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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN MOODY; DONALD HARMON; RICK RAY; WALLY MCILLMURRAY,
Plaintiffs-Appellees/Cross-Appellants,

v.

MICHIGAN GAMING CONTROL BOARD, et al.,
Defendants,

AL ERNST; JOHN LESSNAU,
Defendants-Appellants/Cross-Appellees.

Nos. 16-2244/2369

Appeal from the United States District Court
for the Eastern District of Michigan at Flint.
No. 4:12-cv-13593—Gershwin A. Drain,
District Judge.

Argued: July 26, 2017

Decided and Filed: September 11, 2017

Before: COLE, Chief Judge; BATCHELDER and MOORE, Circuit Judges.

COUNSEL

ARGUED: Jason A. Geissler, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellants/Cross-Appellees. Hugh M. Davis, CONSTITUTIONAL LITIGATION ASSOCIATES, P.C., Detroit, Michigan, for Appellees/Cross-Appellants. **ON BRIEF:** Jason A. Geissler, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellants/Cross-Appellees. Hugh M. Davis, Cynthia Heenan, Scott Mackela, CONSTITUTIONAL LITIGATION ASSOCIATES, P.C., Detroit, Michigan, for Appellees/Cross-Appellants.

MOORE, J., delivered the opinion of the court in which COLE, C.J., joined, and BATCHELDER, J., joined in part. BATCHELDER, J. (pp. 13–22), delivered a separate opinion concurring in part and dissenting in part.

OPINION

KAREN NELSON MOORE, Circuit Judge. In 2010, the Michigan Gaming Control Board ("MGCB"), a state entity that regulates horse racing, held a hearing to determine whether certain drivers were involved in an illegal race-fixing scheme. At the hearing, Plaintiffs John Moody, Donald Harmon, Rick Ray, and Wally McIllmurray, Jr. ("Plaintiffs"), four drivers licensed by the MGCB, declined to answer questions and invoked their Fifth Amendment right against self-incrimination. The MGCB later

suspended the Plaintiffs' licenses and issued orders excluding them from the race tracks, citing the Plaintiffs' refusal to cooperate at the hearing. The Plaintiffs filed suit, alleging violations of their procedural due process and Fifth Amendment rights. In these appeals, which revisit issues considered by a prior panel of this court, the Defendants challenge the district court's denial of qualified immunity on the procedural due process claim, and the Plaintiffs challenge the district court's grant of qualified immunity on the Fifth Amendment claim.

For the following reasons, we **AFFIRM** the denial of qualified immunity on the procedural due process claim, **REVERSE** the grant of qualified immunity on the Fifth Amendment claim, and **REMAND** the case for further proceedings.

I. BACKGROUND

Upon receiving an anonymous tip, the MGCB began to investigate allegations of a race-fixing scheme involving certain gamblers and harness-racing drivers. As part of this investigation, the MGCB held an administrative investigatory hearing on May 20, 2010, with the Plaintiffs, all of whom were licensed by the MGCB as harness drivers. The hearing, referred to by some as the "Steward's hearing," was held to determine whether these drivers were involved in the scheme. At the hearing, all four drivers declined to answer questions and invoked their Fifth Amendment right against self-incrimination. R. 18–5 (Moody MGCB Hr'g Tr. at 5–8) (Page ID #197–200); R. 18–6 (Harmon MGCB Hr'g Tr. at 5–13) (Page ID #212–20); R. 18–7 (McIllmurray MGCB Hr'g Tr. at 6–10) (Page ID #230–34); R. 18–8

(Ray MGCB Hr'g Tr. at 7–11) (Page ID #245–49). The next day, the MGCB suspended the Plaintiffs' licenses, citing their failure "to comply with the conditions precedent for occupational licensing in Michigan as outlined in R431.1035." R. 18–9 (Stewards Hr'g Ruling) (Page ID #254–57). This rule provides that an applicant for an occupational license must "cooperate in every way . . . 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. Later, on November 30, 2010, the MGCB issued orders of exclusion banning the drivers from all state race tracks, again citing their "'failure to cooperate' at the time of the Steward's Hearing in May 2010." R. 85–16 (Ernst Letters) (Page ID #1377–79). The Plaintiffs' applications for 2011, 2012, and 2013 licenses were also denied.

In August 2012, the Plaintiffs brought suit under 42 U.S.C. § 1983, claiming violations of their procedural due process and Fifth Amendment rights. On November 27, 2013, the district court held that the Defendants were entitled to qualified immunity because the Plaintiffs had failed to identify a constitutional violation. It therefore granted the Defendants' motion for summary judgment and denied the Plaintiffs' motion for partial summary judgment. On appeal, we affirmed in part and reversed in part the district court's holding with respect to Plaintiffs' procedural due process claim, and held that although Plaintiffs had received due process with respect to their license suspensions, there was a disputed issue of material fact as to whether the Plaintiffs were denied due process on

their exclusion from the race tracks. *Moody v. Michigan Gaming Control Bd.*, 790 F.3d 669, 680 (6th Cir. 2015) ("*Moody I*"). Specifically, we found that the Plaintiffs were due a post-exclusion hearing, which they did not receive, and that there was a genuine dispute as to whether or not Plaintiffs were themselves at fault for failing to request a hearing. *Id.* at 679–80. As to the Plaintiffs' Fifth Amendment claim, we reversed the district court's holding that Plaintiffs had failed to identify a constitutional violation. We held that the "Constitution entitled the harness drivers to refuse to answer potentially self-incriminating questions, unless the state immunized them from prosecution. To punish the drivers violated the Constitution, and both suspension and exclusion constitute punishment." *Id.* at 673. We therefore found that the Defendants had violated the drivers' constitutional rights against self-incrimination, and remanded to the district court to consider the question of whether that right was clearly established at the time of the violation. *Id.*

On remand, the parties filed renewed cross-motions for summary judgment. The Defendants argued that we erred in concluding that the Plaintiffs did not receive a post-exclusion hearing, because Plaintiffs received a hearing on April 25, 2013, two years before our initial remand. The Plaintiffs, in response, conceded that a post-exclusion hearing took place on that date, but argued that the hearing, which occurred two years after the exclusion orders were issued, was not timely. On the Fifth Amendment claim, the Defendants argued, once again, that the Plaintiffs had failed to identify a constitutional violation, and that the right to be offered immunity

against self-incrimination was not clearly established at the time of the violation.

The district court held that the Defendants' argument with respect to the April 2013 hearing was irrelevant to the question on remand, and re-emphasized our holding that there was "a dispute of fact regarding whether the 2011 license applications constituted hearing requests." R. 172 (Dist. Ct. Order at 12) (Page ID #4144). It concluded once again that neither party was entitled to summary judgment on the procedural due process claim. The district court also held that the Fifth Amendment violation identified in *Moody I* was not clearly established at the time of the violation, because "before the Sixth Circuit's decision in *Moody [I]*, a reasonable officer could have believed, as the [district c]ourt did, that they were not required under the Fifth Amendment to offer immunity." *Id.* at 10 (Page ID #4142). It held that the Defendants were entitled to qualified immunity on the Fifth Amendment claims, and dismissed those Defendants whose personal involvement extended only to that claim. *Id.* at 10, 14 (Page ID #4142, 4146).

Both parties now appeal. Defendants argue that the district court erred in denying their motion for summary judgment, because Plaintiffs now concede that they did receive a post-exclusion hearing. The Plaintiffs argue that they were nonetheless denied due process because that hearing was not timely, and the Plaintiffs challenge the district court's holding that the Fifth Amendment right identified in the initial appeal was not clearly established at the time of the violation.

II. ANALYSIS

A. Standard of Review

We review de novo a district court's grant or denial of summary judgment on the basis of qualified immunity. *United States v. Ohio*, 787 F.3d 350, 353 (6th Cir. 2015). Summary judgment is proper where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In considering a motion for summary judgment, we must draw all inferences "in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotation marks omitted).

Where a defendant raises the defense of qualified immunity, "it is the plaintiff's burden to show that the defendants are not entitled to qualified immunity." *Burgess v. Fischer*, 735 F.3d 462, 472 (6th Cir. 2013). To determine whether qualified immunity applies, this court applies a two-part test and asks: (1) whether the officer violated a constitutional right, and (2) whether that constitutional right was clearly established such that "a reasonable official would understand that what he is doing violates that right." *Saucier v. Katz*, 533 U.S. 194, 201–02 (2001) (internal quotation marks omitted), *abrogated in part by Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Courts have discretion to decide which of the two parts to apply first. *Pearson*, 555 U.S. at 227.

B. Defendants' Appeal

1. Law-Of-The-Case Doctrine

Before reaching the merits of the Defendants' appeal, it is necessary that we determine whether review of the procedural due process claims is barred by the law-of-the-case doctrine. "The law-of-the-case doctrine precludes reconsideration of issues decided at an earlier stage of the case." *Caldwell v. City of Louisville*, 200 F. App'x 430, 433 (6th Cir. 2006). The doctrine applies only to issues that were actually decided, whether explicitly or by necessary implication. *Id.* (citing *McKenzie v. BellSouth Telecomms., Inc.*, 219 F.3d 508, 513 n.3 (6th Cir. 2000). It does not extend to issues that should have been raised, or to issues not "fully briefed [or] squarely decided in an earlier appeal." *Burley v. Gagacki*, 834 F.3d 606, 618 (6th Cir. 2016) (internal quotation marks omitted).

"Importantly, however, [the law-of-the-case] doctrine is intended to enforce a district court's adherence to an appellate court's judgment, and so is applied only loosely when we reconsider our own decisions." *Miller v. Maddox*, --- F.3d ---, No. 17-5021, 2017 WL 3298570, at *2 (6th Cir. Aug. 3, 2017). Therefore, while we generally will not, for prudential reasons, consider issues addressed by a prior panel, the doctrine does not limit our power of review, and we may, in exceptional circumstances, deem it necessary to depart from a prior ruling. *Musacchio v. United States*, 136 S. Ct. 709, 716 (2016); *see also McKenzie*, 219 F.3d at 513 n.3 (noting that the "'law of the case' doctrine is 'directed to a court's common sense' and is not an 'inexorable command'"). We have

recognized three exceptional circumstances under which we will consider a previously decided issue: "(1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice." *United States v. Rayborn*, 495 F.3d 328, 337 (6th Cir. 2007) (quoting *Westside Mothers v. Olszewski*, 454 F.3d 532, 538 (6th Cir. 2006)).

Here, the Defendants appeal the district court's holding that they were not entitled to qualified immunity on the procedural due process claim. As the district court rightly pointed out, this issue was addressed by a prior panel of this court in *Moody I*, which determined that (1) it was clearly established that the Plaintiffs were entitled to a post-exclusion hearing, (2) the Plaintiffs had not received such hearings, and (3) the Defendants therefore were not entitled to qualified immunity on that claim. *Moody I*, 790 F.3d at 679. Although the district court did not err in holding that *Moody I* had addressed these issues, we find that the parties have identified exceptional circumstances that justify our reconsideration of this issue now on appeal. Specifically, the parties now agree that the Plaintiffs actually received a hearing on their exclusions on April 25, 2013 in response to a request made on November 27, 2012. R. 144 (Defs. Mot. Summ. J. at 20–21) (Page ID #3717–18); R. 156 (Pls. Resp. Defs. Mot. Summ. J. at 9) (Page ID #4035). Because this is a new fact that was not before the prior panel, we believe it is prudent to revisit the question of whether or not a constitutional violation took place.

It is worth noting that the circumstances that justify reconsideration of this issue are indeed extraordinary. Here, despite both parties' failure to raise these arguments in the initial appeal, the parties now agree that different facts govern our review. First Br. at 29; Fourth Br. at 2. These assertions, moreover, are supported by record evidence. R. 85-14 (Nov. 27, 2012 Letter from Counsel at 2) (Page ID #1369); R. 85-13 (Notice of Hr'g at 1) (Page ID #1364). Although these documents were available to the prior panel, neither document states the particular purpose of the hearing. That ambiguity was not resolved until the parties appeared before this panel for oral argument, and counsel clarified that the hearing addressed both the exclusion orders and the license suspensions. Therefore, although the evidence supporting these facts may not be "new," the particular fact before us—that the *exclusion orders* were considered in the April 2013 hearing—is, from our perspective, a new fact.

We will not, however, revisit our prior holding that the right at issue was clearly established, because the parties have put forth no extraordinary circumstances warranting our reconsideration of that claim. We also will not revisit the issue of Defendants Ernst and Lessnau's personal involvement in violating Plaintiffs' procedural due process rights. This claim was raised in the Defendants' initial motion for summary judgment, and therefore was a part of the record before the *Moody I* panel. R. 144 (Defs. Mot. Summ. J. at 8) (Page ID #3705). In fact, as the district court pointed out on remand, the *Moody I* panel specifically identified Ernst as an individual who told Plaintiffs that they could not appeal their

exclusion orders. *See Moody I*, 790 F.3d at 679–80. Because there are no new factual claims with respect to Ernst and Lessnau's personal involvement, and no other extraordinary circumstances that warrant our consideration, we decline to reconsider whether these Defendants may be dismissed on the basis that they were not personally involved in the alleged violation.

2. Procedural Due Process Claim

The Defendants contend that they are entitled to summary judgment on the procedural due process claim because the Plaintiffs now admit that they received a post-exclusion hearing. First Br. at 29. The Plaintiffs, in response, argue that the April 25, 2013 hearing did not moot their claim, because the hearing was not received within fourteen days of their November 27, 2012 request, as required by Michigan Administrative Code Rule 431.1130(3). Second Br. at 49–50. Therefore, they argue that they were deprived of a *prompt* post-deprivation hearing. *Id.* at 50.

Contrary to the Defendants' assertion, due process is not satisfied merely because a hearing took place. Due process requires that a post-deprivation hearing take place "at a meaningful time and in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (citation omitted). With respect to horse racing in particular, the Supreme Court has held that trainers, and presumably drivers, are entitled to a prompt post-deprivation hearing "that would proceed and be concluded without appreciable delay," because "the consequences to a [driver] of even a temporary suspension can be severe." *Barry v. Barchi*, 443 U.S. 55, 66 (1979).

Here, the exclusion orders were issued on November 30, 2010, and the post-exclusion hearing did not take place until April 25, 2013—nearly two and one-half years after the deprivation took place. Under these circumstances, it is clear that the Plaintiffs have identified a violation of a clearly established right, and the Defendants are not entitled to summary judgment on the basis of qualified immunity. We therefore affirm the district court's denial of the Defendants' motion for summary judgment with respect to the procedural due process claim. We remand the case for further proceedings, with the understanding that going forward, it shall be the law of the case that the Plaintiffs received a post-exclusion hearing on April 25, 2013.

