UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Russ Bellant, Detroit Library Commissioner; Tawanna Simpson, Lamara Lemmons, Elena Herrada, Detroit Public Schools Board Members; Donald Watkins, and Kermit Williams, Pontiac City Council Members; Duane Seats, Dennis Knowles, Juanita Henry, and Mary Alice Adams, Benton Harbor Commissioners; William "Scott" Kincaid, Flint City Council President; Bishop Bernadel Jefferson; Paul Jordan; Rev. Jim Holley, National Board Members, Rainbow Push Coalition; Rev. Charles E. Williams II, Michigan Chairman, National Action Network; Rev. Dr. Michael A. Owens, Rev. Lawrence Glass, Rev. Dr. Deedee Coleman, Bishop Allyson Abrams, Executive Board, Council of Baptist Pastors of Detroit and Vicinity,

Plaintiffs,

v

RICHARD D. SNYDER, as Governor of the State of Michigan, and ANDREW DILLON, as the Treasurer of the State of Michigan, acting in their individual and/or official capacities,

Defendants.

No. 2:13-cv-11370

HON. GEORGE CARAM STEEH

MAGISTRATE JUDGE R. STEVEN WHALEN

DEFENDANTS' REPLY BRIEF

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DEFENDANTS' REPLY BRIEF

CONTROLLING AUTHORITIES

Mixon v. Ohio, 193 F.3d 389 (6th Cir. 1999)
Moore v. Detroit Sch. Reform Bd., 293 F.3d 352 (6th Cir. 2002)
Reynolds v. Sims, 377 U.S. 533 (1964)
Sailors v. Bd. of Ed. of Kent County, 387 U.S. 105 (1967)
Thornburgh v. Gingles, 478 U.S. 30 (1986)

DEFENDANTS' REPLY BRIEF

I. Plaintiffs' Statement of Facts contains three fundamental errors.

First, Plaintiffs assert that Defendants cannot explain how a general grant of governing power, including general legislative power over matters unrelated to municipal finances, is rationally related "to a community's financial instability." Not only is it Plaintiffs' burden to prove the absence of any rational basis but also Defendants *have* demonstrated a rational basis for the grant of some "general legislative power" to an emergency manager: the inability of P.A.72 and its predecessor to effectively establish long-term solutions to local government financial emergencies. Even Plaintiffs recognize the limitations of P.A. 72, which separated financial management and government restructuring. Resolving financial distress and achieving long-term financial stability requires both these major components—an approach recognized and accepted by the federal courts. *Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 371 (6th Cir. 2002); *Sailors v. Bd. of Ed. of Kent County,* 387 U.S. 105, 107 (1967) (citing *Reynolds v. Sims*, 377 U.S. 533, 575 (1964)). P.A. 4, and now P.A. 436, appropriately merges finance with government and governance.

Second, Plaintiffs incorrectly characterize the emergency managers' function as general legislative power. EMs are fundamentally performing executive duties and responsibilities, Mich. Comp. Laws § 141.1552(1), (2)—even when they adopt or amend ordinances to implement their policies through the issuance of executive orders. *Id.* at § 141.1552(1)(dd). Plaintiffs cite no constitutional basis for prohibiting

the appointment of non-legislative local government officials. To the contrary, "viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions." *Sailors*, 387 U.S. at 110-111; see also *Reynolds*, 377 U.S. at 575.

Third, Defendants correctly represented a time limit on the EM's term in office. Where an EM has served at least 18 months, the EM may be removed by a 2/3 vote of the governing body of the local government with "strong mayor" approval when appropriate. Mich. Comp. Laws § 241.1549(6)(c). The local government must then negotiate a consent agreement or proceed to neutral evaluation.

