No. _____

In the Supreme Court of the United States

RUSSELL BELLANT, *et al.*,
Petitioners,

v.

RICHARD D. SNYDER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

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, Charles E. Williams, Michael A. Owens, Lawrence Glass, Deedee Coleman, and Allyson Abrams, were plaintiffs-appellants in the proceedings below.

Richard D. Snyder, as Governor of the State of Michigan, and Andrew Dillon, as Treasurer of the State of Michigan, were defendants-appellees in the proceedings below.

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JURISDICTION

The court of appeals entered judgment on September 12, 2016, and denied rehearing *en banc* on November 1, 2016. App. 77. On January 23, 2017, Justice Kagan extended the time to file a petition for *certiorari* to March 31, 2017. The petition is filed by that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2 of the Voting Rights Act of 1965, as amended in 1982, 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 10303(f)(2) of this title, as provided in subsection (b).
>
> **(b)** A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that 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 by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301.

Relevant provisions of Michigan Public Act 436 of 2012 appear in the Appendix.

STATEMENT OF THE CASE

In 2011, the Michigan legislature adopted an emergency manager law that deprived locally-elected officials in some financially distressed municipalities of all their governmental powers. In the general election in November 2012, Michigan's citizens voted to repeal that law. Nevertheless, in a lame-duck session the following month, the legislature quickly passed—and the governor quickly signed—a resurrected emergency manager law. That resurrected law, Public Act 436, once again deprives locally elected officials of all governmental power in jurisdictions where the governor appoints an emergency manager, thereby stripping the voters in those jurisdictions of their ability to elect representatives of their choice to govern them. Although the jurisdictions in which the governor has invoked the emergency manager law have

disproportionately large minority populations when compared to the rest of the state, the Sixth Circuit held that Public Act 436 was not even subject to review under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301.[1]

1. Since the 1980s, Michigan has provided for the state government to intervene in municipalities that are experiencing financial distress. Under Public Act 101 of 1988, and then its replacement Public Act 72 of 1990, the state government could appoint an "emergency financial manager" (sometimes referred to as an "EFM") for such municipalities. As reflected in the name, "[t]he EFM's powers extended to matters of finances," but "local elected officials remained in control of administrative and policy matters." App. 38. Under the 1990 emergency financial manager statute, "the state local financial emergency review board appointed EFMs in the cities of Benton Harbor, Ecorse, Flint, Hamtramck, Highland Park and Pontiac, as well as over the Detroit Public Schools." *Id.* (As in many states, public school systems in Michigan constitute separate municipalities from the counties, cities, and towns whose students attend their schools.)

After a shift in partisan control in the 2010 elections, the Michigan legislature enacted Public Act 4 of 2011. "PA 4 repealed PA 72 and converted all EFMs into Emergency Managers ('EM'), greatly expanding the scope of their powers. EMs could act 'for and in the place of' the municipality's elected governing

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[1] Because the lower courts dismissed this case on the pleadings, all factual allegations in the complaint must be taken as true. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

body, including a general grant of legislative power." App. 38. Under Public Act 4, an emergency manager's power "extended not only to financial practices and fiscal policy" but to the full array of municipal authority and governance. Amd. Cplt. ¶ 48. Public Act 4 specifically provided that an emergency manager would "act for and in the place and stead of the governing body and the office of chief administrative officer of the local government." Mich. Pub. Act 4 of 2011 § 15(4). And the statute specifically barred "the governing body and the chief administrative officer of the local government" from "exercis[ing] any of the powers of those offices except as may be specifically authorized in writing by the emergency manager." *Id.* Even if an emergency manager *did* authorize the locally-elected officials to exercise any of their powers of government, the statute emphasized, that authorization would always be "subject to any conditions required by the emergency manager." *Id.*

The new law—with its expanded powers for the state-appointed emergency manager—"was widely seen as a response to a court ruling finding that the Detroit Public Schools' School Board, and not the EFM, possessed the power under state law to determine what curriculum would be taught and which texts would be used in the city's public schools. The decision provoked elements of the state legislature who then sought greater control over the content of the curriculum taught in Detroit's schools." Amd. Cplt. ¶ 43.

Pursuant to Public Act 4, the governor converted the emergency financial managers in Benton Harbor, Ecorse and Pontiac, as well as in the Detroit Public Schools, to full-fledged emergency managers. And he

appointed emergency managers to run the City of Flint, the Highland Park Public Schools, and the Muskegon Public Schools. App. 38.

As the Sixth Circuit noted, "Michigan citizens disapproved of PA 4." App. 5. Following the procedure in Mich. Const. Art. II § 9, over 200,000 Michigan voters "signed petitions to place a referendum on the ballot in 2012 that would reject the law." App. 5. By operation of Michigan law, Public Act 4 "was suspended as soon as the petitions were certified and placed on the ballot," and the prior, more limited, emergency financial manager law, Public Act 72, "thus sprang back into effect." App. 5. To avoid any lapse in coverage, the state issued new "emergency financial manager" appointments to all of the individuals who had been appointed as emergency managers under Public Act 4. *Id.*

In the November 2012 election, the voters rejected Public Act 4. *Id.* But the governor and the legislature did not back down. In the lame-duck session following the election, the legislature quickly passed, and the governor quickly signed, Public Act 436 of 2012. Like the rejected Public Act 4, the new Public Act 436 provides for the appointment of an "emergency manager" rather than simply an emergency *financial* manager. Mich. Comp. L. § 141.1549(1). Like the rejected Public Act 4, the new Public Act 436 provides that the emergency manager will "act for and in the place and stead of the governing body and the office of chief administrative officer of the local government"; that "the governing body and the chief administrative officer of the local government shall not exercise any of the powers of those offices except as may be specifically

authorized in writing by the emergency manager or as otherwise provided by this act"; and that any exercise of governmental authority by locally-elected officials will be "subject to any conditions required by the emergency manager." Mich. Comp. L. § 141.1549(1).

Public Act 436 thus gives emergency managers all of the powers that had previously been exercised by locally-elected officials. The statute explicitly provides that the emergency manager "[e]xercises solely, for and on behalf of the local government, all other authority and responsibilities of the chief administrative officer and governing body concerning the adoption, amendment, and enforcement of ordinances or resolutions of the local government." Mich. Comp. L. § 141.1552(1)(dd). And the statute authorizes the emergency manager to "[t]ake any other action or exercise any power or authority of any officer, employee, department, board, commission, or other similar entity of the local government, whether elected or appointed, relating to the operation of the local government." Mich. Comp. L. § 141.1552(1)(ee). Public Act 436 emphasizes that "[t]he power of the emergency manager shall be superior to and supersede the power of any of the foregoing officers or entities." *Id.*

Although Public Act 436 is identical to Public Act 4 in the broad power it gives to emergency managers—and thus takes away from locally-elected officials—the resurrected emergency manager law differs from its predecessor in some respects. Public Act 436 formalizes four options that with the approval of the governor or state treasurer, a municipality may request when a financial emergency is declared: accept the appointment of an emergency manager; negotiate

a consent agreement with the state treasurer to avoid appointment of an emergency manager; undergo a "neutral evaluation process" with its creditors; or request permission to file for bankruptcy under Chapter 9 of the Bankruptcy Code with the governor appointing an individual to represent the municipality in those proceedings. Mich. Comp. L. § 141.1547(1). Under Public Act 72 and Public Act 4, a municipality could negotiate a consent agreement with the state treasurer to avoid the finding of a financial emergency. Mich. Pub. Act 4 of 2011 § 15 and Mich. Pub. Act 72 of 1990 § 14. Under Public Act 72 and Public Act 4, a municipality could enter Chapter 9 bankruptcy after the declaration of a financial emergency and with the consent of the governor. Mich. Pub. Act 4 of 2011 § 23 and Mich. Pub. Act 72 of 1990 § 22. Unlike its predecessor, Public Act 436 allows the municipality's governing body, by a two-thirds vote, to terminate the receivership after 18 months. Mich. Comp. L. § 141.1549(6)(c), (7). But if the governor determines that the "financial emergency continues to exist," the municipality must undergo the "neutral evaluation" process and, if unsuccessful, the municipality must proceed with Chapter 9 bankruptcy and the governor may again appoint an individual to represent the municipality. Mich. Comp. L. § 141.1549(7).

Public Act 436 also gives the governor new powers over local governments after an emergency manager's tenure has come to a close. The law authorizes the governor to "appoint a receivership transition advisory board to monitor the affairs of the local government until the receivership is terminated." Mich. Comp. L. § 141.1563(1). The transition advisory board (sometimes referred to as a TAB) has broad powers

over the financial affairs of the municipality, including final authority to approve budgets, budget amendments, and collective bargaining agreements. Mich. Comp. L. § 141.1563(5).

Most important, the new emergency manager law, unlike its predecessor, stripped the people of Michigan of the power to challenge it at a referendum. Public Act 436 accomplished this result by including an appropriation of funds. Although its expressed purpose was to "administer the provisions of this act and to pay the salaries of emergency managers," Mich. Comp. L. § 141.1574, and to "provide technical and administrative support for the department of treasury to implement this act," Mich. Comp. L. § 141.1575(2)(a), the effect of the appropriation—which the legislature had found unnecessary in the prior manager law—was to insulate the resurrected emergency manager law from a new referendum. See Mich. Const. Art. II § 9 (providing that "[t]he power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds").

"When PA 436 took effect, emergency managers were in place in Allen Park, Benton Harbor, Ecorse, Flint, Pontiac, Detroit, the Detroit Public Schools, Highland Public Schools, and Muskegon Heights Public Schools." App. 7. At the time this suit was filed, "52% of the State's African–American population [was] under the governance of an EM, a consent agreement or a TAB, while only a tiny percentage of the State's Caucasian population [was] under such governance." App. 40.

2. Petitioners filed this lawsuit in the United States District Court for the Eastern District of Michigan on March 27, 2013, the day before the resurrected emergency manager law, PA 436, took effect. Petitioners include numerous voters and elected officials from Detroit, Pontiac, Benton Harbor, and Flint—jurisdictions then run by state-appointed emergency managers. Amd. Cplt. ¶¶ 7-25. Petitioners alleged, among other claims, that Public Act 436 resulted in a denial or abridgment of the right to vote on account of race in violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. Amd. Cplt. ¶¶ 162-173. Petitioners alleged "that emergency managers have been appointed in a disproportionately high number of areas with large African American populations, while predominantly white municipalities in similar financial distress do not have an EM imposed by state action." App. 64.[2]

The district court dismissed the claim. The court noted that Petitioners "do not take issue directly with the voting system in which local officials are elected" but instead simply "take issue with the fact that citizens in municipalities under emergency management have a vote that does not mean anything since the officials they elect have no decision-making authority." App. 64. Although the court recognized that Public Act 436 made changes in the authority of

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[2] Petitioners also included claims under the First, Thirteenth, and Fourteenth Amendments, as well as the Republican Form of Government Clause of Article IV. The lower courts dismissed these claims, App. 8-9—the Fourteenth Amendment race discrimination claim without prejudice based on a stipulated dismissal, App. 29-34—and we do not pursue them here.

elected officials that were "dramatic and meaningful," it concluded that those changes did not relate to "voting standards, practices, or procedures" and thus were not subject to any scrutiny under Voting Rights Act Section 2. App. 68.

The Sixth Circuit affirmed. The appellate court held that Section 2 did not apply to the resurrected emergency manager law, for two reasons. First, it relied on prior circuit precedent holding that Section 2 does not constrain a state's decision to change the process for filling an office from election to appointment. App. 24 (citing *Mixon v. Ohio*, 193 F.3d 389 (6th Cir. 1999)). Although Public Act 436 does not replace an elected position with an appointed one but instead removes all governmental authority from elected officials in a subset of jurisdictions, the court found it "difficult to see" how that distinction made "a Voting Rights Act difference." *Id.* Second, the Sixth Circuit relied on this Court's decision in *Presley v. Etowah County Commission*, 502 U.S. 491 (1992), that *Section 5* of the Voting Rights Act does not reach changes in the allocation of authority among government officials. App. 25-26. Without considering any of the differences in text and structure between Section 2 and Section 5, the Court held that the *Presley* holding should extend fully to Section 2 cases. *Id.*

The Sixth Circuit denied a petition for rehearing *en banc*. App. 77-78.

REASONS FOR GRANTING THE PETITION

When a lame-duck Michigan Legislature resurrected the emergency manager law after the voters rejected it in 2012, the result was to deprive elected local officials of any meaningful governance power in the municipalities in which 52% of the state's African Americans lived. Amd. Cplt. ¶ 86. By contrast, "only about 2% of Michigan's white citizens live in communities governed by an [emergency manager]. PA 436 has been applied to multiple municipalities of different sizes and jurisdictions, and almost all of them are predominantly black." App. 58. Although the residents in the municipalities in which the resurrected law was invoked could still go to the polls and cast ballots for mayors and city councilmembers, those elections were a sham. Regardless of the physical act of "electing" purported local representatives, Public Act 436 gives all local government powers to an unelected emergency manager appointed by the governor. See Mich. Comp. L. § 141.1549(2).

The Flint Water Crisis, in which an emergency manager had the unilateral power to decide, for financial reasons, that the city would use Flint River drinking water rather than continuing to receive clean Lake Huron water, demonstrates the harms of depriving accountable local officials of their power. In March 2015, the elected members of the Flint City Council, citing mounting evidence of health and safety harms to city residents, voted to stop using Flint River water and return to using Lake Huron water. But the city's appointed emergency manager used his powers under Public Act 436 to unilaterally overrule that vote. Dismissing the safety concerns, he declared the City

Council's vote "incomprehensible" and refused to stop using Flint River water.[3] As a result, the city continued to use Flint River water for nearly seven more months, with city residents experiencing lead poisoning, Legionnaire's Disease, and other significant harms.

By holding that the resurrected emergency manager law did not even implicate the Voting Rights Act, the Sixth Circuit made a serious error on a question of national importance. Its ruling is at odds with the text and purpose of Section 2 of the Voting Rights Act and conflicts with another circuit court. Relying on its own prior ruling that Section 2 of the Voting Rights Act did not reach a state's decision to fill an office by appointment rather than election, *Mixon v. Ohio*, 193 F.3d 389, 407-08 (6th Cir. 1999), the court concluded that Michigan's decision to remove all governmental powers midstream from elected officials who remain in office in municipalities under emergency management was similarly exempt from Section 2 scrutiny. But that conclusion disregarded the Eleventh Circuit's holding that, even if the decision to fill a position by appointment lies outside of the statute's ambit, Section 2 applies "[o]nce a post is opened to the electorate." *Dillard v. Crenshaw County*, 831 F.2d 246, 251 (11th Cir. 1987). It also ignored the plain text and legislative history of Section 2. And the Sixth Circuit's reliance on *Presley v. Etowah County Commission*, 502 U.S. 491, 504 (1992), which held that *Section 5* of the Voting

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[3] See Ron Fonger, *Emergency Manager Calls City Council's Flint River Vote "Incomprehensible,"* M LIVE, Mar. 24, 2015, http://www.mlive.com/news/flint/index.ssf/2015/03/flint_emergency_manager_calls.html.

Rights Act generally does not reach reallocations of authority among officials, disregarded salient differences between Section 5 and Section 2.

The State of Michigan's own Civil Rights Commission has concluded that "communities of color have been starkly overrepresented in jurisdictions placed under emergency management." MICHIGAN CIVIL RIGHTS COMM'N, THE FLINT WATER CRISIS: SYSTEMIC RACISM THROUGH THE LENS OF FLINT 109 (Feb. 17, 2017).[4] The Commission found that Public Act 436 "exacerbates existing gaps between urban and suburban communities, and erects additional barriers to narrowing the racial gap." *Id.* As applied, the emergency manager law "far too often addresses the problems of already financially stricken governments in second class communities, segregated based on race, wealth and opportunity, by appointing an emergency manager whose toolbox is filled with short term solutions that are contrary to the long term interests of the people living there." *Id.* at 109-110. The Sixth Circuit's holding that this law is entirely exempt from scrutiny under the Voting Rights Act demands this Court's review.

A. The Sixth Circuit's Ruling is Incorrect

The Sixth Circuit's holding contravenes basic principles of Section 2 of the Voting Rights Act.

1. The Text—The Voting Rights Act defines "vote" as including "all action necessary to make a vote effective." 52 U.S.C. § 10310(c)(1). And it provides that

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[4] https://www.michigan.gov/documents/mdcr/MDCR_Flint_Water_Crisis_Report_552190_7.pdf.

a violation of Section 2 will be established if, "based on the totality of circumstances," members of a racial or linguistic minority group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

Based on the plain text of those provisions, the resurrected emergency manager law should have been subject to Section 2. Although Public Act 436 leaves the *form* of elections intact, "citizens in municipalities under emergency management have a vote that does not mean anything," because "the officials they elect have no decision-making authority." App. 64. The law thus "results in a denial or abridgment of the right * * * to vote" of residents of those municipalities, because it ensures that those residents "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(a), (b).

As this Court has emphasized, "in a representative democracy, the very purpose of voting is to delegate to chosen representatives the power to make and pass laws. The ability to exert more control over that process is at the core of exercising political power." *Georgia v. Ashcroft*, 539 U.S. 461, 483 (2003), superseded by statute on other grounds, 52 U.S.C. § 10304(b), (d). And that is precisely the ability that Public Act 436 denies to citizens in municipalities with emergency managers. Petitioners should have had the opportunity to prove that this denial or abridgment, which Michigan has applied overwhelmingly to heavily minority communities, was "on account of race or color" in violation of Section 2. 52 U.S.C. § 10301(a).