C. Plaintiffs' Cross-Appeal

1. Fifth Amendment Claim

The Plaintiffs, in their cross-appeal, challenge the district court's holding that the Fifth Amendment right identified in *Moody I* was not clearly established at the time of the violation. "A right is 'clearly established' if '[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Baynes v. Cleland*, 799 F.3d 600, 610 (6th Cir. 2015) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)), *cert. denied*, 136 S. Ct. 1381 (2016). "In deciding whether a right has been clearly established, the Supreme Court has 'repeatedly' warned lower courts not to define the right at 'a high level of generality.'" *Hagans v. Franklin Cty. Sheriff's Office*, 695 F.3d 505, 508 (6th Cir. 2012) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). However, we have

also recognized that "[a] court need not have previously held illegal the conduct in the precise situation at issue because officials can still be on notice that their conduct violates established law even in novel factual circumstances. *Sutton v. Metro. Gov't of Nashville & Davidson Cty.*, 700 F.3d 865, 876 (6th Cir. 2012) (internal quotation marks omitted).

The right identified in *Moody I* is derived from the Fifth Amendment, which states that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V, § 3. In *Moody I*, we held that the Amendment "entitled the harness drivers to refuse to answer potentially self-incriminating questions, unless the state immunized them from prosecution. To punish the drivers violated the Constitution, and both suspension and exclusion constitute punishment." *Moody I*, 790 F.3d at 673. The right at issue, therefore, was the right to refuse to answer self-incriminating questions without threat of punishment, unless immunity was offered. The Defendants argue that the *Moody I* panel announced "a new requirement that the government expressly offer immunity to state licensees before sanctioning them for refusing to answer regulatory-related questions." Third Br. at 25. Their argument is belied by precedent. In *Lefkowitz v. Turley*, 414 U.S. 70, 78 (1973), the Supreme Court 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." In other words, "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." *Id.* at 84–85 (emphasis added). That is precisely the right announced in *Moody I*. Therefore, the right was clearly established.

The Defendants nonetheless argue that prior to *Moody I*, an employer was not required to offer immunity because an employee could presume his statements were automatically immune under *Garrity v. New Jersey*, 385 U.S. 493 (1967). In *Garrity*, the Supreme Court held that where a public employer "use[s] the threat of discharge to secure incriminatory evidence against an employee," the Fifth Amendment prohibits the use of such incriminating evidence in a subsequent criminal proceeding. 385 U.S. at 499–500. We do not find the Defendants' argument persuasive. First, prior cases indicate that *Garrity* immunity may not necessarily be coextensive with "whatever immunity is required to supplant the privilege." *Turley*, 414 U.S. at 84–85. For example, as noted in *Kastigar v. United States*, 406 U.S. 441, 458 (1972), the Fifth Amendment protects against the use and the *derivative* use of coerced statements at trial. That grant of immunity exceeds the grant articulated in *Garrity*.

Second, the Defendants' argument undermines the clear language of subsequent cases that articulate the specific right at issue here. The Supreme Court in *Turley* articulated a separate Fifth Amendment right that applies when potentially self-incriminating questions are posed in a public-employment setting.

Turley, 414 U.S. at 78. Although that right is not absolute, it is clear that under some circumstances a public employee must be able to invoke that privilege without fear of punishment. *See id*. at 77 (holding that the Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings"); *Gardner v. Broderick*, 392 U.S. 273, 276 (1968) ("Our decisions establish beyond dispute the breadth of the privilege to refuse to respond to questions when the result may be self-incriminatory, and the need to fully implement its guaranty"). The key question, for our purposes, is when that privilege can be invoked. *Turley* provides us with an answer, and instructs that the privilege may be enjoyed "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." 414 U.S. at 78. To assume, as the Defendants would have us do, that immunity applied automatically is to say that there is no right at all.

Moreover, the Defendants 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. Immunity under *Garrity* has direct and obvious criminal implications that require the right to be absolute. *See Garrity*, 385 U.S. at 500

("There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price.") Although the right at issue here and in *Turley* involves potential criminal consequences, it is more directly related to an individual's interest in public employment, which must be balanced against the public interest in obtaining information to "to assure the effective functioning of government." *Turley*, 414 U.S. at 81 (citation omitted). These countervailing considerations color the contours of the right and impose a different set of procedural steps that are intended both to preserve the privilege against self-incrimination, but also to allow the state to compel testimony to ensure the effective administration of government. *See Kastigar*, 406 U.S. at 444–45. As *Turley* makes clear, making an offer of immunity is one such procedural step. *Turley*, 414 U.S. at 84–85.

Garrity immunity prohibits the use of coerced statements in criminal proceedings, but it does not protect against the act of coercion itself. The Supreme Court in *Turley*, *Gardner*, and *Kastigar* recognized that the act of coercion itself is a public action that threatens the Fifth Amendment in a markedly different way than does the use of a coerced statement in a criminal proceeding. Therefore, "a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself." *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977). Given the Supreme Court's recognition that the privilege against self-incrimination "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory," *Kastigar*, 406

U.S. at 444, the Court has recognized a separate right for individuals to refuse to answer in civil proceedings, the contours of which are separate from the immunity articulated in *Garrity*.

Finally, we reject the Defendants' argument that the circumstances here are distinguishable from cases where employees were explicitly asked to waive their right to immunity. *See Turley*, 414 U.S. at 82; *Cunningham*, 431 U.S. at 805–06. The record demonstrates that the Plaintiffs were suspended and excluded solely on the basis of Michigan Administrative Code Rule 431.1035, which requires an applicant for an occupational license to cooperate in every way during the course of an investigation, including by responding to all questions. *See* R. 18–9 (Stewards Hr'g Ruling) (Page ID #254–57); R. 85–16 (Ernst Letters) (Page ID #1377–79); Mich. Admin. Code R. 431.1035. These circumstances are substantially similar to the circumstances in *Turley*, where state law provided that a failure to cooperate or answer questions was grounds for disqualifying a state contractor's contracts. *Turley*, 414 U.S. at 71, 82. Indeed, the Court in *Turley* recognized that "[t]he waiver sought by the State, under threat of loss of contracts, would have been no less compelled than a direct request for the testimony without resort to the waiver device." *Id.* at 82. Here, the administrative rule, as applied, left Plaintiffs with only two choices: to waive their privilege and cooperate with an investigation, or to be punished. The Supreme Court has clearly held this choice to be coercion, which constitutes an illegal action until an offer of immunity is made.

Under the conditions articulated with respect to the particular right at issue, a public employee "may rightfully refuse to answer *unless and until* he is protected at least against the use of his compelled answers." *Turley*, 414 U.S. at 78 (emphasis added). The Supreme Court has made clear that if a state wishes to punish an employee for invoking that right, "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." *Id.* at 85. We therefore reverse the district court's grant of qualified immunity on the Fifth Amendment claim, and hold that the right articulated in *Moody I* was clearly established at the time of the violation.

2. Motion to Reopen Discovery and Amend the Complaint

The Plaintiffs also appeal from the district court's denial of their motion to reopen discovery, motion to compel discovery, and motion to amend the complaint. These claims are not properly before us. The district court has not entered a final judgment in this case, nor has it certified any of these claims for immediate appeal pursuant to Federal Rule of Civil Procedure 54(b). These claims therefore exceed our jurisdiction.

III. CONCLUSION

Based on the foregoing, we **AFFIRM** the denial of qualified immunity on the procedural due process claim, **REVERSE** the grant of qualified immunity on the Fifth Amendment claim, and **REMAND** the case for further proceedings.

CONCURRING IN PART AND DISSENTING IN PART

ALICE M. BATCHELDER, Circuit Judge, concurring in part and dissenting in part. I agree with the majority—albeit for different reasons—that the district court did not err by holding that there is a material dispute of fact over whether there was a constitutional violation on the drivers' procedural due process claim. I part ways with the majority on its analysis of the Fifth Amendment claim and would affirm the district court's grant of qualified immunity. Accordingly, I respectfully concur in part and dissent in part.

I.

I begin with the majority's treatment of the drivers' post-exclusion procedural due process claim. On a motion for summary judgment, a plaintiff who brings a § 1983 action against a government official bears the burden of overcoming the qualified immunity defense by showing that (1) the defendant violated a constitutional right and (2) that right was clearly established. *Quigley v. Tuong Vinh Thai*, 707 F.3d 675, 680–81 (6th Cir. 2013). When we previously resolved an appeal in this case, we held that the drivers were "due the process of 'a prompt postsuspension hearing,'" which the drivers had received. *Moody v. Mich. Gaming Control Bd.*, 790 F.3d 669, 679 (6th Cir. 2015) ("*Moody I*") (quoting *Barry v. Barchi*, 443 U.S. 55, 66 (1979)). We also held that the drivers had the same right following their

exclusions, applying the principles that a person is due "some kind of hearing . . . at some time before . . . [being] finally deprived of his property interests" and that "the *suspension* of a jockey's license entitles him to a post-deprivation hearing." *Id.* at 677, 679 (extending *Wolff v. McDonnell*, 418 U.S. 539, 557–58 (1974), and *Barry*, 443 U.S. at 66, to hold that a harness driver has a right to post-exclusion due process).

For purposes of my analysis, I assume that the right was clearly established.[1] Although I agree with

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[1] In *Moody I*, we held that a driver is "due the process of a postexclusion hearing" by extending *Barry* to cover "exclusions" in addition to "suspensions." During that discussion, we did not discuss whether the law was clearly established, but our remand order asked the district court to consider whether the drivers' "due-process claims involve[d] clearly established rights." 790 F.3d at 679, 681. On remand, the district court explained that whether the "post-exclusion due process rights were clearly established" was not up for debate, citing Michigan law. The majority in this appeal treats *Moody I* as if we held that the right was clearly established in spite of the remand instruction. *Moody I*'s analysis of the right at issue implied that the leap from suspensions to exclusions was not a large one. In some cases, the extension of a principle can satisfy our duty to determine whether a right was clearly established. *Cf. Comstock v. McCrary*, 273 F.3d 693, 711 (6th Cir. 2001) ("[W]e need not find a case in which 'the very action in question has previously been held unlawful,' but, 'in the light of pre-existing law, the unlawfulness must be apparent.'" (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (brackets omitted))). I question whether the right was clearly established prior to *Moody I*, but I understand why the majority found that *Moody I* determined the right was clearly established. If we were to consider this issue, I would examine the differences under Michigan law between suspensions and exclusions, the effect of our opinion in *Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 739 (6th Cir. 1980), and why the district court's citation to

the majority that the district court did not err by holding that there are material, disputed facts concerning whether there was a constitutional violation here, I cannot subscribe to the majority's rationale. The majority allows the drivers to modify their claim from one of nodue- process to one of untimely-due-process. It does so by relying on the law-of-the-case doctrine, which I find unnecessary. I would find that the drivers survive summary judgment on their post-exclusion due process claim on the basis of *Moody I*, as well as the standards governing summary judgment.

The rationale of *Moody I*'s holding was that *if* the drivers had requested a post-exclusion hearing through their license applications, then MGCB violated the drivers' due process right by denying them a post-exclusion hearing. *Moody I*, 790 F.3d at 679 (holding that the drivers would fail on this due process claim "*if* they had failed to request a hearing" (emphasis added)). Accordingly, we remanded "to the district court for further proceedings on [whether] the harness drivers request[ed] hearings on their exclusions." *Id.* at 681. The implication in our prior opinion was that the drivers were obliged to adduce further evidence on remand to demonstrate that the drivers had, in fact, requested a hearing. Instead, confronted with the fact that they had received a hearing on their exclusions, the drivers changed rein to focus on whether that hearing was timely, while

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state law alone is likely insufficient to "be the basis for a federal constitutional violation" pursuant to *Smith v. City of Salem, Ohio*, 378 F.3d 566, 578 (6th Cir. 2004).

MGCB focused on whether the drivers had requested a hearing in the first place.

To unravel this knot, I turn to the standards applicable in a summary judgment proceeding and on an appeal of such a proceeding. MGCB moved for summary judgment on this issue, so the drivers were obliged to produce more than a "mere scintilla of evidence" to demonstrate that there was a genuine issue of material fact. *Novak v. MetroHealth Med. Ctr.*, 503 F.3d 572, 577 (6th Cir. 2007) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). We view the evidence and draw any inferences in the light most favorable to the drivers. *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). And because MGCB appeals the denial of its qualified-immunity-based motion for summary judgment, we review the legal issues and decline to review the sufficiency of the factual allegations. *DiLuzio v. Vill. Of Yorkville, Ohio*, 796 F.3d 604, 609 (6th Cir. 2015).

MGCB produced a bevy of evidence—some of which was new—to support its argument that it had not construed the drivers' license applications as appeals of the exclusion orders. But because MGCB moved for summary judgment and now appeals the denial of its motion, we are less concerned with the evidence it adduced than with the drivers' response to the motion. Indeed, we make no factual findings. The district court relied on *Moody I* to hold that there is a genuine dispute of material fact, so that is what we review. The onus was on the drivers to demonstrate more than a mere scintilla of evidence in support of their claims. On that point, they had formidable

assistance in the form of *Moody I*'s pronouncement that "[a] reasonable juror might conclude that the MGCB should have construed those applications as requests for the hearings due to them under the federal constitution and state regulations" and its citation to the Ernst Letter. 790 F.3d at 680. On remand, the drivers relied on this explanation, as well as letters from Al Ernst and Erik Pedersen, both employees of MGCB, to argue that it was "undisputed" that the drivers requested a hearing on their exclusions. On appeal, they argue that it "cannot be seriously disputed that [they] requested hearings on the exclusion orders." Without our prior opinion, I would find it necessary to reject these claims, because MGCB has done quite a bit to show that there is a dispute over this issue. But my conclusion must be tempered by our prior opinion. On the evidence before the court, *Moody I* explained that a juror could find that MGCB should have construed the license applications as appeals of the exclusion orders. When it remanded the case for further proceedings, it did not explain that the drivers necessarily had an obligation to adduce further evidence to establish its claim and satisfy its burden on summary judgment. The drivers took this to mean that we had found this to be an undisputed fact.

The drivers offered the same evidence before both the *Moody I* panel and us. I am satisfied that the drivers should survive summary judgment at this point, because we view the evidence and draw inferences in their favor. Although they failed to produce any additional evidence, *Moody I*'s holding gives the drivers enough of an edge to carry their burden at summary judgment now. MGCB's evidence

is "no bum steer"[2] and may well carry the day before a jury. But I cannot agree that the drivers have failed to meet their burden such that we can condone a grant of summary judgment in favor of MGCB.

I would affirm the denial of qualified immunity on the procedural due process claim for these reasons. Accordingly, I concur in the majority's affirming the order of the district court.

II.

A.

Turning to the majority's analysis of the Fifth Amendment privilege against self-incrimination, I respectfully dissent. In a qualified immunity case, the clearly established analysis "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *abrogated in part by Pearson v. Callahan*, 555 U.S. 223, 236 (2009). "[W]e need not find a case in which 'the very action in question has previously been held unlawful,' but, 'in the light of pre-existing law, the unlawfulness must be apparent.'" *Comstock*, 273 F.3d at 711 (brackets omitted) (quoting *Anderson*, 483 U.S. at 640). To evaluate the contours of the right, "we must look first to decisions of the Supreme Court, then to decisions of this court and other courts within our circuit, and finally to decisions of other circuits." *Baker v. City of Hamilton, Ohio*, 471 F.3d 601, 606 (6th Cir. 2006) (internal quotation marks omitted). Although the Supreme Court "'does not require a case

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[2] *Cf.* Frank Loesser, *Fugue for Tinhorns*, *on* Guys & Dolls (Original Broadway Cast Recording) (Decca 2000) (1950).

directly on point' for a right to be clearly established, 'existing precedent must have placed the statutory or constitutional question beyond debate.'" *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam) (internal brackets and quotation marks omitted) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam)).

