No. 15-2394

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CATHERINE PHILLIPS, JOSEPH VALENTI; MICHIGAN AFSCME COUNCIL 25; RUSSELL BELLANT; TAWANNA SIMPSON; LAMAR LEMMONS; ELENA HERRADA; DONALD WATKINS; KERMIT WILLIAMS; DUANE SEATS; JUANITA HENRY; MARY ALICE ADAMS; WILLIAM KINCAID; PAUL JORDAN; BERNADEL JEFFERSON; DENNIS KNOWLES; JIM HOLLEY; REV CHARLES E. WILLIAMS; MICHAEL A. OWENS; LAWRENCE GLASS; DEEDE COLEMAN; ALLYSON ABRAMS, Bishop,

Plaintiffs-Appellants,

v.

RICHARD D. SNYDER; ANDREW DILLON,

Defendants-Appellees.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division

BRIEF FOR DEFENDANTS-APPELLEES

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The constitutionality of a state financial stability law is an issue of first impression for this Court. Additionally, Michigan is keenly interested in resolution of whether Michigan's financial stability law is constitutional. Oral argument would assist this Court in reaching the correct result in this case.

JURISDICTIONAL STATEMENT

The district court assumed subject-matter jurisdiction pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§1331 & 1343. On November 19, 2014, the district court granted in part and denied in part Defendants-Appellees' motion to dismiss filed under Fed. R. Civ. P. 12(b)(1) and (6) (R. 49, 11/19/2014 Order Pg ID## 888-925.) The court denied reconsideration of that order. (R. 52, 12/15/2014 Order, Pg ID## 997-998.) On October 23, 2015, the Court dismissed Count IV without prejudice based on the parties' stipulation (R. 73, 10/23/2015 Stip. Order, Pg ID## 1367-1370), and this order is a final order dismissing all claims in the case allowing this court appellate jurisdiction under 28 U.S.C. §1291.

STATEMENT OF ISSUES PRESENTED

1. Are Plaintiffs' claims nonjusticiable because Plaintiffs lack standing and the municipal residents' and elected officials' claims are moot since their local governments are no longer under emergency management?

2. Michigan's Legislature passed Public Act 436 to provide the State with adequate tools to address serious concerns about the fiscal health of the State's local units of government and school districts. Is the statute constitutional facially and applied where it:

   a. does not violate substantive-due-process guarantees because federal courts have never expanded the concept of substantive due process to recognize a right to have local elected officials run local government;

   b. does not violate the Guarantee Clause because the question is a nonjusticiable political one and article IV, §4 guarantees a republican form of government to the States, not local units;

   c. does not violate the Equal Protection Clause based on the right to vote, wealth, or predecessor statutes because Plaintiffs are not similarly situated in all relevant respects, and even if they are, the applicable rational basis test is met;

   d. does not violate the Voting Rights Act because an emergency manager is an appointed, not an elective, position, and Plaintiffs have not met the *Gingles* preconditions;

   e. does not violate First Amendment free-speech or petition guarantees because Plaintiffs and others in affected communities still have a political voice in local

government, and they have no inherent right to a particular outcome when they petition government; and

f. does not violate the Thirteenth Amendment because it does not place a burden on black citizens as an unconstitutional "badge of slavery"?

3. Even if this Court were to conclude that P.A. 436's emergency-manager option and related provisions are unconstitutional facially or as-applied, is Plaintiffs' requested relief of declaring the entire statute unconstitutional overly broad because on a facial challenge the emergency management provisions are severable, and on an as-applied challenge no part of the statute would need to be stricken?

INTRODUCTION

There is decades-long precedent for state intervention in cities suffering financial stress. Now, for many reasons—among them the recent economic crisis and lingering effects of deindustrialization—a disturbingly high number of local governments and school districts are teetering on the brink of financial catastrophe. Indeed, a growing number have resorted to bankruptcy, including Michigan's own Detroit. Many states are hoping to halt this downward trend by exploring tools or expanding existing ones in an effort to maintain needed services, keep local units solvent, and protect credit ratings and assure reasonable access to credit markets.

Michigan is among them. For the past 28 years, the State has enacted various fiscal responsibility statutes. Each one, including the now-challenged 2012 Public Act 436, has encompassed various options for remedying financial distress. And each has included the possibility of either an emergency financial manager or an emergency manager. Thus, the emergency-manager concept is not new to Michigan. But while previous acts tended to separate fiscal management and

government restructuring, P.A. 436 appropriately merges the two. This gives emergency managers greater flexibility to solve local problems.

The crux of Plaintiffs' arguments, of course, is the breadth of authority given to an appointed emergency manager to displace locally elected officials. But it is important to place this authority in its proper context. First, it is temporary. Second, it is one of four options available to local units in financial emergency, and, other than local governments where emergency financial managers have been reappointed under P.A. 436 or an uncured breach of a consent agreement, it is *the local unit* that ultimately chooses emergency management. Third, the Act involves the local unit in other aspects of financial-stability decision-making, from the determination of probable financial stress to the timetable and procedures for an emergency manager's removal, which can be initiated by the local unit. Fourth, it applies neutral criteria to all local units and school districts.

Although P.A. 436 is comprehensive and flexible, Plaintiffs' arguments focus exclusively on the Act's emergency-manager option. Yet they have brought a facial challenge to the whole Act and requested equally broad relief: striking down the entire Act. (R. 39, Am. Compl.

"Relief," Pg ID# 510-553.) This relief is unnecessary and would leave the State with no tools with which to address financial crises in its local governments.

The measure of whether the Act is facially constitutional is not, of course, its application in the City of Flint, or the City of Detroit, or the City of Allen Park. It is not determined by specific facts regarding decisions made in any particular case, just as other forms of government are not rendered legal or not on the basis of whether the decisions made are deemed to be wise or foolish. Instead, it is whether Michigan has the power to structure—and thus, to temporarily restructure—its local governments when locally elected officials have been unable to achieve fiscal stability and significant local and state interests are at stake. It does.

In short, this action contains no cognizable legal claims, and this Court should affirm the district court's order dismissing Counts 1-3 and 5-9. Plaintiffs' battle against P.A. 436 must be fought through the political process.

STATEMENT OF THE CASE

Plaintiffs bring this action under 42 U.S.C. §1983, alleging that P.A. 436, Michigan Compiled Laws §141.1541 *et seq*., violates the Fourteenth Amendment (substantive due process and equal protection); article IV, §4's Guarantee Clause; Section 2 of the Voting Rights Act; the First Amendment (speech and petition rights); and the Thirteenth Amendment (vestiges of slavery). They ask that the Act be declared unconstitutional in its entirety, and request compensatory and punitive damages. (R. 39, Am. Compl., ¶¶91-209, Pg ID# 528-551.)

Although Plaintiffs bring both facial and as-applied challenges, their First Amended Complaint alleges no specific applications of P.A. 436 to any factual occurrence other than the reappointment of their local governments' existing emergency financial managers, which applies only to their equal-protection claim. Otherwise, this is a facial challenge to the constitutionality of the Act. And Plaintiffs' allegations focus exclusively on the Act's emergency-manager component.

Michigan's Successive Acts to Address Local Financial Distress

Public Act 101

Under a Republican-controlled Senate and a Democratic-controlled House, Michigan passed its first Local Government Fiscal Responsibility Act in 1988, 1988 P.A. 101, Michigan Compiled Laws §§ 141.1101-1118, in response to financial difficulties in the City of Ecorse. Under P.A. 101, any one of fourteen conditions triggered a preliminary review of a local governmental unit. If, after conducting a preliminary review, the State Treasurer concluded, and the Governor agreed, that a serious financial problem existed in the local unit, the Governor could appoint a financial review team (consisting of the State Treasurer, Auditor General, nominees from the Speaker of the House and Senate Majority leader, and any other officials appointed by the Governor) to determine whether a serious financial problem existed.

If, after receiving the financial review team's report, the Governor determined that a financial emergency existed, the Governor would then assign to the Local Emergency Financial Assistance Loan Board (ELB) the responsibility for managing the financial emergency and require the Board to appoint an emergency financial manager to

oversee the financial operations of the local unit. The underlying architecture for P.A. 101 was the Wayne County Circuit Court's prior appointment of a receiver to oversee Ecorse's finances and its order listing the receiver's powers and authority.

Public Act 72

Two years later, the Legislature, again with bipartisan support, passed 1990 P.A. 72, Mich. Comp. Laws §141.1201, *et seq.*, superseding P.A. 101. Public Act 72 used the same fourteen triggers for preliminary reviews. It also maintained the concept of a review team and the ELB's role in managing a financial emergency and appointing an emergency financial manager. The principal difference between P.A. 101 and P.A. 72 was that the latter also encompassed school districts as well as other types of units of local government.

Once an emergency financial manager was appointed, all financial duties and responsibilities of the elected local government officials were removed and transferred to the emergency financial manager. (However, emergency financial managers appointed for school districts had control over only fiscal matters). The Act enumerated seventeen additional actions that an emergency financial

manager could take, including: developing budgets, contracting, approving or disapproving appropriations, selling assets and bonds, enacting ordinances, and, with the approval of the ELB, taking the local entity into Chapter 11 bankruptcy. But it did not allow the emergency financial manager to impose new taxes or override union contracts. Emergency financial mangers appointed under P.A. 101 were reappointed under P.A. 72, assuming broader powers.

