UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Catherine Phillips, et al.

Plaintiffs,

v.

Richard D. Snyder, et al.

Defendants.

Case no. 2:13-cv-11370

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

NOW COME Plaintiffs, by and through their attorneys, the SUGAR LAW CENTER FOR ECONOMIC & SOCIAL JUSTICE, THE SANDERS LAW FIRM, PC, GOODMAN AND HURWITZ, P.C. on behalf of the Detroit And Michigan

National Lawyers Guild, MILLER COHEN, PLC, 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.

TABLE OF CONTENTS

I. CONCISE STATEMENT OF ISSUES PRESENTED

A. SHOULD DEFENDANTS' MOTION UNDER FED. R. CIV. P. 12(b) ALLEGING A LACK OF STANDING BE DENIED WHEN ELECTED OFFICIALS AND RESIDENTS IN CITIES WITH EMERGENCY MANAGERS HAVE SUFFERED DISTINCT HARMS NOT SUFFERED BY OTHER ELECTED OFFICIALS AND RESIDENTS IN OTHER CITIES IN MICHIGAN?

Plaintiffs' Answer: YES
Defendants' Answer: NO

B. SHOULD DEFENDANTS' MOTION UNDER FED. R. CIV. P. 12(b)(6) BE DENIED WHEN PLAINTIFFS HAVE PROPERLY PLED CAUSES OF ACTION ALLEGING THAT PUBLIC ACT 436:

1. VIOLATES 14TH AMENDMENT SUBSTANTIVE DUE PROCESS RIGHTS AND DEPRIVES PERSONS OF THEIR LIBERTY INTEREST IN AN ELECTED GOVERNMENT WHEN NO POLITICAL SUBDIVISION OF THE UNITED STATES HAS PRESVIOUSLY EXPERIMENTED WITH A FORM OF GOVERNMENT WHERE ONE UNELECTED OFFICIAL POSSESSES ALL GOVERNING POWERS AND CAN PASS LAWS BY DECREE;

2. VIOLATES THE GUARANTEE CLAUSE AT ART. IV, § 4 BY GRANTING UNLIMITED DISCRETIONARY POWER TO ONE UNELECTED OFFICIAL TO LEGISLATE LOCAL LAWS AT THEIR SOLE DISCRETION AND BY DECREE;

3. VIOLATES THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT BY REVOKING AND/OR MATERIALLY DILUTING A FUNDAMENTAL RIGHT TO VOTE IN LOCAL ELECTIONS IN CITIES WITH

EMERGENCY MANAGERS BUT NOT FOR OTHER CITIES;

4. VIOLATES THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT BY DISENFRACHISING AND/OR MATERIALLY DILUTING A RIGHT TO VOTE IN LOCAL ELECTIONS FOR A MAJORITY OF BLACK PERSONS IN MICHIGAN BUT NOT FOR PERSONS OF OTHER RACES;

5. VIOLATES THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT BY DISENFRANCHISING AND/OR MATERIALLY DILUTING, A RIGHT TO VOTE IN LOCAL ELECTIONS BASED ON WEALTH;

6. VIOLATES THE RIGHTS PROTECTED BY SECTION 2 OF THE VOTING RIGHTS ACT OF 1965 BY DISCRIMINATING AGAINST RACIAL MINORITIES AND MATERIALLY LIMITING THEIR VOTING POWER IN LOCAL ELECTIONS;

7. VIOLATES FREE SPEECH RIGHTS UNDER THE 1ST AMENDMENT BY EFFECTIVELY NEGATING CITIZENS' VOICE IN GOVERNMENT THROUGH REMOVAL, OR RENDERING POWERLESS, DEMOCRATICALLY-ELECTED RERPRESENTATIVES;

8. VIOLATES PERSONS' 1ST AMENDMENT RIGHT TO PETITION THEIR GOVERNMENT BY TRANSFERRING ALL GOVERNING POWER TO A SINGLE UNELECTED OFFICIAL WHO IS WHOLLY UNACCOUNTABLE TO THE VOTING PUBLIC;

9. VIOLATES PERSONS' 1ST AMENDMENT RIGHTS TO FREE SPEECH AND TO PETITION THEIR GOVERNMENT BY RETAILIATING AGAINST VOTERS THROUGH

REENACTMENT OF THE SAME LAW THAT VOTERS REPEALED BY REFERENDUM;

10. VIOLATES THE 13TH AMENDMENT BY PERPETUATING THE BADGES AND INCIDENTS OF SLAVERY FOR A MAJORITY OF BLACK PERSONS IN MICHIGAN BY REMOVING AND/OR MATERIALLY DILUTING THEIR RIGHT TO VOTE IN LOCAL ELECTIONS;

11. VIOLATES EQUAL APPLICATION OF THE LAWS AS PROTECTED BY THE 14TH AMENDMENT THROUGH PROVISIONS THAT PROHIBIT ELECTED OFFICIALS FROM REMOVING EMERGENCY MANAGERS IN COMMUNITIES THAT HAVE HAD THEM FOR MORE THAN TWO YEARS, WHILE PERMITTING OTHERS TO REMOVE EMERGENCY MANAGERS AFTER 18 MONTHS?

Plaintiffs' Answer: YES
Defendants' Answer: NO

II. CONTROLLING AUTHORITY

Standard for Motion to Dismiss
Fed. R. Civ. P. 12 (b)(6)
Fed. R. Civ. P. 8 (a)(2)
Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)
Ass'n of Cleveland Fire Fighters v. City of Cleveland, 502 F.3d 545 (6th Cir. 2007)

Plaintiffs' Standing
Fed. R. Civ. P. 12 (b)(6)
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)
Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977)
Baker v. Carr, 369 U.S. 186 (1962)
Sandusky Cnty. Democratic Party v. Blackwell, 387 F.3d 565 (6th Cir. 2004)

Due Process Clause-Liberty Interests – Right to Elect Official with Legislative Powers
U.S. Const. amend. XIV
Washington v. Glucksberg, 521 U.S. 702 (1997)
Reynolds v. Sims, 377 U.S. 533 (1964)
Warf v. Bd. of Elections, 619 F.3d 553 (6th Cir. 2010)

Guarantee Clause
U.S. Const. art. IV, § 4
New York v. United States, 505 U.S. 144 (1992)
Largess v. Supreme Judicial Court, 373 F.3d 219 (1st Cir. 2004)

Equal Protection Clause – Voting Rights – Fundamental Right
U.S. Const. amend. XIV
Bush v. Gore, 531 U.S. 98 (2000) (per curiam)
Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966)
Reynolds v. Sims, 377 U.S. 533 (1964)
Baker v. Carr, 369 U.S. 186 (1962)
Yick Wo v. Hopkins, 118 U.S. 356 (1886)

Equal Protection Clause – Voting Rights – Race
U.S. Const. amend. XIV
Wayte v. United States, 470 U.S. 598 (1985)
Washington v. Davis, 426 U.S. 229 (1976)
Farm Labor Org. Comm. v. Ohio State Highway Patrol, 308 F.3d 523 (6th Cir. 2002)
United States v. Birmingham, 727 F.2d 560 (6th Cir. 1984)

Equal Protection Claus – Voting Rights - Wealth
U.S. Const. amend. XIV
Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966)
Gray v. Sanders, 372 U.S. 368 (1963)

Voting Rights Act of 1965
Voting Rights Act of 1965, 42 U.S.C. §§ 1973 to 1973aa-6
Chisom v. Roemer, 501 U.S. 380 (1991)
Bd. of Estimate of N.Y. v. Morris, 489 U.S. 688 (1989)

First Amendment – Freedom of Speech
U.S. Const. amend. I
Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995)
Burdick v. Takushi, 504 U.S. 428 (1992)
Time Warner Cable, Inc. v. Hudson, 667 F.3d 630 (5th Cir. 2012)
Peeper v. Callaway Cnty. Ambul. Dist., 122 F.3d 619 (8th Cir. 1997)