At "a high level of generality," *id.* at 552 (citation omitted), a public employee or, in this case, a licensee may refuse to answer questions that may tend to incriminate himself unless and until he has immunity from prosecution on the basis of his answers to the State's questions. *Moody I* was correct to explain that "'a governmental body may not require an employee to waive his privilege against self-incrimination as a condition to keeping his job . . . even [when] no criminal proceedings were ever instituted against' an employee who was later successful in constitutional claims." *Moody I*, 790 F.3d at 674 (alteration in original) (quoting *Lingler v. Fechko*, 312 F.3d 237, 239 (6th Cir. 2002)).

I part ways with the majority, however, because it does not—and cannot—point to "clearly established law [that is] 'particularized' to the facts of [this] case." *White*, 137 S. Ct. at 552 (quoting *Anderson*, 483 U.S. at 640). The majority finds clearly established *Moody I*s holding that MGCB violated the drivers' rights when it "did not offer [them] immunity before the hearing." *Moody I*, 790 F.3d at 674. Based on my understanding of the Supreme Court's precedent, I cannot agree. Moreover, the majority fails to grapple with binding precedent from our circuit that undermines its holding that the right at issue was

clearly established. *See Lingler*, 312 F.3d at 239–40 (holding that it was not a constitutional violation for a police chief to exact statements from police officers concerning their employment when they were not required to waive their privilege against self-incrimination and the statements were not used against them in a criminal proceeding).

The majority finds that the right at issue was clearly established on the basis of *Lefkowitz v. Turley*, 414 U.S. 70, 78 (1973), which, in its view, defined "precisely the right announced in *Moody I*." There, the Supreme Court reviewed New York state laws requiring the State to cancel contracts and disqualify contractors from future State contracts when a contractor "refuses to waive immunity or to answer questions when called to testify." *Id.* at 71–72. Two licensed architects subject to these laws "were summoned to testify before a grand jury," where the architects refused to sign waivers of immunity. The district attorney thereafter notified the contracting agencies of the architects' refusal to waive their immunity, and the architects brought an action seeking to declare New York's statutes unconstitutional. The Supreme Court explained that "a witness protected by the privilege 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 (citing *Kastigar v. United States*, 406 U.S. 441 (1972)). It also analyzed the animating policy behind this line of cases:

> [The cases] ultimately rest on a reconciliation of the well-recognized policies behind the privilege of self-incrimination, and the need of the State, as well as the Federal Government, to obtain information to assure the effective functioning of government. Immunity is required if there is to be rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify.

Id. at 81 (internal citations and quotation marks omitted); *see also id.* at 84 ("Although due regard for the Fifth Amendment forbids the State to compel incriminating answers from its employees and contractors that may be used against them in criminal proceedings, the Constitution permits that very testimony to be compelled if neither it nor its fruits are available for such use."). This policy ensures that governments are able to maintain integrity through investigations, but this comes at a cost—the government may not use testimony gathered as part of such an investigation to prosecute a participant in that investigation.

It is not until the very end of *Turley* that one sees any language implying that the state must offer immunity.

> But the State may not insist that appellees waive their Fifth Amendment privilege against self-incrimination and consent to the use of the fruits of the interrogation in any later proceedings brought against them. Rather, the State must recognize what our cases hold: that answers elicited upon the

> threat of the loss of employment are compelled and inadmissible in evidence. Hence, 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.

Id. at 84–85 (emphasis added). The majority emphasizes the italicized language in this quotation, but, in context, it is clear why it was necessary in *Turley*. New York had required the architects both to sign a waiver of their Fifth Amendment rights and to consent to the use of their testimony in a subsequent prosecution, and all of this occurred when the architects were before the grand jury. Such is not the case here. The hearing we are concerned with was before a racing regulator, and the drivers do not suggest that the regulator had either the power to bring a criminal proceeding against them or to immunize them from prosecution without the involvement of a prosecutor. Nor have the drivers pointed to anything in the record suggesting that MGCB asked them to sign away their Fifth Amendment rights. Indeed, unlike the New York law at issue in *Turley* that explicitly required the architects to waive their immunity, the Michigan law requiring compliance with an investigation does not condition licensure on the waiver of the right. The drivers certainly did not lose their Fifth Amendment rights in this hearing, and could reasonably fear their answers might be used against them in a subsequent prosecution. But we have held that the mere "threat of disciplinary action" does not create an implicit waiver of the privilege against self-incrimination. *See*

Lingler, 312 F.3d at 239 ("[T]he officers contend that a waiver of the privilege is implicit in any statement given by a public employee under threat of disciplinary action. The caselaw does not support this contention—and . . . any such waiver would have been ineffective."). In light of these key distinctions, I cannot agree that *Turley* clearly established the right in question here.

I acknowledge that a threat of termination can be coercion that violates the Fifth Amendment, *see Turley*, 414 U.S. at 80–83, and the drivers' Fifth Amendment rights are not watered down in such a situation. *See Lefkowitz v. Cunningham*, 431 U.S. 801, 805–06 (1977) ("[O]ur cases have established that a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself."). But the applicable precedent is not so simple. *See id.* at 806 ("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."). It requires us to parse out the nature of the investigation and the source of the threat of termination. In *Gardner v. Broderick*,

> If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself[,] the privilege against

> self-incrimination would not have been a bar to his dismissal.
>
> The facts of this case, however, do not present this issue. Here, petitioner was summoned to testify before a grand jury in an investigation of alleged criminal conduct. He was discharged from office, not for failure to answer relevant questions about his official duties, but for refusal to waive a constitutional right. He was dismissed for failure to relinquish the protections of the privilege against self-incrimination. The Constitution of New York State and the City Charter both expressly provided that his failure to do so, as well as his failure to testify, would result in dismissal from his job. He was dismissed solely for his refusal to waive the immunity to which he is entitled if he is required to testify despite his constitutional privilege.

392 U.S. 273, 278 (1968) (citations and footnote omitted). *Gardner* distinguishes between situations in which a public employee is asked questions concerning performance of his duties and those in which the State asks him to waive his immunity. A threat of termination in the former is clearly permissible, whereas immunity must accompany such a threat in the latter. Here, it is not clear that the Steward's Hearing was tantamount to a proceeding before the grand jury in which a witness must waive the privilege against self-incrimination. The Steward's Hearing addressed allegations about the drivers' possible involvement in race-fixing, which

directly relates to the public license they held. This falls within the first scenario contemplated by *Gardner*. As for the second *Gardner* scenario, there was no grand jury and there was no request that the drivers sign away their constitutional rights. Therefore, *Gardner* cannot be the basis for determining whether this right was clearly established, because the threat of termination following the Steward's Hearing could have been permissible if it was "narrowly relating to the [drivers'] performance" as state licensees. *Gardner*, 392 U.S. at 278.

I cannot agree that *Turley*, *Gardner*, and like cases provide the proper lens through which we should assess this case for purposes of qualified immunity. These cases address different situations from the one here. The question, then, is whether MGCB needed to "offer" immunity in the form of notifying the drivers that their testimony could not be used against them. This is where *Garrity*, which is the progenitor of the other cases I have discussed so far, fits into the picture.

B.

In *Garrity*, the Supreme Court held that a statement obtained under the coercive threat of removal from office violates the Constitution. *See Garrity v. New Jersey*, 385 U.S. 493, 499 (1967). And in a companion case to *Garrity*, the Supreme Court explained the constitutional problem as requiring employees to choose "between surrendering their constitutional rights or their jobs," but holding that employees would "subject themselves to dismissal if they refuse to account for their performance of their

public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights." *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 280, 284–85 (1968). Courts have construed *Garrity* as effectively immunizing a public employee's or licensee's statements from being used against her in a subsequent prosecution by explaining that such statements would be rendered inadmissible in such a prosecution.[3] *See Lingler*, 312 F.3d at 239. In fact, even in *Turley*, the Supreme Court construed *Garrity* to mean that if evidence was obtained in violation of the principle that a party may not be forced to waive her immunity, "any answers elicited [would be] inadmissible." *Turley*, 414 U.S. at 80–81 (citing *Garrity*, 385 U.S. at 499–500); *cf. Lingler*, 312 F.3d at 240 (explaining that the law does not support the contention that "a waiver of the privilege is implicit in any statement given by a public employee under

[3] The majority finds that "*Garrity* immunity may not necessarily be coextensive with 'whatever immunity is required to supplant the [Fifth Amendment] privilege.'" Maj. Op. at 11 (quoting *Turley*, 414 U.S. at 84–85). It further notes that in *Kastigar v. United States*, 406 U.S. 441, 458 (1972), the Supreme Court held that the Fifth Amendment protects against the use and the derivative use of coerced statements at trial and that this "exceeds the grant articulated in *Garrity*." Maj. Op. at 11. Even if they are right that *Kastigar*'s view of immunity exceeds *Garrity*'s, this is a question for another day. Here, we are not concerned with evidence—direct, derivative, or otherwise—that was presented to a jury, so we have no occasion to determine whether *Garrity* would render some such hypothetical evidence inadmissible but allow other hypothetical evidence to be admitted.

threat of disciplinary action" and that under *Garrity*, "any such waiver would have been ineffective").

Interpreting *Garrity* to mean that coerced testimony cannot be used in a subsequent criminal proceeding, however, leaves an important question unanswered: is that effect of the Fifth Amendment privilege against self-incrimination a self-executing one, or must the public employer or agency affirmatively make its employee, contractor, or licensee aware of the immunity that *Garrity* affords? In *Moody I*, we concluded that MGCB had an affirmative obligation to notify the drivers that they were afforded immunity in exchange for being threatened with the loss of their licenses. In effect, we created a prophylactic rule, but this rule had not been in place before. The district court was therefore correct when it explained that "[w]hat was not clearly established in this Circuit [before *Moody I*] was whether the State was required to *offer* immunity in the first place." *Moody v. Mich. Gaming Control Bd.*, 202 F. Supp. 3d 756, 760 (E.D. Mich. 2016).

This is the proper lens through which to analyze this case, so I cannot find that the right had been clearly established before *Moody I*. The Supreme Court has not directly addressed how this right plays out in non-prosecutorial administrative proceedings, as I discussed above. Nor has our circuit addressed this previously. And looking to the other circuits demonstrates precisely why I cannot find that the right announced in *Moody I* was clearly established, for it is the subject of a circuit split among the various United States Courts of Appeals. *See, e.g.*, *Sher v. U.S. Dep't of Veterans Affairs*, 488 F.3d 489, 503 (1st Cir.

2007) ("The circuits have taken different approaches to the issue of whether a government employer is required to provide such notice to an employee."); *compare, e.g.*, *Atwell v. Lisle Park Dist.*, 286 F.3d 987, 990 (7th Cir. 2002) ("Our court has ruled in several cases that the government employer who wants to ask an employee potentially incriminating questions must first warn him that because of the immunity to which the cases entitle him, he may not refuse to answer the questions on the ground that the answers may incriminate him."), *with Hill v. Johnson*, 160 F.3d 469, 471 (8th Cir. 1998) ("[T]he mere failure affirmatively to offer immunity is not an impermissible attempt to compel a waiver of immunity."). This split of authority, although not acknowledged by the majority, supports my conclusion that the law was not clearly established prior to *Moody I*. To saddle MGCB with the unjustified holding that this issue was clearly established before *Moody I* runs counter to the qualified immunity doctrine. I therefore respectfully dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN MOODY, DONALD HARMON, RICK RAY, and WALLY MCILLMURRARY, JR.,

Plaintiffs,

v.

Case No. 12-cv-13593

MICHIGAN GAMING CONTROL BOARD, RICHARD KALM, GARY POST, DARYL PARKER, RICHARD GARRISON, BILLY LEE WILLIAMS, JOHN LESSNAU and AL ERNST,

Defendants.

UNITED STATES DISTRICT COURT JUDGE GERSHWIN A. DRAIN

UNITED STATES MAGISTRATE JUDGE STEPHANIE DAWKINS DAVIS

_____/

JUDGMENT

This matter came before the Court on Plaintiffs' Motion for Entry of Final Judgment Pursuant to Rule 54(b). For the reasons stated in the Opinion and Order issued on this date,

IT IS ORDERED that the Plaintiffs' Motion for Entry of Judgment Pursuant to Rule 54(b) is **GRANTED**.

IT IS FURTHER ORDERED that the proceedings regarding Plaintiffs' remaining due process claim be **STAYED** pending the Rule 54(b) appeal.

Dated at Detroit, Michigan, this 20th, day of September, 2016.

DAVID J. WEAVER
CLERK OF THE COURT

BY: T. BANKSTON
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN MOODY, DONALD HARMON, RICK RAY and WALLY MCILLMURRARY,

Plaintiffs,

v.

MICHIGAN GAMING CONTROL BOARD, RICHARD KALM, GARY POST, DARYL PARKER, RICHARD GARRISON, BILLY LEE WILLIAMS, JOHN LESSNAU and AL ERNST,

Defendant.
_____/

Case No. 12-cv-13593

UNITED STATES DISTRICT COURT JUDGE GERSHWIN A. DRAIN

UNITED STATES MAGISTRATE JUDGE STEPHANIE DAWKINS DAVIS

OPINION AND ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [138] AND GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [144]

I. INTRODUCTION

Plaintiffs commenced this action on August 14, 2012. *See* Dkt. No. 1. The Complaint alleges several civil rights claims against the Defendants under 42

U.S.C. § 1983: (1) Deprivation of Liberty Interest Pursuant to the 5th Amendment; (2) Deprivation of Property Without Due Process of Law; and (3) Unconstitutional Conditions. *Id.*

On October 15, 2015, the Plaintiffs filed their Motion for Summary Judgment. *See* Dkt. No. 138. On November 4, 2015, the Defendants filed their Motion for Summary Judgment. *See* Dkt. No. 144. A hearing on both motions was held August 9, 2016 at 10:00 a.m. For the reasons discussed herein, the Court will **GRANT** the Defendants' Motion **IN PART**, and **DENY** the Plaintiffs' Motion.

II. BACKGROUND

In 2010, the Michigan Gaming Control Board ("MGCB") received an anonymous tip that certain harness-racing drivers were fixing races in concert with certain known gamblers. On May 19, 2010, Michigan State Police Detective Thomas DeClercq informed the harness drivers' then-attorney that the harness drivers would be arrested, criminally charged, and arraigned following an informal investigative hearing that had earlier been scheduled for May 20, 2010. At that hearing, the harness drivers asserted their Fifth Amendment right against self-incrimination and refused to answer questions. The following day, the state suspended the Plaintiffs' 2010 licenses to work in horse racing because they failed "to comply with the conditions precedent for occupational licensing in Michigan as outlined in R431.1035." Rule 431.1035 provides, in part, "[t]hat the applicant [for an occupational license, such as the license to race horses] . . . shall cooperate in every way . . . during the conduct of an investigation . . . ." On May 26, the

harness drivers appealed their suspensions administratively. The harness drivers subsequently filed a suit for injunctive relief in Wayne County Circuit Court. The MGCB delayed the administrative appeal pending the state-court ruling.