II. P.A. 436 neither violates liberty interests protected by the Due Process Clause nor violates the Guarantee Clause.

Plaintiffs' due process argument is based on the erroneous conclusion that the EM is a general legislative function. But again, the EM is an executive function responsible for all operations of the local government. Mich. Comp. Laws § 241.1552(1), (2). While the EM has some legislative function for purposes of carrying out executive policy and programs—the adoption, amendment and enforcement of ordinances or resolutions of the local government as provided in certain enumerated state laws—the predominate function remains executive. Plaintiffs' cited case law recognizes neither a due process interest under these facts nor a violation of protected liberty interests based on the performance of an executive

official's limited "legislative function." Indeed, the Supreme Court has rejected this argument. *Reynolds* 377 U.S. at 575; *Sailors*, 387 U.S. at 107, 110-111.

Significantly, federal courts have always been reluctant to expand the concept of substantive due process. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Plaintiffs present no compelling argument to justify the expansive application of due process protections to the "liberty interest" asserted here, particularly given the true executive function of the EM and the compelling state interest being served.

Plaintiffs' Guarantee Clause argument fails on at least two essential grounds. First, it wrongly assumes the Clause extends to local governments when, in fact, it guarantees a republican form of government to the states, not to the local governments, which are mere political subdivisions created and authorized by each state. *New York v. U.S.*, 505 U.S. 144, 185-188 (1992); *Largess v. Supreme Judicial Ct of Mass*., 373 F.3d 219, 226, 227 (1st Cir. 2004). In contrast, states are not "mere political subdivisions" of the United States; they retain a "residuary and inviolable sovereignty" distinct from the federal government. *New York*, 505 U.S. at 188.

Second, Plaintiffs fail to present a justiciable question that avoids the "political questions" doctrine. Most disputes concerning the relationship among state government's constituent branches do not offend the Guarantee Clause. *Largess*, 373 F.3d at 228. Instead, "'[h]ow power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.'" *Id.* (citing *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937)).

III. Plaintiffs' Equal Protection Theories Have Been Previously Rejected.

Plaintiffs' vote dilution argument was raised and rejected in both *Mixon v. Ohio*, 193 F.3d 389, 407-408 (6th Cir. 1999) and *Moore v. Detroit School Reform Board*, 293 F.3d 352, 371 (6th Cir. 2002). Plaintiffs' attempt to distinguish *Moore* fails. A decade ago, reform legislation changed the structure of the Detroit Public School District from an elected to an appointed board. Plaintiffs claim that no equal protection violation occurred then because the Detroit Public Schools could be treated differently based on its relative magnitude as compared with all other school districts in the state. But the same is true here: P.A. 436 (reform legislation) treats communities differently based on the "relative magnitude" of their fiscal instability.

Neither has any individual racial discrimination or vote dilution occurred—despite Plaintiffs' contention that "…over 50% of Michigan's black population has lost the right to vote or had their right to vote severely diluted in local actions," while "only about 2% of Michigan's white citizens live in communities governed by an EM." (Resp. at 21.) Even accepting arguendo that a disproportionate impact on the minority community occurs, it is insufficient to establish the invidious discrimination required for Plaintiffs to succeed. See *Moore*, 293 F.3d at 352 (no invidious discrimination occurred even though Detroit's resident population and student public school population were predominantly African-American).

Plaintiffs' equal protection claim based on wealth is equally specious and wrongly presumes that the right to vote where an EM has been appointed is

conditioned upon the net worth of an individual citizen or of that community. Neither is a factor in determining whether an EM is appointed. Rather, it is a matter of how those resources are managed or mismanaged under a very specific set of criteria. Mich. Comp. Laws §§ 141.1544 & 1545. Too, the local government may exercise other options before the appointment of an EM. *Id.* at § 141.1547(1).