First Amendment – Right to Petition
U.S. Const. amend. XIV
Cornelius v. NAACP Legal Def. & Ed. Fund, Inc., 473 U.S. 788 (1985)
Storer v. Brown, 415 U.S. 724 (1974)
Peeper v. Callaway County Ambulance District, 122 F.3d 619 (8th Cir. 1997)

Thirteenth Amendment – Vestiges of Slavery
U.S. Const. amend. XIII
Memphis v. Greene, 451 U.S. 100 (1981)
The Civil Rights Cases, 109 U.S. 3 (1883)

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)

Equal Protection – Equal Application of Laws
U.S. Const. amend. XIV
Grutter v. Bollinger, 539 U.S. 306 (2003)
Nordlinger v. Hahn, 505 U.S. 1 (1992)
Peeper v. Callaway Cnty. Ambulance Dist., 122 F.3d 619 (8th Cir. 1997)

III. INDEX OF AUTHORITES

U.S. Constitution

U.S. Statutes

Supreme Court Opinions

First Circuit Opinions

Fifth Circuit Opinions

Sixth Circuit Opinions

Seventh Circuit Opinions

Eighth Circuit Opinions

D.C. Circuit Opinions

District of Columbia Opinions

Michigan State Constitution

Michigan State Statutes

Other

IV. STATEMENT OF FACTS

On February 12, 2014, Plaintiffs filed their First Amended 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*. (PA 436). Plaintiffs' claims are brought pursuant to 42 USC §1983 for violations of rights protected by the United States Constitution. As shown in their forty-four page First Amended Complaint, including more than twelve pages of factual allegations,[1] Plaintiffs have standing and have stated well-pleaded claims that PA 436 violates their constitutional rights.

Public Act 436 was passed by the Michigan legislature following Michigan voters' repeal of the *Local Government and School District Fiscal Accountability Act*, Act No. 4, Public Acts of 2011 (PA 4). At the general election on November 6, 2012, citizens overwhelmingly voted to reject PA 4. In response, incensed state officials quickly moved to reenact a new emergency manager law substantially identical to the rejected law. As a result, PA 436 was introduced and enacted in December 2012 during the lame-duck session of the Michigan legislature.

Public Act 4 of 2011 was Michigan's **first** foray into imposing emergency managers (EM) over Michigan's municipalities. Prior to PA 4, Michigan had

[1] *See* Dkt. No. 39, First Amended Complaint filed February 12, 2014 at pp. 7-19.

Local Government Fiscal Responsibility Act, Act No. 72, Public Acts of 1990 (PA 72). Public Act 72 allowed for the appointment of an emergency ***financial*** manager (EFM) and did not contain a general grant of legislative powers. Defendants are well aware of the difference between the emergency manager laws and emergency *financial* manager laws; however Defendants seek to mislead the court and the public by conflating the two types of statutes. Under PA 72, general governing powers and general legislative powers remained vested in local elected officials and the emergency financial managers' powers extended broadly, but were limited to matters relating to municipal finances.

Repeating long-recited boilerplate, Defendants suggest that PA 436 contains new tools and grants new powers necessary to rectify financial emergencies that were not in PA 72. The principal new tool and new powers found in PA 4, and now in PA 436, is a grant to emergency managers of full governing authority - even over matters *wholly unrelated* to a municipality's financial condition. The Defendants have not and cannot explain how a general grant of governing power, including a grant of general legislative power over matters unrelated to municipal finances, is necessary or even rationally related to resolving a community's financial instability.

Defendants seek to distinguish PA 436 from PA 4 and PA 72 with similar boilerplate. Defendants argue that PA 436 differs from prior law because it

permits 1) options—"chosen by the local government"—to address the financial emergency; 2) an 18 month time-limit on an emergency manager's appointment; and 3) authority to petition for removal of an emergency manager.[2]

The cited PA 436 "options" are illusory and are not "chosen" at the discretion of the local government. Two of the four options – entering a consent agreement and the appointment of an EM - are the same as under PA 4. Public Act 72 also permitted entering a consent agreement and the appointment of an EFM. The other two options – "neutral evaluation" (i.e. mediation) with creditors and Chapter 9 bankruptcy - have long been available to cities and school districts under federal and Michigan law. Both entering a consent agreement and Chapter 9 bankruptcy require the governor's approval.

Defendants misrepresent that there is a time limit on an EM's term in office. **There is no time limit in PA 436.** Emergency managers serve at the pleasure of the governor and for as long as the emergency exists.[3] After the EM has been in office for 18 months and with approval of the chief executive and upon a 2/3 vote of city council or a school board, a *particular* EM can be removed.[4] The governor

[2] Dkt No. 41, Motion to Dismiss, filed March 5, 2014 at p. 3.

[3] *See* Mich. Comp. Laws § 141.1549(3)(d), (6)(a).

[4] *Id.* § 141.1549(6)(c).

then has 30 days to appoint a replacement EM.[5] The only exception is when a municipality has not previously entered a consent agreement with the state.[6] In which case, the municipality has 10 days to negotiate a consent agreement with the state treasurer.[7] If an agreement is not reached, then the governor may appoint a new emergency manager. Under a consent agreement, the state treasurer can also appoint a city official with EM powers.[8] Thus, the individual may change, but an EM remains in place.

Defendants misrepresent that PA 436 "builds in checks on an EM's authority by … local elected officials,"[9] citing Mich. Comp. Laws §§ 141.1552(1)(k), (r), (u), .1552(4), .1555(1), .1559(1). Pursuant to §1559 (1) under one set of narrow circumstances, local elected officials may suggest an alternative to EM actions specifically taken under Mich. Comp. Laws § 141.1552(1)(k), (r), (u). The state's local emergency financial assistance loan board[10] then has sole discretion regarding whether to approve the EM's actions. Sections 1552 (4) and 1555 (1) do not

[5] *Id.* § 141.1549(6)(a).

[6] *Id.* § 141.1549(6)(c).

[7] The state treasurer is appointed by the state's governor. Mich. Const. art. VI, § 1

[8] Mich. Comp. Laws § 141.1548(10). The powers granted under this section are identical to those found in PA 4.

[9] Dkt No. 41, Motion to Dismiss, filed March 5, 2014 at p. 4.

[10] The board is composed of the state Treasurer and the governors appointed directors from other departments of the executive branch. Mich. Comp. Laws § 141.932.

provide any role for local officials.

The cities of Ecorse and Pontiac have not been returned to the control of elected officials in any meaningful sense. Both Ecorse and Pontiac remain under the governance of the governor's appointees and EM, albeit in slightly different form than the office of the emergency manager. Both cities now have transition advisory boards. The "advisory" descriptor is misleading – deliberately so.

In Ecorse, *all actions* taken by the Mayor and City Council are "subject to approval by the board."[11] Notably, the Defendant state Treasurer's designee is the Chair and the city's EM is the Vice Chair of the board. In Pontiac, the EM established and appointed a City Administrator and then delegated all governing and decision-making authority the EM's City Administrator.[12] *The role of the Mayor and City Council is largely ceremonial and purely advisory*. Virtually all their actions are subject to the approval of first, the EM's unelected City

[11] *See* attached Exhibit 1, Emergency Manager City of Ecorse, Wayne County, Michigan, Order No. 094 at pp. 2-4. Full compliance with all aspects of this order is required by the governor's April 30, 2013 order, attached as Exhibit 2 and by the Rules of Procedure of the Receivership Transition Advisory Board for the City of Ecorse at Section 2.1 (h), attached to Defendants' pending Motion as Exhibit 5.