On November 30, 2010, the MGCB issued "Orders of Exclusion" as to each harness driver. The MGCB took the position that it would not lift the Exclusion Orders unless the Plaintiffs answered questions without legal representation. The harness drivers applied for 2011 licenses without success. In response to the harness drivers' letters that sought to appeal "the denial of 2011 occupational license," the MGCB indicated that the exclusion orders precluded their consideration of the harness drivers' applications. Letter from Alexander Ernst, Horse Racing Manager, to John R. Moody (Nov. 16, 2011) (herein referred to as "Ernst Letter").

In August 2012, the harness drivers filed this suit under 42 U.S.C. § 1983, seeking damages, costs, fees, and injunctive and declaratory relief. On November 27, 2013, the Court granted the MGCB's motion for summary judgment and denied the harness drivers' motion for partial summary judgment. The Court held that the Eleventh Amendment barred plaintiffs' claims for money damages against MGCB and its officials, and that the MGCB was entitled to qualified immunity because the harness drivers failed to identify a violation of a constitutional right. *Moody v. Michigan Gaming Control Board*, No. 12-cv-13593, 2013 WL 6196947 (E.D. Mich. November 27, 2013). The harness drivers appealed. The Sixth Circuit

affirmed in part and reversed in part the judgment of the Court.

The Sixth Circuit held that the suspension and exclusion of the harness-drivers constituted a violation of the Plaintiffs' Fifth-Amendment rights against self-incrimination. *Moody v. Michigan Gaming Control Board*, 790 F.3d 669, 673 (6th Cir. 2015). The Sixth Circuit further held there was a genuine dispute of material fact over whether the Plaintiffs were given due process before being excluded. *Id.* at 680. The case was remanded for further proceedings. Shortly afterward, the parties filed these cross-motions for summary judgment.

III. LEGAL STANDARD

Federal Rule of Civil Procedure 56(c) "directs that summary judgment shall be granted if there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 779 (6th Cir. 1998) (quotations omitted). The court must view the facts, and draw reasonable inferences from those facts, in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). No genuine dispute of material fact exists where the record "taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus., Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Ultimately, the court evaluates "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–52.

IV. DISCUSSION

A. Eleventh Amendment Sovereign Immunity

As an initial matter, neither party disputes that the doctrine of sovereign immunity protects the Michigan Gaming Control Board from suits for money damages. The Sixth Circuit did not reverse this holding.

B. Fifth Amendment Qualified Immunity

The Sixth Circuit has already held that the Plaintiffs' Fifth Amendment rights were violated. *Moody*, 790 F.3d at 673. The Sixth Circuit remanded the case back to the District Court to determine whether the Fifth Amendment violation involved a clearly established right which a reasonable person in the Defendants' position would have known. *Id.* "[T]he objective (albeit fact-specific) question [is] whether a reasonable officer could have believed" the actions taken "to be lawful, in light of clearly established law . . . ." *Anderson*, 483 U.S. at 641.

The Plaintiffs argue that the right to assert the Fifth Amendment in an administrative proceeding without suffering costly sanctions has been clearly established. Dkt. No. 156 at 22–25 (Pg. ID No. 4042–45). The Defendants, on the other hand, define the right as being more specific. The Defendants contend that a regulatory agency's punishment of a licensee who, based on the Fifth Amendment, refused to answer regulatory-related questions has never before been held to be a violation of the Fifth Amendment. Dkt. No. 144 at 21 (Pg. ID No. 3710).

The Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Occupy Nashville v. Haslam*, 769 F.3d 434, 443 (6th Cir. 2014). "For a right to be clearly established, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. [I]n the light of pre-existing law the unlawfulness must be apparent.' " *Id.* (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). "In other words, 'existing precedent must have placed the statutory or constitutional question . . . beyond debate.' " *Id.* (quoting *Plumhoff v. Rickard,* 134 S.Ct. 2012, 2023 (2014) (internal quotation marks omitted)). "[B]inding precedent from the Supreme Court, the Sixth Circuit, [or] the district court itself" can provide such clarity; persuasive authority from "other circuits that is directly on point" may also demonstrate that a law is clearly established. *Holzemer v. City of Memphis*, 621 F.3d 512, 527 (6th Cir. 2010). Notwithstanding those helpful indicators, "[a] court need not have previously held illegal the conduct in the precise situation at issue because officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Sutton v. Metro. Gov't of Nashville,* 700 F.3d 865, 876 (6th Cir. 2012) (internal quotation marks omitted).

It is clear that licensees may not be required to choose between forfeiting their livelihood and criminal prosecution. *See Spevack v. Klein*, 385 U.S. 511 (1967). However, employers may take disciplinary

actions against public employees for refusal to divulge information, as long as they are not required to waive immunity.

In *Uniformed Sanitation Men Ass'n., Inc. v. Comm'r. of Sanitation of City of New York*, Justice Harlan made note that there was a process for "public officials [to] be discharged and lawyers disciplined for refusing to divulge appropriate authority information pertinent to the faithful performance of their offices." 88 S. Ct. 1920, 1921 (1968) (Harlan, J., concurring). In *Gardner v. Broderick*, the Supreme Court held that a police officer may be discharged for refusing to answer questions about the performance of his official duties, as long as the officer is not required to waive immunity. *Gardner v. Broderick*, 392 U.S. 273, 279 (1968).

This reasoning was expanded to include not only state employees, but also contractors in *Lefkowitz v. Turley*, 414 U.S. 70 (1973). In *Lefkowitz*, the U.S. Supreme Court held that a New York law, allowing for the termination of public contracts if a contractor refuses to waive immunity or to testify concerning his state contracts, violated the Fifth Amendment. The *Lefkowitz* Court also noted, however, that "given adequate immunity, the State may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment." *Id.* at 84.

In *Lefkowitz v. Cunningham*, the U.S. Supreme Court held a New York statute, which automatically disqualified a person from holding office within a political party for five years if he or she refused to waive immunity, violated the Fifth Amendment. 431

U.S. 801, 806 (1977). The Court held that the "government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized." *Id.*

In all of these cases, the plaintiffs were required to waive immunity, else face termination. What was not clearly established in this Circuit was whether the State was required to *offer* immunity in the first place.

In *Spevack*, the threat of disbarment, without the offer of immunity, was enough to find a Fifth Amendment violation. *Spevack*, 385 U.S. at 514. However, in *Gardener*, the Supreme Court held that an employee could be fired for his refusal to answer questions about his performance if he was not "*required to waive his immunity . . . .*" *Gardner*, 392 U.S. at 278 (emphasis added). Accordingly, there appeared to be an open question regarding the actions required of the State to avoid violating the Fifth Amendment. In short, is the State required to *offer* immunity before disciplining a public employee or licensee? Or is merely *not requiring its waiver* sufficient to respect the right?

This Court relied on the language in *Gardner* in its prior Opinion and Order when it found that the Defendants had not committed a constitutional violation. *Moody*, 2013 WL 6196947 at *8. As the Court noted then, other federal appellate courts have done the same. *See Aguilera v. City of Los Angeles*, 510 F.3d 1161, 1171 (9th Cir. 2007) ("In *Gardner*, the Court noted that the constitutional violation arose not when a public employee was compelled to answer job-related questions, but when that employee was

*required to waive his privile*ge against self-incrimination while answering his employer's legitimate job-related questions.") (emphasis added); *Wiley v. Mayor & City Council of Baltimore*, 48 F.3d 773, 777 (4th Cir. 1995) ("This language strongly indicates that forcing a public employee to answer potentially incriminating job-related questions does not implicate the Fifth Amendment *unless* the employee *is also compelled* to waive his privilege.").

At oral argument, the Plaintiffs argued that the *Gardner* line of cases only applied to public employees, and not to licensees. However, the Sixth Circuit's opinion made clear that the same standard applies to both classes of individuals. *Moody*, 790 F.3d at 676 n.12.

With *Moody*, the Sixth Circuit has now established once and for all that the State is required to offer immunity before it may discharge an employee, or revoke a state-issued license, for standing on Fifth Amendment rights. However, before the Sixth Circuit's decision in *Moody*, a reasonable officer could have believed, as the Court did, that they were not required under the Fifth Amendment to offer immunity. Therefore, because a reasonable officer would have believed his actions to be lawful, the rights at issue were not clearly established. Accordingly, the Defendants are entitled to qualified immunity on these claims.

C. Due Process Claims

The Court must also analyze whether the Defendants or Plaintiffs are entitled to summary judgment on the Plaintiffs' Procedural Due Process

claims. In this case, the due process rights center on post-deprivation relief. It is established law that a suspended harness-horse trainer, and by extension a harness driver, is entitled to "a prompt postsuspension hearing" upon request. *Barry v. Barchi*, 433 U.S. 55, 63 (1979). As the Sixth Circuit affirmed, Plaintiffs' post-suspension due process rights were not violated. Additionally, under Michigan law "[a]ny person who is ordered to be . . . excluded . . . shall, upon written request, have the right to a hearing *de novo* before the commissioner to review the order . . . ." MICH. ADMIN. CODE R. 431.1130(3). Thus, that Plaintiffs' post-exclusion due process rights were clearly established under Michigan law is not up for debate. The Court need only address the issue of whether those due process rights were violated.

The Sixth Circuit held that "there is a disputed issue of material fact as to whether the defendants denied plaintiffs the [post-exclusion] process they were due or whether the plaintiffs failed to seek that process." *Moody*, 790 F.3d at 680. The Sixth Circuit found that the "harness drivers would fail on this due-process claim . . . if they had failed to request a hearing." *Id.* at 679. The Sixth Circuit also found that a reasonable juror "might conclude that the MGCB should have construed [their 2011 license applications] as requests for the hearings due to them under the federal constitution and state regulations." *Id.* at 680. Despite this holding, both sides still argue they are entitled to summary judgment.

a. Defendants' Motion for Summary Judgment

Defendants argue that they are still entitled to summary judgment because "the record clearly shows that the MGCB did not construe the drivers' post-exclusion license applications as appeal-hearing requests." Dkt. No. 144 at 27–28 (Pg. ID No. 3716–17). This argument, frankly, was flatly rejected by the Sixth Circuit. *See Moody*, 790 F.3d at 680 ("After all, the MGCB seemed to construe the harness drivers' applications for 2011 licenses as an attempt[t] to recreate either an administrative or judicial appeal process.") (quotations and citations omitted).

Defendants next argue that they are entitled to summary judgment because the Plaintiffs were eventually given an appeal hearing on April 25, 2013, following the Plaintiffs' hearing request that was made on November 27, 2012. Dkt. No. 144 at 29–30 (Pg. ID No. 3717–18). This argument necessarily ignores the fact that the Sixth Circuit found there to be a dispute of fact regarding whether the 2011 license applications constituted hearing requests. Neither party disputes that the 2011 license applications were not answered with a hearing. Defendants' argument is irrelevant to the question currently before the Court.

Finally, the Defendants argue that they are still entitled to qualified immunity because any violation did not involve a clearly established right that a reasonable person would have known. Dkt. No. 144 at 30–31 (Pg. ID No. 3719– 20). Specifically, Defendants argue that "[t]he drivers can cite no analogous case law that would have placed the regulators on notice that . . . applying for a license would constitute a

hearing request." *Id.* This argument mischaracterizes the Sixth Circuit's Opinion.

As stated above, it has been clearly established that a horse-driver is entitled to a post-exclusion hearing upon request. *Moody*, 790 F.3d at 678–679 (citing *Barry*, 443 U.S. at 63–64); MICH. ADMIN. CODE R. 431.1130(3). The Sixth Circuit further held that "[i]f the MGCB, in point of fact, did construe the harness drivers' applications as written requests for appeal, then the harness drivers were due the process of a hearing concerning their Exclusion Orders." *Id.* at 680. Therefore, the question is not whether Defendants were *on notice* that the subsequent applications were requests for hearings. The question is whether the Defendants "did, in point of fact" construe the applications as requests for hearings, and subsequently deny the hearings. Accordingly, Defendants are not entitled to summary judgment on these claims.

b. Plaintiffs' Motion for Summary Judgment

Plaintiffs similarly argue that they are entitled to summary judgment because their November 27, 2012 hearing request was not granted until April 25, 2013. Plaintiffs argue that their due process rights were violated because the hearing was well after the 14 day time window set forth by the Michigan regulations. Dkt. No. 138 at 19 (Pg. ID No. 3605). Those requests were made after the filing of this complaint. The Complaint has not been amended to reflect these claims. Thus, this claim is not properly before the Court.

D. Personal Involvement Defenses

Defendants argue that they are entitled to summary judgment on the Plaintiffs' 1983 claims because they have raised personal involvement defenses that were overlooked by the Sixth Circuit. Dkt. No. 144 at 16–18 (Pg. ID No. 3705–07). Defendants have raised personal involvement defenses for Defendants Lessnau, Ernst, Post, Kalm, Parker, Garrison and Williams.

Personal involvement defenses are often reserved for supervisory officials. The Sixth Circuit has held that "[b]ecause § 1983 liability cannot be imposed under a theory of *respondeat superior*, proof of personal involvement is required for a supervisor to incur personal liability." *Grinter v. Knight*, 532 F.3d 567, 575 (6th Cir. 2008) (citing *Miller v. Calhoun County*, 408 F.3d 803, 817 n. 3 (6th Cir. 2005)). "At a minimum, a § 1983 plaintiff must show that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate." *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir. 1984).

As described above, although the Plaintiffs' Fifth Amendment rights were violated by the issuance of suspensions and exclusion orders, those rights were not clearly established, and no liability may be found. Thus, the only violation that may be found is the Due Process violation.

Defendants Kalm, Post, Parker, Garrison, and Williams are only alleged to have been involved personally in the Fifth Amendment claim. They do not

appear to be personally involved in the Due Process violation. Seeing as the Defendants are entitled to Qualified Immunity on this claim, the Court need not discuss their personal involvement.

However, Defendant Ernst was recognized by the Sixth Circuit as not only receiving the Plaintiffs' 2011 license applications, but possibly construing them as hearing requests. *Moody*, 790 F.3d at 680. He is further alleged to have told Plaintiffs that they could not appeal their Exclusion Orders. *See* Dkt. No. 156 at 19 (Pg. ID No. 4039). Furthermore, Defendant Lessnau is alleged to have issued a report recommending against lifting Plaintiff Ray's suspension. Dkt. No. 156 at 18 (Pg. ID No. 4038). A reasonable juror could conclude that both Lessnau and Ernst were personally involved in the alleged due process violation. Accordingly the defense is denied as to these two defendants.

E. Quasi-Judicial Immunity

Defendants argue that the stewards are entitled to quasi-judicial immunity because of the impartial role they played in the license suspension and exclusion. Dkt. No. 144 at 31 (Pg. ID No. 3720).