2. The Legislative History—Congress added the "totality of circumstances" and "participate in the political process" language of Section 2(b) in 1982. The legislative history of that amendment demonstrates that Congress intended for Section 2 to apply to a law like Public Act 436.

This Court has explained that the Senate Report represents "the authoritative source for legislative intent" on the 1982 amendments to Section 2. *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986). See also *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 426 (2006) (looking to the Senate Report to interpret the "totality of circumstances" language in amended Section 2). That report explained Congress's view that practices that "operate, designedly or otherwise, to minimize or cancel out the voting strength and political effectiveness of minority groups, are an impermissible denial of the right to have one's vote fully count, just as much as outright denial of access to the ballot box." S. Rep. No. 97-417 at 28 (1982). The report explained that prior Voting Rights Act cases had "dealt with electoral system features such as at-large elections, majority vote requirements and districting plans." *Id.* at 30. But the report made clear that Congress intended amended Section 2 to extend more broadly to "practices, which, while episodic and not involving permanent structural barriers, result in the denial of equal access to *any phase* of the electoral process for minority group members." *Id.* (emphasis added). The report emphasized that the amended statute's requirement of political processes "equally open to participation," 52 U.S.C. § 10301(b), "extends beyond formal or official bars to registering and voting, or to maintaining a

candidacy." S. Rep. No. 97-417 at 30. Rather, "the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality.'" *Id.* (quoting *White v. Regester*, 412 U.S. 755, 766, 770 (1973)).

As this legislative history makes clear, the fact that Public Act 436 imposes no "formal or official bar[] to registering and voting," S. Rep. No. 97-417 at 30, does not exempt that statute from review under Section 2. Because the resurrected emergency manager law removes all governmental power from local elected officials in disproportionately minority communities, it "minimize[s] or cancel[s] out the voting strength and political effectiveness" of the voters in those communities. *Id.* at 28. It is thus subject to Section 2 "just as much as outright denial of access to the ballot box." *Id*.

Indeed, this Court, relying on the 1982 Senate Report, has warned against applying "inflexible rule[s]" and "simplification[s]" that would avoid the "totality of circumstances" inquiry the statute requires. *Johnson v. De Grandy*, 512 U.S. 997, 1018-1019 (1994). As the Court explained, "[t]he need for such 'totality' review springs from the demonstrated ingenuity of state and local governments in hobbling minority voting power, a point recognized by Congress when it amended the statute in 1982: '[S]ince the adoption of the Voting Rights Act, [some] jurisdictions have substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices that dilute minority voting strength.'" *Id.* at 1018 (citations omitted; quoting S. Rep. No. 97-417 at 10). By exempting Public Act 436 from the Voting Rights Act

because that law still allows residents to vote for municipal officials (at the same time as it takes all governmental power away from them), the Sixth Circuit's holding disregards this Court's warning.

3. This Court's Precedent—In its two-paragraph discussion of the Voting Rights Act claim, the Sixth Circuit made no attempt to square its holding with the statute's definition of "vote," with the "totality of circumstances" and "participate in the political process" language of Section 2(b), or with the legislative history of amended Section 2. Instead, the court relied exclusively on two precedents: the Sixth Circuit's own prior decision in *Mixon*, *supra*; and this Court's decision in *Presley*, *supra*. Neither case supports the Sixth Circuit's holding.

Mixon held that Section 2 does not apply to a state's decision to select an officer by appointment. 193 F.3d at 407-408. There, the Sixth Circuit relied on dicta from this Court's decision in *Chisom v. Roemer*, 501 U.S. 380, 401 (1991), which stated that "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." But there is a fundamental difference between *Mixon* (and the appointed-judiciary hypothetical in *Chisom*) and this case: Here, Michigan has *not* chosen to select municipal officers by appointment. Rather, the state provides that those officers shall be elected by the residents of their municipalities—but in a subset of those municipalities in which a disproportionate number of minorities reside, the state has deprived those officers, in the midst of their elected terms of office, of all of their governmental power. By retaining

the form of municipal elections, but ensuring that the elections "do[] not mean anything" in the heavily minority jurisdictions in which the emergency manager law has been triggered, App. 64, the state has taken action that is subject to review under the plain terms of Section 2.

This Court's decision in *Presley*, 502 U.S. at 509-510, held that a change in "the allocation of power among governmental officials," was not subject to preclearance under Section 5 of the Voting Rights Act, because it was not a change in a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," 52 U.S.C. § 10304(a). But Section 2—the portion of the Voting Rights Act at issue here—is very different than Section 5.

One difference between the two sections is textual. Section 5 applies to any "voting qualification or prerequisite to voting, or standard, practice, or procedure *with respect to voting*," 52 U.S.C. § 10304(a) (emphasis added), while Section 2 applies to any "voting qualification or prerequisite to voting or standard, practice, or procedure," full stop. 52 U.S.C. § 10301(a). And Section 5 does not include the "totality of circumstances" language that Congress added to Section 2 in 1982, 52 U.S.C. § 10301(b). That a reallocation of authority is not a change "with respect to voting" under Section 5 does not at control whether it is a "standard, practice, or procedure" that, in the "totality of circumstances," denies minority voters an equal opportunity "to participate in the political process and to elect representatives of their choice" in violation of Section 2. *Id.* See *Dep't of Homeland Security v. MacLean*, 135 S. Ct. 913, 919 (2015)

("[C]ongress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted).

Relying on the plurality opinion in *Holder v. Hall*, 512 U.S. 874, 883 (1994), the Sixth Circuit held that the coverage of "§ 5 if anything is *broader* than § 2." App. 25. The Sixth Circuit misread Justice Kennedy's plurality opinion in *Holder*. That opinion explained that "the coverage of §§ 2 and 5 is presumed to be the same (at least if differential coverage would be anomalous)," but that their coverage will sometimes be different, because "the two sections differ in structure, purpose, and application." *Holder*, 512 U.S. at 882, 883 (plurality opinion).

Although the Court had previously held that a *change* in the size of an elected body was subject to preclearance under Section 5, the *Holder* plurality concluded that plaintiffs could not maintain a challenge to the *existing* size of an elected body under Section 2. See *id.* at 882-885. The difference in structure of the two sections was key to the plurality's conclusion. Because Section 5 measured whether a voting change led to a retrogression from the *status quo ante*, the statute provided a ready-made "baseline for comparison": When making a preclearance determination, the Attorney General or the court could simply ask whether the change in the size of the

elected body made things worse for minority voters than before the change. *Id.* at 883-884. But Section 2 measures vote dilution, not against a pre-existing practice, but against a hypothetical benchmark that measures "'how hard it should be for minority voters to elect their preferred candidates under an acceptable system.'" *Id.* at 880 (quoting *Gingles*, 478 U.S. at 88 (O'Connor, J., concurring in the judgment)). And where plaintiffs challenge the size of a government body under Section 2, "[t]here is no principled reason why one size should be picked over another as the benchmark for comparison." *Id.* at 881.

But the difference in structure between Section 2 and Section 5 cuts in exactly the opposite direction here. The *Presley* Court refused to hold that reallocations of authority among officials were changes covered by Section 5, because "[i]nnumerable state and local enactments having nothing to do with voting affect the power of elected officials." *Presley*, 502 U.S. at 504. These include "adopt[ing] a new governmental program or modif[ying] an existing one," "alter[ing] [an elected body's] internal operating procedures, for example by modifying its subcommittee assignment system," and "pass[ing] a budget that differed from the previous year's budget." *Id.*

If every one of these acts counted as a voting change that was subject to preclearance under Section 5, then the statute would subject "most" if not "all" of the "decisions of government in covered jurisdictions to federal supervision." *Id.* The consequences would be severe: A state or municipality covered by Section 5 could not implement *any* of these sorts of routine changes in policy and governance without first

obtaining preclearance from the Attorney General or the District Court for the District of Columbia. See 52 U.S.C. § 13104. And to obtain preclearance, the jurisdiction would be required to shoulder the burden of proving that the change was not discriminatory in purpose or effect. See *id.* A covered jurisdiction thus would routinely be forced to expend time and effort—which would often take "years," *Shelby County v. Holder*, 133 S. Ct. 2612, 2624 (2013)—before it could take almost any action on almost any topic. The *Presley* Court held that Congress did not intend to place such a monumental burden on covered jurisdictions: "Were the rule otherwise, neither state nor local governments could exercise power in a responsible manner within a federal system." *Presley*, 502 U.S. at 507.

But Section 2 is very different. Unlike Section 5, Section 2 does not freeze in place prior rules pending the conclusion of proceedings; Section 2 allows a state or local government to put new rules in place subject to challenge under ordinary court procedures. And unlike Section 5, Section 2 does not place the burden of proving *non*-discrimination on the state or local government; following the usual rules of civil litigation, Section 2 places on the plaintiff the burden of proof. See *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477-480 (1997) (detailing these differences between Section 2 and Section 5).

Because of these differences, applying Section 2 to reach reallocations of authority among government officials will have none of the severe consequences that would have occurred if this Court had applied Section 5 to those reallocations. Plaintiffs could not establish

a violation of Section 2—and thus could not stop a jurisdiction from reallocating authority—unless they could show that, in the "totality of circumstances," the challenged action denies minority voters equal opportunity "to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(a). The "routine actions of state and local governments," *Presley*, 502 U.S. at 494, will not, in the totality of circumstances, lead to such a result. Accordingly, they will not be impaired by the application of Section 2. But when a change in the authority of elected officials does lead to such a result—as the complete removal of authority effected by the emergency manager law does—the plain text and legislative history of the Voting Rights Act makes clear that the change violates Section 2.

The Sixth Circuit was wrong to conclude that the Section 5 *Presley* precedent controls in this Section 2 case. Rather, the court should have applied the plain statutory text and not pretermitted Petitioners' challenge to the resurrected emergency manager law. The Sixth Circuit's error—with its serious consequences for the basic democratic rights and welfare of the citizens who reside in municipalities in which Public Act 436 has been invoked—demands this Court's review.

B. The Sixth Circuit's Ruling Creates a Circuit Conflict

In holding that the resurrected emergency manager law is immune from scrutiny under Section 2 of the Voting Rights Act, the Sixth Circuit relied on its previous decision in *Mixon*, *supra*. There, the court rejected a Section 2 challenge to an Ohio statute that

transformed the Cleveland School Board from a popularly-elected to a mayorally-appointed body. *Id.*, 193 F.3d at 407-408. The court held that Section 2 "does not apply to appointed offices." *Id.* at 408. In support of that holding, the court relied on cases from the Fourth, Fifth, Eighth, and Eleventh Circuits, which it read as having "determined that Section 2 only applies to elective, not appointive, systems." *Id.* at 407 (citing *African-American Citizens for Change v. St. Louis Bd. of Police Comm'r*, 24 F.3d 1052, 1053 (8th Cir.1994); *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1357 (4th Cir. 1989); *Dillard v. Crenshaw County*, 831 F.2d 246, 251 (11th Cir.1987); *Searcy v. Williams*, 656 F.2d 1003, 1010 (5th Cir.1981), aff'd, 455 U.S. 984 (1982)).

The Sixth Circuit was correct in its description of the Eighth Circuit's holding in *African-American Citizens for Change*: That case did indeed conclude that "§ 2 is limited to elected officials" and does not reach a state's decision to select some officials (there, a local police commission) by appointment rather than election. *African-American Citizens for Change*, 24 F.3d at 1053-1054.

But neither the Fourth nor the Fifth Circuit so held. Although the Fourth Circuit found it "more probable than not that Section 2 is not applicable to appointive offices," the court expressly declined to decide that question. *Irby*, 889 F.2d at 1357. Instead, the *Irby* court rejected the plaintiffs' challenge to Virginia's appointive system for school boards on the merits—it held that the plaintiffs had "failed to prove that the appointive system" had "produced discriminatory results." *Id.* at 1358. See *Mixon*, 193 F.3d at 407

(stating that *Irby* had "impl[ied], but not h[eld], that Section 2 does not apply to appointive offices"). The Fifth Circuit, too, addressed the issue only in dicta. In *Searcy*, 656 F.2d at 1009-1010, the court held that the plaintiffs had established that the method of selecting school board members in Thomaston, Georgia, was intentionally discriminatory in violation of the Fourteenth Amendment. Although the Fifth Circuit stated, in a single, conclusory sentence, that because the case "involved an appointive rather than an elective scheme," the "district court was correct in holding that voting rights did not apply," *id.* at 1010, the court expressly found it unnecessary to reach the Section 2 question. See *id.* at 1010 ("Because we have held that the statute involved in this case has been applied in a manner that violates the Fourteenth Amendment it is unnecessary to consider the appellants' arguments based on the Fifteenth Amendment and the Voting Rights Act.").

And the Eleventh Circuit's decision in *Dillard*, far from supporting the Sixth Circuit's holding here, actually conflicts with it. *Dillard* addressed the question whether a proposed county commission plan would comply with Section 2 when five commissioners would be elected from districts and a sixth, with additional responsibilities, would be elected at large. The court stated, in dicta, that the county could have chosen to assign those additional responsibilities to an unelected county administrator, who "would by nature be subject to greater control by the Commission" than the single at-large commissioner, and that such a position "would not be subject to the Voting Rights Act." *Dillard*, 831 F.2d at 251 n.12. But, the Eleventh Circuit emphasized, Section 2 applies "[o]nce a post is

opened to the electorate." *Id.* at 251. Because of racially polarized voting, the commissioner elected from one of the five districts would be the only slot for which African-American voters had an opportunity to elect the candidate of their choice. See *id.* at 247-248. By allocating a set of important responsibilities away from the commissioners elected by districts and to the at-large commissioner—whom, because of the county's persistently polarized voting, African-Americans would have no opportunity to select—the county's proposal would, in the Eleventh Circuit's view, violate Section 2. See *id.* at 251-253.

The similarities with this case are notable. Unlike the defendants in *Mixon* and *African-American Citizens for Change*, the State of Michigan has not changed the method of selecting officials in Petitioners' municipalities from election to appointment. To the contrary, Michigan has continued to "open[]" selection of municipal officers "to the electorate," *Dillard*, 831 F.2d at 251—but it has deprived those officers of any power. That is, PA 436 allows the governor to unilaterally nullify the governance authority of all elected officials in a municipality, in the midst of their elected terms of office, and to transfer *all* of that power to an emergency manager selected by the governor, who is elected statewide. And unlike the hypothetical county administrator the Eleventh Circuit discussed in *Dillard*, 831 F.2d at 251 n.12, emergency managers in Michigan are not "subject to" any meaningful "control" by local elected officials. The control runs entirely in the opposite direction. While an emergency manager holds the office, that official has the authority to preempt or override any decision local elected officials have made in the past or will make during the

emergency manager's reign. The Flint emergency manager's veto of a return to Lake Huron water illustrates the point plainly. See pp. 11-12, *supra*.

The Sixth Circuit asserted that it was "difficult to see" why the distinction between selecting officials by appointment and leaving an elected office intact "should make a Voting Rights Act difference." App. 24. But that very distinction—between making an office appointive and "open[ing]" it "to the electorate"—is the precise distinction the *Dillard* court drew. 831 F.2d at 251. The Sixth Circuit's ruling thus conflicts with the Eleventh Circuit's ruling in *Dillard*. This Court should grant *certiorari* to resolve the conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)
File Name: 16a0228p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15-2394

[Filed September 12, 2016]

CATHERINE PHILLIPS, et al.,
Plaintiffs,

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; CHARLES E WILLIAMS; MICHAEL A OWENS; LAWRENCE GLASS; DEEDEE COLEMAN; ALLYSON ABRAMS,
Plaintiffs-Appellants,

v.

RICHARD D. SNYDER; ANDREW DILLON,
Defendants-Appellees.

App. 2

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:13-cv-11370—George C. Steeh, District Judge.

Argued: August 4, 2016

Decided and Filed: September 12, 2016

Before: SUHRHEINRICH, ROGERS, and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: Herbert A. Sanders, THE SANDERS LAW FIRM, P.C., Detroit, Michigan, John C. Philo, SUGAR LAW CENTER FOR ECONOMIC & SOCIAL JUSTICE, Detroit, Michigan, Julie H. Hurwitz, GOODMAN AND HURWITZ, P.C., Detroit, Michigan, for Appellants. Ann M. Sherman, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellees. **ON BRIEF:** Herbert A. Sanders, THE SANDERS LAW FIRM, P.C., Detroit, Michigan, John C. Philo, SUGAR LAW CENTER FOR ECONOMIC & SOCIAL JUSTICE, Detroit, Michigan, Julie H. Hurwitz, William H. Goodman, GOODMAN AND HURWITZ, P.C., Detroit, Michigan, Mark P. Fancher, ACLU FUND OF MICHIGAN, Detroit, Michigan, Cynthia Heenan, CONSTITUTIONAL LITIGATION ASSOCIATES, P.C., Detroit, Michigan, for Appellants. Ann M. Sherman, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellees.

OPINION

ROGERS, Circuit Judge. When the finances of a Michigan municipality or public school system are in jeopardy, a state law allows for the temporary appointment of an emergency manager to right the ship. An emergency manager's powers in pursuing this end are extensive and arguably displace all of those of the local governmental officials. Plaintiffs, voters in areas with emergency managers and local elected officials in those areas, filed suit and argue that, by vesting elected officials' powers in appointed individuals, the law violates their substantive due process right to elect local legislative officials. Using similar reasoning, they argue that the law violates the Constitution's guarantee, in Article IV, § 4, of a republican form of government. They assert additional claims under the First and Thirteenth amendments as well as a claim under the Voting Rights Act. Plaintiffs appeal the district court's dismissal of their claims. Because the relevant constitutional and statutory provisions do not support relief for plaintiffs, the district court's dismissal of the claims was proper.