[12] *See* attached Exhibit 3, City of Pontiac, Office of the Emergency Manager, Louis Schimmel, Order No. S-334 at pp. 2-4. Full compliance with all aspects of this order is required by the governor's August 19, 2013 order, attached as Exhibit 4, appointing a transition advisory board and by the Rules of Procedure of the Receivership Transition Advisory Board for the City of Pontiac at Section 2.1 (h) attached to Defendants' pending Motion as Exhibit 6.

Administrator and then the board. Again, the state Treasurer's designee is the Chair and the city's EM is the Vice Chair of the board.

Since the initial filing of this case, the city of Hamtramck received an EM. The city of Highland Park and Royal Oak Township have also been found to be undergoing financial emergencies and PA 436 procedures have been invoked.

Defendants do not otherwise contest the facts asserted in Plaintiffs' Complaint and those facts should be taken as true for purposes of this motion.

V. DISCUSSION

A. PLAINTIFFS HAVE STANDING TO BRING THEIR CLAIMS.

The Sixth Circuit has clarified that a Rule 12 (b) (1) motion based on standing raises a constitutional issue - whether a complaint satisfies the U.S. Const. art. III "case or controversy" requirement.[13] Defendants do not appear to contest that a genuine case and controversy exists. Rather, Defendants argue issues of statutory standing. Such challenges are made under Rule 12 (b)(6) and ask whether the petitioner is a member of a class of persons "who may use the courts to enforce the right at issue."[14]

All Plaintiffs in this case have been tangibly affected by PA 436 EMs. The

[13] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); and *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979).

[14] *Roberts v. Hamer*, 655 F.3d 578, 580 (6th Cir. 2011).

standing doctrine requires Plaintiffs to have: (1) suffered an "injury in fact", meaning an invasion of a protected interest that is "concrete" and "particularized"; (2) a causal connection between the injury and the conduct; and (3) it must be "likely" that the injury will be "redressed by a favorable decision."[15] Each Plaintiff satisfies each of these criteria.

The Supreme Court held in *Baker v. Carr* that qualified voters who have alleged that they have been personally disadvantaged by a state statute can demonstrate standing to challenge the statute's constitutionality.[16] In *Gray v. Sanders*, the Supreme Court, reiterated: "any person whose right to vote is impaired has standing to sue."[17]

Congress amended the Voting Rights Act in 1975 to confer standing upon all "aggrieved persons." It is unnecessary to determine whether Plaintiffs' allegations of impairment of their voting rights are true in order to hold they have standing to seek relief.[18] If the impairment produces an *alleged injury* and they are

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[15] *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 573-74 (6th Cir. 2004) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

[16] *Baker v. Carr*, 369 U.S. 186, 204-08 (1962).

[17] *Gray v. Sanders*, 372 U.S. 368, 373-75 (1963) (citations omitted). *See also*, *Henderson v. Ft. Worth Indep. Sch. Dist.*, 526 F.2d 286, 288 (5th Cir. 1976) and *Sandusky Cnty. Democratic Party*, 387 F.3d at 570-71.

[18] *Baker*, 369 U.S. at 208.

among those affected, Plaintiffs have standing to bring their claims.

Plaintiffs are residents of cities and school districts with EMs, are registered voters, have voted, intend to vote again, and are persons who are actively engaged in the political process at the local level of government. Some are even elected officials who have been displaced by EMs and the PA 436 transitional boards (Watkins, Williams, Seats, Knowles, Henry, Adams, and Kincaid) and have alleged equal protection arguments based on their inability to remove EMs after 18 months (Simpson, Lemmons, and Herrada). Under Defendants' argument, no conceivable person would have standing to challenge PA 436 and thereby, the constitutional harm can be continued indefinitely at the Defendants' discretion.

There is little question that each of the Plaintiffs have suffered a concrete and particularized harm, caused by PA 436, that can be redressed by the relief requested. The harms Plaintiffs have suffered differ markedly from harms suffered by other Michigan residents living in cities without an EM. Defendants attempt to argue otherwise - by comparing Plaintiffs only to other residents in localities with an EM and not the residents or elected officials of other cities in Michigan without one – is frivolous. Plaintiffs have already and are continuing to suffer the alleged constitutional deprivations,[19] while the residents of other

[19] In *Zielasko v. Ohio*, 873 F.2d 957 (6th Cir. 1989) the Sixth Circuit found that the plaintiff, a potential candidate for judge but for the age limit, was injured in fact.

Michigan communities without an EM have suffered no such harms.

Defendants' citations to *City of Los Angeles v. Lyons,*[20] *Miyazawa v. City of Cincinnati,*[21] *Anthony v. State of Michigan,*[22] and *Moore v. Detroit Bd. of Educ.*[23] are misplaced. In *City of Los Angeles*, plaintiffs could not show they would be subjected to the alleged constitutional deprivation in the future, while in the present case the Plaintiffs are presently suffering the alleged constitutional deprivations. Unlike *Miyazawa*, the Plaintiffs here have already lost their right to "effective" voting power, freedom of speech, the right to petition government and other rights as a result of PA 436. *Anthony*[24] is equally distinguishable and *Moore* does not address standing issues at all.

Further, the plaintiff-voter who desired to vote for the plaintiff-potential candidate was also injured in fact.

[20] *Los Angeles v. Lyons*, 461 U.S. 95 (1983).

[21] *Miyazawa v. City of Cincinnati*, 45 F.3d 126 (6th Cir. 1995).

[22] *Anthony v. Michigan*, 35 F. Supp. 2d 989 (E.D. Mich. 1999).

[23] *Moore v. Det. Sch. Reform Bd.*, 293 F.3d 352 (6th Cir. 2002)

[24] *Anthony* involved a challenge based on an alleged attempt to keep African-American judges off the bench when Plaintiffs' were not shown to be likely potential candidates for judicial office. *Anthony*, 35 F. Supp. 2d at 1003.

B. PUBLIC ACT 436 VIOLATES LIBERTY INTERESTS PROTECTED BY THE DUE PROCESS CLAUSE OF THE U.S. CONST. AMEND. XIVAND THE GUARANTEE CLAUSE OF ART. IV, § 4 (COUNTS I & II).

1. *Public Act 436 Violates Plaintiffs' Liberty Interests In A Democratically-Elected Government.*

The Fourteenth Amendment protects against violations of citizen's liberty interests. The Court describes its analysis of substantive due process protections as follows:

> First … the **Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition**," … and "implicit in the concept of ordered liberty," **such that "neither liberty nor justice would exist if they were sacrificed**."[25]

In the present case, the fundamental right at issue is a right to elect those officials who possess legislative (i.e. lawmaking) power. No court has yet considered this issue, but certain principles are well-recognized within case law.

There is no question that the right to vote for legislative officials is "regarded as a fundamental political right, because preservative of all rights" and is deeply rooted in our nation's concept of ordered liberty. Moreover, the fundamental nature of a legislative body as a **representative body elected by the people** is well-recognized in *Reynolds v. Sims*, where the Court stated that "[a]s

[25] *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted and emphasis added).

long as ours is a representative form of government, … **the right to elect legislators … is a bedrock of our political system**."[26]

The Sixth Circuit has held:

> The **Due Process Clause is implicated** … **where a state's voting system is fundamentally unfair**. … Such an exceptional case may arise, for example, if a state employs [rules] … that **result in significant disenfranchisement and vote dilution** … or significantly departs from previous state election practice.[27]

This case presents just such a circumstance.[28]

Public Act 436 has the effect of creating a voting system where citizens in communities with an EM vote for officials who have no governing authority while citizens of other communities vote for those who actually govern and can act as the elector's representatives in office. No other state has adopted such a form of government as is provided by PA 436. The law is a radical departure from prior forms of local government known in Michigan and the United States. Such a system is profoundly undemocratic and discriminatory to racial minorities and the economically poor. Such a system is fundamentally unfair[29] and is a radical

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[26] *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

[27] *Warf v. Bd. of Elections*, 619 F.3d 553, 559 (6th Cir. 2010) (emphasis added).

