No. 15-2394

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CATHERINE PHILLIPS, et al.

Plaintiffs-Appellants,

v.

RICHARD SNYDER, et al.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
Hon. George C. Steeh
2:13-cv-11370

CORRECTED
BRIEF OF PLAINTIFFS-APPELLANTS CATHERINE PHILLIPS, et al.

ORAL ARGUMENT REQUESTED

DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 25, PLAINTIFF-APPELLANTS, makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation? **No.**

   If the answer is YES, list below then identify of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome? **No.**

   If the answer is YES, list the identity of such corporation and the nature of the financial interest:

Respectfully submitted,

*/s/Cynthia Heenan*_____

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The Michigan's Public Act 436, is an unprecedented usurpation of local governmental authority and the voting rights of local citizens. It is challenged on numerous federal constitutional grounds and raises multiple issues of first impression, which have not been previously addressed by this or any court. The complexity of the issues involved and the uniqueness of the application of federal constitutional principles to Michigan's unprecedented statutory scheme will benefit from exploration in oral argument.

JURISDICTIONAL STATEMENT

This is an appeal as of right from a final order pursuant to 28 USC § 1291. On November 19, 2014, the District Court entered an order dismissing all of Plaintiffs' claims except Count IV of Plaintiffs' Amended Complaint. Plaintiffs filed a Motion for Reconsideration as to the dismissed counts, which were denied by the District Court on December 15, 2014. Thereafter, Plaintiffs stipulated to dismiss Count IV without prejudice, noting that the stipulation disposed of the remaining claims in the case, which is reflected in the District Court's Order of October 23, 2015. This order constitutes a final order dismissing all claims and giving this Court jurisdiction to hear this appeal.

Plaintiffs timely filed their Notice of Appeal on November 13, 2015 pursuant to Fed. R. App. P. 4(a)(6). The underlying subject matter jurisdiction arises pursuant to 42 USC § 1983 and 28 USC § 1331 (federal question) and 28 USC § 1343 (civil rights).

STATEMENT OF THE ISSUES

Whether the District Court erred in granting the Defendants' Rule 12 (b)(6) Motion to Dismiss, prior to factual development of Plaintiffs' claims, by holding that Michigan's Public Act 436 (P.A. 436), which has principally been imposed on majority African American cities and school districts and which removes *all* governing power from local elected officials and transfers that power to political appointees violates the United States Constitution.

The facts arising as a result of P.A. 436's enactment and implementation are novel and have not been imposed elsewhere in the history of the nation. As a result, the issues presented are those of first impression for the court and raise issues of whether P.A. 436 violates citizens' rights as recognized under 14th Amendment understandings of substantive due process and the Equal Protection Clause, under the Guarantee Clause, under the Voting Rights Act and under the 1st Amendment.

STATEMENT OF THE CASE

This appeal seeks to restore to the constitutional rights of all residents in Michigan who have lost their voting rights and/or had their 1st Amendment rights infringed by Michigan's novel experiment in local governance. Plaintiffs' underlying action challenges the legality of Michigan's P.A.436, also commonly known as the emergency manager law.

Michigan had previously enacted Public Acts 101 and 72 (See 1st Amended Complaint, RE 39, ¶¶ 34 & 35, Pg. ID 517) authorizing the Governor to appoint "emergency *financial* managers" to address financial issues of municipalities in fiscal distress. *(Id*. at ¶¶ 34 & 36, Pg. ID 517-518). Unsatisfied with the limited authority granted to emergency "financial" managers, the Michigan legislature, on March 16, 2011, enacted Public Act 4 (P.A. 4). Public Act 4 significantly extended state control over municipalities and school districts. The new law allowed the Governor to declare a financial emergency and, upon declaration of a financial emergency, municipalities and school districts became subject to long-term oversight and control by state authorities. Not least of these was the authority of the Governor to appoint 'emergency managers' (EM) *(Id*. at ¶¶ 44 & 47, Pg. ID 520).

Upon appointment of an EM, the governing power of all local elected officials was immediately suspended and all governing power was transferred to

the EM. Thus, EMs were given the sole and full authority to govern local municipalities and school districts. (P.A. 4 Sec. 19(1)(z)(ee)). See 1st Amended Complaint, RE 39, at ¶48, Pg. ID 520. Public Act 4 troubled many Michigan citizens because among other things, it codified observed historical racial and class discrimination patterns, (1st Amended Complaint, RE 39, at ¶¶84, 85, 86 & 87, Pg. ID Nos. 526-528) since the authority granted by P.A. 4 (and subsequently P.A. 436) was predominately exercised in majority African American communities with the resulting loss of local control. *Id* Opponents collected the necessary signatures to hold a referendum on P.A. 4 and the statute was repealed after the referendum passed with 60% of the vote on November 6, 2012.

Notwithstanding the repeal of P.A. 4, the legislature quickly enacted P.A. 436 during a 'lame duck' session of the outgoing state legislature in December 2012. The only significant difference between P.A. 4 and P.A. 436, was the inclusion of nominal appropriations provision. Under Michigan law, the appropriations provision in the new statute bars another public referendum on the new law. Enactment of the new law defeats the 1st Amendment rights of those who voted to repeal P.A. 4.

Plaintiffs have alleged and it must be accepted as true at this point in the proceedings, that the state government has applied P.A. 4 and P.A. 436 primarily to majority African American communities. Fifty-two percent of Michigan's

African American population has been subject to P.A. 436 in their cities and/or school districts. *(Id*. at ¶86, Pg. ID 527). Once an EM is appointed under P.A. 436, all governing power of local elected officials is automatically transferred to the EM and these cities and school districts have suffered a dramatic loss of voting rights.

The net effect of the emergency manager law has been that, as a practical matter, on election days the majority of Michigan's African American voters, many poor people of all races, and other residents of the same localities have gone to the polls to cast ballots for candidates of their choice but these candidates have no authority to govern. *Id*. at ¶¶81 & 82, Pg. ID 526. The result is that these Michigan citizens have lost their fundamental right to vote under the Constitution and have otherwise had their right to vote debased and diluted in comparison with other Michigan residents. The governance system imposed by P.A. 436 results in a profound lack of public accountability to the persons governed.

The lead-poising of the Flint water supply and the ongoing failure of the Detroit Public Schools exemplifies the gross failures of P.A 4 and P.A. 436 to actually solve the problems they are purportedly designed to address and further exemplify the lack of public accountability and responsiveness upon which Michigan's traditional forms of democratic governance are based.

This is in stark contrast to the circumstances of voters who live in municipalities where residents' votes result in the election of officials who actually govern.

SUMMARY OF THE ARGUMENT

While the issues presented are ones of first impression for the court, P.A. 436 violates rights that are well-recognized under developed understanding of 14th Amendment substantive due process and the Equal Protection Clause, the Guarantee Clause, the Voting Rights Act and the 1st Amendment. The District Court committed clear errors of law and improperly made findings of incorrect and disputed facts such that dismissal under Rule 12(b)(6) was improper.

On Plaintiffs' 14th Amendment substantive due process claims, the District Court committed clear error when finding that the right to vote is not a fundamental right; that there is no fundamental right to vote for legislative officials; and by misconstruing Plaintiffs' claim as only a vote dilution claim.

On Plaintiffs' Guarantee Clause claims the District Court erred by holding that the requirements of a republican form of government do not apply to a state's organization of its municipal subdivisions, thus allowing states to manipulate their subdivisions to defeat the Clause's intent and purpose.

On Plaintiff's 14th Amendment's Equal Protection Clause claims based upon infringement of citizens' fundamental right to vote, the District Court committed

multiple errors. The court erred by again finding that the right to vote is not a fundamental right and that Michigan's citizens have not lost a right to vote when their elected officials are *wholly divested* of governing power. The court erred by not recognizing that local legislative officials exercise state legislative power as state agents. As a consequence, there is debasement and dilution of residents' voting rights in state legislative matters when an emergency manager is appointed when compared to the voting power of residents in other communities. The court erred as well in finding that the Constitution only protects the form of voting and not its substance. The court further erred by arbitrarily finding that Michigan citizens in communities with an emergency manager are not similarly situated to other Michigan citizens and then applying a rational basis standard of review.

Plaintiffs also claim that P.A. 436 violates the Equal Protection Clause by conditioning the right to vote in local elections upon residents' wealth. The wealth of residents is directly and intimately related to the financial circumstances of communities that receive emergency managers. The court erred in finding that the only prohibited wealth restrictions are those that require the payment of a poll tax or some other fee. The court further erred when making assumed findings regarding the state's criteria for receiving an emergency manager and further finding that factors such as the overall financial condition, the status of financial

books not being order, and poor management of financial resources are neutral criteria unrelated to a community or an individual's wealth.

The District Court erred in dismissing Plaintiffs' §2 Voting Rights Act claim when it applied an incorrect standard of review that was unduly narrow and has only been found to be applicable to §5 claims. The court further erred by finding that §2 is not implicated when voting rights are impaired by changes resulting in the abolition of an elective office and by omitting the well-recognized 'Senate Factors' from its analysis. The court finally and fatally erred by basing its decision on a factually and legally incorrect finding that voters continue to possess the right to repeal P.A. 436 by referendum.

On Plaintiffs'1st Amendment claim, the District Court erred by finding that reenactment of a virtually identical law after a successful citizens' referendum does not implicate protected freedom of speech and association rights. The court also incorrectly held that Plaintiffs continue to have the full array of political avenues of relief available to rescind P.A. 436. The court further erred by overlooking well-recognized understandings that an elected official's loss of governing authority impair voter's 1st Amendment rights.

On the 13th Amendment claim of Plaintiffs, the District Court wrongly determined that the declaration of a financial emergency and resulting appointment of an Emergency Manager is a 'routine' incident to citizenship and that P.A. 436

does not create a restraint on the ability to vote when all governing power is removed from elected officials in favor of political appointees.

Finally, Plaintiffs' claim that P.A. 436's 18-month removal process violates the Equal Protection Clause by treating communities where an Emergency Manager was appointed under P.A. 4 the same as those communities with an Emergency Manager appointed under P.A. 436. The court erred by failing to apply strict scrutiny and by finding that the differing treatment is rationally related to the statute's purpose.

STANDARD OF REVIEW

It is well established that the standard of review on appeal from Fed. R. Civ. P. 12(b)(6) motions is *de novo* as to questions of law. See *Regensburger v. City of Bowling Green, Ohio*, 278 F.3d 588, 592 (6th Cir. 2002) (citing *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986), *Cousin v. McWherter*, 46 F.3d 568, 574 (6th Cir. 1995), and Fed. R. Civ. P. 52(a)). The Sixth Circuit summarizes:

> We review *de novo* a district court's dismissal of a complaint under FED. R. CIV. P. 12(b)(6). We must read all well-pleaded allegations of the complaint as true. Our review is essentially the same as the district court's; we take the plaintiff's factual allegations as true. *Weiner v. Klais & Co.*, 108 F.3d 86, 88 (6th Cir. 1997) (citations and internal quotation marks omitted).

Before dismissal under Rule 12(b)(6) is properly granted, there must be no set of facts that would allow the plaintiff to recover. *Hammond v. Baldwin*, 866 F.2d 172, 175 (6th Cir. 1989). Matters outside the pleadings are not be considered. *Id.*

ARGUMENT

A. PUBLIC ACT 436 VIOLATES FUNDAMENTAL RIGHTS PROTECTED BY THE DUE PROCESS CLAUSE OF THE U.S. CONST. AMEND. XIV. (COUNT I).

Plaintiffs' claim that P.A. 436 violates 14th Amendment (U.S. CONST. AMEND. XIV) substantive due process by: 1) revoking the fundamental right to vote for local legislative offices in EM communities; and 2) by instituting an appointive system for local legislative offices that is fundamentally unfair and results in significant disenfranchisement while departing from long-established state election practices.

In this case, the District Court erred by incorrectly finding that substantive due process only protects fundamental privacy rights, not voting rights and when it misunderstood Plaintiffs' claim as solely alleging a vote dilution claim. In each respect, the District Court's errors led to improper dismissal and precluded development of a factual record.[1]

The Supreme Court has long-held that substantive due process "provides heightened protection against government interference with fundamental rights." *Wash. v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Collins v. Harker Heights*,

[1] A factual record would establish that the right to vote for legislative officials is deeply embedded within nation's traditions and concepts of ordered liberty; that P.A. 436 is not narrowly tailored to its aims; and that P.A. 436's impact on voting rights results in significant disenfranchisement and departs from long-established state election practices.

503 U.S. 115, 125 (1992)) (citing *Reno v. Flores*, 507 U.S. 292, 301-302 (1993) and *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)). The Court holds that the 14th Amendment:

> **[S]pecially 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," … Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decision-making," *Id*. at 720-721 (1997) (internal citations and quotations omitted). See also, *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977); *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937); and *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

When a fundamental right is at issue, the Supreme Court requires that "**the infringement [be] narrowly tailored to serve a compelling state interest**." *Wash. v. Glucksberg*, 521 U.S. at 721. The Sixth Circuit states further:

> The Due Process Clause is implicated … **where a state's voting system is fundamentally unfair** … for example, if a state employs [system] … that **result in significant disenfranchisement** and vote dilution … or **significantly departs from previous state election practice**. *Warf v. Bd. of Elections*, 619 F.3d 553, 559 (6th Cir. 2010) (emphasis added) (citing *League of Women Voters v. Brunner*, 548 F.3d 463 (6th Cir. 2008); *NE. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 597-98 (6th Cir. 2012) and *Griffin v. Burns*, 570 F.2d 1065, 1078-79 (1st Cir. 1978)).

The infringement on Plaintiffs' right to vote violates the standards of the Supreme Court and the Sixth Circuit, since P.A. 436 is not narrowly tailored to a

compelling state interest and establishes a voting system for local officials that are fundamentally unfair.

1. THE DISTRICT COURT ERRED IN FINDING THAT SUBSTANTIVE DUE PROCESS ONLY PROTECTS FUNDAMENTAL PRIVACY RIGHTS, NOT VOTING RIGHTS

The District Court incorrectly found that substantive due process only protects privacy rights, not voting rights. The court wrote that under substantive due process, "**each recognized right is in the nature of a privacy right**." Order Granting in Part/Denying in Part Def. Mtn. to Dismiss and Denying Def. Mtn. to Stay Proceedings, RE 49, at pgs. 9-10, Pg. ID Nos. 896-897. (emphasis added). The District Court then wrongly concluded that the right to vote is not a fundamental right. *Id*. at pg. 11, Pg. ID 898. (the "Court has never recognized the right to vote as a right qualifying for substantive due process protection."). The District Court's conclusion is wholly incorrect.[2]

Contrary to the District Court's finding, the Supreme Court has long held that the right to vote is a "fundamental political right", entitled to protection under the 14th Amendment. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966); *Harman v. Forssenius*, 380 U.S.

[2] The District Court erred by attempting to separate fundamental rights protected by equal protection from those protected by substantive due process. The Supreme Court however first determines whether a right is fundamental within the 14th Amendment as whole and then, based upon the specific facts, applies the protections of the appropriate clause to the facts of the case.

528, 537 (1965); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012); *Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219, 234 (6th Cir. 2011); *Warf v. Bd. of Elections*, 619 F.3d at 559; and *League of Women Voters v. Brunner*, 548 F.3d at 476. Federal circuits have repeatedly recognized that the right to vote is a "precious right," *Williams v. Rhodes*, 393 U.S. 23, 31 (1968); *Reynolds*, 377 U.S. at 560; and *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), "preservative of all rights." See citations at fn. 24-29. The Court summarizes: "we have often reiterated that voting is of the most fundamental significance" *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (U.S. 1979) and all "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Williams*, 393 U.S. at 30. The Supreme Court and Sixth Circuit have thus explicitly found that the right to vote is a fundamental right under the 14th Amendment. See citations *supra*, fn 24. See also, *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981); *Griffin v. Burns*, 570 F.2d 1065, 1078 (1st Cir. 1978); *Briscoe v. Kusper*, 435 F.2d 1046, 1053-54 (7th Cir. 1970). This is settled law.

In this case, the fundamental right at issue is a right to vote for the state's local legislative officials. **No court has considered the questions presented by this case. No other state has suspended or revoked the election of legislative officials in favor of a system of political appointments.**

While no court has considered these issues, certain principles are well-recognized. In *Williams v. Rhodes*, the Court highlighted the fundamental nature of the right to elect legislators writing that "**[n]o right is more precious** in a free country than that of having a voice in **the election of those who make the laws** under which, as good citizens, we must live." *Williams v. Rhodes*, 393 U.S. at 30 (1968). In *Reynolds v. Sims*, the Court found that [a]s long as ours is a representative form of government … **the right to elect legislators … is a bedrock of our political system**. *Reynolds v. Sims*, 377 U. S. at 562 (1964). (emphasis added).