Michigan has a long history of municipal financial crises following national and global economic depressions and recessions. According to plaintiffs' amended complaint, Michigan had the fourth-highest number of defaulting municipalities among all states during the Great Depression.

In 1988, Michigan developed its own statutory scheme to deal with municipal insolvency. Public Act

101 of 1988 allowed the state to appoint emergency financial managers (EFMs) over cities experiencing a financial emergency. Two years later, the Local Government Fiscal Responsibility Act, Public Act 72 (PA 72), replaced Public Act 101. PA 72 provided for a local financial emergency review board that would appoint an EFM for a local government only after the governor declared a financial emergency there.

Under PA 72, the local financial emergency review board appointed several EFMs throughout the state. The board appointed EFMs in the municipalities of Hamtramck, Highland Park, Flint, Pontiac, Ecorse, Benton Harbor, and Village of Three Oaks. The board also appointed an EFM for the Detroit Public Schools. Furthermore, under a provision in PA 72 allowing for consent agreements rather than the appointment of an EFM, the city of River Rouge entered into an agreement with the board.

Michigan repealed PA 72 in 2011 when it passed the Local Government and School District Fiscal Accountability Act, Public Act 4 (PA 4). PA 4 changed the title of EFMs to "emergency managers" and expanded the scope of their powers to cover all the conduct of local government. An emergency manager under PA 4 was allowed to act "for and on behalf of" the municipality's elected governing body. *See* PA 4 § 19(2). After the passage of PA 4, what were PA 72 EFMs in Benton Harbor, Ecorse, Pontiac, and the Detroit Public Schools were converted to emergency managers under PA 4 and vested with broad power under that statute. There were also new emergency managers appointed under PA 4 in Flint, the Highland Park Public Schools, and the Muskegon Heights Public Schools.

Michigan citizens disapproved of PA 4. Over 200,000 citizens signed petitions to place a referendum on the ballot in 2012 that would reject the law. After an initial challenge to the form of the petitions, the referendum was placed on the ballot. Pursuant to Michigan law, PA 4 was suspended as soon as the petitions were certified and placed on the ballot. PA 72 thus sprang back into effect on August 8, 2012, the day the Michigan Board of Canvassers certified the petitions. State officials then reappointed all PA 4 emergency managers as PA 72 EFMs. At the general election in November of 2012, Michigan citizens rejected PA 4.

After the referendum on PA 4, Michigan passed a new law, the Local Financial Stability and Choice Act, Public Act 436 (PA 436). PA 436, like PA 4, authorizes the appointment of emergency managers. Mich. Comp. Laws § 141.1549. EFMs under PA 72 and emergency managers under PA 4 were automatically converted to emergency managers under PA 436 when that law took effect. § 141.1549(10). Emergency managers under PA 436 exercise the power of the local government. § 141.1549(2). PA 436 also allows the state treasurer to oversee the activities of emergency managers when the governor so chooses. § 141.1549(8).

There are eighteen scenarios contained in PA 436 that act as triggers for the statute. § 141.1544(1)(a)–(r). If one of those scenarios occurs, the "state financial authority" (the state treasurer for a municipality, or the superintendent of public education for a school district, § 141.1542(u)(i)–(ii)) conducts a preliminary review to determine whether a given entity is under "probable financial stress." § 141.1544(3). The financial

authority then turns its final report over to a local emergency financial assistance loan board, which is a statutory entity established by § 141.932. This board reviews the authority's report and makes an official finding of either probable financial stress or no financial stress. § 141.1544(3). If the board reaches a conclusion of probable financial stress for an entity, the governor appoints a "review team." § 141.1544(4), (5). Within sixty days of a review team's appointment, it must turn in a report to the governor that reaches a conclusion on whether a financial emergency exists within the reviewed local government. § 141.1545(3), (4). Within ten days after receiving the review team's report, the governor determines whether a financial emergency exists or not. § 141.1546(1). A local government is provided an opportunity to appeal this determination to the Michigan court of claims. § 141.1546(3).

A local government has four options when confronted with a finding of a financial emergency: the local government can (1) enter into a consent agreement with the state treasurer; (2) accept the appointment of an emergency manager; (3) undergo a neutral evaluation process, which is akin to arbitration, with its creditors; or (4) enter into Chapter 9 bankruptcy. § 141.1547(1)(a)–(d). Giving local governments these options is one difference between PA 436 and PA 4.

There are other differences between the laws. PA 436 contains provisions for removing an emergency manager after eighteen months of service, and if a local government wishes to have an emergency manager removed before that emergency manager has served

eighteen months, the law provides the local government with a mechanism for petitioning the governor to do so. § 141.1549(11). Another new provision in PA 436 allows the governor to appoint a receivership transition advisory board (TAB) once the financial emergency in a given locality has been rectified. § 141.1563. TABs generally monitor the operations of the local government and ensure that it is operating in a financially conscious and sound way. *Id.*

When PA 436 took effect, emergency managers were in place in Allen Park, Benton Harbor, Ecorse, Flint, Pontiac, Detroit, the Detroit Public Schools, Highland Public Schools, and Muskegon Heights Public Schools. The city of Hamtramck has since had an emergency manager placed in control of it, and the emergency managers in Ecorse and Pontiac have been replaced by TABs. A TAB replaced Benton Harbor's emergency manager and subsequently voted to return the city to local control.

Plaintiffs, voters and elected officials from Detroit, Pontiac, Benton Harbor, Flint, and Redford, filed suit. They alleged that PA 436 violates their right to elect local legislative officials under (1) the Due Process Clause of the Fourteenth Amendment to the United States Constitution; (2) the Guarantee Clause of Article IV, § 4 of the United States Constitution; (3) the Fourteenth Amendment's Equal Protection Clause by burdening their right to vote and by discriminating against African Americans, the poor, and those entities that had emergency managers under the previous laws; (4) § 2 of the Voting Rights Act (VRA); (5) the First Amendment by engaging in viewpoint discrimination

and infringing on plaintiffs' freedom of speech, freedom of association, and right to petition their government; and (6) the Thirteenth Amendment.

The district court held that plaintiffs had Article III standing, reasoning as follows:

> Plaintiffs are residents of cities with [emergency managers], elected officials of cities or school districts who have actually been displaced by [emergency managers], voters who intend to vote again in the future, and people who are actively engaged in the political process at the local level of government. The harms alleged by plaintiffs are unique as compared to Michigan residents living in cities without an [emergency manager]. The court notes that the sweeping powers under PA 436 appear much more expansive than those given to receivers in Pennsylvania, where standing was not found. *See Williams v. Governor of Pennsylvania*, 552 Fed. Appx. 158 (3rd Cir. 2014). Plaintiffs have already suffered, and continue to suffer, the alleged constitutional deprivations, while the residents of Michigan communities without an [emergency manager] have suffered no such harms. In all instances, the alleged deprivations stem directly from the application of PA 436, and it is also true that the alleged injuries will be redressed by a decision favorable to plaintiffs.

Phillips v. Snyder, No. 2:13-cv-11370, 2014 WL 6474344, at *4 (E.D. Mich. Nov. 19, 2014).

The district court proceeded to dismiss almost all of plaintiffs' claims. *Id*. First, the district court held that

the Fourteenth Amendment's Due Process Clause does not contain a fundamental right to elect local legislators. *Id*. at *6. With regard to the Guarantee Clause claim, the court held that the Clause does not apply to local governments. *Id.* Reasoning that the Equal Protection Clause protects the right to vote on an equal footing in a particular jurisdiction, the court dismissed plaintiffs' first Equal Protection Clause claim because, so limited, the right was not violated. *Id.* at *8. The court likewise dismissed the Equal Protection claim based on wealth discrimination because, according to the court, PA 436 does not restrict plaintiffs' ability to vote based on their wealth. *Id.* at *12. The court also held that the final Equal Protection claim could not succeed because PA 436 has a rational basis for its differential treatment. *Id.* at *13.

The court held that PA 436 imposed no impediment to voting that was required to violate § 2 of the VRA, and the court therefore dismissed that claim. *Id.* at *14-16. The First Amendment Claims failed because there were no infringements on speech rights that resulted from PA 436. *Id.* at *16-18. The court also dismissed the Thirteenth Amendment claim, because plaintiffs still have available to them what the court deemed "every device in the political arsenal." *Id.* at *19.

The only claim to survive dismissal was the Equal Protection claim based on discrimination against African-Americans. *Id.* at *10-12. In a move that permitted the instant appeal to go forward promptly, however, the parties stipulated to a dismissal of this claim without prejudice.

Plaintiffs filed the present appeal, presenting many of the same arguments rejected by the district court. The defendants argue that plaintiffs lack standing, that the case is moot, that the Guarantee Clause claims are not justiciable, and that the district court's dismissal was correct in all other respects. Although the district court had jurisdiction under Article III, plaintiffs' constitutional claims are without merit, and the district court's dismissal of the claims was proper.[1]

I.

Most of the plaintiffs have alleged that they, as residents or elected officials of cities and school districts that have been subjected to emergency managers, have already suffered and continue to suffer unique harms that stem directly from the procedures set forth in PA 436. All but one of the plaintiffs is a resident or an elected official of Detroit, Pontiac, Benton Harbor, Flint, or the Detroit Public Schools. These cities and schools were under emergency managers when the plaintiffs filed their amended complaint. These plaintiffs therefore, at least at that time, allegedly suffered constitutional deprivations and other harms that residents and elected officials of cities without emergency managers did not suffer, as

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[1] Plaintiffs Catherine Phillips, Joseph Valenti, and Michigan AFSCME Council 25 were named in neither the amended complaint in the district court, nor the notice of appeal. These three plaintiffs—parties to the city of Detroit's bankruptcy proceedings—were named in the original complaint in this case, and the district court did not remove their names from the docket after the amended complaint was filed. Thus, although the three plaintiffs were originally included in the official caption of this appeal, this appears to have been a mistake.

explained by the district court. Accordingly, plaintiffs suffered the "concrete and particularized" injuries required for standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), that affect them in personal and individualized ways. This removes plaintiffs' injuries from the realm of generalized grievances. The injury was ongoing and thus actual and imminent as opposed to conjectural or hypothetical, therefore satisfying the second part of the injury inquiry outlined in *Lujan*. *Id.* Further, these alleged deprivations stem directly from the application of PA 436 to plaintiffs' cities or schools and would be redressed by a decision favorable to plaintiffs. Most of the plaintiffs have therefore established standing under Article III.[2]

It is true that the municipalities where plaintiffs reside or are elected officials are not currently governed by an emergency manager. However, the municipalities where most of the plaintiffs reside are currently governed by TABs that have final authority to govern those cities. Plaintiffs have challenged the

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[2] One plaintiff, however, failed to establish standing. Plaintiff Glass is from Redford and is on the Council of Baptist Pastors of Detroit. Because he is a Redford resident, his votes for his local officials have not been affected in any way by an emergency manager. However, when one party has standing to bring a claim, the identical claims brought by other parties to the same lawsuit are justiciable. *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330 (1990); *see also Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 n.9 (1977). To the extent that Glass's arguments do not differ from those of the other plaintiffs, his lack of standing does not affect our ability to reach them. To the extent that any of Glass's arguments are Redford-specific, his lack of standing prevents us from reaching them.

constitutionality of PA 436 in its entirety, not only the provisions that allow the Governor to appoint emergency managers and that prescribe the authority of emergency managers. This includes the provision that provides for TABs, § 141.1563. Thus, according to their allegations, plaintiffs are continuing to suffer constitutional deprivations and other harms as long as PA 436 limits the powers of their local elected officials in any manner.[3] The present case is therefore distinguishable from *Williams v. Corbett*, 552 F. App'x 158 (3d Cir. 2014), in which the Third Circuit held that plaintiffs lacked standing because of the need for a number of contingent events before a future injury, *id.* at 161–62.

The claims for equitable relief by the plaintiffs from Benton Harbor and the Detroit Public Schools may be moot. The defendants point to the fact that the TAB in Benton Harbor has voted to return the city to local control and was dissolved on July 1, 2016. The defendants also point out that the Detroit Public Schools will be dissolved pursuant to recently passed Michigan legislation, and operate under a transition manager as of July 1, 2016, until the school board for the new community district takes office in January 2017. However, in line with our resolution of the standing inquiry, whether the claims of these parties are moot is itself a moot issue, as their claims are not distinguishable from those of nonmoot parties whose claims we reject today.

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[3] This also proves that the case presented by these plaintiffs is a live controversy and not moot as the defendants attempt to argue.

II.

Plaintiffs' substantive due process claim, based on their asserted right to vote for the individual(s) exercising legislative power at the local level, is contrary to the Supreme Court's venerable holding that states have "absolute discretion" in allocating powers to their political subdivisions (and therefore to the officers running those subdivisions), which are "convenient agencies" created by the states. *City of Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394, 397 (1919); s*ee also Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004); *Tennessee v. FCC*, No. 15-3291, 2016 WL 4205905, at *10 (6th Cir. Aug. 10, 2016). More particularly, states may allocate the powers of subsidiary bodies among elected and non-elected leaders and policy-makers. This power is squarely supported by *Sailors v. Board of Education*, 387 U.S. 105 (1967). In that case Michigan had established a system for selecting members of a county school board that was "basically appointive rather than elective." 387 U.S. at 109. The Court stated:

> Viable local governments may need innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation. At least as respects nonlegislative officers, a State can appoint local officials or elect them or combine the elective and appointive systems as was done here.

Id. at 110–11. *Sailors* therefore indicates that, given the need for states to structure their political subdivisions in innovative ways, there is no

fundamental right to have local officials elected. Plaintiffs in the present case assert that *Sailors*'s limited holding applies to only "nonlegislative" officers, and they argue that *Sailors* is therefore distinguishable. But just a few years after *Sailors*, the Court indicated in *Hadley v. Junior College District of Metropolitical Kansas City*, 397 U.S. 50 (1970), that the *Sailors* holding would also apply to legislative officers, by recognizing the untenability of a line between administrative and legislative officers for the purposes of assessing the constitutionality of a state statute determining which persons are to be selected by popular election to perform governmental functions. *Id.* at 55–56. Although *Hadley* was an Equal Protection case, the Court rejected the administrative-legislative distinction and instead characterized the correct constitutional inquiry as whether an individual engages in "governmental activities." *Id*. The Court further stated that the right to vote on an equal basis with other voters applies "*whenever* a state or local government *decides* to select persons by popular election to perform governmental functions," *id.* at 56 (emphasis added), which suggests that a state has the power to decide not to select local officials by election. Together, the cases of *Sailors* and *Hadley* lead to the conclusion that there is no fundamental right to have local officers exercising governmental functions selected by popular vote.

Plaintiffs' main argument supporting its due process claim misinterprets *Reynolds v. Sims*, 377 U.S. 533 (1964). *Reynolds* stated that "each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies." 377 U.S. at 565. Plaintiffs argue

that because their local officials derive their power from the state of Michigan, the local officials compose a "state legislative body," and *Reynolds* thus stands for the proposition that there is a fundamental right to vote for local legislative officials. With respect, the argument is meritless. American governments, whether state or federal, have subsidiary agencies that are led by appointed officials, and which make orders and regulations that may carry the force of law. S*ee, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). No federal constitutional provision requires the administrators or boards that run these agencies to be elected. Suggesting as much would be revolutionary to our way of government, even assuming that a government under such a constraint could even function. Further, *Reynolds* dealt with the election of the state legislature of Alabama. The comment in *Reynolds* about "state legislative bodies" obviously applies to state legislatures. Moreover, the issue in *Reynolds* was the principle of one person, one vote under the Equal Protection Clause. Any asserted right in *Reynolds* was in the context of that Clause. *Reynolds* thus stands for a right to vote for state legislators on an equal footing with other voters in the state rather than a stand-alone right to vote for legislators.[4] Equal access to the ballot for an elected official simply does not imply that certain officials must be elected.

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[4] Plaintiffs also cite *Williams v. Rhodes*, 393 U.S. 23 (1968), but that case dealt with the entirely different issue of the constitutionality of hurdles facing new parties seeking access to a state gubernatorial ballot. Language plucked from that decision about the right to vote can be relevant to this case only in the most general and abstract sense.

Although this court has expressed, in a case involving the voiding of absentee ballots, that "[t]he Due Process [C]lause is implicated . . . in the exceptional case where a state's voting system is fundamentally unfair," *Warf v. Board of Elections of Green County*, 619 F.3d 553, 559 (6th Cir. 2010), we have never held that the Due Process Clause is implicated when a state decides to appoint local officials instead of having them be elected. Further, the Sixth Circuit cases that plaintiffs cite in this context all address whether states' entire election processes impaired citizens' abilities to participate in state elections on an equal basis with other qualified voters. *See Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580 (6th Cir. 2012); *Warf*, 619 F.3d 553; *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463 (6th Cir. 2008). These cases therefore do not imply, much less recognize, a fundamental right to have local legislative officers be elected.

III.

