No. 15-2394

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CATHERINE PHILLIPS, et al.

Plaintiffs-Appellants,

v.

RICHARD SNYDER, et al.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
Hon. George C. Steeh
2:13-cv-11370

BRIEF OF PLAINTIFFS-APPELLANTS CATHERINE PHILLIPS, et al.

ORAL ARGUMENT REQUESTED

DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 25, PLAINTIFF-APPELLANTS, makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation? **No.**

   If the answer is YES, list below then identify of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome? **No.**

   If the answer is YES, list the identity of such corporation and the nature of the financial interest:

Respectfully submitted,

*/s/Cynthia Heenan*_____

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The Michigan's Public Act 436, is an unprecedented usurpation of local governmental authority and the voting rights of local citizens. It is challenged on numerous federal constitutional grounds and raises multiple issues of first impression, which have not been previously addressed by this or any court. The complexity of the issues involved and the uniqueness of the application of federal constitutional principles to Michigan's unprecedented statutory scheme will benefit from exploration in oral argument.

JURISDICTIONAL STATEMENT

This is an appeal as of right from a final order pursuant to 28 USC § 1291. On November 19, 2014, the District Court entered an order dismissing all of Plaintiffs' claims except Count IV of Plaintiffs' Amended Complaint. Plaintiffs filed a Motion for Reconsideration as to the dismissed counts, which was denied by the District Court on December 15, 2014. Thereafter, Plaintiffs stipulated to dismiss Count IV without prejudice, noting that the stipulation disposed of the remaining claims in the case, which is reflected in the District Court's Order of October 23, 2015. This order constitutes a final order dismissing all claims and giving this Court jurisdiction to hear this appeal.

Plaintiffs timely filed their Notice of Appeal on November 13, 2015 pursuant to Rule 4(a)(6).[1] The underlying subject matter jurisdiction arises pursuant to 42 USC § 1983 and 28 USC § 1331 (federal question) and 28 USC § 1343 (civil rights).

[1] Fed. R. App. P. 4(a)(6).

STATEMENT OF THE ISSUES

Whether the District Court erred in granting the Defendants' Rule 12 (b)(6) Motion to Dismiss, prior to factual development of Plaintiffs' claims, by holding that Michigan's Public Act 436 (P.A. 436), which has principally been imposed on majority African American cities and school districts and which removes *all* governing power from local elected officials and transfers that power to political appointees violates the United States Constitution.

The facts arising as a result of P.A. 436's enactment and implementation are novel and have not been imposed elsewhere in the history of the nation. As a result, the issues presented are those of first impression for the court and raise issues of whether P.A. 436 violates citizens' rights as recognized under 14th Amendment understandings of substantive due process and the Equal Protection Clause, under the Guarantee Clause, under the Voting Rights Act and under the 1st Amendment.

STATEMENT OF THE CASE

This appeal seeks to restore to the constitutional rights of all residents in Michigan who have lost their voting rights and/or had their 1st Amendment rights infringed by Michigan's novel experiment in local governance. Plaintiffs' underlying action challenges the legality of Michigan's P.A.436, also commonly known as the emergency manager law.

Michigan had previously enacted Public Acts 101 and 72[2] authorizing the Governor to appoint "emergency *financial* managers" to address financial issues of municipalities in fiscal distress.[3] Unsatisfied with the limited authority granted to emergency "financial" managers, the Michigan legislature, on March 16, 2011, enacted Public Act 4 (P.A. 4). Public Act 4 significantly extended state control over municipalities and school districts. The new law allowed the Governor to declare a financial emergency and, upon declaration of a financial emergency, municipalities and school districts became subject to long-term oversight and control by state authorities. Not least of these was the authority of the Governor to appoint 'emergency managers' (EM).[4]

Upon appointment of an EM, the governing power of all local elected officials was immediately suspended and all governing power was transferred to

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[2] Dkt. #39, 1st Amended Complaint, ¶¶ 34 & 35, Pg. ID 517.

[3] *Id*. at ¶¶ 34 & 36.

[4] *Id*. at ¶¶ 44 & 47.

the EM. Thus, EMs were given the sole and full authority to govern local municipalities and school districts.[5] Public Act 4 troubled many Michigan citizens because of, among other things, it codified observed historical racial and class discrimination patterns,[6] since the authority granted by P.A. 4 (and subsequently P.A. 436) was predominately exercised in majority African American communities with the resulting loss of local control.[7] Opponents collected the necessary signatures to hold a referendum on P.A. 4 and the statute was repealed after the referendum passed with 60% of the vote on November 6, 2012.

Notwithstanding the repeal of P.A. 4, the legislature quickly enacted P.A. 436 during a 'lame duck' session of the outgoing state legislature in December 2012. The only significant difference between P.A. 4 and P.A. 436, was the inclusion of nominal appropriations provision. Under Michigan law, the appropriations provision in the new statute bars another public referendum on the new law. Enactment of the new law defeats the 1st Amendment rights of those who voted to repeal P.A. 4.

Plaintiffs have alleged and it must be accepted as true at this point in the proceedings, that the state government has applied P.A. 4 and P.A. 436 primarily

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[5] (P.A. 4 Sec. 19(1)(z)(ee)). See also, Dkt. #39, 1st Amended Complaint at ¶ 48, Pg. ID 520.

[6] Dkt. #39, 1st Amended Complaint at ¶¶ 84, 85, 86 & 87, Pg. ID Nos. 526-527

[7] *Id*.

to majority African American communities. Fifty-two percent of Michigan's African American population has been subject to P.A. 436 in their cities and/or school districts.[8] Once an EM is appointed under P.A. 436, all governing power of local elected officials is automatically transferred to the EM and these cities and school districts have suffered a dramatic loss of voting rights.

The net effect of the emergency manager law has been that, as a practical matter, on election days the majority of Michigan's African American voters, many poor people of all races, and other residents of the same localities have gone to the polls to cast ballots for candidates of their choice but these candidates have no authority to govern.[9] The result is that these Michigan citizens have lost their fundamental right to vote under the Constitution and have otherwise had their right to vote debased and diluted in comparison with other Michigan residents. The governance system imposed by P.A. 436 results in a profound lack of public accountability to the persons governed.

The lead-poising of the Flint water supply and the ongoing failure of the Detroit Public Schools exemplifies the gross failures of P.A 4 and P.A. 436 to actually solve the problems they are purportedly designed to address and further exemplify the lack of public accountability and responsiveness upon which

[8] *Id*. at ¶ 86.

[9] *Id*. at ¶¶81 & 82.

Michigan's traditional forms of democratic governance are based.

This is in stark contrast to the circumstances of voters who live in municipalities where residents' votes result in the election of officials who actually govern.

SUMMARY OF THE ARGUMENT

While the issues presented are ones of first impression for the court, P.A. 436 violates rights that are well-recognized under developed understanding of 14th Amendment substantive due process and the Equal Protection Clause, the Guarantee Clause, the Voting Rights Act and the 1st Amendment. The District Court committed clear errors of law and improperly made findings of incorrect and disputed facts such that dismissal under Rule 12(b)(6) was improper.

On Plaintiffs' 14th Amendment substantive due process claims, the District Court committed clear error when finding that the right to vote is not a fundamental right; that there is no fundamental right to vote for legislative officials; and by misconstruing Plaintiffs' claim as only a vote dilution claim.

On Plaintiffs' Guarantee Clause claims the District Court erred by holding that the requirements of a republican form of government do not apply to a state's organization of its municipal subdivisions, thus allowing states to manipulate their subdivisions to defeat the Clause's intent and purpose.

On Plaintiff's 14th Amendment's Equal Protection Clause claims based upon infringement of citizens' fundamental right to vote, the District Court committed multiple errors. The court erred by again finding that the right to vote is not a fundamental right and that Michigan's citizens have not lost a right to vote when their elected officials are *wholly divested* of governing power. The court erred by

not recognizing that local legislative officials exercise state legislative power as state agents. As a consequence, there is debasement and dilution of residents voting rights in state legislative matters when an emergency manager is appointed when compared to the voting power of residents in other communities. The court erred as well in finding that the Constitution only protects the form of voting and not its substance. The court further erred by arbitrarily finding that Michigan citizens in communities with an emergency manager are not similarly situated to other Michigan citizens and then applying a rational basis standard of review.

Plaintiffs also claim that P.A. 436 violates the Equal Protection Clause by conditioning the right to vote in local elections upon residents' wealth. The wealth of residents is directly and intimately related to the financial circumstances of communities that receive emergency managers. The court erred in finding that the only prohibited wealth restrictions are those that require the payment of a poll tax or some other fee. The court further erred when making assumed findings regarding the state's criteria for receiving an emergency manager and further finding that factors such as the overall financial condition, the status of financial books not being order, and poor management of financial resources are neutral criteria unrelated to a community or an individual's wealth.

The District Court erred in dismissing Plaintiffs' §2 Voting Rights Act claim when it applied an incorrect standard of review that was unduly narrow and has

only been found to be applicable to §5 claims. The court further erred by finding that §2 is not implicated when voting rights are impaired by changes resulting in the abolition of an elective office and by omitting the well-recognized 'Senate Factors' from its analysis. The court finally and fatally erred by basing its decision on a factually and legally incorrect finding that voters continue to possess the right to repeal P.A. 436 by referendum.

On Plaintiffs'1st Amendment claim, the District Court erred by finding that reenactment of a virtually identical law after a successful citizens' referendum does not implicate protected freedom of speech and association rights. The court also incorrectly held that Plaintiffs continue to have the full array of political avenues of relief available to rescind P.A. 436. The court further erred by overlooking well-recognized understandings that an elected official's loss of governing authority impair voter's 1st Amendment rights.

On the 13th Amendment claim of Plaintiffs, the District Court wrongly determined that the declaration of a financial emergency and resulting appointment of an emergency manager is a 'routine' incident to citizenship and that P.A. 436 does not create a restraint on the ability to vote when all governing power is removed from elected officials in favor of political appointees.

Finally, Plaintiffs' claim that P.A. 436's 18-month removal process violates the Equal Protection Clause by treating communities where an emergency manager

was appointed under P.A. 4 the same as those communities with an emergency manager appointed under P.A. 436. The court erred by failing to apply strict scrutiny and by finding that the differing treatment is rationally related to the statute's purpose.