The *Reynolds* Court writes further:

> **[E]ach and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them**. Full and effective participation by all citizens … requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. **Modern and viable state government needs, and the Constitution demands, no less**. *Id*. at 565.

Notably, the *Reynolds* Court used the plural when finding that citizens have a right to vote for the representatives of their "State's legislative **bodies**." *Id.* As discussed further in section B.1., **city and township councils are state legislative bodies**. *Equality Found v. City of Cincinnati*, 1998 U.S. App. LEXIS 1765, 3 (6th Cir. 1998) (J. Boggs concurring: the "Constitution contemplates only two

sovereigns: the United States itself … and the respective states… [cities] are not constitutionally cognizable political sovereignties"). Attached as Ex. 1. They possess no independent legislative power and municipalities have no sovereign powers. See *Belle Isle Grill Corp v Detroit*, 256 Mich. App. 463, 480-481 (2003) ("the police power of … a home rule city is of the same general scope and nature as that of the state.") *Detroit v Walker*, 445 Mich. 682, 690 (1994). Rather, their legislative power is directly delegated from the state and it is the state's legislative power that they exercise. As such, *Reynolds* should be found to extend the right of local citizens to vote for all legislative officials of the state.

In *Sailors v. Bd. of Ed. of Kent County*, 387 U.S. 105 (1967), the Supreme Court further suggested a right to vote for local legislative officials. While finding that elections were not required for local school board members, the Court cautioned that "local officers of the **nonlegislative** character" may be appointed. *Id*. at 108. (emphasis added). See also, *id*. at 110. Likewise in *Mixon v. Ohio*, 193 F.3d 389, 402 (6th Cir. 1999). See also *Moore v. Detroit Sch. Reform Bd.*, 293 F.3d at 365. ("Citizens do not have a fundamental right to elect *nonlegislative, administrative* officers"), the Sixth Circuit limited its holding to find that "there is no fundamental right to elect **an administrative body** such as a school board." The Supreme Court and Sixth Circuit's omission of legislative officials from their holdings must be presumed intentional and shows that different considerations

must be analyzed when considering whether a right to vote exists for legislative bodies.

Contrary to the District Court's findings, (Order Granting in Part/Denying in Part Def. Mtn. to Dismiss and Denying Def. Mtn. to Stay Proceedings, RE 49, at pgs. 14-16, Pg. ID Nos. 901-903) the Supreme Court did not abandon *Sailors* three years later in *Hadley v. Junior College Dist*., 397 U.S. 50 (1970). Rather, *Hadley* addressed a different issue, **whether the one-person-one-vote rule applies for <u>all</u> elective offices**. In *Hadley*, the Court examined facts involving the selection of a regional board of junior college education. The Court rejected as "unmanageable" the state's argument that the one-person-one-vote rule should be conditioned upon a classification of whether the office at issue is administrative or legislative. *Id.* at 55-56. The Court held that whenever the state establishes a voting system for selecting office holders, the one-person-one-vote rule applies, regardless of whether the office is administrative or legislative. *Id.* at 56. The *Sailors* decision addressed a different question - whether the Constitution requires elections for certain public offices. The *Sailors* Court held that elections are not required for **nonlegislative** offices, but did not reach the issues presented by this case.

At this stage of the present case, there should be no factual dispute that P.A. 436 establishes a system eliminating elections for local legislative offices in favor of a system of political appointments. The law does this through the powers

granted to EMs who, upon their appointment, assume all the powers of the community's elected legislative officials. See MCL §141.1549 (2) and §141.1552 (1)(dd). EMs have, in fact, adopted dozens, if not hundreds of local laws. Factual development would show that P.A. 436 is a radical departure from the state's history of selecting these officials by elections.

For the first time in our nation's history, Michigan has revoked elections for local legislative officers in favor of political appointees, who possess the **full scope** of local legislative power. Michigan's experiment infringes a fundamental right and violates substantive due process because it is not narrowly tailored to a compelling state interest and because it establishes a system that is fundamentally unfair. The court improperly dismissed Plaintiffs' claim, precluding the development of a factual record that would further show the merits of this claim.

2. THE DISTRICT COURT MISUNDERSTOOD PLAINTIFFS' CLAIM AS SOLELY A VOTE DILUTION ARGUMENT.

The district further erred by misconstruing the basis of Plaintiffs' substantive due process claim, recasting it as an equal protection argument. The court wrote 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" (Order Granting in Part/Denying in Part Def. Mtn. to Dismiss and Denying Def. Mtn. to Stay Proceedings, RE 49, at pgs. 9-11, Pg. ID Nos. 896-898) and concluded that the claim was therefore was an Equal Protection Clause argument.

While Plaintiffs have argued, concurrently and alternatively, that P.A. 436 also violates the Equal Protection Clause by debasing and diluting residents' right to vote, Plaintiffs have however also asserted a *separate and distinct* substantive due process claim as stated above. 1st Amended Complaint, RE 39, at ¶¶91-105, Pg. ID Nos. 528-531. By recasting Plaintiffs' theory solely as a vote dilution claim, the District Court dispensed with the required review and incorrectly entered dismissal pursuant to Rule 12(b)(6).

B. PUBLIC ACT 436 VIOLATES THE REPUBLICAN FORM OF GOVERNMENT CLAUSE (COUNT II).

The Constitution's Guarantee Clause provides: "The United States shall guarantee to every State in this Union a Republican Form of Government." (U.S. CONST. ART IV, §4.) A republican form of government is one where citizens possess the right to elect officials exercising "legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people." *In re Duncan*, 139 U.S. 449, 461 (1891). (emphasis added); See also, *Largess v. Supreme Judicial Court*, 373 F.3d 219, 227 (1st Cir. 2004) cert. denied by 543 U.S. 1002 (2004)

In *New York v. United States*, 505 U.S. 144 (1992) the Court recognized that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." *Id.* at 185 (emphasis added). Writing for the majority, Justice Sandra Day O'Connor noted that nonjusticiability has not always been the rule *Id* and she

then assumed that the claims at issue were justiciable before finding that the Clause was not violated. *Id*

On Plaintiffs' substantive due process claim, the District Court applied an incorrect standard for consideration of Plaintiffs' Guarantee Clause claim. The trial court solely based its dismissal on the absence of case law applying the Clause to a state's local governments. Order Granting in Part/Denying in Part Def. Mtn. to Dismiss and Denying Def. Mtn. to Stay Proceedings, RE 49, at 12, Pg. ID 899.

The Supreme Court however clearly indicates that the Guarantee Clause applies to a state's organization of its subdivision. Plaintiffs' cited *Kies ex rel. Att'y Gen. of Mich. v. Lowrey*, 199 U.S. 233 (1905). See Brief In Support of Plaintiffs' Response To Defendants' Mtn. to Dismiss, RE 45-1, at fn. 32, Pg. ID 712. In that case, the Court assumed that the Guarantee Clause may apply to municipal corporations, but found that the legislature had not violated the Constitution. *Kies ex rel. Att'y Gen. of Mich. v. Lowrey*, 199 U.S. 233, 239 (1905). A second Supreme Court decision, again cited by the Plaintiffs, further examined state actions concerning municipalities. In *Forsyth v. Hammond*, 166 U.S. 506 (1897), the Supreme Court analyzed the facts under the Guarantee Clause and found that a system for municipal annexation utilized by the City of Hammond did not violate Art IV, §4 of the Constitution. *Id.* at 519

A blanket rule finding the Guarantee Clause inapplicable to municipalities is counter to principles articulated by the Supreme Court and would render the Clause meaningless. The Supreme Court cautions that "[a] **State cannot of course manipulate its political subdivisions so as to defeat a federally protected right**. *Sailors v. Board of Educ.*, 387 U.S. at 108 (1967). As recognized by the District Court in this case, municipalities are instrumentalities created by state government. Inapplicability would leave the state free to delegate all the functions of state government to its municipalities and thereby entirely circumvent the Guarantee Clause's requirements.

The case before the court is readily distinguishable from prior cases where the nonjusticiability doctrine was applied. None of the prior cases address the core issue in this case - whether state government can vest **all local governing authority and legislative power in one unelected official**. Under any recognized definition of a republican form of government, it cannot and Plaintiffs have properly pled a claim for relief such that dismissal pursuant to Rule 12(b)(6) was improper.

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

1. PUBLIC ACT 436 VIOLATES THE EQUAL PROTECTION CLAUSE THROUGH PROVISIONS THAT REVOKE, DEBASE AND/OR DILUTE CITIZENS' FUNDAMENTAL RIGHT TO VOTE.

The Equal Protection Clause (U.S. CONST. AMEND. XIV) is particularly concerned with statutes that treat some groups of persons differently than others. There is little question that P.A. 436 treats persons living in EM communities very differently than other Michigan residents with their respect to their right to vote for local officials.

The trial court erred by: 1) misunderstanding established jurisprudence unequivocally finding that voting is a fundamental right; 2) failing to recognize that local legislative officials are state officials exercising state legislative power; 3) erroneously elevating the form of voting over its substance; 4) inappropriately finding that citizens in EM cities are not similarly situated to other Michigan citizens; and 5) improperly applying the rational basis test as the standard of review.

i. THE DISTRICT COURT ERRED IN FINDING THAT THE RIGHT TO VOTE IS NOT A FUNDAMENTAL RIGHT.

The District Court erroneously found that a fundamental right to vote "**has never been recognized** by the courts" (Order Granting in Part/Denying in Part Def. Mtn. to Dismiss and Denying Def. Mtn. to Stay Proceedings, RE 49, at pg. 18,

Pg. ID 905 (emphasis added)), and that "[t]he ability to vote on equal footing" (*Id.* at pg. 17, Pg. ID 904) is all that is protected. The court's finding is incorrect. As noted above in section A.1., federal courts have repeatedly found that, once granted, the right to vote in state and local elections is a fundamental right. See also *Bush v. Gore*, 531 U.S. 98, 104 (2000); *M.L.B. v. S.L.J.*, 519 U.S. 102, at fn 14 (1996); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Burson v. Freeman*, 504 U.S. 191, 199 (1992); *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986); *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. at 184 (1979); *Ohio State Conf. of the NAACP v. Husted*, 768 F.3d 524, 537 (6th Cir. 2014); *Obama for Am. v. Husted*, 697 F.3d at 428 (6th Cir. 2012); *Hunter v. Hamilton County Bd. of Elections*, 635 F.3d at 234 (6th Cir. 2011).

As stated by the Supreme Court, **"[i]t is beyond cavil that voting is of the most fundamental significance** under our constitutional structure." *Burdick*, 504 U.S. at 433 (1992). (emphasis added, internal quotations omitted). The Supreme Court writes that "there can be no doubt … that once the franchise is granted … lines may not be drawn which are inconsistent with the Equal Protection Clause of the 14th Amendment." *Evans v. Cornman*, 398 U.S. 419, 422 (1970) (citing *Harper*, 383 U.S. at 665). Public Act 436 crosses those lines.

The Court holds that the right to vote cannot "be denied outright" *Reynolds*, 377 U.S. at 555 and includes a right to have one's vote "counted at full value

without dilution or discount." *Bush*, 531 U.S. at 104-05 (internal citations, quotations omitted and emphasis added). Public Act 436 revokes, debases and dilutes citizens' right to vote in the following ways:

- By removing all governing powers from elected officials, **the statute substantively revokes their right to vote** for local officials in cities where EMs are appointed, while preserving that right in all other communities;

- At best the statute renders elected officials to an advisory position in EM communities. Citizens in EM communities thus lose voting power on state legislative matters in comparison to other Michigan citizens and their vote is **thereby debased and/or diluted in relation to all other communities**; and

- Through their vote for the Governor, all Michigan citizens receive an equal indirect vote in the governing official of cities with an EM. In cities without an EM, only residents of those cities elect their governing officials. As a result, the voting power of residents in cities that do not have an EM is greater than EM residents whose **right to vote is thereby further debased and/or diluted**.

Plaintiffs have stated a valid claim for relief under the 14th Amendment and this claim should be remanded for proceedings to determine, consistent with the Court's standard, whether P.A. 436 is narrowly tailored to meet a compelling state interest. See *Dunn*, 405 U.S. at 337 and *Mixon*, 193 F.3d at 402.

ii. THE DISTRICT COURT ERRED IN FINDING THAT RESIDENTS HAVE NOT LOST VOTING POWER IN STATE LEGISLATIVE MATTERS AND HAVE NOT HAD THEIR RIGHT TO VOTE REVOKED, DEBASED AND/OR DILUTED.

The District Court failed to recognize that local officials are state actors, exercising state legislative powers. As such, citizens in EM communities lose

voting power in state matters, relative to other Michigan residents. The District Court's analysis (Order Granting in Part/Denying in Part Def. Mtn. to Dismiss and Denying Def. Mtn. to Stay Proceedings, RE 49, at pg. 18, Pg. ID 905) arrives at a conclusion that, because cities are mere instruments of the state, the state is free to suspend or deny voting rights in local elections. This conclusion is incorrect.

The Supreme Court recognizes that "[t]he Equal Protection Clause **reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State**." *Avery v. Midland County*, 390 U.S. 474, 480 (1968).

The power to legislate is retained by the states through the 10th Amendment. (U.S. CONST., AMEND. X.) Under their inherent police powers, states have the power to regulate by adopting legislation. See *Nebbia v. New York* 291 U.S. 502, 524 (1934) (citing *Thurlow v. Massachusetts*, 46 U.S. 504, 5 How. 504, 583 (1847)). Under our constitutional system, local governments are not sovereigns and do not possess inherent legislative powers. Rather, local governments receive their powers **solely** through delegation of the state's powers. *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 108-109 (1953). Through delegation, local governments acquire the ability to legislate. See *Worcester v. Worcester C. S. R. Co.*, 196 U.S. 539, 548-550 (1905) ("a municipal corporation is not only a part of the State but is a portion of its governmental power"). However, they do

not become sovereigns in their own right. *Id.* Instead they legislate as agents of the state, using the power reserved to the states under the 10th Amendment. Thus, when municipalities legislate, they are the state's agent utilizing state legislative power. When residents lose their right to vote for the state's local legislators or when that vote is diluted, they lose real **voting power** in relation to the legislative affairs of the state within their jurisdiction.

Michigan, like all states, apportions state legislative power between the state legislature and local governments. Traditionally, Michigan citizens had the right to vote for all state legislative officials – those in the state legislature and those in their local government. After P.A. 436, only Michigan citizens in cities without EMs retain full voting power with respect to all state legislative officials. Residents in communities with EMs however only retain the right to vote for state legislators. These residents are excluded from voting for state officials who exercise state legislative power locally. This exclusion results in a loss of voting power that severely debases and dilutes their voting rights within the state. The debasement and dilution of their voting rights by the lost voting power, infringes upon their rights under the Equal Protection Clause.

iii. THE DISTRICT COURT ERRONEOUSLY ELEVATES THE FORM OF VOTING ABOVE ITS SUBSTANCE.

The District Court also erred in finding that P.A. 436 preserved the form of voting and the statute thereby and *per se* did not affect local residents' voting

rights. The Court found that Plaintiffs "cannot, claim a denial or impairment of their right to vote for elected officials." (Order Granting in Part/Denying in Part Def. Mtn. to Dismiss and Denying Def. Mtn. to Stay Proceedings, RE 49 at pg. 17, Pg. ID 904.) The trial court bases this conclusion on the sole fact that P.A. 436 continues to allow elections for mayors and council persons. It is undisputed however that these officials are elected into positions without the powers of their office. *Id.*

The District Court recognized that "if the right to vote is to mean anything, certainly it must provide that the elected official wields the powers attendant to their office." *Id.* Despite this recognition, the lower court found that it was of no consequence. The District Court thus elevated the form of voting over its substance, contrary to the holdings of the Supreme Court.