Public Act 4

As the national financial crisis exacerbated the financial stress of local units of government (which includes school districts), the Legislature passed 2011 Public Act 4 to replace P.A. 72. Public Act 4 contained more tools and authority to rectify financial emergencies. It added four triggering conditions to the fourteen that existed under P.A. 72, and it created an emergency-manager position to replace the emergency-financial-manager position. This position had expanded powers, including the ability to unilaterally modify union contracts, subject to the approval of the State Treasurer. Existing emergency financial managers became emergency managers under P.A. 4.

Public Act 72 Springs Back to Life

In November of 2012, Michigan voters disapproved P.A. 4 in a statewide referendum. So P.A. 72 sprung back into effect from August 8, 2012 to March 28, 2013. See OAG, 2011-2012, No 7267, p 6 (August 6, 2012), available at http://www.ag.state.mi.us/opinion/datafiles/2010s/op10346.htm (opining that once P.A. 4 was suspended, the prior repealed law, P.A. 72, was revived and would either cease with the approval of P.A. 4 or become permanent with P.A. 4's disapproval).

Public Act 436, the Subject of This Appeal

Shortly after the referendum of P.A. 4, the Legislature enacted, and the Governor signed into law, P.A. 436, the Local Financial Stability and Choice Act (the Act), which took effect on March 28, 2013. The Legislature determined that local fiscal stability is necessary for the State's health, welfare, and safety, and that the Act was necessary to protect those interests as well as the credit ratings of the State and its political subdivisions. Mich. Comp. Laws §141.1543.

The Act contains the eighteen triggers from P.A. 4, §1544 (a)-(r). However, one of those triggers, (k), regarding the filing of annual financial audits, was split into two separate triggers to form a total of

19 triggers. §1544(l). Because the Legislature intended the Act to be a successor statute to former Acts 101, 72, and 4, emergency financial managers under P.A. 72 were reappointed as emergency managers under P.A. 436, assuming the new Act's broader powers.

The Act requires various reviews before any actions are taken. These reviews can be requested by the local government or initiated by the State. When initiated by the State, before commencing the first or preliminary review, the state financial authority (State Treasurer or Superintendent of Public Instruction) notifies the local government. After preliminary review, the state financial authority prepares an interim report (which is provided to local officials for five days for their review and comment) and a final report to the ELB. The ELB then publicly deliberates, allowing the general public to offer comments before the ELB makes a determination as to the existence of probable financial stress. §1544(2). If financial stress is found, the Governor appoints a review team, which submits a written report concluding whether a financial emergency exists. §§1544(3), 1455(3).

Key Features of P.A. 436

First, once the review team concludes that a financial emergency exists, §1545(6)(*iv*), and the Governor determines the same, §1546(1)(b), it is the local government itself that chooses from one of four options to address that emergency: a consent agreement, appointment of an emergency manager, neutral evaluation (a form of alternative dispute resolution or mediation), or Chapter 9 federal bankruptcy, §1547(1).

Second, these local governments have a voice in other aspects of the process leading up to the choice of options for resolving the financial emergency, including the ability to (1) request preliminary review of its financial condition, (2) comment on the preliminary review report that weighs into a determination of probable financial stress; (3) participate in the review team process (because a review team interviews local officials and union representatives); and 4) by 2/3 vote, appeal in the Court of Claims the Governor's confirmation of a financial emergency.

Third, as did P.A. 4, the Act broadens the reach of the emergency manager, allowing him or her to "act for and in the place and stead of the governing body and the office of the chief administrative officer of the local government" during receivership, §1544(n).

Fourth, it sets forth limits for the duration of a financial manager's appointment, §1549, and also allows the local unit to petition for early removal of an emergency manager, §1549(11).

Fifth, the Act builds in checks on an emergency manager's authority. For example, before making unilateral changes to collective bargaining agreements, selling local-government assets, or issuing debt, the emergency manager must first obtain approval from the State Treasurer or Governor, depending on the action, and before executing the action, must submit his or her proposal to the local governing body for consideration. §1552(1)(k), (r), & (u). If the local governing body disapproves it, that body shall, within seven days of its disapproval, submit an alternative to the ELB that would yield substantially the same financial result as the emergency manager's proposal. *See also* §§1552(4) (selling or transferring public utilities), and 1555(1) (selling of assets more than $50K in value).

Sixth, the Act authorizes the Governor to appoint a Receivership Transition Advisory Board once a financial emergency has been rectified. The board monitors local government affairs until receivership is terminated. §1563. Significantly, P.A. 436 does *not*

suspend or alter local elections or voter registration, redraw local-government election boundaries, or alter or eliminate elected offices.

Update on Application of P.A. 436

Since this lawsuit was originally filed, four other local governments have undergone a preliminary review. A finding of no probable financial stress was reached as to the Hazel Park School District on August 12, 2013 and the East Detroit School District on September 23, 2013. On July 1, 2013, the City of Hamtramck was determined to be in a financial emergency and an emergency manager was appointed at the City's request. (R. 41, Defs.' Mot. to Dismiss, Ex. 2, Pg ID## 611-617.) That emergency manger departed on December 18, 2014. A finding of probable financial stress was made with respect to the City of Lincoln Park on December 12, 2013. (R. 41, Defs.' Mot. to Dismiss, Ex. 3, Pg ID## 618-621.) An emergency manager was appointed on July 3, 2014 and departed on December 22, 2015.

With the exception of several school districts—Detroit Public Schools, Highland Park Schools, and Muskegon Heights Schools—no local governments are presently subject to emergency management. Seven municipalities (Flint, Allen Park, Benton Harbor, Ecorse,

Hamtramck, Lincoln Park, and Pontiac) are subject to Receivership Transition Advisory Boards; Detroit is subject to a Financial Review Commission, as discussed in the final bankruptcy court order; and Wayne County, the City of Inkster, Royal Oak Township, and Benton Harbor and Pontiac Schools are subject to consent agreements.

Proceedings Below

Defendants filed a motion to dismiss and brief in support. (R. 20, Defs.' Mot. to Dismiss, Pg ID## 156-195.) While the action was pending, the Detroit bankruptcy was also pending, so the district court stayed and administratively closed the case based on Chapter 9's automatic-stay provision. (R. 30, 8/22/2013 Order, Pg ID## 364-366.)

On Plaintiffs' motion, the case was reopened (R. 38, 2/6/2014 Order, Pg ID## 508-509) and Plaintiffs filed their first amended complaint (R. 39, Am. Compl., Pg ID## 510-551), which added new claims but no new parties. Defendants moved to dismiss the amended complaint and then moved to stay the proceedings pending final decisions in related cases filed by Plaintiffs—*City of Detroit v. Catherine Phillips*, USDC, E.D. No. 14-cv-10637 and *Rick Snyder v. Phillips*, USDC, E.D., No. 14-cv-10630.

The district court granted in part and denied in part the motion to dismiss and denied the stay motion. Although the court held that Plaintiffs had standing to bring their claims, it dismissed all claims except the equal-protection claim based on race discrimination (Count IV), holding that there were factual issues as to that claim. (R. 49, 11/19/2014 Order, Pg ID## 888-925.) Plaintiffs' motion for reconsideration was denied. (R. 52, 12/15/2014 Order, Pg ID## 997-998.)

Discovery proceeded on Count IV. After extensive discovery, the parties agreed to dismiss that count without prejudice, and the district court closed the case. (R. 73, stipulated Order, Pg ID## 1367-1370.)

SUMMARY OF ARGUMENT

Plaintiffs raise substantive-due-process, Guarantee Clause, equal-protection, Voting Rights Act, First Amendment free-speech and petition, and Thirteenth Amendment claims. Plaintiffs lack standing, the claims of the municipal residents and elected officials are moot, and in any event, each claim fails on the merits. Plaintiffs have no viable legal cause of action under any of the theories alleged, and thus, cannot succeed on either their facial or as-applied challenges.

Plaintiffs fail to demonstrate a substantive due-process right to have local elected officials run the local unit. No federal court has expanded the concept of substantive due process to recognize such a right. And the State can structure its local governments as it sees fit.

Plaintiffs' Guarantee Clause argument also fails, first because the question is a nonjusticiable political one and second because the Guarantee Clause guarantees a republican form of government to the states, not local units.

Plaintiffs' three equal-protection theories (voting, wealth, and predecessor laws) fail at the outset because Plaintiffs are not similarly situated in relevant respects to either residents or elected officials in financially solvent communities or to those in financially distressed communities where an emergency manager was appointed for the first time under P.A. 436. Also, (1) there is no fundamental right to vote for locally elected officials; (2) P.A. 436 bases its problem-solving measures on how a local elected or appointed officers manage or mismanage resources, not on local residents' individual or collective net worth; and, (3) restarting the clock for emergency managers reappointed under P.A. 436 makes sense because it gives them a chance to modify or amend

their existing plans put into place under previous, differing statutes (which contained no hard timeline for resolving the financial emergency).

