No. 16-1207

IN THE

RUSSELL BELLANT, *et al.*,

Petitioners,

—v.—

RICHARD D. SNYDER, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR *AMICI CURIAE* LATINOJUSTICE PRLDEF AND DĒMOS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a law that removes all governmental authority from locally-elected officials in municipalities that have disproportionately large minority populations, and thereby denies the residents of those municipalities the ability to elect representatives of their choice to govern them, is subject to scrutiny under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301?

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STATEMENT OF INTEREST[1]

LatinoJustice PRLDEF ("LatinoJustice") and Dēmos as *amici curiae* respectfully submit this brief in support of the petition for a writ of certiorari made by Petitioners urging the Court to review this important Voting Rights Act case.

Amici are organizations committed to eliminating racial discrimination against Latinos and persons of color generally in the areas of political access, economic opportunity, education, and immigrant rights. The mission of *amicus* LatinoJustice is to protect the civil rights of all Latinos and to promoting justice for the pan-Latino community. It has worked to secure the voting rights and political participation of Latino voters since its founding in 1972, when it initiated a series of suits to create bilingual voting systems throughout the United States. *Amicus* Dēmos is a public policy organization working for an America where we all have an equal say in our democracy and an equal chance in our economy. It deploys original research, advocacy, litigation, and strategic communications to protect voting rights and work toward equal representation.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part, and no person other than *amici*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Respondents and Petitioners' consent to the filing of this brief is on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

In Michigan, 98% of the state's white residents are represented in their local government by officials they had an opportunity to elect. Yet for more than half of the state's black residents and nearly 16% of its Latino[2] population, that is not the case.[3] These figures are the result of a law enacted in Michigan in 2012, 2012 Mich. Pub. Acts 436 ("PA 436"), which has selectively disenfranchised voters in predominantly non-white communities. In numerous Michigan communities of color, elected local officials have been entirely stripped of any authority to govern and have been replaced by an "emergency manager" appointed by the governor. As a result, communities of color across the state have no meaningful right to vote for effective representation in local elections.[4]

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[2] We use the terms "Latino" and "Hispanic" interchangeably to refer to the group designated by the Census as "Hispanic." Specifically, a report on the 2010 Census states that "'Hispanic or Latino' refers to a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race." Karen R. Humes, Nicholas A. Jones, & Roberto R. Ramirez, *Overview of Race and Hispanic Origin: 2010, 2010 Census Briefs* 1, 2 (March 2011), http://www.census.gov/prod/cen2010/briefs/c2010br 02.pdf.

[3] *See* App. 58 (for black residents); U.S. Census Bureau, *Quick Facts*, https://www.census.gov/quickfacts/table/PST045216/00 (last visited May 6, 2017) (comparing the total number of Latino residents living in municipalities affected by the state's emergency manager law to the total number of Latino residents of Michigan, according to 2010 U.S. Census data).

[4] *See infra* notes 13–14 and accompanying text; *see also* App. 40 (Order Granting in Part and Den. in Part Defs.' Mot.

Section 2 of the Voting Rights Act (the "Act" or "Section 2"), 52 U.S.C. § 10301 (2012), passed in 1965 and amended in 1982, is intended to prevent and remedy racial discrimination in voting, and ensure that protected classes of "minority" voters – historically disenfranchised communities of color – have equal power to effectively elect candidates of their choice who are responsive and accountable to them. Congress substantially amended the Voting Rights Act in 1982 after finding that the law's first two decades were marred by insufficient progress. Endless variations on discriminatory voting practices and complex, novel schemes designed to diminish the effective right to participation and representation escaped the Act's scrutiny under unduly narrow interpretations of the law. Congress recognized after twenty years of slow progress and recalcitrance that states and localities had begun to engage in complex "second-generation" harms, having "substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices that dilute minority voting strength."[5] In particular, Congress recognized the unchecked proliferation of "a broad array of dilution schemes" including, among other things, that "elective posts were made appointive."[6] To prevent the success of "similar maneuvers in the future,"[7] Congress imbued the Act with a purposefully broad remedial mandate capable of rectifying any such "devices result[ing] in unequal

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Dismiss & Den. Defs.' Mot. Stay Proceedings, *Phillips v. Snyder*, 2:13-cv-11370, at 6 (E.D. Mich. Nov. 19, 2014)).