The Court has held that in addition to fairness in the form of voting, citizens have a right to "cast their votes effectively." *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983). In *Reynolds v Sims*, the Court states: "**[t]here is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth**." *Reynolds v. Sims*, 377 U.S. at 555 n.29. (emphasis added). See also, *Hadley v. Junior College Dist. of Metropolitan Kansas City*, 397 U.S. 50 (1970). Federal courts recognize that the right to vote includes all actions necessary to make a vote effective. See generally, *Anderson*,

460 U.S. at 786-87; *Williams*, 393 U.S at 30; *Lawrence v. Blackwell*, 430 F.3d 368, 373 (6th Cir. 2005). And, that an effective vote means "meaningful access to the political process rather than narrowly as a mere right of … access to the ballot box." *Smith v. Winter*, 717 F.2d 191 (5th Cir. 1983) (citing *Kirksey v. Board of Supervisors*, 554 F.2d 139, 142 (5th Cir.1977).

The Court holds that "the rights of voters and the rights of candidates do not lend themselves to neat separation." *Anderson*, 460 U.S. at 786 (citing *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). See also, *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 184 (citing *Lubin v. Panish*, 415 U.S. 709, 716 (1974)). Federal courts recognize that "restrictions on an elected official's ability to perform her duties implicate … the voters' rights to be meaningfully represented by their elected officials" (*Peeper v. Callaway Cnty. Ambul. Dist.*, 122 F.3d 619, 623 (8th Cir. 1997). See also, *Franzwa v. City of Hackensack*, 567 F. Supp. 2d 1097, 1108 (D. Minn. 2008)) and that "restrictions on an officeholder **after election** also infringe upon voters' rights to be represented even more severely than when a state similarly restricts candidacy." *Peeper*, at 623.

The case of *Green v. Crew*, 1996 U.S. Dist. LEXIS 20227 (E.D.N.Y. Sept. 5, 1996), attached as Ex. 2, is closely related to the facts in the present case. In *Green*, the Court considered Plaintiffs' Equal Protection claim arising from facts where elected school board members were suspended and replaced by an appointed

trustee. *Id.* at 5-7. Recognizing that "voting includes all action necessary to make a vote effective," (*Id*. at 30 (citing *Allen v. State Board of Elections*, 393 U.S. 544, 566 (1969)), the Court found that the fact that suspended elected officials "never took office at all suggest[s] a plausible claim" (*Id*. at 29-30) for denial of citizens' right to vote" and that "changing elective posts to appointive may also result in vote dilution." *Id*. at 25. The Court denied dismissal and permitted Plaintiffs an opportunity to factually develop their claims. *Id*. at 40-41. The Court's reasoning in *Green* is equally persuasive in the present case.

Under P.A. 436, elected officials have been replaced by an appointed one, the EM. The system renders citizens' right to vote wholly ineffective by preventing elected officials from assuming the authority of the offices. The statute thus revokes the vote for some while preserving it for others in the state thereby raising plausible claims under the 14th Amendment.

iv. THE DISTRICT COURT INAPPROPRIATELY FOUND THAT MICHIGAN CITIZENS IN CITIES WITH EMERGENCY MANAGERS ARE NOT SIMILARLY SITUATED TO CITIZENS IN OTHER COMMUNITIES.

The District Court further erred in finding that Michigan citizens in EM communities were not similarly situated to other Michigan citizens. Order Granting in Part/Denying in Part Def. Mtn. to Dismiss and Denying Def. Mtn. to Stay Proceedings, RE 49 at pg. 17, Pg. ID 904. The District Court provides no meaningful analysis or rationale for its conclusion that these two groups are

improper comparators. Rather, the Court's conclusion is arbitrary. Through the arbitrary denial of proper comparators – other Michigan citizens - the trial court evaded a proper evaluation of whether citizens in EM communities had been disenfranchised and/or had their right to vote debased or diluted.

The argument that Plaintiffs are not "similarly situated" to other Michigan voters is an unartful argument that the state has a compelling interest in treating Plaintiffs differently from voters in other locales throughout the state. For nearly 200 years, Michigan has granted all citizens the right to elect local governing officials. Public Act 436 revokes this right from some citizens and not others. The suggested reason for treating the Plaintiffs differently is the financial distress in their communities. Plaintiffs should be permitted to factually develop the record to show that P.A. 436 is not narrowly tailored to the state's asserted interest.

v. THE DISTRICT COURT INCORRECTLY UTILIZED THE RATIONAL BASIS TEST AS THE STANDARD OF REVIEW.

The District Court finally erred in applying rational basis as the standard of review and further, in its application of this standard. Rational basis may be a deferential review; however it is not abdication and still requires scrutiny by the court. In this case, the District Court found that P.A. 436's stated purpose of alleviating financial distress was rationally related to the statute's suspension of elected governance. This is a logical leap and there is no rationale correlation between the stated purpose and the methods used.

2. PUBLIC ACT 436 VIOLATES THE EQUAL PROTECTION CLAUSE THROUGH PROVISIONS THAT CONDITION THE RIGHT TO VOTE IN LOCAL ELECTIONS UPON RESIDENTS' WEALTH.

Under the Equal Protection Clause, wealth restrictions on a person's right to vote are strictly scrutinized and rarely justified. In the present case, Plaintiffs allege that P.A. 436 conditions the right to vote for local governing officials upon the wealth of a community.

The District Court erred in dismissing Plaintiffs' claim by applying an incorrect standard of review, making assumptions of fact, and misconstruing Plaintiffs' claim.

i. THE DISTRICT COURT IMPROPERLY REQUIRED RESTRICTIVE FACTUAL PREDICATES AS A CONDITION TO INVOKING THE PROHIBITION OF WEALTH AS A CONDITION TO VOTING RIGHTS.

The trial court effectively required that a voter's wealth be an explicitly stated condition or a poll tax before the constitutional prohibition is implicated. The court wrote that "there is no restriction on the plaintiffs' ability to vote … they are [not] required to pay a poll tax or any other fee." Order Granting in Part/Denying in Part Def. Mtn. to Dismiss and Denying Def. Mtn. to Stay Proceedings, RE 49 at pgs. 23-24, Pg. ID Nos. 910-911.

The Supreme Court however has not limited its scrutiny to highly specific factual predicates such as a poll tax or a demonstration of an individual's wealth. Rather, the Court has broadly found that **any standard or criteria that conditions**

voting rights on the "affluence of voters" violates the Equal Protection Clause. *Harper*, 383 U.S. at 666. Contrary to the District Court's methodology in this case, the Supreme Court finds that there is no "litmus test that would neatly separate valid from invalid restrictions." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190 (2008).

The District Court's finding, without any supporting facts, divorces the "overall financial condition and prognosis of a local unit of government" (Order Granting in Part/Denying in Part Def. Mtn. to Dismiss and Denying Def. Mtn. to Stay Proceedings, RE 49 at pg. 24, Pg. ID 911) from the wealth of the residents who reside within that local unit of government. **Plaintiffs' claim however is that the "overall financial condition of the local unit of government" is directly and inextricably related to the wealth of its residents** from whom the local unit government is dependent for its revenue.[3] By suspending the electoral rights of all

[3] Factual development would show that Michigan cities receive approximately 42% of their revenue from local property taxes. Cities receive an additional 9% of their revenue from local income taxes. The bulk of remaining local revenue (34%) is received through state revenue sharing and other state payments. During the recessions of the 2000s, the state dramatically cut state revenue sharing and as result cities have been required to make up losses through property taxes, income taxes and additional service fees from residents. Cities with the poorest residents have the least ability to generate additional revenue from residents, yet paradoxically have the highest demands for public services. Among cities that had become subject to P.A. 436 at the time Plaintiffs' Complaint was filed, ten out of eleven of those communities have between one-third and one-half of their residents living below the federal poverty level. These communities have poverty rates

residents because the poor overall financial condition of the local unit of government, the State of Michigan is conditioning their voting rights in local elections upon residents' wealth. As a result of the District Court's ruling, Plaintiffs have been prevented from developing facts showing the direct and intimate relationship between residents' wealth and the financial stability of local governments in Michigan.

ii. THE DISTRICT COURT IMPROPERLY ASSUMED INACCURATE FACTS.

The District Court erred again when it based its decision upon an explicit assumption of erroneous fact. Without analysis, the court arbitrarily assumed that the wealth of citizens "or even the community as a whole" is not a factor in whether an EM is appointed. Order Granting in Part/Denying in Part Def. Mtn. to Dismiss and Denying Def. Mtn. to Stay Proceedings, RE 49 at pg. 24, Pg. ID 911. The Court wrote:

> Rather, it is the overall financial condition and prognosis … Any community whose financial books are not in order is subject to review under P.A. 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.

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double and triple Michigan's average, Likewise, these communities are among those hardest hit by the foreclosure crisis and the collapse of home values and have disproportionately high rates of unemployment. The linkage between residents' wealth and the financial health of their local government is intimate and direct.

The District Court's findings are simply not accurate and are based on the court's own generalized characterization of assumed facts. It is not drawn from the statute's text or any evidence produced by the parties and, as such, has no place in the court's evaluation of whether the Plaintiffs have stated a plausible claim for relief under Rule 12 (b)(6). The statute's actual criteria rely on factual indicators of whether the local community is paying certain creditors and other obligations and whether the local community is running operating deficits – nothing more.[4]

Even if the District Court's factual assumptions were correct, they still do not support dismissal. The court's findings would effectively exempt states from the Supreme Court's prohibition on wealth as a condition of voting. The District Court incorrectly found one's 'overall financial condition and prognosis,' 'financial books not being in order,' and the poor financial management of 'resources' to be factors unrelated to one's wealth. Each of these factors however directly concern the circumstances of a community's or an individual's lack of wealth. Under *Harper*, the state clearly could not condition the voting rights of individuals such factors. Likewise, the state is not permitted to suspend the voting rights of the entire community based on these conditions.

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[4] See MCL §141.1545. Three (3) of the indicators directly relate to a community's inability to pay bills, including: creditors, pension obligations, wages, bond obligations, etc. Six (6) indicators relate to the existence unsustainable budget deficits. The two (2) remaining indicators relate to the improper use of restricted revenues and a catch-all for other circumstances indicating a financial emergency.

The trial Court's Order further suggests reasoning that because the language of P.A. 436 appears to be facially neutral and can be applied to rich and poor communities alike, the statute is thereby exempted from further constitutional scrutiny. Such reasoning evokes Anatole France's famous critique of class in France's legal system during the Belle Époque:

> [The] majestic equality of the laws, forbids rich and poor alike to sleep under the bridges, to beg in the streets and to steal their bread. [1] Anatole France, THE RED LILY (The Modern Library, New York, 1917) at 75.

This sentiment applies to arguments that P.A. 436 applies equally to wealthy and poor communities. In only the rarest of instances will a community composed of financially wealthy households become subject to P.A. 436 and have their right to vote for local officials revoked. 1st Amended Complaint, RE 39, at ¶87, Pg. ID 527.

iii. THE DISTRICT COURT MISCONSTRUED PLAINTIFFS' CLAIM AS A DISPARATE IMPACT ARGUMENT.

The trial court erred again by assuming that Plaintiffs' claim is based on a disparate impact type argument. The court found:

> Plaintiffs claim that … P.A. 436 has yielded disproportionately more emergency manager appointments in lower-income communities. Plaintiffs maintain that ***P.A. 436 therefore conditions*** a citizen's right to vote ... on the wealth of their community.

The trial court misunderstands Plaintiffs' claim as one where the disproportionate appointment of EMs in low-income communities provides *the basis* for their claim that P.A. 436 conditions residents' local right to vote upon the community's wealth. This is a clear misconstruction of Plaintiffs' claim. Plaintiffs' claim is that P.A. 436 introduces wealth as a criteria for determining which communities are permitted to elect their local governing officials. The fact that communities composed of high percentages of economically poor households have disproportionately received such appointments does not create the basis of Plaintiffs' claim. Rather, such facts support Plaintiffs' argument that the wealth of a community is inextricably linked to the financial emergency in that community and, as a result, whether that community will have their voting rights suspended. Plaintiffs have been deprived of their right to show the predicate linkage by the District Court's erroneous dismissal of this claim.

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

The trial court improperly found that P.A. 436 is not subject to the Voting Rights Act ("VRA") 52 U.S.C. §§ 10101 *et. seq.* because it results in "changes which affect only the distribution of power among officials," (Order Granting in Part/Denying in Part Def. Mtn. to Dismiss and Denying Def. Mtn. to Stay Proceedings, RE 49, at pg. 27, Pg. ID 914) and that "such changes have no direct relation to, or impact on, voting." *Id*. The trial court further found that "[p]laintiffs

take issue with the fact that citizens in municipalities under emergency management have a vote that does not mean anything." *Id*. Plaintiffs agree that citizens' votes in EM communities are meaningless, but thoroughly disagree with the court's disregard of the significance of that fact vis-à-vis the VRA.

The trial court relied heavily on *Presley v. Etowah County Commission*, 502 U.S. 491 (1992). It is noteworthy that the *Presley* case only pertains to §5 of the Voting Rights Act, which has now been effectively repealed by the Supreme Court in *Shelby Cty., Ala. v. Holder, 133 S. Ct. 2612 (2013)* and only deals with whether or not there is a "preclearance" requirement that applies to a given community. for the proposition that the Supreme Court makes a distinction between a 'standard, practice or procedure affecting voting by the electorate' and 'changes in the routine organization and functioning of government.' However, P.A. 436 affects *both* 'voting by the electorate' **and** the 'organization and functioning of government.' There has never before been such a law like P.A. 436, inasmuch as it allows for executive appointment of one unelected official to usurp 100% of all power of all elected legislative officials in a given jurisdiction. As a result, the applicability of the VRA to such a situation is one of first impression.

The District Court's dismissal of Plaintiffs' VRA, §2 claim is erroneous for four reasons: 1) the holding, relying on *Presley* erroneously applied narrower §5 analysis to a §2 case; 2) the court failed to apply §2 of the VRA, which governs

'changes which affect the creation or abolition of an elective office'; (3) the District Court's ruling erroneously ignores the 'Senate Factors'; and 4) the court's finding that voters can repeal P.A. 436 is incorrect as a matter of law and fact.

1. THE DISTRICT COURT ERRONEOUSLY APPLIED THE WRONG STANDARD TO A PLAINTIFFS' § 2 CLAIMS.

Section 2 of the Voting Rights Act, states as follows:

> (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...
>
> (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. 52 U.S.C. §10301. (emphasis added).

By contrast, §5 of the Act, in pertinent part, provides:

> Whenever a[n applicable] State or political subdivision … shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure *with respect to voting* different from that in force or effect. *Id*. at §10302. (emphasis added).

Most importantly, §5 applies to discriminatory "standards, practices, or procedures," **only** "with respect to voting." *Id.* Section 2 contains no such limiting

language, and thus applies to a broader array of "standards, practices of procedures." Yet, the trial court erroneously concluded that §2 and §5 of the VRA have the same scope. Order Granting in Part/Denying in Part Def. Mtn. to Dismiss and Denying Def. Mtn. to Stay Proceedings, RE 49 at pgs. 27-28, Pg. ID Nos. 914-915.

The District Court specifically quoted *Holder* for the proposition that "the coverage of §2 and §5 is presumed to be the same." *Id.*, at pg. 28, Pg. ID 915. (citing *Holder,* at 882). However, *Holder* makes no such finding and states as follows:

> It is true that in *Chisom v. Roemer*, 501 U.S. 380, 401-402… (1991), we said that the coverage of §§2 and 5 is presumed to be the same (at least if differential coverage would be anomalous). **We did not adopt a conclusive rule to that effect …** To be sure, if the structure and purpose of §2 mirrored that of §5, then the case for interpreting §§2 and 5 to have the same application in all cases would be convincing. **But the two sections differ in structure, purpose, and application**. *Id.* at 882-83 (emphasis added).

The Supreme Court has long held that §2 and §5 differ in structure, purpose, and application, and that, indeed, §2 has a broader mandate than §5. *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 478-9 (1997). Moreover, unlike §5, §2 employs a totality of the circumstances test (i.e. the 'results test') for determining whether or not a given practice, standard, or procedure has a discriminatory effect on voting. Under the results test, courts are to consider whether the results of a

given policy are discriminatory, regardless of how well-intended the law or practice may be. "The Senate Report states that §2, when amended in 1982, was designed to restore the 'results test'… Under the 'results test,' plaintiffs are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose." *Thornburg v. Gingles*, 478 U.S. 30, 44 n. 8. (1986). By the plain statutory language and in light of the Supreme Court rulings of *Holder* and *Reno*, §2 and §5 are thus not the same in scope and application.