Plaintiffs' Voting Rights Act claim fails because a §2 claim must involve an elective—not an appointive—office, and emergency managers are appointed. And even if §2 applies, Plaintiffs have not attempted to show they meet the necessary preconditions for bringing such a claim.

Plaintiffs' First Amendment claims fail because the Michigan Constitution does not prohibit the passing of a statute similar to one that was repealed by referendum. Nor does P.A. 436 prohibit Plaintiffs from expressing their opinions. Residents can still vote for their local officials; local officials play a role in how the financial emergency is resolved; and both can voice concerns to their elected state officials.

Plaintiffs have failed to demonstrate a violation of the Thirteenth Amendment because P.A. 436 does not benefit white citizens within affected communities in a way that it does not benefit black citizens.

Finally, to the extent a provision is held to be unconstitutional, Plaintiffs' requested remedy of striking the whole Act is overbroad because both P.A. 436 and state law require severability.

ARGUMENT

I. Plaintiffs' claims are nonjusticiable because they lack standing and the claims of municipal residents and elected officials are moot.

A. Standard of Review

Standing and mootness involve this Court's subject-matter jurisdiction and can be raised at any time. *Loren v. Blue Cross & Blue Shield of Michigan*, 505 F.3d 598, 606-07 (6th Cir. 2007) (internal citation omitted).

B. Analysis

None of these Plaintiffs have standing to bring their claims, and the claims of the municipal residents and elected officials are moot.

1. Plaintiffs lack standing because they have not shown a substantial likelihood of future injury and their claims are generalized grievances.

To invoke the subject-matter jurisdiction of an Article III federal court, individual plaintiffs must establish a particularized injury, one that affects them in a personal and individual way. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). And where, as here, declaratory relief is sought, Plaintiffs have the heightened burden of showing a substantial likelihood they will be injured in the future. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). Future injury must be

impending; allegations of possible future injury are insufficient. *Clapper v. Amnesty Int'l USA,* ___U.S.____, 133 S. Ct. 1138, 1147 (2013).

Especially given the broad options P.A. 436 makes available to local governments, these resident- or locally-elected-official Plaintiffs[1] have not established the substantial likelihood of being subject to emergency management in the future. On this basis alone, Plaintiffs lack standing to sue for declaratory relief. *See Williams v. Corbett,* 552 Fed. Appx. 158, 161-62 (3rd Cir. 2014) (affirming dismissal of constitutional challenge to Pennsylvania's Financially Distressed Municipalities Act, holding that the members of the city government in receivership who were complaining of injuries if they failed to comply with a writ of mandamus had pled only speculative future injuries).

Plaintiffs also have not pled a particularized injury. Their asserted injury is the generalized interest all Michigan citizens have in constitutional governance. The fact that their community is in financial emergency now and another community may be subject to P.A. 436's

[1] To the extent Plaintiffs may purport to bring this action in their official capacities as members of various local entities, there is no indication in the First Amended Complaint that these local government bodies have authorized them to act on their behalf.

implementation in the future does not change the generalized nature of their grievances. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974) (generalized citizen interest in constitutional governance is insufficient to invoke federal judicial power). Plaintiffs have not alleged injuries based on a particular application of the law different from any other community that would be or has been deemed to be in emergency and subject to the Act's implementation.

The closest Plaintiffs come to a particularized injury is that they were under a different emergency-management scheme prior to P.A. 436. But even this is a generalized grievance about Defendants' policy choices related to financially distressed local governments. This Court should refrain from monitoring the wisdom of P.A. 436, an act of the co-equal legislative branch. Plaintiffs' grievances are more appropriately addressed in the representative branches. *Allen v Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) (citation omitted) (Article III judicial power is not an unconditioned authority to determine the constitutionality of legislative or executive acts). Indeed, the U.S. Supreme Court has explained that the concrete injury

requirement is "particularly applicable" where, as here, plaintiffs seek "an interpretation of a constitutional provision which has never before been construed by the federal courts." *Schlesinger*, 418 U.S. at 221.

2. The claims of the municipal residents and elected officials are moot.

"A federal court has no authority to render a decision upon moot questions or to declare rules of law that cannot affect the matter at issue." *Cleveland Branch, N.A.A.C.P. v. City of Parma*, 263 F.3d 513, 530 (6th Cir. 2001). The test for mootness is "whether the relief sought would, if granted, make a difference to the legal interests of the parties." *Ford v. Wilder*, 469 F.3d 500, 504 (6th Cir. 2006).

Here, the requested relief of striking down P.A. 436 in its entirety would not affect the legal interest of the municipal residents and elected officials. No municipality is currently under emergency management. Thus, the claims of the municipal residents and elected officials (Bellant, Watkins, Williams, Seats, Knowles, Henry, Adams, Kincaid, Bishop Jefferson, Jordon, and Reverands Holley, Williams, Owens, Glass, Coleman, and Abrams) are moot. But the claims of Plaintiffs associated with the Detroit Public Schools (Simpson, Lemmons, and Herrada) are not moot.

II. P.A. 436 is constitutional both facially and as applied.

A. Standard of Review

This Court reviews de novo the district court's dismissal for failure to state a claim pursuant to 12(b)(6). *Moir v. Greater Cleveland Reg'l Transit Auth.,* 895 F.2d 266, 269 (6th Cir. 1990). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

B. Analysis

Plaintiffs' facial challenges to P.A. 436 fail. And the only facts Plaintiffs raise that even arguably give rise to an as-applied challenge relate to the equal-protection challenge based on predecessor financial-stability laws. Plaintiffs' as-applied challenges fail as well.

1. P.A. 436 does not violate substantive-due-process guarantees of the Due Process Clause.

Plaintiffs' substantive-due-process claim (Count 1) is premised on a right to vote for local governmental officials who possess "general legislative power" and alleges injury because the governing authority of

their elected local officials has been removed or terminated. (R. 39, Am. Compl. ¶¶ 91, 96, 97, 101, 115 Pg ID## 528, 529, 532.)

a. Substantive-due-process framework

In analyzing a substantive-due-process claim, this Court must carefully identify the fundamental right or liberty interest allegedly implicated. The Due Process Clause protects those fundamental rights and liberties that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation and citation omitted). Only when a state law infringes on these fundamental rights and interests is it subject to strict scrutiny. *Id.* at 721.

The fundamental rights and interests accorded substantive protection under the Due Process Clause include matters related to marriage, family, procreation, bodily integrity, and directly related privacy interests. *Id.* at 720; *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1062 (6th Cir. 1998). The U.S. Supreme Court has been reluctant to expand the concept of substantive due process further "because guideposts for responsible decision making in this unchartered area are

scarce and open-ended." *Glucksberg,* 521 U.S. at 720 (internal quotation and citation omitted).

b. Plaintiffs do not have a substantive-due-process right to democratically elect local officials.

Although the "right to vote" is not expressly enumerated in the federal constitution, *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 35, n.78 (1973), the U.S. Supreme Court has recognized that the right to vote is an implicit "fundamental political right" that is "preservative of all rights." *Reynolds v. Sims,* 377 U.S. 533, 562 (1964) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). Still, as the district court properly recognized, "[T]he Supreme Court has never recognized the right to vote as a right qualifying for substantive due process protection." (R. 49, 11/19/2014 Order, Pg ID ## 888-925.) Instead, it is a citizen's right to participate in elections on equal footing with other citizens in the jurisdiction that is protected by the Fourteenth Amendment. *Rodriguez v. Popular Democratic Party,* 457 U.S. 1, 9-10 (1982); a*ccord Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667-68 (1965); *Reynolds*, 377 U.S. at 565-66. The U.S. Supreme Court has instructed that the more explicit textual constitutional

context (here, equal protection) should guide the constitutional analysis. *Graham v. Connor*, 490 U.S. 386, 395 (1989). Plaintiffs' substantive-due-process claim fails on that basis alone.

Plaintiffs also frame their substantive-due-process argument around the distinction between legislative bodies and nonlegislative bodies. (R. 39, Am. Compl., ¶¶ 96-102, Pg ID## 529, 530.) But no federal court has ever recognized the right to elect local officials, whatever their position, *see Rodriquez,* 457 U.S. at 9-10, let alone to have them continue to carry out the duties of their office and exercise their "legislative powers." The cases Plaintiffs cite in support of their "legislative powers" argument involve *state* legislative bodies. *See, e.g.*, *Reynolds*, 377 U.S. at 565 ("[E]ach and every citizen has an inalienable right to full and effective participation in the political processes of his *State's* legislative bodies," referring to a State's two legislative chambers) (emphasis added).

Moreover, P.A. 436 does not suspend local elections, alter the local election process, alter voter registration requirements, or discount Plaintiffs' votes. And to the extent locally elected officials in affected communities are "removed" or "terminated" (Plaintiffs' inaccurate

description of the process), such action is only temporary when under emergency management.

In short, this Court should decline to recognize a novel substantively protected right to elect local officials who perform legislative functions. And it should decline to announce a right for them to remain in office to perform those functions regardless of the circumstances—particularly where this "generalized right to vote" is not itself protected.