Moreover, the Constitution's guarantee of a republican form of government in Article IV does not provide plaintiffs with a basis for invalidating PA 436. Traditionally, the Supreme Court "has held that claims brought under the Guarantee Clause are nonjusticiable political questions." *Padavan v. United States*, 82 F.3d 23, 28 (2d Cir. 1996) (citations omitted). The doctrine goes back to *Luther v. Borden*, 48 U.S. 1 (1849), and was restated in unqualified fashion in *Colegrove v. Green*, 328 U.S. 549, 556 (1946), and *City of Rome v. United States*, 446 U.S. 156, 182 n.17 (1980). In *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 141–48 (1912), the Court held not justiciable a

Guarantee Clause challenge to a state constitutional provision permitting the bypassing of the state legislature by a voter initiative procedure. In short, it is up to the political branches of the federal government to determine whether a state has met its federal constitutional obligation to maintain a republican form of government. *Id.* at 147. This conclusion disposes of plaintiffs' Guarantee Clause claim.

The Supreme Court more recently—in a challenge to a federal statute—has expressed doubt that all Guarantee Clause challenges are not justiciable, but in doing so did not resolve the issue. *New York v. United States*, 505 U.S. 144, 185 (1992). Even assuming that a challenge based on the Guarantee Clause may be justiciable in some circumstances, we are aware of no case invalidating the structure of *political subdivisions* of states under the Clause. This is not surprising in light of the Supreme Court's repeated indication that states, not federal courts, should determine the structure of political subdivisions within a state. The Court has recognized that "[h]ow power shall be distributed by a state among its governmental organs, is commonly, if not always, a question for the state itself." *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937).

Plaintiffs cite two cases for the contention that the Guarantee Clause applies to allocation of powers among political subdivisions, but even if these pre-*Pacific States* cases can be loosely read to contemplate justiciability, they strongly support the conclusion that there is no Guarantee Clause violation here. In *Attorney General of Michigan ex rel. Kies v. Lowrey*, a

Michigan statute allocating property between old and new school districts was challenged under the Contracts Clause, the Due Process Clause, and the Guarantee Clause. 199 U.S. 233, 240 (1905). The Supreme Court stated flatly:

> [T]he grounds all depend ultimately upon the same arguments. If the legislature of the State has the power to create and alter school districts, and divide and apportion the property of such district[s], no contract can arise, no property of a district can be said to be taken, and the action of the legislature is compatible with a republican form of government *even if it be admitted* that [Article IV, § 4] of the Constitution . . . applies to the creation of, or [to] the powers or rights of property of, the subordinate municipalities of a State. We may omit, therefore, that [S]ection and [A]rticle from further consideration.

Id. at 239 (emphasis added). *Forsyth v. City of Hammond*, 166 U.S. 506 (1897), an even earlier case, concerned an Indiana statute authorizing the annexation of contiguous territory to the limits of a city by a court rather than the state legislature. Although the case involved a city's territory, the Guarantee Clause argument was one of separation of powers between the judiciary and the legislature of the *state* government. *Id.* at 519. The case says nothing about the republican form of the city. Moreover, with respect to the state separation-of-powers issue, the Court reasoned that "there is nothing in the federal Constitution to prevent the people of a state from giving, if they see fit, full jurisdiction over such matters

to the courts and taking it entirely away from the legislature." *Id.* These cases provide no support for either the justiciability or the validity of a Guarantee Clause challenge to the form of government of a political subdivision of a state.

IV.

With regard to the plaintiffs' claims under the Equal Protection Clause, PA 436 passes rational basis review. The financial conditions of plaintiffs' localities are the reasons for the appointments of the emergency managers. An entity in a distressed financial state can cause harm to its citizenry and the state in general. Improving the financial situation of a distressed locality undoubtedly is a legitimate legislative purpose, and PA 436, while perhaps not the perfect remedy, is one that is rationally related to that purpose. The emergency manager's powers may be vast, but so are the problems in financially distressed localities, and the elected officials of those localities are most often the ones who—through the exercise of their powers—led the localities into their difficult situations. A rational relationship to a legitimate governmental purpose is all that is required for a law to pass this low form of scrutiny. *See*, *e.g.*, *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012). PA 436 therefore does not violate the Equal Protection Clause.

Plaintiffs also claim that PA 436 violates the Equal Protection Clause by discriminating against entities already having EFMs from PA 72, but this claim lacks merit. Under § 141.1549(6)(c), an EFM appointed under PA 72 who was still serving in that capacity at the time of the Act's taking effect was deemed to be an emergency manager under PA 436. That individual

would then be subject to the eighteen-month provision in PA 436 and would effectively remain in place longer than an emergency manager who was appointed for the first time under the new law. *Id.* Plaintiffs argue that this treats them in a discriminatory manner. This different treatment, however, is justified for the reasons stated by the district court: the eighteen-month limitation on removal is rational, because the managers in place before PA 436 took effect had much less power under PA 72 than they did under PA 436. Giving these individuals time to adjust to the new, broad powers is a legitimate interest, and giving them the same eighteen months as other emergency managers to work with these powers is rationally related to that interest. Although plaintiffs argue that the emergency managers appointed under PA 4—who became EFMs when PA 72 sprang back into effect—did not change any of their practices after the referendum, this fact if accurate does not affect the rationality of a distinction based on their power to change their practices. Whether those managers violated PA 72 by overstepping their statutory powers is also not relevant to the rationality of the distinction. The district court's dismissal of this claim was therefore correct.

There is, moreover, no basis for applying scrutiny stricter than rational basis review. The plaintiffs argue for stricter scrutiny on the theory that PA 436 violates the Equal Protection Clause by denying their right to vote and by conditioning their vote on wealth. However, neither of these theories requires that PA 436 be subjected to higher scrutiny.

Right to Vote. PA 436 does not impair plaintiffs' right to vote under the Equal Protection Clause.

Plaintiffs are still provided a vote. PA 436 does not remove local elected officials; it simply vests the powers of the local government in an emergency manager. Plaintiffs argue, however, that as a practical matter they are unable to elect the people exercising local legislative power while individuals in areas without emergency managers have the ability to do so. But Equal Protection close scrutiny has not been applied beyond the right to vote on an equal footing with other citizens in a given jurisdiction, in cases such as *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), which involved residency duration requirements for voting. In particular, in cases where the issue is whether an election is required in the first place, the Court has declined to apply close scrutiny. For instance, in *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 10 (1982), the Court rejected a challenge to a procedure whereby vacancies in the Puerto Rico legislature could be filled on an interim basis by political parties. The Court reasoned that "[t]he right to vote, *per se*, is not a constitutionally protected right," and that the Constitution does not "compel[] a fixed method of choosing state or local officers or representatives." *Id.* at 9 (citation and internal quotation marks omitted). The Court further explained:

> To be sure, when a state or the Commonwealth of Puerto Rico has provided that its representatives be elected, "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). *See Kramer v. Union Free School District*, 395 U.S. 621, 626–629 (1969); *Gray v. Sanders*, 372 U.S. 368, 379–380 (1963).

> However, the Puerto Rico statute at issue here does not restrict access to the electoral process or afford unequal treatment to different classes of voters or political parties. All qualified voters have an equal opportunity to select a district representative in the general election; and the interim appointment provision applies uniformly to all legislative vacancies, whenever they arise.

Id. at 10. A similar distinction applies here. Plaintiffs have not shown that they have been denied the right to vote on equal footing within their respective jurisdictions. Individuals in jurisdictions without emergency managers are not relevant to the protected right. In short, geographical or other distinctions regarding the allocation of responsibilities among elected and appointed bodies must have a rational basis, but if they do, there is no basis for stricter scrutiny if there is equal access to the ballot with respect to voting for the elected bodies.

Wealth. Plaintiffs claim that the distinctions between communities with and without emergency managers are based on race, but plaintiffs have voluntarily dismissed that claim. They instead argue for stricter scrutiny based on wealth discrimination. Such a claim, however, does not require scrutiny any closer than rational basis scrutiny. Plaintiffs argue that the financial condition of a local government—the basis for an emergency manager appointment—is the same as the wealth of the people who reside in that government's area. This is factually and logically incorrect. The solvency of a local government is the result of the management of the finances of that government. Although solvency may correlate with the

wealth of a locality's residents, solvency and wealth are separate concepts. Indeed, it is possible for a locality with wealthy residents to become insolvent and subject to PA 436.

In any event, a legal distinction among political subdivisions that ultimately affects people differently based on wealth does not—without the involvement of some other fundamental right or suspect category—implicate closer scrutiny than rational basis review. This conclusion is clearly required by the Supreme Court's holding in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). The Supreme Court in that case rejected the application of strict scrutiny to Texas's system of local-property-based financing of public education, and in particular a claim based on "district wealth discrimination," reasoning in part:

> [I]t is clear that appellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts. The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Id. at 28 (footnote omitted). This reasoning disposes of any wealth-based discrimination argument for strict scrutiny in this case.

V.

PA 436 also does not violate § 2 of the Voting Rights Act (VRA). In making their VRA claim, plaintiffs attempt to fit a square peg into a round hole. Section 2 states that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied . . . which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color." 52 U.S.C. § 10301(a). Plaintiffs argue that the emergency manager provision denies their right to vote. *Mixon v. Ohio*, however, held that § 2 of the VRA does not cover appointive systems. 193 F.3d 389, 407–08 (6th Cir. 1999). *Mixon* involved the Cleveland School District's changing the selection of the Cleveland School Board from an elective system to an appointive one. *Id.* at 394. The Court stated that allowing § 2 challenges to states' choices between elective and appointive systems would be an interpretation that would "reach[] too far." *Id.* at 408. *Mixon* is analogous to the present case. In enacting PA 436, Michigan made a choice between allocating certain powers to appointed individuals rather than elected ones. Thus, § 2 does not provide plaintiffs an avenue for recovery, and the district court correctly dismissed this claim. Plaintiffs argue that *Mixon* is distinguishable because, in that case, a statute changed the process for selecting school board members, while the elective office in the present case remains intact. It is difficult to see why this distinction should make a Voting Rights Act difference.

Presley v. Etowah County Commission, 502 U.S. 491, 504 (1992), also supports dismissing plaintiffs' claim under VRA § 2. In *Presley*, the Court employed a "direct relation to voting" test to determine when a change in a standard, practice, or procedure falls under VRA § 5. *Id.* at 506. "Changes which affect only the distribution of power among officials" and "delegat[e] . . . authority to an appointed official" fail this test, and the VRA therefore does not cover them. *Id.* at 506, 507. Plaintiffs correctly note that there is a difference in scope between § 5 and § 2. *See Holder v. Hall*, 512 U.S. 874, 882 (1994) (plurality opinion). Although *Presley* dealt with a § 5 claim, its reasoning applies *a fortiori* to the § 2 claim here. First, the § 5 language that the Supreme Court focused upon in *Presley* was "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," language indistinguishable from that of § 2 ("voting qualification or prerequisite to voting, or standard, practice, or procedure . . . [resulting] in a denial or abridgement of the right . . . to vote . . ."). The *Holder* Court, in distinguishing § 2 and § 5, held that "we do not think that the fact that a change in a voting practice must be precleared under § 5 necessarily means that the voting practice is subject to challenge in a dilution suit under § 2." *Id.* at 883. In other words, for purposes of interpreting these words, § 5 if anything is *broader* than § 2.[5] And while *Presley* did contemplate that a "*de facto* replacement of an elective office with an appointive one" was not within its holding, *id.* at 508,

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[5] We recognize, of course, that in other respects § 5 is narrower than § 2. *See Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 478–79 (1997).

plaintiffs agree that there was no replacement of an elective office with an appointive one in this case. Their elected officials still retain some (although limited) powers under PA 436. *Presley* thus supports the applicability of our *Mixon* holding in this case: VRA § 2 does not apply, because this is not a case involving a voting qualification or prerequisite to voting or standard, practice, or procedure resulting in the denial of a right to vote.

VI.

Turning to the First Amendment claims, the enactment of PA 436 was not an instance of viewpoint discrimination against plaintiffs. Plaintiffs, along with a significant number of Michigan voters, indeed voted to repeal PA 4. The legislature then enacted PA 436, a law that plaintiffs admit is different from PA 4. Because plaintiffs admit that PA 436 is different, the analysis need not go any further. Furthermore, Michigan would have been allowed to pass PA 436 even if it were identical to PA 4. *See Michigan Farm Bureau v. Hare*, 151 N.W.2d 797, 802 (Mich. 1967). In any event, the fact that a legislature passes new legislation similar in import to legislation previously vetoed by referendum does not restrict the expression of one's viewpoint. The legislature either had the power to repass similar legislation or it did not. No one's ability to express views was infringed.

Nothing in PA 436 abridges plaintiffs' rights to freedom of speech and to freedom of association. A removal or modification of government power can hardly be equated to a restriction on speech. If it were, all reallocations of the legislative powers of political subdivisions would be subject to heightened scrutiny

under the First Amendment—an entirely unprecedented and anomalous result.

This reasoning would apply regardless of whether the plaintiff elected officials were left with no governmental power, but that is not even the case. Local officials under PA 436 may, by a two-thirds vote, petition for removal of an emergency manager before the emergency manager has served for eighteen months. Mich. Comp. Laws § 141.1549(11). Furthermore, after the emergency manager has served for eighteen months, the same two-thirds vote of the local government removes the emergency manager. § 141.1549(6)(c). PA 436 also presents local government officials in a financial emergency with four options, and only one of those options is the appointment of an emergency manager. This suggests that local officials are generally still empowered to act under PA 436. Citizens are still able to advocate for the removal of the emergency manager, and the decision to appoint an emergency manager can be appealed under PA 436. Citizens are also able to vote out their local officials who got them into the financial emergency, the state legislators who enacted PA 436, and the governor who appointed an emergency manager.

PA 436 therefore does not abridge plaintiffs' First Amendment rights.

VII.

Plaintiffs' final claim, resting on the Thirteenth Amendment, though eloquently presented at oral argument, is without merit. PA 436's focus on financial emergencies makes this case similar to *City of Memphis v. Greene*, 451 U.S. 100 (1981). That case

involved the closure of a street in Memphis that allegedly had the effect of segregating races within the city. *Id.* at 102. However, the Court decided that this action did not violate the Thirteenth Amendment as a "badge or incident of slavery," because "a regulation's adverse impact on a particular neighborhood will often have a disparate effect on an identifiable ethnic or racial group" due to urban neighborhoods' being often "characterized by a common ethnic or racial heritage." *Id.* at 128. Similarly here, PA 436 looks to the financial health (or lack thereof) of municipalities. Plaintiffs do not challenge the label of "financial emergency" being attached to their localities. There is no sufficiently direct connection to race in PA 436 that could amount to something, in the words of the Supreme Court in *Greene*, "comparable to the odious practice the Thirteenth Amendment was designed to eradicate." *Id.* Plaintiffs cite no case law that brings their facts anywhere near the prohibitions of the Thirteenth Amendment. The state's remedy for financially endangered communities—passed by state-elected bodies for which African-Americans have a constitutionally protected equal right to vote, and facially entirely neutral with respect to race—are far removed from being a "badge" of the extraordinary evil of slavery.

VIII.

The district court's dismissal of plaintiffs' claims is accordingly affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 2:13-cv-11370

[Filed October 23, 2015]

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

v

RICHARD D. SNYDER, as Governor of the State of Michigan, and ANDREW DILLON,

as the Treasurer of the State of Michigan,)
acting in their individual and/or official)
capacities,)
Defendants.)
_____)

HON. GEORGE CARAM STEEH

MAGISTRATE JUDGE R. STEVEN WHALEN

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STIPULATION AND ORDER TO DISMISS COUNT IV

The parties, through their counsel, STIPULATE and AGREE as follows:

1. To dismiss Count IV of the First Amended Complaint filed February 12, 2014, without prejudice.

2. Plaintiffs may appeal the claims dismissed under Fed. R. Civ. P. 12b(6), set forth in the Court's opinion dated November 19, 2014 (Doc. 49). If an appeal is not timely filed in the 6th Circuit Court of Appeals, the tolling agreement in Paragraph 3 expires and the statute of limitations on the dismissed claim (Count IV) continues to run upon expiration of the appeal period.

3. The statute of limitations on the dismissed claim (Count IV) will be tolled during the pendency of the appeal.

4. If a timely appeal is filed with the 6th Circuit Court of Appeals, the tolling agreement in Paragraph 3 will expire 60 days after entry of a final order or opinion resolving that appeal. If a timely Petition for Writ of Certiorari is filed, the tolling agreement in Paragraph 3 will expire 60 days after either of the following occur: 1) entry of an order denying the Petition or; 2) if the Petition is granted, after entry of the opinion resolving that appeal.

5. All evidence regarding the pending claim will be preserved and our litigation holds will remain in effect until the resolution of the appeal and possible re-filing of the dismissed claim (Count IV).

6. Discovery will immediately cease and Defendants will withdraw their Motion for Protective Order currently pending with the Court. Plaintiffs agree to maintain the discovery materials already produced and will not seek the same materials again should the claim/case be re-filed or remanded.

This agreement disposes of the remaining claim in the captioned matter.

s/Herbert A. Sanders (w/consent)
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Dated: October 23, 2015

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Dated: October 23, 2015

ORDER

This matter having come before the court upon the Stipulation of the parties;

IT IS SO ORDERED.

s/George Caram Steeh
Hon. George Caram Steeh
United States District Judge

Dated: October 23, 2015

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 2:13-CV-11370

[Filed November 19, 2014]

CATHERINE PHILLIPS, et al.,)
Plaintiffs,)
)
v.)
)
RICHARD D. SNYDER et al.,)
Defendants.)

