UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Russ Bellant, et al.

Plaintiffs,

v.

Richard D. Snyder, et al.

Defendants.

Case no. 2:17-cv-13887

Hon. George Caram Steeh
Mag. R. Steven Whalen

BRIEF IN SUPPORT OF PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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BRIEF IN SUPPORT OF PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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BRIEF IN SUPPORT OF PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

NOW COME Plaintiffs, by and through their attorneys, the SUGAR LAW CENTER FOR ECONOMIC & SOCIAL JUSTICE, THE SANDERS LAW FIRM, PC, GOODMAN HURWITZ & JAMES, P.C. on behalf of the Detroit/Michigan National Lawyers Guild, the CENTER FOR CONSTITUTIONAL RIGHTS, and CONSTITUTIONAL LITIGATION ASSOCIATES, P.C. for their *Brief in Support of Plaintiffs' Response to Defendants' Motion to Dismiss* do hereby state as follows:

I. STATEMENT OF FACTS

On 12/1/17, Plaintiffs re-filed their Complaint seeking declaratory and injunctive relief against the *Local Financial Stability and Choice Act*, Act No. 436, Public Acts of 2012, Mich. Comp. Laws § 141.1541 *et. seq*. (P.A. 436). Plaintiffs' claims are brought pursuant to 42 U.S.C. §1983 for violations of the Equal Protections Clause of the United States Constitution. As stated in the Complaint, including nearly sixteen pages of factual allegations,[1] Plaintiffs claims are not moot, they have standing, and have stated well-pleaded claims that P.A. 436 violates their constitutional rights.

Repeating the state's disingenuous boilerplate, Defendants suggest that P.A. 436 is simply a continuation of the state's "financial stability laws" offering local

[1] *See* Doc.#1, Case No. 2:17-cv-13887, Complaint, Pg ID # 8-24. ("Doc. 1").

government "a range of options to resolve their fiscal crises." [2] Neither statement is true and Defendants know it.

The state has repeatedly argued contradictory positions in various forums, depending on their perception of the audience and the expediency of the moment. In the past, they argued that cities and school districts have no choice but to accept emergency managers ("EMs") appointed by the state. Here, they argue that the city gets to choose how long they stay. In other forums, they argue that EMs are state officials; in others, city officials.[3] The law itself requires the state's approval of any of the options selected by local officials and the state has full discretion to decline.[4] And, when the state declines, the local community can select from the remaining options, which the state may again decline until the local community arrives at the

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[2] Doc.#11, Case No. 2:17-cv-13887, Motion & Brief in Support of Defendants' Motion to Dismiss, Pg ID # 70 ("Doc. 11").

[3] *See,e.g.*, *Mays v. State of Michigan*, ___Mich App__, 2018 WL 559726, at *12-*16 (2018).

[4] *See MCL 141.1548* (consent agreements: negotiated with the state treasurer, who is appointed by the governor; state treasurer has to concur in the agreement; if not, another option must be then selected); *MCL 141.1549* (emergency managers: "governor may appoint an emergency manager to address a financial emergency." It is governor's sole discretion whether to appoint one and thus must consent if this option is selected by local officials and if not, then another option must be selected); *MCL 141.1565* (neutral evaluation: as noted by Detroit Emergency Manager Kevyn Orr, this is simply a state codification of prerequisite to entering Chapter 9 bankruptcy and presumably all fiscally distressed jurisdictions have been negotiating with creditors before P.A. 436 is invoked. Also, any agreement reached is subject to the approval of the state treasurer who can then require one of the other options); and *MCL 141.1566* (Chapter 9 Bankruptcy: requires the governor's approval).

'correct' choice. In practice, few if any, majority minority cities or school districts had a choice in which option was selected for them.

In short, Michigan does not have a fiscal responsibility statutes. Other states do. Michigan has is an emergency manager statute, which other states do not. Michigan's statute was adopted in reaction to specific events, occurring at a specific time, in a predominately African-descended community. It is impossible to conceive of it being adopted in reaction to the same events in a predominately white community. No amount of searching and obfuscating for seemingly race neutral language and glossing over of actions by officials can hide this.

Michigan's emergency manager statute was born from racial politics and has thrived on exploiting the racial divisions in our state. It is toxic and must be struck.

A. MICHIGAN'S EMERGENCY MANAGER LAW WAS BORN FROM RACIAL POLITICS.

Michigan's first emergency manager law was enacted to thwart elected local control over the governance of the City of Detroit's public schools. From 1999 through 2005, the Detroit public schools were solely under state control as its financial condition worsened. The downward financial spiral continued when an elected school board was reinstituted in 2006. In 2009, the state then, under P.A. 72, installed an emergency ***financial*** manager ("EFM") over the school district.

Under P.A. 72, once a financial emergency was declared, the *local emergency financial assistance loan board* had the power to appoint an EFM. The

EFM possessed all the authority of the local government over the finances of the city, including spending and budgetary decisions. Local officials to remain in office and retain power over policy and administrative matters outside the scope of the EFM's fiscal authority. This understanding was substantially confirmed during the course of litigation in late 2010.

Thus, while Detroit public schools' EFM had full control over the district's finances, the elected school board retained authority over nonfinancial issues. As anyone who is familiar with City of Detroit school district politics knows, state officials in Michigan have a deep and abiding disdain for the various school boards that have served in the city. In 2010, this disdain found its expression in then-ongoing litigation between the city's EFM and the school board and then, in the adoption of P.A. 4, the state's first emergency manager law.

In 2009, the Detroit Public Schools' elected school board sued the school district's EFM alleging that he had overstepped his powers.[5] In a lengthy opinion, the court found that the EFM had exceeded his powers under P.A. 72, by seeking to establish academic policies and school curriculum.[6] The court held that these were nonfinancial issues, which the EFM conceded, and authority in these areas

[5] *See* Ex. 1, Opinion of Hon. Wendy Baxter in Case No. Case No. 09-020160-AW (Wayne Cnty. Cir. Ct., Dec. 6, 2010), at p. 1-2.
[6] *Id.* at 31.

remained vested in the elected school board.[7] This was unacceptable to state officials and within four months of the court's decision, P.A. 72 was replaced by Public Act 4 of 2011 – not for the purpose of giving new tools to resolve financial distress, but to disempower an elected school board in an overwhelming African-descended city.