5 S. Rep. No. 97-417, at 10 (1982) [hereinafter S. Rep.].

6 *Id.* at 6.

7 *Id.*

access to the electoral process." *Thornburg v. Gingles*, 478 U.S. 30, 46 (1984).

If the Sixth Circuit's reasoning is maintained, this Congressional intent will be evaded yet again. The decision permits a law that effects widespread and complete deprivation of the voting power of communities of color throughout the state to escape any scrutiny under the Voting Rights Act, on the basis that states are generally free to allocate the duties of local officials or to determine what offices should be appointed or elected. That dangerous line of reasoning ignores Section 2's mandate to examine the racially disproportionate impact of the law under the totality of the circumstances. It is only in low-income communities and communities of color that local officials have been supplanted by state appointees. It is only in majority low-income communities and communities of color that any local duties have been "allocate[d]."[8] And to call it an allocation "simply gives euphemism a bad name"[9] – the elected officials in the affected communities have been stripped of all meaningful governing power. Any law, by whatever mechanism, that has such a stark, dramatic, and disproportionate overall effect on racial minorities' voting rights *must* be subject to scrutiny under Section 2.

Michigan's emergency manager law, PA 436, is the sharpest example of many such laws that are being considered throughout the United States. As explained below, PA 436 has operated to disenfranchise entire communities of color in

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8 App. 13.

9 *Koszola v. Fed. Deposit Ins. Comm'n*, 393 F.3d 1294, 1302 (D.C. Cir. 2005) (Roberts, J.).

Michigan. Laws like it, if left unchecked, have breathtaking potential to disenfranchise communities of color in the many other jurisdictions where they are proliferating. These laws, enacted by majority-white jurisdictions, deprive majority-minority political subdivisions of meaningful local democracy and effective representation.

PA 436 is broader in scope than many of these laws, but its extreme reach only underscores the potential harm inherent in these devices. They belong to a class of facially neutral laws with clear discriminatory effects – laws that were precisely what Congress contemplated when it established the broad remedial mandate of Section 2. If left outside the ambit of federal voting rights law, Michigan's extreme example may serve as a model for other jurisdictions of the latest "sophisticated device" to deprive citizens of color a meaningful right to participate in the political process.[10]

REASONS FOR GRANTING THE PETITION

Michigan's emergency manager law, even with its sweeping breadth, works in a familiar way: behind a veneer of facial neutrality and while purporting to address a legitimate matter of public concern, the law dilutes and denies the effective voting power of racial minorities in favor of the preferences of a jurisdiction's majority political faction. The federal courts have applied Section 2 of the Voting Rights Act's broad language to scrutinize discriminatory "standards, practices, or procedures" no matter their form. 52 U.S.C. § 10301(a). In refusing even to apply Section 2 to Michigan's

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[10] S. Rep. at 10.

extreme emergency manager regime, which has had a strikingly disproportionate effect on communities of color throughout the state, the court below erred and departed from established Voting Rights Act jurisprudence, which has properly focused on the overall effects of the law at issue, not simply the means. This Court should grant review to correct that error and hold that PA 436 is subject to scrutiny under Section 2 of the Voting Rights Act. In doing so, the Court would prevent opening a gaping hole in the protection of a meaningful and effective right to vote under Section 2.

I. Emergency Manager Laws Have Unlimited Potential to Deprive Minority Voters of Meaningful Participation in Local Elections

The practical effect of laws like Michigan's is that nearly all white communities in a state will have local elected officials but communities of color will not. That disproportionate effect is enough to trigger searching review under Section 2. The risk that these laws will be employed to take away control from communities of color is not speculative. Today, at least twenty states authorize extraordinary intervention against municipal fiscal distress.[11] In many of these states, the law has

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[11] These states are Connecticut, Florida, Illinois, Indiana, Louisiana, Maine, Massachusetts, Michigan, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, and Texas. *See* Pew Charitable Trusts, *The State Role in Local Government Financial Distress* 20 (2016), http://www.pewtrusts.org/en/research-and-analysis/reports/2013/07/23/the-state-role-in-local-government-financial-distress (identifying states); *see also* 2001 Conn. Spec. Acts 01; 1993 Conn.

overwhelmingly been applied to communities of color.

