UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Catherine Phillips, et al.

Plaintiffs,

v.

Richard D. Snyder, et al.

Defendants.

Case no. 2:13-cv-11370

Hon. George Caram Steeh
Mag. R. Steven Whalen

PLAINTIFFS' MOTION FOR RECONSIDERATION

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PLAINTIFFS' MOTION FOR RECONSIDERATION

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

CONSTITUTIONAL RIGHTS, and CONSTITUTIONAL LITIGATION ASSOCIATES, P.C. and in support of this *Motion for Reconsideration* state as follows.

1. On February 12, 2014, Plaintiffs filed their *First Amended Complaint*[1] seeking declaratory and injunctive relief against the Local Financial Stability and Choice Act, Act No. 436, Public Acts of 2012, MCL §§ 141.1541 et. seq. (PA 436) pursuant to 42 USC §1983 for violations of the Plaintiffs' rights under the United States Constitution, Art. 4, §4; Amend. I; Amend. XIII; Amend. XIV; and the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 *et. seq*.

2. Defendants filed their renewed *Motion to Dismiss*[2] on March 5, 2014. After briefing, oral argument on Defendants' motion was held before this Honorable Court on April 30, 2014.

3. On November 19, 2014, this court entered its *Order Granting in Part and Denying in Part Defendants' Motion to Dismiss (Doc. 41) and Denying Defendants' Motion to Stay Proceedings (Doc. 47).*[3]

4. Plaintiffs bring this motion pursuant to Local Rule 7.1(h) seeking

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[1] Doc. # 39, *First Amended Complaint* filed February 12, 2014

[2] Doc. # 41, Motion to Dismiss, filed March 5, 2014.

[3] Doc. #49, Order Denying Part and Granting in Part Defendants' Motion to Dismiss, entered on November 18, 2014.

reconsideration of this Honorable Court's ruling on Defendants' *Motion to Dismiss* and to deny dismissal of Counts 1, 2, 3, 5, 6, 7, 8, and 9 of Plaintiffs' *First Amended Complaint*.

5. This Honorable Court's November 19, 2014 Order is based on palpable error that misled this court to erroneously dismiss Counts 1, 2, 3, 5, 6, 7, 8, and 9 of Plaintiffs' First Amended Complaint.

6. The palpable error includes but is not limited to:

a. Count 1 (Substantive Due Process): Utilizing an incorrect standard of review that effectively limited unenumerated liberty interests exclusively to privacy rights and rights previously recognized by the Court. Liberty interests are those fundamental rights traditionally protected by the nation's conceptions of well-ordered liberty. Plaintiffs have asserted a *plausible* claim. The claim's ultimate viability can only be determined by factual development of the asserted right fits within the nation's traditions of well-ordered liberty.

b. Count 2 (Guarantee Clause): Finding that municipal governments are separate and distinct entities existing apart from the state itself such that the requirements of the U.S. Constitution do not apply. A state government cannot do through its political subdivisions what the Constitution forbids. Through PA 436, the State of Michigan has done that – manipulated its subdivisions to defeat Michigan citizens' right to be governed by a republican form of government.

c. Count 3 (Equal Protection: Fundamental Right & Voting): Holding that the Equal Protection Clause is not implicated so long as the form of voting, and not its substance, is equal among differing groups and holding that the right to vote, once granted by the state, is not fundamental. The rights at issue require application of strict scrutiny. Additionally, an incomplete standard of review was invoked when applying the rational basis test. Rational basis requires not only a finding of a legitimate governmental interest; but

also a rational relationship between the state's action and the governmental interest. The second element of this test was not analyzed by the court. No rational relationship can be found between PA 436's general grant of general legislative power over matters unrelated to municipal finances, and the state's legitimate interest in resolving financial instability. To do so, is inherently contradictory.

d. Count 5 (Equal Protection: Wealth & Voting Rights): Effectively imposing a requirement that voting restrictions based on wealth must be explicitly stated before the Equal Protection clause is implicated. The Equal Protection clause forbids any statute that *introduces* wealth as a factor in one's right to vote, explicitly or implicitly. Whether there is a correlation between the wealth of those individuals in communities coming under PA 436 governance and the consequent impact on the voting rights of those individuals *is a highly fact intensive inquiry* precluding dismissal under Fed. R. Civ. Proc. Rule 12 (b)(6).