The swiftness of legislative action following the *Adams* ruling betrays the state's motivations. Elections in November of 2010 caused high turnover in the state legislature. Yet on 2/9/11, less than a month after taking office on January 12, the largely brand-new members of the Michigan legislature introduced House Bill 4214 (2011).[8] The bill moved swiftly and within two weeks passed the House, with no known public hearings in Committee, no meaningful study, and little opportunity for debate. Within another two weeks, it passed the Senate in similar manner. Both chambers voted to give it immediate effect, with the House doing so by an improper "rising" vote, over objections and despite calls for a roll call vote.[9] Within another two weeks, the bill was signed into law by the governor. Thus in less than six weeks, a historic overhaul of state law governing municipal financial emergencies, unprecedented in any other state, was accomplished.

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[7] *Id.*
[8] *See* Ex. 2, Legislative Record of Public Act 4 of 2011.
[9] *See* Citizen's Research Council, *Use of Immediate Effect in* Michigan, at fn 2 on p. 6, available online at https://crcmich.org/.

Public Act 4 of 2011 was Michigan's **first** foray into imposing EMs over Michigan's municipalities.[10] At the time of its enactment, P.A. 4 converted all EFMs to EMs. By summer 2011, EMs were in place, displacing elected officials, only in majority African-descended communities – Benton Harbor, Ecorse, Flint, and Pontiac and the Detroit public schools. By spring 2012, majority African-descended school districts in Highland Park and Muskegon Heights joined the list. Additionally, the majority African-descended city of Inkster was required to enter into a consent agreement.

In response, citizens across Michigan mobilized and gathered sufficient signatures to place a referendum on the state-wide ballot. The measure was approved for the ballot in early August of 2012 and P.A. 4 was suspended by operation of law.[11] After suspension of the law, the predominately white city of Allen Park requested and received an EFM, appointed under P.A. 72.

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[10] Prior to P.A. 4, Michigan had the Local Government Fiscal Responsibility Act, Act No. 72, Public Acts of 1990 (P.A. 72), which allowed for the appointment of an **emergency financial manager** but did **not** contain a general grant of legislative powers**.** Defendants are well aware of the difference between the power of an **EM** as opposed to an **EFM**. Under P.A. 72, general governing powers and general legislative powers remained vested in local elected officials and the emergency financial managers' powers, while broad, were limited to matters relating solely to municipal finances.

[11] Deviating from prior understandings regarding the effect of certification and repeal, the Attorney General issued an opinion that the state followed, finding that P.A. 72 sprang back into effect after certification of the referendum, and thus all the EMs automatically became EFMs.

In November 2012, citizens overwhelmingly voted to repeal P.A. 4. In response, during the lame-duck session of the legislature, incensed state officials quickly moved to reenact another EM law substantially identical to P.A. 4, by rewriting an unrelated bill that had languished in committee for nearly a year and became the new emergency manager law. The bill was out of committee on December 5, passed both chambers of the legislature within one week and was signed into law, as P.A. 436, by the governor on 12/31/12. As with P.A. 4, the measure was introduced and enacted without public hearings or meaningful opportunity for debate.[12]

B. P.A. 436 IS IMPOSED UPON COMMUNITIES BASED ON RACIAL POLITICS.

Michigan's African-descended communities certainly have had no choice in whether they would receive EMs or otherwise come under the law. As Detroit's EM Kevyn Orr candidly stated in January 2013, with regard to the lack of any real local choice for local officials under P.A. 436:

> [A]lthough the new law provides **a <u>veneer</u> of a revision it is essentially a <u>redo</u>** of the prior rejected law and appears to merely adopt the conditions necessary for a chapter 9 filing.[13]

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[12] *See* Ex. 5, Legislative Record of Public Act 436 of 2012.

[13] See Ex. 3, Email of Kevyn Orr dated 1/31/2013. At that time and again today, Kevyn Orr was and is a partner in the largest law firm in the country and one of the ten largest law firms in the world. He is also a graduate of the University of Michigan Law School. Presumably, he had the knowledge and experience to make such an assessment.

Notably, at the time of that statement, 1/31/13, Kevyn Orr was being recruited by the governor to become the EM over the City of Detroit; yet, the city was not operating under either a P.A. 72 or P.A. 4 consent agreement, but rather under a consent agreement cobbled together and rationalized under other state laws. The new EM, P.A. 436 would not take effect for three more months and, at least as argued by these Defendants throughout this case, city officials would have a choice in whether to accept an EM, or a consent agreement, or bankruptcy, or neutral evaluation. However, no such choice was given to City of Detroit officials, and Kevyn Orr assumed the office of EM on the day the law took effect.[14] Defendants can be expected to argue that Kevyn Orr was appointed as a P.A. 72 EFM and simply assumed the office of EM when P.A. 436 took effect. Defendants are betrayed, however, by his contract's start date – the day that P.A. 436 took effect – and by his recruitment, selection and appointment by the governor. Public Act 72's local emergency financial assistance loan board had no substantive role.

Likewise, there is no dispute that no choice *at all* was provided to or allowed by officials at the Detroit Public Schools, Highland Park Public Schools, Muskegon Heights Public Schools, the City of Ecorse, City of Flint, and the City of Pontiac, all

[14] *See* Ex. 4, Contract for Kevyn Orr as Emergency Manager. Note, contract was signed on 3/27/13 and its term began on the day that the law became effective. Kevyn Orr took his "oath of office" on 3/13/13 but did not begin any work or act in any way until the effective date of P.A. 436.

of which were governed for extensive times under P.A. 436 EMs. Likewise, River Rouge and Inkster had a consent agreement imposed on them without any choice. Along with the City of Detroit, all are majority minority cities and school districts.