This outcome makes sense because, as explained in more detail below, local governments are not sovereign entities but instead derive their authority from the State. *See Sailors v. Bd. of Educ., Kent County,* 387 U.S. 105, 107-108 (1967) (quoting *Hunter v. City of Pittsburgh,* 207 U.S. 161, 178 (1907)). Michigan may enact laws of general concern that limit the authority and power of local governments and local elected officials, consistent with the state constitution and other law. *See Moore v. Detroit Bd. of Educ.,* 293 F.3d 352, 358 (6th Cir. 2002), *cert. denied* 537 U.S. 1226 (2003) (holding that the plaintiffs possessed no fundamental right to elect school board members or retain elected officials). P.A. 436 is a law of general concern—the concern being the

fiscal integrity of the State's local governments and the health, safety and welfare of its citizens. It is a proper exercise of the State's authority, and its temporary limitations on local-government authority do not violate substantive due process. The district court correctly dismissed the facial and as-applied substantive-due-process claims.

2. P.A. 436 does not violate the Guarantee Clause.

The Guarantee Clause states that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. Const. art. IV, § 4. The essence of Plaintiffs' Guarantee Clause claim (Count 2) is that a state government cannot vest all local governing authority and legislative power in one unelected official. (Br. on appeal, p 31.) This is a nonjusticiable political question, and even if justiciable, it fails.

a. The claim is a nonjusticiable political question.

It makes sense that there is no justiciable controversy when a party seeks adjudication of a political question. *Gilligan v. Morgan*, 413 U.S. 1, 9 (1973). A Guarantee-Clause question is nonjusticiable where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department, or a lack of judicially

discoverable and manageable standards for resolving it." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

The U.S. Supreme Court has often held that cases were nonjusticiable—including, notably, where federal-court adjudication would unduly interfere with state autonomy. *See, e.g.*, *id*. (challenge to legislative apportionment); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608 (1937) (attack on delegation of legislative authority to state agency); *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930) (challenge to taxation scheme); *Ohio ex rel. Davis v. Hildebrant,* 241 U.S. 565 (1916) (challenge to state-referendum procedure).

The question of how Michigan structures its local political subunits is a political question not subject to judicial determination. Federal courts do not generally meddle in how states structure their local political subunits. And as a practical matter, without the ability to appoint individuals to local councils or boards, or fashion alternative forms of government at the local level, States would be hampered in their ability to structure—and repair—their local governments.

b. The Guarantee Clause does not apply to local governments.

Even if the question is justiciable, Plaintiffs do not support their novel proposition that the guarantee of a republican government extends to systems of local government. To the contrary, the framers of the United States Constitution were careful to repose the guarantee of a republican form of government only in the states: The Guarantee Clause provides that "the United States shall guarantee to *every State* in this Union a Republican Form of government. . . ." U.S. Const. art. IV, § 4 (emphasis added).

Local governmental units are "'created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,' and the 'number, nature and duration of the powers . . . rests in the absolute discretion of the State.'" *Reynolds*, 377 U.S. at 575 (quoting *Hunter*, 207 U.S. at 178); *see also Sailors*, 387 U.S. at 108 (explaining that local political subdivisions have been "traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions"); *Highland Farms Dairy*, 300 U.S. at 612 ("How power shall be

distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.").

Indeed, States' political subdivisions "never were and never have been considered as sovereign entities." *Sailors*, 387 U.S. at 107. So with respect to political subdivisions, the State's legislative body "'may do as it will, unrestrained by any provision of the Constitution of the United States.'" *Greater Heights Acad. v. Zelman*, 522 F.3d 678, 680 (6th Cir. 2008) (quoting *City of Trenton v. New Jersey*, 262 U.S. 182, 186-187 (1923)); *S. Macomb Disposal Auth. v. Washington Twp.*, 790 F.2d 500, 504 (6th Cir. 1986) (quoting *City of Trenton*, 262 U.S. at 187) (the "'State may withhold, grant, or withdraw powers and privileges [from a municipality] as it sees fit'"). As the district court correctly held, "maintenance of republican form at the state level is sufficient to satisfy the Guarantee Clause." (R. 49, 11/19/2014 Order, Pg ID## 888-925).

Here, in the absence of any infringement on a federally protected right such as equal participation in the voting process—which, as explained in Section II(B)(ii) below, has not occurred—Michigan's choice to address the significant issues arising from a local government's

financial distress is both constitutional and within its sovereign authority. Indeed, "[v]iable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions" and "nothing in the Constitution [ ] prevent[s] experimentation." *Sailors*, 387 U.S. at 110, 111. P.A. 436 is one such innovation—even experimentation—in subordinate governmental functions. Plaintiffs' facial challenge based on the Guarantee Clause argument fails as a matter of law, and fails as applied because they have no viable cause of action under this theory.

3. P.A. 436 does not violate the Equal Protection Clause.

Plaintiffs assert that P.A. 436 violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution because it burdens the right to vote (Count 3); discriminates based on wealth (Count 5); and because §9(6)(c) discriminates against localities with an emergency manager appointed under previous financial stability laws (Count 9). These claims lack merit.

The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S.

Const. amend. XIV, §1. To state an equal protection claim, a plaintiff must "adequately plead that the government treated the plaintiff 'disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis.'" *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (internal citation omitted); *accord TriHealth, Inc. v. Bd. of Com'rs, Hamilton Cty., Ohio*, 430 F.3d 783, 790-91 (6th Cir. 2005).

a. As a threshold matter, the "similarly situated" requirement is not met as to any of Plaintiffs' equal-protection claims.

As the district court correctly held, all three of Plaintiffs' equal protection claims fail at the outset because the "similarly situated" requirement is not met. (R. 49, 11/19/2014 Order, Pg ID## 888-925.) The Equal Protection Clause "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill*, 521 U.S. 793, 799 (1997). Indeed, "[d]isparate treatment of persons is reasonably justified if they are dissimilar in some material respect." *TriHealth,* 430 F.3d at 790. In determining whether individuals are "similarly situated," a court should "not demand exact

correlation, but should instead seek *relevant* similarity." *Perry v. McGinnis*, 209 F.3d 597, 601 (6th Cir. 2000) (citation omitted) (emphasis added).

Thus, as a threshold matter, as to their voting and wealth claims, Plaintiffs must demonstrate they are similarly situated in all relevant respects to persons in non-emergency-management communities (because that is who they are comparing themselves to). As to their §9(6)(c) claim, they must demonstrate they are similarly situated in all relevant respects to residents or elected officials in local governments first placed under emergency management after P.A. 436 took effect, instead of under a predecessor statute. Again, this is who they are comparing themselves to. Plaintiffs are not similarly situated under either theory and the equal-protection analysis need go no further.

i. Voting and wealth claims

Plaintiffs are not similarly situated to residents of local units of government that have not been in financial distress or declared to be in a financial emergency. The financial condition of Plaintiffs' local government is the whole reason an emergency manager was appointed there in the first place. And significantly, Plaintiffs do not challenge

the existence of a financial emergency in each of the local governments with which they are affiliated. Clearly then, the Plaintiffs are markedly *dis*similar in the most relevant respect from those local governments with no financial emergency and that are not under emergency management. As a result, Plaintiffs have failed to make the threshold "similarly situated" showing, and their facial and as-applied equal-protection claims based on voting and wealth necessarily fail. *See TriHealth, Inc*, 430 F.3d at 790.

ii. § 9(6)(c) claim based on predecessor statutes

Nor have Plaintiffs, whose emergency managers were reappointed under P.A. 436, shown that they are similarly situated to residents or elected officials of local governments with emergency managers first appointed under P.A. 436. First, emergency management was imposed on Plaintiffs' local governments initially under different statutory schemes. The financial triggers and processes for determining whether a financial emergency existed, and the options available to a local unit deemed to be in financial emergency, were different under those predecessor statutes.

Second, because §9(6)(c) gives the local government the discretion to remove its emergency manager 18 months after his or her *appointment under P.A. 436*, naturally the former local governments whose emergency managers were reappointed under P.A. 436 will have been under emergency management longer than 18 months before they initiate removal of the emergency manager. Accordingly, Plaintiffs' facial and as-applied equal-protection claims fail at the outset. The equal-protection analysis should end here.

b. Plaintiffs have not been denied their fundamental right to vote or had that right diluted, and the Act meets rational basis.

Plaintiffs assert that P.A. 436 has denied, abridged, and/or diluted the fundamental right to vote because local governing officials are stripped of their authority and that authority is transferred to one unelected emergency manager who is not accountable to the local citizens. (R. 39, Am. Compl. ¶123, Pg ID# 533.) They also assert that the entire State now participates in selecting their local government officials, while the residents in non-EM localities directly vote for their own local elected officials. (*Id.*, ¶125, Pg ID# 534.) On appeal, they argue that the district court erred in holding that there is no

fundamental right to vote in local elections and that the court improperly applied rational basis as the standard. (Pls.' Appeal Br. 22.)