e. Count 6 (Voting Rights Act: Section 2): Finding that the voting system resulting from PA 436 is not a standard, practice or procedure under the Voting Rights Act, Section 2. Under PA 436, the emergency manager is the sole governing local official in communities where they have been appointed. The law has explicitly changed the executive and legislative branches from an elective office to an appointed one. In these communities, local citizens receive a debased, diluted and abridged vote for their local governing official which only exists derivatively through their vote for the state's Governor. In cities, villages and townships without an emergency manager, citizens receive a direct vote for their local governing local officials when they vote for their mayors, councils, supervisors, and trustees. This voting system is created by PA 436 and well within the standards, practices and procedures subject to Voting Rights Act scrutiny. Further palpable error is found in legal and factual findings that removal of elected government is simply temporary and that Plaintiffs retain the right to initiate a referendum to repeal PA 436. Both findings are factually incorrect.

f. Count 7 (First Amendment: Viewpoint, Speech, & Petition): Finding that citizens' right to petition their government after

enactment of PA 436 is identical to their rights as they existed before enactment. This finding is incorrect. Unlike PA 4, PA 436 is not subject to referendum and citizens' cannot petition for its repeal. Moreover a finding was made that citizens can petition their local governments to remove their communities from governance by an emergency manager. The court was misled by Defendants representations in their Motion, in their Reply and during oral argument on April 28, 2014 stating that the local government can, vote to exit emergency manager after 18 months. After the April hearing, Defendants argued otherwise in other forums and in the case of *Detroit Board of Education v. Jack Martin*, File No. 14-725-CZ, the Ingham County Circuit ruled that a municipality cannot remove government by emergency manager after 18 months.

g. Count 9 (Equal Protection: PA 436's 18-Month Provision): Erroneously comparing communities under PA 72 with communities under PA 436. As acknowledged by the court, the powers granted to emergency managers under PA 4 and PA 436 are substantively identical. Various communities and school districts served under a PA 4 for more than 18 months. No rational basis exists for not permitting such communities to utilize the 18-month provision of the statute. Additionally, Plaintiffs allege that various communities and school districts have served various periods of time under a PA 4 emergency manager and that these time periods that there is no rational basis for not allowing cumulatively determining time under a PA 4 emergency manager and a PA 436 emergency manager when determining the 18 month time-frame.

h. Count 8 (Thirteenth Amendment): the court commits the same palpable errors as found with respect to Plaintiffs' First Amendment claims, but also applied an incorrect standard of review. Whether or not other devices for the repeal of PA 436 are available to Plaintiffs is not relevant to whether the statute imposes a badge or incident of slavery. A determination of whether PA 436's form of government – where some communities vote directly for their local governing officials and others cannot – constitutes a badge or incident of slavery is a fact intensive inquiry not properly disposed of on Defendants' Motion to Dismiss.

7. Given the existence of multiple instances of palpable error that misled the court in reaching its decision, reinstatement of Counts 1, 2, 3, 5, 6, 7, 8, and 9 of Plaintiffs' First Amended Complaint is proper and necessary. Reinstatement of the claims will also serve to conserve judicial resources by allowing the case to proceed in a unitary fashion with factual development on all claims proceeding simultaneously rather than separately after appeal.

8. Pursuant to Local Rule 7.1(a), Plaintiffs' counsel sought concurrence in the relief requested by this motion. To date, such concurrence has not been granted by the Defendants.

WHEREFORE, Plaintiffs respectfully pray that this Honorable Court enter an order granting *Plaintiffs' Motion for Reconsideration* and denying in full Defendants' Motion to Dismiss.

Respectfully Submitted,

By: /s/ John C. Philo

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Dated: December 1, 2014

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BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION

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BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION

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

National Lawyers Guild), MILLER COHEN, PLC, the CENTER FOR CONSTITUTIONAL RIGHTS, and CONSTITUTIONAL LITIGATION ASSOCIATES, P.C. and for their *Brief in Support of Plaintiffs' Motion for Reconsideration* state as follows.