The only majority minority jurisdictions to have had any say in the "options" under P.A. 436, were the public school districts in Pontiac and Benton Harbor and the City of Royal Oak Township, each electing to enter a consent agreement.

The only other jurisdictions to receive EMs were Allen Park, Hamtramck, and Lincoln Park. Each is majority white. None had EMs imposed upon them but rather, all three cities requested the appointment of an EM. Likewise, majority white Wayne County requested and was granted a consent agreement. No majority white school districts have come under either P.A. 4 or P.A. 436.

In summary, ten of Michigan's thirteen African-descended communities had a P.A. 436 'solution' selected by and imposed upon them by the state. Every EM that served in an African-descended community was state-imposed. In contrast, only four predominately white communities have come under P.A. 436 and city officials in each *selected* whether to have an EM or enter a consent agreement.

It is a mistake to think that race-neutral organic processes led to P.A. 436 being so overwhelmingly imposed in African-descended communities. White communities experienced significant fiscal distress in the wake of the Great Recession, yet were far less likely to undergo state financial review. Previously, the

Michigan Department of Treasury maintained a scoring system to determine the financial health of the state's cities and townships. [15] The latest information available from the state is for the fiscal year 2009. Fiscal indicator scores between 5-7 place a municipality on a fiscal watch list and scores between 8-10 result in the community receiving consideration for review. Six out of seven communities (85%) with a majority population of racial and ethnic minorities received EMs when they had scores of 7. At the same time, *none* of the twelve communities with a majority white population received an EM despite having scores of 7 or higher.

In 2010 the state's scoring system and the scoring system used by municipalities across the state and sanctioned to do so by the Department of Treasury, was taken over by a private company, Munetrix. Munetrix is a municipal financial metrics company that consults with municipalities on budgeting, forecasting and reporting. After Munetrix took over, they used and improved upon the State of Michigan's metrics. Their numbers are stark – particularly for Michigan school districts -- indicating that numerous predominately white school districts were in every bit as much fiscal distress as those that received EMs, including school districts in Perry, Holly, Taylor, Brighton, White Cloud, Mackinaw City, Mount Clemens, Bellaire, Bellevue, Suttons Bay, Bridgeport, Hamtramck,

[15] *See* Ex. 5, *Fiscal Indicator Scores,* Michigan Department of Treasury, State of Michigan (formerly available at http://www.michigan.gov/treasury/0,1607,7-121-1751_47023-171423--,00.html).

Ypsilanti, Eastpointe, and other locations.[16] Yet, no predominately white school district came under P.A. 436 or received EMs.

In short, cities and school districts with African-descended majority populations did not request state review of their finances under P.A. 4/P.A. 436 before an EM or consent agreement was imposed by the state while comparable cities and school districts composed of a majority white population commonly only received such reviews upon the request of governing officials and then only received an EM when city officials requested their appointment.

As noted in Plaintiffs' Complaint, statistics amply establish that for each 1% increase in the African-descended population of a local government, there is a 5% increase in the likelihood of state intervention under P.A. 436. Correspondingly, a 20% increase in a community's Black/African American population would result in a 100% increase in the likelihood of intervention.[17] It should not be surprising, then, for state officials and others to know that as a result of the Defendants' actions, fifty-six percent (56%) of the state's African-descended population of the state - 847,907 persons - have experienced the suspension of elected local governance and come under the governance of a P.A. 436 EM, consent agreement and/or a

[16] *See* Ex. 7, Munetrix fiscal scores.

[17] *See* L. Owen Kirkpatrick, and Nate Breznau, *The (Non)Politics of Emergency Political Intervention: The Racial Geography of Urban Crisis Management in Michigan*, at 19 (3/24/16), available online at https://ssrn.com/abstract =2754128.

transition advisory board, compared to under 3% of the state's white population.

The experiences in Flint bear witness to the unconscionable systemic racism that the emergency manager law represents. No recounting of the poisoning of an entire city's children is necessary here, but one cannot turn a blind eye to the integral role that the emergency manager law played in that tragedy,[18] the effects of which will be experienced by Flint residents for the rest of their lives. The Michigan Civil Rights Commission extensively investigated the causes of the crisis an unequivocally concluded: "Whether one supports or opposes the EM law is not the issue. **What is clear is that its application in Michigan has had a racially disparate effect**."[19]

The Commission recognized what these Defendants refuse to see:

> If you live in Michigan, there is a 10% chance that you have lived under emergency management since 2009. But if you are a black Michigander, the odds are 50/50 … The record reveals that communities of color have been starkly overrepresented in jurisdictions placed under emergency management … In short, the EM law as applied far too often addresses the problems of already financially stricken governments in second class communities, segregated based on race, wealth and opportunity,

[18] *See* State of Michigan, Flint Water Advisory Task Force, *Final Report*, at pp. 39-41 (March 2016) (Commissioned by the Office of the Governor Rick Snyder), available online at https://www.michigan.gov/documents/snyder/FWATF_FINAL_REPORT_21March2016_517805_7.pdf.

[19] *See* Ex. 8, Michigan Civil Rights Commission, *The Flint Water Crisis: Systemic Racism Through the Lens of Flint*, at p. 109 (2/17/17), (emphasis added), available online at https://www.michigan.gov/documents/mdcr/VFlintCrisis Rep-F-Edited3-13-17_554317_7.pdf.

> by appointing an emergency manager whose toolbox is filled with short term solutions that are contrary to the long term interests of the people living there.[20]

A lengthy historical narrative of disenfranchisement of these communities from meaningful economic and political power within Michigan and the nation is well-established. It is thus inescapable that the state's action in adopting and implementing P.A. 436 is an intentional and purposeful continuation of this narrative of racism.[21]

II. DISCUSSION

A. PLAINTIFFS' FACIAL CHALLENGE IS NOT MOOT.

Defendants wholly fail in their burden to establish mootness of Plaintiffs' claims in this case. "The test for mootness 'is whether the relief sought would, if granted, make a difference to the legal interests of the parties," *McPherson v. Michigan High Sch. Ath. Ass'n*, 119 F.3d 453, 458 (6th Cir., 1997) (citing with approval *Crane v. Indiana High Sch. Athletic Ass'n*, 975 F.2d 1315, 1318 (7th Cir. 1992)).