But the district court was correct. Even if similarly situated, Plaintiffs do not have a viable equal-protection claim based on voting.

i. Plaintiffs have not been denied their fundamental right to vote.

The U.S. Supreme Court explains that "the right to vote, *per se*, is not a constitutionally protected right." *San Antonio*, 411 U.S. at 35 n.78. Nor does the Constitution compel a particular method of choosing state or local officers. *Rodriquez*, 457 U.S. at 9; *see also Fortson v. Morris*, 385 U.S. 231, 232 (1966) (State Assembly could "elect[ ] one of the two highest candidates as Governor" without offending notions of equal protection); *Bush v. Gore*, 531 U.S. 98 (200) ("The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors. . . .[T]here is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated") (some internal quotations and citations omitted).

Here, Plaintiffs are still free to vote in federal and state elections. And they offer no adequate support for the proposition that the right to

vote in local elections, once extended, becomes a fundamental right as opposed to simply a right to participate on equal footing. (Pls.' Appeal Br. 33 fn 61.) Nor do Plaintiffs' cited cases offer support for a recognized right to participate in *local* political processes, even where the local unit is a legislative body. *Cf. Reynolds*, 377 U.S. at 565 (referring to a citizen's "full and effective participation in the political processes of his *State's* legislative bodies," and "by all citizens in *state* government") (emphasis added).

Nevertheless, the right to vote is a "fundamental" political right. *Harper*, 383 U.S. at 670; *Reynolds*, 377 U.S. at 561-62. Therefore, the Equal Protection Clause applies when a state either classifies voters in disparate ways or places restrictions on the right to vote. *League of Women Voters v. Brunner*, 548 F.3d 463, 477-78 (6th Cir. 2008) (citing *Bush*, 531 U.S. at 104). This is true whether local officers are administrative or legislative. *See Hadley v. Junior Coll. Dist. of Metro. Kansas City, MO*, 397 U.S. 50, 55-56 (1970).

The applicable equal-protection standard is determined by the specific character of the State's action and the nature of the burden on voters. When a State's classification "severely" burdens the right to

vote, strict scrutiny is appropriate. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Absent a reciprocal burden on the fundamental right to vote, the rational basis standard of review should apply. *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807-09 (1969) (applying rational basis to a state statute prohibiting plaintiffs' access to absentee ballots where no right-to-vote burden was shown); *Biener v. Calio*, 361 F.3d 206, 214-15 (3d Cir. 2004) (applying rational basis absent a showing of an "infringement on the fundamental right to vote"). Where the burden is somewhere in the middle, courts apply the "flexible standard" outlined in *Anderson v. Celebrezze*, 460 U.S. 780, 817 (1983), and *Burdick,* 504 U.S. at 434. *See Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 238 (6th Cir. 2011) (applying the balancing test in an equal-protection challenge to the counting of provisional ballots).

Here, there is no suspect class and P.A. 436 does not burden Plaintiffs' right to vote. As to school districts, there is no fundamental right to vote for public-school officials. *See Moore*, 293 F.3d at 365 (citing *Sailors*, 387 U.S. at 108) ("[C]itizens do not have a fundamental right to elect nonlegislative, administrative officers such as school board members."). As to qualified voters in affected local governmental units,

all are able to vote in their local elections; P.A. 436 does not change voting procedures or leave votes uncounted. And although P.A. 436 may temporarily prohibit a local unit's chief executive officer and governing body from exercising the powers of those offices during the receivership, §1549(2), it does not preclude residents from voting candidates into these offices or local officials from continuing to hold those offices during emergency management. Also, an emergency manager may restore in whole or in part local officials' duties and responsibilities, along with their salary and other compensation. §1553. Additionally, those local officials may, by resolution, petition the Governor to remove the emergency manager prior to completion of 18 months of service from the date of appointment. §1549(11).

Plaintiffs' alleged injury really rests on the fact that the local government elected officials may not (at least temporarily) perform the duties of their elected office while under emergency management. This alleged injury is not a recognized violation of the right to vote.

ii. Plaintiffs' fundamental right to vote has not been diluted.

Plaintiffs' claim of vote dilution also fails. There is no question that "the right of suffrage can be denied by a debasement or dilution of

the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555; *Hadley*, 397 U.S. at 54. But P.A. 436 does not violate this "one person, one vote" principle.

Voters in jurisdictions with emergency managers vote for their local officials, just as do other voters throughout the State. And the weight of a local-official vote cast in an affected jurisdiction is the same for all voters in that jurisdiction. As the district court correctly noted, "it is not appropriate to compare the voters in jurisdictions with appointed EMs to those in jurisdictions without EMs." (R. 49, 11/9/2014 Opinion, Pg ID# 904.)

Indeed, context matters in equal-protection cases, and case law illustrates this. *Gray v. Sanders*, 372 U.S. 368 (1963), for example, involved the weighting of votes in statewide elections, and established the basic principle of equality of voters *within a state* for purposes of *statewide* and congressional elections. Likewise, *Reynolds'* language about diluting the weight of votes based on residence arose in the context of apportioning representation in a *state legislature*, and the U.S. Supreme Court held that qualified residents had a right to a ballot

for election of state legislators that was of equal weight to the vote *of every other resident*. *Id.* at 566. Similarly, that Court in *Avery v. Midland County, Texas*. 390 U.S. 474, 484-85 (1968) dealt with political subdivisions in the context of redistricting of county precincts, and explained that its holding was limited to recognizing that the Constitution "permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers *over the entire geographic area served by the body*." (emphasis added)

Here, the geographic area of the local government under emergency management is that affected jurisdiction. So if the State weighted certain residents' votes in an affected area differently than other votes there, allowed local officials to continue to fully represent some but not all local voters, or if there was some sort of gerrymandering that spread votes so as to allow one group to gain political advantage (thereby "diluting" the vote of the disadvantaged group), *that* would be vote dilution. But that is not the effect of P.A. 436.

This conclusion recognizes the importance of equal protection in the vote while not diminishing a State's ability to structure its local governments as it sees fit—including taking innovative steps to fix what may be broken in local government. For this reason, in the context of a vote-dilution case, *Avery*, the Supreme Court indicated it would not bar "'the emergence of a new ideology and structure of public bodies, equipped with new capacities and motivations.'" *Id.* at 485 (quoting R. Wood, 1400 Governments, at 175 (1961)).

Accordingly, there is no infringement on the right to vote, and neither strict scrutiny nor the *Burdick* balancing test apply. The applicable standard is rational basis.

iii. The Act survives the applicable rational-basis review.

To survive rational-basis scrutiny, P.A. 436 need only be "rationally related to legitimate government interests." *Doe v. Mich. Dep't of State Police*, 490 F.3d 491, 501 (6th Cir. 2007) (internal quotation marks and citation omitted). And it "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). State statutes are

given "a strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319-20 (1993).

Whether emergency management was imposed under a predecessor statute or now chosen by the local government, the State has a rational basis for enacting P.A. 436: the establishment of financial stability, and the ability to provide necessary services and protect the credit of both the local unit and the State as a whole. Mich. Comp. Laws §141.1543. Allowing the emergency manger the discretion to temporarily assume local powers and to permit the local unit to act if and to the extent consonant with resolving the emergency—without impacting the right to vote or the effect of the vote across voters in that geographical area—serves this rational basis.

c. P.A. 436 does not discriminate based on wealth.

In Count 5, Plaintiffs allege that P.A. 436 violates equal-protection principles by discriminating based on wealth. They assert that "[u]nder Public Act 436, all stated criteria for appointing an EM are based on a community's wealth and by extension, the wealth of the persons who reside within a community." (R. 39, Am. Compl., ¶156, Pg ID# 540.) This is wrong.

P.A. 436 does not discriminate against local units of government, let alone their residents, based on wealth (or poverty). It is the overall financial condition and prognosis of a local government that will subject it to review and the possible appointment of an emergency manager under P.A. 436—*not* the individual or collective wealth of its residents or businesses, or lack thereof. §§1544(1), 1545(1), 1546(1) and 1547(1). For example, a "wealthy" community whose financial books are in order would not be subject to review under P.A. 436, but neither would a "poor" community whose books are also in good order and is managing its resources. P.A. 436 is directed at rectifying financial *mismanagement*, which can occur in local units of government of any size and any degree of individual or community wealth. Thus, the State is not conditioning voting rights upon wealth.

There is no fundamental right at issue because, as discussed above, P.A. 436 does not unconstitutionally burden the right to vote. Moreover, wealth-based classifications—even if there were any—do not discriminate against a suspect class. *See Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010) (citing *Papasan v. Allain*, 478 U.S. 265, 283-84 (1986)). Therefore, at most, P.A. 436 is subject to rational-basis review.

Bredesen, 624 F.3d at 746. And it survives that review because there is a "reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Comm'ns, Inc.*, 508 U.S. at 313.

"When social or economic legislation is at issue, the Equal Protection Clause allows the states wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (internal citation omitted); *see also Sailors* 387 U.S. at 109 ("Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs.")