This impact is forcefully underscored by an analysis of the communities in which Michigan's emergency manager law has been deployed.[12] Seven out of ten municipalities in Michigan that recently had emergency managers were comprised of significantly more persons of color when compared to the state population as a whole, and nearly all of the

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Spec. Acts 04; 1992 Conn. Spec. Acts 05; 1991 Conn. Spec. Acts 40; 1990 Conn. Spec. Acts 31; 1989 Conn. Spec. Acts 24; 1989 Conn. Spec. Acts 47; 1988 Conn. Spec. Acts 80; Fla. Stat. Ann. §§ 218.50–218.504 (2014); 65 Ill. Comp. Stat. Ann. 5/8-12-1–8-12-24 (2004); Ind. Code Ann. §§ 6-1.1-20.3–6-1.1-20.3-15 (2007); La. Stat. Ann. §§ 39:1351-1356 (2011); Me. Rev. Stat. Ann. tit. 30 §§ 6101-6113 (1987); 2010 Mass. Acts 170; 2004 Mass. Acts 731; 1991 Mass. Acts 679; Mich. Comp. Laws Ann. §§ 141.1541–141.1575 (2012); Mich. Comp. Laws §§ 141.1501–141.1531 (2011); 1990 Mich. Pub. Acts 72; 1988 Mich. Pub. Acts 101; Nev. Rev. Stat. Ann. §§ 354.655–354.725 (1995); N.H. Rev. Stat. §§ 13:1-13:7 (2014); N.J. Stat. Ann. § 52:27D-118.24-118.31 (1987); N.J. Exec. Order No. 171 (2015); N.J. Stat. Ann. §§ 52:27BBB-1–BBB79 (2002); N.J. Stat. Ann. §§ 18A:7A – 18A:7A-60 (1975); N.J. Stat. Ann. §§ 52:27BB-1–BB100 (1947); N.M. Stat. Ann. §§ 10-5-2–10-5-8 (2006); N.M. Stat. Ann. §§12-6-1-12-6-14 (1978), N.M. Stat. Ann. §§ 6-1-1-6-1-13 (1978), N.Y. Pub. Auth. Law §§ 3650–3669 (2016); N.Y. Pub. Auth. L. §§ 3950–3973 (2016); N.Y. Pub. Auth. L. §§ 3850-3873 (2014); N.Y. Unconsol. L. §§ 5401-5420 (McKinney 2012); N.C. Gen. Stat. Ann. §§ 159-176 (2013); Ohio Rev. Code Ann. §§ 118.01–118.99 (1999); Or. Rev. Stat. §§ 203.095, 203.100, 287A.630 (2009); 1987 Pa. Laws 246, No. 47; R.I. Gen Laws § 45-9-3 (2013); Tenn. Code Ann. §§ 9-13-201-212 (1995); Tenn. Code Ann. § 9-13-301-302 (1993); Tenn. Code Ann. § 9-21-403 (1986); Tex. Loc. Gov't Code § 101.006 (1987).

[12] All population figures are based on 2010 census data. *See* U.S. Census Bureau, *supra* note 3.

municipalities covered by the law remain majority-minority communities of color.[13] Michigan is over 75% white, but the communities with emergency managers are on average only 38% white.[14]

The racial impact of these laws is not just limited to Michigan; it is equally dramatic in its neighboring states. Both Gary, Indiana, and East St. Louis, Illinois, have recently been subject to some level of state oversight.[15] Although these oversight schemes are less sweeping than the one in Michigan, the racial makeup in these communities – and in particular, the racial disparity between these communities and their states – is striking. Gary is 84.8% black, as compared to the rest of Indiana, which is only 9.1% black. And East St. Louis is 98% black, as compared to Illinois, which is only 14.5% black. These are just two among many majority-minority communities in the Rust Belt in financial

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[13] Benton Harbor is nearly 90% black and 2.2% Latino; Ecorse is 46.4% black and 13.4% Latino; Flint is 56.6% black and 3.9% Latino; Highland Park is 93.5% black and 1.3% Latino; Pontiac is 52.1% black and 16.5% Latino; Muskegon Heights City is 78.3% black and 4.2% Latino; and Detroit is 82.7% black and 6.8% Latino. In contrast, Michigan is over 75% white.