In the present case, there is no question that the relief requested by the Plaintiffs would make a difference to their legal interests. The cities of Ecorse,

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[20] *Id.*

[21] *See generally*, Peter J. Hammer, *The Flint Water Crisis, KWA and Strategic-Structural Racism*, at 9-13 (7/18/16) (written testimony submitted to the Michigan Civil Rights Commission Hearings on the Flint Water Crisis), available online at http://www.michigan.gov/documents/mdcr/.

Detroit, Flint, Pontiac and all school districts that received EMs are still actively under P.A. 436's ongoing restrictions as discussed below. Benton Harbor also continues to be affected by the decisions of its former P.A. 436 EMs. The relief requested by Plaintiffs would vindicate their and citizens of their communities' legal interests.

A P.A. 436 EM is currently in office over Highland Park's public schools[22] and a receivership transition advisory board remains in place over Muskegon Heights public schools. Additionally, each remaining community that had an EM imposed remains under P.A. 436 restrictions or is otherwise suffering the continuing effects of P.A. 436 emergency management.

Under P.A. 436, the EM's budget cannot be amended for two years *following a community's exiting of receivership* – including all contractual and employment agreements – and EM orders and ordinances cannot be amended for one year *following receivership*.[23] The statute reads:

> (2) After the completion of the emergency manager's term and the termination of receivership, the governing body of *the local government shall not amend the 2-year budget adopted* under

[22] While the state's website, at https://www.michigan.gov/treasury/0,4679,7-121-1751_51556_64472---,00.html, states that the EM is no longer in office, no formal end has yet occurred and school board officials have been informed that the EM remains in office at this time.

[23] In each community with EMs, local officials were prohibited from any collective bargaining negotiations when contracts expired, with the EM then setting all terms of employment.

> subsection (1) without the approval of the state treasurer, and *shall not revise any order or ordinance implemented by the emergency manager during his or her term prior to 1 year after the termination of receivership*. [24]

Defendants acknowledge that the City of Flint is still potentially subject to P.A. 436 interventions. No documentation has been shown and no order of the governor is known to have been issued releasing the City of Detroit from P.A. 436 receivership.[25] As such, Detroit remains subject to P.A. 436's budgetary controls and the EM's orders and ordinances. It is under the supervision of a separate statutory entity, the Detroit Financial Review Commission[26] that is acting in the place of the transition advisory board.[27]

Detroit Public Schools (DPS) also remains in the same status as the City of Detroit. No documentation has been shown and no order of the governor is known

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[24] MCL 141.1561 (emphasis added). As these conditions are mandated by state law, they cannot be waived by the Defendants, and whether they are presently actively enforced is irrelevant.

[25] *See* State of Michigan, Department of Treasury's website for the City of Detroit at https://www.michigan.gov/treasury/0,4679,7-121-1751_51556_64472-298259--,00.html.

[26] The city announced on 4/30/18, that the commission would go dormant but remain in place for 10 years and can be reactivated at any time during that span.

[27] That the commission is acting in the place of receivership transition advisory boards and that the city is still under P.A. 436 receivership is evidence by MCL 14.1637 (p), which empowers to commission to undertake all the duties and assume the powers of a transition advisory board as imposed by the emergency manager law.

to have been issued releasing the school district from P.A. 436 receivership.[28] The DPS remains subject to the budgetary controls and the EM's orders and ordinances, and it is also under the supervision of the Detroit Financial Review Commission.

While Ecorse's receivership ended on 12/1/17,[29] under P.A. 436, the city cannot amend any order/ordinance of the EM before 12/1/18. And, while Pontiac's receivership ended on 7/27/17,[30] city officials cannot amend any order or ordinance of the EM before 7/27/18.

The only former emergency manager city or school district that is not formally still under P.A. 436 is the City of Benton Harbor. Benton Harbor exited receivership on 7/1/16. Benton Harbor, however, still experiences the effects of its former EMs through the dozens of ordinance changes they unilaterally imposed on the city.

As further noted by the Sixth Circuit in *Chirco v. Gateway Oaks, L.L.C.*, 384 F.3d 307 (6th Cir., 2004), an exception to mootness exists where the issues presented are capable of repetition and review may again be evaded. The court recognized:

> The Supreme Court has carved out a mootness exception for

[28] *See* State of Michigan, Department of Treasury's website for Detroit's public schools at https://www.michigan.gov/treasury/0,4679,7-1211751_51556_64472_71819_75800-391105--,00.html.
[29] *See* Ex. 9, Ecorse Receivership Exit Letter.
[30] *See* Ex. 10, Pontiac Receivership Exit Letter.

> issues "capable of repetition, yet evading review." *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515, 55 L. Ed. 310, 31 S. Ct. 279 (1911). In *Weinstein v. Bradford*, 423 U.S. 147, 46 L. Ed. 2d 350, 96 S. Ct. 347 (1975), it limited the "capable of repetition, yet evading review" doctrine to situations where: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Id*. at 148.

Chirco v. Gateway Oaks, L.L.C., 384 F.3d at 309.

Public Act 436 remains in full force and effect in Michigan. Despite calls for its repeal, amendment, or replacement by the Governor's own Task Force -- and by the Michigan Civil Rights Commission -- Defendants steadfastly resist. The law can thus be enforced at any time, perhaps the minute this suit is ended. As the American economy is cyclical (Michigan's is no different), with the next economic downtown, the law is likely to again be invoked. This will, once again, fall hardest on African-descended communities who will again experience elected governance suspended.