STANDARD OF REVIEW

It is well established that the standard of review on appeal from Rule 12(b)(6)[10] motions is *de novo* as to questions of law.[11] The Sixth Circuit summarizes:

> We review de novo a district court's dismissal of a complaint under FED. R. CIV. P. 12(b)(6). We must read all well-pleaded allegations of the complaint as true. Our review is essentially the same as the district court's; we take the plaintiff's factual allegations as true.[12]

Before dismissal under Rule 12(b)(6) is properly granted, there must be no set of facts that would allow the plaintiff to recover.[13] Matters outside the pleadings are not be considered.[14]

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[10] Fed. R. Civ. P. 12(b)(6).

[11] See *Regensburger v. City of Bowling Green, Ohio*, 278 F.3d 588, 592 (6th Cir. 2002) (citing *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986), *Cousin v. McWherter*, 46 F.3d 568, 574 (6th Cir. 1995), and Fed. R. Civ. P. 52(a))

[12] *Weiner v. Klais & Co.*, 108 F.3d 86, 88 (6th Cir. 1997) (citations and internal quotation marks omitted).

[13] *Hammond v. Baldwin*, 866 F.2d 172, 175 (6th Cir. 1989).

[14] *Id.*

ARGUMENT

A. PUBLIC ACT 436 VIOLATES FUNDAMENTAL RIGHTS PROTECTED BY THE DUE PROCESS CLAUSE OF THE U.S. CONST. AMEND. XIV. (COUNT I).

Plaintiffs' claim that P.A. 436 violates 14th Amendment[15] substantive due process by: 1) revoking the fundamental right to vote for local legislative offices in EM communities; and 2) by instituting an appointive system for local legislative offices that is fundamentally unfair and results in significant disenfranchisement while departing from long-established state election practices.

In this case, the District Court erred by incorrectly finding that substantive due process only protects fundamental privacy rights, not voting rights and when it misunderstood Plaintiffs' claim as solely alleging a vote dilution claim. In each respect, the District Court's errors led to improper dismissal and precluded development of a factual record.[16]

The Supreme Court has long-held that substantive due process "provides heightened protection against government interference with fundamental rights."[17]

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[15] U.S. CONST. AMEND. XIV.

[16] A factual record would establish that the right to vote for legislative officials is deeply embedded within nation's traditions and concepts of ordered liberty; that P.A. 436 is not narrowly tailored to its aims; and that P.A. 436's impact on voting rights results in significant disenfranchisement and departs from long-established state election practices.

[17] *Wash. v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)) (citing *Reno v. Flores*, 507 U.S. 292, 301-302

The Court holds that the 14th Amendment:

> **[S]pecially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty**," such that "neither liberty nor justice would exist if they were sacrificed," … Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decision-making,"[18]

When a fundamental right is at issue, the Supreme Court requires that "**the infringement [be] narrowly tailored to serve a compelling state interest**."[19]

The Sixth Circuit states further:

> The Due Process Clause is implicated … **where a state's voting system is fundamentally unfair** … for example, if a state employs [system] … that **result in significant disenfranchisement** and vote dilution … or **significantly departs from previous state election practice**.[20]

The infringement on Plaintiffs' right to vote violates the standards of the Supreme Court and the Sixth Circuit, since P.A. 436 is not narrowly tailored to a compelling state interest and establishes a voting system for local officials that is fundamentally unfair.

(1993) and *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

[18] *Id.* at 720-721 (1997) (internal citations and quotations omitted). See also, *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977); *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937); and *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934))

[19] *Wash. v. Glucksberg*, 521 U.S. at 721.

[20] *Warf v. Bd. of Elections*, 619 F.3d 553, 559 (6th Cir. 2010) (emphasis added) (citing *League of Women Voters v. Brunner*, 548 F.3d 463 (6th Cir. 2008); *NE. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 597-98 (6th Cir. 2012) and *Griffin v. Burns*, 570 F.2d 1065, 1078-79 (1st Cir. 1978)).

1. THE DISTRICT COURT ERRED IN FINDING THAT SUBSTANTIVE DUE PROCESS ONLY PROTECTS FUNDAMENTAL PRIVACY RIGHTS, NOT VOTING RIGHTS

The District Court incorrectly found that substantive due process only protects privacy rights, not voting rights. The court wrote that under substantive due process, "**each recognized right is in the nature of a privacy right**."[21] The District Court then wrongly concluded that the right to vote is not a fundamental right.[22] The District Court's conclusion is wholly incorrect.[23]

Contrary to the District Court's finding, the Supreme Court has long held that the right to vote is a "fundamental political right", entitled to protection under the 14th Amendment.[24] Federal circuits have repeatedly recognized that the right to

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[21] Dkt. #49 Order Granting in Part and Denying in Part Def. Mot. to Dismiss and Denying Def. Mot. to Stay Proceedings, at 9-10, Nov. 19, 2014. (emphasis added) Pg. ID Nos. 896-897

[22] *Id*. at 11. (the "Court has never recognized the right to vote as a right qualifying for substantive due process protection.").

[23] The District Court erred by attempting to separate fundamental rights protected by equal protection from those protected by substantive due process. The Supreme Court however first determines whether a right is fundamental within the 14th Amendment as whole and then, based upon the specific facts, applies the protections of the appropriate clause to the facts of the case.

[24] *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966); *Harman v. Forssenius*, 380 U.S. 528, 537 (1965); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012); *Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219, 234 (6th Cir. 2011); *Warf v. Bd. of Elections*, 619 F.3d at 559; and *League of Women Voters v. Brunner*, 548 F.3d at 476.

vote is a "precious right,"[25] "preservative of all rights."[26] The Court summarizes: "we have often reiterated that voting is of the most fundamental significance"[27] and all "[o]ther rights, even the most basic, are illusory if the right to vote is undermined."[28] The Supreme Court and Sixth Circuit have thus explicitly found that the right to vote is a fundamental right under the 14th Amendment.[29] This is settled law.

In this case, the fundamental right at issue is a right to vote for the state's local legislative officials. **No court has considered the questions presented by this case. No other state has suspended or revoked the election of legislative officials in favor of a system of political appointments.**

While no court has considered these issues, certain principles are well-recognized. In *Williams v. Rhodes*, the Court highlighted the fundamental nature of the right to elect legislators writing that "**[n]o right is more precious** in a free country than that of having a voice in **the election of those who make the laws**

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[25] *Williams v. Rhodes*, 393 U.S. 23, 31 (1968); *Reynolds*, 377 U.S. at 560; and *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

[26] See citations at fn. 24-29.

[27] *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (U.S. 1979).

[28] *Williams*, 393 U.S. at 30.

[29] See citations *supra*, fn 24. See also, *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981); *Griffin v. Burns*, 570 F.2d 1065, 1078 (1st Cir. 1978); *Briscoe v. Kusper*, 435 F.2d 1046, 1053-54 (7th Cir. 1970).

under which, as good citizens, we must live."[30] In *Reynolds v. Sims*, the Court found that [a]s long as ours is a representative form of government … **the right to elect legislators … is a bedrock of our political system**.[31]

The *Reynolds* Court writes further:

> **[E]ach and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them**. Full and effective participation by all citizens … requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. **Modern and viable state government needs, and the Constitution demands, no less**.[32]

Notably, the *Reynolds* Court used the plural when finding that citizens have a right to vote for the representatives of their "State's legislative **bodies**."[33] As discussed further in section B.1., **city and township councils are state legislative bodies**.[34] They possess no independent legislative power and municipalities have no sovereign powers.[35] Rather, their legislative power is directly delegated from

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[30] *Williams*, 393 U.S. at 30.

[31] *Reynolds*, 377 U. S. at 562. (emphasis added).

[32] *Id*. at 565.

[33] *Id.*

[34] *Equality Found. v. City of Cincinnati*, 1998 U.S. App. LEXIS 1765, 3 (6th Cir. 1998) (J. Boggs concurring: the "Constitution contemplates only two sovereigns: the United States itself … and the respective states… [cities] are not constitutionally cognizable political sovereignties"). Attached as Exhibit 1.

[35] See *Belle Isle Grill Corp v Detroit*, 256 Mich. App. 463, 480-481 (2003) ("the

the state and it is the state's legislative power that they exercise. As such, *Reynolds* should be found to extend the right of local citizens to vote for all legislative officials of the state.

In *Sailors v. Bd. of Ed. of Kent County*,[36] the Supreme Court further suggested a right to vote for local legislative officials. While finding that elections were not required for local school board members, the Court cautioned that "local officers of the **nonlegislative** character" may be appointed.[37] Likewise in *Mixon v. Ohio*, the Sixth Circuit limited its holding to find that "there is no fundamental right to elect **an administrative body** such as a school board."[38] The Supreme Court and Sixth Circuit's omission of legislative officials from their holdings must be presumed intentional and shows that different considerations must be analyzed when considering whether a right to vote exists for legislative bodies.

Contrary to the District Court's findings,[39] the Supreme Court did not

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police power of … a home rule city is of the same general scope and nature as that of the state."). *Detroit v Walker*, 445 Mich. 682, 690 (1994);

[36] *Sailors v. Bd. of Ed. of Kent County*, 387 U.S. 105 (1967).

[37] *Id.* at 108. (emphasis added). See also, *id*. at 110.

[38] 193 F.3d 389, 402 (6th Cir. 1999). See also *Moore v. Detroit Sch. Reform Bd.*, 293 F.3d at 365. ("citizens do not have a fundamental right to elect *nonlegislative, administrative* officers").

[39] Dkt. #49, Order Granting in Part and Denying in Part Def. Mot. to Dismiss and Denying Def. Mot. to Stay Proceedings at 14-16, Pg. ID Nos. 901-903.

abandon *Sailors* three years later in *Hadley v. Junior College Dist.*[40] Rather, *Hadley* addressed a different issue, **whether the one-person-one-vote rule applies for all elective offices**. In *Hadley*, the Court examined facts involving the selection of a regional board of junior college education. The Court rejected as "unmanageable" the state's argument that the one-person-one-vote rule should be conditioned upon a classification of whether the office at issue is administrative or legislative.[41] The Court held that whenever the state establishes a voting system for selecting office holders, the one-person-one-vote rule applies, regardless of whether the office is administrative or legislative.[42] The *Sailors* decision addressed a different question - whether the Constitution requires elections for certain public offices. The *Sailors* Court held that elections are not required for **nonlegislative** offices, but did not reach the issues presented by this case.