The factors to be considered in determining whether an official is entitled to quasi-judicial immunity are:

> (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling

> unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal.

Friedman v. Hall, 843 F.2d 1391 (6th Cir. 1988) (citing *Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985)). "Persons such as judges, prosecutors acting in their adversarial capacity, and witnesses are absolutely immune from civil rights suit for damages." *Id.*

The Sixth Circuit has indicated that racing stewards are likely to be entitled to quasi-judicial immunity. *See id.* However, seeing as the Defendant Stewards are already entitled to qualified immunity, the Court finds no need to rule on this issue.

V. CONCLUSION

For the reasons discussed above, the Court **DENIES** the Plaintiffs' Motion for Summary Judgment [138], **GRANTS** the Defendants' Motion for Summary Judgment **IN PART** with respect to Plaintiffs' Fifth Amendment Claim, and **DENIES IN PART** the Defendants' Motion with respect to Plaintiffs' Due Process.

IT IS SO ORDERED.

Dated: August 15, 2016
Detroit, MI

s/Gershwin A. Drain
HON. GERSHWIN A. DRAIN
United States
District Court Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on August 15, 2016.

s/Teresa McGovern
Teresa McGovern
Case Manager Generalist

RECOMMENDED FOR FULL-TEXT
PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)
File Name: 15a0125p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN MOODY; DONALD HARMON; RICK RAY; WALLY MCILLMURRAY,
Plaintiffs-Appellants,

v.

MICHIGAN GAMING CONTROL BOARD; RICHARD KALM; GARY POST; DARYL PARKER; RICHARD GARRISON; BILLY LEE WILLIAMS; JOHN LESSNAU; AL ERNST; MICHIGAN DEPARTMENT OF ATTORNEY GENERAL, Criminal Division,
Defendants-Appellees.

No. 14-1511

Appeal from the United States District Court
for the Eastern District of Michigan at Flint.
No. 4:12-cv-13593—Gershwin A. Drain, District Judge.

Argued: March 11, 2015
Decided and Filed: June 16, 2015
Before: KEITH, MERRITT, and BOGGS, Circuit Judges.

COUNSEL

ARGUED: Hugh M. Davis, CONSTITUTIONAL LITIGATION ASSOCIATES, P.C., Detroit, Michigan, for Appellants. Jason A. Geissler, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellees. **ON BRIEF:** Hugh M. Davis, CONSTITUTIONAL LITIGATION ASSOCIATES, P.C., Detroit, Michigan, for Appellants. Jason A. Geissler, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellees.

OPINION

BOGGS, Circuit Judge. The Michigan Gaming Control Board (MGCB)[1] regulates harness racing, a form of horse racing, in Michigan. In the course of investigating allegations of illegal race-fixing, Michigan horse-racing stewards asked Plaintiffs-Appellants John Moody, Donald Harmon, Rick Ray, and Wally McIlmurray, Jr. (harness drivers) questions that the harness drivers construed as possibly self-incriminating. Invoking the Fifth Amendment to the Constitution, the harness drivers refused to answer. Because of this refusal, the MGCB suspended the harness drivers' licenses to race and excluded them from horse-racing grounds. The harness drivers, in addition to seeking relief in state court and administrative fora, sued the MGCB and its employees in federal district court. That court granted

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[1] Defendants-Appellees in addition to the Michigan Gaming Control Board include various state employees. We refer to the defendants-appellees collectively as "the MGCB."

summary judgment to the MGCB. The harness drivers timely appealed. We affirm the district court's judgment in part, reverse in part, and remand for further proceedings.

I

In 2010, the MGCB received an anonymous tip that certain harness-racing drivers were fixing races in concert with certain known gamblers. On May 19, 2010, Michigan State Police Detective Thomas DeClercq informed the harness drivers' then-attorney that the harness drivers would be arrested, criminally charged, and arraigned following an informal investigative hearing that had earlier been scheduled for May 20. At that hearing, the harness drivers asserted their Fifth Amendment right against self-incrimination and refused to answer questions. The following day,[2] the state suspended the plaintiffs' 2010 licenses to work in horse racing because they failed "to comply with the conditions precedent for occupational licensing in Michigan as outlined in R431.1035."[3] Rule 431.1035 provides, in part, "[t]hat the applicant [for an occupational license, such as the license to race horses] . . . shall cooperate in every way . . . during the conduct of an investigation . . . ." On May 26, the harness drivers appealed their suspensions administratively. The harness drivers

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[2] The district court suggested that the administrative ruling was issued on May 20, not May 21.

[3] Although each state and Canadian province regulates horse racing separately, the regulators have reciprocity agreements. Thus, the effect of these suspensions was to suspend plaintiffs from working in horse racing anywhere in the United States or Canada.

subsequently filed a suit for injunctive relief in Wayne County Circuit Court. The MGCB delayed the administrative appeal pending the state-court ruling.[4]

On November 30, 2010, the MGCB issued "orders of exclusion" as to each harness driver. The MGCB took the position that it would not lift the exclusion orders unless the plaintiffs answered questions without legal representation. The harness drivers applied for 2011, 2012, and 2013 licenses without success. In response to the harness drivers' letters that sought to appeal "the deni[a]l of 2011 occupational license," the MGCB indicated that the exclusion orders precluded their *consideration* of the harness drivers' applications. Letter from Alexander Ernst, Horse Racing Manager, to John R. Moody (Nov. 16, 2011) (Ernst Letter).

In August 2012, the harness drivers filed this suit under 42 U.S.C. § 1983, seeking damages, costs, fees, and injunctive and declaratory relief. On November 27, 2013, the district court granted the MGCB's motion for summary judgment and denied the harness drivers' motion for partial summary judgment. The district court held that the Eleventh Amendment barred plaintiffs' claims for money damages against MGCB and its officials. And the district court held

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[4] The Wayne County Circuit Court heard and decided the case. On appeal, the Michigan Court of Appeals ultimately did not consider the case until after the plaintiffs' 2010 licenses had expired, and so dismissed the case as moot. The MGCB claims that, despite its repeated inquiries, the harness drivers only confirmed on November 27, 2012, their wish to proceed with their administrative appeal.

that the MGCB was entitled to qualified immunity because the harness drivers failed to identify the violation of a constitutional right.[5] The harness drivers timely appealed.[6]

"On appeal, this court reviews the district court's grant of summary judgment de novo." *T-Mobile Cent. LLC v. Charter Twp. of W. Bloomfield*, 691 F.3d 794, 798 (6th Cir. 2012). Qualified immunity involves a two-step inquiry. *Brown v. Lewis*, 779 F.3d 401, 417 (6th Cir. 2015). We must determine whether the facts viewed in the light most favorable to the plaintiffs show that a constitutional violation has occurred and whether the violation involved a clearly established constitutional right of which a reasonable person would have known. *See id.* at 411. We may address these steps in either order. *Pearson v. Callahan*, 555 U.S. 223, 227 (2009).[7]

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[5] After their 2014 license applications were not accepted, plaintiffs filed a mandamus action in state court. *Moody v. Mich. Gaming Control Bd.* (Ingham Cnty. Cir. Ct.) (No. 14-159-AW). The court did not grant preliminary injunctive relief. Thereafter, defendants processed plaintiffs' applications. By June 2014, plaintiffs were relicensed.

[6] Defendants argue that the plaintiffs have abandoned their claims for monetary relief. But plaintiffs appealed the district court's determination that defendants did not violate their constitutional rights. *See* Reply Br. 8 ("Appellants' appeal squarely challenges the trial court's erroneous conclusion that Appellees did not violate their constitutional rights."). So they "made no . . . concession as to any qualified immunity the individual Appellees claim protects them in their individual capacities . . . ." *Id.* at 7.

[7] In our qualified-immunity analysis, we had required plaintiffs to demonstrate the governments' objective unreasonableness. *See, e.g.*, *Feathers v. Aey*, 319 F.3d 843, 848

We consider five actions that may have violated the harness drivers' rights: (1) suspension of license because of refusal to self-incriminate without immunity, (2) exclusion from horse racing for same reason, (3) suspension without hearing, (4) exclusion without hearing, and (5) retaliation.

On the self-incrimination claims, we reverse the district court's grant of summary judgment. Based on the applicable law, the facts viewed in the light most favorable to the harness drivers show that the Constitution entitled the harness drivers to refuse to answer potentially self-incriminating questions, unless the state immunized them from prosecution. To punish the drivers violated the Constitution, and both suspension and exclusion constitute punishment. So the MGCB violated the harness drivers' constitutional rights against self-incrimination. Whether these rights were clearly established at the time remains a question. We remand the case for further proceedings. *Cf. Dominque v. Telb*, 831 F.2d 673, 677 (6th Cir. 1987).

The harness drivers were due hearings on their suspensions and their exclusions. As we explain below, they were granted due process on their suspensions. We affirm the judgment of the district court on the due-process claim concerning suspensions. The harness drivers were not granted due process on their exclusions. But, for reasons explained below, the absence of that process may have

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(6th Cir. 2003). After *Pearson v. Callahan*, 555 U.S. 223 (2009), we consider reasonableness during our evaluation of the two qualified-immunity factors. *See Brown v. Lewis*, 779 F.3d 401, 417 (6th Cir. 2015).

resulted from the harness drivers' own failure to act. We reverse the grant of summary judgment on the due-process claims concerning exclusions and remand for further relevant proceedings.

Finally, the retaliation claims are not properly before us.

II

A

The privilege against self-incrimination applies more broadly than the bare text of the Fifth Amendment might suggest. A few examples demonstrate the privilege's practical reach. The privilege against self-incrimination applies in civil as well as criminal proceedings. *Malloy v. Hogan*, 378 U.S. 1, 11 (1964); *see also Fieger v. U.S. Att'y Gen.*, 542 F.3d 1111, 1120 (6th Cir. 2008) (observing that "the fulcrum of the Fifth Amendment privilege is the potential for self-incrimination, not the nature of the instant proceeding" (citing *Bialek v. Mukasey*, 529 F.3d 1267, 1272 (10th Cir. 2008))). It protects against the use in prosecution of police officers of incriminating statements that they made when given the choice "to forfeit their jobs or to incriminate themselves." *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967).

When the questioned persons make the inverse choice under the same sort of duress, i.e., they prefer to forfeit their jobs rather than incriminate themselves, the privilege protects them. *Cf. id.* at 498; *Union Pac. R.R. Co. v. Pub. Serv. Comm'n*, 248 U.S. 67, 70 (1918). It is "clearly established . . . that public

employers may not coerce their employees to abdicate their constitutional rights on pain of dismissal . . . ." *Clemente v. Valso*, 679 F.3d 482, 492 (6th Cir. 2012); *see also Spevack v. Klein*, 385 U.S. 511 (1967) (holding that the privilege protects a lawyer who refuses to give testimony that might incriminate himself); *Gardner v. Broderick*, 392 U.S. 273 (1968) (police officer); *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 284 (1968) (public sanitation employees); *Slochower v. Bd. of Educ.*, 350 U.S. 551 (1956) (public-school teacher). These cases "stan[d] for the proposition that a governmental body may not require an employee to waive his privilege against self-incrimination as a condition to keeping his job . . . even [when] no criminal proceedings were ever instituted against" an employee who was later successful in constitutional claims. *Lingler v. Fechko*, 312 F.3d 237, 239 (6th Cir. 2002) (citations omitted).

Nor does the privilege protect only state employees. It protects a contractor, such as an architect, against the cancellation of state contracts and disqualification from receiving subsequent contracts. *Lefkowitz v. Turley*, 414 U.S. 103 (1973). It protects from dismissal from his position a political-party officer in the same situation. *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977).[8]

Here, the MGCB did not offer the harness drivers—state licensees—immunity before the

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[8] This is true whether or not a criminal investigation was ongoing. As it happens, the harness drivers clarified at the hearing on May 20, 2010, that they were asserting their rights against self-incrimination because of DeClercq's threats of prosecution.

hearing on May 20, 2010. So 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, although a court would have been unlikely to admit those answers, given the law laid out in *Garrity* and its sequellae. In this situation, the Constitution entitled the harness drivers to assert the privilege against self-incrimination and thus to refuse to answer the MGCB's questions. To ban them 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. *Cunningham*, 431 U.S. at 807.[9]

B

The district court relied on *Chavez v. Martinez*, 538 U.S. 760 (2003), for the proposition that mere compulsion does not violate the Fifth Amendment. In that case, a man exchanged gunfire with police and later was interrogated by a police officer while in excruciating pain from face wounds and in emergency treatment for the same. The state never used the fruits of this interrogation for any reason. The man sued the police officer under 42 U.S.C. § 1983 for violating his constitutional rights. The Ninth Circuit held that the officer had violated his rights. A divided

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[9] The MGCB does not dispute that it did not offer plaintiffs immunity at the time. Moody ultimately was immunized to some degree, although the parties dispute the extent of that immunity. None of the plaintiffs has been charged with a crime related to the original criminal and administrative inquiry.

Supreme Court, producing five different opinions, reversed and remanded.

Writing for himself and three colleagues, Justice Thomas characterized the underlying plaintiff's position as attempting to turn a failure to provide *Miranda* warnings into a violation of the federal constitution. Justice Thomas acknowledged that the law permits a witness to insist on immunity in order to memorialize the fact that his testimony had been compelled. *Chavez*, 538 U.S. at 772 (plurality op.). But Justice Thomas distinguished permission to assert "the Fifth Amendment privilege . . . in noncriminal cases" from the constitutional *right* against self-incrimination in criminal cases. *Ibid.* *Miranda*, Justice Thomas suggested, protected constitutional rights, but was not the same as those rights.

Justice Souter, writing for himself and Justice Breyer, suggested that the Court's "decision requires a degree of discretionary judgment greater than Justice Thomas acknowledges." *Id.* at 777 (Souter, J., concurring). Given the facts presented, however, Justice Souter agreed with Justice Thomas that the officer had not violated the underlying plaintiff's rights.[10] Because the Court's judgment depended on

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[10] Justice Kennedy, writing for himself and two of his colleagues, emphasized that "the Self-Incrimination Clause is a substantive constraint on the conduct of the government . . . ." *Chavez*, 538 U.S. at 791 (Kennedy, J., concurring in part and dissenting in part). Explicitly disagreeing with Justice Thomas, Justice Kennedy argued that the protection against coercion exists as "a present right." *Ibid.* "The Clause provides . . . a continuing right against government conduct intended to bring about self-incrimination." *Id.* at 791-92 (citing *Turley*, *Bram v.*

Justice Souter's fact-specific view of the law, Justice Thomas's broader suggestion—that mere compulsion of testimony, without more, does not violate constitutional rights against self-incrimination—does not bind us in different situations.

This 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. Solely because the harness drivers asserted these rights, the MGCB both suspended their occupational licenses and also banned them from receiving new licenses. Had the state threatened to revoke their licenses but, after the plaintiffs asserted their rights against self-incrimination, not revoked their licenses at all (or revoked their licenses only on account of and only after a process proving their involvement in illegal gambling), we would have a different case. In other words, "*Chavez* only applies where a party actually makes self-incriminating statements. . . [T]he Fifth

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United States, 168 U.S. 532, 542-43 (1897); and *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892)).