As noted above, it is well-documented that for every percentage increase in a local community's African-descended population there is a marked increase in the likelihood that P.A. 436 processes will be invoked against that community. For a 20% increase, there is a 100% increase in the likelihood that the community will come under P.A. 436. These statistics show that, on its face, the invocation of P.A. 436 processes is not only race-neutral, *it is highly race dependent*.

It is also important to note that the likelihood of future application of EM cities remains very real. Since Defendants have sole control over how long receivership lasts, the statute could continuously evade review. The cities of Benton Harbor, Ecorse, Highland Park and Flint, as well as DPS, have all seen this before. Each has come under and exited from the state's previous EFM laws and now its EM laws. Neither of these laws have fixed the core financial problems; nor are they intended to. Rather, these statutes were and are based on racist assumptions that the fiscal distress in the communities is caused by the incompetence and corruption that are all too easily laid on communities of color by the majority population.[31] As recognized by the Michigan Civil Rights Commission, these assumptions are at the core of P.A. 436 and they have done nothing to alleviate fiscal distress in these communities.[32] The causes run much deeper and until they are addressed, the state is doomed to repeat the cycle of fiscal distress in these communities that have been defined the past.[33]

B. AS RESIDENTS OF MUNICIPALITIES THAT WERE, ARE, OR COULD AGAIN BE SUBJECT TO P.A. 436, PLAINTIFFS HAVE STANDING.

Defendants argue that Plaintiffs have not "sustained an individualized injury"

[31] *See* Ex. 8 at pp. 109-110.
[32] *Id.*
[33] *Id.*

and instead "raise only general grievances regarding Defendants' policy choices."[34] The injury-in-fact requirement to establish Article III standing "ensures that the plaintiffs have a personal stake in the outcome of the controversy." *Green Party of Tennessee v. Hargett*, 791 F.3d 684, 695-96 (6th Cir. 2015) (internal citations and quotations omitted). "To be sufficient, the injury must be 'concrete and particularized' and 'actual and imminent,' not 'conjectural' or 'hypothetical.'" *Id.*, at 696.

Defendants cite *Lance v. Coffman*, 549 U.S. 437, 441 (2007), as support for the inability of 'generalized grievances' to establish standing. However, in *Lance*, the plaintiffs challenged a state supreme court's decision regarding the constitutionality of a law in federal court despite never having participated in the original challenge to the statute in state court. *Id.* at 438, 441. Therefore, the *Lance* plaintiffs were making an impermissible "generalized grievance about the conduct of government" because they were challenging the court's interpretation of the law. *Id*. at 442. Plaintiffs, here, are not challenging government conduct. As set forth below, they are Michigan residents who are themselves challenging the constitutionality of a Michigan statute as it has been or could be applied specifically to them, and, as such, have pled a particularized injury sufficient to confer standing.

1. Defendants Misinterpret The Nature And Extent Of

[34] Doc. 11, at Pg ID # 79.

Plaintiffs' Alleged Injury.

In arguing that none of the non-Flint Plaintiffs has suffered individualized injury as a result of the contested provisions of P.A. 436, Defendants classify the injury that Plaintiffs allege as the deprivation of the authority of elected officials in certain municipalities and school districts. However, the harm that Plaintiffs actually allege is from the enforcement of P.A. 436, not simply the loss of locally elected officials' governing authority. This harm thus lies in the deprivation of Plaintiffs' ability to meaningfully participate in the democratic process by shifting governing authority away from the locally elected officials where Plaintiffs live to unelected state-level officials. Because P.A. 436 strips or restricts the decision-making authority of locally elected government officials, Plaintiffs are functionally deprived of the right to be governed by officials of their choosing.

Defendants contend that Plaintiffs do not have a "fundamental right to elect nonlegislative administrative officers."[35] However, this argument misses the point because the crux of Plaintiffs' Equal Protection claim is not that P.A. 436 deprives Plaintiffs of a "fundamental right" but, rather, that it invidiously discriminates against them on the basis of race, both on its face and in its application, by revoking or restricting the political power of residents in majority African-descended

[35] Doc. 11, at Pg ID # 30 (citing *Moore v. Detroit School Reform Bd., 293 F.3d 352* (6th Cir. 2000), cert. denied 533 U.S. 1226 (2003) (additional citation and internal quotations omitted)).

communities while exempting residents in similarly-situated majority white communities from such adverse consequences.[36] It is this unequal treatment that Plaintiffs claim has deprived them of their constitutional right to equal protection of the laws, regardless of whether they have a separate fundamental right to elect all of their local government officials. Additionally, P.A. 436 takes governing authority away from legislative and executive officials that Plaintiffs do have a right to elect, such as the mayor and city council members.

Thus, Defendants' contention that Plaintiffs have not and will not "suffer any greater harm than that of any other voter"[37] ignores the substance of Plaintiffs' claim. Plaintiffs, who reside in municipalities that are subject to P.A. 436, have suffered, are suffering, and are likely to continue suffering greater harm than other voters. This Court has already acknowledged these facts:

> Plaintiffs are residents of cities with [emergency managers], elected officials of cities or school districts who have actually been displaced by [emergency managers], voters who intend to vote again in the future, and people who are actively engaged in the political process at the local level of government. Plaintiffs have already suffered, and continue to suffer, the alleged constitutional deprivations, while the residents of Michigan communities without an [emergency manager] have suffered no such harms.

Phillips v. Snyder, 836 F.3d 707, 713 (6th Cir. 2016), cert. denied sub nom. *Bellant v. Snyder*, 138 S. Ct. 66, 199 L. Ed. 2d 21 (2017).

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[36] *See* Doc. 1, at ¶¶ 97-98, Pg ID # 26.

[37] Doc. 11, at Pg ID # 30 (citing *Miyazawa v. City of Cincinnati*, 45 F.3d 126, 126–28 (6th Cir. 1995) (internal quotations omitted).