At this stage of the present case, there should be no factual dispute that P.A. 436 establishes a system eliminating elections for local legislative offices in favor of a system of political appointments. The law does this through the powers granted to EMs who, upon their appointment, assume all the powers of the

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[40] *Hadley v. Junior College Dist.*, 397 U.S. 50 (1970).

[41] *Id.* at 55-56.

[42] *Id.* at 56.

community's elected legislative officials.[43] Factual development would show that P.A. 436 is a radical departure from the state's history of selecting these officials by elections.

First the first time in our nation's history, Michigan has revoked elections for local legislative officers in favor of political appointees, who possess the **full scope** of local legislative power. Michigan's experiment infringes a fundamental right and violates substantive due process because it is not narrowly tailored to a compelling state interest and because it establishes a system that is fundamentally unfair. The court improperly dismissed Plaintiffs' claim, precluding the development of a factual record that would further show the merits of this claim.

2. THE DISTRICT COURT MISUNDERSTOOD PLAINTIFFS' CLAIM AS SOLELY A VOTE DILUTION ARGUMENT.

The district further erred by misconstruing the basis of Plaintiffs' substantive due process claim, recasting it as an equal protection argument. The court wrote that "plaintiffs' theory is not that they were unable to vote, but that the meaningfulness of their vote is unequal to those in localities without an EM"[44] and concluded that the claim was therefore was an Equal Protection Clause argument.

While Plaintiffs have argued, concurrently and alternatively, that P.A. 436

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[43] See MCL §141.1549 (2) and §141.1552 (1)(dd). EMs have, in fact, adopted dozens, if not hundreds of local laws.

[44] Dkt. #49, Order Granting in Part and Denying in Part Def. Mot. to Dismiss and Denying Def. Mot. to Stay Proceedings at 9-11, Pg. ID Nos. 896-898.

also violates the Equal Protection Clause by debasing and diluting residents' right of vote, Plaintiffs' have however also asserted a *separate and distinct* substantive due process claim as stated above.[45] By recasting Plaintiffs' theory solely as a vote dilution claim, the District Court dispensed with the required review and incorrectly entered dismissal pursuant to Rule 12(b)(6).

B. PUBLIC ACT 436 VIOLATES THE REPUBLICAN FORM OF GOVERNMENT CLAUSE (COUNT II).

The Constitution's Guarantee Clause provides: "The United States shall guarantee to every State in this Union a Republican Form of Government."[46] A republican form of government is one where citizens possess the right to elect officials exercising **"**legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people."[47]

In *New York v. United States*,[48] the Court recognized that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions."[49] Writing for the majority, Justice Sandra Day O'Connor noted that nonjusticiability

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[45] Dkt. #39. 1st Amended Complaint, at ¶¶91-105, Pg. ID Nos. 528-530.

[46] U.S. CONST. ART IV, §4.

[47] *In re Duncan*, 139 U.S. 449, 461 (1891). (emphasis added); See also, *Largess v. Supreme Judicial Court*, 373 F.3d 219, 227 (1st Cir. 2004) cert. denied by 543 U.S. 1002 (2004)

[48] *New York v. United States*, 505 U.S. 144 (1992).

[49] *Id.* at 185 (emphasis added).

has not always been the rule[50] and she then assumed that the claims at issue were justiciable before finding that the Clause was not violated.[51]

On Plaintiffs' substantive due process claim, the District Court applied an incorrect standard for consideration of Plaintiffs' Guarantee Clause claim. The trial court solely based its dismissal on the absence of case law applying the Clause to a state's local governments.[52]

The Supreme Court however clearly indicates that the Guarantee Clause applies to a state's organization of its subdivision. Plaintiffs' cited *Kies ex rel. Att'y Gen. of Mich. v. Lowrey*.[53] In that case, the Court assumed that the Guarantee Clause may apply to municipal corporations, but found that the legislature had not violated the Constitution.[54] A second Supreme Court decision, again cited by the Plaintiffs, further examined state actions concerning municipalities. In *Forsyth v. Hammond*,[55] the Supreme Court analyzed the facts under the Guarantee Clause and found that a system for municipal annexation utilized by the City of Hammond did

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[50] *Id.*

[51] *Id.*

[52] Dkt. #49, Order Granting in Part and Denying in Part Def. Mot. to Dismiss and Denying Def. Mot. to Stay Proceedings, at 12, Pg. ID 899.

[53] 199 U.S. 233 (1905). See Dkt. #45-1. Brief In Support Of Plaintiffs' Response To Defendants' Motion To Dismiss, at fn. 32, Pg. ID 712.

[54] *Kies ex rel. Att'y Gen. of Mich. v. Lowrey*, 199 U.S. 233, 239 (1905).

[55] *Forsyth v. Hammond*, 166 U.S. 506 (1897).

not violate Art IV, §4 of the Constitution.[56]

A blanket rule finding the Guarantee Clause inapplicable to municipalities is counter to principles articulated by the Supreme Court and would render the Clause meaningless. The Supreme Court cautions that "[a] **State cannot of course manipulate its political subdivisions so as to defeat a federally protected right**.[57] As recognized by the District Court in this case, municipalities are instrumentalities created by state government. Inapplicability would leave the state free to delegate all the functions of state government to its municipalities and thereby entirely circumvent the Guarantee Clause's requirements.

The case before the court is readily distinguishable from prior cases where the nonjusticiability doctrine was applied. None of the prior cases address the core issue in this case - whether state government can vest **all local governing authority and legislative power in one unelected official**. Under any recognized definition of a republican form of government, it cannot and Plaintiffs have properly pled a claim for relief such that dismissal pursuant to Rule 12(b)(6) was improper.

C. PUBLIC ACT 436 VIOLATES VOTING RIGHTS PROTECTED BY THE EQUAL PROTECTION CLAUSE OF THE U.S. CONST. AMEND. XIV, § 1 (COUNTS III & V).

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[56] *Id.* at 519.

[57] *Sailors v. Board of Educ.*, 387 U.S. at 108.

1. PUBLIC ACT 436 VIOLATES THE EQUAL PROTECTION CLAUSE THROUGH PROVISIONS THAT REVOKE, DEBASE AND/OR DILUTE CITIZENS' FUNDAMENTAL RIGHT TO VOTE.

The Equal Protection Clause[58] is particularly concerned with statutes that treat some groups of persons differently than others. There is little question that P.A. 436 treats persons living in EM communities very differently than other Michigan residents with their respect to their right to vote for local officials.

The trial court erred by: 1) misunderstanding established jurisprudence unequivocally finding that voting is a fundamental right; 2) failing to recognize that local legislative officials are state officials exercising state legislative power; 3) erroneously elevating the form of voting over its substance; 4) inappropriately finding that citizens in EM cities are not similarly situated to other Michigan citizens; and 5) improperly applying the rational basis test as the standard of review.

i. THE DISTRICT COURT ERRED IN FINDING THAT THE RIGHT TO VOTE IS NOT A FUNDAMENTAL RIGHT.

The District Court erroneously found that a fundamental right to vote "**has never been recognized** by the courts"[59] and that "[t]he ability to vote on equal

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[58] U.S. CONST. AMEND. XIV.

[59] Dkt. #49 Order Granting in Part and Denying in Part Def. Mot. to Dismiss and Denying Def. Mot. to Stay Proceedings, at 18. (emphasis added), Pg. ID 905.

footing" [60] is all that is protected. The court's finding is incorrect. As noted above in section A.1., federal courts have repeatedly found that, once granted, the right to vote in state and local elections is a fundamental right. [61]

As stated by the Supreme Court, **"[i]t is beyond cavil that voting is of the most fundamental significance** under our constitutional structure."[62] The Supreme Court writes that "there can be no doubt … that once the franchise is granted … lines may not be drawn which are inconsistent with the Equal Protection Clause of the 14th Amendment."[63] Public Act 436 crosses those lines.

The Court holds that the right to vote cannot "be denied outright" [64] and includes a right to have one's vote "counted at full value without dilution or discount."[65] Public Act 436 revokes, debases and dilutes citizens' right to vote in the following ways:

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[60] *Id.* at 17.

[61] See citations at fn 24-29. See also *Bush v. Gore*, 531 U.S. 98, 104 (2000); *M.L.B. v. S.L.J.*, 519 U.S. 102, at fn 14 (1996); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Burson v. Freeman*, 504 U.S. 191, 199 (1992); *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986); *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. at 184; *Ohio State Conf. of the NAACP v. Husted*, 768 F.3d 524, 537 (6th Cir. 2014); *Obama for Am. v. Husted*, 697 F.3d at 428; *Hunter v. Hamilton County Bd. of Elections*, 635 F.3d at 234.

[62] *Burdick*, 504 U.S. at 433. (emphasis added, internal quotations omitted).

[63] *Evans v. Cornman*, 398 U.S. 419, 422 (1970) (citing *Harper*, 383 U.S. at 665)

[64] *Reynolds*, 377 U.S. at 555.

[65] *Bush*, 531 U.S. at 104-05. (internal citations, quotations omitted and emphasis added).

- By removing all governing powers from elected officials, **the statute substantively revokes their right to vote** for local officials in cities where EMs are appointed, while preserving that right in all other communities;

- At best the statute renders elected officials to an advisory position in EM communities. Citizens in EM communities thus lose voting power on state legislative matters in comparison to other Michigan citizens and their vote is **thereby debased and/or diluted in relation to all other communities**; and

- Through their vote for the Governor, all Michigan citizens receive an equal indirect vote in the governing official of cities with an EM. In cities without an EM, only residents of those cities elect their governing officials. As a result, the voting power of residents in cities that do not have an EM is greater than EM residents whose **right to vote is thereby further debased and/or diluted**.