HON. GEORGE CARAM STEEH

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS (DOC. #41) AND DENYING DEFENDANTS' MOTION TO STAY PROCEEDINGS (DOC. #47)

This action challenging the constitutionality of Michigan's Emergency Manager Law, the *Local Financial Stability and Choice Act*, Act No. 436, Public Acts of 2012, Mich. Comp. Laws Ann. §§ 141.1451 *et seq*. (West 2013) ("PA 436"), was commenced by plaintiffs who include local elected officials, unelected citizens, and members of the governing boards of various religious and civil rights organizations. Defendants, the Governor and Treasurer of the State of

Michigan, have moved to dismiss all nine counts alleged by plaintiffs in their First Amended Complaint. For the reasons stated below, defendants' motion to dismiss is GRANTED in part and DENIED in part, and defendants' motion to stay proceedings is DENIED.

PROCEDURAL MOTION

Defendants move the court to stay the determination of this case pending completion of the City of Detroit bankruptcy. Defendants argue that a finding that PA 436 is unconstitutional would halt the Detroit bankruptcy and require the unwinding of all the acts of Detroit's Emergency Manager. However, the Bankruptcy Court and this court have already considered defendants' stay arguments and have determined that on balance, the pending challenge to the constitutionality of PA 436, which is actively being implemented throughout the state, should go forward. Defendants have not raised any new arguments in their most recent motion.

First, plaintiffs' claims in this case are not directly related to the City of Detroit, and any impact on the City's bankruptcy is speculative at best. Judge Rhodes opined that a successful challenge to PA 436 will not automatically or necessarily result in the removal of Detroit's emergency manager or the nullification of anything that has already occurred in the bankruptcy proceedings. *Order Denying Motion for Reconsideration*, *In re City of Detroit,* Dkt. # 2256. For this reason, defendants are not able to establish that they will suffer irreparable harm absent the granting of a stay. On the other hand, issuing a stay will cause substantial harm to plaintiffs by denying their right to proceed with a constitutional challenge that is only

tangentially related to the City of Detroit or the bankruptcy. Finally, the public has a strong interest in avoiding unnecessary delay in resolving civil rights claims, like those raised in this case.

It is this courts' determination that this lawsuit should go forward and defendants' motion to stay shall be denied.

FACTS

Plaintiffs bring this action under 42 U.S.C. § 1983, challenging the constitutionality of PA 436, which was enacted to address problems presented by fiscal instability among the State's local governments. Specifically, plaintiffs allege that PA 436 violates Fourteenth Amendment guarantees of Due Process and Equal Protection; Article IV, Section 4 of the Constitution, which provides for a Republican Form of Government; the Voting Rights Act; the First Amendment rights of free speech and to petition government; and the Thirteenth Amendment.

Prior to 1988, municipalities in Michigan that were experiencing financial difficulties could be placed into receivership by the courts. Court-appointed receivers were compensated from the property that the courts placed within the care of the receiver. In 1988, the State of Michigan enacted PA 101, which allowed the State to appoint an emergency financial manager over cities experiencing a financial emergency. In 1990, the legislature replaced PA 101 with the *Local Government Fiscal Responsibility Act*, PA 72, which authorized Michigan's local financial emergency review board to appoint an emergency financial manager ("EFM") only after the Governor declared the local government to be

in a financial emergency. The EFM's powers extended to matters of finances, including the authority to renegotiate contracts, while local elected officials remained in control of administrative and policy matters. Under PA 72, the state local financial emergency review board appointed EFMs in the cities of Benton Harbor, Ecorse, Flint, Hamtramck, Highland Park and Pontiac, as well as over the Detroit Public Schools.

In 2011, possibly in response to a court ruling finding that the Detroit Public Schools' Board, and not the EFM, possessed the power to determine what curriculum would be taught in the public schools, the governor signed the *Local Government and School District Fiscal Accountability Act*, PA 4 into law. PA 4 repealed PA 72 and converted all EFMs into Emergency Managers ("EM"), greatly expanding the scope of their powers. EMs could act "for and in the place of" the municipality's elected governing body, including a general grant of legislative power. EFMs in Benton Harbor, Ecorse and Pontiac, as well as the Detroit Public Schools, were converted to EMs. EMs were newly appointed in Flint, Highland Park Public Schools and Muskegan Public Schools.

Citizens gathered signatures to place a referendum on the ballot to reject PA 4. The petitions were certified August 8, 2012, and by operation of law PA 4 was suspended and PA 72 went back into effect. All PA 4 EMs were reappointed as PA 72 EFMs. At the general election on November 6, 2012, Michigan voters voted to reject PA 4.

During the lame-duck session that followed the repeal of PA 4, the state legislature passed, and the

Governor signed, the *Local Financial Stability and Choice Act*, PA 436. PA 436 changed the title of EFMs to EMs and expanded the scope of their powers to cover all the conduct of local government - both finance and governance. PA 436 contains some new provisions for local government not present in previous laws, including expanded local government options to address the financial emergency and a procedure to remove the EM after he or she has served 18 months. The EMs appointed under PA 4 and EFMs appointed under PA 72 all became EMs under PA 436. When PA 436 took effect on March 28, 2013, EMs were in place in the cities of Allen Park, Benton Harbor, Detroit, Ecorse, Flint, Inkster, Pontiac and River Rouge, as well as the public school districts of Detroit, Highland Park and Muskegon Heights. Since that time, the City of Hamtramck had an EM placed in control of the city's governance, the City of Highland Park was deemed to be in a financial emergency, Inkster, River Rouge, Royal Oak Township and the Pontiac Public Schools have entered into consent agreements, and the Hazel Park and East Detroit School Districts were found not to be in financial distress. The EMs of Allen Park, Benton Harbor, Ecorse and Pontiac were replaced by "transition advisory boards" ("TAB") with governing authority returned to elected officials. The TAB's duties and responsibilities are restricted to consulting, reviewing and approving certain financial and budget transactions. In July of this year, an EM was appointed to run the City of Lincoln Park.

As noted, this case involves plaintiffs' claims that the sweeping powers given to Emergency Managers under PA 436 in supplanting local elected officials offend the constitution and laws of the United States.

Not implicated in this case are the multitude of state law based claims that might have been raised.

Plaintiffs assert that 52% of the State's African-American population is under the governance of an EM, a consent agreement or a TAB, while only a tiny percentage of the State's Caucasian population is under such governance. In addition, the percentage of persons living below the poverty line in Michigan as a whole is 15.7%. All but one of the cities with an EM have a poverty level at least double the state average. Plaintiffs allege that as a result of PA 436, a disproportionate number of African Americans and those in poverty are under the governance of an EM instead of the local officials who were voted into office. Finally, plaintiffs allege that citizens in communities with EMs have effectively lost their right to vote or have had that right diluted to the point that it has no meaning.

LEGAL STANDARD

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the sufficiency of the complaint. Viewing the facts in a light most favorable to the plaintiff, the court assumes that the plaintiff's factual allegations are true in determining whether the complaint states a valid claim for relief. *See Bower v. Fed. Express Corp.*, 96 F.3d 200, 203 (6th Cir. 1996). "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)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the

defendant is liable for the misconduct alleged." *Id.* at 678 (citing *Twombly*, 550 U.S. at 556).

ANALYSIS

I. Standing

Federal courts "have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto," therefore a plaintiff must possess both constitutional and statutory standing in order for a federal court to have jurisdiction over a matter. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).

Defendants challenge whether plaintiffs are proper parties to seek an adjudication of the issues raised in the amended complaint. This is a question of Article III, or Constitutional, standing and goes to the issue of the court's subject matter jurisdiction. To survive this challenge, plaintiffs must show (1) they have suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendants; and (3) it is likely that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). It is a threshold requirement that plaintiffs allege they have sustained, or are in immediate danger of sustaining, some direct injury as a result of PA 436. It is not enough that plaintiff suffer an indefinite injury in common with people in general. *Miyazawa v. City of Cincinnati*, 45 F.3d 126, 127 (6th Cir. 1995) (citation omitted). "The injury . . . must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *O'Shea v Littleton*, 414 U.S. 488, 494 (1974) (citation omitted).

Because declaratory relief is sought, plaintiffs also 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).

Plaintiffs are residents of cities with EMs, elected officials of cities or school districts who have actually been displaced by EMs, voters who intend to vote again in the future, and people who are actively engaged in the political process at the local level of government. The harms alleged by plaintiffs are unique as compared to Michigan residents living in cities without an EM. The court notes that the sweeping powers under PA 436 appear much more expansive than those given to receivers in Pennsylvania, where standing was not found. See *Williams v. Governor of Pennsylvania*, 552 Fed. Appx. 158 (3rd Cir. 2014). Plaintiffs have already suffered, and continue to suffer, the alleged constitutional deprivations, while the residents of Michigan communities without an EM have suffered no such harms. In all instances, the alleged deprivations stem directly from the application of PA 436, and it is also true that the alleged injuries will be redressed by a decision favorable to plaintiffs.

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

Statutory standing requires that the statute plaintiffs invoke gives them certain rights they may

enforce. Plaintiffs do not have to demonstrate actual harm in order to show statutory standing. Most of the plaintiffs are unelected individuals who are residents of localities with EMs appointed under PA 436. These individuals allege their right to vote has been impaired. Congress amended the Voting Rights Act in 1975 to confer standing upon all "aggrieved persons." For purposes of deciding a Rule 12(b)(6) motion, it is unnecessary to determine whether plaintiffs' allegations of impairment of their voting rights are true in order to hold they have standing to seek relief. This court ultimately finds that plaintiffs' allegations of impairment of their voting rights, under the Voting Rights Act, fail as further described below. Nevertheless, whether or not plaintiffs have stated a viable claim is properly analyzed in assessing the sufficiency of the allegations, not as a question of standing. The Supreme Court has held that qualified voters who have alleged they have been personally disadvantaged by a state statute can demonstrate standing to challenge the statute's constitutionality. *Baker v. Carr*, 369 U.S. 186, 204-08 (1962) (plaintiffs are asserting "a plain, direct and adequate interest in maintaining the effectiveness of their votes," not merely a claim of "the right possessed by every citizen 'to require that the government be administered according to law . . .'" (citations omitted)). In another case, the Court reiterated that "any person whose right to vote is impaired has standing to sue." *Gray v. Sanders*, 372 U.S. 368, 375 (1963). Plaintiffs are minorities who allege their right to vote has been abridged by PA 436 because they can now only vote for local officials who are rendered impotent in that the Act takes away their elected officials' power to legislate.

The remaining plaintiffs are elected individuals who have been displaced by EMs and PA 436 Transitional Advisory Boards. They allege equal protection arguments based on their inability to remove EMs after 18 months because they were already displaced by EMs when PA 436 took effect. These plaintiffs argue they are suffering alleged constitutional deprivations, while residents of other Michigan communities without an EM suffer no such harms.

At the motion to dismiss stage, plaintiffs demonstrate statutory standing by alleging the type of harm protected by the statute under which their case is brought. Plaintiffs in this case have shown they have statutory standing to bring their claims.

II. Substantive Due Process (Count I)

The Fourteenth Amendment protects against violations of citizens' liberty interests, which have been described by the Supreme Court as follows:

> [T]he Due Process Clause specifically protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," . . . and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."

Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (citations omitted). When substantive due process applies, the government must show a compelling reason that demonstrates an adequate justification for taking away life, liberty or property. The Supreme Court has invoked the concept of substantive due process for the protection of unenumerated

constitutional rights including the right to work, the right to marry, the right to custody of one's children, the right to an abortion, and the right for an adult to refuse medical care. Each recognized right is in the nature of a privacy right. The Supreme Court, however, has repeatedly warned against adding fundamental liberties to the substantive due process doctrine. *See id*. at 720.

Plaintiffs allege that they have a fundamental right to vote, including the right to elect officials who possess legislative power, which has been violated by PA 436. According to plaintiffs, PA 436 has the effect of creating a voting system where citizens in communities with an EM vote for officials who have no governing authority, while citizens of other communities vote for those who actually govern and act as the elector's representatives in office. Claiming that PA 436 has resulted in "a radical departure from prior forms of local government known in . . . the United States," plaintiffs point to the statute's uniqueness as an indication of a violation of a fundamental right. P.A. 436 results in unprecedented disenfranchisement and vote dilution, they argue, which implicates the Due Process Clause. *See Warf v. Bd. of Elections*, 619 F.3d 553, 559 (6th Cir. 2010).

The right to vote "is a fundamental matter in a free and democratic society." *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). "Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id*. at 562. In *Reynolds*, which struck down Alabama's apportionment plan under the Equal Protection Clause

because it was not based on current population, the Supreme Court recognized a right to vote in state and federal elections, protected by the Constitution. The Supreme Court, in a case challenging a public school financing scheme under the Equal Protection Clause, stated in a footnote that "the right to vote, *per se*, is not a constitutionally protected right, . . . [but we recognize a] protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population. " *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973). Indeed, going back to 1886, the Supreme Court compared the concept of the abhorrence of slavery to the protection of the political franchise, holding that both ideas are "self-evident in the light of our system of jurisprudence. . . . The case of the political franchise of voting . . . [t]hough not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

Clearly, the right to vote, once given, is to be scrupulously protected to make sure all voters are able to participate on an equal basis with other voters. However, the Supreme Court has never recognized the right to vote as a right qualifying for substantive due process protection. Given that plaintiffs' theory is not that they were unable to vote, but that the meaningfulness of their vote is unequal to those in localities without an EM, the proper route for plaintiffs' challenge is the Equal Protection Clause. Defendants'

motion to dismiss plaintiffs' substantive due process claim in Count 1 is granted.

III. Guarantee Clause (Count 2)

The Guarantee Clause states "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. Const., art. IV, § 4. Plaintiffs allege that defendants violated this constitutional guarantee by appointing unelected emergency managers to their respective localities, a position not directly accountable to local voters. This argument requires a logical step in order to prevail, because plaintiffs must show that the term "state" also refers to local governments.

The Guarantee Clause is a "guarantee to the states, as such . . . [and] does not extend to systems of local governments for municipalities." *Johnson v. Genesee*, 232 F. Supp. 567, 570 (E.D. Mich. 1964) (citations omitted). Since local governments are considered "convenient agencies" whose powers depend on the discretion of the state, *Reynolds*, 377 U.S. at 575, maintenance of republican form at the state level is sufficient to satisfy the Guarantee Clause. Plaintiffs' brief cites authority which defines the term "republican" and attempts to demonstrate the justiciability of the question, but cites no authority that actually applies the Guarantee Clause to local governments. Plaintiffs have thus failed to state a valid claim as to the violation of the Guarantee Clause, because they make no claim that the political form of the state is anything but republican. Defendants' motion to dismiss Count 2 is granted.

IV. Equal Protection Clause

The Fourteenth Amendment of the United States Constitution provides in relevant part that "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court has stated that this language "embodies the general rule that States must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill*, 521 U.S. 793, 799 (1997). Equal protection prevents states from making distinctions that burden a fundamental right, target a suspect class, or intentionally treat one individual differently from others similarly situated without any rational basis. *Radvansky v. City of Olmstead Falls*, 395 F.3d 291, 312 (6th Cir. 2005). 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) (citations omitted). Plaintiffs make four equal protection claims: PA 436 (1) unduly burdens their fundamental right to vote, (2) has a discriminatory impact on African American populations, (3) has a discriminatory impact on lower-income communities, and (4) discriminates based on the status of previously having an appointed emergency manager under PA 72 or PA 4.

A. Burden on the Right to Vote (Count 3)

Plaintiffs argue that their fundamental right to vote has been denied, abridged, and/or diluted by PA 436 because governing authority is stripped from local

elected officials and transferred to one unelected EM with no accountability to local citizens. First Amended Complaint ¶ 123. Furthermore, since local decisions in such communities are now made by a direct appointee of the State, plaintiffs argue, voters across the entire state wield voting power over them, but the reverse is not true: "the entire state electorate participates in the selection of the local government in the affected municipalities and school districts, while in all other localities across the state, local residents alone directly vote for their local elected officials." First Amended Complaint ¶ 125. Finally, plaintiffs maintain that PA 436 is not narrowly tailored to address the asserted government interest of achieving financial stability for local governmental units.

There is a constitutionally protected right for citizens "to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population." *Rodriguez*, 411 U.S. at 35 n.78. The right to vote underlies our republican form of government. "As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." *Reynolds*, 377 U.S. at 562. "Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969).

This case does not present a traditional burden on the right to vote because all qualified voters are actually able to vote in their local elections. Rather, the complaint made by plaintiffs is that the officials they elect do not have the powers attendant to their office because essentially all such legislative and executive powers are vested in an appointed individual.

The Constitution does not compel a particular method of choosing state or local officers or representatives. *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982). The Supreme Court has addressed the issue of whether the members of a county board of education could be appointed rather than elected. *Sailors v. Board of Education*, 387 U.S. 105 (1967). The Court's analysis started with the fact that political subdivisions of states "have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental function." *Id*. at 107-08 (citing *Reynolds, 377 U.S. 533*). These 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 conferred upon (them) * * * and the territory over which they shall be exercised rests in the absolute discretion of the state.'" *Id*. The Court concluded that, as such, "state or local officers of the nonlegislative character" do not have to be elected. Rather they may be appointed by the governor, the state legislature, or by some other means rather than by election. *Id*. at 108. The *Sailors* Court found that the county school board members perform "essentially administrative functions," and expressly reserved the issue "whether

a State may constitute a local legislative body through the appointive rather than the elective process." *Id*. at 109-110. A few years later, the Supreme Court considered a challenge to the constitutionality of a statutory method for the election of trustees of a junior college apportioned among school districts throughout the state based on the number of students living in each district. The Court rejected the notion of distinguishing between elections for legislative officials and administrative officials, in favor of the more general category of officials who perform "governmental functions."