Additionally, as Plaintiffs' Equal Protection claim alleges, African American voters are more likely to live in municipalities that are subject to P.A. 436 and are therefore more likely to experience this harm.[38]

2. Benton Harbor And Pontiac Resident Plaintiffs Watkins, Kermit Williams, Seats, Henry And Adams, Have Standing To Bring As-Applied Claims.

Defendants argue that the three Benton Harbor and two Pontiac resident Plaintiffs, all of whom are also elected members of the legislative bodies of those two municipalities, lack standing because "the entities to which they are elected are not covered or substantially likely to be covered by P.A. 436's EM, consent agreement, or advisory board provisions."[39] However, as explained *supra*, this argument misinterprets the nature of Plaintiffs' claimed injuries, which stem from their status as residents, not elected officials, of Pontiac and Benton Harbor. Both Pontiac and Benton Harbor were very much subject to the contested provisions of P.A. 436 at the time of the filing of the complaint in this case and continue to be subject to those provisions today.

Unlike the concept of mootness -- i.e., a case or controversy that once existed no longer does -- the concept of standing "seeks to ensure the plaintiff has a personal stake in the outcome of the controversy at the outset of litigation." *Sumpter*

[38] Doc. 1, at ¶ 82-85, Pg ID # # 21-22.
[39] Doc. 11, Pg ID # 29-30.

v. Wayne Cty., 868 F.3d 473, 490 (6th Cir. 2017) (internal citations and quotations omitted). Therefore, as long as Plaintiffs reside in municipalities that were subject to one or more of P.A. 436's contested provisions at the time the complaint was filed, they present an actual case or controversy sufficient to establish claims for injunctive and declaratory relief. *Id*. at 490. Moreover, notwithstanding Defendants' contention that "[n]either Pontiac nor Benton Harbor is currently covered or substantially likely to be covered by the EM provisions of P.A. 436,"[40] the Sixth Circuit has previously explained that in this case "Plaintiffs have challenged the constitutionality of P.A. 436 in its entirety, not just the [emergency manager] provisions." *Phillips*, 836 F.3d at 714. Therefore, "plaintiffs are continuing to suffer constitutional deprivations and other harms as long as P.A. 436 limits the powers of their local elected officials *in any manner*." *Id*. (emphasis added)

The three Benton Harbor and two Pontiac plaintiffs thus have standing to bring their as-applied challenge to P.A. 436 because both Benton Harbor Area Schools and Pontiac Public Schools were subject to P.A. 436 consent agreements at the time the complaint in this case was filed, and they continue to be subject to those agreements. The elected governing body of a municipality or school district that has entered into a consent agreement with the state treasurer has significant

[40] Doc. 11, at Pg ID # 30 n.10.

restrictions placed on its governing autonomy and may even have an EM reappointed by the governor in the event of an uncured material breach of the agreement, which the state treasurer has the sole discretion to declare. *See* M.C.L.A. §141.1548(1). For example, the Pontiac School District's consent agreement prohibits the locally elected board of the District or its superintendent from making certain changes to: (a) collective bargaining agreements with unions representing District Personnel; (b) its plan for providing education support services to students; or, (c) certain instructional strategies in core curricular subject areas without prior approval from the state treasurer and/or state superintendent of public instruction. Moreover, if the governor chooses to place the district in a "receivership," which means an EM will be appointed, in response to a material breach of the agreement, the District cannot contest that decision. Benton Harbor's consent agreement contains very similar provisions. Therefore, in addition to still being subject to P.A. 436, because they are bound by consent agreements, it is entirely likely that Pontiac or Benton Harbor School Districts could have an EM reappointed if either locality is found to have breached the consent agreement.

3. Detroit Resident Plaintiffs Bellant, Simpson, Herrada, Holley, Owens, Coleman, And Lemmons Have Standing To Bring A Facial Challenge To P.A. 436.

The Detroit resident Plaintiffs have standing to bring a facial challenge to P.A. 436 because "[a] facial challenge to a law's constitutionality is an effort to

invalidate the law in each of its applications, to take the law off the books completely." *Green Party*, 791 F.3d at 691. The plaintiff must establish, which Plaintiffs properly claim here, "that no set of circumstances exist under which [the statute] would be valid." *Id.* This case is an Equal Protection challenge, which by definition means that the law impermissibly treats similarly situated people differently. Therefore, there is no set of circumstances under which removing and replacing the governing authority of elected officials in predominantly African American communities, but not in others, would be valid.

As Michigan residents challenging the constitutionality of a Michigan statute that has been or could be applied to them, Detroit residents have standing. *See, e.g.*, *Id.*, at 696, (plaintiffs had sufficiently established an injury where "defendants ha[d] not enforced or threatened to enforce [a] statute against plaintiffs. . . [but] they also ha[d] not explicitly disavowed enforcing [the statute] in the future"). *See also Sumpter*, 868 F.3d at 491 (the likelihood of future injury decreased because "defendants ha[d] changed their official policy"). As noted above in the preceding section, the City of Detroit and DPS remain very much under P.A. 436 receivership, and even if they were not, as long as P.A. 436 exists and there is a possibility that it could be enforced against them, Detroit residents have standing to challenge the constitutionality of the law on its face.

C. THE DECLARATORY RELIEF IS APPROPRIATE, AND SAME SHOULD BE GRANTED.

1. Contrary To The Defendants' Assertion, The Plaintiffs Present Evidence Of An Actual Controversy.

As the Sixth Circuit has explained, "Article III's 'case and controversy' requirement is not satisfied, and a court therefore has no jurisdiction, when the claimant lacks standing, that is, 'a sufficiently concrete and redressable interest in the dispute.'" *Fieger v. Mich. Supreme Court*, 553 F.3d 955, 961 (6th Cir. 2009) (citation omitted). In order for a plaintiff to meet its burden in establishing standing, he or she must establish that: (1) he or she has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. In the context of a declaratory judgment action, allegations of past injury alone are not sufficient to confer standing. The plaintiff must allege and/or demonstrate actual present harm or a significant possibility of future harm. *See Fieger v. Ferry*, 471 F.3d 637, 643 (6th Cir. 2006)).