[28] It is important to note that under PA 436, the state has not disincorporated municipalities and undertaken direct rule by the state. Rather, the state has maintained the local body corporate with all its legislative and police powers and transferred those powers to the EM.

[29] PA 436's fundamental unfairness is further highlighted by case law analyzing

departure from past electoral practices in Michigan.

The only question on the pending motion is whether Plaintiffs' Complaint states a valid claim for a violation of their liberty interests as protected by substantive due process. While such claims are uncommon, the form of government established by Michigan's PA 436 is even more so. Plaintiffs properly raise a right to relief under the Fourteenth Amendment that is well-above the speculative. As a result, Defendants' request for dismissal of this claim must fail.

2. Public Act 436 Violates The Guarantee Clause.

The Constitution's Guarantee Clause provides: "The United States shall guarantee to every State in this Union a Republican Form of Government."[30] While, in most instances, courts ultimately find that Guarantee Clause claims raise nonjusticiable issues, federal courts **have not** eliminated such causes of action.

In *New York v. United States*, the Court recognized that "[m]ore recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." [31] Writing for the majority, Justice Sandra Day

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the merging of all governing authority within one branch of government. In *Dreyer v. Illinois*, 187 U.S. 71, 83-84 (1902), the Court noted that placing all the powers of government in the same hands "**subverts the principles of a free constitution.**"

[30] U.S. Const. art. IV, § 4.

[31] *New York v. United States*, 505 U.S. 144, 185 (1992).

O'Connor noted that nonjusticiability has not always been the rule of the Court.[32] She then proceeded to assume that the claims were justiciable, but found that a right to a republican form of government had not been violated.[33]

The First Circuit provides guidance on analysis of Guarantee Clause claims. In *Largess v. Supreme Judicial Court*, the court found that "[t]he first portion of the Clause is only implicated when there is a threat to a 'Republican Form of Government'."[34] The court recognized a definition of republican forms as: "a **government in which supreme power resides in a body of citizens entitled to vote** and **is exercised by elected officers and representatives responsible to them.**"[35]

The Supreme Court also recognizes that:

> **the distinguishing feature** of that form [of republican government] **is the right of the people to choose their own officers** for governmental administration, and **pass their own laws in virtue of the legislative power reposed in representative bodies**, **whose**

[32] *N.Y. v. U.S.*, 505 U.S. at 185 ("The merits of Guarantee Clause claims, without any suggestion of nonjusticiability were decided in *Kies ex rel. Att'y Gen. of Mich. v. Lowrey*, 199 U.S. 233, 239 (1905)); *Forsyth v. Hammond*, 166 U.S. 506, 519 (1897); *In re Duncan*, 139 U.S. 449, 461-62 (1891); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175-76 (1875)").

[33] *N.Y. v. U.S.*, at 185. *See also, Reynolds*, 377 U.S. at 582 (Finding that Guaranty Clause are nonjusticiable *when they raise issues* that are political in nature and there is a clear absence of manageable standards).

[34] *Largess v. Supreme Judicial Court*, 373 F.3d 219, 227 (1st Cir. 2004), *cert. denied by* 543 U.S. 1002 (2004).

[35] *Largess*, 373 F.3d at 227 (citations omitted and emphasis added).

legitimate acts may be said to be those of the people themselves.[36]

The new form of government instituted by PA 436 clearly violates the Court's definition of a republican form of government. The case before the court is readily distinguishable from prior cases where the nonjusticiability doctrine was applied. None of the prior cases address the core issue in this case - whether state government can vest **all governing authority and general legislative power in one unelected official** with no accountability to the people governed. Under any recognized definition of a republican form of government, it cannot, and Plaintiffs have properly pled a claim for relief.

Defendants' reliance upon *Sailors v. Bd. of Ed. of Kent County*[37] is in misplaced. In *Sailors*, the Court did not address a Guarantee Clause claim and recognized that states have latitude to determine how **nonlegislative** state and local officers might be chosen. The Defendants run afoul of *Sailors* by appointing local officers **with legislative powers**.

Defendants correctly note that a state "cannot manipulate its subdivisions to defeat a federally protected right."[38] In the present case, it cannot create unelected local governments to legislate in a manner that the state itself could not.

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[36] *In re Duncan,* 139 U.S. at 461.

[37] *Sailors v. Bd. of Educ. of Kent Cnty.*, 387 U.S. 105 (1967)

[38] Dkt No. 41, Motion to Dismiss, filed March 5, 2014 at p. 10.

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

1. *Public Act 436 Violates The Equal Protection Clause Through Provisions That Effectively Revoke And/Or Impermissibly Dilute The Fundamental Right The Vote.*

The Fourteenth Amendment requires that each state provide equal protection under the law to all people living within a state's borders.[39] The Equal Protection Clause is particularly concerned with statutes that treat some groups of persons differently than others.[40]

When a state law discriminates against persons in the exercise of a fundamental right or where a statute classifies persons based on protected characteristics, the statute will receive strict scrutiny. Strict scrutiny requires that the state's differing treatment be narrowly tailored to further a compelling state interest.[41] This requires that the statute employ the least restrictive means available to advance the state's interest. The Court has long-recognized that once the right to vote in local elections is granted, voting is a fundamental right.[42]

Defendants concede that voting is a fundamental right and that the right to

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[39] U.S. Const. amend. XIV, §1.

[40] *See McGowan v. Maryland*, 366 U.S. 420 (1961).

[41] *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

[42] *See Bush v. Gore*, 531 U.S. 98, 105 (2000) (per curiam); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966); *Yick Wo v. Hopkins*, 118 U.S. 356, 370-71 (1886).

vote in local elections is granted to all citizens in Michigan. Defendants solely contest whether: 1) Plaintiffs, as residents of communities with an EM are similarly situated to residents in communities without one;[43] 2) there has been any denial or infringement of Plaintiffs' right to vote;[44] and 3) there has been a dilution of the Plaintiffs' right to vote.[45]

Defendants' argument that Plaintiffs are not "similarly situated" to other Michigan voters is an unartful argument that the state has a compelling state interest in treating Plaintiffs differently from other voters in other locales throughout the state. The Defendants' suggested reason for treating the Plaintiffs' differently is the financial distress in their communities. If the financial distress does not constitute a compelling reason, Plaintiffs' residence in such communities cannot provide a valid constitutional basis for the differing treatment. While a genuine financial emergency may be a compelling state interest, PA 436 is not narrowly tailored or even rationally related to achieving such ends.

Defendants next seek to argue that there has been no denial, infringement or dilution of the Plaintiffs' right to vote. Incredulously, Defendants assert that Plaintiffs "retain all their rights to exercise the franchise and vote for the

[43] Dkt No. 41, Motion to Dismiss, filed March 05, 2014 a pp. 12-14.

[44] *Id.* at 14-15.

[45] *Id.* at 15-16.

candidates of their choice, including candidates for local government, and to have those votes counted"[46] as residents of cities without an EM. Yet, Defendants admit that the elected officials in cities and school districts with EMs have no governing authority. Defendants' argument elevates the form of voting over its substance.

In addition to fairness in the form of voting, citizens have a right to "cast their votes effectively."[47] The Court in *Reynolds v Sims* states: "**[t]here is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth**." [48] The right to vote includes a right to have one's vote "**counted at full value without dilution or discount**."[49]

Public Act 436 removes all governing authority from local elected officials. Voting for a public official whose opinions are, at most, advisory is a denial, infringement and/or severe dilution of residents vote when residents of other cities vote for public officials possessing all the governing authority of their offices.

Moreover, residents from cities without an EM achieve a direct vote in the local government of their cities when they vote for their mayor and city council. Due to the transfer of all governing powers to the EM, residents in those cities

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[46] *Id.* at 15.