Plaintiffs have stated a valid claim for relief under the 14th Amendment and this claim should be remanded for proceedings to determine, consistent with the Court's standard, whether P.A. 436 is narrowly tailored to meet a compelling state interest.[66]

ii. THE DISTRICT COURT ERRED IN FINDING THAT RESIDENTS HAVE NOT LOST VOTING POWER IN STATE LEGISLATIVE MATTERS AND HAVE NOT HAD THEIR RIGHT TO VOTE REVOKED, DEBASED AND/OR DILUTED.

The District Court failed to recognize that local officials are state actors, exercising state legislative powers. As such, citizens' in EM communities lose voting power in state matters, relative to other Michigan residents. The District

[66] See *Dunn*, 405 U.S. at 337 and *Mixon*, 193 F.3d at 402.

Court's analysis[67] arrives at a conclusion that, because cities are mere instruments of the state, the state is free to suspend or deny voting rights in local elections. This conclusion is incorrect.

The Supreme Court recognizes that "[t]he Equal Protection Clause **reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State**."[68]

The power to legislate is retained by the states through the 10th Amendment.[69]

Under their inherent police powers,[70] states have the power to regulate by adopting legislation.[71] Under our constitutional system, local governments are not sovereigns and do not possess inherent legislative powers. Rather, local governments receive their powers **solely** through delegation of the state's powers.[72] Through delegation, local governments acquire the ability to legislate[73] however,

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[67] Dkt. #49, Order Granting in Part and Denying in Part Def. Mot. to Dismiss and Denying Def. Mot. to Stay Proceedings, at 18, Pg. ID 905.

[68] *Avery v. Midland County*, 390 U.S. 474, 480 (1968)

[69] U.S. CONST., AMEND. X.

[70] See *Nebbia v. New York* 291 U.S. 502, 524 (1934) (citing *Thurlow v. Massachusetts*, 46 U.S. 504, 5 How. 504, 583 (1847)).

[71] *Id.*

[72] *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 108-109 (1953).

[73] See *Worcester v. Worcester C. S. R. Co.*, 196 U.S. 539, 548-550 (1905) ("a municipal corporation is not only a part of the State but is a portion of its

they do not become sovereigns in their own right.[74] Instead they legislate as agents of the state, using the power reserved to the state's under the 10th Amendment. Thus, when municipalities legislate, they are the state's agent utilizing state legislative power. When residents lose their right to vote for the state's local legislators or when that vote is diluted, they lose real **voting power** in relation to the legislative affairs of the state within their jurisdiction.

Michigan, like all states, apportions state legislative power between the state legislature and local governments. Traditionally, Michigan citizens had the right to vote for all state legislative officials – those in the state legislature and those in their local government. After P.A. 436, only Michigan citizens in cities without EMs retain full voting power with respect to all state legislative officials. Residents in communities with EMs however only retain the right to vote for state legislators. These residents are excluded from voting for state officials who exercise state legislative power locally. This exclusion results in a loss of voting power that severely debases and dilutes their voting rights within the state. The debasement and dilution of their voting rights by the lost voting power, infringes upon their rights under the Equal Protection Clause.

iii. THE DISTRICT COURT ERRONEOUSLY ELEVATES THE FORM OF VOTING ABOVE ITS SUBSTANCE.

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governmental power").

[74] *Id.*

The District Court also erred in finding that P.A. 436 preserved the form of voting and the statute thereby and *per se* did not affect local residents' voting rights. The court found that Plaintiffs "cannot, claim a denial or impairment of their right to vote for elected officials."[75] The trial court bases this conclusion on the sole fact that P.A. 436 continues to allow elections for mayors and council persons. It is undisputed however that these officials are elected into positions without the powers of their office.[76]

The District Court recognized that "if the right to vote is to mean anything, certainly it must provide that the elected official wields the powers attendant to their office."[77] Despite this recognition, the lower court found that it was of no consequence. The District Court thus elevated the form of voting over its substance, contrary to the holdings of the Supreme Court.

The Court has held that in addition to fairness in the form of voting, citizens have a right to "cast their votes effectively."[78] In *Reynolds v Sims*, the Court states: "**[t]here is more to the right to vote than the right to mark a piece of paper**

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[75] Dkt. #49 Order Granting in Part and Denying in Part Def. Mot. to Dismiss and Denying Def. Mot. to Stay Proceedings at 17, Pg. ID 904.

[76] *Id.*

[77] *Id.*

[78] *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983).

and drop it in a box or the right to pull a lever in a voting booth." [79] Federal courts recognize that the right to vote includes all actions necessary to make a vote effective.[80] And, that an effective vote means "meaningful access to the political process rather than narrowly as a mere right of … access to the ballot box."[81]

The Court holds that "the rights of voters and the rights of candidates do not lend themselves to neat separation."[82] Federal courts recognize that "restrictions on an elected official's ability to perform her duties implicate … the voters' rights to be meaningfully represented by their elected officials"[83] and that "restrictions on an officeholder **after election** also infringe upon voters' rights to be represented even more severely than when a state similarly restricts candidacy."[84]

The case of *Green v. Crew*,[85] is closely related to the facts in the present

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[79] *Reynolds*, 377 U.S. at 555 n.29. (emphasis added). See also, *Hadley v. Junior College Dist. of Metropolitan Kansas City*, 397 U.S. 50 (1970).

[80] See generally, *Anderson*, 460 U.S. at 786-87; *Williams*, 393 U.S at 30; *Lawrence v. Blackwell*, 430 F.3d 368, 373 (6th Cir. 2005).

[81] *Smith v. Winter*, 717 F.2d 191 (5th Cir. 1983) (citing *Kirksey v. Board of Supervisors*, 554 F.2d 139, 142 (5th Cir.1977).

[82] *Anderson*, 460 U.S. at 786 (citing *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). See also, *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 184 (citing *Lubin v. Panish*, 415 U.S. 709, 716 (1974)).

[83] *Peeper v. Callaway Cnty. Ambul. Dist.*, 122 F.3d 619, 623 (8th Cir. 1997). See also, *Franzwa v. City of Hackensack*, 567 F. Supp. 2d 1097, 1108 (D. Minn. 2008).

[84] *Peeper*, at 623.

[85] *Green v. Crew*, 1996 U.S. Dist. LEXIS 20227 (E.D.N.Y. Sept. 5, 1996). Attached as Exhibit 2.

case. In *Green*, the court considered plaintiffs' Equal Protection claim arising from facts where elected school board members were suspended and replaced by an appointed trustee.[86] Recognizing that "voting includes all action necessary to make a vote effective,"[87] the court found that the fact that suspended elected officials "never took office at all suggest[s] a plausible claim"[88] for denial of citizens' right to vote" and that "changing elective posts to appointive may also result in vote dilution."[89] The court denied dismissal and permitted plaintiffs an opportunity to factually develop their claims.[90] The court's reasoning in *Green* is equally persuasive in the present case.

Under P.A. 436, elected officials have been replaced by an appointed one, the EM. The system renders citizens' right to vote wholly ineffective by preventing elected officials from assuming the authority of the offices. The statute thus revokes the vote for some while preserving it for others in the state thereby raising plausible claims under the 14th Amendment.

iv. THE DISTRICT COURT INAPPROPRIATELY FOUND THAT MICHIGAN CITIZENS IN CITIES WITH EMERGENCY MANAGERS ARE NOT SIMILARLY SITUATED TO CITIZENS IN OTHER COMMUNITIES.

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[86] *Id.* at 5-7.

[87] *Id*. at 30 (citing *Allen v. State Board of Elections*, 393 U.S. 544, 566 (1969)).

[88] *Id*. at 29-30.

[89] *Id*. at 25.

[90] *Id*. at 40-41.

The District Court further erred in finding that Michigan citizens in EM communities were not similarly situated to other Michigan citizens.[91] The District Court provides no meaningful analysis or rationale for its conclusion that these two groups are improper comparators. Rather, the court's conclusion is arbitrary. Through the arbitrary denial of proper comparators – other Michigan citizens - the trial court evaded a proper evaluation of whether citizens in EM communities had been disenfranchised and/or had their right to vote debased or diluted.

The argument that Plaintiffs are not "similarly situated" to other Michigan voters is an inartful argument that the state has a compelling interest in treating Plaintiffs differently from voters in other locales throughout the state. For nearly 200 years, Michigan has granted all citizens the right to elect local governing officials. Public Act 436 revokes this right from some citizens and not others. The suggested reason for treating the Plaintiffs' differently is the financial distress in their communities. Plaintiffs should be permitted to factually develop the record to show that P.A. 436 is not narrowly tailored to the state's asserted interest.

v. THE DISTRICT COURT INCORRECTLY UTILIZED THE RATIONAL BASIS TEST AS THE STANDARD OF REVIEW.

The District Court finally erred in applying rational basis as the standard of review and further, in its application of this standard. Rational basis may be a

[91] Dkt. #49 Order Granting in Part and Denying in Part Def. Mot. to Dismiss and Denying Def. Mot. to Stay Proceedings at 17, Pg. ID 904.

deferential review, however it is not abdication and still requires scrutiny by the court. In this case, the District Court found that P.A. 436's stated purpose of alleviating financial distress was rationally related to the statute's suspension of elected governance. This is a logical leap and there is no rationale correlation between the stated purpose and the methods used.

2. PUBLIC ACT 436 VIOLATES THE EQUAL PROTECTION CLAUSE THROUGH PROVISIONS THAT CONDITION THE RIGHT TO VOTE IN LOCAL ELECTIONS UPON RESIDENTS' WEALTH.

Under the Equal Protection Clause, wealth restrictions on a person's right to vote are strictly scrutinized and rarely justified. In the present case, Plaintiffs allege that P.A. 436 conditions the right to vote for local governing officials upon the wealth of a community.

The District Court erred in dismissing Plaintiffs' claim by applying an incorrect standard of review, making assumptions of fact, and misconstruing Plaintiffs' claim.

i. THE DISTRICT COURT IMPROPERLY REQUIRED RESTRICTIVE FACTUAL PREDICATES AS A CONDITION TO INVOKING THE PROHIBITION OF WEALTH AS A CONDITION TO VOTING RIGHTS.