Nonetheless, the court devotes two entire paragraphs to the *Holder* Court's ruling that "a plaintiff cannot maintain a §2 challenge to the size of a government body." (Order Granting in Part/Denying in Part Def. Mtn. to Dismiss and Denying Def. Mtn. to Stay Proceedings, RE 49, at pgs. 29-30, Pg. ID Nos. 916-917.) *Holder* is distinguishable. In *Holder*, the issue was vote dilution based on a **change in the size of the government body**. In the present case, the size of the elected government body has not changed and votes have not been diluted in the same manner. In this case, in predominantly African American communities throughout the State of Michigan, the governing authority of all elected officials has been completely suspended under P.A. 436, and votes to elect officials have thus been drained of any meaning. The trial court thus erroneously relied on *Holder* to support its finding that the VRA §2 is not triggered.

2. EVEN UNDER *PRESLEY*, P.A. 436 VIOLATES §2 OF THE VOTING RIGHTS ACT BY ABOLISHING ALL GOVERNING AUTHORITY OF ELECTED OFFICIALS WHICH IMPACT MORE THAN 50% OF MICHIGAN'S AFRICAN AMERICAN POPULATION.

i. P.A. 436 DOES NOT JUST "CHANGE THE DISTRIBUTION OF POWER." IT CEDES ALL POWER TO A POLITICAL APPOINTEE.

In *Presley*, the Court identified four scenarios that trigger coverage under the VRA. One scenario are changes which affect the creation or abolition of an elective office. *Id.*, at 502-503. The Court expressly noted that these factual scenarios were not exclusive, and fully anticipated the possibility of unforeseen scenarios. *Id.* at 502 (emphasis added).

The unique facts surrounding the effects of P.A. 436 has resulted in the unprecedented **elimination of all governing authority** of elected officers coupled with the **concurrent transfer of all governing authority** to an appointed official. These facts are squarely distinguishable from those in *Presley*, which involved the shifting of some, but not all, the authority of elected officials to appointed ones. The Court found that the elected county commission in *Presley* however "retain[ed] substantial authority." *Presley* at 509. *Presley* explicitly carved out from its holding circumstances that "rise to the level of a de facto replacement of an elective office with an appointive one." *Id.*

As *Presley* acknowledged, the VRA is triggered when a citizen "is prohibited from electing an officer formerly subject to the approval of the voters,"

(*Id.* at 506 (citing *Allen*, 393 U.S. at 569-70) and that such occurs when a law "change[s] an elective office into an appointive one." *Id.* (citing to *Bunton v. Patterson*, 393 U.S. 544, (1969), a case in which the position of county officer became appointive instead of elective). The Court in *Allen* further held: "[t]he legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered state in **even a minor way**." *Allen*, 393 U.S. at 566. (emphasis added).

Although the appointment of EMs under P.A. 436 did not *physically* remove elected officials from office, they did, by operation of law, *effectively* do just that. Thus, the operation of the P.A. 436, does not simply result in a "change in the relative authority of various governmental officials" as in *Bunton*. Rather, it removes **all** authority **from** locally elected officials and transfers it **all to** one unelected official.

While it is also true, as the District Court found, that voters living under an EM regime could still cast ballots, they cannot vote for a candidate with any actual authority. As such, their votes are meaningless and ineffective. The Supreme Court emphasized this distinction in the more recent case of *Bartlett v. Strickland*, 556 U.S. 1 (2009). In *Bartlett*, the Court recognized that §2 protections go beyond the mere act of casting a vote. Rather, §2 also protects the right for minority voters' votes to be *effective*:

> Treating [voter] dilution as a remediable harm recognizes that §2 protects **not merely the right of minority voters to put ballots in a box, but to claim** a fair number of districts **in which their votes can be effective**. *Id*. at 28

Because P.A. 436 renders the votes of affected communities entirely ineffective, it is barred by§2.

ii. THE DISTRICT COURT'S ORDER OMITS THE 'SENATE FACTORS' FROM ITS ANALYSIS.

In addition to its erroneous understanding of *Presley* and *Holder*, the trial court completely failed to consider the legislative history of the VRA. The entire line of Supreme Court cases following the 1982 amendment to §2 rely heavily on the legislative history, commonly referred to as the 'Senate Factors,' that led to the restoration of the "results test" and to the eradication of an intent requirement. See also, Ellen Katz et. al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982 Final Report of the Voting Rights Initiative*, 39 U. Mich. J.L. Reform 643, 724 (2006).

In *Thornburg v. Gingles*, 478 U.S. 30, 44 n. 7 (U.S. 1986), the Supreme Court opined that the Senate Factors and VRA's entire legislative history must be given authoritative weight: "[w]e have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill." *Id.* n 7. Since that time, federal courts have relied heavily on the Senate Factors when making a 'totality of the circumstances' inquiry into §2 violations.

In *Cousin v. McWherter*, 46 F.3d 568, 573 (6th Cir. 1995), the Sixth Circuit recognized seven 'Senate Factors.' The court found the following factors "useful in establishing the existence of unequal access to the political process:" *Id.*

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, **or otherwise to participate in the democratic process**;

2. The extent to which voting in the elections of the state or political subdivision is racially polarized;

3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. If there is a candidate slating process, whether members of the minority group have been denied access to that process;

5. ***The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process***;

6. Whether political campaigns have been characterized by overt or subtle racial appeal; and/or

7. The extent to which members of the minority group have been elected to public office in the jurisdiction. *Id.*, at 573. (emphasis added).

The Sixth Circuit applied the 'Senate Factors' to its consideration of whether certain election changes violated §2 and held:

> In adopting a results test as the proper Section 2 inquiry, the Senate Report codified the test enunciated by the Supreme Court in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). … Congress also added subsection (b) to Section 2 which requires a "totality of the circumstances" inquiry into whether members of a protected class of citizens have less opportunity than others to participate in the political process.
>
> ***
>
> [The factors are not exclusive and] there is no requirement that any particular factors be prove[n] or that a majority of them point one way or another." *Id.* Rather, Congress left it for the courts to decide whether, ***under the "totality of the circumstances," the voting strength of minority voters is "minimized or cancelled out."*** *Id.* at 207 n. 118. Congress explicitly instructed that in reaching this determination courts must conduct "a searching practical evaluation of the 'past and present reality.'" *Id.* at 573. (emphasis added).

However, contrary to the law of this circuit and the Supreme Court, the trial court did not consider the "Senate Factors" at all in its holding and completely omitted any kind of "totality of the circumstances" inquiry. Instead, the court erroneously relied exclusively on *Presley's* analysis of §5 , as discussed above, and ignored the actual effect of P.A. 436, namely the minimization and cancellation of the voting strength of minority voters and the severe restrictions on- if not outright denial of- their ability to participate in their respective municipalities' political processes in any meaningful way[5].

[5] Although not part of the record in this case -- because it post-dates the trial court's ruling below -- the extreme effect of how P.A. 436 has revoked the voting rights of a predominantly African American community in Michigan is

iii. THE DISTRICT COURT'S FINDING THAT VOTERS CAN REPEAL P.A. 436 IS CLEARLY ERRONEOUS AS A MATTER OF LAW AND FACT.

The trial court further relied on a factually wrong assumption to support the erroneous conclusion that P.A. 436 is not subject to the Voting Rights Act. The court found that "[t]he residents … retain their voting rights and **can again repeal the enactment as they did its predecessor**." Order Granting in Part/Denying in Part Def. Mtn. to Dismiss and Denying Def. Mtn. to Stay Proceedings, RE 49, at pg. 31, Pg. ID 918 (emphasis added).

The court's finding is clearly in error. Voters **cannot** repeal P.A. 436 as they did its predecessor. The Michigan legislature attached an appropriation provision to P.A. 436. See MCL §141.1574, P.A. 436, §34 and MCL §141.1575: P.A. 436, §35. Article II, §9 of the Michigan Constitution mandates that "the power of referendum **does not extend to acts making appropriations** for state institutions." MICH. CONST. ART. II § 9. (emphasis added). As a result, an appropriation provision in a bill or law shields it from referendum. This court's conclusion is simply wrong as a matter of fact and law.

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exemplified by the tragic events of Flint, when the unelected EM made the unilateral decision to switch the municipal water system to highly hazardous sources, without public hearings or accountability to residents.

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

The Supreme Court finds that state voting laws "inevitably affect[s] … the individual's … right to associate with others for political ends." *Burdick*, 504 U.S. at 433 (quoting *Anderson*, 460 U.S. at 788). "[W]hen the law discriminates against a small and identifiable group that is engaged in the business of speech, the court applies strict scrutiny to determine whether a challenged regulation violates the 1st Amendment." See *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 638-40 (5th Cir. 2012), *cert. denied*, 132 S. Ct. 2777 (2012), and *News Am. Pub., Inc. v. FCC*, 844 F.2d 800, 810-14 (D.C. Cir. 1988).

1. AFTER A CITIZENS' REFERENDUM REPEALING THE STATE'S EMERGENCY MANAGER LAW, THE LEGISLATURE'S ADOPTION OF A VIRTUALLY IDENTICAL LAW DEFEATS PLAINTIFFS' 1ST AMENDMENT RIGHTS.

The District Court acknowledges that Plaintiffs' claim a fundamental right to have a voice through their local elected officials and that the right to vote at the local level has significant impact on voters' lives. (Order Granting in Part/Denying in Part Def. Mtn. to Dismiss and Denying Def. Mtn. to Stay Proceedings, RE 49, at pg. 16, Pg. ID 903). Despite recognizing these facts, the District Court denies citizens in EM communities "**the ability to vote on equal footing [and have] the weight of the vote … equal to that of other voters.**" *Id.*

Michigan's constitution grants a right of referendum. MICH. CONST. ART. II § 9. Michigan citizens exercised their right of referendum by voting to repeal P.A. 4. Thereafter, the Michigan legislature re-enacted an almost mirror image law - P.A. 436. The court correctly notes that the powers of EMs under both laws are essentially the same. (Order Granting in Part/Denying in Part Def. Mtn. to Dismiss and Denying Def. Mtn. to Stay Proceedings, RE 49, at pgs. 25-26, Pg. ID Nos. 912-913.) By reinstituting the rejected provisions of P.A. 4, the Defendants violated Plaintiffs' 1st Amendment rights.

2. THE DISTRICT COURT INCORRECTLY FOUND THAT PLAINTIFFS HAVE POLITICAL AVENUES AVAILABLE TO REPEAL OR CHANGE PUBLIC ACT 436 AND THAT ITS RESTRICTIONS ARE TEMPORARY.

The dismissal of Plaintiffs' 1st Amendment claims wholly rests on palpable error whereby the court found that Michigan residents can again use the referendum to repeal P.A. 436 at the next election. (Order Granting in Part/Denying in Part Def. Mtn. to Dismiss and Denying Def. Mtn. to Stay Proceedings, RE 49, at pg. 32, Pg. ID 919.) The District Court's finding is incorrect. As noted above in section D.2.iii., **P.A. 436 is not subject to referendum** under Michigan law. Factual development, if permitted in this case, would also reveal that governance under emergency management is a wholly private affair. Decisions, including those to enact local laws are made with no required notices, no open meetings, no public hearings, no designated offices to

access local government, no publication of decisions required or often made.[6] Additionally, contrary to the trial court's finding, Plaintiffs are not "free to voice their dissatisfaction with P.A. 436 at town hall meetings, or through protests and letter writing campaigns," (Order Granting in Part/Denying in Part Def. Mtn. to Dismiss and Denying Def. Mtn. to Stay Proceedings, RE 49 at pg. 37, Pg. ID 924) and such processes are superficial at best. Factual development would show that EMs have, in fact, continuously frustrated public access and participation when holding the 'public informational meetings' required by MCL §141.1551(4).

Moreover, the District Court committed palpable error in finding that emergency management is a temporary condition and that local officials may remove their communities from governance by an EM after 18 months. See generally, MCL §141.1549 (6)(c). This is not correct. See attached Ex. 3, Trx., *Detroit Board of Education v Martin*, 30th Judicial Circuit Court Ingham County, Case No.14-725-CZ. The Court was misled by Defendants' repeated misrepresentations of the state's intent. In this case, the Defendants have consistently stated that under § 9 of P.A. 436, a local government can, after 18 months, elect to end governance by an EM. See Defs' Mtn. to Dismiss, RE 41, at

[6] The lack of public accountability resulting from such a deprivation of the fundamental right to speech and association has been highlighted by the recent developments in the Flint Water Crisis, and the miseducation of Detroit Public School students.

pgs. 14 & 34-35, Pg. ID Nos. 571, 591-592; Defs' Reply Brief, RE 46, at pg. 5, Pg. ID 816; and Trx. of Oral Argument, Apr. 30, 2015 at pg. 63, attached as Ex. 3. However in other forums, the Defendants have successfully argued the **exact opposite.** As a result, the Ingham County Circuit recently ruled that after a local government votes to remove an EM after 18 months, the Governor can appoint a replacement EM and the 18-month period begins anew. The state is thus free to maintain an EM over a local government in perpetuity.[7] Palpable error occurred when the court was misled by the facts as represented by the Defendants and as a result dismissal was improper.

3. AN ELECTED OFFICIAL'S LOSS OF GOVERNING AUTHORITY IS AN IMPAIRMENT OF VOTERS' 1ST AMENDMENT RIGHTS.

While the Constitution does not provide an affirmative right to individuals to vote for state or local officials, the 1st and 14th Amendments have been interpreted to protect voters' associational and speech rights to cast their votes effectively. See *Storer v. Brown*, 415 U.S. 724 (1974). The District Court wholly failed to properly analyze the voter's elected official's loss of governing authority as an impairment of 1st Amendment rights. "The First Amendment, among other things, protects the right of citizens to band together in promoting among the electorate candidates who espouse their political views." *Clingman v. Beaver*,

[7] Additionally, factual development would show that through the EMs' final orders and transition advisory boards, emergency management is maintained long after particular EMs leave office.

544 U.S. 581 (2005) (citations and quotations omitted). In the case at bar, the fundamental rights of speech and association are impermissibly curtailed by P.A. 436's removing and/or severely impairing the governing power of duly elected officials.

In *Peeper v. Callaway County Ambulance District*, the Eighth Circuit addressed post-election 1st and 14th Amendment rights of voters and officeholders. *Peeper*, 122 F.3d 619. The court found:

> [R]estrictions on an elected official's ability to perform her duties implicate the interests of two distinct parties: the individual's 1st Amendment associational rights … and the voters' rights to be meaningfully represented by their elected officials. *Id.* at 623.

Indeed, the court stated that "restrictions on an officeholder after election also infringe upon voters' rights to be represented **even more severely** than when a state similarly restricts candidacy." *Id*. (emphasis added). See also, *Gay Rights Coal. of Georgetown Univ. Law Center v. Georgetown Univ.*, 536 A.2d 1, 39 (D.C. 1987).

In this case, P.A. 436 singles out elected officials and deprives them of their right to speak within government as a representative of those who elected them. In so doing, the statute deprives both the elected officials and the citizens who elected them of their freedom of speech rights. As a result, P.A. 436 must be shown to be narrowly tailored to further a compelling government interest. See

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

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

Plaintiffs claim that P.A. 436 violates the 13th Amendment. U.S. CONST. AMEND. XIII. This Amendment is "an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." *Civil Rights Cases*, 109 U.S. 3 (1883). Unlawful conduct under the 13th Amendment includes state action that generates, implements and effectuates the "badges and incidents of slavery" *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Runyon v. McCrary*, 427 U.S. 160, 179 (1976).

The District Court held that "[w]ith **every device in the political arsenal remaining available to plaintiffs**, a law directed at … addressing a serious fiscal concern cannot be characterized as a vestige of slavery." (Order Granting in Part/Denying in Part Def. Mtn. to Dismiss and Denying Def. Mtn. to Stay Proceedings, RE 49, at pg. 37, Pg. ID 924 (emphasis added)). The court's ruling is both factually and legally erroneous for the following reasons: 1) the court misinterprets/misapplies *City of Memphis v. Greene*, 451 U.S. 100, 129 (1981); 2)

P.A. 436 creates a restraint on the ability to vote; and 3) the power of the entire political process is not available for effectuating changes to the restrictions imposed by P.A. 436.

1. THE COURT ERRONEOUSLY INTERPRETED/APPLIED *CITY OF MEMPHIS V. GREENE*.

The court cites *City of Memphis v. Greene*, for the proposition that "routine burdens of citizenship" will not constitute a violation of the 13th Amendment. (Order Granting in Part/Denying in Part Def. Mtn. to Dismiss and Denying Def. Mtn. to Stay Proceedings, RE 49 at pg. 37, Pg. ID 924 (citing *Greene* at 129)). However, this citation is misleading once the broader context of the holding in *Greene* is considered:

> We merely hold that the impact of the closing of West Drive on nonresidents of Hein Park is a routine burden of citizenship; it does not reflect a violation of the Thirteenth Amendment. *Id.* at 128-29 (1981) (emphasis added).