As articulated above, Plaintiffs are not challenging government conduct; rather, as Michigan residents they are challenging the constitutionality of a statute as it has been or could be applied specifically to them. The harm they allege is caused by the enforcement of P.A. 436, not simply the loss of locally elected officials' governing authority. Plaintiffs' harm lies in the loss of their ability to meaningfully participate in the democratic process by shifting governing authority

away from those elected in the municipalities where Plaintiffs live to unelected state-appointed officials.[41] Wherein P.A. 436 strips or restricts local elected officials of much of their decision-making authority, Plaintiffs are functionally deprived of the right to be governed by officials of their choosing. Moreover, this Court has previously stated concerning this issue:

> As for meeting the heightened burden of demonstrating that they are likely to be injured in the future, each day that the elected officials who have been replaced by an EM are not able to exercise their legislative authority, the plaintiffs continue to suffer the constitutional harms alleged. Plaintiffs have therefore established Article III standing to bring this case.[42]

Additionally, Plaintiffs assert that even if EMs have been removed from a particular branch of government, to the extent Plaintiffs continue to be affected by laws and/or policies implemented by the former EMs, they continue to suffer injury, and will potentially suffer injury in the future to the extent P.A. 436 continues to exist.

2. The Five Factor Test Warrants This Court Exercising Jurisdiction Over Plaintiffs' Declaratory Judgment Action.

The Declaratory Judgment Act provides that, "[i]n a case of actual controversy within its jurisdiction, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any

[41] Doc. 1, at ¶¶ 80, 90, Page ID #20, 24.
[42] *See Phillips v Snyder*, 2:13-cv-11370-GCS-RSW, Doc # 49 Filed 11/19/14, Pg ID # 894.

interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C § 2201. Ultimately, a court has discretion whether to exercise jurisdiction in a declaratory judgment action. *Scottsdale Ins. Co. v. Roumph*, 211 F.3d 964, 968 (6th Cir. 2000). In S*cottsdale*, the court listed five factors for deciding whether to exercise jurisdiction over a declaratory judgment action: (1) whether the judgment would settle the controversy; (2) whether the declaratory judgment action would serve a useful purpose in clarifying the legal relations at issue; (3) whether the remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for *res judicata*;" (4) whether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction; and (5) whether there is an alternative remedy that is better or more effective. *Id*.

Defendants only challenges the first two prongs of the Five Factor Test, arguing that a declaratory judgment: 1) would not settle the controversy before the Court; and 2) would serve no useful purpose in clarifying the legal relations at issue.

Defendants first argue that a judgment here would not settle the controversy because: (1) Emergency Management is temporary; (2) the statute on its face is racially neutral; and (3) Plaintiffs present no facts establishing an intent to discriminate. Most, if not all, of the issues raised by the Defendants were

previously addressed by this Court in denying the Defendants' Motion to Dismiss in *Phillips v Snyder*, 2:13-CV-11370.

Defendants' argument that Emergency Management is temporary holds no water. There is no statutory requirement that the appointment of an EM be temporary. EMs serve at the pleasure of the governor, who determines the extent of their appointment. Even after EMs have left their positions, the people affected continue to suffer and will continue to suffer from the decisions, laws, and policies of EMs for decades to come, as exemplified by the Flint EM experience. Moreover, as long as the law remains unimpeded, the potential for future harm continues.

Defendants' argument that the statute is facially neutral is equally misplaced. As this Court has previously stated, even to the extent that the statute is facially neutral, it can still violate the Equal Protection Clause: "a facially neutral law with a legitimate purpose can still violate the Equal Protection Clause." *United States v. City of Birmingham*, 727 F.2d 560, 565 (1984). Likewise, Defendants' argument that the Plaintiffs' Complaint presents no facts that could establish an intent to discriminate also fails, as was previously addressed by this Court:

> Since it is inherently difficult to prove discriminatory intent, as legislators rarely admit to it, claimants may use a number of objective factors to determine the existence of such intent. *Id*. (citing *Arlington Heights*, 429 U.S. at 266-68). … At the motion to dismiss stage, plaintiffs need only state a plausible claim for relief. *Iqbal*, 556 U.S. at 678….Defendants argue that these statistics are old and of no application to P.A. 436, but the history of state intervention makes it reasonable to assume that

> similar statistics are available in discovery to support plaintiffs' claims regarding the pattern of decision making. There are twelve factors that may be considered by state authorities in assessing whether a local government is eligible for appointment of an EM, yet only one factor is necessary to serve as the basis for state intervention. This confers enormous discretion to state decision makers and creates a significant potential for discriminatory decisions. This court is satisfied that at this juncture plaintiffs have pleaded a plausible equal protection claim based on the racial impact of P.A. 436's implementation. Defendants' motion to dismiss Count 4 is denied.[43]

Second, Defendants argue that a Declaratory Judgment would serve no useful purpose in clarifying the legal relations at issue because Emergency Management is unlikely to ever occur again. Again, the Defendants' argument is unsubstantiated. First, it is Plaintiffs' contention that to the extent every EM is removed, the Plaintiffs still continue to suffer from the ill effects of Emergency Management. Moreover, to the extent that P.A. 436 remains a law in Michigan, the Defendants have no basis in which to assert that it is unlikely to ever be used again. The Defendants fail to assert any legitimate basis that would substantiate this Court not considering the Plaintiffs' requests for declaratory relief.