The trial court effectively required that a voter's wealth be an explicitly stated condition or a poll tax before the constitutional prohibition is implicated. The court wrote that "there is no restriction on the plaintiffs' ability to vote … they

are [not] required to pay a poll tax or any other fee."[92]

The Supreme Court however has not limited its scrutiny to highly specific factual predicates such as a poll tax or a demonstration of an individual's wealth. Rather, the Court has broadly found that **any standard or criteria that conditions voting rights on the "affluence of voters" violates the Equal Protection Clause**.[93] Contrary to the District Court's methodology in this case, the Supreme Court finds that there is no "litmus test that would neatly separate valid from invalid restrictions."[94]

The District Court's finding, without any supporting facts, divorces the "overall financial condition and prognosis of a local unit of government"[95] from the wealth of the residents who reside within that local unit of government. **Plaintiffs' claim however is that the "overall financial condition of the local unit of government" is directly and inextricably related to the wealth of its residents** from whom the local unit government is dependent for its revenue.[96] By

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[92] Dkt. #49 Order Granting in Part and Denying in Part Def. Mot. to Dismiss and Denying Def. Mot. to Stay Proceedings at 23-24, Pg. ID Nos. 910-911.

[93] *Harper*, 383 U.S. at 666.

[94] *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190 (2008).

[95] Dkt. #49 Order Granting in Part and Denying in Part Def. Mot. to Dismiss and Denying Def. Mot. to Stay Proceedings at 24, Pg. ID 911.

[96] Factual development would show that Michigan cities receive approximately 42% of their revenue from local property taxes. Cities receive an additional 9% of their revenue from local income taxes. The bulk of remaining local revenue (34%)

suspending the electoral rights of all residents because the poor overall financial condition of the local unit of government, the State of Michigan is conditioning their voting rights in local elections upon residents' wealth. As a result of the District Court's ruling, Plaintiffs have been prevented from developing facts showing the direct and intimate relationship between residents' wealth and the financial stability of local governments in Michigan.

ii. THE DISTRICT COURT IMPROPERLY ASSUMED INACCURATE FACTS.

The District Court erred again when it based its decision upon an explicit assumption of erroneous fact. Without analysis, the court arbitrarily assumed that the wealth of citizens "or even the community as a whole" is not a factor in whether an EM is appointed.[97] The court wrote:

> Rather, it is the overall financial condition and prognosis … Any community whose financial books are not in order is

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is received through state revenue sharing and other state payments. During the recessions of the 2000s, the state dramatically cut state revenue sharing and as result cities have been required to make up losses through property taxes, income taxes and additional service fees from residents. Cities with the poorest residents have the least ability to generate additional revenue from residents, yet paradoxically have the highest demands for public services. Among cities that had become subject to P.A. 436 at the time Plaintiffs' Complaint was filed, ten out of eleven of those communities have between one-third and one-half of their residents living below the federal poverty level. These communities have poverty rates double and triple Michigan's average, Likewise, these communities are among those hardest hit by the foreclosure crisis and the collapse of home values and have disproportionately high rates of unemployment. The linkage between residents' wealth and the financial health of their local government is intimate and direct.

[97] Dkt. #49 Order Granting in Part and Denying in Part Def. Mot. to Dismiss and Denying Def. Mot. to Stay Proceedings at 24, Pg. ID 911.

> subject to review under P.A. 436, regardless of the relative wealth of that community. How a community's resources are managed will be reviewed in making the determination whether to appoint an EM.

The District Court's findings are simply not accurate and are based on the court's own generalized characterization of assumed facts. It is not drawn from the statute's text or any evidence produced by the parties and, as such, has no place in the court's evaluation of whether the Plaintiffs have stated a plausible claim for relief under Rule 12 (b)(6). The statute's actual criteria rely on factual indicators of whether the local community is paying certain creditors and other obligations and whether the local community is running operating deficits – nothing more.[98]

Even if the District Court's factual assumptions were correct, they still do not support dismissal. The court's findings would effectively exempt states from the Supreme Court's prohibition on wealth as a condition of voting. The District Court incorrectly found one's 'overall financial condition and prognosis,' 'financial books not being in order,' and the poor financial management of 'resources' to be factors unrelated to one's wealth. Each of these factors however directly concern the circumstances of a community's or an individual's lack of

[98] See MCL §141.1545. Three (3) of the indicators directly relate to a community's inability to pay bills, including: creditors, pension obligations, wages, bond obligations, etc. Six (6) indicators relate to the existence unsustainable budget deficits. The two (2) remaining indicators relate to the improper use of restricted revenues and a catch-all for other circumstances indicating a financial emergency.

wealth. Under *Harper*, the state clearly could not condition the voting rights of individuals such factors. Likewise, the state is not permitted to suspend the voting rights of the entire community based on these conditions.

The trial court's order further suggests reasoning that because the language of P.A. 436 appears to be facially neutral and can be applied to rich and poor communities alike, the statute is thereby exempted from further constitutional scrutiny. Such reasoning evokes Anatole France's famous critique of class in France's legal system during the Belle Époque:

> [The] majestic equality of the laws, forbids rich and poor alike to sleep under the bridges, to beg in the streets and to steal their bread.[99]

This sentiment applies to arguments that P.A. 436 applies equally to wealthy and poor communities. In only the rarest of instances will a community composed of financially wealthy households become subject to P.A. 436 and have their right to vote for local officials revoked.[100]

iii. THE DISTRICT COURT MISCONSTRUED PLAINTIFFS' CLAIM AS A DISPARATE IMPACT ARGUMENT.

The trial court erred again by assuming that Plaintiffs' claim is based on a disparate impact type argument. The court found:

> Plaintiffs claim that … P.A. 436 has yielded disproportionately

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[99] Anatole France, THE RED LILY (The Modern Library, New York, 1917) at 75.

[100] Dkt. #39, 1st Amended Complaint, at ¶87, Pg. ID 527.

> more emergency manager appointments in lower-income communities. Plaintiffs maintain that ***P.A. 436 therefore conditions*** a citizen's right to vote ... on the wealth of their community.

The trial court misunderstands Plaintiffs' claim as one where the disproportionate appointment of EMs in low-income communities provides *the basis* for their claim that P.A. 436 conditions residents' local right to vote upon the community's wealth. This is a clear misconstruction of Plaintiffs' claim. Plaintiffs' claim is that P.A. 436 introduces wealth as a criteria for determining which communities are permitted to elect their local governing officials. The fact that communities composed of high percentages of economically poor households have disproportionately received such appointments does not create the basis of Plaintiffs' claim. Rather, such facts support Plaintiffs' argument that the wealth of a community is inextricably linked to the financial emergency in that community and, as a result, whether that community will have their voting rights suspended. Plaintiffs have been deprived of their right to show the predicate linkage by the District Court's erroneous dismissal of this claim.

D. PUBLIC ACT 436 VIOLATES THE VOTING RIGHTS ACT OF 1965 (COUNT VI).

The trial court improperly found that P.A. 436 is not subject to the Voting

Rights Act ("VRA")[101] because it results in "changes which affect only the distribution of power among officials,"[102] and that "such changes have no direct relation to, or impact on, voting."[103] The trial court further found that "[p]laintiffs take issue with the fact that citizens in municipalities under emergency management have a vote that does not mean anything."[104] Plaintiffs agree that citizens' votes in EM communities are meaningless, but thoroughly disagree with the court's disregard of the significance of that fact vis-à-vis the VRA.

The trial court relied heavily on *Presley v. Etowah County Commission*[105] for the proposition that the Supreme Court makes a distinction between a 'standard, practice or procedure affecting voting by the electorate' and 'changes in the routine organization and functioning of government.' However, P.A. 436 affects *both* 'voting by the electorate' **and** the 'organization and functioning of government.' There has never before been such a law like P.A. 436, inasmuch as it allows for executive appointment of one unelected official to usurp 100% of all

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[101] 52 U.S.C. §§ 10101 *et. seq.*

[102] Dkt. 49, Order Granting in Part and Denying in Part Def. Mot. to Dismiss and Denying Def. Mot. to Stay Proceedings at 27, Pg. ID 914.

[103] *Id*.

[104] *Id*.

[105] 502 U.S. 491 (1992). It is noteworthy that the *Presley* case only pertains to §5 of the Voting Rights Act, which has now been effectively repealed by the Supreme Court in *Shelby Cty., Ala. v. Holder, 133 S. Ct. 2612 (2013)* and only deals with whether or not there is a "preclearance" requirement that applies to a given community.

power of all elected legislative officials in a given jurisdiction. As a result, the applicability of the VRA to such a situation is one of first impression.

The District Court's dismissal of Plaintiffs' VRA, §2 claim is erroneous for four reasons: 1) the holding, relying on *Presley* erroneously applied narrower §5 analysis to a §2 case; 2) the court failed to apply §2 of the VRA, which governs 'changes which affect the creation or abolition of an elective office'; (3) the District Court's ruling erroneously ignores the 'Senate Factors'; and 4) the court's finding that voters can repeal P.A. 436 is incorrect as a matter of law and fact.

1. THE DISTRICT COURT ERRONEOUSLY APPLIED THE WRONG STANDARD TO A PLAINTIFFS' § 2 CLAIMS.

Section 2 of the Voting Rights Act, states as follows:

> (a) **No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement** of the right of any citizen of the United States to vote on account of race or color...
>
> (b) A **violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open** to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[106]

[106] 52 U.S.C. §10301. (emphasis added).

By contrast, §5 of the Act, in pertinent part, provides:

> Whenever a[n applicable] State or political subdivision … shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure *with respect to voting* different from that in force or effect.[107]

Most importantly, §5 applies to discriminatory "standards, practices, or procedures," **only** "with respect to voting."[108] Section 2 contains no such limiting language, and thus applies to a broader array of "standards, practices of procedures." Yet, the trial court erroneously concluded that §2 and §5 of the VRA have the same scope.[109]

The District Court specifically quoted *Holder* for the proposition that "the coverage of §2 and §5 is presumed to be the same."[110] However, *Holder* makes no such finding and states as follows:

> It is true that in *Chisom v. Roemer*, 501 U.S. 380, 401-402… (1991), we said that the coverage of §§2 and 5 is presumed to be the same (at least if differential coverage would be anomalous). **We did not adopt a conclusive rule to that effect …** To be sure, if the structure and purpose of §2 mirrored that of §5, then the case for interpreting §§2 and 5 to have the same application in all cases would be convincing. **But the two sections differ in structure, purpose, and application**.[111]

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[107] *Id*. at §10302. (emphasis added).