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

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

[49] *Id.*

have no direct vote for the governing officials of their local government.

Through their vote for the governor who appoints the EMs, all Michigan citizens receive an equal indirect vote in the local government of cities with an EM. At the same time however, residents in cities with an EM do not receive a reciprocal vote in the local governments of cities that do not possess an EM. As such, residents of cities that do not have an EM possess a greater vote in their local elections than those who live in cities with one.

On the pending motion, Plaintiffs are not required to prove that the statute is not narrowly tailored to achieve the interests stated. However, a multiplicity of less restrictive alternatives exist. Less restrictive alternatives include, but are not limited to: a) restricting emergency managers' power to financial matters and not matters of pure policy such as zoning, regulatory ordinances, board appointments, historical designations, etc. b) laws existing in dozens of other states to address fiscal emergencies without imposing an EM; c) court receivership; d) Chapter 9 bankruptcy, etc. In the presence of numerous less restrictive alternatives, PA 436 cannot be found narrowly tailored to serve legitimate interests of the state. As a result, a claim for violation of the Equal Protection Clause has been stated.

2. Public Act 436 Violates The Equal Protection Clause Through Provisions That, On The Basis Of Race, Effectively Remove And/Or Impermissibly Dilute Citizen's Fundamental Right To Vote

The Equal Protection Clause subjects statutes and practices that discriminate

on the basis of race to strict scrutiny. Such laws and practices need not overtly classify by race to be unconstitutional; a facially neutral law with a legitimate purpose violates the Fourteenth Amendment if the challenged practice "had a discriminatory effect and . . . was motivated by a discriminatory purpose."[50]

Plaintiffs need not demonstrate 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.[51] Nor is discriminatory purpose neutralized by the inclusion of other groups as objects of discriminatory intent.[52] In determining whether a law or its application stems from a discriminatory intent, courts must consider the "'totality of the relevant facts.'"[53] "[I]t is an inherently difficult task to ascertain the motivations of multi-membered public bodies,"[54] and "officials … seldom, if ever, announce … their desire to

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[50] *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).

[51] *United States v. Birmingham*, 727 F.2d 560, 565 (6th Cir. 1984) (emphasis added) and *Alexander v. Youngstown Bd. of Educ.*, 675 F.2d 787, 791-92 (6th Cir. 1982).

[52] *Hunter v. Underwood*, 471 U.S. 222 (1985).

[53] *Farm Labor Org. Comm.*, 308 F.3d at 534 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

[54] *Alexander*, 675 F.2d at 792.

discriminate against a racial minority."[55] The Supreme Court therefore "'has identified objective factors that may be probative of racially discriminatory intent among legislative bodies."[56]

First, "the fact … that the law [or practice] bears more heavily on one race than another" supports an inference of racial discrimination.[57] Indeed, "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."[58] Plaintiffs alleging race-based discrimination can demonstrate discriminatory effect "through the use of statistical"[59] evidence showing that one class is being treated differently from another class that is otherwise similarly situated.[60]

In addition, courts consider the historical background of the decision, the sequence of events, procedural and substantive departures from normal procedure,

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[55] *Birmingham*, 727 F.2d at 564.

[56] *Id.* at 565 (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977)).

[57] *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).

[58] *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) (internal citations omitted).

[59] *Farm Labor Org. Comm.*, 308 F.3d at 534 (internal citations omitted).

[60] *Id.*

and legislative or administrative history."[61] These factors, which consider both direct *and* circumstantial evidence of intent, are not exhaustive, and no one factor is dispositive.[62]

Plaintiffs' Complaint notes that *over 50%* of Michigan's black population has lost the right to vote or had their right to vote severely diluted in local elections.[63] At the same time, only about 2% of Michigan's white citizens live in communities 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.

Additionally, the Michigan Department of Treasury maintains a scoring system to determine the financial health of the state's cities and townships.[64] 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

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[61] *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267-68 (1977).

[62] *Arlington Heights*, 429 U.S. at 266; *Birmingham*, 727 F.2d at 565.

[63] See Dkt. No. 39, First Amended Complaint filed February 12, 2014 at pp. 17-18, ¶¶ 85-86. Note: Hamtramck has come under an EM since filing the initial Complaint and the cities of Highland Park and Royal Oak Township have been found in a financial emergency and the determination of whether an EM will be appointed is pending. These cities have an African-American population as follows: Hamtramck, 19.3%; Highland Park, 93.5%; and Royal Oak Township, 95.3%.

[64] *Fiscal Indicator Scores*, Michigan Department of Treasury, State of Michigan at http://www.michigan.gov/treasury/0,1607,7-121-1751_47023-171423--,00.html.

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 (0%) with a majority white population received an EM despite having scores of 7 or higher.[65]

Defendants' citation to *TriHealth, Inc. v. Bd. of Comm'rs, Hamilton Cnty.*,[66] is completely inapposite. *Tri-Health* does not address racial discrimination at all and has no bearing on the instant case.[67] Likewise, Defendants' reliance upon *Moore v. Detroit Sch. Reform Bd.*[68] is similarly flawed. In *Moore*, the relative magnitude of the Detroit Public School District distinguished it from all other school districts in the state. In the instant case, Defendants have implemented PA 436 in multiple districts and municipalities of varying size and jurisdiction, almost all of which are predominantly black. The "totality of the relevant facts"[69] alleged here thus completely distinguishes PA 436 from the legislation challenged in *Moore*. Again, Plaintiffs have properly pled a claim for relief and Defendants have

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[65] *See* Fiscal Indicator Scores for all communities with a score of 7 or higher attached as Exhibit 5. The City of Allen Park is an outlier - its financial stress resulted from one particular transaction. The city sold $31 million in bonds to finance a movie studio that failed to generate anticipated revenue.

[66] *Trihealth, Inc. v. Bd. of Comm'rs*, 430 F.3d 783 (6th Cir. 2005).

[67] *Id.* at 788.

[68] *Moore*, 293 F.3d 352.

[69] *Davis*, 426 U.S. at 242.

wholly failed to meet their burden for dismissal.

3. Public Act 436 Violates The Equal Protection Clause Through Provisions That, On The Basis Of Wealth, Effectively Remove And/Or Impermissibly Dilute Citizen's Fundamental Right To Vote

The Equal Protection Clause of U.S. Constitution protects against both subtle restrictions on the right to vote and outright denial of the right. Wealth restrictions infringing upon a person's right to vote are rarely justified and are strictly scrutinized.[70]

In *Harper v. Virginia Bd. of Elections*,[71] the United States Supreme Court considered whether restrictions that act as a barrier to economically poor persons voting in state elections violate the Equal Protection Clause. In *Harper*, the Court found that a person's qualifications to vote have "no relation" to one's wealth.[72] The *Harper* Court drew from its decision in *Gray v. Sanders* where the Court found that all voters have an equal right to vote in a state's elections "whatever their occupation, **whatever their income**."[73] The *Harper* Court found "the **same**

[70] It is important to note, that a finding of corruption, fiscal neglect, or financial incompetence is not required and has, in fact, not been shown in any of the cities receiving an EM. Rather, such attributes are implicitly assumed in the removal of elected officials from governing authority.

[71] *Harper*, 383 U.S. 663.

[72] *Id.* at 666.

[73] *Gray*, 372 U.S. at 380 (emphasis added).

must be true of requirements of wealth or affluence."[74]

The Court held that a state violates the Fourteenth Amendment's Equal Protection Clause "**whenever it makes the affluence of the voter** … an electoral standard"[75] and recognized that "[w]ealth, like race … is not germane to one's ability to participate intelligently in the electoral process" and that "[t]o introduce wealth … as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. **The degree of the discrimination is irrelevant**."[76]

Subsequent Courts have consistently affirmed the *Harper* Court's holding[77] As a result, a state statute conditioning a right to vote on wealth or affluence will be strictly scrutinized and will only survive Constitutional review if narrowly tailored to further a compelling state interest.[78]

On its face, Michigan's PA 436 conditions citizen's right to vote in local

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[74] *Harper*, 383 U.S. at 667. (emphasis added).