In this case, Plaintiffs are not considering a mere street closure. Instead, Plaintiffs challenge the annihilation of any and all governing authority of elected leaders in predominately African American communities.

The distinction between *Greene* and the present case is two-fold. First, the 'routine' burdens alluded to in *Greene* have not been generalized amongst the body politic of the State of Michigan. Only certain communities have been forced to bear the burden of P.A. 436, and those communities are predominately African

American. Second, there is nothing "routine" about an emergent situation of the type that would necessitate an EM. By definition, P.A. 436 is law implemented *in lieu* of the routine. Therefore, an EM regime is not merely a "routine burden of citizenship" (*Id.*) and there is nothing routine about the total suspension of an elected governing authority.

That the disenfranchisement of predominantly African American communities, unlike the barricading of a road, is a virtual hallmark, indeed a badge and incident of slavery is clearly denoted in a speech of Frederick Douglass, given within days of Lee's surrender:

> "Again, **I want the elective franchise, for one, as a colored man, because ours is a peculiar government**, based upon a peculiar idea, and that idea is universal suffrage. If I were in a monarchial government, or an autocratic or aristocratic government, where the few bore rule and the many were subject, there would be no special stigma resting upon me, because I did not exercise the elective franchise. … but here **where universal suffrage is the rule, where that is the fundamental idea of the Government, to rule us out is to make us an exception, to brand us with the stigma of inferiority,** and to invite to our heads the missiles of those about us; therefore, I want the franchise for the black man." Frederick Douglas, Speech at the Annual Meeting of the Massachusetts Anti-Slavery Society (April 1865) (transcript available athttp://www.frederick-douglass-heritage.org/). (emphasis added).

It is not hard to imagine the scorn and vituperation with which Douglass would have greeted P.A. 436's factual presentation. "Does it not harken back to slavery," he would ask, "when the votes of those in largely black communities have no

significance or power, and those in predominantly white communities actually vote to elect officials with actual power?"

2. P.A. 436 CREATES A RESTRAINT ON THE ABILITY TO VOTE.

As noted above in section C.1. of this brief, P.A. 436 creates a significant restraint on the plaintiffs' ability to vote for a "**preferred representative**;" (See *Thornburg v. Gingles*, 478 U.S. 30 (1986) ("The essence of a [VRA] §2 claim is that a certain electoral … structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their *preferred representatives*." *Id.* at 47. (emphasis added)) that is, one with authority to actually govern.

3. THE POWER OF THE ENTIRE POLITICAL PROCESS IS NOT AVAILABLE FOR EFFECTUATING CHANGES TO THE RESTRICTIONS OF P.A. 436.

As noted more fully in section E.2. of this brief, 'the entire political process' is not available to" Plaintiffs, particularly those living in communities where EMs have been appointed. The process of electing new legislators on the hope that they will legislatively repeal P.A. 436 is not a practical likelihood, and is 'too little too late' insofar as the harm caused by the unilateral decisions now being made – and having already been made by emergency managers throughout the State is occurring too quickly for the legislative process to be an effective remedy. And, as noted above, P.A. 436 **cannot be repealed by referendum**, as a matter of law.

In the present case, the facts are such that Plaintiffs have *none* of the common political devices in their arsenal. Under the court's own analysis, Plaintiffs have a valid 13th Amendment claim, i.e. the deprivation of access to a meaningful political process that disproportionately impacts the majority of African American voters in Michigan. At the very least, a genuine issue of material fact exists such that dismissal was improper.

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

Plaintiffs claim that the state's interpretation of § 9(6)(c) of P.A. 436 cannot survive rational-basis review, much less strict scrutiny. This section of the statute provides for the removal of an EM by a two-thirds vote of the local government after the EM has been in office for 18 months. MCL § 141.1549(6)(c)

For municipalities and school districts with EMs in place pursuant to P.A. 4, Defendants interpret the 18 months to begin on the effective date of P.A. 436 - March 28, 2013. *Id*. Defendants thereby arbitrarily classify local governments into two groups: (1) those that were governed by EMs appointed prior to P.A. 436's effective date; and (2) those governed by EMs appointed after P.A. 436's effective date.[8]

[8] As noted in section E.2 after a local government votes for removal the Defendants appoint a replacement and the 18-month period restarts from the date of the new appointment. Thereby, EMs can remain in place in perpetuity.

The District Court erred in finding that the distinction between the first two groups was rationally related to legitimate state interests. The District Court acknowledged that EMs under P.A. 4 enjoyed essentially the same authority as they do under P.A. 436. (Order Granting in Part/Denying in Part Def. Mtn. to Dismiss and Denying Def. Mtn. to Stay Proceedings, RE 49, at pgs. 25-26, Pg. ID Nos. 912-913.) However, the District Court found that the first two groups are not similarly situated because P.A. 72 nominally came into effect for several months between the certification of the P.A. 4 referendum petition (August 8, 2012) and March 28, 2013. Plaintiffs submit that the court engaged in impermissible fact finding to reach this conclusion and applied an incorrect standard of review.

Between August 8, 2012 and March 28, 2013, no new EMs were appointed under P.A. 72. All of the EMs reappointed when P.A. 436 took effect had been previously appointed under P.A. 4. No evidence has been presented to the court indicating that any of the P.A. 4 EMs changed their actions, conduct, plans, orders, or ceded any control over non-financial areas of governance during the time that P.A. 72 was in effect.[9] In reaching its conclusion that P.A. 72 somehow impeded the continuity of EM governance during the interim period, the court improperly assumed facts which have not been brought before the court.

[9] Factual development would readily show that EMs had not changed any practices during the interim period when P.A. 72 was in effect.

The District Court further erred by ignoring Plaintiffs' arguments for application of strict scrutiny. During the time that an EM is appointed, a local government's elected officials are entirely without any authority to govern. As discussed above and as alleged in Plaintiffs' Complaint, this implicates the fundamental right to vote and equal protection concerns based on race and therefore require application of strict scrutiny.

Under a strict-scrutiny analysis, a state classification is constitutional only if it is narrowly tailored to achieve a compelling governmental interest. *Grutter*, 539 US at 326. The state has not shown either a compelling interest or narrow tailoring in support of Section 9(6)(c). MCL § 141.1549(6)(c).

In light of the virtually identical substance of P.A. 4 and P.A. 436, whatever interest the state can articulate in providing for the removal of EMs appointed under P.A. 436 after 18 months in office would be equally well served by providing for the removal of EMs appointed under P.A. 4 once *those* EMs had served 18 months. There can simply be no rational reason, let alone a compelling one, for the state's refusal to accrue time served under P.A. 4 toward the 18-month requirement of Section 9(6)(c) of P.A. 436.

CONCLUSION

For the foregoing reasons, the Plaintiffs request that the Court of Appeals reverse the District Court's grant of dismissal on each of the counts of Plaintiffs' Amended Complaint.

Respectfully Submitted,

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Dated: March 23, 2016

Case No. 15-2394

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Catherine Phillips, et al.	)
	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
Richard Snyder, et al.	)
	)
Defendants-Appellees.	)

_____/

CERTIFICATE OF COMPLIANCE

I certify that this brief is in compliance with F.R.A.P 32(a)(7)(C) and contains 13,942 words, excluding the corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, the Designation of the Contents of the Joint Appendix and any certificates of counsel do not count toward the limitation.

Respectfully Submitted,

By: /s/Cynthia Heenan

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that ***Plaintiff-Appellants' Brief on Appeal***, along with this ***Certificate of Service*** was served on all parties of record via electronic mail through the Court's ECF system on March 24, 2016:

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ADDENDUM I

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Date Filed	Dkt. No.	Description	Pg. ID
02/12/2014	39	AMENDED COMPLAINT *for Declaratory Relief* filed by All Plaintiffs against All Defendants. NO NEW PARTIES ADDED. (Philo, John) (Entered: 02/12/2014)	510-553
03/05/2014	41	MOTION to Dismiss by Andrew Dillon, RICHARD D SNYDER. (Attachments: # 1 Index of Exhibits Exhibit List, # 2 Exhibit 1. Chart, # 3 Exhibit 2. Order 2013-11 and Order 2013-13, # 4 Exhibit 3. Order 2013-19, # 5 Exhibit 4. Order No. 094, # 6 Exhibit 5. Order No. S-334) (Barton, Denise) (Entered: 03/05/2014)	558-659
03/06/2014	42	EXHIBIT *Corrected Exhibit 1* re 41 MOTION to Dismiss by Andrew Dillon, RICHARD D SNYDER (Barton, Denise) (Entered: 03/06/2014)	660-661
03/28/2014	45	RESPONSE to 41 MOTION to Dismiss *under Rule 12 (b)* filed by All Plaintiffs. (Attachments: # 1 Document Continuation Brief in Support of Plaintiffs Response to Motion to Dismiss, # 2 Index of Exhibits Exhibit Index, # 3 Exhibit Ex 1-EM Ecorse Order, # 4Exhibit Ex 2-Gov Ecorse Order, # 5 Exhibit Ex 3-EM Pontiac Order, # 6 Exhibit Ex 4-Gov Pontiac Order, # 7 Exhibit Ex 5-Fiscal Scores, # 8 Exhibit Ex 6-PA 4) (Philo, John) (Entered: 03/28/2014)	672-811
04/15/2014	46	REPLY to Response re 41 MOTION to Dismiss filed by Andrew Dillon, RICHARD D SNYDER. (Barton, Denise) (Entered: 04/15/2014)	812-822

11/19/2014	49	ORDER granting in part and denying in part defendants' Motion to Dismiss 41 and denying defendants' Motion to Stay Proceedings 47 Signed by District Judge George Caram Steeh. (MBea) (Entered: 11/19/2014)	888-925
12/01/14	50	MOTION for Reconsideration re 49 Order on Motion to Dismiss, Order on Motion to Stay by All Plaintiffs. (Attachments: # 1 Index of Exhibits Index to Exhibits, # 2 Exhibit Exhibit 1) (Philo, John) (Entered: 12/01/2014)	926-962
12/15/2014	52	ORDER denying 50 Motion for Reconsideration. Signed by District Judge George Caram Steeh. (MBea) (Entered: 12/15/2014)	997-998
10/23/2015	73	STIPULATED ORDER DISMISSING Count IV and closing case. Signed by District Judge George Caram Steeh. (MBea) (Entered: 10/23/2015)	1367-1370

ADDENDUM II

DESIGNATION OF RELEVANT DOCUMENTS

Exhibits	Description
1	Equality Found v. City of Cincinnati
2	Green v. Crew
3	DBE v. Martin - Transcript of 10/1/14

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LexisNexis

Equality Found. v. City of Cincinnati

United States Court of Appeals for the Sixth Circuit

February 5, 1998, Filed

Nos. 94-3855, 94-3973, 94-4280

Reporter
1998 U.S. App. LEXIS 1765; 75 Fair Empl. Prac. Cas. (BNA) 1763

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., ET AL. (94-3855/3973/4280), Plaintiffs-Appellees, v. CITY OF CINCINNATI (94-3973/4280), Defendant-Appellant, EQUAL RIGHTS NOT SPECIAL RIGHTS, ET AL. (94-3855), Intervening Defendants-Appellants.

Prior History: **[*1]** Original Opinion of October 23, 1997, Reported at: *1997 U.S. App. LEXIS 29076*.

Disposition: Petition for rehearing denied.

Counsel: For EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., RICHARD BUCHANAN, CHAD BUSH, EDWIN GREENE, RITA MATHIS, ROGER ASTERINO, HOME, INC., Plaintiffs - Appellees (94-3855, 94-3973, 94-4280): Alphonse A. Gerhardstein, Laufman, Rauh & Gerhardstein, Scott T. Greenwood, Greenwood & Associates, Cincinnati, OH.

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For EQUAL RIGHTS, NOT SPECIAL RIGHTS, MARK MILLER, THOMAS E. BRINKMAN, JR., ALBERT MOORE, Intervenors - Appellants (94-3855): John J. Fossett, Cors & Bassett, Ft. Wright, KY.

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THE AMERICAN FAMILY ASSOCIATION OF OHIO, Amicus Curiae (94-3855, 94-3973): Thomas W. Condit, Condit & Dressing, Cincinnati, OH.

CINCINNATI FEDERATION OF TEACHERS, Amicus Curiae (94-3855, 94-3973): Robert E. Manley, Manley, Burke, Lipton & Cook, Cincinnati, OH.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., Amicus Curiae (94-3855, 94-3973): Alice L. Brown, Alan Jenkins, NAACP Legal Defense & Educational Fund, New York, NY.

JAMES E. ANDREWS, Amicus Curiae (94-3855, 94-3973): Eric J. Graninger, Louisville, KY.

THE AMERICAN PSYCHOLOGICAL ASSOCIATION, Amicus Curiae (94-3855, 94-3973): Paul M. Smith, Jenner & Block, Washington, DC.

OHIO ATTORNEY GENERAL, Amicus Curiae (94-3855, 94-3973): Marianne Neal, Asst. Atty. General, Office of the Attorney General of Ohio, Columbus, OH.

OHIO ATTORNEY GENERAL, Amicus Curiae (94-3855, 94-3973): Richard A. Cordray, Grove City, OH.

FAMILY RESEARCH COUNCIL, Amicus Curiae (94-3855): Melissa Wells-Petry, Law Offices of Melissa Wells-Petry, Washington, DC.

For CITY OF CINCINNATI, Defendant - Appellant (94-3973, 94-4280): Karl P. Kadon, III, Mark S. Yurick, City Solicitor's Office for the City of Cincinnati, Cincinnati, OH.

Judges: BEFORE: KENNEDY, KRUPANSKY, and NORRIS, Circuit Judges. BOGGS, Circuit Judge, concurring in the denial of the suggestion for rehearing en banc. GILMAN, Circuit Judge, with whom Chief Judge MARTIN, Judges DAUGHTREY, MOORE, COLE and CLAY join, dissent.

Opinion

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further 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. Accordingly, the petition is denied.

Concur by: BOGGS

Concur

BOGGS, Circuit Judge, concurring in the denial of the suggestion for rehearing en banc.

Even the staunchest proponents of the Supreme Court's decision in *Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996)*, readily **[*2]** admit that the Court in that case purposely crafted a narrow opinion focused on the precise factual situation presented by Colorado's *Amendment 2*. *See, e.g.,* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6 (1996) (noting that *Romer* and other recent "minimalist" cases "leave[] issues open for democratic deliberation, but also and more fundamentally . . . promote[] reason-giving and ensure[] that certain important decisions are made by democratically accountable actors.") I write separately to point out that, contrary to the view expressed by my dissenting colleagues, *Romer* said nothing about whether a city like Cincinnati could choose to foreclose the enactment of possibly salutary, but also possibly insidious, gay-rights ordinances. *Romer's* holding is simple: a state may not, by constitutional amendment, prohibit a municipal government from enacting ordinances conferring benefits or protections on gay residents. *See Romer, 116 S. Ct. at 1626*. As explained below, nothing about this holding calls into question the judgment of the panel in this case, and I therefore concur in the court's denial of the petition for rehearing en **[*3]** banc.

The federal Constitution contemplates only two sovereigns: the United States itself, on the one hand, and the respective states, on the other. *Romer,* along with evidence from the Constitutional text itself (for example, the Guaranty Clause, *see U.S. CONST. art. IV, § 4*), at most arguably suggests that *state* government may not be structured so as to uniquely burden the ability of gays (or members of other non-suspect classes) to participate in the political life of the sovereign absent a demonstrable, rational reason for doing so. Even this limited principle, however, does not apply to *cities,* which are not constitutionally cognizable political sovereignties and which, therefore, vary widely in their forms of government. Perhaps more so than states, "cities . . . [are] laboratories for political experiments in public participation." Joseph P. Tomain, *On Local Autonomy: Discontinuity and Convergence, 55 U. CIN. L. REV. 399, 418 (1986)*. Indeed, one of the rationales for Ohio's home-rule statute is that "home rule permits cities and counties to serve as laboratories for innovations in government, a role for which their limited size is ideally suited." Stephen **[*4]** Cianca, *Home Rule in Ohio Counties: Legal and Constitutional Perspectives, 19 U. DAYTON L. REV. 533, 534 (1994)*.