I. STATEMENT OF ISSUES PRESENTED

SHOULD THIS HONORABLE COURT RECONSIDER ITS ORDER OF NOVEMBER 19, 2014 WHEN ITS RULING WAS BASED ON PALPABLE ERROR CONCERNING THE CORRECT STANDARD OF REVIEW AND OTHER LEGAL AND FACTUAL FINDINGS THAT MISLED TO THE COURT TO ERRONEOUSLY DISMISS COUNTS 1, 2, 3, 5, 6, 7, 8, AND 9 OF PLAINTIFFS' FIRST AMENDED COMPLAINT?

II. INTRODUCTION

On February 12, 2014, Plaintiffs filed their First Amended Complaint seeking declaratory and injunctive relief against the *Local Financial Stability and Choice Act*, Act No. 436, Public Acts of 2012, Mich. Comp. Laws § 141.1541 *et. seq*. (PA 436). Plaintiffs' claims are brought pursuant to 42 USC §1983 for violations of rights protected by the United States Constitution.

Public Act 436 was passed by the Michigan legislature following Michigan voters' repeal of the *Local Government and School District Fiscal Accountability Act*, Act No. 4, Public Acts of 2011 (PA 4). At the general election on November

6, 2012, citizens overwhelmingly voted to reject PA 4. In response, state officials quickly moved to reenact a new emergency manager law substantially identical to the rejected law. The only notable difference between PA 4 and PA 436 is that the new law is not subject to a citizen's referendum.

Public Act 4 and Public Act 436 are Michigan's first forays into imposing emergency managers (EM) over Michigan's municipalities. While many states have long had statutes to address municipal financial emergencies, Michigan's is the only law in the history of the nation to explicitly grant general legislative powers (the ability to enact laws under the state's police power) to a single unelected individual. Moreover, the state has imposed the law much more broadly and expansively over communities of color and economically poor communities than any other state in the nation. In short, Michigan's law great exceeds any previous model known in this country. As a result, this case raises issues of first impression that have not been addressed by any federal or state court.

The state's actions under PA 436 present three central questions that have not previously been considered or redressed by the nation's courts:

1. Under the U.S. Constitution's Guarantee and Due Process clauses, can a state grant unrestricted legislative power to one unelected state official to govern cities, townships and villages;

2. Under the Constitution's Equal Protection clause and the Voting Rights Act, Section 2, can a state establish one form of local government for majority-race and financially wealthy communities that is directly elected by local citizens and another form of local government in minority-race

and financially poor communities that is appointed by state officials; and

3. Under the Constitution's First Amendment, can a state nullify the results of a citizen's referendum and immediately reenact a substantially identical law that is not subject to referendum and take actions to otherwise eliminate all avenues of redress for citizens opposing such law.

The *Order Granting in Part and Denying in Part Defendants' Motion to Dismiss (Doc. 41) and Denying Defendants' Motion to Stay Proceedings (Doc. 47)* effectively finds that the U.S. Constitution permits governance by one unelected official with full legislative power over local communities, that the Voting Rights Act permits two forms of governance between majority race/wealthy and minority race/poor communities; and that the state may nullify referendum results in such manner. The Order however is based upon clear palpable error that misled this Honorable Court in reaching an erroneous conclusion on each of the dismissed claims.

III. DISCUSSION

Reconsideration is properly exercised to reinstate Counts 1, 2, 3, 5, 6, 7, 8 and 9 of Plaintiffs' First Amended Complaint. Local Rule 7.1(h) provides that where a decision is based on palpable defects, the court may reconsider its prior decision. On reconsideration, the "movant must … demonstrate a palpable defect by which the Court and the parties … on the motion have been misled … [and] show that

correcting the defect will result in a different disposition of the case."[1]

In matters of first impression, courts should "more fully examine the issues involved than would normally be necessary."[2]

A. Plaintiffs state a plausible claim based upon violations of right protected by substantive due process (Count 1).

The standard of review for substantive due process claims is whether the asserted right is deeply rooted in the nation's tradition and history. Chief Justice Rehnquist states the Court's analysis as follows:

> Our established method of substantive-due-process analysis has two primary features: **First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition,"** *id.*, at 503 (plurality opinion); *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko* v. *Connecticut*, 302 U.S. 319, 325, 326 (1937). **Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest**. *Flores*, *supra*, at 302; *Collins*, *supra*, at 125; *Cruzan*, *supra*, at 277-278. **Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decision making,"** *Collins*, *supra*, at 125, that direct and restrain our exposition of the Due Process

[1] Local Rule 7.1(h).