[75] *Id.* at 666. (emphasis added).

[76] *Id.* at 668. (emphasis added).

[77] *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 (2008); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973); *Goosby v. Osser*, 409 U.S. 512, 520 (1973); *Bullock v. Carter*, 405 U.S. 134, 142 (1972); *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969);

[78] Defendants reliance upon *Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010) (citing *Papasan v. Allain*, 478 U.S. 265, 283-84 (1986)) is patently incorrect. In *Johnson*, the court correctly noted that the plaintiff as a convicted *felon* did not have a fundamental right to vote and in the absence of a fundamental right to vote, wealth alone is not a suspect class.

elections on the wealth of their communities. Public Act 436 suspends the right to vote in municipalities experiencing financial distress – distress caused by declining wealth within the households of those municipalities. The economic circumstances of cities and school districts directly reflects the affluence of individuals living within the community.[79]

In Michigan, EMs have overwhelmingly been appointed over disproportionately poor communities that have been hardest hit by the national economic downturn.[80] Arguments that the law applies equally to wealthy and poor communities are unpersuasive.[81] In only the rarest of instances will a community composed of financially wealthy households become subject to PA 436. Moreover, because some poorer communities may escape falling into financial distress during any particular economic downturn does not mitigate against a finding that Michigan's law conditions the right to vote in local elections upon

[79] In Michigan, the revenue of municipalities is overwhelmingly provided by local property and income tax and state revenue sharing all of which have sharply declined as the result of widespread loss of household wealth.

[80] *See* poverty statistics cited in Plaintiffs' First Amended Complaint. Dkt. No. 39 filed February 12, 2014 at pp. 18-19, ¶ 87. Hamtramck, Highland Park and Royal Oak Township are equally plagued with poverty rates significantly above state averages.

[81] Such arguments evoke the critical appraisal that "[I]n its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread." Anatole France, THE RED LILY at 95 (Winifred Stephens trans., John Lane Company 1901).

economic wealth.

Once the exercise of a voting right is conditioned on economic status such as wealth, then the law must be narrowly tailored to advance a compelling state interest. As noted above, PA 436 is not narrowly tailored to serve a compelling state interest. Rather, the statute serves as a very blunt tool in service of the state's interests. Plaintiffs have clearly stated a well-pleaded claim for relief under the Equal Protection Clause and are not required to prove all facts in support of the claim at this stage of the proceedings.

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

Section 2 of the Voting Rights Act of 1965 provides that "no voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[82] The Supreme Court has held that the Act "**should be interpreted in a manner that provides the broadest possible scope in combating racial discrimination**."[83] Because intent is not required to demonstrate a violation of Section 2 of the Act, Plaintiffs need show only that the

[82] 42 U.S.C. § 1973(a).

[83] *Chisom v. Roemer*, 501 U.S. 380, 402 (1991).

challenged system or practice "*results* in minorities being denied equal access to the political process."[84]

Practices that deny "equal access to the political process" include those that render elected representatives powerless. "[I]n this country the people govern themselves through their elected representatives and 'each and every citizen has an inalienable right to full and effective participation in the political processes' of the legislative bodies of the Nation, State, or locality as the case may be."[85] "Simply put, the right to vote for someone who is powerless to represent the voter renders meaningless the right to vote for that person."[86]

Given the broad scope of the Act, the imposition of EMs eviscerates the power of local representatives elected by black voters and is clearly a standard, practice, or procedure that results in "minorities being denied access to the political process,"[87] and is therefore covered by Section 2. Blacks comprise only 14.2% of the Michigan population, but PA 436 places more than 50% of the black population under EM rule, effectively depriving them of representation by local

[84] *Id*. at 395 (citing S. Rep. No. 97-417, p. 2 (1982)) (emphasis added).

[85] *Bd. of Estimate of N.Y. v. Morris*, 489 U.S. 688, 693 (1989) (quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)).

[86] *Equal. Found. v. City of Cincinnati*, 838 F. Supp. 1235, 1239-40 (S.D. Ohio 1993), *rev'd on other grounds sub nom. Equal. Found. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995), vacated and remanded in light of *Romer v. Evans*, 517 U.S. 620 (1996), *Equal. Found. v. City of Cincinnati*, 518 U.S. 1001 (1996).

[87] *Chisom*, 501 U.S. at 395.

officials they themselves have elected.[88] Because elected representatives have no governing authority in municipalities with an EM, the votes of citizens in these jurisdictions is rendered meaningless. This is exactly the sort of "standard, practice, or procedure" that requires the protections of Section 2.[89]

Faced with the broad and inclusive nature of the Act, Defendants provide only one principle in support of their motion to dismiss claims under Section 2: a narrow proposition from *Thornburg v. Gingles*[90] that has no application in this case. The portion of *Gingles* cited by Defendants is plainly limited to challenges to multimember district elections[91] and contrary to Defendants' suggestion, does not narrow claims brought under the broad reach of Section 2. Instead, it stands for the proposition that a variety of factors "*may* be relevant to a §2 claim."[92] Further, *Gingles* emphasizes that the enumerated factors "are neither comprehensive nor exclusive."[93] Far from being limited to *Mallory*-type claims, Section 2 of the Act

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[88] Dkt. No. 39, First Amended Complaint filed February 12, 2014 at pp. 17-18, ¶¶ 85-86.

[89] 42 U.S.C. § 1973(a) (2006). *See also Bd. of Cnty. Comm'rs v. Burson*, 121 F.3d 244, 248 (6th Cir. 1997).

[90] *Thornburg v. Gingles*, 478 U.S. 30 (1986).

[91] *See id*. at 50. Likewise, the only other case cited by Defendants, *Mallory v. Ohio*, 173 F.3d 377 (6th Cir. 1999) deals exclusively with the narrow issue of multimember election districts.

[92] *Id.* at 44-45.

[93] *Id*. at 45.

"prohibits the use of *any* electoral practice or procedure that 'results in a denial or abridgment of any citizen of the United States to vote on account of race or color.'"[94]

Given clear Supreme Court directive to interpret the Act in the broadest possible manner and Defendants' failure to provide any support for their position, Defendants' motion to dismiss Plaintiffs' claims under the Voting Rights Act must be rejected.

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

Amendment I of the US Constitution protects against infringements upon citizens' freedom of speech and their right to petition government. The Supreme Court has noted that state voting laws "inevitably affect[s] … the individual's … right to associate with others for political ends."[95] "[W]hen the law discriminates against a small and identifiable group that is engaged in the business of speech, the court may apply heightened or strict level scrutiny to determine whether a

[94] *Stewart v. Blackwell*, 444 F.3d 843, 864 (6th Cir. 2006), *vacated on other grounds*, Stewart v. Blackwell, 473 F.3d 692 (6th Cir. 2007) (citing 42 U.S.C. § 1973(a)) (emphasis added).

[95] *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

challenged regulation violates the First Amendment."[96]

1. *Public Act 436 Violates Citizens' Freedom of Speech And Right To Petition Their Government Through The Re-Enactment Of Emergency Manager Provisions After A Repeal Referendum.*

Michigan's Constitution at art 2, § 9 grants the citizen's a right of referendum. The citizens of the State of Michigan exercised their right of referendum by voting to repeal PA 4. Thereafter, the Michigan Legislature re-enacted an almost mirror image law known as PA 436. By reinstituting the rejected provisions of PA 4, the Defendants violated the First Amendment rights of the Plaintiffs.