Again, Michigan has a legitimate government interest in preventing or rectifying the insolvency of its political subdivisions. P.A. 436 thus survives rational basis review and Plaintiffs' wealth-based equal-protection claims fail on their face and as applied.

d. P.A. 436 does not discriminate against local units of government with emergency managers first appointed under P.A. 72 or P.A. 4.

Plaintiffs argue that because their affected local units of government have already been under the administration of an

emergency manager longer than 18 months, it violates equal protection guarantees to make these communities wait the additional 18 months to take advantage of §1549(6)(c), which allows for removal of an emergency manager after 18-months of service. As set forth in Argument I above, this argument is moot as to Plaintiffs in municipalities that are no longer under emergency management.

Because there is no fundamental right or suspect class involved, rational-basis review applies to this claim. *Bredesen*, 624 F.3d at 746. Section 6(c) allows the emergency manager, by resolution, to be removed by a 2/3 vote of the governing body of the local government, and if the local unit has a strong mayor, with strong mayoral approval. Neither P.A. 72 nor P.A. 4 had such a provision. Section 1549(10) provides that earlier appointed emergency managers "shall be considered an emergency manager under this act [P.A. 436] and shall continue under this act to fulfill his or her powers and duties." Thus, *all* local units of government currently under the administration of an emergency manager are eligible to use §6(c) at the expiration of 18 months from its appointment under P.A. 436.

As to the non-municipal Plaintiffs, the rational-basis standard is met. It is a firmly established principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). The Legislature had a legitimate government interest in both setting a potential 18-month endpoint to a local unit of government's administration by an emergency manager and in not making this option immediately available to communities who have had emergency managers longer than 18 months under another statutory scheme. First, the duties and authority of the emergency financial manager under P.A. 72 and emergency manager under P.A. 4 were different. Second, neither P.A. 72 nor P.A. 4 had a similar time limit, and the financial plans put in place by these pre-existing emergency managers were not likely designed to resolve a financial emergency within 18 months.

Thus, subjecting existing local units of government to the additional 18 months allows their P.A. 436 emergency managers to modify or amend the financial plans to comport with their duties, powers, and time limitation. Moreover, P.A. 436 expressly provides

these local units of government with the interim alternative of petitioning the Governor to remove an emergency manager who has served *less* than 18 months under P.A. 72—an alternative that did not previously exist. §1549(11). Accordingly, P.A. 436 survives rational-basis review, and the district court correctly dismissed both the facial and as-applied claims asserted under this theory.

4. P.A. 436 does not violate the Voting Rights Act.

Plaintiffs' alleged violation of §2 of the Voting Rights Act of 1965, 42 U.S.C. §1973 (Count 6), hinges on their assertion that P.A. 436 discriminates in the appointment of an emergency manager based on racial composition, "result[ing] in Black/African American citizens having dramatically less opportunity for self-governance than other members of Michigan's electorate." (R. 39, Am. Compl., ¶¶170-171, Pg ID# 544.)

Section 2 provides:

> a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

Subsection (b) provides that subsection (a) is violated if, based on the

totality of the circumstances, the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected in subsection (a). 42 U.S.C. §1973(b). Section 2 requires only a showing of discriminatory effect. *Thornburg v. Gingles*, 478 U.S. 30, 70-74 (1986).

Plaintiffs' claim does not fall within §2's language because P.A. 436 is not a standard, practice, or procedure within the meaning of §2. To state a threshold claim for a §2 violation, Plaintiffs' claim must involve an elective and not an appointive office. *Holder v. Hall*, 512 U.S. 874, 880 (1994) ("Here, again, we doubt Congress contemplated that a racial group could bring a §2 dilution challenge to an appointive office (in an attempt to force a change to an elective office) . . . ."); *Mixon v. Ohio*, 193 F.3d 389, 407-08 (6th Cir. 1999) (Statute that changed the process for selecting school board members from elective to appointive system did not trigger Section 2 of the Voting Rights Act); *Chisom v. Roemer*, 501 U.S. 380, 401 (1991) ("Louisiana could, of course, exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed. . . .").

Plaintiffs themselves acknowledge that emergency managers are "selected and appointed solely at the discretion of the Governor[.]" (R. 39, Am. Compl., ¶169a, Pg ID# 544.) And changes to the internal operations of an elected body and the distribution of power among officials are not changes in standards practices or procedures within the meaning of §2. Thus, Plaintiffs' §2 claim fails on that basis alone.

Additionally, proceeding with the framework for analyzing a §2 claim is the wrong fit. The U.S. Supreme Court has held that a minority group must meet what are commonly referred to as the "*Gingles* preconditions" by (1) "being sufficiently large and geographically compact to constitute a majority in a single-member district;" (compactness); (2) "being politically cohesive" (cohesiveness); and (3) by showing that "the white majority votes sufficiently function as a bloc to enable it–in the absence of special circumstances, such as the minority candidate running unopposed–usually to defeat the minority's preferred candidate" (white-bloc voting). *Mallory v. Ohio*, 173 F.3d 377, 381-82 (6th Cir. 1999) (internal citations omitted). But *Gingles*-precondition analysis makes no sense in the context of Plaintiffs' vote-dilution claim predicated on the purported "statewide

participation of the electorate" in their local governance. (R. 39, Am. Compl. ¶168, Pg ID# 543.) Voting practices and procedures that violate §2 are typically those that prevent majority-minority-district candidates of choice from being elected by implementing vote-dilution mechanisms—mechanisms such as "cracking" (diluting the minority vote by fragmenting black or Latino voters among several districts or wards) and "packing" (concentrating black or Latino voters in a single or small number of districts that are necessary in order to prevent them from winning enough seats to gain a majority of votes).

Even if the *Gingles* analysis is attempted, the claim fails. First, Plaintiffs have not even alleged that they constitute a "majority-minority group" capable of bringing a §2 claim.

Second, Plaintiffs' vote-dilution claim does not implicate any of the *Gingles* factors. For example, as set forth above, citizens do not have a fundamental right to vote for nonlegislative public school officials such as school board members, *Moore*, 293 F.3d at 365; Mich. Comp. Laws, §141.1542(k). And residents in local units of government under emergency management retain the same rights to vote and elect

candidates for local office—and have their votes count—as do residents in other local units of government.

Moreover, Plaintiffs make no allegations related to compactness, cohesiveness, or white-bloc voting. Instead, their First Amended Complaint focuses on their disagreement with Defendants' policy choice in enacting P.A. 436. Even on appeal Plaintiffs make no effort to show that the *Gingles* preconditions are met, instead chiding the district court for ignoring the "Senate Factors"—noninclusive inquiries that are not required and may only be considered in assessing the totality of the circumstances *after* the *Gingles* preconditions are met. (Pls.' Appeal Br. 43-44.) Failure to meet the *Gingles* preconditions requires dismissal of Plaintiffs' Voting Rights Act claim. *See Mallory*, 173 F.3d at 386.

Even if the *Gingles* preconditions had been met, the totality of the circumstances (application of the "Senate Factors") does not support a finding of liability because (1) P.A. 436 does not result in a denial or abridgement of the right of any citizen of the United States to vote *on account* of race or color (any changes are on account of the unit's financial condition); (2) Plaintiffs and other residents continue to participate in the political process because their elected local

government has the ability to petition for removal of an emergency manager before he or she has served 18 months after appointment; (3) their elected local government has the ability to remove the emergency manager by resolution of 2/3 of the governing body after he or she has served as least 18 months after appointment; and (4) Plaintiffs and other residents of the affected local governments under emergency management may participate in replacing state officers who enacted P.A. 436.[2]

Finally, in a §2 vote dilution case, in addition to determining whether the *Gingles* preconditions are met and the totality of the circumstances supports a finding of liability, a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice. *See Holder*, 512 U.S. at 880 (citing *Gingles,* 478 U.S. at 88) ("In order to decide whether an electoral

[2] Defendants agree that residents of affected communities cannot replace P.A 436 by referendum because the Act contained an appropriations bill which prohibits repeal by referendum. Mich. Const. art. II, §9; *see also Michigan United Conservation Clubs v. SOS*, 630 N.W.2d 297 (Mich. 2001). But just as the framers of the Michigan Constitution established a direct check on democracy through referendum, they also chose to limit that right—by allowing the Legislature to insulate certain bills from referendum.

system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it should be for minority voters to elect their preferred candidates under an acceptable system.'")

No such benchmark exists here. A local government emergency manager has always been appointed either by the ELB under P.A. 72 or the governor under P.A. 4 and P.A. 436. And, even while under emergency management, the local government elections are held and the local government's officials are elected, except with some school districts. It cannot be said, and Plaintiffs do not argue, that "an electoral system has made it harder for minority voters to elect the candidates they prefer" for these local governments. *Gingles,* 478 U.S. at 88. Thus, there is no workable standard and no viable §2 challenge. The district court properly dismissed this claim.

Despite their failure to sustain a valid §2 claim, Plaintiffs are nonetheless seeking the remedy of preclearance under 42 U.S.C. §1973a (R. 39, Am. Compl., Prayer for Relief "c," Pg ID# 551.) In this context, such a remedy would be novel, drastic, and wholly unnecessary.