In my opinion, Cincinnati's Issue 3 merely reflects the kind of social and political experimentation that is such a common characteristic of city government. Cincinnati (unlike other cities in Ohio) has made a political judgment, expressed by plebiscite, that its city council will not enact ordinances that confer legal status or benefits based on sexual orientation. It is not the case that this judgment deprives anyone of their right to participate in the political life of the sovereign *(i.e.,* the State of Ohio). Unlike gays in Colorado after the passage of *Amendment 2*, gay residents of Cincinnati are not even arguably deprived of their rights under the state civil rights laws, nor are they deprived of their right to seek

redress in the state legislature. In this respect, gays in Cincinnati are in a situation essentially similar to Colorado gays who happen not to reside in Aspen, Boulder, or Denver (the three cities whose gay-rights ordinances would have been nullified by *Amendment 2*). In short, if in *Romer* the Supreme Court held that cities may choose to enact **[*5]** gay-right ordinances without nullification by state constitutional amendment, it did not hold that cities *must* choose to do so. It is not constitutionally offensive that over time some cities *(e.g.,* Aspen, Boulder, and Denver) will pass such ordinances, while others *(e.g.,* Cincinnati) will not.

Since Issue 3 does not implicate the same kind of political-process concerns identified by the Supreme Court in *Romer,* it remains only to consider whether there was a rational reason for Cincinnati voters to approve the change in the city charter. District Judge Spiegel concluded that there could be no such rational reason. Judge Spiegel's view of the human cortex notwithstanding, I find it difficult to label all of the following hypothetical Cincinnati residents utterly irrational:

Fred is a small business owner who is gay. He has many gay customers and employees. Being gay himself, Fred knows that he would not discriminate against gays whether or not Issue 3 were to pass. However, as a small business owner, Fred believes that he is vulnerable to lawsuits, meritorious or not, and he understandably does not want his legal exposure to increase as a result of a proliferation **[*6]** of group-rights laws. Fred also recognizes that competitors who are situated, by market or geography, so as to have fewer gay employees, applicants, or customers may be in a more favorable market position with regard to this added expense. Fred recognizes that Bill, another gay business owner, believes that if Issue 3 is defeated, it will be anti-gay employers who will suffer more, and that the potential for litigation against them will actually advantage gay business owners. Fred has a different view, however, and decides to vote for Issue 3.

Sally, who is also gay, is politically of a libertarian persuasion. Although she believes that it is both wrong and stupid for employers and landlords to discriminate on the basis of sexual orientation, she believes that she has no moral right to interfere with their market choices. Sally believes that, after all, she did not build the employers' businesses or the landlords' houses, and she therefore has no right to use force to affect their personal choices. She decides to vote for Issue 3.

Irving is gay, but unlike Sally he has no moral qualms about using state power against anti-gay business owners. However, his readings in economics have **[*7]** led him to conclude that without Issue 3, prospective employers will believe that every gay employee now comes with a more expensive price tag: the expected cost of lawsuits by that employee, discounted by the likelihood of such suits. He believes that the extra cost to the employer will actually increase covert discrimination, especially in initial hiring, to such an extent that he will be hurt by that factor more than he could be helped by the anti-discrimination laws themselves. He believes that his skills and situation are such that he will not encounter serious discrimination once on the job, but that in the absence of Issue 3, he will actually suffer more from pre-employment discrimination.

John is an employer who concluded, after reading *Mein Kampf* and the *Diary of Anne Frank,* that Nazis are bad people, and he therefore refuses to hire skinheads or other perceived Nazi sympathizers. For completely different reasons, based on his reading of the Bible and literature disseminated by the NAMBLA organization, John also believes that homosexuals are bad people, and so he refuses to hire them as well. He decides to vote for Issue 3.

James is an employee. He has no prejudice **[*8]** against gay people, but believes that, in the absence of Issue 3, an employer may find it easier to fire him rather than a gay co-worker, if push comes to shove, because firing the co-worker raises the prospect of a costly discrimination lawsuit, meritorious or not. James thus believes it is in his economic self-interest to vote for Issue 3.

In *Romer,* the Supreme Court said that ″[a] State cannot . . . deem a class of persons a stranger to its laws.″ *Romer, 116 S. Ct. at 1629*. In the present case, no state has done so. Instead, a *city* has made a political judgment that it will not enact gay-rights measures of the sort adopted in Aspen, Boulder, or Denver. Because the *Romer* Court's special concern that no group be excluded from the political life of the sovereign does not apply here, this court was obligated to uphold Issue 3 as long as it was a rational means of achieving some permissible state interest. Unless each of the people described above justly can be deemed patently irrational -- and I cannot imagine how, in good faith, they could be-- Issue 3 satisfies this test.

Dissent by: GILMAN

Dissent

GILMAN, Circuit Judge, with whom Chief Judge Martin, Judges DAUGHTREY, **[*9]** MOORE, COLE and CLAY join, dissent.

Because we believe that the panel's opinion (whose earlier decision in this case was vacated by the Supreme Court and remanded for further consideration in light of *Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996))* conflicts with the Supreme Court's decision in that case, we dissent from the majority's decision to deny en banc review.

In *Romer,* the Supreme Court was presented with the question of whether Colorado's *Amendment 2*, which had been adopted in a statewide referendum, was constitutional under the *Equal Protection Clause. Amendment 2* prohibited the enactment of any measure designed to protect individuals due to their sexual orientation. *116 S. Ct. at 1623*. Because of its passage, *Amendment 2* rescinded a number of municipal ordinances, an executive order signed by the governor of Colorado, a provision of the state's insurance code, and various anti-discrimination policies adopted at state run universities. *Id. at 1624-25*. The State's principal argument for upholding *Amendment 2* was that ″the measure does no more than deny homosexuals special rights.″ *Id. at 1624*. Although the Supreme Court questioned the **[*10]** State's construction of the amendment, the Court found *Amendment 2* infirm even on the narrow reading offered by the State. Applying rational basis review, the Supreme Court struck down *Amendment 2*. In reaching this result, the Supreme Court held: ″*Amendment 2* fails, indeed defies, even this conventional inquiry *[i.e.,* rational basis review]. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as well shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.″ *Id. at 1627*.

In this case, the people of Cincinnati passed Issue Three in a local ballot measure, which amended Cincinnati's city charter. Issue Three, which was based on the language used in *Amendment 2* and is substantially similar, prohibits the city of Cincinnati from enacting any measure designed to protect individuals due to their sexual orientation. In a *pre-Romer* decision, this court upheld Issue **[*11]** Three under rational basis review. Over the dissent of three justices, the Supreme Court granted certiorari and remanded the case for reconsideration in light of *Romer.*

On remand, the panel sought to distinguish *Romer* on a number of grounds, each of which ultimately had its genesis in the rationale proffered by the *dissenting* justices in the order remanding this case for further consideration. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 518 U.S. 1001, 135 L. Ed. 2d 1044, 116 S. Ct. 2519 (1996)*. As a majority of the Supreme Court obviously did not share the views of the dissent, using the dissent's rationale is itself suspect. Moreover, the distinctions drawn by the dissent and later articulated by the panel appear to be either refuted by the facts or the principle of law announced in *Romer.*

The panel first began by noting that ″the salient operative factors which motivated the Romer analysis and result were *unique* to that case and were not implicated in″ this case. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 295 (6th Cir. 1997)* (emphasis added). The panel acknowledged that the *Romer* Court struck **[*12]** down *Amendment 2* on the narrowest reading advocated for the measure, *i.e.,* the withdrawal of special rights for homosexuals. *Id. at 295*. The panel nevertheless opined that *Amendment 2*'s true constitutional infirmity rested with the ″ominous″ possibility that it could be read broadly to withdraw from homosexuals the protection afforded to all of Colorado's citizens. *Id. at 296-97*. Since the panel construed Issue Three to only divest homosexuals of special rights, it is allegedly distinguishable from *Amendment 2*. *Id. at 296*. The panel's analysis appears faulty, however, because the Supreme Court expressly declined to decide the case based on such a possibility. (″If this consequence [the withholding of protection provided by statutes of general application] follows from *Amendment 2*, as its broad language suggests, it would compound the constitutional difficulties the law creates. The state court did not decide whether the amendment has this effect, however, *and neither need we.*″ *Romer, 116 S. Ct. at 1626* (emphasis added)).

The panel then noted that the Supreme Court struck down *Amendment 2* because the only avenue through which homosexuals could seek redress after **[*13]** *Amendment 2* was by ″the formidable political obstacle of securing a rescinding amendment to the state constitution.″ *Id. at 297*. Because homosexuals could ″seek local repeal [of Issue Three] through ordinary municipal political processes,″ the panel declared Issue Three did not impose as onerous a burden as *Amendment 2*. *Id. at 297*. This distinction is unpersuasive, however, given that the Supreme Court expressly declined to rest its holding on the political restructuring cases, such as *Hunter v. Erickson,* where such distinctions are normally used. *Romer, 116 S. Ct. at 1624*. Therefore, the fact that it is easier for a group to seek the repeal of a city charter amendment as opposed to a state constitutional amendment is of no consequence as far as the essential rationale of *Romer* is concerned.

The panel also stated that the Supreme Court employed an ″extra-conventional″ application of equal protection principles in *Romer* because *Amendment 2* was passed by people living outside the municipalities that had passed anti-discrimination ordinances. *Id. at 297*. It opined that since the voters in Colorado were not directly affected by the ordinances they sought **[*14]** to repeal through *Amendment 2*, no rational relationship to a legitimate state interest existed. The panel's hypothesis, while novel, ignores the facts in *Romer.* *Amendment 2* not only invalidated city ordinances; it also rescinded a section of the state's insurance code, an executive order signed by the state's governor, and various anti-discrimination policies adopted by state run universities. Therefore, the citizens of Colorado were indeed directly affected by the measures they sought to repeal when they passed *Amendment 2*.

Finally, the panel makes the sweeping statement that ″in any event, *Romer* should not be construed to forbid local electorates the authority, via initiative, to instruct their elected . . . representatives . . . to withhold special rights.″ *Equality Foundation, 128 F.3d at 298*. *Romer,* however, was decided on equal protection grounds, which applies to local as well as state governmental action. Therefore, the fact that Issue Three is a local as opposed to a state measure is of no controlling significance for purposes of the *Equal Protection Clause*. *See* *City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985)*. **[*15]**

Whether or not we agree with the majority decision in *Romer,* we are of course obligated by law to give rulings of the Supreme Court full force and effect. We believe the panel decision in this case draws ″distinctions without a difference″ and fails to abide by the key ruling in *Romer* that ″A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.″ *116 S. Ct. at 1628*.

LexisNexis

Green v. Crew

United States District Court for the Eastern District of New York

September 5, 1996, Decided ; September 10, 1996, FILED

CV-96-3367 (CPS)

Reporter
1996 U.S. Dist. LEXIS 20227; 1996 WL 524395

Agnes E. Green, etc., et alia, Plaintiffs, - against - Rudolph F. Crew, etc., et alia, Defendants.

Disposition: **[*1]** Plaintiffs' motion for preliminary injunction denied. Defendants' motion to dismiss complaint denied in part and granted in part.

Case Summary

Procedural Posture
Plaintiffs, a school board member and various voters, moved for a preliminary injunction in their action alleging that the board member's continued suspension under *N.Y. Educ. Law. § 2590-l(3)* was unconstitutional and violative of the Voting Rights Act, *42 U.S.C.S. § 1973*. Defendants, a city, board of education, and officials, moved to dismiss the complaint for failure to state a cause of action.

Overview
The year after she was elected, the board member was suspended for ineffectiveness and inability to promote the educational welfare of students. Although she was re-elected, her suspension was continued under *N.Y. Educ. Law. § 2590-l(3)*. She and various voters were African American and they sued, claiming racial discrimination and a violation of their voting rights. In denying them a preliminary injunction and dismissing certain of their claims, the court ruled that plaintiffs failed to show irreparable harm or a substantial likelihood of success on the merits, and they lacked standing to challenge *N.Y. Educ. Law. § 2590-c(4)(b)* because that statute was not applied to plaintiffs. They failed to show racial animus to support claims under the *Thirteenth* and *Fifteenth Amendments*, the scope of the *Thirteenth Amendment* did not reach voting challenges, and a *Fifth Amendment* due process claim lacked any factual predicate. However, the complaint sufficiently alleged that the suspension directly impacted voting and association rights and that it was irrational, arbitrary, and capricious, so as to violate plaintiffs' equal protection rights.

Outcome
The motion for a preliminary injunction was denied. The motion to dismiss was granted in part with respect to a challenge to a statute that was not applied to the suspended board member, claims under the *Fifth*, *Thirteenth*, and *Fifteenth Amendments*, and claims against individual board members, but the motion was denied with respect to claims under the *First* and *Fourteenth Amendments* and the Voting Rights Act.

Counsel: For AGNES E. GREEN, Individually and on behalf of all those similarly situated as Voters, Candidates, and Elected Officials of Community School Board Number Seventeen, in the May 1993 and May 1996 Elections, CHERYALYN WELCOME, OLIVIA FARROW, MAE PERKINS, Individually and on behalf of all those similarly situated as Voters in the May 1993 and May 1996 Elections, ROBERT FARROW, JAMAL SCHOFIELD, ZAINAB ALI, Individually and on behalf of all those similarly situated as Voters, Parent Voters, and Nominating Signers in the May 1996 Election, plaintiffs: Paul Wooten, Paul Wooten, Brooklyn, NY.

For RUDOLPH F. CREW, Individually and as the Chancellor of the New York City Board of Education, RAYMOND CORTINES, as the former Chancellor of the New York City Board of Education, CAROL GRESSER, IRENE IMPELLIZZERI, NINFA SEGARRA, LUIS REYES, WILLIAM THOMPSON, JR., SANDRA E. LERNER, JERRY CAMMARATA, Individually and as Members of the New York City Board of Education, NEW YORK CITY BOARD OF EDUCATION, CITY OF NEW YORK, defendants: Chlarens Orsland, NYC Law Department, **[*2]** New York, NY. Peter David Winebrake, Esq., Corporation Counsel for the City of New York, New York, NY. For DENNIS VACCO, in his capacity as the New York State Attorney General, defendant: Chlarens Orsland, (See above).

Judges: Charles P. Sifton, United States District Judge

Opinion by: Charles P. Sifton

Opinion

MEMORANDUM AND ORDER

SIFTON, Chief Judge.

This is an action by plaintiffs Agnes Green, Cheryalyn Welcome, Olivia Farrow, Mae Perkins, Robert Farrow, Jamal Schofield, and Zainab Ali, [1] alleging voting rights violations under Article II and the *First*, *Thirteenth*, *Fourteenth*, and *Fifteenth Amendments to the United States Constitution*, *42 U.S.C. § 1983*, and *Sections 2* and *5* of the Voting Rights Act (hereinafter the "Act"), *42 U.S.C. §§ 1973*, *1973c*, against the Board of Education of the City of New York and its members; Rudolph Crew, individually and in his capacity as New York City Schools Chancellor; Raymond Cortines, as the prior Schools Chancellor; and the City of New York. [2] Plaintiffs have, subsequent to filing their complaint, withdrawn their *Section 5* claims and now move pursuant to Rule 65 of the Federal Rules of Civil Procedure for a preliminary injunction to secure the following **[*3]** relief pending the trial of this matter: (1) enjoining the defendants from continuing Green's suspension as a member of Community School Board 17 into the new term for which she was elected on May 7, 1996; (2) enjoining the defendants from continuing Green's original suspension as a member of the school board for District 17 on November 30, 1994; and (3) enjoining the defendants from appointing or continuing the appointment of any trustees to act in place of Agnes Green. In their complaint, plaintiffs seek permanent injunctive relief and also judgment declaring that the defendants violated Article 2 and the *First*, *Fourteenth*, and *Fifteenth Amendments of the United States Constitution* and the civil rights of the plaintiffs and declaring that the New York State Election Law *Section 2590-l* (Chapter 330 of the Laws of 1969), as amended by Chapter 339 of the Laws of 1995 and Chapter 45 of the Laws of 1996, is unconstitutional on its face and as applied. Defendants have cross moved to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of civil Procedure. For the reasons discussed below, plaintiffs' motion for a preliminary injunction is denied. Defendants' motion to dismiss the **[*4]** complaint is denied in part and granted in part.

BACKGROUND

The following facts are taken from the parties' papers submitted on conjunction with the instant motions and are essentially undisputed except as noted.