At its core, the First Amendment prohibits the government from engaging in discrimination "based on viewpoint."[97] Viewpoint discrimination is a "blatant" violation of our First Amendment right to free speech, for it raises the specter of government censorship of "particular views taken by speakers on a subject."[98] The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the

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

[97] *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009).

[98] *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

restriction."[99]

The government may violate the First Amendment if it regulates speech based on its substantive content or the message it conveys.[100] But when it suppresses "particular views . . . on a subject," the violation is "all the more blatant."[101] Such viewpoint discrimination occurs when the government restricts speech because of "the specific motivating ideology or the opinion or perspective of the speaker,"[102] or "solely to suppress the point of view he espouses."[103]

Even when a justification for a speech restriction is facially neutral, "the government nevertheless violates the First Amendment when its stated purpose in reality conceals a bias against the viewpoint advanced by the excluded speakers."[104] Suspicion of hostility to a particular viewpoint arises if a speech restriction poorly serves the viewpoint-neutral ground; "where, in other words, the fit between means and ends is loose or nonexistent."[105]

A court's job in such a circumstance is to determine if the law is

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[99] *Id.*

[100] *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972).

[101] *Rosenberger*, 515 U.S. at 829.

[102] *Id.*

[103] *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985).

[104] *United Food & Commer. Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 355-56 (6th Cir. 1998) (citing *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 811 (1985)).

[105] *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 87 (1st Cir. 2004).

"impermissibly motivated by a desire to suppress a particular point of view."[106] This is accomplished by combing the record and scrutinizing the viewpoint-neutral justifications the state offers for the enactment.

Clearly in the case at bar, PA 436 was 'impermissibly motivated by a desire to suppress a particular point of view' – the viewpoint that was expressed by the citizen's referendum on PA 4. The enactment of PA 436 violates the Plaintiffs' First Amendment rights and Plaintiff has stated a cause of action for relief.

2. *Public Act 436 Violates Citizens' Free Speech & Petition Rights Through Provisions That Effectively Remove Democratically-Elected Officials From Office.*

While the United States Constitution does not provide an affirmative right to individuals to vote for state or local officials, the First and Fourteenth Amendments have been interpreted to protect voters' associational and speech rights to cast their votes effectively.[107]

"[T]he First Amendment, among other things, protects the right of citizens to band together in promoting among the electorate candidates who espouse their political views."[108] In the case at bar, the fundamental rights of speech and association are impermissibly curtailed by the Act's removing or severely

[106] *Cornelius*, 473 U.S. at 812-13.

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

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

impairing the power of duly elected officials.

In *Peeper v. Callaway County Ambulance District*, the Eighth Circuit addressed post-election First and Fourteenth Amendment rights of officeholders and analogized those rights to an individual's right to run for public office.[109] As with laws restricting ballot access or candidacy:

> restrictions on an elected official's ability to perform her duties implicate the interests of two distinct parties: the individual's 1st Amendment associational rights and 14th Amendment equal protection rights; and the voters' rights to be meaningfully represented by their elected officials.[110]

Indeed, the court stated that "restrictions on an officeholder after election also infringe upon voters' rights to be represented even more severely than when a state similarly restricts candidacy."[111]

In the case at bar, elected officials are provided no due process rights before being stripped of their Charter and Michigan Constitutional authority. In *Gay Rights Coalition v. Georgetown University*,[112] the D.C. Court of Appeals found:

> [t]he Supreme Court long ago made it clear that "the manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy….the act of voting on public issues by a member of a public

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[109] *Peeper v. Callaway Cnty. Ambul. Dist.*, 122 F.3d 619 (8th Cir. 1997).

[110] *Id.* at 623.

[111] *Id*. at 623

[112] *Gay Rights Coal. of Georgetown Univ. Law Center v. Georgetown Univ.*, 536 A.2d 1, 39 (D.C. 1987).

> agency or board comes within the freedom of speech guarantee of the first amendment.[113]

In this case, PA 436 singles out elected officials and deprives them of their right to vote on matters of public concern and speak within government as a representative of the constituencies who elected them. In so doing, the statute deprives both the elected officials and the citizens who elected them of their freedom of speech rights.

As a result of its infringements upon First Amendment rights, PA 436 must be shown to be narrowly tailored to further a compelling government interest.[114] It cannot be and Plaintiffs' have established a valid claim for relief.

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

Defendants clearly view Plaintiffs' claims under the Thirteenth Amendment as neither a) serious; and b) nor necessary to address. Plaintiffs urge this Court to reject the Defendants' invitation to treat this issue as unimportant and frivolous. In so doing, Plaintiffs also urge this Court to consider the following.

The Thirteenth Amendment "is not a mere prohibition of state laws

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[113] *Id.*

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

establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States."[115] Under the Thirteenth Amendment, unlawful conduct includes the generation, implementation and effectuation of the "badges and incidents of slavery,"[116] which "include[d] restraints upon 'those fundamental rights which are the essence of civil freedom."[117]

Undeniably, there is a crystal clear connection between slavery and disenfranchisement, the palpable loss of the "essential rights that appertain to American citizenship and to freedom"[118] That disenfranchisement is a virtual hallmark, let alone a badge and incident, of slavery is clearly denoted in a speech that Frederick Douglass gave to the Massachusetts Anti-Slavery Society in Boston, April 1865, within days of Lee's surrender, to wit:

> Again, I want the elective franchise, for one, as a colored man, because ours is a peculiar government, based upon … universal suffrage. … here where universal suffrage is the rule, … to rule us out is to make us an exception, to brand us with the stigma of inferiority.[119]

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[115] *The Civil Rights Cases*, 109 U.S. 3, 19 (1883).

[116] *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) and *Runyon v. McCrary*, 427 U.S. 160, 179 (1976).

[117] *Jones*, 392 U.S. at 441 (citing *Civil Rights Cases*, supra, at 22).

[118] *Id.* at 443 (citation omitted).

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

By imposing the harsh consequences of PA 436 on predominately black communities, the Defendants have stigmatized the black community in a dramatic and shocking fashion. That stigma proclaims that "these people" are incapable of self-government.

There are at least two pertinent lines of cases regarding the implementation of the Thirteenth Amendment. The *first* line relates to legislation, passed by Congress, to enact post slavery protection for blacks, who have been "victims of conspiratorial, racially discriminatory . . . action aimed at depriving them of basic rights that law secures to all free men."[120] These statutes, primarily the Civil Rights Act of 1866, 42 USC §§ 1981, 1982 and 1985, are primarily aimed at *private* conduct.[121] These cases help to identify the circumstances where conduct falls under the rubric of "badges and incidents."

In *Jones v. Alfred Mayer*, petitioners were a black couple that sought to purchase a house in a suburb of St. Louis, Missouri. When a private real estate company refused to them a house, the petitioners sued for relief alleging that the landowner's refusal to sell was based solely on their race.[122] The Supreme Court allowed the petitioners to proceed, holding that 42 USC § 1982, as authorized by

[120] *Griffin v. Breckenridge*, 403 U.S. 88, 91 (1971).

[121] *See id*. at 102.

[122] *Jones*, 392 U.S. 409.

the Thirteenth Amendment, clearly was intended to allow people to live where they chose and that to inhibit that ability constituted a badge and incident of slavery.[123] Similarly, in *Runyon v. McCrary*,[124] black children denied admission to private schools solely on the basis of race, could seek relief under 42 U.S.C. § 1981, in that such a prohibition constitutes a badge and incident of slavery.

The second line of pertinent cases suggests that *public* entities can be sued directly under the Thirteenth Amendment. Mr. Justice Harlan in *Hodges v. United States*,[125] said of the Thirteenth Amendment that "*by its own force*, that Amendment destroyed slavery and all its incidents and badges."[126]

Thus, in *City of Memphis v. Greene*,[127] the Court analyzed the facts under a direct Thirteenth Amendment claim. In that case, the residents of a predominantly black neighborhood sued the City of Memphis claiming that the closing of a certain street[128] constituted a badge of servitude. While the Court expressly declined to decide the question of direct cause of action under the Amendment itself, the Court suggested that under the correct circumstances, such a cause of

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[123] *Id.* at 439-444.