[2] *Brake Shop, Inc. v. Dacey*, 830 F. Supp. 1008, 1009 (E.D. Mich. 1993).

Clause.[3]

Under substantive due process, Plaintiffs claim a right to elect those local officials who possess full legislative power – the power to enact laws pursuant to the state's general police power. The court misconstrued the claimed right to be a theory "that the meaningfulness of their vote is unequal to those in localities without an EM."[4] This is inaccurate, although it is in part, a basis of Plaintiffs' equal protection claim, not their substantive due process claim.

The court committed palpable error when it then analyzed the incorrect theory by primarily considering whether the asserted right was in the nature of a privacy right and whether a generalized right to vote had been previously recognized under substantive due process.

The court concluded that 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"[5] and then

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[3] *Wash. v. Glucksberg*, 521 U.S. 702, 720-721 (1997) (Emphasis added). See also *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (U.S. 1989) (Justice Scalia writing: that substantive due process protects "those rights [that] are fundamental (a concept that, in isolation, is hard to objectify), but also … traditionally protected by our society").

[4] Doc. #49, Order Denying Part and Granting in Part Defendants' Motion to Dismiss, entered on November 18, 2014, at p. 11.

[5] *Id*.

suggested that the Court has only invoked substantive due process to protect those "privacy rights."[6] These statements are clearly incomplete.[7]

While the Court is certainly cautious when recognizing additional rights, it has *never sought to impose an exhaustive list* of protected rights. Rather the Court has instructed that the asserted right be broadly analyzed within the context of the nation's history and traditions and notions of liberty.

Substantive due process review requires first a clear statement of the right asserted and then a substantive analysis of the asserted right's place in the nation's history and traditions. Neither was undertaken.

Factual development is important and necessary before any conclusions can be drawn regarding where a right to vote for local legislative officials fits within the context of our nation's history and traditions, particularly where, as here, the state's method of abrogating that right has no precedent.[8] As a result, Plaintiffs have stated a plausible claim and any determination of the claim's ultimate viability can be made

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[6] *Id*.

[7] See e.g., *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (excessive punitive damages awards); *Pierce v. Society of Sisters*, 268 U.S. 390 (1923) (freedom of religion).

[8] The Supreme Court and other lower federal courts have not directly addressed the right asserted by Plaintiffs in this case because of the long history and tradition in our nation that all officials with legislative power are elected. The unusual nature of PA 436 is all the more reason for this court to require factual development.

only after an opportunity to factually develop the claim.

B. Under the Guarantee Clause, a state cannot do through its political subdivisions that which is prohibited by the United States Constitution (Count 2).

The Supreme Court makes clear that a state government "cannot of course manipulate its subdivisions to defeat a federally protected right."[9] Through PA 436, the State of Michigan has done precisely this – manipulated its subdivisions to defeat Michigan citizens' right to be governed by a republican form of government (i.e. a democratically elected government).

There is little doubt, and at minimum a substantive question, that the State of Michigan would violate the guarantee clause if it made its state legislature appointed rather than elective offices. Yet, the state has done this on matters of local legislation by transferring that power to appointed emergency managers who then govern (and enact legislation) over cities, townships and villages.

Palpable error exists in the essential finding that municipal governments are separate and distinct entities existing apart from the state itself such that the requirements of the U.S. Constitution do not apply. As correctly noted by the court, "local governments are … 'convenient agencies' whose powers depend on the discretion of the state."[10] As such, local government is an agent and an arm of the

[9] *Sailors v. Board of Educ.*, 387 U.S. 105, 108 (1967).

[10] Doc. #49, Order Denying Part and Granting in Part Defendants' Motion to

state. When the state structures such agents by making them governed by appointed officials and delegating to them the essential characteristics of state government (general lawmaking power), the state has manipulated its subdivisions to undermine constitutional guarantees of a republican form of government,

C. The Supreme Court has long found voting to be a fundamental political right and Plaintiffs have stated a plausible claim for relief (Count 3).