Plaintiffs commenced this action on July 8, 1996, with the contemporaneous filing of the complaint and obtaining an order to show cause seeking a temporary restraining order and a preliminary injunction. The Court denied the temporary restraining order on July 9, 1996, and set the matter down for a hearing on the preliminary injunction on July 24, 1996. Prior to the hearing, the Attorney General of the United States issued a ruling rendering moot the cause of action premised **[*5]** on violations of the *Section 5* claims and plaintiffs have voluntarily discontinued that cause of action.

District 17 is one of thirty-two community school districts established within the City School District of the City of New York pursuant to Article 52-A of the New York Education Law. Under *N.Y. Educ. L. § 2590-c*, each community district is governed by a community board composed of nine members elected for a three-year term and serving without compensation. Elections are conducted by the Board of Elections of the City of New York on the first Tuesday in May of every third year. Under *N.Y. Educ. L. § 2590-c(3)*, every registered voter who resides in a community district as well as every parent whose child attends any school under the jurisdiction of the community board of such district, who is a citizen of the state, a resident of the city for at least thirty days, and at least 18 years old is eligible to vote in the community school board elections.

Plaintiff Agnes Green is an African American qualified registered voter and was elected to be a member of Community School Board 17 ("CSB 17") in the May 1993 election for a term running from July 1, 1993, to June 30, 1996. She was **[*6]** re-elected to the board on May 7, 1996, with her term to run from July 1, 1996, to June 30, 1999.

Plaintiffs Cheryalyn Welcome, Olivia Farrow, Mae Perkins, Robert Farrow, Jamal Schofield, and Zainab Ali, bring this action on behalf of themselves and other similarly situated voters. All the just named plaintiffs are African American and all state they voted for Agnes Green in the May 1996 election. Ms. Welcome, Ms. Farrow, and Ms. Perkins also voted for Agnes Green in the May 1993 election. Additionally, the complaint states that plaintiff Zainab Ali is a parent voter who brings this action on behalf of himself and other similarly situated registered parent voters.

On November 30, 1994, the prior chancellor, Ramon Cortines, suspended Agnes Green and other members of

[1] Of the above listed plaintiffs, Agnes Green is a suspended school board member of District 17. The remaining plaintiffs are either voters, parent voters, or petition signers in that school district.

[2] The parties agreed to dismiss with prejudice the complaint against the defendant New York State Attorney General.

CSB 17 because of their ineffectiveness, inability to communicate, and inability to promote the educational welfare of the children of the school district. In their place five trustees were appointed to serve on an interim basis until the next school board election.

On April 9, 1996, Chapter 45 of the New York State Laws of 1996 was enacted. Chapter 45 amended the New York Education Law to permit the chancellor to continue **[*7]** the suspensions of reelected community school board members for up to one year in order to safeguard the educational welfare of the school children. *See* N.Y. Educ. Law. § 2590-1(3). [3] **[*8]** Pursuant to *Section 5* of the Act, the City of New York sought preclearance of Chapter 45 from the United States Attorney General (″Attorney General″) on April 24, 1996. [4] By letter dated June 24, 1996, the Attorney General notified the City of New York that she would not interpose any objection to Chapter 45. The Attorney General further stated, however, that, because the legislation was enabling in nature, the Chancellor would have to seek approval from the Justice Department prior to each future suspension or removal carried out under the Education Law. [5] The defendants state that over the past 25 years New York City schools chancellors have consistently suspended or removed school board members without obtaining preclearance and have never been ordered to secure such approval.

[*9] As noted, the most recent school board election was held on May 7, 1996. Several months prior to the most recent election, the Board of Election of the City of New York circulated rules and regulations governing the procedures and qualifications for candidates to be elected to the various community school boards. The first day to circulate nominating petitions for election was January 30, 1996, and the last day to file such petitions was March 17, 1996. Plaintiff Agnes Green, with the assistance of plaintiffs Cheryalyn Welcome, Olivia Farrow, and Mae Perkins as

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[3] N.Y. Educ. Law § 2590-1(3) reads in relevant part:

> (a) The suppression of a community board or suspension or removal of a community board or any member or members thereof ordered by the chancellor and in effect prior to the commencement of the term for which an election was held pursuant to section twenty-five hundred ninety-c of this chapter shall remain in effect after the commencement of such term if the chancellor, prior to the commencement of such term, determines that the continued supersession, suspension or removal is in the best educational interests of the students of the community district and states his or her reasons for such determination in writing. …
>
> (b) In no event shall the period of continued supersession, suspension or removal continue for more than one year after the commencement of such term, provided, however, that nothing herein shall be deemed to limit the powers and duties of the chancellor, including but not limited to the power to order a new supersession of such board or a new suspension or removal of such board or any member or members thereof.
>
> ….
>
> (d) If the chancellor determines to continue the supersession of a community board or suspension or removal of a community board or any member or members thereof pursuant to this subdivision, such board or member or members thereof may within fifteen days after the commencement of the term, file an appeal with the city board as provided in subdivision two of this section.

[4] In the same submission to the Attorney general, the defendants sought prior approval of Chapter 46 which provide for the expiration of Chapter 45 prior to the next round of school board elections in 1999. The defendants also sought to advance the effective date of Chapter 399, which disqualifies from serving on a school board for a period of three years from the date of removal, any individual convicted of a crime directly related to his service upon the board, or any individual guilty of an act of malfeasance directly related to his service on such community school board. *See* N.Y. Educ. ***§ 2590-c(4)(b)***. Chapter 399 had been enacted originally in July 1995 but had been amended on April 20, 1996. Although the plaintiff claims that the defendants asserted that all of Chapter 45 would not apply to any of the newly elected members, the defendants' letter to the Attorney General merely states that Chapter 399, the eligibility subsection, did not appear to affect any of the recent electees. *See* Pl.'s Ex. 5, Def.'s Letter to Attorney General, pp. 6, 8.

[5] The Attorney General also stated that New York State Educational Law 2590-l, which originally received preclearance in April 1974, was also an enabling statute requiring Section 5 preclearance on a case-by-case basis. Plaintiff thus argues that the defendants violated Section 5 when they first suspended her in November 1994.

subscribing witnesses, secured 486 signatures of duly registered voters eligible to vote in the May 7, 1996 community school board election. Plaintiff Agnes Green was nominated as a candidate on March 15, 1996. [6] Of the nine newly elected school board members for District 17, four of them, Agnes Green, Shirley Paterson, Sylvester Leaks, and Abraham Flint, had been suspended by Chancellor Cortines' previous action. The school board members were to be sworn in on June 27, 1996, with their term of office beginning July 1, 1996.

[*10] Prior to the swearing in of the new school board, the current chancellor, Rudolph Crew, exercised his authority pursuant to the newly enacted Chapter 45, *see* New York Education Law § 2590-l(3), to continue the suspension of Agnes Green and the other three incumbents. The continued suspension was communicated in writing on June 27, 1996, to become effective July 1, 1996, and is to continue for a period not greater than one year. The chancellor stated that the suspension was being continued for the same reasons it had been implemented in the first instance, namely, the inability of the individuals to work together which resulted in serious educational and administrative problems. By letter dated July 3, 1996, the defendants reappointed the interim trustees to serve in the stead of Ms. Green and the other suspended school board members.

Although plaintiff Agnes Green filed no administrative appeal challenging Chancellor Crew's action, *see* N.Y. Educ. L. § 2590-l(3)(d), she claims that her original suspension as well as the decision to continue her suspension was arbitrary and capricious. Plaintiffs also dispute the chancellor's finding that the previous board was detrimental **[*11]** to the school children of District 17. They further reject the notion that significant advances have been made under the appointed trustees or that any claimed progress would be lost if the incumbents return to office.

The defendants sought expedited preclearance for the continued supervision after the fact on July 1, 1996. By letter dated July 12, 1996, the Attorney General stated that she would interpose no objection to the defendants continuing the suspension of Agnes Green and the other incumbent members of CSB 17 and that there would be no objection to the defendants reappointing the trustees to serve alongside the other five duly elected members. Since Chancellor Cortines' original suspension of the plaintiff on November 30, 1994, had been superseded by the continued suspension for *Section 5* purposes, the Attorney General declined to comment on that action. Because the matter had been considered on an expedited basis, the Attorney General reserved the right to reexamine the defendants' submissions if additional information that would otherwise require an objection came to her attention during the remainder of the sixty-day period. *See* 28 C.F.R. § 51.41, 51.43.

In the same **[*12]** May 7, 1996 school board elections, David Miller was re-elected to Community School Board 16. Miller was one of nine school board members for District 16 who had been suspended by then Chancellor Cortines on July 24, 1994. That board had failed to select a new superintendent, and the chancellor suspended them for the purposes of selecting a new board. Miller, however, was the only member returned to office in the May 1996 election. The defendants claim that these circumstances did not warrant continuing the suspension of Miller into the next school term. Unlike plaintiff Agnes Green, however, Chancellor Crew did not continue the suspension of Miller. He was sworn into office on June 27, 1996, and permitted to take his post on July 1. Plaintiff Green claims that this action violated her rights under the *Equal Protection Clause of the Fourteenth Amendment of the United States Constitution*.

Plaintiffs' complaint alleges four additional causes of action. [7] First, plaintiffs allege that the defendants have abridged their right to vote, to freely associate, and their right to participate in the political process as guaranteed by Article 2 and the *First*, *Fourteenth*, and *Fifteenth Amendments* **[*13]** *of the United States Constitution*. They argue that *New York Educational Law §§ 2590-l* and *2590-c(b)(4)* is unconstitutional on its face and as applied. Second, plaintiffs allege a similar violation as that complained of in the second cause of action and argue that the defendants, by their actions, have violated *42 U.S.C. § 1983*, the Civil Rights Act.

The third cause of action asserts an equal protection violation under the *Fourteenth Amendment* in that the defendants treated plaintiff differently from David Miller, the suspended and re-elected school board member from District 16. Plaintiff Green also complains that she was not treated equally because the other five school board members

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[6] For the purposes of this motion, it is assumed that Agnes Green had collected the necessary signatures of registered voters to qualify herself to be a candidate for the school board in District 17.

[7] As noted, the Section 5 claim, originally the first cause of action, has been withdrawn.

who had been elected to District 17, but had never been suspended previously, were permitted to take office. [8]

[*14] The fourth cause of action alleges that defendants, by their actions, have violated *Section 2* of the Voting Rights Act, *42 U.S.C. § 1973*, as well as the *Thirteenth*, *Fourteenth*, and *Fifteenth Amendments to the Constitution of the United States*. Plaintiffs allege that these acts present a real and actual controversy and that they will suffer irreparable injury and continued harm unless enjoined by this Court.

Plaintiffs' complaint states that this action is brought as a class action pursuant to Rule 23(a) and Rule 23(b)(2) of the Federal Rules of Civil Procedure. Plaintiffs claim to represent seven classes of litigants ranging in size from the four board members of CSB 17 to the approximately 90,000 registered and qualified voters in District 17. Included within is a subclass of an undisclosed number of African Americans who are registered voters and who purportedly voted for Agnes Green and the other suspended incumbents. Plaintiffs have not sought to certify the class, nor have the defendants responded to plaintiffs' class action allegations.

DISCUSSION

The parties disagree initially over the requisite showing for a preliminary injunction. Plaintiffs claim the usual standard **[*15]** under Rule 65 of the Federal Rules of Civil Procedure applies, namely, that a party seeking to obtain a preliminary injunction must demonstrate (1) irreparable harm and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor. *See Communications Workers of America, Dist. One, AFL-CIO v. NYNEX Corp., 898 F.2d 887, 891 (2d Cir. 1990)*; *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979)* (per curiam). Defendant argues correctly, however, that the lesser standard requiring the movant merely to demonstrate a "fair ground for litigation" and a balance of hardships is not available if the moving party challenges "government action taken in the public interest pursuant to a statutory or regulatory scheme." *Jolly v. Coughlin, 76 F.3d 468, 473 (2d Cir. 1996)* (internal quotations omitted).

If the injunction sought "will alter, rather than maintain, the status quo -- i.e., is properly characterized as a 'mandatory' rather than a 'prohibitory' injunction," then an even stricter standard than that **[*16]** enunciated under Rule 65 applies, and the moving party must make a "clear" or "substantial" showing of a likelihood of success or must show that extreme or serious damage will result from the denial of preliminary relief. *Id.* (citations omitted); *Tom Doherty Assoc., Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 33-34 (2d Cir. 1995)*; *Abdul Wali v. Coughlin, 754 F.2d 1015, 1025 (2d Cir. 1985)*.

It is clear that the challenged action here was taken in the public interest. The defendants purported to act out of concern for the educational welfare of the children enrolled in the city's public school system, and the specific conduct taken was authorized and controlled by *New York Educ. Law § 2590-l*. *See also Brock v. Sands, 924 F. Supp. 409, 416 (E.D.N.Y. 1996)* (court used clear likelihood of success standard in action challenging state nominating Petition regulations).

The determination whether plaintiffs seek a prohibitory rather than a mandatory injunction presents a closer question. Often the distinction is unclear since the requested relief can be framed in either mandatory or prohibitory terms. *See Tom Doherty, 60 F.3d at 34*. On one level the injunction seeks **[*17]** to prohibit future enforcement of these laws upon a finding that they are unconstitutional, thus preventing the defendants from interfering with the school board's activities and the election procedures for the local school districts. *Cf. Abdul Wali, 754 F.2d at 1026* (prohibitory because merely prevented prison officials from interfering with delivery of reports).

The circumstances here, however, compel a finding that the requested relief is mandatory. Plaintiffs ask this Court to reach back and declare Agnes Green's original suspension invalid, to declare the continued suspension, which has been precleared by the Justice Department, invalid, and to order her immediate reinstatement as well as the removal of the appointed trustees. Such an order would require a marked

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[8] The third cause of action also contains a conclusory statement that ***Sections 2590-c*** and 2590-l deny them due process of law in violation of the ***Fifth Amendment***. Plaintiffs' pleading, however, fails for lack of any factual predicate articulating what right -- i.e., right to vote, to take office, to be a candidate -- has been denied. *See* Fed. R. Civ. P. 8. The complaint also does not allege who was injured, the plaintiff Agnes Green or the plaintiff voters. *Id.* Plaintiffs' memorandum of law in support of the motion for preliminary injunction contains no mention whatsoever of the ***Fifth Amendment*** claim. Plaintiffs for the first time offered some explanation of their due process allegations in their reply papers but still failed to articulate a sufficient claim identifying the nature of the injury and the parties. Accordingly, having failed to demonstrate any irreparable injury or a clear likelihood of success on the merits of this claim, *see* discussion *infra*, plaintiffs' request for preliminary injunctive relief on this ground is denied, and the cause of action on this ground is dismissed without prejudice to more adequate pleading in an amended complaint.

shift in Board of Education policies regarding monitoring and control of school boards. Accordingly, this Court construes this request as one seeking a mandatory injunction; thus, plaintiffs must demonstrate either a ″clear″ or ″substantial″ showing of a likelihood of success or a showing that extreme or serious damage will result from denial of preliminary relief. Of course, the movant must also demonstrate irreparable **[*18]** harm, the first prong of the test under Rule 65 of the Federal Rules of Civil Procedure.

Ordinarily, the showing of irreparable harm is the ″single most important prerequisite for the issuance of a preliminary injunction,″ *Bell and Howell: Mamiya Co. v. Masel Supply Co., 719 F.2d 42, 45 (2d Cir. 1983)*, and the moving party must show that injury is likely before the other requirements for an injunction will be considered. Irreparable harm must be shown to be actual and imminent, not remote or speculative, and the injury must be such that it cannot be fully remedied by monetary damages. *Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 975 (2d Cir. 1989)*. This Court may consider both harm to the parties as well as harm to the public. *See Long Island Railroad Co. v. International Ass'n of Machinists, 874 F.2d 901, 910 (2d Cir. 1989)*, *cert. denied*, *493 U.S. 1042 (1990)*.

Plaintiffs argue they have demonstrated irreparable harm by alleging a deprivation of a constitutional right. The ″right to a meaningful vote or to the full and effective participation in the political process is in and of itself irreparable harm.″ *Puerto Rican Legal Defense and Education* **[*19]** *Fund, Inc. v. City of New York, 769 F. Supp. 74, 79 (E.D.N.Y. 1991)* (citing *Reynolds v. Sims, 377 U.S. 533, 562, 565, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964))*. Here, plaintiffs have alleged a dilution or denial of their right to vote through the replacement of the elected representatives with appointed trustees. As is demonstrated in the ensuing discussion, however, plaintiffs fail to meet the clear or substantial likelihood of success on the merits test and thus it is not presumed they will suffer irreparable injury from any voting rights violations. Plaintiffs have alleged no injury that could not be remedied if they are successful at trial on the merits. This is not a case where special election would have to be ordered. The suspended board members would merely be reinstated. Additionally, plaintiff voters had notice of the newly amended statute prior to casting their vote in the May 1996 election. Although it had not yet been precleared, plaintiffs had every reason to know and believe that the statute could be used to suspend certain of the individuals on the ballot for CSB 17. Finally, the appointed trustees reflect the minority presence in the community and there has been **[*20]** no allegation that the replacements have acted beyond the scope of their enumerated authority. Accordingly, this Court finds no irreparable injury.