[14] This figure was calculated using the mean percentage of white individuals across the various Michigan communities under the emergency manager regime.

[15] *See* 65 Ill. Comp. Stat. 5/8-12-1–5/8-8-12-24 (2016); Ind. Code. §§ 6-1.1-20.3–6-1.1-20.3-15 (2016); *see also The Only 'Distressed' City in Illinois Will Shed State Oversight*, Reuters (Nov. 14, 2013), http://www.reuters.com/article/usa-illinois-eaststlouis-idUSL2N0IZ20A20131114; Distressed Unit Appeals Board, *Meeting Minutes* (May 20, 2009), http://www.in.gov/dlgf/files/090520-_DUAB_Meeting_Minutes.pdf.

distress. But as examples, they show that an expansion of state emergency manager laws like the one in Michigan would threaten to disenfranchise communities of color across the country – communities that exist as islands of local minority political control in states where electoral power, politics, and policies remain largely determined by white majorities.[16] There is thus a real risk that Michigan's legislation will signal to other states considering similar arrangements that they too can disenfranchise communities of color, particularly given that Michigan has deployed its emergency manager law on communities of color with surgical precision.

The breadth of statutes like PA 436 in Michigan only augments this risk. Fiscal interventions trace their roots to the Great Depression,[17] but Michigan's statute is not just acting as a tool to aid cities in financial distress; it

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[16] There are many potential contributing factors to this unequal breakdown in political power, including a history of *de jure* state and federal fiscal policies that fomented residential segregation, as well as the *de facto* segregation, redlining, economic divestment, and post-industrial isolation of majority-minority communities. *See generally* Richard Thompson Ford*, The Boundaries of Race: Political Geography in Legal Analysis,* 107 Harv. L. Rev. 1841 (1994); *see also id.* at 1844 (observing that residential segregation is "a matter of political fragmentation and economic stratification along racial lines, enforced by public policy and the rule of law," and noting the persistence of the historical impoverishment and political powerlessness of segregated minority communities).

[17] *See* David R. Berman, Takeovers of Local Governments: An Overview and Evaluation of State Policies, 25 Publius J. Federalism 55, 57 (1995).

empowers the state to completely strip communities of color of a meaningful right to vote in local elections, supplanting elected municipal officials with unelected appointees who are not required to be responsive or accountable to the community's voters.[18]

Importantly, the statute did not start out as broad as it is today. It originated as one focused on assisting municipalities in financial distress. Prior iterations of the statute allowed for the appointment of an "emergency financial manager," but its powers extended only to "matters of finance."[19] In turning over *all* policy-making power to an official with little to no transparency or public accountability,[20] the statute has significantly expanded in scope, going well beyond the oversight present in a typical receivership. And this new and striking power given to the state of Michigan – allowing it to take complete control and to remove and displace local

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[18] PA 436 authorizes the appointment of an "emergency manager" who will "act for and in the place and stead of the governing body." Mich. Comp. Laws § 141.1549 (2016). The governor determines whether a financial emergency exists, *id.* § 141.1546(1), whom to appoint as emergency manager, *id.* § 141.1549(1), and the duration of the emergency manager's tenure, *id.* § 141.1549(3)(d) (the emergency manager "serve[s] at the pleasure of the governor"). Emergency managers can eliminate or privatize services, sell public assets, cancel local programs, break contracts, and negotiate and approve agreements on the municipality's behalf. *Id.* § 141.1552.

[19] App. 37–38.

[20] *See, e.g.*, App. 38 ("[Emergency Managers] could act 'for and in the place of' the municipality's elected governing body, including a general grant of legislative power.").

representation of a municipality by way of unelected officials – has resulted in effectively disenfranchising six of the state's majority-minority communities.

The emergency managers' powers have a real impact in these communities. For example, in Benton Harbor, Michigan – a community that is approximately 90% black – an emergency manager in 2011 linked fees applied to trash collection and access to water, raising the specter that residents too poor to pay their trash bills would have their water cut off.[21] In Detroit – a community that is approximately 83% black and 7% Latino – an emergency manager closed half of the public schools between 2009 and 2015,[22] critically diminishing equal access to quality education for a population overwhelmingly comprised of black and Latino students.[23] And the water crisis in Flint, Michigan – a community that is approximately 57% black and

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[21] *See* Jonathan Mahler, *Now That the Factories Are Closed, It's Tee Time in Benton Harbor, Mich.*, N.Y. Times (Dec. 15, 2011), http://www.nytimes.com/2011/12/18/magazine/benton-harbor.html.