Chavez resulted in a remand to the Ninth Circuit on substantive-due-process grounds. Had Justices Kennedy, Stevens, and Ginsburg insisted on their "position, there would be no controlling judgment of the Court." *Chavez*, 538 U.S. at 799 (Kennedy, J., concurring in part and dissenting in part). Instead, Justice Kennedy allowed the Court to dispose of the case by remanding it and suggested that substantive due process could protect most of the rights outlined in the Self-Incrimination Clause. *Ibid.*

Amendment would be violated if a public employee were fired for refusing to make self-incriminating statements, even though no self-incriminating statement could ever have been used against the employee." *Aguilera v. Baca*, 510 F.3d 1161, 1179 (9th Cir. 2007) (Kozinski, J., dissenting "for the most part").

The MGCB cites *McKinley v. Mansfield*, 404 F.3d 418 (6th Cir. 2005), "for the proposition that an individual does not suffer a Fifth Amendment violation unless compelled to be a witness against himself in a criminal case." Appellee Br. 5-6; *see also id.* at 27. *McKinley* concerned a police department's investigation of unlawful use of police-department scanners. The department interviewed the underlying plaintiff, explicitly promising not to use his statements against him in criminal proceedings without his permission. Despite this offer of immunity, he lied during the interview. The department interviewed him a *second* time. The prosecutor later sought to use the plaintiff's statements from the *second* interview in his prosecution for falsification and obstruction: i.e., not to prove that the plainfiff had used department scanners unlawfully but to prove that he had lied about not doing so during the first interview. *See McKinley*, 404 F.3d at 427. We acknowledged that "*Garrity* does not preclude use of such statements in prosecutions for the independent crimes of obstructing the public employer's investigation or making false statements during it." *Ibid.* However, because we concluded that there was "a genuine issue of material fact as to whether, at the time of [the policeman's] interview, he was the target of an

independent falsification and obstruction investigation, and no longer a mere *Garrity* witness," *id.* at 430, we reversed the district court's grant of summary judgment to the police department and city on that claim.

Like *Chavez*, *McKinley* does not apply here. As Justice Thomas acknowledged in *Chavez*, "governments may penalize public employees and government contractors . . . to induce them to respond to inquiries [*only*] *so long as* the answers elicited . . . are immunized from use in any criminal case against the speaker." *Chavez*, 538 U.S. at 768 (plurality op.) (emphasis added). Here, plaintiffs asserted their rights clearly on May 20, 2010. But, for four years, the state declined to offer immunity or to allow plaintiffs to make a living at the racetrack.

The district court cited some cases without precedential authority and inapposite here. First, the district court cited *Aguilera v. Los Angeles*, 510 F.3d 1161 (9th Cir. 2007). In *Aguilera*, the plaintiffs had been threatened with transfer to less prestigious "job assignments and work shifts," not total discharge. *Id.* at 1171; *see also id.* at 1173 (distinguishing "re-assignment from field to desk duty" from "losing one's job").[11] Here, the district court erred in suggesting

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[11] Even when the punishment is not equivalent to termination, the Ninth Circuit's position is not the only one. In "[t]he Second, Seventh and Federal Circuits[, t]he government must tell public employees that they have immunity before it can constitutionally punish them for refusing to make self-incriminating statements." *Aguilera*, 510 F.3d at 1178 (Kozinski, J., dissenting "for the most part") (citing *Weston v. U.S. Dep't of Hous. & Urban Dev.*, 724 F.2d 943, 948 (Fed. Cir. 1983); *Confederation of Police v. Conlisk*, 489 F.2d 891, 895 & n.4 (7th

that "similar to the facts in *Aguilera*, [the harness drivers] were not *forced* to answer the stewards' questions . . . ." *Moody v. Mich. Gaming Control Bd.*, 2013 WL 6196947, at *9 (E.D. Mich. Nov. 27, 2013) (emphasis added). In point of fact, they were.[12] To subject plaintiffs to the choice between self-incrimination, perjury, or dismissal *is*, at least for Fifth Amendment purposes, to *force* them to answer.

The district court also cited *Morgan v. Columbus*, No. 92-4086, 1993 WL 389954 (6th Cir. Oct. 1, 1993). In *Morgan*, the Columbus Police Department investigated the city's appointed deputy development director, a former officer with the department who also was a lawyer. His superior told him to "answer those questions that you can. *I'm not asking you to answer things that you feel would incriminate.*" *Id.* at *4 (emphasis added). During the hearing, the former officer read a substantial statement that did not mention the Fifth Amendment or the privilege against self-incrimination, but concluded with "[t]hat is my statement in its entirety today." *Id.* at *6. The city subsequently fired him and he sued under § 1983. We held that the plaintiff "was not deprived of a constitutional right" because he "was only required to answer those questions which he did not believe would infringe his constitutional rights," *id.* at *21, whereas here, defendants told plaintiffs that their licenses required them to answer questions and not to

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Cir. 1973); and *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of N.Y.*, 426 F.2d 619, 621, 627 (2d Cir. 1970) (Friendly, J.)).

[12] For our purposes here, state licensees enjoy the same rights about their licenses that state employees do about their employment.

assert their rights against self-incrimination. So *Morgan* does not dispose of this case.

III

We turn to the process due to the harness drivers prior or subsequent to their suspension and exclusion. "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolf v. McDonnell*, 418 U.S. 539, 558 (1974) (citing *Dent v. West Virginia*, 129 U.S. 114, 123 (1889)). The Supreme Court has explained that identifying

> the specific dictates of due process generally requires consideration of three distinct factors: [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

"[T]he ordinary principle [is] that something less than an evidentiary hearing is sufficient prior to adverse administrative action." *Id.* at 343. But the courts, not the state, decide where that principle applies. A state may not condition a statutory entitlement on a beneficiary's acceptance of process so minimal that it fails to satisfy constitutional

standards. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

The district court suggested that plaintiffs do not have a *liberty* interest in an occupation in the horse-racing industry and that plaintiffs do not have a property interest in the "mere *expectation* of being licensed by the Racing Commissioner" (emphasis added). But the harness drivers need only to demonstrate *property* interests—the harness drivers can demonstrate that they have a property interest in their licenses in two ways.

A

First, the Supreme "Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests. The requirement for some kind of hearing applies to . . . the revocation of licenses . . . ." *Wolf*, 418 U.S. at 557-58 (citing *Joint Anti-Fascist Refugee Cmte. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring); and *In re Ruffalo*, 390 U.S. 544 (1968)). "Suspension of issued licenses . . . involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Bell v. Burson*, 402 U.S. 535, 539 (1971). In addition, a state's establishment of process means that "state law has engendered a clear expectation of continued enjoyment of a license absent proof of culpable conduct . . . ." *Barry v. Barachi*, 443 U.S. 55, 64 n.11 (1979) (citing *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Bd. of Regents v. Roth*, 408 U.S. 564 (1972); *Bell*, 402 U.S. at 539; and *Goldberg v. Kelly*, 397 U.S. 264 (1970)).

In Michigan, the racing commissioner can license people to participate in horse racing and wagering and can promulgate rules to that effect. M.C.L. 431.307(1). In addition, "[t]he racing commissioner may . . . investigate . . . a licensee . . . to ensure compliance . . . ." M.C.L. 431.307(7). To that end,

> [u]pon the filing of a written complaint . . . or . . . motion of the racing commissioner regarding . . . a person issued a[n] occupational license [for harness driving], the racing commissioner may summarily suspend the occupational license . . . not more than 90 days pending a hearing and final determination . . . regarding of the acts or omissions complained of . . . , if the commissioner determines . . . that the public health, safety, or welfare requires emergency action. The racing commissioner shall schedule the [hearing to occur] within 14 business days after the [summary suspension.] The hearing shall be conducted in accordance with the contested case provisions of the administrative procedures act . . . .

M.C.L. 431.316(7). The Michigan Administrative Procedures Act, in turn, provides that "[t]he parties [in a contested case] shall be given a reasonable notice of the hearing, which notice shall include: . . . . [a] reference to the particular sections of the statutes and rules involved" and "the issues involved." M.C.L. 24.271(2). Because Michigan has established a process for appealing suspensions of licenses, the

harness drivers had property interests in their licenses.[13]

B

Second, although a state statute "does not affront the Due Process Clause by authorizing summary suspensions" of horse-racing licenses "without a presuspension hearing," *Barry*, 443 U.S. at 63, *we* do not need to apply the *Mathews* criteria to the harness drivers, because the *Supreme Court* already has done so: a suspended harness-horse trainer (and so, we

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[13] The harness drivers suggest that the Michigan law "sets forth the *basic due-process requirements* of contested-case proceeding where the administrative agency intends to suspend an occupational license." Appellant Br. 23 (emphasis added). To the extent they mean *federal constitutional* due-process requirements, they err. It is true that, "under section 92 of the [Michigan] Administrative Procedures Act, two notices to the licensee are required before a revocation hearing may be held." *Rogers v. Mich. St. Bd. of Cosmetology*, 244 N.W.2d 20, 22 (Mich. Ct. App. 1976). In all, the act requires four steps: (1) issuance of notice, (2) informal opportunity to show compliance, (3) only if licensee does not offer to comply, issuance of notice of hearing, which commences proceedings, (4) hearings. *Id.* at 21-22. The Act requires informal opportunity to show compliance because "the Legislature intended to delay the revving up of the formal bureaucratic machinery." *Id.* at 23. In addition, "proceedings do not commence . . . when the parties physically assemble [but rather] with the mailing of the notice of the hearing . . . by analogy [to] the civil forum, [wherein] the filing of the complaint initiates the proceedings." *Ibid.* But while § 1983 provides a remedy for violations of *federal* rights, the amount and kind of process due to a licensee under the Constitution is not necessarily equivalent to the process to which a state statute entitles him as a matter of state law.

presume, a harness driver) is due the process of "a prompt postsuspension hearing," *id.* at 66.

The harness drivers received a postsuspension hearing in Michigan state court. Whether or not plaintiffs ought to have received, as matter of Michigan state law, an additional hearing in front of an administrative agency does not affect the federal constitutional analysis. So we affirm the district court's grant of summary judgment insofar as it held that the defendants' suspension of plaintiffs did not violate the plaintiffs' due-process rights.

C

In November and December 2010, Richard Kalm, Executive Director of the MGCB, issued orders of exclusion as to each harness driver. Each order proceeded in the same way. Each identified the harness driver as a licensee suspended for "failing to comply with the conditions precedent for occupational licensure . . . ." *See, e.g.*, Kalm, Order of Exclusion In the Matter of John Moody at 1 (Nov. 30, 2010) (citing M.C.L. 431.316(1); and 1985 M.R. 6, R 431.1035). Reciting that the harness driver had "asserted that he had the right to invoke a 5th Amendment right against self-incrimination in response to questions asking whether he ever failed to give his best efforts in a race or ever accepted money to alter the outcome of a race," the Order stated that "[b]ased on the continued and ongoing administrative investigation into race fixing, information that [the plaintiff] was involved in race fixing, *and his failure to cooperate*, [he] . . . is to be excluded from horse racing tracks . . . . [Kalm] deems it necessary to be proactive to preserve the integrity of horse racing in the State of Michigan

and to protect the public health, safety and welfare." *See, e.g.*, *id.* at 1-2 (emphasis added).

The harness drivers were due the process of a postexclusion hearing for the two reasons that they were due the same for their suspensions: the general principle of a hearing before final or permanent deprivation, and the *Barry* Court's holding that the *suspension* of a jockey's license entitles him to a post-deprivation hearing. We also note that the Exclusion Orders seem to contemplate as much: the Order concluded by acknowledging that "[u]pon written request, [the plaintiff] has a right to a hearing de novo before the Executive Director." *Ibid.* The harness drivers were due the process of a hearing, which they did not receive.

But the harness drivers would fail on this due-process claim, as well, if they had failed to request a hearing. On the harness drivers' account, they "awaited the outcome in the Michigan Court of Appeals" before requesting a hearing about their exclusion. Appellant Br. 36. That court issued its decision on July 21, 2011, declaring the issue of the suspension of 2010 licenses moot. The harness drivers claim that, in August 2011, they "called and met with Defendants regarding re-licensure . . . ." *Ibid.* According to the harness drivers, the MGCB ultimately took the position that the relevant rules and regulations entitled plaintiffs to appeal only within ten days of the order of exclusion. *Ibid.* In a letter dated November 16, 2011, the MGCB's Horse Racing Manager stated that "the time to appeal the Exclusion Order has long passed." Ernst Letter. Similarly, on January 13, 2012, the MGCB told the

harness drivers that "an Exclusion Order was entered against you that you did not appeal. As such, you are excluded indefinitely from licensure . . . ." *See, e.g.*, Letter from Erik Pedersen, Div. of Horse Racing, Audit & Gaming Technology, to John R. Moody at 1 (Jan. 13, 2012). This later letter, though, suggested that the harness drivers might still appeal their 2010 suspension. *Id.* at 1-2.

The regulation under which the Racing Commissioner excluded the plaintiffs provides that:

> Any person who is ordered to be . . . excluded . . . shall, upon written request, have the right to a hearing de novo before the commissioner to review the order . . . unless such a hearing has already been held before the commissioner under [M.C.L. § 24.201 et seq.] and a final determination made by the commissioner before issuance of the order under review. Upon such a request, the commissioner shall schedule . . . the hearing to be held within 14 days . . . . The hearing shall be held pursuant to [M.C.L. § 24.201 et seq.]. The person shall remain . . . excluded . . . not more than 90 days after receipt of a request for review pending the hearing and final determination of the commissioner regarding the order . . . under review.

Mich. Admin. Code R. 431.1130(3). The language of the regulation seems not to contemplate a deadline for appeal. The harness drivers do not demonstrate that they ever clearly submitted "a written request" for review.

That omission still does not end the inquiry. No one disputes that, despite the Exclusion Orders in late 2010, the harness drivers applied for 2011 licenses (and, subsequently, for 2012, 2013, and 2014 licenses). A reasonable juror might conclude that the MGCB should have construed those applications as requests for the hearings due to them under the federal constitution and state regulations. After all, the MGCB seemed to construe the harness drivers' applications for 2011 licenses as an "attempt[t] to recreate either an administrative or judicial appeal process." Ernst Letter. If the MGCB, in point of fact, did construe the harness drivers' applications as written requests for appeal, then the harness drivers were due the process of a hearing concerning their Exclusion Orders. Such an outcome makes policy sense. If a licensee regards his un-reviewed exclusion from licensure to be an error, and so applies for a license, due-process doctrine favoring hearings prior to final deprivation would seem to require that his application trigger the review owed to him.

We hold that there is a disputed issue of material fact as to whether the defendants denied plaintiffs the process they were due or whether the plaintiffs failed to seek that process. We reverse the grant of summary judgment on plaintiffs' due-process claims that they were denied their rights to a hearing after their exclusion and remand the question to the district court.