The Supreme Court has long found that the right to vote, once granted, is a fundamental political right.[11] In the present case, there is no dispute that Michigan law has long granted cities, townships, and villages the power to vote for their local governing officials – executive and legislative officers. Under Equal Protection clause analysis it matters not what office is at issue, once the right is granted it cannot be taken away for some and not others without applying strict scrutiny.

Palpable error exists in the finding that "[t]he Act does not take away a fundamental right to vote, because such a right has never been recognized by the courts."[12] It is a bed-rock principle of Equal Protection jurisprudence that once the franchise is granted, the right to vote is a fundamental political right, regardless of

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Dismiss, entered on November 18, 2014, at p. 12.

[11] See e.g., *Bush v. Gore*, 531 U.S. 98, 105 (2000) (*per curiam*); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370-71 (1886).

[12] Doc. #49, Order Denying Part and Granting in Part Defendants' Motion to Dismiss, entered on November 18, 2014, at p. 12.

the office involved.

Further palpable error is present in the finding that "[t]he Supreme Court has had multiple opportunities to find a fundamental right to vote, and has passed each time."[13] This statement is incomplete and/or plainly inaccurate. The Court has written on numerous occasions that the right to vote is fundamental political right.[14] What the court has frequently abstained from deciding is whether or not there is a right to vote for particular political offices.[15]

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[13] Doc. #49, Order Denying Part and Granting in Part Defendants' Motion to Dismiss, entered on November 18, 2014, at p. 17.

[14] See note 11.

[15] No case has arisen where the Supreme Court (or other federal courts) has been asked to determine whether there is a fundamental right to vote for officials with legislative power (the power to make laws), although the dicta of several cases strongly suggests that there is. The direct issue has not come before the court because no state is known to have sought to make state or local legislative officers and appointive office as has occurred under PA 436. Thus, the absence of such case law is not instructive in any manner.

Contrary to suggestions otherwise, *Hadley v. Junior College Distr. Of Metropolitan Kansas City, MO*, 397 U.S. 50, 55-56 (1970) does not alter the decision of *Sailors v. Bd. of Educ. of Kent Cnty.*, 387 U.S. 105 (1967). In *Sailors*, the Court addressed the issue of whether a county school board must be chosen by electors rather than by school board delegates. The Court found that school boards are administrative in nature and, within the traditions of our nation, do not need to be elected. The Court expressly reserved deciding whether legislative officials must be elected, since the issue was not present in the case and had not come before the Court before or since. In *Hadley*, the Court addressed an apportionment issue. The governmental party argued that the apportionment rules were different depending on whether the offices at issue is administrative or legislative in character. This party argued that the rules are more relaxed for nonlegislative offices. The Court rejected this argument, holding that one-person-one vote applied, regardless of the character of the office. The *Hadley* decision simply has no bearing on the issues presented or

Plaintiffs' Equal Protection claim is plausible on no less than three basis. First, Plaintiffs have been had their right to vote for local governing officials revoked without a compelling basis narrowly tailored to the state's interest, while this right has been preserved for others in the state. Effectively, the appointment of an emergency manager removes all governing power from their local officials and the emergency manager becomes the mayor and local legislature. Plaintiffs in EM cities thus lose the right to vote for local governing officials while those elsewhere in the state retain the right.

Second, Plaintiffs have had their right to vote for local governing officials debased and diluted by the Governor's appointment of an emergency manager. Vote dilution occurs as follows: through their vote for governor, who appoints the EMs, all Michigan citizens receive an equal indirect vote in the governing official (EM) of cities with an EM. At the same time however, residents in cities with an EM do not receive a reciprocal vote in the local governments of cities that do not possess an EM. As such, residents of cities that do not have an EM possess a greater vote in their local elections than those who live in cities with one.

Third, as set forth in the above-stated substantive due process argument, Plaintiffs have a fundamental right to vote for local legislative officials (i.e. officials

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decided by *Sailors*, **which have now come before federal courts in a matter of first impression.**

who possess the power to enact local laws pursuant to the state's police power).[16] Whether there is a fundamental right to vote for legislative officials is clearly a matter of first impression. In this case, local legislative power has been transferred to emergency managers in communities where they have been appointed. As a result, emergency managers become the "legislature" of the local government. While city council members retain their titles, they are no longer legislative officials, since their power to legislate has been removed. This right is denied to citizens in EM cities and granted to citizens in other cities throughout Michigan without a compelling bases narrowly tailored to the state's interests.