[22] *See* Curt Guyette, *After Six Years and Four State-Appointed Managers, Detroit Public Schools' Debt Has Grown Even Deeper*, Detroit Metro Times (Feb. 25, 2015), http://www.metrotimes.com/detroit/after-six-years-and-four-state-appointed-managers-detroit-public-schools-debt-is-deeper-than-ever/Content?oid=2302010 (noting that the number of schools within the district was reduced from 198 to 103, and the number of students from 95,000 to 48,900).

[23] The Detroit Public Schools Community District is comprised of 97.52% students of color. Michigan Dep't of Educ., *Racial Census Reports by School District 2016-2017,* https://www.michigan.gov/documents/mde/RacialCensus0506_204440_7.pdf (last visited May 7, 2017).

4% Latino – is too terribly familiar to bear lengthy review here; the emergency manager sacrificed public safety to save costs on drinking water, to the unequivocal detriment of the health and safety of children, families, and voters in Flint.[24]

In its total displacement of local elected officials, Michigan's emergency manager law created a category of its own, but other jurisdictions are positioned to follow its lead. In Rhode Island, after the city of Central Falls, which is 60.3% Latino, neared insolvency, Rhode Island authorized – both retroactively, for Central Falls, and thereafter – the appointment of a receiver with the "powers of the elected officials . . . relating to or impacting the fiscal stability of the town," as well as the "power to exercise any function or power of any municipal . . . officer or employee . . . relating to or impacting the fiscal stability of the town."[25] Elected officials there now occupy a mere "advisory" role.[26] As with PA 436, the Rhode Island law denies the Latino population in that city equal access to meaningful representation, accountability, and responsiveness in the political process. In both Michigan and Rhode Island, what might previously have been resolved by state aid or limited oversight has resulted in the

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[24] *See* Merrit Kennedy, *2 Former Flint Emergency Managers, 2 Others Face Felony Charges over Water Crisis*, NPR (Dec. 20, 2016), http://www.npr.org/sections/thetwo-way/2016/12/20/506314203/2-former-flint-emergency-managers-face-felony-charges-over-water-crisis.

[25] R.I. Gen. Laws § 45-9-7 (2016).

[26] *Id.* § 45-9-7(c).

wholesale disenfranchisement of communities of color.

Although the appointment of emergency managers may sometimes only be temporary, the decisions those unelected officials make can have long-lasting effects on communities. The true impacts of Flint's public health emergency are yet to be seen, and Detroit residents will suffer from the closure of schools long into the future.[27]

Michigan's law is demonstrative of the far-reaching control states can exercise over municipalities, and how that control may be wielded to disenfranchise persons of color. And it is clear communities of color are overwhelmingly impacted by these increasing displacements of local control. Holding that this wholesale displacement is not subject to any review under Section 2 not only contradicts the purpose of the Voting Rights Act's broad remedial mandate, it is also dangerous and wrong. It would grant states carte blanche to allow white jurisdictions to be effectively represented and governed by elected officials of their choice, while denying that same right to communities of color. When a law has that kind of disproportionate result on the political participation of communities of color, the Voting Rights Act must have something to say about it.

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[27] Guyette, *supra* note 22.

II. The Plain Text and History of Section 2 of the Voting Rights Act Must Apply to Sophisticated State Statutory Devices with Broad Discriminatory Effect, like Michigan's Emergency Manager Law

The Voting Rights Act was enacted in 1965 to provide a meaningful remedy for race-based electoral disenfranchisement. It was passed after a century of piecemeal litigation failed to vindicate the promise of the Fifteenth Amendment, and proved unequal to the task of stamping out efforts by states and localities to impair equal access to the right to vote.[28] Section 2 of the Act was drafted with a broad mandate, explicitly rejecting a narrow focus on the form of discrimination to target *any* "standard, practice, or procedure" that, "based on the totality of the circumstances," impairs equal political participation "on account of race or color." 52 U.S.C. § 10301; *see also South Carolina v. Katzenbach*, 383 U.S. 301, 316 (1966) ("Section 2 broadly prohibits the use of voting rules to abridge exercise of the franchise on racial grounds.").