IV

After discovery, plaintiffs moved to amend their complaint to include a First Amendment retaliation claim. The district court denied that motion. We do

not review the district court's denial because, as the MGCB correctly suggests, "the Harness Drivers have not appealed the District Court's denial of leave to amend the Complaint" to include a First Amendment retaliation claim. Appellee Br. 38.

Because we reverse summary judgment, the case will return to the district court. There, plaintiffs can move for the district court to reconsider its decision to deny plaintiffs' motion to amend its complaint. If the district court denies that motion, the plaintiffs can appeal that denial after final judgment.

V

In conclusion, we AFFIRM the district court's grant of summary judgment to the MGCB on the harness drivers' due-process claims about their suspensions. We REVERSE the district court's grant of summary judgment to the MGCB on the harness drivers' due-process claims about their exclusions and self-incrimination claims, and REMAND the case to the district court for further proceedings on these three issues: did the harness drivers request hearings on their exclusions, did their self-incrimination and due-process claims involve clearly established rights, and, if so, should an officer in the MGCB's position have known about those rights? If, on a pretrial motion or after trial, the district court finds that the MGCB is liable on one or more of the harness drivers' claims, the district court should determine what damages the MGCB owes the harness drivers.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 14-1511

FILED
Jun 16, 2015
DEBORAH S. HUNT, Clerk

JOHN MOODY; DONALD HARMON; RICK RAY; WALLY MCILLMURRAY,
Plaintiffs - Appellants,

v.

MICHIGAN GAMING CONTROL BOARD; RICHARD KALM; GARY POST; DARYL PARKER; RICHARD GARRISON; BILLY LEE WILLIAMS; JOHN LESSNAU; AL ERNST; MICHIGAN DEPARTMENT OF ATTORNEY GENERAL, Criminal Division,
Defendants - Appellees.

Before: KEITH, MERRITT, and BOGGS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Flint.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED IN PART, REVERSED IN PART, and

REMANDED to the district court for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN MOODY, *et al.*,
Plaintiffs,
Case No. 12-cv-13593
HON. GERSHWIN A. DRAIN
vs.

MICHIGAN GAMING CONTROL BOARD, *et al.*,
Defendants.
_____/

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [#85], DENYING PLAINTIFFS' AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT [#98], FINDING PLAINTIFFS' MOTION FOR ORDER TO ALLOW DEPOSITION OF NON-PARTY WITNESS THOMAS DECLERQ MOOT [#97], GRANTING DEFENDANTS' MOTION TO STRIKE [#112], DENYING PLAINTIFFS' MOTION TO FILE SUPPLEMENTAL AUTHORITY [#114] AND DISMISSING ACTION

I. INTRODUCTION

Plaintiffs, John Moody, Donald Harmon, Rick Ray, and Wally McIlmurray, Jr., filed the instant 42 U.S.C. § 1983 action on August 14, 2012 seeking declaratory and injunctive relief concerning the legality of the suspension of their harness racing occupational licenses by Defendants, the Michigan

Gaming Control Board ("MGCB"), Richard Kalm, Gary Post, Daryl Parker, Richard Garrison, Billy Lee Williams, John Lessnau and Al Ernst. Presently before the Court is Defendants' Motion for Summary Judgment, filed on June 3, 2013. Also before the Court is Plaintiffs' Amended Motion for Partial Summary Judgment, filed on July 2, 2013. These matters are fully briefed and a hearing was held on September 10, 2013. For the reasons that follow, the Court grants Defendants' Motion for Summary Judgment and denies Plaintiffs' Amended Motion for Partial Summary Judgment.

II. FACTUAL BACKGROUND

Plaintiffs have been involved in harness racing throughout the United States, including in Michigan. In 2009, Defendant Gary Post, then Operations Manager of the Horse Racing Section of the MGCB, received an anonymous tip about several drivers, trainers, and gamblers involved in a race fixing scheme that took place in 2008 and 2009. Following this telephone call, Post immediately began an investigation and enlisted steward Robert Coberley to help in reviewing suspicious races. Initially, Coberley and Post focused their attention on eight harness races which included the Plaintiffs as participants. After investigating these races, the MGCB reported its findings to the Michigan State Police ("MSP").

Thereafter, MSP conducted an investigation and later executed search warrants for certain owners, trainers and gamblers, including Plaintiff Arthur McIlmurray. On March 11, 2010, the MSP interviewed McIlmurray, who identified Plaintiffs John Moody, Donald Harmon, Wally McIlmurray, Jr.

and others as being key participants in a race-fixing scheme where drivers would finish fifth place or lower in certain races to benefit known gamblers. For their participation in the scheme, these drivers were paid by gamblers Haitham Shamoun and Saleh Summa. The MSP interviewed Plaintiff John Moody on March 12, 2010, wherein Moody implicated not only himself but the other Plaintiffs in these activities. Moody admitted that in fifteen to twenty races he did "not drive very, very aggressive" and estimated Summa paid him roughly $5,000.00 total for his participation in the race fixing scheme. The Plaintiffs have since repudiated these statements claiming they were coerced by the MSP into admitting wrongdoing.

Thereafter, the MGCB summoned each of the Plaintiffs for administrative stewards hearings, which took place on May 20, 2010. Plaintiffs received advance notice of the hearings, and each summons identified the purpose of the hearing, its time and location and what documents were to be produced. The summonses further advised the Plaintiffs that they were entitled to have an attorney represent them at the hearing if they chose to retain counsel.

Thereafter, Plaintiffs met with and retained Joseph Niskar to represent them. Plaintiffs claim that on several occasions prior to their appearance at the hearings, Sergeant Thomas DeClerq of the MSP advised Niskar that the Plaintiffs were suspects in a race-fixing scheme and that they would be arrested at the conclusion of the hearings. Plaintiffs further maintain that prior to the hearings, Niskar informed Post that the Plaintiffs intended to invoke their Fifth Amendment rights at the hearings and this

constituted "just cause" within the meaning of Michigan Compiled Laws 431.307(8).

Moody's hearing was first. Post, as well as representatives from the Michigan Attorney General, attended the hearing. When Moody, a catch driver for the industry, was asked whether "he ever failed to put forth his best effort in a race," or took "any money or anything else of value in exchange . . . for the outcome of a race," he replied, "[o]n the advice of my attorney I refuse to answer this question and I invoke my Fifth Amendment right against self-incrimination." When asked whether he knew Summa or Shamoun, he again asserted his Fifth Amendment rights. Lastly, when asked about the occupational license application he signed, Moody also invoked his Fifth Amendment rights. The license application states in relevant part:

> I expressly agree to be subject to the subpoena powers of the Michigan Gaming Control Board (MGCB), Horse Racing Section or a written request issued in lieu of a subpoena and to provide the MGCB Horse Racing Section with any and all such information or documents which the MGCB Horse Racing Section may so request as authorized under the Michigan Racing Law and rules. I further consent to be subject to the searches provided for in Public Act 279 of 1995, Section 16(4) that authorizes personal inspections including urine and breathalyzer tests, inspections of any personal property, and inspections of premises and property related to my participation in a race meeting by persons authorized by the MGCB Horse

> Racing Section. I agree to fully cooperate with the MGCB Horse Racing Section regulatory investigations and law enforcement investigations related to racing. I also agree to report racing violations and/or criminal activity occurring at or away from the track to the MGCB Horse Racing Section or local, state, and federal law enforcement agencies.

The other Plaintiffs provided similar answers during their hearings. They all invoked their Fifth Amendment rights and refused to acknowledge whether they knew Shamoun or Summa or whether they were aware of anybody else that may have engaged in race-fixing. Plaintiffs also relied on the Fifth Amendment when they refused to bring their 2008 and 2009 bank records that the MGCB requested in its summons for each individual.

Unlike Moody, the other Plaintiffs acknowledged signing the license application form and agreed they were required to cooperate with any investigation as a condition precedent to obtaining and maintaining their occupational licenses. Further, Plaintiffs were advised that failure to cooperate with the investigation could subject them to suspension or revocation of their licenses.

On May 20, 2010, the stewards issued their rulings. The rulings suspended the Plaintiffs' occupational licenses until December 31, 2010–at which time the occupational licenses expired and a renewal application was required to be filed in order to maintain their occupational licenses. The reasons given for each Plaintiff's suspension was the same in each decision issued by the stewards. Specifically, the

stewards concluded that the Plaintiffs had "failed to comply with the conditions precedent for occupational licensing in Michigan as outlined in R431.1035."[1]

After their suspensions, Plaintiffs filed an appeal of their suspensions with the MGCB, as well as filed an Emergency Motion for Declaratory, Injunctive Relief and for a Temporary Restraining Order (TRO) in the Wayne County Circuit Court. Because the Plaintiffs had filed an action in state court, the Defendants determined it was reasonable to delay the administrative appeal until the state court ruled on the Plaintiffs request for injunctive relief. The Honorable John Murphy denied Plaintiffs request for a TRO but scheduled a show cause hearing on June 4, 2010. Plaintiffs argued that they satisfied the four requirements for injunctive relief. Judge Murphy

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[1] Michigan Administrative Code Regulation 431.1035(2)(d) states:

> (2) Application for an occupational license means consent and agreement by the applicant,, upon application and for the duration of the occupational license, if issued, to all of the following conditions precedent:
>
> * * *
>
> (d) That the applicant will conduct himself or herself and his or her business at all times in a manner befitting the best interests of racing and shall 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.

disagreed, concluding that there was no likelihood of success on the merits and that the public harm involved in granting injunctive relief was greater than the harm to Plaintiffs. *Id.*, Ex. 5. The Michigan Court of Appeals affirmed Judge Murphy's decision. The Michigan Court of Appeals determined that Plaintiffs' appeal was moot, and that even if it were not moot, they failed to address all of the requirements for injunctive relief. The court did not address Plaintiffs' constitutional violation arguments. Plaintiffs did not file an application for leave to appeal to the Michigan Supreme Court.

After the Court of Appeals' decision, Defendants asked Plaintiffs on several occasions whether they wanted to pursue their administrative appeal. However, it was not until November 27, 2012, after the initiation of the instant action, that Plaintiffs confirm they wished to proceed with their appeal of the stewards' hearing. The administrative appeal was heard on April 25, 2013 and a decision was issued in October of this year. The record is silent as to the outcome of the Plaintiffs' administrative appeal of the stewards' decision.

On November 30, 2010, while the appeal was pending before the Michigan Court of Appeals, the MGCB issued an Order of Exclusion for each Plaintiff. On August 8, 2011, all of the Plaintiffs submitted license applications for the 2011 licensing year, however none of their applications were considered based on the Exclusion Orders. Nevertheless, Plaintiffs filed appeals of the "denial [sic] of 2011 occupational license." On November 16, 2011, Al Ernst, Racing Manager for the MGCB, responded to

Plaintiffs' appeals indicating that, based on the Exclusion Orders, Plaintiffs were prohibited from being licensed in the State of Michigan under the Racing Act. *Id.*, Ex. 9. He further noted that, "[a]s a result, your application was neither approved nor denied. Rather, it was not considered based on the language of the Exclusion Order." *Id.* Ernst advised Plaintiffs that "the time to appeal the Exclusion Order has long passed." *Id.*

Plaintiffs again submitted license applications in January of 2012. On or about January 15, 2012, Moody contacted MGCB regarding the status of Plaintiffs' license applications. Moody claims that Ernst advised him that he and the other Plaintiffs were ineligible for a license as long as they had legal counsel. Deputy Director Erik Pederson responded to Plaintiffs' applications by indicating that when Plaintiffs initiated judicial proceedings in the Wayne County Circuit Court, their administrative appeals of their occupational license suspensions was placed on hold. He requested that Plaintiffs inform him if they wished to pursue their appeal of the stewards' decision. He also informed Plaintiffs that the suspension and exclusion orders were based upon Plaintiffs failure to cooperate at the stewards investigative hearing as required by Mich. Admin. Code Rule 431.1035. *Id.*

III. LAW & ANALYSIS

A. Standard of Review

Federal Rule of Civil Procedure 56(a) empowers the court to render summary judgment "if the pleadings, depositions, answers to interrogatories and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See Redding v. St. Eward*, 241 F.3d 530, 532 (6th Cir. 2001). The Supreme Court has affirmed the court's use of summary judgment as an integral part of the fair and efficient administration of justice. The procedure is not a disfavored procedural shortcut. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *see also Cox v. Kentucky Dept. of Transp.*, 53 F.3d 146, 149 (6th Cir. 1995).

The standard for determining whether summary judgment is appropriate is "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Amway Distribs. Benefits Ass'n v. Northfield Ins. Co.,* 323 F.3d 386, 390 (6th Cir. 2003) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)). The evidence and all reasonable inferences must be construed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Redding*, 241 F.3d at 532 (6th Cir. 2001). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original); *see also National Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 907 (6th Cir. 2001).

If the movant establishes by use of the material specified in Rule 56(c) that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law, the opposing party must come forward with "specific facts showing that there is a genuine issue for trial." *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 270 (1968); *see also McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000). Mere allegations or denials in the non-movant's pleadings will not meet this burden, nor will a mere scintilla of evidence supporting the non-moving party. *Anderson*, 477 U.S. at 248, 252. Rather, there must be evidence on which a jury could reasonably find for the non-movant. *McLean*, 224 F.3d at 800 (citing *Anderson*, 477 U.S. at 252).

B. Defendants' Motion for Summary Judgment

1. 11th Amendment Immunity

As an initial matter, Plaintiffs cannot bring this action against the State of Michigan's MGCB because their claims are barred by the doctrine of sovereign immunity. *See Johnson v. Dellatifa*, 357 F.3d 539, 545 (6th Cir. 2004) ("The state of Michigan . . . has not consented to being sued in civil rights actions in the federal courts."); *Abick v. Michigan*, 803 F.2d 874, 877 (6th Cir. 1986). In addition to the States themselves, the Eleventh Amendment immunizes departments and agencies of the states. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). Therefore, to the extent Plaintiffs raise claims for money damages against the MGCB or the Defendants in their official capacities, such claims are barred by the Eleventh Amendment.

2. Qualified Immunity

Defendants also argue that they are entitled to qualified immunity because Plaintiffs have failed to identify the violation of a constitutional right, as well as failed to demonstrate that Defendants actions were not authorized under the law.

Government officials are generally immune from liability and civil damages insofar as their conduct does not violate clearly established federal statutory or constitutional rights of which a reasonable person should have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The doctrine of qualified immunity balances "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Qualified immunity recognizes that "reasonable mistakes can be made," and protects "all but the plainly incompetent or those who knowingly violate the law." *Dorsey v. Barber*, 517 F.3d 389, 394 (6th Cir. 2008).

Whether qualified immunity applies is a legal question. *See Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). This Court must undertake a two-part inquiry: (1) whether the Plaintiffs have alleged the deprivation of a constitutional right, and (2) whether that right was clearly established at the time of the defendant's alleged misconduct. *Pearson*, 555 U.S. at 232. Here, the Court concludes that Defendants are entitled to qualified immunity because Plaintiffs have failed to demonstrate the deprivation of a constitutional right.

i. Substantive Due Process

Plaintiffs maintain that Defendants have violated their substantive due process rights because they have a constitutionally protected property and liberty interest in their right to pursue a lawful occupation. Conversely, Defendants argue horse racing is a state licensed and highly regulated form of gambling, thus it does not fall within the ambit of life's common occupations. Because the Court concludes that harness racing is not one of life's common occupations, Plaintiffs cannot demonstrate their constitutional rights have been violated entitling Defendants to judgment in their favor on Plaintiffs' substantive due process claim.

