the importance of the constitutionally protected interest at stake. Michigan requires that any individual excluded from regulated racetrack grounds has a right to an administrative hearing de novo. Mich. Admin. Code R. 431.1130(3). That hearing is to be scheduled by the commissioner of the Control Board within 14 days of a request for review. *Ibid.* The hearings respondents eventually received, more than two years after petitioners issued them exclusion orders, was a far cry from that guaranteed process. Michigan's procedural safeguards no doubt exist because members of the horse-racing profession have significant constitutional interests at stake.[7]

b. Due process has long compelled state entities to provide a hearing at a meaningful time and place. Where a constitutionally protected interest is established, courts must determine how much process is due. The relevant test balances (1) the individual's interest, (2) the government's interest, and (3) the re-

---

[7] Petitioners argue an extreme form of error correction, faulting the court of appeals for not addressing a specific factual argument regarding petitioners Ernst and Lessnau. Pet. 35-36. But the court of appeals did address this issue specifically. See Pet. App. 10a-11a. Petitioners' argument now is hard to follow. These petitioners were involved with the due process violation; for example, Ernst told respondents—wrongly—that they had only ten days to appeal the exclusion order. Compare Ernst Letters, with Mich. Admin. Code R. 431.1130(3). The district court likewise specifically considered and rejected petitioners' arguments. Pet. App. 50a.

quested procedure's effect on the risk of erroneous deprivation. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). Although *Mathews* and its predecessor, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), both involved requests for pre-deprivation hearings, the Court has held that the Due Process Clause requires more generally that a hearing be offered at a "meaningful time." *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 538 (1985).

To determine whether a delay is constitutional, courts "examine the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken." *FDIC* v. *Mallen*, 486 U.S. 230, 242 (1988). More directly on point, in the context of another suspension of a horse-racing license, the Court held that a post-suspension hearing must be made available "*promptly* after the temporary deprivation occurs." *Barry*, 443 U.S. at 72.

c. The hearings respondents received over two years after their deprivation was untimely and did not constitute due process. They were owed a timely hearing on the deprivation imposed by the exclusion orders. In the horse-racing industry, the Court has held that the consequences of an occupation-related deprivation can be "severe," and that where a pre-deprivation hearing is not possible, "a prompt postsuspension hearing, one that would proceed and conclude without appreciable delay" is "necessary." *Barry*, 443 U.S. at 66. Moreover, petitioners cannot assert—and therefore do not attempt to identify—any reasonable interest in delaying the hearings for nearly two and a half years.

The delay faced by respondents is significantly longer than others this Court has considered in procedural due process cases. The suspension at issue in *Barry* was only 15 days long. See *Mallen*, 486 U.S. at 246. The officials here were on notice that a delay of nearly two and a half years would violate the clearly established right to a post-deprivation hearing. The process afforded was inadequate.

Respondents' due process rights were therefore "clearly established," and the Sixth Circuit was correct below to deny petitioners' motion for summary judgment on qualified immunity for this claim.

Petitioners' contrary argument, it appears, is that a procedural due process violation can *never* constitute clearly established law, as each inquiry involves unique balancing considerations. See Pet. 30. It would be exceptional and troubling to conclude that procedural due process claims are categorically blocked by qualified immunity. That is not, and should not become, the law.

4. If anything, the Court should move in the opposite direction. As we have explained (see p. 27, *supra*), the Court should reverse the doctrine of qualified immunity in its entirety. While further review is unwarranted in this case for several reasons, if the Court nonetheless does consider the case, it should first reconsider qualified immunity as a whole.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted.

HUGH M. DAVIS, JR.
CYNTHIA M. HEENAN
Constitutional Litigation Associates, P.C.
450 W. Fort St., Ste. 200
Detroit, MI 48226
(313) 961-2255

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
ANDREW J. PINCUS
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

Counsel for Respondents

MAY 2018