5. P.A. 436 does not violate First Amendment free-speech and petition rights.

The bases for Plaintiffs' speech and petition claims are twofold: first, that P.A. 436 mirrors P.A. 4, which was rejected by voter referendum, and thus violates protected rights to free speech and to petition government; and second, that emergency-manager appointment strips local elected officials of all authority and thus abridges free speech and petition rights. (R. 39, Am. Compl., ¶179-184, Pg ID## 546-547.) These claims fail.

a. First Amendment framework

The right to petition and the right to free speech are separate guarantees, yet they are related and generally subject to the same constitutional analysis. *Thaddeus-X v. Blatter*, 175 F.3d 378, 390 (6th Cir. 1999).

The First Amendment provides in part that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I. Freedom of speech, though a fundamental right, is not absolute. *Konigsberg v. State Bar of California*, 366 U.S. 36, 49 (1961).

The Petition Clause guarantees only that an individual may "speak freely and petition openly" and that he will be free from retaliation by the government for doing so. *Smith v. Arkansas State Highway Emp.'s, Local 1315*, 441 U.S. 463, 464-65 (1979) (per curiam). But it does not guarantee that the government will listen or respond, or that a particular petition will be effective. *Id.* (holding that the state's highway commission did not violate unions' First Amendment petition rights merely because it ignored the union, which it was free to do); *Canfora v. Old*, 562 F.2d 363, 364 (6th Cir. 1977) ("[N]either in the First Amendment [or] elsewhere in the Constitution is there a provision guaranteeing that all petitions for the redress of grievances will meet with success.").

b. There has been no abridgement of First Amendment rights.

A threshold issue in any First Amendment analysis is whether there has been an abridgement of First Amendment rights. Here, there has been no abridgment under either of the theories alleged.

i. Plaintiffs' free-speech claim based on P.A. 4 fails because the Michigan Legislature can enact similar legislation after repeal by referendum.

Plaintiffs' P.A. 4 argument fails for three reasons. First, P.A. 436 is not a mirror image or reenactment of P.A. 4. It replaces P.A. 72, which was in effect at the time. Moreover, it contains provisions not found in P.A. 4. For example, P.A. 436 includes the local-government choice options, checks on the emergency manager's authority, and provisions that allow the local government to request removal of the emergency manager both before and after the 18 months has been served. Mich. Comp. Laws, §§141.1547; 1549(6)(6); 1549(11); 11552(k), (r), (u); 1555(1); 1559.

Second, Michigan law allows the legislature to enact laws similar to or even identical to one disapproved by referendum—one "with exactly the same subject as the referred act, and in the same manner." *Michigan Farm Bureau v. Hare*, 151 N.W.2d 797, 802 (Mich. 1967); *see also Reynolds v. Bureau of State Lottery*, 610 N.W.2d 597 (Mich. App. 2000).

Third, voters exercised their speech and petition rights when they rejected P.A. 4. They also exercised their speech and petition rights

when their elected officials enacted P.A. 436 to ensure local fiscal stability. Plaintiffs may exercise their speech and petition rights by expressing discontent with current elected officials or by electing new state officials. This is the political process at work.

ii. Plaintiffs' free-speech claim based on governance fails because P.A. 436 allows for choice and voice.

Plaintiffs' free-speech claim based on local governing authority fails at the outset as to the elected-official Plaintiffs because local government bodies do not have any recognized speech rights. And it fails as to the resident Plaintiffs because under P.A. 436 there is no abridgement of their free-speech rights. Speech abridgement occurs when an individual is prohibited from demonstrating or promoting an idea, whether symbolic or expressive. *Stromberg v. California*, 283 U.S. 359 (1931).

Here, neither Plaintiffs nor other residents of the affected areas are any less able to freely advocate for a certain state or local policy. First, an emergency manager is not simply thrust on local residents of affected communities. Instead, the Act gives them both choice and voice. Even before a preliminary review is conducted, the local

government is notified and has an opportunity to provide comments to the state financial authority. §1544(2). Once the local government is under review, it then has an opportunity to provide information concerning its financial condition. §1545(2). If after review it is determined that a financial emergency exists, the local unit may appeal this determination. §1546(3). Once the financial emergency is confirmed, the local government has options, including a consent agreement, an emergency manager, a neutral evaluation process, or bankruptcy. §1547(1)(a)-(d).

Thus, an emergency manager is but one of the choices available to a local unit. The City of Hamtramck, for example, requested the appointment of an emergency manger under P.A. 436 in June 2013. Moreover, apart from reappointment of an emergency manager previously appointed under P.A. 72, or the Governor's appointment of an emergency manager because there has been a material, uncured breach of a consent agreement, §1548, there is no way a local unit could end up under emergency management *other* than by its own choosing.

Emergency management is also temporary by design. An emergency manager continues only until the financial emergency is

rectified. §1549(7). So local units may be removed from emergency management at any time by rectifying their financial condition. And again, local units can petition for removal either before the 18-month period by a 2/3 vote of the governing body of the local government, §1549(11), and may remove the emergency manager after at least 18 months of service from the date of appointment, by a 2/3 vote of the local-unit governing body, §1549(6)(c), (11).

It is true that the Governor on his or her own initiative, or on recommendation from a receivership transition advisory board, may determine that the financial conditions of a local government have not been corrected and appoint a new emergency manager. §1464. And the Governor may remove, or the Legislature may impeach or convict, an emergency manager. §1549(3)(d). It is also true, as Plaintiffs point out (Pls.' Appeal Br. 59-60) that if an emergency manager leaves before his or her 18 months expires, the 18-month period begins again as to the new manager. But even so, the local governing officials retain the option of petitioning to remove that newly appointed emergency manager before the 18-month period passes. And contrary to Plaintiffs' exaggerated claim that emergency managers will essentially serve "in

perpetuity," *id*. at 60, at present there are no emergency managers over Michigan's municipal governments. They have been successfully discharged in Lincoln Park, Hamtramck, Pontiac, Flint, Benton Harbor, Ecorse, and Allen Park, and in Detroit by virtue of federal bankruptcy proceedings. Emergency managers remain in three public school systems, only one of which—Detroit Public Schools—is related to this action.

Moreover, an emergency manager is accountable in various ways to both the Legislature and the Governor—the State's elected officials—so P.A. 436 does not leave citizens without a voice or petition rights in local government affairs. In *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 73-74 (1978), a case upholding Alabama's decision to allow cities to exercise extraterritorial jurisdiction over nearby settlements, the U.S. Supreme Court recognized that it did not "sit to determine whether Alabama has chosen the soundest or most practical form of internal government possible." Instead, the "[a]uthority to make those judgments resides in the state legislature, and Alabama citizens are *free to urge their proposals to that body*." *Id*. (emphasis added, citation omitted).

The same is true here. It is not for this Court to second-guess whether P.A. 436 is the most practical solution. Instead, as in *Holt Civic Club*, Michigan must continue to respond to evolving economic challenges and in doing so has broad authority over local governments. Plaintiffs are free to urge their proposals to their state elected officials—even where an emergency manager has temporarily limited the powers of their local officials. And they *still* get to vote, *still* get to voice their views about how local government is run, and *still* can seek to replace officials with whom they are dissatisfied.

Significantly too, while the local unit of government is in receivership, emergency managers are accountable to the State's *elected* officials—who, in turn, are accountable to Plaintiffs and other voters. For example, at the six-month mark and each three months thereafter, the emergency manager must submit an accounting of expenditures, contracts, loans, new or eliminated positions, and his or her financial and operating plan to the Governor, the State Treasurer, various legislative representatives of the local government, and the clerk of the local government. §1557(a)-(h). The Governor ultimately determines

whether the financial emergency has been rectified, §1562(2), and has the power to appoint a new emergency manager, §1564.

Plaintiffs cite a nonbinding case, *Peeper v. Callaway County Ambulance District*, 122 F.3d 619 (8th Cir. 1997), for the proposition that restrictions on elected officials' ability to perform their duties after election are more severely restrictive than when a State restricts candidacy. (Pls.' Appeal Br. 61-62.) Even if *Peeper* were binding, and on point (which it is not because it involves locals limiting the authority of a local official rather than the State temporarily limiting the local government structure and authority pursuant to its sovereign authority), P.A. 436 would certainly survive the rational basis test applied by the Eighth Circuit. *Id.* The Act's option of temporarily restricting the duties of local officeholders is rationally related to the State's interest in ensuring delivery of necessary services and protecting the State's credit rating.

iii. Plaintiffs have no constitutional right to local self-government.

Plaintiffs do not have a constitutional right to local self-government. A state may take action including dissolving the municipal corporation entirely, "conditionally or unconditionally, with

or without the consent of the citizens, or even against their protest," and may do so "unrestrained by any provision of the Constitution of the United States." *Hunter*, 207 U.S. at 178-79. Thus, the U.S. Supreme Court in *Hunter v. City of Pittsburgh* upheld an act authorizing city consolidation and providing for temporary government and payment of the consolidated city's debts. *Id.* at 178. Despite some limitations placed on this expansive power—none of which apply here, as explained above—*Hunter* remains good law. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994) (citing *Hunter* and affirming that "ultimate control of every state-created entity resides with the State . . . [and p]olitical subdivisions exist solely at the whim and behest of their State") (internal quotation marks and citation omitted); *Kelley v. Metropolitan Cty. Bd. of Educ. of Nashville & Davidson County, Tenn.*, 836 F.2d 986, 994 (6th Cir. 1987).