IV. P.A. 436 does not violate the Voting Rights Act or Thirteenth Amendment.

Plaintiffs fail to address Defendants' argument that a Section 2 claim must involve an elective and not an appointive office. See *Mixon*, 193 F.3d at 407-408. Because Plaintiffs do not dispute that an EM is an appointed official under P.A. 436, Section 2 of the Voting Rights Act is not triggered here. Plaintiffs' voting rights challenge is similar to and as equally flawed as the one raised in *Moore*. Just as the Sixth Circuit rejected a Section 2 challenge to the school reform legislation enacted by the Michigan Legislature, under which the plaintiffs claimed that Detroit's voters were denied "the right to elect their school board, while allowing other Michigan citizens to continue to vote for their school board members," *Moore*, 293 F.3d at 363, so, too, should this Court reject Plaintiffs' voting rights claim.

Plaintiffs address only Defendants' alternative argument that even if Section 2 applies, they do not need to meet the *Gingles* preconditions (compactness, cohesion, and bloc voting), which apply to the narrow issue of multimember election districts. (Resp. at 28.) They suggest instead that this Court apply "a variety of factors", yet fail to demonstrate how these factors relate to their voting rights claim.

Plaintiffs' failure to plead the existence of facts related to the required "totality of the circumstances analysis" is fatal to their voting rights claim. In any event, all the *Gingles* preconditions must be satisfied before the totality of circumstances can show that the minority group does not possess the same opportunities to participate in the political process as other voters. *Thornburgh v. Gingles*, 478 U.S. 30, 48-49 (1986), *Johnson v. DeGrandy*, 512 U.S. 997, 1010-1013 (1994).

Also, Plaintiffs again fail to explain the scope and nature of the preclearance remedy briefly mentioned in their amended complaint. Likewise, their Thirteenth Amendment claim is defective. Indeed, after lengthy argument, they essentially concede there is no binding precedent to support their claim. (Resp. at 37).

V. P.A. 436 does not violate free speech or right to petition guarantees.

Plaintiffs' response focuses heavily on what they characterize as a reenactment of emergency manager provisions after the voters repealed P.A. 4. But it does not counter Defendants' arguments that P.A. 436 is not a reenactment of P.A. 4 but instead a replacement for P.A. 72; and that Michigan's Constitution does not prohibit such a reenactment. Plaintiffs' characterization of the "reenactment" as viewpoint suppression has no legal support and should be rejected.

Similarly, Plaintiffs do not counter Defendants' argument that the nature and duration of the powers of local government ultimately rest with the State. Yet, fatally, their First amendment speech and association arguments are predicated on local governmental units having an ultimate authority they do not possess.

In that vein, the cases on which Plaintiffs rely are distinguishable because none involves the relationship between state and local governments. *Peeper v. Callaway County Ambulance District*, 122 F.3d 619, 623 (8th Cir. 1997), for example, analyzed a *county* ambulance board member's First Amendment challenge to a resolution by the *county* board of directors that would have served to limit her participation as a member of the board. The language they quote from *Gay Rights Coalition of Georgetown University Law Center v. Georgetown Univ*., 536 A.2d 1, 39 (D.C. 1987), actually appears not in that case but in *Bond v. Floyd*, 385 U.S. 116, 136 (1966) and *Miller v. Town of Hull, Mass*, 878 F.2d 523, 532 (1st Cir. 1989). *Bond* involved disqualification of a *representative* from the Georgia House because of his statements critical of the federal government. *Miller* involved members of a *town* redevelopment authority who were removed by a town board of selectmen.

Also, the Eighth Circuit in *Peeper* noted that the resolution affected only the potential board member's *participation* in the proceedings of that public body and not her "ability to vote for Board members, to speak before the Board during public comment periods, or to otherwise express her opinions about the District's operation as any other citizen may under the First Amendment's free speech guarantee." 122 F.3d at 623 fn 4. Similarly, neither the locally elected officials nor their constituents is barred from voting, speaking out or expressing opinions—in other words, from exercising their First Amendment rights. In fact, local elections have been held in areas in which an EM has been appointed (Ex. 1 to Defs' Mtn to Dismiss.)

Respectfully submitted,

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Dated: April 15, 2014

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2014, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such. I also mailed the foregoing paper via US Mail to all non-ECF participants.

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