[108] Id.

[109] Dkt. 49 Order Granting in Part and Denying in Part Def. Mot. to Dismiss and Denying Def. Mot. to Stay Proceedings at 27-28, Pg. ID Nos. 914-915.

[110] *Id.*, at 28. (citing *Holder*, at 882).

[111] *Id.* at 882-83 (emphasis added).

The Supreme Court has long held that §2 and §5 differ in structure, purpose, and application, and that, indeed, §2 has a broader mandate than §5.[112] Moreover, unlike §5, §2 employs a totality of the circumstances test (i.e. the 'results test') for determining whether or not a given practice, standard, or procedure has a discriminatory effect on voting. Under the results test, courts are to consider whether the results of a given policy are discriminatory, regardless of how well-intended the law or practice may be.[113] By the plain statutory language and in light of the Supreme Court rulings of *Holder* and *Reno*, §2 and §5 are thus not the same in scope and application.

Nonetheless, the court devotes two entire paragraphs to the *Holder* Court's ruling that "a plaintiff cannot maintain a §2 challenge to the size of a government body."[114] *Holder* is distinguishable. In *Holder*, the issue was vote dilution based on a **change in the size of the government body**. In the present case, the size of the elected government body has not changed and votes have not been diluted in the same manner. In this case, in predominantly African American communities

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[112] *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 478-9 (1997).

[113] "The Senate Report states that §2, when amended in 1982, was designed to restore the 'results test'… Under the 'results test,' plaintiffs are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose." *Thornburg v. Gingles*, 478 U.S. 30, 44 n. 8. (1986).

[114] Dkt. 49, Order Granting in Part and Denying in Part Def. Mot. to Dismiss and Denying Def. Mot. to Stay Proceedings at 29-30, Pg. ID Nos. 916-917.

throughout the State of Michigan, the governing authority of all elected officials has been completely suspended under P.A. 436, and votes to elect officials have thus been drained of any meaning. The trial court thus erroneously relied on *Holder* to support its finding that the VRA §2 is not triggered.

2. EVEN UNDER *PRESLEY*, P.A. 436 VIOLATES §2 OF THE VOTING RIGHTS ACT BY ABOLISHING ALL GOVERNING AUTHORITY OF ELECTED OFFICIALS WHICH IMPACT MORE THAN 50% OF MICHIGAN'S AFRICAN AMERICAN POPULATION.

i. P.A. 436 DOES NOT JUST "CHANGE THE DISTRIBUTION OF POWER." IT CEDES ALL POWER TO A POLITICAL APPOINTEE.

In *Presley,* the Court identified four scenarios that trigger coverage under the VRA. One scenario are changes which affect the creation or abolition of an elective office.[115] The Court expressly noted that these factual scenarios were not exclusive, and fully anticipated the possibility of unforeseen scenarios.[116]

The unique facts surrounding the effects of P.A. 436 has resulted in the unprecedented **elimination of all governing authority** of elected officers coupled with the **concurrent transfer of all governing authority** to an appointed official. These facts are squarely distinguishable from those in *Presley*, which involved the shifting of some, but not all, the authority of elected officials to appointed ones. The Court found that the elected county commission in *Presley* however

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[115] *Id.*, at 502-503.

[116] *Id.* at 502 (emphasis added).

"retain[ed] substantial authority."[117] *Presley* explicitly carved out from its holding circumstances that "rise to the level of a de facto replacement of an elective office with an appointive one."[118]

As *Presley* acknowledged, the VRA is triggered when a citizen "is prohibited from electing an officer formerly subject to the approval of the voters,"[119] and that such occurs when a law "change[s] an elective office into an appointive one."[120] The Court in *Allen* further held: "[t]he legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered state in **even a minor way**."[121]

Although the appointment of EMs under P.A. 436 did not *physically* remove elected officials from office, they did, by operation of law, *effectively* do just that. Thus, the operation of the P.A. 436, does not simply result in a "change in the relative authority of various governmental officials" as in *Bunton*. Rather, it removes **all** authority **from** locally elected officials and transfers it **all to** one unelected official.

While it is also true, as the District Court found, that voters living under an

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[117] *Presley* at 509.

[118] *Id*.

[119] *Id.* at 506 (citing *Allen,* 393 U.S. at 569-70.

[120] *Id.* (citing to *Bunton v. Patterson,* 393 U.S. 544, (1969), a case in which the position of county officer became appointive instead of elective).

[121] *Allen*, 393 U.S. at 566. (emphasis added).

EM regime could still cast ballots, they cannot vote for a candidate with any actual authority. As such, their votes are meaningless and ineffective. The Supreme Court emphasized this distinction in the more recent case of *Bartlett v. Strickland.*[122] In *Bartlett*, the Court recognized that §2 protections go beyond the mere act of casting a vote. Rather, §2 also protects the right for minority voters' votes to be *effective*:

> Treating [voter] dilution as a remediable harm recognizes that §2 protects **not merely the right of minority voters to put ballots in a box, but to claim** a fair number of districts **in which their votes can be effective**.[123]

Because P.A. 436 renders the votes of affected communities entirely ineffective, it is barred by§2.

ii. THE DISTRICT COURT'S ORDER OMITS THE 'SENATE FACTORS' FROM ITS ANALYSIS.

In addition to its erroneous understanding of *Presley* and *Holder,* the trial court completely failed to consider the legislative history of the VRA. The entire line of Supreme Court cases following the 1982 amendment to §2 rely heavily on the legislative history, commonly referred to as the 'Senate Factors,' that led to the restoration of the "results test" and to the eradication of an intent requirement.[124]

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[122] *Bartlett v. Strickland,*556 U.S. 1 (2009).

[123] *Id*. at 28

[124] See also, Ellen Katz et. al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982 Final Report of the*

In *Thornburg v. Gingles*,[125] the Supreme Court opined that the Senate Factors and VRA's entire legislative history must be given authoritative weight: "[w]e have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill."[126] Since that time, federal courts have relied heavily on the Senate Factors when making a 'totality of the circumstances' inquiry into §2 violations.

In *Cousin v. McWherter*,[127] the Sixth Circuit recognized seven 'Senate Factors.' The court found the following factors "useful in establishing the existence of unequal access to the political process:"[128]

> 1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, **or otherwise to participate in the democratic process**;
>
> 2. The extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. If there is a candidate slating process, whether members

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Voting Rights Initiative, 39 U. Mich. J.L. Reform 643, 724 (2006).

[125] 478 U.S. 30, 44 n. 7 (U.S. 1986).

[126] *Id.* n 7.

[127] *Cousin v. McWherter*, 46 F.3d 568, 573 (6th Cir. 1995).

[128] *Id.*

> of the minority group have been denied access to that process;
>
> 5. ***The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process***;
>
> 6. Whether political campaigns have been characterized by overt or subtle racial appeal; and/or
>
> 7. The extent to which members of the minority group have been elected to public office in the jurisdiction.[129]

The Sixth Circuit applied the 'Senate Factors' to its consideration of whether certain election changes violated §2 and held:

> In adopting a results test as the proper Section 2 inquiry, the Senate Report codified the test enunciated by the Supreme Court in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). … Congress also added subsection (b) to Section 2 which requires a "totality of the circumstances" inquiry into whether members of a protected class of citizens have less opportunity than others to participate in the political process.
>
> ***
>
> [The factors are not exclusive and] there is no requirement that any particular factors be prove[n] or that a majority of them point one way or another." *Id.* Rather, Congress left it for the courts to decide whether, ***under the "totality of the circumstances," the voting strength of minority voters is "minimized or cancelled out."*** *Id.* at 207 n. 118. Congress explicitly instructed that in reaching this determination courts must conduct "a searching practical evaluation of the 'past and present reality.'"[130]

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[129] *Id.*, at 573. (emphasis added).

[130] *Id.* at 573. (emphasis added).

However, contrary to the law of this circuit and the Supreme Court, the trial court did not consider the "Senate Factors" at all in its holding and completely omitted any kind of "totality of the circumstances" inquiry. Instead, the court erroneously relied exclusively on *Presley's* analysis of §5 , as discussed above, and ignored the actual effect of P.A. 436, namely the minimization and cancellation of the voting strength of minority voters and the severe restrictions on- if not outright denial of- their ability to participate in their respective municipalities' political processes in any meaningful way[131]

iii. THE DISTRICT COURT'S FINDING THAT VOTERS CAN REPEAL P.A. 436 IS CLEARLY ERRONEOUS AS A MATTER OF LAW AND FACT.

The trial court further relied on a factually wrong assumption to support the erroneous conclusion that P.A. 436 is not subject to the Voting Rights Act. The court found that "[t]he residents … retain their voting rights and **can again repeal the enactment as they did its predecessor**."[132]

The court's finding is clearly in error. Voters **cannot** repeal P.A. 436 as

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[131] Although not part of the record in this case -- because it post-dates the trial court's ruling below -- the extreme effect of how P.A. 436 has revoked the voting rights of a predominantly African American community in Michigan is exemplified by the tragic events of Flint, when the unelected EM made the unilateral decision to switch the municipal water system to highly hazardous sources, without public hearings or accountability to residents.

[132] Dkt. 49, Order Granting in Part and Denying in Part Def. Mot. to Dismiss and Denying Def. Mot. to Stay Proceedings at 31 (emphasis added), Pg**.** ID 918.

they did its predecessor. The Michigan legislature attached an appropriation provision to P.A. 436.[133] Article II, §9 of the Michigan Constitution mandates that "the power of referendum **does not extend to acts making appropriations** for state institutions."[134] As a result, an appropriation provision in a bill or law shields it from referendum. This court's conclusion is simply wrong as a matter of fact and law.