[124] *Runyon*, 427 U.S. 160.

[125] *Hodges v. United States*, 203 U.S. 1 (1906)

[126] *Id.* at 27 (emphasis added).

[127] *Memphis v. Greene*, 451 U.S. 100 (1981).

[128] The street closing was alleged to have blocked access to white neighborhoods and other areas of the city.

action would be available.[129] In order to arrive at its holding that the street closing was a mere "routine burden of citizenship" and not a violation of the Thirteenth Amendment, the Court implicitly adopted an analysis that assumes a direct cause of action.

Contrary to Defendants assertions, *City of Memphis v. Greene thus* stands for the proposition that the role of the courts is to determine whether the action of the state constitutes a badge and incident of slavery, on the one hand, or, alternatively, a routine burden of citizenship on the other. [130] The only other case upon which the Defendants rely, *Johnson v. Harron*,[131] is where, unlike this case, the plaintiff failed to assert any "basis for his Thirteenth Amendment claim."[132]

In virtually every circumstance, PA 436 has been implemented to intentionally deny the benefits of voting and democratic institutions to huge numbers of black citizens of Michigan. However, a showing of intentional discrimination is not required if the Plaintiffs can show that to eliminate the rights of the descendants of slaves from the "mass of … [their] fellow-men," as Douglass

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[129] *Id.* at 129.

[130] *See also Southend Neighborhood Improv. Asso. v. Cnty. of St. Clair*, 743 F.2d 1207, 1213 (7th Cir. 1984).

[131] *Johnson v. Harron*, 1995 WL 319943 (N.D.NY., May 23, 1995).

[132] *Id.*

noted, is to brand them with the badge of slavery.[133] For all of these reasons, Plaintiffs have stated a valid claim for relief under the Thirteenth Amendment.

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

The state's interpretation of section 9(6)(c) of PA 436[134] providing for the removal of the EM by a 2/3 vote of the local governmental body after the EM has been in office for 18 months, cannot survive rational-basis review, much less strict scrutiny. With respect to municipalities and school districts that already had EMs in place pursuant to PA 4, Defendants have interpreted the 18-month time-frame to have begun on March 28, 2013, the effective date of PA 436. Defendants' thereby arbitrarily classify local governments into two groups: (1) those that were governed by EMs appointed prior to PA 436's effective date; and (2) those that are or will be governed by EMs appointed after PA 436's effective date.

Members of the first group receive no credit for time spent under an EM appointed under PA 436's nearly identical predecessor statute. This means that DPS must wait another 18 months to vote for removal of its EM, even though its current EM, Roy Roberts, was appointed in May 2011. Other municipalities, such

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

[134] Mich. Comp. Laws § 141.1549(6)(c)

as Benton Harbor, Flint, Pontiac, and Highland Park Public Schools with pre-existing EMs are similarly penalized. At the same time, members of the second group need only wait 18 months to vote to remove their EMs.

1. *Public Act 436's Restrictions On Removal Of Emergency Managers Are Subject To Strict Scrutiny.*

The Eighth Circuit recognized in *Peeper*[135], "restrictions on an elected official's ability to perform her duties implicate: the individual's First Amendment associational rights and Fourteenth Amendment equal protection rights' and the voters' rights to be meaningfully represented by their elected officials."[136]

The Supreme Court has long recognized that voters' rights are implicated even where there is merely a restriction on candidacy.[137] The *Peeper* court noted that "[r]estrictions on an officeholder after election also infringe upon voters' rights to be represented even more severely than when a state similarly restricts candidacy"[138] reasoning that limitations on an officeholder provide voters no other opportunity through an alternative representative.[139] If the restrictions prevent the officeholder from meaningfully representing the voters who elected them, such

[135] *Peeper*, 122 F.3d at 622.

[136] *Id*. at 623.

[137] *See Bullock*, 405 U.S. at 143 (Rights of voters and the rights of candidates do not always lend themselves to neat separation").

[138] *Peeper*, 122 F.3d at 623.

[139] *Id*.

restrictions are subject to strict scrutiny.

Under PA 436, elected officials lose all their governing powers and all powers of their office and cannot fairly be said to continue to represent the voters who elected them. As such, an equal-protection challenge to PA 436 must be analyzed under the strict-scrutiny. Under a strict-scrutiny analysis, such a classification is constitutional only if it is narrowly tailored to achieve a compelling governmental interest.[140] The state cannot show either a compelling interest or narrow tailoring in support of Section 9(6) (c).

In light of the virtually identical substance of PA 4 and PA 436, whatever interest the State can articulate in providing for the removal of EMs appointed under PA 436 after 18 months in office would be equally well served by providing for the removal, by the same process, of EMs appointed under the virtually identical PA 4 once *those* EMs had served 18 months in office. There can simply be no rational reason, let alone a compelling one, for the State's refusal to accrue time served under PA 4 toward the 18-month requirement of Section 9(6) (c) of PA 436. Thus, Plaintiffs have properly pled a claim for relief and dismissal is unwarranted.

[140] *Grutter*, 539 U.S. at 326.

2. If Not Subject To Strict Scrutiny, Section 9 (6)(C) Still Cannot Survive Rational-Basis Review.

Section 9 (6)(c) cannot survive rational-basis review because no legitimate governmental purpose is served by forcing those local governments that have already accrued time under an EM appointed pursuant to a predecessor statute to "start over" and wait another 18 months under PA 436 before they are able to vote to remove those managers.

A classification will survive rational-basis review if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.[141] The broad deference given legislative judgment under rational-basis review allows for "an imperfect fit between means and ends."[142] "But deference is not abdication and 'rational basis scrutiny' is still scrutiny."[143] "Courts must always ensure that some rational link exists between a statute's classification and objective."[144] As such, some conceivable set of facts must be articulated, whether by the State or by this Court, that could withstand scrutiny and justify the classification at issue.

In the case at bar, no such set of facts can be imagined, primarily because

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[141] *See, e.g., Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992).

[142] *Heller v. Doe*, 509 U.S. 312, 321 (1993).

[143] *Nordlinger*, 505 U.S. at 31.

[144] *Maxwell's Pic-Pac, Inc. v. Dehner*, 887 F. Supp. 2d 733, 744 (W.D. Ky. 2012) (citing *Romer v. Evans*, 517 U.S. 620 (1996)).

whatever governmental interests could conceivably be served by PA 436 were equally served by PA 4. Any argument that PA 436 advances substantively different interests from PA 4 is belied by a comparison of the legislative findings and purposes articulated by each law. The stated governmental interests and the powers granted to EMs are substantially identical.[145] As closely as these two laws track each other, there can be no rational basis, under any conceivable set of facts, for the differential application of the 18-month requirement as interpreted by the State.

As a result, Plaintiffs have well-pleaded grounds for relief under the Equal Protections Clause such that Defendants Motion must again, fail.

VI. CONCLUSION

Plaintiffs clearly have standing and their First Amended Complaint states well-pleaded facts in support of claims that Public Act 436 violates Plaintiffs' constitutional rights and rights protected by the Voting Rights Act of 1965. Each of Plaintiffs' counts states a claim upon which relief can be granted. 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.

[145] *See* PA 4, attached as Exhibit 6, at Section 3 and PA 436 at Section 3 (MCL 141.1543).

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Dated: March 28, 2014

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Catherine Phillips, et al.

Plaintiffs,

v.

Richard D. Snyder, et al.

Defendants.

Case no. 2:13-cv-11370

Hon. George Caram Steeh
Mag. R. Steven Whalen

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2014, I electronically filed the foregoing ***Brief In Support Of Plaintiffs' 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.

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