Congress amended the Act in its second decade, recognizing that states and localities had "substantially moved from the direct, over[t] impediments to the right to vote to more

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[28] *See* 108 *Special Message to the Congress on the Right to Vote*, 1 Pub. Papers: Lyndon B. Johnson 287–88 (Mar. 15, 1965) (urging passage of the Voting Rights Act because "the Fifteenth Amendment of our Constitution is today being systematically and willfully circumvented in certain State and local jurisdictions" and "the remedies available under law to citizens thus denied their Constitutional rights . . . are clearly inadequate").

sophisticated devices that dilute minority voting strength."[29] Demonstrating the drafters' focus on adapting the Act to address unforeseen means of discrimination, the amendments "ma[d]e clear that a violation [can] be proved by showing discriminatory effect alone and . . . establish[ed] as the relevant legal standard the 'results test.'" *Gingles*, 478 U.S. at 35 (1986). Under this results test, "plaintiffs [can] prevail by showing that, under the totality of the circumstances, a challenged election law or procedure ha[s] the effect of denying a protected minority an equal chance to participate in the electoral process." *Id.* at 44 n.8.

Since the 1982 amendments and the Court's decision in *Gingles*, federal courts have applied Section 2 to voting rights claims arising out of diverse standards, practices, and procedures. Such devices – and litigation to check them – have recently proliferated,[30] giving rise to efforts to develop "[a] clear test for Section 2 vote denial claims." *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (quoting *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014), *vacated on other grounds by* No. 14–3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014)) (remanding a challenge to Texas's voter identification laws for appropriate Section 2 review). These lower courts – including another panel of the Sixth Circuit – have recognized

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[29] S. Rep. at 10.

[30] *See, e.g.*, Ari Berman, *Give Us the Ballot: The Modern Struggle for Voting Rights in America*, 286–315 (2015) (describing rise of voting-related legislation and voting rights litigation in wake of *Shelby County*).

that vote denial and vote dilution claims cannot be divorced from their local social and historical contexts,[31] and have thoughtfully analyzed Section 2 claims brought before them. *See, e.g.*, *Husted*, 768 F.3d at 554 (proposing that Section 2 vote denial claims require that (i) "the challenged 'standard, practice, or procedure' must impose a discriminatory burden on members of a protected class" and (ii) "that that burden must in part be caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class" (citing *Gingles*, 478 U.S. at 47)); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014) (applying similar test to various voting restrictions adopted by North Carolina legislature).

The decision below is a stark departure from appropriately rigorous Voting Rights Act analyses that have focused on a challenged law's effects. Indeed, the Sixth Circuit panel refused even to apply Section 2 and held instead that the structure of this particular voting practice – essentially, its form, rather than its effect – categorically removes it from the Voting Rights Act's ambit. App. 24 (describing requested Section 2 analysis of PA 436 as an "attempt to fit a square peg into a round hole"). The logic of the panel's ruling contradicts the express intent of Congress in establishing the broad reach of Section 2, which was designed to get at such "second-

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[31] Dale E. Ho, *Voting Rights Litigation After* Shelby County*: Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. Legis. & Pub. Pol'y 675, 686, 698-99 (2014).

generation" discriminatory harms.[32] If left uncorrected by this Court and adopted by others, the Sixth Circuit's ruling would subvert the Voting Rights Act, which instructs courts to evaluate the effects of a challenged practice rather than its form, by holding that the Act does not permit voting rights claims where a state deprives voters in its majority-minority municipalities – and *only* in those municipalities – of an effective right to vote in their local elections.

The only novel aspect of Petitioners' claims is the *form* by which minority votes are stripped of any effective meaning in local representation.[33] The discriminatory *effect* in this case joins a long line of vote dilution, racial gerrymandering, and vote denial cases.[34] The Voting Rights Act's drafters explicitly

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[32] *See Stewart v. Blackwell*, 444 F.3d 843, 858 (6th Cir. 2006) ("Vote dilution, of course, while just as effective as an outright denial of the franchise, may be accomplished in many ways, both intentionally and unintentionally, in a manner that does not immediately shock the senses as would an outright denial."), *vacated en banc as moot* 473 F.3d 692 (6th Cir. 2007).