In sum, how local government is organized is up to the State. And the way to change state law is through the political process, not the courts.

c. Any abridgment of speech rights is justified by local financial emergencies.

Regardless of whether the Act abridges free-speech rights, it is still constitutional because any abridgement is content-neutral and justified by the financial emergencies of local governments.

As courts have recognized, there are free-speech compromises that are not unconstitutional. *E.g.*, *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding prohibition on display or distribution of campaign materials within 100 feet of a polling place); *Hill v. Colorado*, 530 U.S. 703, 725 (2000) (upholding a statute making it a misdemeanor to pass out material or counsel within eight feet of a person entering or leaving a health care facility). That is why courts routinely uphold all manner of restrictions on petitioning: *E.g.*, registration and disclosure requirements for lobbyists. *United States v. Harriss,* 347 U.S. 612, 625 (1954); limiting access to the courts, *Swekel v. City of River Rouge*, 119 F.3d 1259, 1263 (6th Cir. 1997); and subjecting petitioning to neutral time, place and manner voting restrictions consistent with public safety and order, *Buckley v. Valeo*, 424 U.S. 1 (1976). A free speech violation occurs only when the restricted speech is constitutionally protected and

the government's justification for the restriction is insufficient. *Frisby v. Schultz,* 487 U.S. 474, 479 (1988).

Even assuming Plaintiffs have a right to exercise their political voice directly to public officials, P.A. 436 is constitutional. To the extent there is any abridgment of speech, the requisite standard is intermediate scrutiny because P.A. 436 is content-neutral. *See Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989) ("[T]he government may impose reasonable [content-neutral] restrictions on the time, place, or manner of protected speech, provided the restrictions: [1] 'serve a significant governmental interest;' [2] 'are narrowly tailored;' and [3] 'leave open ample alternative channels for communication of the information.'") (internal citation omitted). There is no indication that P.A. 436 was intended to suppress ideas or that it has had that effect.

Plaintiffs argue that strict scrutiny applies because they and other residents of affected communities are a "small and identifiable group that is engaged in the business of speech," and they cite a nonbinding case, *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630 (5th Cir. 2012), in support. (Pls.' Appeal Br. 57.) But *Time Warner* is inapplicable because it was based on the government targeting certain speakers for

the exclusion of benefits bestowed on *similarly situated* parties. *Id.* at 636-37. P.A. 436 does not "target" any local government. Local governments in distress are not similarly situated to units with healthy finances. And the financial triggers that lead to a declaration of a financial emergency and possible emergency management, should the local unit choose that option, apply equally to all local governments.

The State also has a significant interest in addressing the financial emergencies of local governments: ensuring health and well-being of local residents, providing services, and protecting local and statewide credit ratings. And the Act does not abridge more speech or petition rights than necessary to address the local government's financial emergency. In fact, the process is specific to the unique circumstances and needs of each local government—one important reason for the breadth of options under P.A. 436.

Again, Plaintiffs have ample channels to voice their concerns on the handling of the local government's financial emergency to their state elected officials. Moreover, P.A. 436's options and solutions are designed to be temporary, to restore financial stability, and have as their goal returning the local government to its elected officials with the

expectation of continued solvency. In short, P.A. 436 is designed to allow the hard choices, the difficult answers, and unpopular solutions to be made for those elected officials who will not or cannot.

Such actions in economic emergencies have routinely been upheld as constitutional even when they result in a temporary abridgment of speech or petition rights. As early as 1934, the Supreme Court addressed an economic emergency in *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 435 (1934), and upheld Minnesota's mortgage moratorium law in response to the Great Depression. The Court noted, "[The] principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court." *Id.* "When major emergencies strike, the 'law of necessity' is the one rule that trumps all the others." William H. Rehnquist, "All the Laws But One: Civil Liberties in Wartime" (1998).

d. There has been no abridgment of petition rights.

P.A. 436 does not prohibit Plaintiffs or other residents in affected communities from petitioning their government for the redress of grievances. As explained above, they can still vote and exercise their petition rights by informing their state elected officials of their desires

with respect to the passage or enforcement of laws such as P.A. 436 or the failures of their local government.

What Plaintiffs are really complaining about is that they cannot control the outcome of their petitioning. But they do not have a right to do so. If Plaintiffs are unhappy with the outcome of their previous attempts to petition the government, their remedy is at the polls. *Minnesota State Bd. for Cmty Coll's v. Knight*, 465 U.S. 271, 285 (1984) (explaining that disagreement with public policy and disapproval of officials' responsiveness is to be registered principally at the polls).

In sum, P.A. 436 does not abridge First Amendment free-speech or petition rights, and any alleged abridgement is not unconstitutional. This claim fails facially and as applied.

6. P.A. 436 does not violate the Thirteenth Amendment.

In Count 8, Plaintiffs claim that their Thirteenth Amendment rights have been violated because the communities impacted by the appointment of an emergency manager consist mostly of African-American residents. This claim should be rejected.

The Thirteenth Amendment bars slavery and involuntary servitude and gives Congress the power to impose legislation that

prohibits such actions. U.S. Const. amend. XIII. As an initial matter, this claim offers no greater protection than Plaintiffs' equal-protection claim and should therefore be dismissed as redundant. *See Johnson v. Harron*, 1995 WL 319943 at *6 (N.D.NY., May 23, 1995) ("[I]n the realm of equal protection, the Thirteenth Amendment offers no protection not already provided under the Fourteenth Amendment.")

In any event, there is no Thirteenth Amendment violation. Nor has there been a violation of any legislation to enforce this Amendment because none has been enacted by Congress. The actions challenged in this case all emanate from the impact of state legislation to fix financially troubled local units of government.

This Act does not benefit white citizens within affected local government in any way that does not also benefit black citizens. Nor does P.A. 436 "place[] a burden on black citizens as an unconstitutional 'badge of slavery.'" *City of Memphis v. N.T. Green*, 451 U.S. 100, 124 (1981). Quite the opposite, P.A. 436's purpose is to benefit all Michigan citizens, of every race and ethnicity. Count 10 fails to state a facial or as-applied claim.

III. Unconstitutional provisions could be severed.

Plaintiffs' arguments focus exclusively on P.A. 436's emergency-manger option and provisions. Yet, despite the narrow focus of their challenge, they ask this Court to overturn the entire Act. The Act is broader in scope and more comprehensive than just its emergency management provisions. Even if the emergency-manager option and related provisions were unconstitutional, a sweeping remedy that leaves Michigan without any useful tools to address local-unit financial distress, would be unnecessary. The emergency manager provisions are severable. The statute includes a severability clause, which states:

> If any portion of this act . . . is found to be invalid by a court, the invalidity shall not affect the remaining portions of this act which can be given effect without the invalid portion [ ]. The provisions of this act are severable.

Mich. Comp. Laws §141.1573. Additionally, state law requires severability unless the statute contains a nonseverability clause, which the Act does not. Mich. Comp. Laws §8.5. Thus, if any portion of P.A. 436 is determined to be facially unconstitutional or illegal, it should be severed and the remainder, which can separately function, should be left intact. Success on any as-applied claim would not require this Court to strike any provision of the statute.

CONCLUSION AND RELIEF REQUESTED

Public Act 436 is a necessary tool for Michigan to address the financial emergencies of its local governments. Plaintiffs lack standing and the municipal residents and officials' claims are moot. Facially and as applied to Plaintiffs, the Act does not violate the substantive guarantees of the Due Process Clause, the Guarantee Clause, the Equal Protection Clause, the Voting Rights Act, or the First or Thirteenth Amendments. Alternatively, the Act is severable should the Court deem any individual provision facially unconstitutional.

Therefore, Defendants-Appellees, Michigan's Governor and State Treasurer, respectfully request that this Court dismiss all claims based on standing, dismiss the claims of the municipal residents and elected officials on grounds of mootness, or alternatively affirm the district court's dismissal of all remaining claims under 12(b)(6) because the statute is constitutional. If this Court concludes that any part of the Act is facially unconstitutional, Defendants ask this Court to deny Plaintiffs' broad request for relief and instead sever any unconstitutional provisions from the Act.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains no more than 14,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). There are a total of 13,874 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2013 in 14 point Century Schoolbook.

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CERTIFICATE OF SERVICE

I certify that on April 12, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Defendants-Appellees, per Sixth Circuit Rule 28(c), 30(b), hereby designated the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID Number
Motion to Dismiss	05/16/2013	R. 20	156-195
Order	08/22/2013	R. 30	364-366
Order	02/06/2014	R. 38	508-509
Amended Complaint	02/12/2014	R. 39	510-553
Motion to Dismiss	03/05/2014	R. 41	611-621
Order	11/19/2014	R. 49	888-925
Order	12/15/2014	R. 52	997-998
Stipulated Order	10/23/2015	R. 73	1367-1370