> Such a suggestion would leave courts with an equally unmanageable principle since governmental activities 'cannot easily be classified in the neat categories favored by civics texts,' [citation omitted] and it must be rejected. We therefore hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election . . . .

Hadley v. Junior College Distr. Of Metropolitan Kansas City, MO, 397 U.S. 50, 55-56 (1970). The Court thus blurred the lines between administrative and legislative officers, requiring compliance with *Reynolds*' "one man, one vote" where officials who perform governmental functions are selected by election.

Pursuant to PA 436, EMs are given the power to "act for and in the place and stead of the governing body and the office of chief administrative officer of the

local government." Mich. Comp. Laws Ann. § 141.1549(2) (West 2013). Once an EM is appointed, "the governing body and the chief administrative officer of the local government shall not exercise any of the powers of those offices except as may be specifically authorized in writing by the emergency manager . . . and are subject to any conditions required by the emergency manager." *Id*. Thus, contrary to defendants' characterization, the EM is granted expansive legislative powers in addition to executive powers under PA 436. Mich. Comp. Laws Ann. § 141.1552 (West 2013). In essence, PA 436 authorizes the State of Michigan to replace locally elected officials performing governmental functions with an appointed EM.

The right to vote at the local level arguably has even more impact on the lives of citizens than it does at the state or federal level. Mayors and city councils enact the laws most immediately affecting citizens. Voters are still likely to know their local representatives, who are their neighbors, who hold town hall meetings, and who have a unique understanding of the views of their constituents. Where local communities do not have government officials who are answerable to the voters, there are serious shortcomings and likewise serious concerns. This case implicates the rights of citizens to elect the local officials who will in fact carry out the duties of elected office.

The court must reconcile the fact that the plaintiffs in this case were actually able to vote for the legislative representatives in their districts, with their claim that by appointing an EM, PA 436 rendered elected officials virtually powerless. On the one hand, PA 436 does not suspend local elections, does not alter the local election

process, and does not affect voter registration requirements. Plaintiffs do not, and cannot, claim a denial or impairment of their right to vote for elected officials. On the other hand, if the right to vote is to mean anything, certainly it must provide that the elected official wields the powers attendant to their office.

The Supreme Court has only gone so far as to hold that there is a constitutionally protected right to participate in elections on an equal basis with other qualified voters in the jurisdiction. *See Rodriguez,* 457 U.S. 1 (1982); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). The Supreme Court has had multiple opportunities to find a fundamental right to vote, and has passed each time. There are plenty of compelling arguments that the right to vote should be a fundamental right, but it is not this court's place to extend the law. The ability to vote on equal footing when the franchise is extended is what is protected, and the weight of the vote must be equal to that of other voters. No cases go beyond this protection of the right to vote. The voters in jurisdictions with EMs have the same voting opportunity as all other voters in that jurisdiction, and it is not appropriate to compare the voters in jurisdictions with appointed EMs to those in jurisdictions without EMs.

Public Act 436 seeks to put local governments on better financial footing. It does this by appointing an EM in jurisdictions where the Governor and State Treasurer have determined that the local government was experiencing a financial emergency. The Act does not take away a fundamental right to vote, because such a right has never been recognized by the courts.

Plaintiffs' challenge to PA 436 as it relates to giving appointed EMs the governmental functions traditionally belonging to elected officials is subject to rational basis review. The statute is given "a strong presumption of validity" and the state must demonstrate a "reasonably conceivable state of facts that could provide a rational basis" for the law. *Heller v. Doe*, 509 U.S. 312, 319-20 (1993). This standard is highly deferential. *Doe v. Michigan Dept. of State Police*, 490 F.3d 491, 501 (6th Cir. 2007). Justice Powell was cognizant of the court's reserved role in relation to the state legislature's role with regard to reform legislation:

> Of course, every reform that benefits some more than others may be criticized for what it fails to accomplish. But we think it plain that, in substance, the thrust of the Texas system [of public school financing] is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution."

San Antonio v. Rodriguez, 411 U.S. at 39.

PA 436 is based on the legislative finding that the authority and powers conferred by the Act constitute a necessary program and serve a valid public purpose - the fiscal integrity of the State's local governments and the health, safety and welfare of its citizens. Mich. Comp. Laws Ann. § 141.1543(a) (West 2013). On its face, PA 436 applies equally to all jurisdictions in the state, and is invoked when certain indicators of financial stress are present. Defendants' equal

protection challenge to PA 436 in Count 3 is therefore subject to rational basis scrutiny.

To survive rational basis scrutiny, PA 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), and "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 Comm'ns, Inc.*, 508 U.S. 307, 313 (1993). "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 v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985); *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.")

This court recognizes Michigan's legitimate government interest in preventing or rectifying the insolvency of its political subdivisions. Mich. Comp. Laws Ann. §141.1543 (West 2013) (finding it necessary to protect the credit of the state and the fiscal stability of the local governments in order to protect the health, safety, and welfare of the citizens of the state). The court thus finds that PA 436 survives rational basis review. Defendants' motion to dismiss Count 3 is granted.

B. Discrimination Based on Race (Count 4)

Plaintiffs assert that the disproportionate impact the appointment of emergency managers has had on African Americans establishes an equal protection claim. By plaintiffs' calculations, over 52% of Michigan's African Americans are under emergency manager authority pursuant to the enactment of PA 436, compared to two percent of Michigan's Caucasian citizens. Plaintiffs argue that as applied, PA 436 invidiously discriminates between similarly situated groups in the exercise of their fundamental rights, and should thus be subject to strict scrutiny. Defendants, on the other hand, argue that rational basis is the appropriate standard because the law is facially neutral, and plaintiffs have not alleged facts raising a plausible inference of discriminatory intent. They also argue that PA 436 and its application pass rational basis scrutiny, so plaintiffs have failed to state an equal protection claim for racial discrimination.

The Constitution's equal protection requirement does not invalidate a facially-neutral law "simply because it may affect a greater proportion of one race than of another." *Washington v. Davis*, 426 U.S. 229, 242 (1976). Disparate impact "is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977). However, a facially neutral law with a legitimate purpose can still violate the Equal Protection Clause if that law "had a discriminatory effect . . . and was motivated by discriminatory purpose." *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d

523, 533-34 (6th Cir. 2002) (citing *Wayte v. United States*, 470 U.S. 598, 608 (1985)).

Invidious discriminatory intent is an impermissible justification for state action, which triggers strict scrutiny. *See Arlington Heights,* 429 U.S. at 265-66 ("When there is a proof that a discriminatory purpose has been a motivating factor in the decision, [judicial] deference is no longer justified."); *Yick Wo*, 118 U.S. at 373 ("Though the law itself be fair on its face . . . if it is applied and administered by public authority . . . so as practically to make unjust and illegal discriminations between persons in similar circumstances . . . the denial of equal justice is still within the prohibition of the Constitution."). A plaintiff need not demonstrate racial discrimination was dominant in the reasoning for state action to trigger strict scrutiny, but only that it was a motivating factor. *United States v. City of Birmingham*, 727 F.2d 560, 565 (1984).

Since it is inherently difficult to prove discriminatory intent, as legislators rarely admit to it, claimants may use a number of objective factors to determine the existence of such intent. *Id.* (citing *Arlington Heights*, 429 U.S. at 266-68). For example, proof of discriminatory impact may demonstrate unconstitutionality in "circumstances [in which] the discrimination is very difficult to explain on nonracial grounds." *Batson v. Kentucky*, 476 U.S. 79, 93 (1986). The legislative or factual history may also be relevant, as well as any procedural or substantive departures from the state's usual course of action. *Arlington Heights*, 429 U.S. at 266-68. Additionally, and most important to this case, claimants may also use statistics to demonstrate the absence of a rational,

nonracial purpose for a certain policy. *Farm Labor Org. Comm.*, 308 F.3d at 534 (citations omitted).

At the motion to dismiss stage, plaintiffs need only state a *plausible* claim for relief. *Iqbal*, 556 U.S. at 678. Since statistical evidence can be used to demonstrate unconstitutional discriminatory action, plaintiffs at this stage must plead some facts that demonstrate the plausibility that emergency managers have been appointed in an intentionally discriminatory manner. The First Amended Complaint states that 52% of Michigan's African American population resides in cities with an EM, a consent agreement, or a transition advisory board. At the same time, only about 2% of Michigan's white citizens live in communities governed by an EM. PA 436 has been applied to multiple municipalities of different sizes and jurisdictions, and almost all of them are predominantly black.

Additionally, the Michigan Department of Treasury maintains a scoring system to determine the financial health of the state's cities and townships. The latest information available from the state is for fiscal year 2009. Fiscal indicator scores between 5 and 7 place a municipality on a fiscal watch list, while scores between 8 and 10 result in the community receiving consideration for review. However, six out of seven communities (85%) with a majority population of racial and ethnic minorities received EMs when they had scores of 7. At the same time, none of the twelve communities (0%) with a majority white population received an EM despite having scores of 7 or higher. Defendants argue that these statistics are old and of no application to PA 436, but the history of state intervention makes it reasonable to assume that

similar statistics are available in discovery to support plaintiffs' claims regarding the pattern of decision making.

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

C. Discrimination Based on Wealth (Count 5)

Plaintiffs' third equal protection claim relates to alleged wealth discrimination. Plaintiffs claim that the implementation of PA 436 has yielded disproportionately more emergency manager appointments in lower-income communities. Plaintiffs maintain that PA 436 therefore conditions a citizen's right to vote in local elections on the wealth of their community. Defendants argue that the general wealth of a community does not determine whether an emergency manager is appointed, but rather the financial situation that they currently exhibit. *See* Mich. Comp. Laws Ann. § 141.1544 (West 2013). Defendants contend that regardless, wealth-based classifications do not discriminate against a suspect class, and therefore rational basis scrutiny is appropriate.

Whenever a state "makes the affluence of the voter . . . an electoral standard," it violates the Equal Protection Clause. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966) (finding poll tax unconstitutional under Equal Protection Clause). The Supreme Court explained that an individual's voting ability and qualifications have "no relation" to his or her wealth, and "to introduce wealth . . . as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." *Id.* at 668. "The degree of the discrimination is irrelevant." *Id.* In fact, the Supreme Court has explicitly confirmed that all voters have an equal right to vote, "whatever their income." *Gray*, 372 U.S. at 380. Therefore, strict scrutiny will apply when the ability to vote is restricted by wealth. *Harper*, 383 U.S. at 669.

In this case there is no restriction on the plaintiffs' ability to vote based on their wealth. Plaintiffs do not contend that they are required to pay a poll tax or any other fee, or that they must demonstrate their wealth in some other way, before they are permitted to vote in local elections.

Furthermore, PA 436 does not use the wealth of individual citizens, or even the community as a whole, to determine whether an EM is appointed. Rather, it is the overall financial condition and prognosis of a local unit of government that will subject it to review and the possible appointment of an emergency manager. Any community whose financial books are not in order is subject to review under PA 436, regardless of the relative wealth of that community. How a community's resources are managed will be reviewed in making the

determination whether to appoint an EM. Mich. Comp. Laws Ann. § 141.1547(1) (West 2013).

Plaintiffs have not alleged a valid, plausible claim of wealth discrimination. Defendants' motion to dismiss Count 5 is granted.

D. Discrimination Against Localities with Emergency Manager Appointed Under Previous Laws (Count 9)

Under PA 436, after a particular EM has been in office for 18 months, he or she can be removed upon the approval of the chief executive and 2/3 vote of city council or the school board. If this occurs, the local government may negotiate a consent agreement with the state treasurer. If a consent agreement is not agreed upon within 10 days, the local government shall proceed with the neutral evaluation process set out at Mich. Comp. Laws Ann. § 141.1565 (West 2013). The neutral evaluator's job is to facilitate a settlement or plan of readjustment between the local government and "interested parties." The neutral evaluation process can last for a maximum of 90 days following the date the neutral evaluator is selected. The process ends with either a settlement of all pending disputes, or a resolution of the local government recommending that the local government proceed under Chapter 9.

Plaintiffs' fourth and final equal protection claim concerns localities that were under emergency manager authority *before* the effective date of PA 436. Plaintiffs in those localities assert unequal treatment because, despite their time under emergency manager authority pursuant to PA 72 and/or PA 4, they must wait an additional 18 months after the enactment of PA 436 to

engage in the removal process. Mich. Comp. Laws Ann. § 141.1549(6)(c) (West 2013). Plaintiffs argue that this imposes *more* than an 18-month wait period for certain localities, in comparison to a locality that was not previously under emergency manager authority, which must only wait 18 months. The equal protection rights violation identified by plaintiffs is that they are treated differently than similarly situated persons in localities placed under EM governance after the effective date of PA 436, and that such disparate treatment burdens the fundamental right to vote.

Plaintiffs identify the similarly situated groups as localities governed by EMs originally appointed prior to PA 436's effective date and those governed by EMs appointed after PA 436's effective date. The court, however, does not conclude that the two groups are similarly situated for purposes of equal protection analysis.

There is a clear difference between the powers of an emergency financial manager under PA 72 and an emergency manager under PA 436. Thus, a new 18-month limitation on removal is a rational means to the legitimate end of allowing such an emergency manager time to oversee the enactment of policies in the new areas of authority. The court does acknowledge that emergency managers under PA 4 enjoyed essentially the same authority as they do under PA 436. However, the revival of PA 72 during the referendum significantly diminished emergency manager authority, which was again expanded upon the enactment of PA 436. Given this period of flux in the scope of emergency managers' authority, it is rational for the state legislature to restart the clock on the removal wait

period. Even if the two groups compared by plaintiffs were similarly situated, PA 436's 18-month provision passes rational basis scrutiny.

Plaintiffs have therefore failed to state a valid equal protection claim on behalf of localities with emergency manager authority originally appointed under PA 72 or PA 4. Defendants' motion to dismiss Count 9 is granted.

V. Voting Rights Act (Count 6)

Section 2 of the Voting Rights Act prohibits any jurisdiction from using racially discriminatory voting practices and procedures resulting in disenfranchisement of minority voters.

> (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 abridgment of the right of any citizen of the United States to vote on account of race or color . . .
>
> (b) A violation of [this prohibition] is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [race] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973.

Plaintiffs allege that by providing for the appointment of emergency managers in a way that diminishes African American voting power, PA 436 is a "standard, practice, or procedure" that violates Section 2 of the Voting Rights Act. Specifically, plaintiffs allege that PA 436 abridges their right to vote in local elections where EMs have been appointed because the elected officials' governing authority in those locales is "substantially removed, circumscribed, and conditional." Plaintiffs cite the same statistics cited in their race equal protection claim, asserting that emergency managers have been appointed in a disproportionately high number of areas with large African American populations, while predominantly white municipalities in similar financial distress do not have an EM imposed by state action.

The fundamental problem with plaintiffs' argument is that PA 436 is not a "standard, practice or procedure . . . which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race . . . ." Plaintiffs do not take issue directly with the voting system in which local officials are elected. They are not alleging that there was an impediment to their ability to vote, such as an identification requirement, a felon disenfranchisement provision, or a problem with polling locations or hours. Rather, plaintiffs take issue with the fact that citizens in municipalities under emergency management have a vote that does not mean anything since the officials they elect have no decision-making authority.

The Supreme Court distinguishes between changes in a standard, practice or procedure directly affecting voting by the electorate and "changes in the routine

organization and functioning of government." *Presley v. Etowah County Commission*, 502 U.S. 491, 504 (1992). While the latter may indirectly affect voting, such organizational changes are not within the scope of Section 2 of the Voting Rights Act. Although *Presley* actually addressed the scope of Section 5 of the Voting Rights Act, its analysis applies to Section 2 because the Court defined terms that are embodied in both sections: "voting qualification or prerequisite to voting, or standard, practice, or procedure" with respect to voting. *See Holder v. Hall*, 512 U.S. 874, 882 (1994) (Kennedy, J.) ("[T]he coverage of §§ 2 and 5 is presumed to be the same.")

In *Presley*, the Supreme Court held that the Voting Rights Act applies only to a change in a standard, practice, or procedure that has a "direct relation to, or impact on, voting." *Id*. at 506. The Court observed that it recognizes four types of changes that meet the "direct relation" test: those that (1) "involve[] the manner of voting"; (2) "involve candidacy requirements and qualifications"; (3) "concern[] changes in the composition of the electorate that may vote for candidates for a given office" or (4) "affect the creation or abolition of an elective office." *Id*. at 502–03 (citations omitted). "The first three categories involve changes in election procedures, while all the examples within the fourth category might be termed substantive changes as to which offices are elective." *Id*. at 503.

The *Presley* plaintiffs were newly elected black commissioners who argued that a transfer of duties among and away from elected officials pertaining to repairs and discretionary spending for road maintenance within two Alabama county commissions

constituted "changes" that had a direct relation to voting, and, thus, required preclearance under Section 5 of the Act. The first alleged change took away the commissioners' discretion to allocate funds as needed in their districts and instead put all funds in a common account to be doled out based upon needs of the county as a whole. The second alleged change transferred authority concerning road and bridge operations from the elected county commissioners to an appointed county engineer who answered to the commission.

The Court held that these changes did not fit within any of the four categories recognized as having a direct relation to voting. The first alleged change "concern[ed] the internal operations of an elected body." *Id*. at 503. "Changes which affect only the distribution of power among officials are not subject to § 5 because such changes have no direct relation to, or impact on, voting." *Id*. at 506. Perhaps more on point to the case pending before this court, the second alleged change was also found not to be a voting practice or procedure because even if "the delegation of authority to an appointed official is similar to the replacement of an elected official with an appointed one", it did not "change[ ] an elective office to an appointive one." *Id*. at 506–07. Both before and after the change, the county voters could elect their county commissioners. The same holds true in this case. Before and after the enactment of PA 436, the electorate can elect their city council members and mayors.