As has long been recognized by the Supreme Court, the Equal Protection Clause protects not only the form, but also the substance, of voting.[17] The Court further states that "[o]ne must be ever aware that the Constitution forbids

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[16] Principles stated by the Supreme Court in *Reynolds v. Sims* are instructive regarding the constitutional failings of PA 436 under the Equal Protection Clause. Chief Justice Warren recognized:

> Since **legislatures are responsible for enacting laws by which all citizens are to be governed, they <u>should be bodies which are collectively responsive to the popular will</u>**. … **With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live**.

377 U.S. 533, 565 (1964).

[17] "[T]here is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth." *Reynolds v. Sims*, 377 U.S. at 555 n.29.

sophisticated as well as simple-minded modes of discrimination."[18] In the present case, palpable error exists in the effective finding that preservation of elections for officials that no longer possess the essential and fundamental powers of their offices in EM jurisdictions is essentially the same as elections in other jurisdictions of the state where those officials retain such powers.

The court's decision effectively finds of no consequence that citizens' vote for their executive and legislative officials is truly and objectively meaningless.[19] Voting rights however have two prongs – procedural and substantive. The substantive prong requires that the vote be formal expression of opinion or will in response to a proposed decision. This element is wholly lacking in the elections occurring within jurisdictions under emergency management.

Finally, palpable error is present in the standard of review used to apply to the rational basis test. Rational basis review requires not only a legitimate governmental interest, *but also* a rational relationship between PA 436 and the state's interest.[20] In this case, no rational relationship can be found between PA 436's general grant of general legislative power over matters unrelated to municipal finances, and the state's legitimate interest in resolving a community's financial

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[18] *Id*. at 563 (Internal quotations omitted).

[19] Because these officials are empowered to exercise none of the attributes of those offices to which they have been elected.

[20] *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992).

instability. To do so, is patently contradictory.

D. The Equal Protection Clause is implicated whenever wealth is introduced as a condition to voting rights (Count 5).

The Supreme Court holds that any statute that *introduces* wealth as a factor in a right to vote, whether explicitly or implicitly, implicates the Equal Protection clause.[21] Palpable error is found by imposing a requirement that voting restrictions based on wealth must be explicitly stated on the face of a statute before Equal Protection clause rights are implicated.

In this case, Plaintiffs allege the dilution and debasement of citizens voting rights in communities that are economically poor, in fact very poor, and that the state's scheme under PA 436 *introduces* wealth as a factor regarding whether citizens will have a right to vote for local executive and legislative branch officials.

Whether there is a correlation between the wealth of those individuals that compose communities coming under PA 436 governance and the consequent impact on the voting rights of citizens within those communities is a highly fact intensive inquiry precluding dismissal under Fed. R. Civ. Proc. Rule 12 (b)(6).

E. The Equal Protection Clause prohibits discrimination against cities governed by an emergency manager under PA 4 (Count 9).

Palpable error exists in the facts upon which the court based its ruling to find

[21] *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

a rational basis for excluding local governments and school districts from adding time served under PA 4 within the 18 month time period established by PA 436. The order misconstrues the time periods of PA 4 and PA 436 that are at issue and erroneously seeks to compare communities under PA 72 with communities under PA 436.

Plaintiffs claim is that the powers granted to emergency managers under PA 4 and PA 436 are substantively identical. The court agreed finding "that emergency managers under PA 4 enjoyed essentially the same authority as they do under PA 436."[22] Various communities and school districts possessed an emergency manager for the full term that PA 4 was in effect – over 1 year and four months. Other communities served partial terms under PA4. For all such communities, no rational basis exists for not including these terms within the 18 month time-period. While rational basis is a deferential review, "deference is not abdication and 'rational basis scrutiny' is still scrutiny."[23] "Courts must always ensure that some rational link exists between a statute's classification and objective."[24] No such rational link has been articulated.

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[22] Doc. #49, Order Denying Part and Granting in Part Defendants' Motion to Dismiss, entered on November 18, 2014, at p. 25-26.