Substantive due process under the Fourteenth Amendment "protects specific fundamental rights of individual freedom and liberty deprivation at the hands of arbitrary and capacious government action." *Gutziller v. Fenik*, 860 F.2d 1317, 1328 (6th Cir. 1988). To establish a violation of substantive due process, Plaintiffs must first show the existence of a constitionally-protected property or liberty interest. *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 201-04 (6th Cir. 1995). The United States Supreme Court has recognized that a liberty interest includes "the right of the individual . . . to engage in any of the common occupations of life." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972); *R.S.S.W., Inc. v. City of Keego Harbor*, 18 F. Supp. 2d 738 (E.D. Mich. 1998); *Sanderson v. Village of Greenhills,* 726 F.2d 284, 286-87 (6th Cir. 1984).

However, the term "any occupation" does not encompass every conceivable type of occupation. *See*

Van Horn v. Nebraska State Racing Comm'n, 304 F. Supp. 2d 1151, 1167 (D. Neb. 2004) (concluding that the plaintiff did not have a liberty interest in practicing veterinary medicine at the racetrack). Jobs in the horse racing industry are gambling related occupations that can be completely outlawed by the state legislature if it chooses. Moreover, the State of Michigan has a legitimate interest in regulating jobs in the gambling industry so that it can adequately protect the wagering public. The Horse Racing Act provides the Racing Commissioner with discretionary authority to issue occupational licenses. *See* MICH. COMP. LAWS § 431.308(1). Therefore, occupations in the horse racing industry are not common occupations of life and do not have a recognized liberty interest for purposes of due process. *See Medina v. Rudman*, 545 F.2d 244, 251 (1st Cir. 1976) ("[W]e do not consider racetrack ownership to be one of life's common occupations."); *Lasky v. Van Lindt*, 115 Misc.2d 259 (N.Y. Sup. Ct. 1982) ("[S]ince owning, training, and racing horses is not one of life's common occupations, it may be subject to the strictest regulation."); *Payne v. Fontenot*, 925 F.Supp. 414, 424-25, n.5 (M.D. La. 1995) (concluding that operating a video gaming establishment is an "uncommon occupation" because the state has a high interest in regulating its gambling industry); *Ziskis v. Kowalski*, 726 F.Supp. 902, 910-11 (D. Conn. 1989) (legalized gambling is not a protected liberty interest).

Similarly, Plaintiffs cannot establish they have a property right in the mere expectation of being licensed by the Racing Commissioner. *See Roth*, 408 U.S. at 577. Under the Horse Racing Law, an occupational license expires at the end of the calendar

year. Renewal is not automatic; instead individuals are requires to submit an application for each year. This application process, including screening of potential licensees, applies even if an individual was licensed during a previous year. Plaintiffs were last licensed in mid-2010, therefore they cannot claim a property interest in the mere desire for a license. Moreover, Plaintiffs "cannot possess a property interest in the receipt of a benefit when the state's decision to award or withhold the benefit is wholly discretionary." *Med. Corp., Inc. v. City of Lima*, 296 F.3d 404, 409 (6th Cir. 2002).

Based on the foregoing, the Court concludes that Defendants are entitled to judgment in their favor as to Plaintiffs' substantive due process claim.

ii. Procedural Due Process

Plaintiffs claim they were deprived of procedural due process, however their claim fails as a matter of law because they were provided adequate notice and an opportunity to be heard prior to the suspension of their occupational licenses.

Generally, procedural due process requires a state action to "provide a person with notice and an opportunity to be heard before depriving that person of a property or liberty interest." *Warren v. City of Athens, Ohio*, 411 F.3d 697, 708 (6th Cir. 2005). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mator v. City of Ecorse*, 30 F. App'x 476, 480 (6th Cir. 2008).

Here, Plaintiffs were provided procedural due process before any adverse action was taken against their licenses for failing to cooperate. The Stewards' summonses provided each Plaintiff with advance notice of the hearing, the purpose of the hearing and that they had a right to be represented by counsel at the hearing. Plaintiffs were ultimately suspended for failing to comply with the conditions precedent for occupational licensing under the Horse Racing Act, Mich. Admin. Code R. 431.1035(2). The Stewards' decision identified the rules under which the Plaintiffs were suspended, specifically Plaintiffs were suspended for the failure to "cooperate in every way with the commissioner . . . 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(2).

Plaintiffs are simply incorrect in arguing they were denied procedural due process because they were summarily suspended pursuant to MICH. COMP. LAWS § 431.316(7). A summary suspension occurs when the Executive Director suspends a licensee on motion or complaint *prior* to an administrative hearing. *See* MICH. COMP. LAWS § 431.316(7) (emphasis added). In this case, Plaintiffs were suspended after a Stewards' hearing. This is supported by the testimony of Defendants Kalm, Parker and Garrison. *See* Defs.' Resp. to Mot. for Summ. J., Exs. 1, 2 and 6. Therefore, Plaintiffs were not summarily suspended under § 431.316(7) and the fourteen day provision is inapplicable herein. As such, Plaintiffs were not denied procedural due process prior to the suspension

of their licenses and Defendants are likewise entitled to judgment in their favor on this claim.

iii. Unconstitutional Conditions

The doctrine of 'unconstitutional conditions' provides that the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the constitutional right." *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). Plaintiffs maintain that Defendants have subjected them to an unconstitutional condition by requiring Plaintiffs to waive their Fifth Amendment right against self-incrimination or suffer the adverse consequences of losing their livelihoods.

The leading case concerning the use of statements during an investigation is the United States Supreme Court decision in *Garrity v. New Jersey*, 385 U.S. 493, 499 (1967), where the court held that when public employees provide statements during an investigation into their workplace conduct, such statements cannot be used in a subsequent criminal proceeding. *Id.* In *Garrity*, the plaintiff-officers were being investigated for alleged wrongdoing in the handling of certain cases. *Id*. at 494. Prior to questioning, the plaintiff-officers were informed that they could invoke their Fifth Amendment right against self-incrimination but if they chose to rely on this right, they would be subject to removal. *Id.* The officers' statements were subsequently used against them in a criminal proceeding. *Id.* at 495. The *Garrity* court held that "[t]he option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of

free choice to speak or remain silent[,]" thus the use of the plaintiff-officers' statements in the later criminal action was unconstitutional. *Id.* at 500.

Later, the United States Supreme Court held that if an employee

> refuse[s] to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, the privilege against self-incrimination would not [be] a bar to his dismissal.

Gardner v. Broderick, 392 U.S. 273, 278 (1968). Therefore, taken together, these cases demonstrate that "a government employee who has been threatened with an adverse employment action by her employer for failure to answer questions put to her by her employer receives immunity from the use of her statements . . . in subsequent criminal proceedings, and, consequently, may be subject to such an adverse employment action for remaining silent." *Sher v. U.S. Dep't of Veterans Affairs*, 488 F.3d 489, 501 (1st Cir. 2007). *Gardner* and its progeny do not prohibit an employer from questioning an employee concerning matters related to that employees' official duties. *See Aguilera v. County of Los Angeles*, 510 F.3d 1161, 1171 (9th Cir. 2007). "In *Gardner*, the Court noted that the constitutional violation arose not when a public employee was compelled to answer job-related questions, but when that employee was required to waive his privilege against self-incrimination while answering his employer's legitimate job-related

questions." *Id.; see also, Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 801, 806 (1968) ("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."); *Wiley v. Mayor & City Council of Baltimore*, 48 F.3d 773, 777 (4th Cir. 1995)("This language strongly indicates that forcing a public employee to answer potentially incriminating job-related questions does not implicate the Fifth Amendment unless the employee is also compelled to waive his privilege.")

Here, similar to the facts in *Aguilara*, Defendants did not violate Plaintiffs' Fifth Amendment right when they questioned them during the stewards' hearing about possible race fixing because Plaintiffs were not forced to answer the stewards' questions nor were they required to waive their Fifth Amendment rights. *See Aguilara*, 510 F.3d at 1172 (finding no constitutional violation where "the deputies were not compelled to answer the investigator's questions or to waive their immunity from self-incrimination. Indeed, it appears that the deputies were never even asked to waive their immunity."); *see also Morgan v. City of Columbus*, No. 92-4086, 1993 U.S. App. LEXIS 25698, *21 (6th Cir. Oct. 1, 1993) (concluding the Fifth Amendment posed no bar to the plaintiff's discharge when he refused to answer questions that would incriminate him during the police department's internal affairs's investigation of his conduct because "he was not required to answer those questions that might be incriminatory . . . .")

Moreover, Plaintiffs' claim also fails because they have never been charged with a crime and the Sixth Circuit Court of Appeals has held that "mere coercion does not violate the . . . Self- Incrimination Clause absent such use of the compelled statements in a criminal case." *McKinley v. City of Mansfield*, 404 F.3d 418, 430 (6th Cir. 2005). The *McKinley* court also indicated that "only once compelled incriminating statements are used in a criminal proceeding" has an "accused suffered the requisite constitutional injury for purposes of a § 1983 action." *Id.*; *see also Lingler v. Fechko*, 312 F.3d 237, 238 -240 (6th Cir. 2002) (no Fifth Amendment violation sufficient to sustain a § 1983 action where police officer-employees who made incriminating statements in compulsory interviews with superiors were never prosecuted.")

Lastly, Plaintiffs have not shown that their statements were in fact entitled to Fifth Amendment protection. Here, the stewards posed several questions to the Plaintiffs which had no criminal implications attached to them. Moreover, Plaintiffs now maintain that they were not involved in race fixing , therefore the Fifth Amendment has no relevance to the instant proceedings as none of Plaintiffs' answers would subject them to criminal sanctions. Accordingly, based on the above considerations, Plaintiffs' unconstitutional conditions claim fails as a matter of law.

C. Plaintiffs' Amended Motion for Partial Summary Judgment

In the present motion, Plaintiffs seek judgment in their favor on their due process and unconstitutional conditions claims, as well as a permanent injunction

requiring Defendants to accept their applications and issue occupational licenses. As previously found by this Court, Plaintiffs were neither suspended nor excluded for exercising their Fifth Amendment rights, rather Plaintiffs were disciplined for their failure to cooperate, a condition precedent to occupational licensing under the Horse Racing Law. Plaintiffs cannot demonstrate a viable unconstitutional conditions claim because the stewards never required that Plaintiffs waive their constitutional right to remain silent, rather Plaintiffs asserted their Fifth Amendment rights and those rights have not been infringed upon. *McKinley*, 404 F.3d at 430; *Lingler*, 312 F.3d at 238 -240; *Morgan*, 1993 U.S. App. LEXIS 25698, at *21; *Aguilera*, 510 F.3d at 1171; *Sher*, 488 F.3d at 501.

Additionally, Plaintiffs' substantive and procedural due process claims fail as a matter of law. Plaintiffs have no property or liberty interest in occupational licenses, nor were they summarily suspended under MICH. COMP. LAWS § 431.316(7). *See Medina*, 545 F.2d at 251; *Payne*, 925 F.Supp.at 424-25, n.5; *Ziskis*, 726 F.Supp. at 910-11; *Roth*, 408 U.S. at 577.

Based on the foregoing, Plaintiffs are not entitled to injunctive relief because their claims lack merit. *See McCuiston v. Hoffa*, 351 F.Supp. 2d 682, 689 (E.D. Mich. 2005)("At the permanent injunction stage, the requirements for injunctive relief are success on the merits . . . ."). Accordingly, Plaintiffs' Motion for Partial Summary Judgment is denied.

IV. CONCLUSION

For the reasons stated above, Defendants' Motion for Summary Judgment [#85] is GRANTED.

Plaintiffs' Amended Motion for Partial Summary Judgment [#98] is DENIED.

Plaintiffs' Motion for Order to Allow Deposition of Non-Party Witness [#97] is MOOT.

Defendants' Motion to Strike [#112] is GRANTED. Document No. 111 is hereby STRICKEN.

Plaintiffs' Motion to File Supplemental Authority [#114] is DENIED.

This cause of action is dismissed.

SO ORDERED.

Dated: November 27, 2013

/s/Gershwin A Drain
GERSHWIN A. DRAIN
U.S. DISTRICT JUDGE

Case No. 16-2244/16-2369

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

JOHN MOODY; DONALD HARMON; RICK RAY; WALLY MCILLMURRAY

Plaintiffs - Appellees
Cross - Appellants

v.

AL ERNST: JOHN LESSNAU

Defendants - Appellants
Cross - Appellees.

BEFORE: COLE, Chief Circuit Judge; BATCHELDER, Circuit Judge; MOORE, Circuit Judge;

Upon consideration of motion to stay mandate,

It is ORDERED that the mandate be stayed to allow Al Ernst, et al time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case, but shall promptly issue if the petition is not filed within ninety days from the date of final judgment by this court.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk
Deborah S. Hunt, Clerk
Issued: December 08, 2017

Case No. 14-1511

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

JOHN MOODY; DONALD HARMON;
RICK RAY; WALLY MCILLMURRAY
Plaintiffs - Appellants
v.

MICHIGAN GAMING CONTROL BOARD;
RICHARD KALM; GARY POST; DARYL PARKER;
RICHARD GARRISON; BILLY LEE WILLIAMS;
JOHN LESSNAU; AL ERNST;
MICHIGAN DEPARTMENT OF ATTORNEY
GENERAL, Criminal Division
Defendants - Appellees

BEFORE: KEITH, MERRITT and BOGGS, Circuit Judges

Upon consideration of the appellees' motion to stay the mandate,

It is therefore **ORDERED** that the motion be and it hereby is **DENIED**.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk
Deborah S. Hunt

Issued: August 25, 2015

Nos. 16-2244/2369
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 14, 2017
DEBORAH S. HUNT, Clerk

JOHN MOODY; DONALD HARMON; RICK RAY; WALLY McILLMURRAY, Plaintiffs-Appellees/ Cross-Appellants,	)
v.	) ORDER
MICHIGAN GAMING CONTROL BOARD, ET AL., Defendants,	)
AL ERNST; JOHN LESSNAU, Defendants-Appellants/ Cross-Appellees.	)

BEFORE: COLE, Chief Judge; BATCHELDER and MOORE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt
Deborah S. Hunt, Clerk

No. 14-1511
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 12, 2015
DEBORAH S. HUNT, Clerk

JOHN MOODY, ET AL.,)
Plaintiffs-Appellants,)
v.) O R D E R
MICHIGAN GAMING)
CONTROL BOARD, ET AL.,)
Defendants-Appellees.)

BEFORE: KEITH, MERRITT, and BOGGS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt
Deborah S. Hunt, Clerk

U.S. Constitution - Amendment 5

Amendment 5 - Trial and Punishment, Compensation for Takings

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.