D. PLAINTIFFS WILL STIPUTATE TO DISMISSAL OF THE FORMER STRATE TREASURERS.

Plaintiffs do not contest Defendants' Eleventh Amendment arguments and will stipulate to amend the Complaint accordingly**.** Although Plaintiffs originally

[43] *Phillips v Snyder*, 2:13-CV-11370-GCS-RSW, Doc # 49 Filed 11/19/14, Pg ID # 907 (emphasis added).

named former treasurers Dillon and Clinton in both their individual and official capacities, they do not dispute that the sole relief requested in their cause of action is that of injunctive or prospective relief. Both Dillon and Clinton were in office and were the official enforcers of P.A. 436 when this litigation was first brought, and their respective roles in acting in that capacity are highly relevant to this litigation. However, given that state treasurer Khouri is the current official policymaker, Plaintiffs do not object to the voluntary dismissal of Defendants Dillon and Clinton, in their official capacities, as named parties to this action. This does not preclude Plaintiffs from obtaining discovery regarding the respective roles played and decisions made by each of them during their respective tenures as state treasurers.

E. PUBLIC ACT 436 ON THE BASIS OF RACE, EFFECTIVELY REMOVE AND/OR IMPERMISSIBLY DILUTE CITIZEN'S FUNDAMENTAL RIGHT TO VOTE.

Under the Equal Protection Clause, statutes and practices that discriminate on the basis of race are subject to strict scrutiny. They need not overtly classify by race to be unconstitutional; a facially neutral law with a legitimate purpose violates the 14th Amendment if the challenged practice "had a discriminatory effect and … was motivated by a discriminatory purpose." *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 533-34 (6th Cir. 2002) (citing *Wayte v. United States*, 470 U.S. 598, 608, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985)). *See also Hunt v. Cromartie*, 526 U.S. 541, 546 (1999).

Plaintiffs need not show that racial discrimination was the "dominant" or "primary" motive of the policy or practice, just that a discriminatory purpose was "*a* motivating factor in the decision" in question. *Birmingham*, 727 F.2d at 565 (emphasis added); *see also Alexander v. Youngstown Bd. of Educ.*, 675 F.2d 787, 791-92 (6th Cir. 1982). Nor is discriminatory purpose neutralized by the inclusion of other groups as objects of discriminatory intent. *Hunter v. Underwood*, 471 U.S. 222 (1985). In determining whether a law or its application stems from a discriminatory intent, courts must consider the "'totality of the relevant facts.'" *Farm Labor Org. Comm.*, 308 F.3d at 534 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). "[I]t is an inherently difficult task to ascertain the motivations of multi-membered public bodies." *Alexander*, 675 F.2d at 792. "Officials…seldom, if ever, announce…their desire to discriminate against a racial minority." *Birmingham*, 727 F.2d at 564.

The Supreme Court therefore "'has identified objective factors that may be probative of racially discriminatory intent among legislative bodies." *Id*. at 565 (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977)). First, "the fact…that the law [or practice] bears more heavily on one race than another" supports an inference of racial discrimination. *Farm Labor Org. Comm.*, 308 F.3d at 534 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). *See also NAACP v. Lansing Bd. of Educ.*, 559 F.2d 1042, 1047-48 (6th Cir. 1977).

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court held that "under some circumstances proof of discriminatory impact may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." *Id.*, at 93. Plaintiffs alleging race-based discrimination can demonstrate discriminatory effect "through the use of statistical" evidence showing that one class is being treated differently from another class that is otherwise similarly situated. *Farm Labor Org. Comm.*, 308 F.3d at 534 (internal citations omitted).

In addition, courts consider the historical background of the decision, the sequence of events, procedural and substantive departures from normal procedure, and legislative or administrative history." *Arlington Heights*, 429 U.S. at 267-68 (1977). These factors, which consider both direct *and* circumstantial evidence of intent, are not exhaustive, and no one factor is dispositive. *Id.*, at 266; *Birmingham*, 727 F.2d at 565.

Defendants advance factual and not legal arguments against Plaintiffs' equal protection claims, arguing that:

- That P.A. 436 attempted to "fix" P.A. 72;
- The text of P.A. 436 is neutral;
- Majority white communities also received EMs; [44]

[44] Contrary to Defendants assertions, the Village of Three Oaks never received an emergency manager and Plaintiffs are not here challenging the constitutionally of P.A. 72. Defendants seek to conflate EMs with the appointment of EFMs to mask

- That P.A. 436 offers communities options other than EMs;
- That the statute attempts to provide a 'soft landing' for fiscally distressed cities;
- That the legislative history does not Ex. discriminatory intent; and
- That P.A. 436 is a simple and neutral governmental policy.[45]

The only issue on the pending motion however, is whether Plaintiffs have stated a plausible claim for relief. Plaintiffs' Complaint notes that *over 50%* of Michigan's African-descended population came under P.A. 436's EMs.[46] At the same time, only about 3% of Michigan's white citizens live in communities that were governed by an EM. This stark statistic alone is sufficient to create an inference of discriminatory intent sufficient to plead a plausible claim for relief.

However, Plaintiffs' Complaint goes considerably further[47] and along with the facts set forth *supra*, reveal that: other white communities were experiencing the same or greater financial distress; numerous academics who studied the issue have found clear discrimination under the law; the statute was passed under highly unusual and rushed circumstances; it was adopted in response to biases against African-American school boards in Detroit; and, other factors indicate that P.A. 436's enactment and its application were motivated by discriminatory intent.

Plaintiffs have therefore properly pled a claim for relief and Defendants have

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their abysmal record of disparate appointments under repealed-P.A. 4 and current P.A. 436.

[45] Doc. 11, Pg ID # 39-45.

[46] Doc. 1, Pg ID # 22.

[47] *Id.*, at Pg ID # 19-25.

wholly failed to meet their burden for dismissal.

III. CONCLUSION

Plaintiffs' claims are not moot; they clearly have standing and their Complaint states well-pleaded facts in support of claims that Public Act 436 violates Plaintiffs' constitutional rights. As a result, Defendants fail to meet their burden of proof on the pending Rule 12 (b) Motion to Dismiss and the motion should be denied in its entirety.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on 6/5/18, I electronically filed the foregoing ***Plaintiffs' Revised Brief In Support Of Response To Defendants' Motion To Dismiss*** with the Clerk of the Court using the ECF system, which will send notification of such filing to all ECF participants.

By: /s/Jillian R. Rosati

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