In 1994, the Supreme Court addressed a Section 2 Voting Rights Act challenge to the size of the Bleckley County, Georgia Commission. *Holder*, 512 U.S. 874. Bleckley County always had a single-commission form

of government, but the state legislature authorized the county to adopt by referendum a multimember commission consisting of five members elected from single-member districts and a chair elected at-large. Voters defeated the proposal to adopt a multimember district, which prompted a challenge by black voters who wanted a chance to elect a commissioner to represent their allegedly cohesive district. A majority of the Supreme Court held that the size of a governing body is not subject to a vote dilution challenge under Section 2 of the Voting Rights Act. The plurality opinion explained that in order to find liability in a Section 2 case, a court must find a reasonable alternative practice as a benchmark against which to measure whether the existing voting practice results in vote dilution. *Id*. at 880. They Court opined that this was problematic for plaintiffs because "[t]here is no principled reason why one size should be picked over another as the benchmark for comparison." *Id*. at 881. The plurality concluded that "a plaintiff cannot maintain a § 2 challenge to the size of a government body . . . ." *Id*. at 885. Justices Thomas and Scalia concurred with this holding, but emphasized that "[o]nly a 'voting qualification or prerequisite to voting, or standard, practice, or procedure' can be challenged under § 2" and concluded that the size of a governing body is not a "standard, practice, or procedure" within the terms of section 2. *Id*. at 892.

This court has considered the state of local elections in the challenged jurisdictions before and after PA 436 became effective. In replacing elected officials with an appointed Emergency Manager, PA 436 changes the decision-making authority of elected officials. PA 436 concerns both the internal operations of an elected body

and the distribution of power among officials. Such changes, though dramatic and meaningful, are not changes in voting standards, practices, or procedures to render PA 436 subject to Section 2 of the Voting Rights Act. The court does not take plaintiffs' challenge lightly, and is cognizant that the Voting Rights Act is to be given "'the broadest possible scope,'" and that the Act "'was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race.'" *Id*. at 895 (quoting *Allen v. State Bd. Of Elections*, 393 U.S. 544, 565, 567 (1969)).

Plaintiffs in this case challenge a temporary reorganization of government, not a voting standard or procedure. The residents of affected communities in this State retain their voting rights and can again repeal the enactment as they did its predecessor; or they can simply replace the state officers who ignored voter sentiment in enacting Act 436. This political process remains the correct means for redress rather than attempting to restructure government under the auspices of the Voting Rights Act. The problem is one that must be addressed through the political process as opposed to bringing a challenge under the Voting Rights Act. Defendants' motion to dismiss Count 6 is granted.

VI. First Amendment Claims (Count 7)

A. Viewpoint Discrimination

Plaintiffs assert that defendants engaged in viewpoint discrimination by enacting PA 436, which suppressed the viewpoint expressed by the citizens' referendum on PA 4. According to plaintiffs, the

government has violated the First Amendment by regulating speech based on its substantive content, and suppressing particular views, on the subject of how to remedy financial exigencies of local governments. Defendants argue that no viewpoint discrimination has occurred because the state government engaged in the proper governmental process of enacting a law.

Viewpoint discrimination violates the First Amendment when it regulates speech based on substantive content. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). However, legislative action supportive of a given policy choice does not necessarily constitute viewpoint discrimination, otherwise all governmental action would be unconstitutional. Instead, viewpoint discrimination reaches unconstitutionality when it "favors one speaker over another." *Id.* When the State enacted PA 436, it did not abridge the speech rights of any group based on their message. This logic is explained in *Michigan Farm Bureau v. Hare*:

> [W]hen an act of the legislature is referred, that particular act is suspended in its operation, but that such [s]uspension does not deprive the [l]egislature of the right thereafter to pass . . . [or] deal with exactly the same subject as the referred act, and in the same manner, but subject, of course, to the same right of reference as was the original act.

379 Mich. 387, 398 (1967). Michigan residents who voted to reject PA 4 have no less ability to express their opinions or petition the state government to overturn PA 436. As noted in the last section, those individuals retain their opportunity to reject PA 436 through

referendum in the next election. Enacting a law that has been previously referred is brow-raising because it is politically dubious, not because it is unconstitutional. Plaintiffs have made no valid claim to unconstitutional viewpoint discrimination.

B. Freedom of Speech

Plaintiffs claim that their speech rights were violated when defendants appointed an emergency manager to their local government, effectively removing their previously elected local officials. Defendants argue that no abridgement of the freedom of speech has occurred because PA 436 provides both "voice and choice." Citizens have "voice" because they can advocate for the removal of the emergency manager or appeal the decision under PA 436 to appoint an emergency manager. They also have "choice" because once a locality is declared financially unstable, PA 436 provides the local government with a choice between an emergency manager, a consent agreement, a neutral evaluation process, and bankruptcy.

"Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const., amend. I. The "first amendment protects . . . the right of citizens to band together in *promoting* among the electorate candidates who espouse their political views." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (emphasis added). Freedom of speech doctrine is implicated when issues of advocacy and expression are raised. An invalid abridgement of this right entails a governmental action that prevents an individual from demonstrating or promoting an idea, whether symbolic or expressive. *See, e.g.*, *Stromberg v. Cal.*, 283 U.S. 359 (1931) (invalidating a law prohibiting the flying of a red

flag as an abridgment of symbolic speech). Nothing in plaintiffs' pleadings suggests that plaintiffs are any less able to freely and openly advocate for a certain state or local policy. Thus, plaintiffs have not met the threshold of a valid speech abridgement claim.

Plaintiffs cite to an Eighth Circuit case, *Peeper v. Callaway Cnty. Ambulance Dist.*, 122 F.3d 619 (8th Cir. 1997), for the proposition that limiting a local officeholders' power amounts to a limitation of speech rights for the officeholders' constituents. However, in *Peeper*, the court used rational-basis review to find that the removal of the single board member was irrational and therefore invalid. *Id.* at 623. Here, the removal of local governments' decision-making authority pursuant to PA 436 is rationally related to the legitimate governmental interest of solving financial crises. Therefore, plaintiffs have not shown that defendants' actions amount to an invalid abridgment of their freedom of speech.

C. Right to Petition Government

Plaintiffs' final First Amendment claim relates to their ability to petition their own local government. Plaintiffs argue that appointing an emergency manager who is not directly accountable to local citizens prevents those citizens from petitioning their local government. Defendants argue that no violation has occurred because plaintiffs' petition rights do not extend to local government, plaintiffs can still petition local officials to remove the emergency manager, and plaintiffs can petition their state government to amend PA 436 or any related legislation.

States are free to make decisions regarding the political control of localities as long as the state citizens are free to "urge proposals" to the state. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 73-74 (1978). This is because states have final authority over local matters: "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be instructed to them." *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907). "[U]ltimate control of every state-created entity resides with the State . . . [and] political subdivisions exist solely at the whim of their state." *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994) (citations omitted). The limitations on this power exist at the borders of constitutional limits: for example, the state may not intentionally discriminate among localities in a manner that violates the Equal Protection Clause. Additionally, the Petition Clause does not require that the state actually respond to citizen petitions; it only requires that the state allow its citizens to make the government aware of its views. *Confora v. Olds*, 562 F.2d 363, 364 (6th Cir. 1977) ("[N]either in the First Amendment nor elsewhere in the Constitution is there a provision guaranteeing that all petitions for the redress of grievances will meet with success.").

Plaintiffs have not alleged that defendants prevented them from petitioning the state government. Despite their claim that the emergency manager is politically unaccountable, plaintiffs have the power to petition their locally elected officials to remove the emergency manager. Other options are available as well: they can petition the state government to alter state law, can promote and elect state representative

candidates who promise to repeal or amend PA 436, and can bring a referendum petition to invalidate PA 436. Plaintiffs have failed to state a valid claim that defendants violated their constitutional right to petition their government.

VII. Thirteenth Amendment Claim (Count 8)

Plaintiffs' final claim is that defendants' actions amount to a vestige of slavery in violation of the Thirteenth Amendment. Plaintiffs argue that the allegedly discriminatory implementation of PA 436 amounts to the disenfranchisement of African Americans in Michigan, which is an unconstitutional incident or badge of slavery. Section One of the Thirteenth Amendment states: "Neither slavery not involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII. Section Two states: "Congress shall have power to enforce this article by appropriate legislation." *Id.* Plaintiffs bring this count under 42 U.S.C. § 1983, meaning they claim that defendants' actions amount to a direct violation of the *first* section of the Thirteenth Amendment, and not any federal statute enabled by Section Two. Thus, in order to state a claim for relief, plaintiffs must demonstrate that defendants' actions have imposed a badge of slavery or involuntary servitude upon African American residents of Michigan.

In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Supreme Court ruled that the Thirteenth Amendment enables Congress to prohibit "badges and incidents of slavery" when they include "restraints upon 'those fundamental rights which are the essence of civil freedom . . .'" *Id.* at 441 (citations omitted). The

question of whether the Thirteenth Amendment itself could be found to prohibit such vestiges of slavery was not determined. In *City of Memphis v. Greene*, 451 U.S. 100 (1981), the Court revisited the question whether courts may strike down state action pursuant to Section One of the Thirteenth Amendment when the action amounts to an incident or badge of slavery. The Court acknowledged it may be an "open question whether § 1 of the [Thirteenth Amendment] by its own terms did anything more than abolish slavery." *Id*. at 125-26. However, the *Greene* Court found it unnecessary to make a determination on that question because the state action at issue, closing down a street in Memphis in a way that effectively segregated races within the city, could not be "fairly characterized as a badge or incident of slavery." *Id*. at 125-26. The Court started with the proposition that the city council had wide discretion in making policy decisions regarding traffic flow and safety. Any inconvenience to motorists was a function of where they lived and drove, not of their race. The Court recognized that closing streets will always impact one area more than another, and because neighborhoods are often characterized by a common ethnic or racial heritage, "a regulation's adverse impact on a particular neighborhood will often have a disparate effect on an identifiable ethnic or racial group." *Id*. at 128. The Court concluded that the impact of closing the street "is a routine burden of citizenship; it does not reflect a violation of the Thirteenth Amendment." *Id*. at 129.

The alleged infringement in *Greene* was that the street closing deprived African Americans of access to their property equal to the access enjoyed by white citizens. In this case, the right allegedly infringed by

the state action is the right to vote. As discussed throughout this opinion, plaintiffs have not lost their right to vote. Not only is there no restraint on plaintiffs' ability to vote in local elections, the power of the entire political process is available to them to attempt to effectuate any changes to the restructuring of government imposed upon them by PA 436. Plaintiffs remain free to voice their dissatisfaction with PA 436 at town hall meetings, or through protests and letter writing campaigns to newspapers and their representatives. They can initiate new legislation through a petition process, or use the referendum procedure to reject PA 436, as was successfully done with the previous version of the emergency manager law, PA 4. Finally, voters can force a recall election to remove legislators who are unresponsive to their views. With every device in the political arsenal remaining available to plaintiffs, a law directed at temporarily reorganizing local government for the purpose of addressing a serious fiscal concern cannot be characterized as a vestige of slavery.

Plaintiffs have failed to state a plausible cause of action for a violation of the Thirteenth Amendment. Defendants' motion to dismiss Count 8 is granted.

CONCLUSION

Plaintiffs have failed to state a claim for relief on all counts except for their allegations that PA 436 violates the Equal Protection Clause by treating similarly situated persons differently in a manner that has a disproportionate impact on a suspect class, that being African American citizens. Therefore, defendants' motion to dismiss is GRANTED as to Counts 1, 2, 3, 5, 6, 7, 8, and 9, and DENIED as to Count 4 of plaintiffs'

First Amended Complaint. In addition, defendants' motion to stay proceedings is DENIED.

Dated: November 19, 2014

s/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

Copies of this Order were served upon attorneys of record on November 19, 2014, by electronic and/or ordinary mail.

s/Marcia Beauchemin
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15-2394

[Filed November 1, 2016]

CATHERINE PHILLIPS, ET AL., Plaintiffs,	)
RUSSELL BELLANT, ET AL. Plaintiffs-Appellants,	)
v.	)
RICHARD D. SNYDER; ANDREW DILLON, Defendants-Appellees.	)

O R D E R

BEFORE: SUHRHEINRICH, ROGERS, and GRIFFIN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX E

LOCAL FINANCIAL STABILITY AND CHOICE ACT [Excerpts]

Act 436 of 2012

AN ACT to safeguard and assure the financial accountability of local units of government and school districts; to preserve the capacity of local units of government and school districts to provide or cause to be provided necessary services essential to the public health, safety, and welfare; to provide for review, management, planning, and control of the financial operation of local units of government and school districts and the provision of services by local units of government and school districts; to provide criteria to be used in determining the financial condition of local units of government and school districts; to authorize a declaration of the existence of a financial emergency within a local unit of government or school district; to prescribe remedial measures to address a financial emergency within a local unit of government or school district; to provide for a review and appeal process; to provide for the appointment and to prescribe the powers and duties of an emergency manager for a local unit of government or school district; to provide for the modification or termination of contracts under certain circumstances; to provide for the termination of a financial emergency within a local unit of government or school district; to provide a process by which a local unit of government or school district may file for bankruptcy; to prescribe the powers and duties of

certain state agencies and officials and officials within local units of government and school districts; to provide for appropriations; and to repeal acts and parts of acts.

* * *

141.1547 Local government options; approval of resolution by mayor or school board; failure of local governing body to pass resolution; limitation.

Sec. 7. (1) Notwithstanding section 6(3), upon the confirmation of a finding of a financial emergency under section 6, the governing body of the local government shall, by resolution within 7 days after the confirmation of a finding of a financial emergency, select 1 of the following local government options to address the financial emergency:

(a) The consent agreement option pursuant to section 8.

(b) The emergency manager option pursuant to section 9.

(c) The neutral evaluation process option pursuant to section 25.

(d) The chapter 9 bankruptcy option pursuant to section 26.

(2) Subject to subsection (3), if the local government has a strong mayor, the resolution under subsection (1) requires strong mayor approval. If the local government is a school district, the resolution shall be approved by the school board. The resolution shall be filed with the state treasurer, with a copy to the

superintendent of public instruction if the local government is a school district.

(3) If the governing body of the local government does not pass a resolution as required under subsection (1), the local government shall proceed under the neutral evaluation process pursuant to section 25.

(4) Subject to section 9(6)(c) and (11), unless authorized by the governor, a local government shall not utilize 1 of the local options listed in subsection (1)(a) to (d) more than 1 time.

* * *

141.1549 Emergency manager; appointment by governor; powers; qualifications; compensation; private funds; additional staff and assistance; quarterly reports; service; removal of local government from receivership; delegation of duties from governor to state treasurer; applicable state laws; appointment under former act; removal.

Sec. 9. (1) The governor may appoint an emergency manager to address a financial emergency within that local government as provided for in this act.

(2) Upon appointment, an emergency manager shall act for and in the place and stead of the governing body and the office of chief administrative officer of the local government. The emergency manager shall have broad powers in receivership to rectify the financial emergency and to assure the fiscal accountability of the local government and the local government's capacity to provide or cause to be provided necessary governmental services essential to the public health,

safety, and welfare. Following appointment of an emergency manager and during the pendency of receivership, the governing body and the chief administrative officer of the local government shall not exercise any of the powers of those offices except as may be specifically authorized in writing by the emergency manager or as otherwise provided by this act and are subject to any conditions required by the emergency manager.

(3) All of the following apply to an emergency manager:

(a) The emergency manager shall have a minimum of 5 years' experience and demonstrable expertise in business, financial, or local or state budgetary matters.

(b) The emergency manager may, but need not, be a resident of the local government.

(c) The emergency manager shall be an individual.

(d) Except as otherwise provided in this subdivision, the emergency manager shall serve at the pleasure of the governor. An emergency manager is subject to impeachment and conviction by the legislature as if he or she were a civil officer under section 7 of article XI of the state constitution of 1963. A vacancy in the office of emergency manager shall be filled in the same manner as the original appointment.

(e) The emergency manager's compensation shall be paid by this state and shall be set forth in a contract approved by the state treasurer. The contract shall be posted on the department of treasury's website within 7 days after the contract is approved by the state treasurer.

(f) In addition to the salary provided to an emergency manager in a contract approved by the state treasurer under subdivision (e), this state may receive and distribute private funds to an emergency manager. As used in this subdivision, "private funds" means any money the state receives for the purpose of allocating additional salary to an emergency manager. Private funds distributed under this subdivision are subject to section 1 of 1901 PA 145, MCL 21.161, and section 17 of article IX of the state constitution of 1963.

(4) In addition to staff otherwise authorized by law, an emergency manager shall appoint additional staff and secure professional assistance as the emergency manager considers necessary to fulfill his or her appointment.

(5) The emergency manager shall submit quarterly reports to the state treasurer with respect to the financial condition of the local government in receivership, with a copy to the superintendent of public instruction if the local government is a school district and a copy to each state senator and state representative who represents that local government. In addition, each quarterly report shall be posted on the local government's website within 7 days after the report is submitted to the state treasurer.

(6) The emergency manager shall continue in the capacity of an emergency manager as follows:

(a) Until removed by the governor or the legislature as provided in subsection (3)(d). If an emergency manager is removed, the governor shall within 30 days of the removal appoint a new emergency manager.