E. PUBLIC ACT 436 VIOLATES FREEDOM OF SPEECH AND PETITION RIGHTS PROTECTED BY THE U.S. CONST. AMEND. I (COUNT VII).

The Supreme Court finds that state voting laws "inevitably affect[s] … the individual's … right to associate with others for political ends."[135] "[W]hen the law discriminates against a small and identifiable group that is engaged in the business of speech, the court applies strict scrutiny to determine whether a challenged regulation violates the 1st Amendment."[136]

1. AFTER A CITIZENS' REFERENDUM REPEALING THE STATE'S EMERGENCY MANAGER LAW, THE LEGISLATURE'S ADOPTION OF A VIRTUALLY IDENTICAL LAW DEFEATS PLAINTIFFS' 1ST AMENDMENT RIGHTS.

The District Court acknowledges that Plaintiffs' claim a fundamental right to

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[133] See MCL §141.1574, P.A. 436, §34 and MCL §141.1575: P.A. 436, §35.

[134] MICH. CONST. ART. II § 9. (emphasis added).

[135] *Burdick*, 504 U.S. at 433 (quoting *Anderson*, 460 U.S. at 788).

[136] See *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 638-40 (5th Cir. 2012), *cert. denied*, 132 S. Ct. 2777 (2012), and *News Am. Pub., Inc. v. FCC*, 844 F.2d 800, 810-14 (D.C. Cir. 1988).

have a voice through their local elected officials and that the right to vote at the local level has significant impact on voters' lives.[137] Despite recognizing these facts, the District Court denies citizens in EM communities "**the ability to vote on equal footing [and have] the weight of the vote … equal to that of other voters.**"[138]

Michigan's constitution grants a right of referendum.[139] Michigan citizens exercised their right of referendum by voting to repeal P.A. 4. Thereafter, the Michigan legislature re-enacted an almost mirror image law - P.A. 436. The court correctly notes that the powers of EMs under both laws is essentially the same.[140] By reinstituting the rejected provisions of P.A. 4, the Defendants violated Plaintiffs' 1st Amendment rights.

2. THE DISTRICT COURT INCORRECTLY FOUND THAT PLAINTIFFS HAVE POLITICAL AVENUES AVAILABLE TO REPEAL OR CHANGE PUBLIC ACT 436 AND THAT ITS RESTRICTIONS ARE TEMPORARY.

The dismissal of Plaintiffs' 1st Amendment claims wholly rests on palpable error whereby the court found that Michigan residents can again use the

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[137] Dkt. #49, Order Granting in Part and Denying in Part Def. Mot. to Dismiss and Denying Def. Mot. to Stay Proceedings at 16, Pg. ID 903.

[138] *Id*.

[139] MICH. CONST. ART. II § 9.

[140] Dkt. #49, Order Granting in Part and Denying in Part Def. Mot. to Dismiss and Denying Def. Mot. to Stay Proceedings at 25-26, Pg. ID Nos. 912-913.

referendum to repeal P.A. 436 at the next election.[141] The District Court's finding is incorrect. As noted above in section D.2.iii., **P.A. 436 is not subject to referendum** under Michigan law. Factual development, if permitted in this case, would also reveal that governance under emergency management is a wholly private affair. Decisions, including those to enact local laws are made with no required notices, no open meetings, no public hearings, no designated offices to access local government, no publication of decisions required or often made.[142] Additionally, contrary to the trial court's finding, Plaintiffs are not "free to voice their dissatisfaction with P.A. 436 at town hall meetings, or through protests and letter writing campaigns,"[143] and such a process are superficial at best.[144]

Moreover, the District Court committed palpable error in finding that emergency management is a temporary condition and that local officials may

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[141] Dkt. #49, Order Granting in Part and Denying in Part Def. Mot. to Dismiss and Denying Def. Mot. to Stay Proceedings at 32, Pg. ID 919.

[142] The lack of public accountability resulting from such a deprivation of the fundamental right to speech and association has been highlighted by the recent developments in the Flint Water Crisis, and the miseducation of Detroit Public School students.

[143] Dkt. 49 Order Granting in Part and Denying in Part Def. Mot. to Dismiss and Denying Def. Mot. to Stay Proceedings at 37, Pg. ID 924.

[144] Factual development would show that EMs have, in fact, continuously frustrated public access and participation when holding the 'public informational meetings' required by MCL §141.1551(4).

remove their communities from governance by an EM after 18 months.[145] This is not correct.[146] The court was misled by Defendants' repeated misrepresentations of the state's intent. In this case, the Defendants have consistently stated that under § 9 of P.A. 436, a local government can, after 18 months, elect to end governance by an EM.[147] However in other forums, the Defendants have successfully argued the **exact opposite.** As a result, the Ingham County Circuit recently ruled that after a local government votes to remove an EM after 18 months, the Governor can appoint a replacement EM and the 18-month period begins anew. The state is thus free to maintain an EM over a local government in perpetuity.[148] Palpable error occurred when the court was misled by the facts as represented by the Defendants and as a result dismissal was improper.

3. AN ELECTED OFFICIAL'S LOSS OF GOVERNING AUTHORITY IS AN IMPAIRMENT OF VOTERS' 1ST AMENDMENT RIGHTS.

While the Constitution does not provide an affirmative right to individuals to vote for state or local officials, the 1st and 14th Amendments have been

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[145] See generally, MCL §141.1549 (6)(c).

[146] See attached Exhibit 3, Transcript, Detroit Board of Education v Martin, 30th Judicial Circuit Court Ingham County, Case No.14-725-CZ.

[147] See Dkt. #41. Defendants' Motion to Dismiss, at 14 & 34-35, Pg. ID Nos. 571, 591-592, March 5, 2015; Dkt. #46. Defs' Reply Brief, at 5, Pg. ID 816, March 5, 2015; and Transcript of Oral Argument, Apr. 30, 2015 at 63.

[148] Additionally, factual development would show that through the EMs' final orders and transition advisory boards, emergency management is maintained long after particular EMs leave office.

interpreted to protect voters' associational and speech rights to cast their votes effectively.[149] The District Court wholly failed to properly analyze the voter's elected official's loss of governing authority as an impairment of 1st Amendment rights. "The First Amendment, among other things, protects the right of citizens to band together in promoting among the electorate candidates who espouse their political views."[150] In the case at bar, the fundamental rights of speech and association are impermissibly curtailed by P.A. 436's removing and/or severely impairing the governing power of duly elected officials.

In *Peeper v. Callaway County Ambulance District*, the Eighth Circuit addressed post-election 1st and 14th Amendment rights of voters and officeholders.[151] The court found:

> [R]estrictions on an elected official's ability to perform her duties implicate the interests of two distinct parties: the individual's 1st Amendment associational rights … and the voters' rights to be meaningfully represented by their elected officials.[152]

Indeed, the court stated that "restrictions on an officeholder after election also infringe upon voters' rights to be represented **even more severely** than when

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[149] See *Storer v. Brown*, 415 U.S. 724 (1974).

[150] *Clingman v. Beaver*, 544 U.S. 581 (2005) (citations and quotations omitted).

[151] *Peeper*, 122 F.3d 619.

[152] *Id.* at 623.

a state similarly restricts candidacy."[153]

In this case, P.A. 436 singles out elected officials and deprives them of their right to speak within government as a representative of those who elected them. In so doing, the statute deprives both the elected officials and the citizens who elected them of their freedom of speech rights. As a result, P.A. 436 must be shown to be narrowly tailored to further a compelling government interest.[154] It is not and dismissal was improper.

F. PUBLIC ACT 436 PERPETUATES THE BADGES AND INCIDENTS OF SLAVERY AND THEREBY VIOLATES U.S. CONST., AMEND. XIII, § 1 (COUNT VIII).

Plaintiffs claim that P.A. 436 violates the 13th Amendment.[155] This Amendment is "an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States."[156] Unlawful conduct under the 13th Amendment includes state action that generates, implements and effectuates the "badges and incidents of slavery"[157]

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[153] *Id*. (emphasis added). See also, *Gay Rights Coal. of Georgetown Univ. Law Center v. Georgetown Univ*., 536 A.2d 1, 39 (D.C. 1987).

[154] See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2740 (2011); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 591-92 (1983); *News Am. Pub*., 844 F.2d at 813-14.

[155] U.S. CONST. AMEND. XIII.

[156] *Civil Rights Cases*, 109 U.S. 3 (1883).

[157] *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Runyon v. McCrary*, 427

The District Court held that "[w]ith **every device in the political arsenal remaining available to plaintiffs**, a law directed at … addressing a serious fiscal concern cannot be characterized as a vestige of slavery."[158] The court's ruling is both factually and legally erroneous for the following reasons: 1) the court misinterprets/misapplies *City of Memphis v. Greene*;[159] 2) P.A. 436 creates a restraint on the ability to vote; and 3) the power of the entire political process is not available for effectuating changes to the restrictions imposed by P.A. 436.

1. THE COURT ERRONEOUSLY INTERPRETED/APPLIED *CITY OF MEMPHIS V. GREENE*.

The court cites *City of Memphis v. Greene*, for the proposition that "routine burdens of citizenship" will not constitute a violation of the 13th Amendment.[160] However, this citation is misleading once the broader context of the holding in *Greene* is considered:

> We merely hold that the impact of the closing of West Drive on nonresidents of Hein Park is a routine burden of citizenship; it does not reflect a violation of the Thirteenth Amendment.[161]

In this case, Plaintiffs are not considering a mere street closure. Instead,

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U.S. 160, 179 (1976).

[158] Dkt. 49, Order Granting in Part and Denying in Part Def. Mot. to Dismiss and Denying Def. Mot. to Stay Proceedings at 37 (emphasis added), Pg. ID 924.

[159] 451 U.S. 100, 129 (1981).

[160] Dkt. 49 Order Granting in Part and Denying in Part Def. Mot. to Dismiss and Denying Def. Mot. to Stay Proceedings at 37 (citing *Greene* at 129), Pg. ID 924.

[161] *Id.* at 128-29 (1981) (emphasis added).

Plaintiffs challenge the annihilation of any and all governing authority of elected leaders in predominately African American communities.

The distinction between *Greene* and the present case is two-fold. First, the 'routine' burdens alluded to in *Greene* have not been generalized amongst the body politic of the State of Michigan. Only certain communities have been forced to bear the burden of P.A. 436, and those communities are predominately African American. Second, there is nothing "routine" about an emergent situation of the type that would necessitate an EM. By definition, P.A. 436 is law implemented *in lieu* of the routine. Therefore, an EM regime is not merely a "routine burden of citizenship"[162] and there is nothing routine about the total suspension of an elected governing authority.