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

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

F. The Voting Rights Act protects against the abridgements of Plaintiffs voting rights as created by PA 436 (Count 6).

Regarding Plaintiffs' Voting Rights Act claims found in Count 6, palpable error is evident in the finding that "PA 436 does not create 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."[25]

The Plaintiffs' claims in this case are closely analogous to those considered in *Allen v. State Bd. of Elections*, where the Court held:

> [a]n important county officer in certain counties was made appointive instead of elective. **The power of a citizen's vote is affected by this amendment; after the change, he is prohibited from electing an officer formerly subject to the approval of the voters**. Such a change could be made either with or without a discriminatory purpose or effect; however, the purpose of § 5 was to submit such changes to scrutiny.[26]

In *Allen*, the Court found that such a transfer from a single official was sufficient to trigger Voting Rights Acts review. In the present case, the entire governing authority of cities, townships, villages, counties and school districts have been transferred from multiple elected officials to a single appointed official. Such a transfer cannot be considered a routine matter of governmental administration

[25] Doc. #49, Order Denying Part and Granting in Part Defendants' Motion to Dismiss, entered on November 18, 2014, at p. 27.

[26] *Allen v. State Bd. of Elections*, 393 U.S. 544, 569-570 (1969).

when no transfers of such breadth and scope have occurred at any time during the history of the nation or in other states. Whether such transfers might be considered routine in any sense requires factual inquiry and development precluding dismissal at point of the case.

The facts considered by the Supreme Court's decision in *Presley v. Etowah County Commission*[27] are clearly not analogous to Plaintiffs claims that PA 436 violates Section 2 of the Voting Rights Act. The Court in *Presley* confronted claims that ordinances - enacted by sitting county commissioners in two counties - that reallocated the manner by which county road funds were expended by the elected county commission. Each of the counties was subject to the Voting Rights Act's Section 5[28] preclearance requirements. In that case, the Court recognized that changes of any kind that "affect the creation or abolition of an elective office" are within the standards, practices, or procedures subject to the Voting Rights Act.[29]

The Court then analyzed the facts of the reallocation of powers in the two counties. In the first county, the commissioners had voted to change the allocation of road funds from distribution by individual commissioners to distribution by the

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[27] 502 U.S. 491 (1992).

[28] Section 5 of the Voting Rights Act has since been effectively struck down by the Court's holding Section 4(b) to be unconstitutional in *Shelby County v. Holder*, 570 U.S. ___ (2013).

[29] *Presley v. Etowah County Commission*, 502 U.S. 491, 503 (1992).

commission as a whole. In the second county after a scandal involving distribution of road funds, the commission voted to have county road funds administered by a newly appointed county engineer who remained subject to supervision and control by the commission as a whole. In both counties, the changes removed allocation of road funds from individual districts where funds were expended at the discretion of individual county commissioners to a system where funds were allocated based on need throughout the entire county. In neither county was a formerly elective officer converted into an appointed one and in neither county did some commissioners retain their powers while others had that power transferred to an appointed official. In both counties, the internal reallocation of the power impacted all commissioners equally. As a result, the Court found that the changes were a "routine matter of governmental administration" and not subject to Section 5's preclearance requirements.[30] Unlike *Presley*, the present case involves the transfer of all governing powers, not just one of their powers, from all local elected officials to a single appointed official in communities with an emergency manager while no such change in powers is affected in other communities.

G. Plaintiffs freedom of speech and petition rights are materially different after passage of PA 436 (Count 7).

The dismissal of Plaintiffs' First Amendment claims in Count 7 wholly rests

[30] *Id.* at 493.

on palpable error whereby the court found that "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."[31] This is factually incorrect. *PA 436 is not subject to referendum*.

After Michigan citizens voted to repeal PA 4 during a referendum in November 2012, the state governor and legislature adopted a new law, PA 436 approximately one month later during the legislature's lame-duck session. The court correctly notes that the powers of emergency managers under both laws is essentially the same.[32] However unlike PA 4, state officials have now excluded the new law from the referendum process by including two modest appropriation provisions in the new law at Sections 34 and 35.[33] Michigan's state constitution provides that "[t]he power of referendum does not extend to acts making appropriations."[34] As a result, Plaintiffs and others holding views against the emergency manager law do not have the same right to petition government. Rather, they are excluded from a right to petition government through the referendum process.

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[31] Doc. #49, Order Denying Part and Granting in Part Defendants' Motion to Dismiss, entered on November 18, 2014, at p. 32.