[33] For the argument that Section 2 of the VRA remains essential to ensure equal access to the political process for all voters as long as the vestiges of racially polarized political subjugation continue to be wrought into novel discriminatory schemes and devices, *see* Joanna E. Cuevas Ingram, Comment, *The Color of Change: Voting Rights in the 21st Century and the California Voting Rights Act,* 15 Harv. Latino L. Rev. 183 (2012).

[34] For Sixth Circuit authority on this history, see *Stewart*, 444 F.3d at 857 ("Dilution of the right to vote through various techniques, including racial gerrymandering and conducting white primaries, likewise violate the Constitution due to the effect of denying some citizens the right to vote. What is clear

contemplated such innovations and intended for the Act to prohibit unforeseen tools of discrimination. *See, e.g.*, *Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994) (noting that "the demonstrated ingenuity of state and local governments in hobbling minority voting power, a point recognized by Congress when it amended the statute in 1982," requires review of the totality of a law's effects).

The Sixth Circuit panel's refusal even to apply Section 2 avoids the searching, meaningful evaluation under the totality of circumstances test that the Voting Rights Act requires when a court is faced with practices that effectively dilute or deny minority groups' meaningful participation and representation in state political processes.[35] Had the ruling below correctly applied Section 2, it would have analyzed PA 436 against "the totality of the circumstances," and considered the results and effects of a law that effectively ends municipal representation for more than half of the state's black citizens while leaving the structure of local

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from all of the Supreme Court's voting rights cases is that '[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.'" (internal citations omitted) (quoting *Reynolds v. Sims,* 377 U.S. 533, 555 (1964))).

[35] *Id.* at 856-57 ("Careful and meticulous scrutiny is necessary because even minor infringements on the franchise can have reverberations in other contexts and throughout democratic society.").

democracy fully intact in cities where nearly all of its white citizens live.[36]

This analysis, had the panel conducted it, would be informed by the Senate Report factors, and specifically their call for consideration of Michigan's historical and contemporary racial politics. *See, e.g.*, *Husted*, 768 F.3d at 554–55 (applying Senate Report factors to vote denial claim and collecting cases doing same); *see also Gingles*, 478 U.S. at 43 & n.7 (the Senate Report "elaborates on the nature of § 2 violations" and is regarded as authoritative by this Court). The State of Michigan – and in particular the state government's relationship with its municipalities – features several of these factors, from a history of racial discrimination affecting political participation of persons of color in the state to racially polarized voting and racial disparities in education, employment, and health that hinder effective minority group political representation.[37]

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[36] *Id.* at 858-59 (citing *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (striking down Tennessee's durational residence statute, and stating that, "in decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction")).

[37] *See* Michelle Wilde Anderson, *Democratic Dissolution: Radical Experimentation in State Takeovers of Local Governments*, 39 Fordham Urb. L.J. 577, 579, 616 (2011) (exploring authorities on the history of racial segregation and segregation's impact on Benton Harbor, Michigan, and noting that the municipality "saw the rapid flight of thousands of white families and jobs from the 1960s to the 1980s," leaving it 91% black – a striking contrast to St. Joseph, the city directly across the river from it, which is 88% white); *see also, e.g.*, *Milliken v. Bradley*, 433 U.S. 267, 269 & n.1 (1977) (describing

None of this analysis figured in the panel decision below. The Sixth Circuit's wholesale refusal even to apply Section 2 stands in sharp contrast to the manner in which other federal courts have approached voting rights claims in recent years. This Court should grant certiorari to correct the Sixth Circuit's incorrect application of the law, its failure to engage in the totality of circumstances test to analyze the discriminatory effects of PA 436 on affected communities of color in Michigan, and to subject Michigan's far-reaching voter-disenfranchisement scheme to an appropriately searching review under Section 2 of the Voting Rights Act.

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unchallenged findings of *de jure* segregation in Detroit public schools, that "[t]he State and its agencies . . . have acted directly to control and maintain the pattern of segregation in the Detroit schools," and that the Michigan Legislature enacted a law forbidding the Detroit School Board from voluntarily remedying the effects of segregation (ellipses in original)).

CONCLUSION

Amicus curiae LatinoJustice and Dēmos respectfully urge that the judgment of the Sixth Circuit be reversed.

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