That the disenfranchisement of predominantly African American communities, unlike the barricading of a road, is a virtual hallmark, indeed a badge and incident of slavery is clearly denoted in a speech of Frederick Douglass, given within days of Lee's surrender:

> "Again, **I want the elective franchise, for one, as a colored man, because ours is a peculiar government**, based upon a peculiar idea, and that idea is universal suffrage. If I were in a monarchial government, or an autocratic or aristocratic government, where the few bore rule and the many were subject, there would be no special stigma resting upon me, because I did not exercise the elective franchise. … but here

[162] *Id.*

> **where universal suffrage is the rule, where that is the fundamental idea of the Government, to rule us out is to make us an exception, to brand us with the stigma of inferiority,** and to invite to our heads the missiles of those about us; therefore, I want the franchise for the black man."[163]

It is not hard to imagine the scorn and vituperation with which Douglass would have greeted P.A. 436's factual presentation. "Does it not harken back to slavery," he would ask, "when the votes of those in largely black communities have no significance or power, and those in predominantly white communities actually vote to elect officials with actual power?"

2. P.A. 436 Creates A Restraint On The Ability To Vote.

As noted above in section C.1. of this brief, P.A. 436 creates a significant restraint on the plaintiffs' ability to vote for a "**preferred representative**;" [164] that is, one with authority to actually govern.

3. The Power Of The Entire Political Process Is Not Available For Effectuating Changes To The Restrictions Of P.A. 436.

As noted more fully in section E.2. of this brief, 'the entire political process' is not available to" Plaintiffs, particularly those living in communities where EMs

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[163] Frederick Douglas, Speech at the Annual Meeting of the Massachusetts Anti-Slavery Society (April 1865) (transcript available athttp://www.frederick-douglass-heritage.org/). (emphasis added).

[164] See *Thornburg v. Gingles*, 478 U.S. 30 (1986) ("The essence of a [VRA] §2 claim is that a certain electoral … structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their *preferred representatives*." *Id.* at 47. (emphasis added).

have been appointed. The process of electing new legislators on the hope that they will legislatively repeal P.A. 436 is not a practical likelihood, and is 'too little too late' insofar as the harm caused by the unilateral decisions now being made – and having already been made by emergency managers throughout the State is occurring too quickly for the legislative process to be an effective remedy. And, as noted above, P.A. 436 **cannot be repealed by referendum**, as a matter of law.

In the present case, the facts are such that Plaintiffs have *none* of the common political devices in their arsenal. Under the court's own analysis, Plaintiffs have a valid 13th Amendment claim, i.e. the deprivation of access to a meaningful political process that disproportionately impacts the majority of African American voters in Michigan. At the very least, a genuine issue of material fact exists such that dismissal was improper.

G. PUBLIC ACT 436 VIOLATES EQUAL APPLICATION OF LAW AS PROTECTED BY U.S. CONST. AMEND. XIV, § 1.

Plaintiffs claim that the state's interpretation of § 9(6)(c) of P.A. 436 cannot survive rational-basis review, much less strict scrutiny. This section of the statute provides for the removal of an EM by a two-thirds vote of the local government after the EM has been in office for 18 months.[165]

For municipalities and school districts with EMs in place pursuant to P.A. 4,

[165] MCL § 141.1549(6)(c)

Defendants interpret the 18 months to begin on the effective date of P.A. 436 - March 28, 2013.[166] Defendants' thereby arbitrarily classify local governments into two groups: (1) those that were governed by EMs appointed prior to P.A. 436's effective date; and (2) those governed by EMs appointed after P.A. 436's effective date.[167]

The District Court erred in finding that the distinction between the first two groups was rationally related to legitimate state interests. The District Court acknowledged that EMs under P.A. 4 enjoyed essentially the same authority as they do under P.A. 436.[168] However, the District Court found that the first two groups are not similarly situated because P.A. 72 nominally came into effect for several months between the certification of the P.A. 4 referendum petition (August 8, 2012) and March 28, 2013. Plaintiffs submit that the court engaged in impermissible fact finding to reach this conclusion and applied an incorrect standard of review.

Between August 8, 2012 and March 28, 2013, no new EMs were appointed under P.A. 72. All of the EMs reappointed when P.A. 436 took effect had been

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[166] *Id.*

[167] As noted in section E.2 after a local government votes for removal the Defendants appoint a replacement and the 18-month period restarts from the date of the new appointment. Thereby, EMs can remain in place in perpetuity.

[168] Dkt. #49, Order Granting in Part and Denying in Part Def. Mot. to Dismiss and Denying Def. Mot. to Stay Proceedings at 25-26, Pg. ID Nos. 912-913.

previously appointed under P.A. 4. No evidence has been presented to the court indicating that any of the P.A. 4 EMs changed their actions, conduct, plans, orders, or ceded any control over non-financial areas of governance during the time that P.A. 72 was in effect.[169] In reaching its conclusion that P.A. 72 somehow impeded the continuity of EM governance during the interim period, the court improperly assumed facts which have not been brought before the court.

The District Court further erred by ignoring Plaintiffs' arguments for application of strict scrutiny. During the time that an EM is appointed, a local government's elected officials are entirely without any authority to govern. As discussed above and as alleged in Plaintiffs' complaint, this implicates the fundamental right to vote and equal protection concerns based on race and therefor requires application of strict scrutiny.

Under a strict-scrutiny analysis, a state classification is constitutional only if it is narrowly tailored to achieve a compelling governmental interest.[170] The state has not shown either a compelling interest or narrow tailoring in support of Section 9(6)(c).[171]

In light of the virtually identical substance of P.A. 4 and P.A. 436, whatever

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[169] Factual development would readily show that EMs had not changed any practices during the interim period when P.A. 72 was in effect.

[170] *Grutter*, 539 US at 326.

[171] MCL § 141.1549(6)(c)

interest the state can articulate in providing for the removal of EMs appointed under P.A. 436 after 18 months in office would be equally well served by providing for the removal of EMs appointed under P.A. 4 once *those* EMs had served 18 months. There can simply be no rational reason, let alone a compelling one, for the state's refusal to accrue time served under P.A. 4 toward the 18-month requirement of Section 9(6)(c) of P.A. 436.

CONCLUSION

For the foregoing reasons, the Plaintiffs request that the Court of Appeals reverse the District Court's grant of dismissal on each of the counts of Plaintiffs' Amended Complaint.

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Dated: March 10, 2016

Case No. 15-2394

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Catherine Phillips, et al.	)
	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
Richard Snyder, et al.	)
	)
Defendants-Appellees.	)

_____/

CERTIFICATE OF COMPLIANCE

I certify that this brief is in compliance with F.R.A.P 32(a)(7)(C) and contains 13,967 words, excluding the corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, the Designation of the Contents of the Joint Appendix and any certificates of counsel do not count toward the limitation.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that ***Plaintiff-Appellants' Brief on Appeal***, along with this ***Certificate of Service*** was served on all parties of record via electronic mail through the Court's ECF system on March 10, 2016:

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ADDENDUM I

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Date Filed	Dkt. No.	Description	Pg. ID
02/12/2014	39	AMENDED COMPLAINT *for Declaratory Relief* filed by All Plaintiffs against All Defendants. NO NEW PARTIES ADDED. (Philo, John) (Entered: 02/12/2014)	510-553
03/05/2014	41	MOTION to Dismiss by Andrew Dillon, RICHARD D SNYDER. (Attachments: # 1 Index of Exhibits Exhibit List, # 2 Exhibit 1. Chart, # 3 Exhibit 2. Order 2013-11 and Order 2013-13, # 4 Exhibit 3. Order 2013-19, # 5 Exhibit 4. Order No. 094, # 6 Exhibit 5. Order No. S-334) (Barton, Denise) (Entered: 03/05/2014)	558-659
03/06/2014	42	EXHIBIT *Corrected Exhibit 1* re 41 MOTION to Dismiss by Andrew Dillon, RICHARD D SNYDER (Barton, Denise) (Entered: 03/06/2014)	660-661
03/28/2014	45	RESPONSE to 41 MOTION to Dismiss *under Rule 12 (b)* filed by All Plaintiffs. (Attachments: # 1 Document Continuation Brief in Support of Plaintiffs Response to Motion to Dismiss, # 2 Index of Exhibits Exhibit Index, # 3 Exhibit Ex 1-EM Ecorse Order, # 4Exhibit Ex 2-Gov Ecorse Order, # 5 Exhibit Ex 3-EM Pontiac Order, # 6 Exhibit Ex 4-Gov Pontiac Order, # 7 Exhibit Ex 5-Fiscal Scores, # 8 Exhibit Ex 6-PA 4) (Philo, John) (Entered: 03/28/2014)	672-811
04/15/2014	46	REPLY to Response re 41 MOTION to Dismiss filed by Andrew Dillon, RICHARD D SNYDER. (Barton, Denise) (Entered: 04/15/2014)	812-822

11/19/2014	49	ORDER granting in part and denying in part defendants' Motion to Dismiss 41 and denying defendants' Motion to Stay Proceedings 47 Signed by District Judge George Caram Steeh. (MBea) (Entered: 11/19/2014)	888-925
12/01/14	50	MOTION for Reconsideration re 49 Order on Motion to Dismiss, Order on Motion to Stay by All Plaintiffs. (Attachments: # 1 Index of Exhibits Index to Exhibits, # 2 Exhibit Exhibit 1) (Philo, John) (Entered: 12/01/2014)	926-962
12/15/2014	52	ORDER denying 50 Motion for Reconsideration. Signed by District Judge George Caram Steeh. (MBea) (Entered: 12/15/2014)	997-998
10/23/2015	73	STIPULATED ORDER DISMISSING Count IV and closing case. Signed by District Judge George Caram Steeh. (MBea) (Entered: 10/23/2015)	1367-1370

ADDENDUM II

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Exhibit	Description
1	Equality Found v. City of Cincinnati
2	Green v. Crew
3	DBE v. Martin - Transcript of 10/1/14

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