[32] *Id.* at p. 25-26.

[33] See MCL 141.1574 & 141.1575.

[34] MICH. CONST. art. II, § 9.

Additionally, factual development if permitted in this case would reveal that governance under emergency management is a wholly private affair. Decisions, including those to enact local laws are a private affair with no required notices, no open meetings, no designated offices to access local government, no publication of decisions required or often made.

Moreover, the court's decision also appears to rest on the palpably erroneous finding that emergency management is a temporary condition and that local officials may remove their communities from governance by an emergency manager after 18 months. This is not correct.

The court was misled by Defendants' misrepresentations in their Motion, in their Reply and during oral argument on April 28, 2014. In this case, the Defendants have consistently stated that under Section 9 of PA 436, a local government can, after 18 months, elect to end governance by an emergency manager.[35] However in other forums, Defendants have successfully argued the exact opposite. As a result, the Ingham County Circuit ruled in October that while a local government may request the removal of a particular emergency manager after 18 months, the Governor is then free to appoint a replacement emergency manager.[36] The 18-month

[35] MCL §141.1549 (6)(c).

[36] See attached Exhibit 1, Transcript of October 1, 2014 hearing in *Detroit Board of Education v. Jack Martin*, File No. 14-725-CZ before the Ingham County Circuit, Lansing Michigan at pp. 12-15.

time period then begins to run anew. The state is thus free to maintain an emergency manager over a local government in perpetuity. While the Governor may not deem it politically wise to do so, there are no limiting provisions within the law that prevent him or her or their successors for doing so. Palpable error occurred when the court was misled by the facts as represented by the Defendants in this case and as a result dismissal of Count 7 is not proper.

H. Plaintiff has stated a plausible claim under the Thirteenth Amendment (Count 8).

With respect to Count 8, the court commits the same palpable errors as found on Plaintiffs' First Amendment claims. The court erroneously finds as a matter of fact that "every device in the political arsenal remain[s] available to plaintiffs" as a result PA 436 cannot be characterized as a vestige of slavery. As noted above, the most effective devices highlighted throughout the subject order are, in fact, unavailable.

Additionally however, whether particular governmental action is properly characterized as a vestige of slavery turns not on whether the action can be overturned by other avenues, but rather whether that action constitutes a badge and incident of slavery or, alternatively, a routine burden of citizenship. The existence of alternative avenues of relief is not central to that issue. The determination of whether PA 436's creation of a form of government where local residents vote for officials without governing powers while other municipalities elect their officials

who govern constitutes a badge or incident of slavery is a fact-intensive inquiry not properly disposed of on Defendants' Motion to Dismiss.

IV. CONCLUSION

The November 19, 2014 *Order Granting in Part and Denying in Part Defendants' Motion to Dismiss (Doc. 41) and Denying Defendants' Motion to Stay Proceedings (Doc. 47)* is based on clear palpable error such that this Honorable Court must reconsider its ruling.

The clear palpable error includes application of incorrect standards of review, and patently incorrect findings of law and fact. On a Fed. R. Civ. P. 12(b)(6) motion to dismiss, Plaintiffs must only show the plausibility of their claims for relief. The ultimate viability of such claims is not subject to review until Plaintiffs have been afforded a meaningful opportunity for factual development.

In the present case, the palpable error misled the court to improperly dismiss Counts 1, 2, 3, 5, 6, 7, 8, and 9 of Plaintiffs' First Amended Complaint. Such claims should be reinstated at this time.

WHEREFORE, Plaintiffs respectfully pray that this Honorable Court enter an order granting *Plaintiffs' Motion for Reconsideration* and denying in full Defendants' Motion to Dismiss.

Respectfully Submitted,

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Dated: December 1, 2014

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Catherine Phillips, et al.

Plaintiffs,

v.

Richard D. Snyder, et al.

Defendants.

Case no. 2:13-cv-11370

Hon. George Caram Steeh
Mag. R. Steven Whalen

_____/

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2014, I electronically filed ***Plaintiffs' Motion for Reconsideration*** and ***Plaintiffs' Brief in Support of Motion for***

Reconsideration with the Clerk of the Court using the ECF system which will send notification of such filing to all attorneys of record.

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