(b) Until the financial emergency is rectified.

(c) If the emergency manager has served for at least 18 months after his or her appointment under this act, the emergency manager may, by resolution, be removed by a 2/3 vote of the governing body of the local government. If the local government has a strong mayor, the resolution requires strong mayor approval before the emergency manager may be removed. Notwithstanding section 7(4), if the emergency manager is removed under this subsection and the local government has not previously breached a consent agreement under this act, the local government may within 10 days negotiate a consent agreement with the state treasurer. If a consent agreement is not agreed upon within 10 days, the local government shall proceed with the neutral evaluation process pursuant to section 25.

(7) A local government shall be removed from receivership when the financial conditions are corrected in a sustainable fashion as provided in this act. In addition, the local government may be removed from receivership if an emergency manager is removed under subsection (6)(c) and the governing body of the local government by 2/3 vote approves a resolution for the local government to be removed from receivership. If the local government has a strong mayor, the resolution requires strong mayor approval before the local government is removed from receivership. A local government that is removed from receivership while a financial emergency continues to exist as determined by the governor shall proceed under the neutral evaluation process pursuant to section 25.

(8) The governor may delegate his or her duties under this section to the state treasurer.

(9) Notwithstanding section 3(1) of 1968 PA 317, MCL 15.323, an emergency manager is subject to all of the following:

(a) 1968 PA 317, MCL 15.321 to 15.330, as a public servant.

(b) 1973 PA 196, MCL 15.341 to 15.348, as a public officer.

(c) 1968 PA 318, MCL 15.301 to 15.310, as if he or she were a state officer.

(10) An emergency financial manager appointed under former 1988 PA 101 or former 1990 PA 72, and serving immediately prior to the effective date of this act, shall be considered an emergency manager under this act and shall continue under this act to fulfill his or her powers and duties. Notwithstanding any other provision of this act, the governor may appoint a person who was appointed as an emergency manager under former 2011 PA 4 or an emergency financial manager under former 1988 PA 101 or former 1990 PA 72 to serve as an emergency manager under this act.

(11) Notwithstanding section 7(4) and subject to the requirements of this section, if an emergency manager has served for less than 18 months after his or her appointment under this act, the governing body of the local government may pass a resolution petitioning the governor to remove the emergency manager as provided in this section and allow the local government to proceed under the neutral evaluation process as provided in section 25. If the local government has a strong mayor, the resolution requires strong mayor approval. If the governor accepts the resolution, notwithstanding section 7(4), the local government

shall proceed under the neutral evaluation process as provided in section 25.

* * *

141.1552 Additional actions by emergency manager; suspension of power of administrative officer and governing body; contracts subject to competitive bidding; sale or transfer of public utility; limitation.

Sec. 12. (1) An emergency manager may take 1 or more of the following additional actions with respect to a local government that is in receivership, notwithstanding any charter provision to the contrary:

(a) Analyze factors and circumstances contributing to the financial emergency of the local government and initiate steps to correct the condition.

(b) Amend, revise, approve, or disapprove the budget of the local government, and limit the total amount appropriated or expended.

(c) Receive and disburse on behalf of the local government all federal, state, and local funds earmarked for the local government. These funds may include, but are not limited to, funds for specific programs and the retirement of debt.

(d) Require and approve or disapprove, or amend or revise, a plan for paying all outstanding obligations of the local government.

(e) Require and prescribe the form of special reports to be made by the finance officer of the local government to its governing body, the creditors of the local government, the emergency manager, or the public.

(f) Examine all records and books of account, and require under the procedures of the uniform budgeting and accounting act, 1968 PA 2, MCL 141.421 to 141.440a, or 1919 PA 71, MCL 21.41 to 21.55, or both, the attendance of witnesses and the production of books, papers, contracts, and other documents relevant to an analysis of the financial condition of the local government.

(g) Make, approve, or disapprove any appropriation, contract, expenditure, or loan, the creation of any new position, or the filling of any vacancy in a position by any appointing authority.

(h) Review payrolls or other claims against the local government before payment.

(i) Notwithstanding any minimum staffing level requirement established by charter or contract, establish and implement staffing levels for the local government.

(j) Reject, modify, or terminate 1 or more terms and conditions of an existing contract.

(k) Subject to section 19, after meeting and conferring with the appropriate bargaining representative and, if in the emergency manager's sole discretion and judgment, a prompt and satisfactory resolution is unlikely to be obtained, reject, modify, or terminate 1 or more terms and conditions of an existing collective bargaining agreement. The rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement under this subdivision is a legitimate exercise of the state's sovereign powers if the emergency manager and state

treasurer determine that all of the following conditions are satisfied:

(*i*) The financial emergency in the local government has created a circumstance in which it is reasonable and necessary for the state to intercede to serve a significant and legitimate public purpose.

(*ii*) Any plan involving the rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement is reasonable and necessary to deal with a broad, generalized economic problem.

(*iii*) Any plan involving the rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement is directly related to and designed to address the financial emergency for the benefit of the public as a whole.

(*iv*) Any plan involving the rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement is temporary and does not target specific classes of employees.

(*l*) Act as sole agent of the local government in collective bargaining with employees or representatives and approve any contract or agreement.

(m) If a municipal government's pension fund is not actuarially funded at a level of 80% or more, according to the most recent governmental accounting standards board's applicable standards, at the time the most recent comprehensive annual financial report for the municipal government or its pension fund was due, the

emergency manager may remove 1 or more of the serving trustees of the local pension board or, if the state treasurer appoints the emergency manager as the sole trustee of the local pension board, replace all the serving trustees of the local pension board. For the purpose of determining the pension fund level under this subdivision, the valuation shall exclude the net value of pension bonds or evidence of indebtedness. The annual actuarial valuation for the municipal government's pension fund shall use the actuarial accrued liabilities and the actuarial value of assets. If a pension fund uses the aggregate actuarial cost method or a method involving a frozen accrued liability, the retirement system actuary shall use the entry age normal actuarial cost method. If the emergency manager serves as sole trustee of the local pension board, all of the following apply:

(*i*) The emergency manager shall assume and exercise the authority and fiduciary responsibilities of the local pension board including, to the extent applicable, setting and approval of all actuarial assumptions for pension obligations of a municipal government to the local pension fund.

(*ii*) The emergency manager shall fully comply with the public employee retirement system investment act, 1965 PA 314, MCL 38.1132 to 38.1140m, and section 24 of article IX of the state constitution of 1963, and any actions taken shall be consistent with the pension fund's qualified plan status under the federal internal revenue code.

(*iii*) The emergency manager shall not make changes to a local pension fund without identifying the changes and the costs and benefits associated

with the changes and receiving the state treasurer's approval for the changes. If a change includes the transfer of funds from 1 pension fund to another pension fund, the valuation of the pension fund receiving the transfer must be actuarially funded at a level of 80% or more, according to the most recent governmental accounting standards board's applicable standards, at the time the most recent comprehensive annual financial report for the municipal government was due.

(*iv*) The emergency manager's assumption and exercise of the authority and fiduciary responsibilities of the local pension board shall end not later than the termination of the receivership of the municipal government as provided in this act.

(n) Consolidate or eliminate departments of the local government or transfer functions from 1 department to another and appoint, supervise, and, at his or her discretion, remove administrators, including heads of departments other than elected officials.

(o) Employ or contract for, at the expense of the local government and with the approval of the state financial authority, auditors and other technical personnel considered necessary to implement this act.

(p) Retain 1 or more persons or firms, which may be an individual or firm selected from a list approved by the state treasurer, to perform the duties of a local inspector or a local auditor as described in this subdivision. The duties of a local inspector are to assure integrity, economy, efficiency, and effectiveness in the operations of the local government by conducting meaningful and accurate investigations and forensic

audits, and to detect and deter waste, fraud, and abuse. At least annually, a report of the local inspector shall be submitted to the emergency manager, the state treasurer, the superintendent of public instruction if the local government is a school district, and each state senator and state representative who represents that local government. The annual report of the local inspector shall be posted on the local government's website within 7 days after the report is submitted. The duties of a local auditor are to assure that internal controls over local government operations are designed and operating effectively to mitigate risks that hamper the achievement of the emergency manager's financial plan, assure that local government operations are effective and efficient, assure that financial information is accurate, reliable, and timely, comply with policies, regulations, and applicable laws, and assure assets are properly managed. At least annually, a report of the local auditor shall be submitted to the emergency manager, the state treasurer, the superintendent of public instruction if the local government is a school district, and each state senator and state representative who represents that local government. The annual report of the local auditor shall be posted on the local government's website within 7 days after the report is submitted.

(q) An emergency manager may initiate court proceedings in the Michigan court of claims or in the circuit court of the county in which the local government is located in the name of the local government to enforce compliance with any of his or her orders or any constitutional or legislative mandates, or to restrain violations of any constitutional or legislative power or his or her orders.

(r) Subject to section 19, if provided in the financial and operating plan, or otherwise with the prior written approval of the governor or his or her designee, sell, lease, convey, assign, or otherwise use or transfer the assets, liabilities, functions, or responsibilities of the local government, provided the use or transfer of assets, liabilities, functions, or responsibilities for this purpose does not endanger the health, safety, or welfare of residents of the local government or unconstitutionally impair a bond, note, security, or uncontested legal obligation of the local government.

(s) Apply for a loan from the state on behalf of the local government, subject to the conditions of the emergency municipal loan act, 1980 PA 243, MCL 141.931 to 141.942.

(t) Order, as necessary, 1 or more millage elections for the local government consistent with the Michigan election law, 1954 PA 116, MCL 168.1 to 168.992, sections 6 and 25 through 34 of article IX of the state constitution of 1963, and any other applicable state law.

(u) Subject to section 19, authorize the borrowing of money by the local government as provided by law.

(v) Approve or disapprove of the issuance of obligations of the local government on behalf of the local government under this subdivision. An election to approve or disapprove of the issuance of obligations of the local government pursuant to this subdivision shall only be held at the general November election.

(w) Enter into agreements with creditors or other persons or entities for the payment of existing debts, including the settlement of claims by the creditors.

(x) Enter into agreements with creditors or other persons or entities to restructure debt on terms, at rates of interest, and with security as shall be agreed among the parties, subject to approval by the state treasurer.

(y) Enter into agreements with other local governments, public bodies, or entities for the provision of services, the joint exercise of powers, or the transfer of functions and responsibilities.

(z) For municipal governments, enter into agreements with other units of municipal government to transfer property of the municipal government under 1984 PA 425, MCL 124.21 to 124.30, or as otherwise provided by law, subject to approval by the state treasurer.

(aa) Enter into agreements with 1 or more other local governments or public bodies for the consolidation of services.

(bb) For a city, village, or township, the emergency manager may recommend to the state boundary commission that the municipal government consolidate with 1 or more other municipal governments, if the emergency manager determines that consolidation would materially alleviate the financial emergency of the municipal government and would not materially and adversely affect the financial situation of the government or governments with which the municipal government in receivership is consolidated. Consolidation under this subdivision shall proceed as provided by law.

(cc) For municipal governments, with approval of the governor, disincorporate or dissolve the municipal government and assign its assets, debts, and liabilities

as provided by law. The disincorporation or dissolution of the local government is subject to a vote of the electors of that local government if required by law.

(dd) Exercise solely, for and on behalf of the local government, all other authority and responsibilities of the chief administrative officer and governing body concerning the adoption, amendment, and enforcement of ordinances or resolutions of the local government as provided in the following acts:

(*i*) The home rule city act, 1909 PA 279, MCL 117.1 to 117.38.

(*ii*) The fourth class city act, 1895 PA 215, MCL 81.1 to 113.20.

(*iii*) The charter township act, 1947 PA 359, MCL 42.1 to 42.34.

(*iv*) 1851 PA 156, MCL 46.1 to 46.32.

(*v*) 1966 PA 293, MCL 45.501 to 45.521.

(*vi*) The general law village act, 1895 PA 3, MCL 61.1 to 74.25.

(*vii*) The home rule village act, 1909 PA 278, MCL 78.1 to 78.28.

(*viii*) The revised school code, 1976 PA 451, MCL 380.1 to 380.1852.

(*ix*) The state school aid act of 1979, 1979 PA 94, MCL 388.1601 to 388.1896.

(ee) Take any other action or exercise any power or authority of any officer, employee, department, board, commission, or other similar entity of the local

government, whether elected or appointed, relating to the operation of the local government. The power of the emergency manager shall be superior to and supersede the power of any of the foregoing officers or entities.

(ff) Remove, replace, appoint, or confirm the appointments to any office, board, commission, authority, or other entity which is within or is a component unit of the local government.

(2) Except as otherwise provided in this act, during the pendency of the receivership, the authority of the chief administrative officer and governing body to exercise power for and on behalf of the local government under law, charter, and ordinance shall be suspended and vested in the emergency manager.

(3) Except as otherwise provided in this subsection, any contract involving a cumulative value of $50,000.00 or more is subject to competitive bidding by an emergency manager. However, if a potential contract involves a cumulative value of $50,000.00 or more, the emergency manager may submit the potential contract to the state treasurer for review and the state treasurer may authorize that the potential contract is not subject to competitive bidding.

(4) An emergency manager appointed for a city or village shall not sell or transfer a public utility furnishing light, heat, or power without the approval of a majority of the electors of the city or village voting thereon, or a greater number if the city or village charter provides, as required by section 25 of article VII of the state constitution of 1963. In addition, an emergency manager appointed for a city or village shall not utilize the assets of a public utility furnishing heat,

light, or power, the finances of which are separately maintained and accounted for by the city or village, to satisfy the general obligations of the city or village.

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141.1563 Receivership transition advisory board.

Sec. 23. (1) Before removing a local government from receivership, the governor may appoint a receivership transition advisory board to monitor the affairs of the local government until the receivership is terminated.

(2) A receivership transition advisory board shall consist of the state treasurer or his or her designee, the director of the department of technology, management, and budget or his or her designee, and, if the local government is a school district, the superintendent of public instruction or his or her designee. The governor also may appoint to a receivership transition advisory board 1 or more other individuals with relevant professional experience, including 1 or more residents of the local government.

(3) A receivership transition advisory board serves at the pleasure of the governor.

(4) At its first meeting, a receivership transition advisory board shall adopt rules of procedure to govern its conduct, meetings, and periodic reporting to the governor. Procedural rules required by this section are not subject to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328.

(5) A receivership transition advisory board may do all of the following:

(a) Require the local government to annually convene a consensus revenue estimating conference for the purpose of arriving at a consensus estimate of revenues to be available for the ensuing fiscal year of the local government.

(b) Require the local government to provide monthly cash flow projections and a comparison of budgeted revenues and expenditures to actual revenues and expenditures.

(c) Review proposed and amended budgets of the local government. A proposed budget or budget amendment shall not take effect unless approved by the receivership transition advisory board.

(d) Review requests by the local government to issue debt under the revised municipal finance act, 2001 PA 34, MCL 141.2101 to 141.2821, or any other law governing the issuance of bonds or notes.

(e) Review proposed collective bargaining agreements negotiated under section 15(1) of 1947 PA 336, MCL 423.215. A proposed collective bargaining agreement shall not take effect unless approved by the receivership transition advisory board.

(f) Review compliance by the local government with a deficit elimination plan submitted under section 21 of the Glenn Steil state revenue sharing act of 1971, 1971 PA 140, MCL 141.921.

(g) Review proposed judgment levies before submission to a court under section 6093 or 6094 of the revised judicature act of 1961, 1961 PA 236, MCL 600.6093 and 600.6094.

(h) Perform any other duties assigned by the governor at the time the receivership transition advisory board is appointed.

(6) A receivership transition advisory board is a public body as that term is defined in section 2 of the open meetings act, 1976 PA 267, MCL 15.262, and meetings of a receivership transition advisory board are subject to the open meetings act, 1976 PA 267, MCL 15.261 to 15.275. A receivership transition advisory board is also a public body as that term is defined in section 2 of the freedom of information act, 1976 PA 442, MCL 15.232, and a public record in the possession of a receivership transition advisory board is subject to the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

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141.1574 Appropriation.

Sec. 34. For the fiscal year ending September 30, 2013, $780,000.00 is appropriated from the general fund to the department of treasury to administer the provisions of this act and to pay the salaries of emergency managers. The appropriation made and the expenditures authorized to be made by the department of treasury are subject to the management and budget act, 1984 PA 431, MCL 18.1101 to 18.1594.

141.1575 Appropriation.

Sec. 35. (1) For the fiscal year ending September 30, 2013, $5,000,000.00 is appropriated from the general fund to the department of treasury to administer the provisions of this act, to secure the services of financial consultants, lawyers, work-out experts, and other professionals to assist in the implementation of this

act, and to assist local governments in proceeding under chapter 9.

(2) The appropriation authorized in this section is a work project appropriation, and any unencumbered or unallotted funds are carried forward into the following fiscal year. The following is in compliance with section 451a(1) of the management and budget act, 1984 PA 431, MCL 18.1451a:

(a) The purpose of the project is to provide technical and administrative support for the department of treasury to implement this act. Costs related to this project include, but are not limited to, all of the following:

(*i*) Staffing-related costs.

(*ii*) Costs to promote public awareness.

(*iii*) Any other costs related to implementation and dissolution of the program, including the resolution of accounts.

(b) The work project will be accomplished through the use of interagency agreements, grants, state employees, and contracts.

(c) The total estimated completion cost of the project is $5,000,000.00.

(d) The expected completion date is September 30, 2016.