Turning to the second prong of the preliminary injunction standard, this Court will address the Voting Rights Act claim followed by the constitutional arguments. Congress enacted the Voting Rights Act of 1965 (the ″Act″) in order to combat ″nearly a century of systematic resistance to the *Fifteenth Amendment*.″ *State of South Carolina v. Katzenbach 383 U.S. 301, 328, 15 L. Ed. 2d 769, 86 S. Ct. 803 (1966)*; *Tisdale v. Sheheen*, 777 F. Supp. 1270, 1272 (D.S.C.), *judgment vacated as moot*, *502 U.S. 932 (1991)*. *Section 2* applies to all jurisdictions, whether or not they fall within the coverage formula set forth in § 4(b) of the Act, *42, U.S.C. § 1973(b)*. [9] *See Baker v. Pataki, 85 F.3d 919, 924-25 (2d Cir. 1996)*.

[*21] The Act as amended in 1982, Pub.L. No. 89-110, 79 Stat. 437 (codified as amended at *42 U.S.C. §§ 1973 et seq.*), does not require a showing of intent to deny the right to vote on the basis of race in order to establish a violation. *See Baker v. Cuomo, 58 F.3d 814, 822* (2d Cir.), *cert. denied*, *116 S. Ct. 488 (1995)*. The amendments explicitly adopted a result-oriented test and a ″totality of the circumstances″ standard. *Section 2* of the Act as amended provides in relevant part:

> (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 … to vote on account of race or color….
>
> (b) A violation … 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

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[9] The defendants do not dispute that Bronx, Kings, and New York Counties is a covered jurisdiction under 42 U.S.C. § 1973b claims or that the Board of Education is a ″political subdivision″ within the meaning of the Act insofar as the board and the city administer school board elections. *See generally United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110, 117-18, 98 S. Ct. 965, 55 L. Ed. 2d 148 (1978); *Dupree v. Mabus*, 776 F. Supp. 290, 297 (S.D. Miss. 1991) (school board and Board of Education defendants), *judgment vacated by Dupree v. Moore*, 503 U.S. 930, 117 L. Ed. 2d 609, 112 S. Ct. 1462 (1992); *N.A.A.C.P., DeKalb County Chapter v. State of Georgia, DeKalb County League of Women*, 494 F. Supp. 668, 676 (N.D. Ga. 1980) (Board of Registration and Elections is a political subdivision).

members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and **[*22]** to elect representatives of their choice.

42 U.S.C. § 1973. Congress enacted the ″results″ test pursuant to its authority under the enforcement provisions of the *Fourteenth* and *Fifteenth Amendment*. *See Baker v. Pataki, 85 F.3d at 926* (citation omitted). It is well settled, however, that the *Fourteenth* and *Fifteenth Amendments* may be violated only by intentional discrimination. *Id.* (citing cases). Accordingly, the results test of *Section 2* employs a lower threshold and reaches conduct which is not directly violative of the *Fourteenth* or *Fifteenth Amendments*. *Id.* [10]

[*23] The Senate Report accompanying the 1982 amendments to *Section 2* listed nine non-exclusive factors that may be considered in determining whether, under the totality of the circumstances, a scheme or practice results in a violation of the Act. These include but are not limited to:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment **[*24]** and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiff's evidence to establish a violation are:

[8] whether there is a significant lack of responsiveness on the part of the elected officials to the particularized needs of the members of the minority group;

[9] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. Rep. No. 417, 97 Cong., 2d Sess. 28-29, reprinted in 1982 U.S.S.C.A.N. (vol. 2) 177, 206-07; see also *Baker v. Cuomo, 58 F.3d at 822-23* (listing factors). In addition, whether a challenged action ″results″ in a denial or abridgement of the right to vote may depend, at least in part, on how the newly imposed regulation or requirement changes the status quo. *See Baker v. Cuomo, 58 F.3d at 823*. ″The essence of a **[*25]** *[Section] 2* claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.″ *Thornburg v. Gingles, 478 U.S. 30, 47, 92 L. Ed. 2d 25, 106 S. Ct. 2752 (1986)*.

Section 2 protects citizens in two ways. First it protects minority groups against schemes, such as certain at-large voting systems, that dilute minority voting strength. *See Baker v. Cuomo, 58 F.3d at 823* (citing *Allen v. State Bd. of Elections, 393 U.S. 544, 569, 22 L. Ed. 2d 1, 89 S. Ct. 817 (1969)*). Typically, dilution claims arise from ″dispersal of [racial minority groups] into districts in which they constitute an ineffective minority of voters, or from the concentration of blacks into districts where they constitute an excessive majority.″ *Gingles, 478 U.S. at 46 n.11*. Other practices such as that alleged here, namely, changing elective posts to appointive may also result in vote dilution. *See Baker v. Cuomo, 58 F.3d at 824*; Senate Report accompanying the 1982 Amendments at 183. These practices diminish the

[10] Nonetheless, the application of Section 2 to N.Y. Educ. Law § 2590-l is constitutionally authorized. In a series of cases involving the Voting Rights Act, the Supreme Court has held that Congress may constitutionally prohibit practices that are not, considered in isolation, constitutional violations but which are alleged to perpetuate the effect of past purposeful discrimination. *See Baker v. Pataki, 85 F.3d at 927-28* (discussing cases). Moreover, the challenged statute here was promulgated and enforced by a ″covered″ state and political subdivision under 42 U.S.C. § 1973b.

″'force of minority votes **[*26]** that were duly cast and counted.'″ *Baker v. Pataki, 85 F.3d 919, 924 n.6* (quoting *Holder v. Hall, 512 U.S. 874, 114 S. Ct. 2581, 2593, 129 L. Ed. 2d 687 (1994)*).

Section 2 also protects citizens by prohibiting the use of certain facially neutral voting qualifications that deny the vote to citizens who are disproportionately members of minority groups. *See Baker v. Cuomo, 58 F.3d at 823* (citing *Gingles, 478 U.S. at 43*). In essence, vote denial occurs when the franchise is denied on account of race. *See Baker v. Pataki, 85 F.3d at 924 n.6*.

Defendants argue that the facts of this case are not within the scope of the ″right to vote″; thus, this claim must be dismissed as a matter of law. A motion to dismiss pursuant to Rule 12(b)(6) should be granted only if it ″appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.″ *Cohen v. Koenig, 25 F.3d 1168, 1172 (2d Cir. 1994)* (quoting *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*). Rule 12(b)(6) dismissal motions are especially disfavored if ″the complaint sets forth a novel legal theory that can best be assessed after **[*27]** factual development.″ *Baker, 58 F.3d at 818-819* (citation omitted).

Although the defendants concede the right to vote must be interpreted broadly as a right of meaningful access to the political process, they argue it does not extend to the ability to command results in the public office. [11] *See Smith v. Winter, 717 F.2d 191, 198 (5th Cir. 1983)*. There the court held that three elected officials who were being subject to ″recall″ proceedings under state law could not maintain a cause of action under *Section 2* of the Act alleging that the removal process abridged the minorities' rights to effective votes by threatening the removal of officials for whom those votes were cast. *Id.* Defendants claim that *Section 2*, which does not establish a right to hold office, [12] must necessarily stop short of any absolute right to resist removal or suspension from office. *See id. at 198*.

[*28] Defendants further claim that the decision to continue the suspension is an individual determination that does not constitute a voting practice or procedure. *See Tisdale v. Sheheen, 777 F. Supp. 1270, 1275* (D.S.C.), *judgment vacated as moot, 502 U.S. 932 (1991)*. In *Tisdale* the court required preclearance of a state legislative rule changing the grounds for removing an elected official but stated that preclearance would not be required prior to each individual disciplinary decision. *Id.* Individual disciplinary decisions of the legislature were not considered to be voting practices or procedures. *Id; see also White v. Dougherty County Board of Education, 579 F. Supp. 1480, 1493* (″decisions on individual personnel matters have always been made on an individual basis … that is hardly a change″), *aff'd, 470 U.S. 1067, 85 L. Ed. 2d 125, 105 S. Ct. 1824 (1985)*. Here, the defendants claim that the decision to suspend the board member was largely a personnel matter and that the chancellor's actions were well within the scope of his authority to manage the affairs of the school district and implement the legislative guidelines.

While defendants' arguments raise substantial **[*29]** questions whether their actions are subject to challenge as denials of the right to vote, it cannot be said as a matter of law that no such claim as alleged here can be sustained. Although the Second Circuit has not addressed this issue, the Attorney General has seen fit, in directing that the defendants seek preclearance, to characterize the suspensions of the board members and appointment of trustees as a change in voting practice that necessitates a Voting Rights Act inquiry into the motive and purpose behind it. Moreover, the *Winter* court acknowledges that under certain circumstances allegations of discriminatory misconduct of a recall or removal process may give rise to a claim under the Act. *See Winter, 717 F.2d at 197*. Plaintiffs allege that defendant Chancellor Crew acted in a manner in which caused an abridgement of their right to vote, that is he denied them the opportunity to put into office duly elected candidates and denied them full representation of elected officers. The facts that the suspension followed immediately the election, that the voters were presumably aware of the problems which led to their candidates' earlier suspensions, and that the elected officials **[*30]** never took office all suggest a plausible claim that the suspensions directly impacted plaintiffs' rights to vote. *See Allen v. State Board of Elections, 393 U.S. at 566* (voting includes all action necessary to make a vote effective). [13]

Accordingly, this Court declines to hold that as a matter of law, plaintiffs' somewhat novel extension of the scope of the right to vote cannot under any circumstances be proved.

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[11] There is no case in this Circuit addressing the scope of the right to vote under similar factual circumstances.

[12] The right to vote does not entail a right to have a minority candidate elected, *see City of Mobile v. Bolden*, 446 U.S. 55, 65, 64 L. Ed. 2d 47, 100 S. Ct. 1490 (1980), or a right to proportional representation. *See id.* at 75-76.

[13] Although *Allen* discussed the general principles driving the Voting Rights Act in dicta, that case dealt specifically with the extent of coverage that should be afforded to Section 5 claims.

Plaintiffs, nonetheless, fail to demonstrate a clear or substantial likelihood of success sufficient to warrant preliminary injunctive relief under either the denial or dilution theory of Section 2. Even before availing themselves of the totality of the circumstances standard under a vote dilution theory, plaintiffs must show that:

> (1) the minority group ″is sufficiently large and geographically **[*31]** compact to constitute a majority in a [hypothetical] single-member district;″ (2) the minority group is ″politically cohesive″; and (3) ″the white majority votes sufficiently as a block to enable it -- in the absence of special circumstances … -- usually to defeat the minority's preferred candidate.

National Association for the Advancement of Colored People, Inc., (NAACP) v. City of Niagara Falls, New York, 65 F.3d 1002 (2d Cir. 1995) (quoting *Gingles, 478 U.S. at 50-51*). Here, no evidence has been presented that plaintiff voters and registered voters have been outvoted by a white majority class. According to the defendants, eight of the nine newly elected board members are African Americans, and with the replacement trustees in place all members of the board are African American. Although plaintiffs argue that the class of voters who elected Agnes Green had their representation diluted by her suspension and replacement, there has been no evidence presented that this class of voters is politically cohesive in its voting practices or that this group's choices have been systematically defeated by the defendants. Nor has plaintiff established any racial block voting, **[*32]** and the results test under *Section 2* does not assume its existence. *See Baker v. Pataki, 85 F.3d at 926* (citing *Gingles, 478 U.S. at 46*). Thus plaintiffs fail to meet the preconditions of a dilution claim.

The plaintiffs also cannot demonstrate any substantial likelihood of success on the merits under the totality of the circumstances standard enunciated in the Senate Report noted above. The totality standard is applied to both dilution and denial claims. Defendants do not dispute that there is a history of voter discrimination in New York State or in the New York, Kings, and Bronx Counties. That is precisely why New York City is considered a covered jurisdiction within the meaning of *42 U.S.C. § 1973b*. Plaintiffs, however, cannot rely on New York's covered status, *see 42 U.S.C. § 1973b*, to argue that every change in voting practice or procedure is *per se* an abridgement or denial of the right to vote on account of race or color. Plaintiffs have produced no historical evidence or specific examples of discrimination in the years since the establishment of the community school board system. [14] In fact New York City has taken affirmative steps to encourage minority **[*33]** voting such as creation of mail registration (*New York Election Law § 5-210(1)*. *See Butts v. City of New York, 779 F.2d 141, 150 (2d Cir. 1985)*, *cert. denied*, *478 U.S. 1021, 92 L. Ed. 2d 740, 106 S. Ct. 3335 (1986)*. Here, numerous voter districts enjoy diverse representation. Each district elects a slate of candidates to the community school board rather than a single member. As noted, in District 17, most if not all the board members are African Americans, and all the replacement trustees are African American.

Plaintiffs argue without any statistical or substantive analysis that, of the districts targeted by the Board **[*34]** of Education for investigations concerning their poor academic performance, only school boards in minority dominated districts were found to require suspensions or removals. In the absence of more detailed analysis of the number of minority and non-minority school boards investigated and of the comparative results, it is difficult to attribute any significance to plaintiffs' assertions. Defendants note that in the many instances of litigation arising out of suspension or removals, there has never been a finding of racial discrimination. [15] Plaintiffs have produced no legislative history evidencing a discriminatory motive behind the statute or its amendments. **[*35]** Accordingly, plaintiffs fail to establish a clear or substantial likelihood of success on the merits, and the motion for a preliminary injunction on grounds of a *Section 2* violation is denied. [16]

Since plaintiffs' request for preliminary injunctive relief based on *Section 2* grounds must fail, I turn next to the application for preliminary injunctive relief premised on

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[14] Plaintiffs cite cases in which the Board of Elections for the City of New York did not obtain preclearance in violation of Section 5 in advance of instituting changes in election practices. *See Ashe v. Board of Elections in the City of New York*, No. 88-CV-1566 (E.D.N.Y. June 8, 1988); *United Parent Association v. Board of Election*, No. 89-CV-0612 (E.D.N.Y. March 10, 1989).

[15] In one recent case in which the chancellor's suspension of a school board was vacated, *see Community School Board Nine v. Cortines*, 160 Misc. 2d 995, 611 N.Y.S.2d 453, 456-57 (Sup. Ct. 1994), the court found merely that the Chancellor had exceeded his statutory authority under New York Education Law § 2590-l. There was no allegation or evidence of discrimination.

[16] Although not required to prove intent under Section 2, the absence of an intent to discriminate is certainly a factor to be considered under the totality of the circumstances standard.

violations of Article II [17] and of the *First*, *Thirteenth*, *Fourteenth*, and *Fifteenth Amendments of the United States Constitution*.

[*36] Plaintiffs characterize their constitutional claims as claims arising under *42 U.S.C. § 1983*. A cause of action stated under *Section 1983* requires only that the plaintiffs show that the defendants acted under color of state law and that they deprived plaintiffs of a federal right. *Baker v. Cuomo, 58 F.3d 814, 819 (2d Cir. 1995)*. Defendants do not dispute that the chancellor acted under color of state law; thus, the principal question is whether the enforcement of the statute deprived plaintiffs of rights secured by the *First*, *Thirteenth*, *Fourteenth*, and *Fifteenth Amendments of the United States Constitution* or Article II.

To support a claim of vote dilution or denial on *Fifteenth Amendment* grounds, plaintiffs must establish "intentional discrimination on account of race, color, or previous condition of servitude." *Baker v. Cuomo, 58 F.3d 814, 822 (2d Cir. 1995)* (quoting *U.S. Const. amend. XV, § 1*); *see also City of Mobile v. Bolden, 446 U.S. 55, 62, 64 L. Ed. 2d 47, 100 S. Ct. 1490 (1980)*; *Butts v. City of New York, 779 F.2d at 145 n.1*; *Reed v. Town of Babylon, 914 F. Supp. 843, 891 (E.D.N.Y. 1996)*. Plaintiffs have not alleged any discriminatory purpose or motivation **[*37]** behind the defendants' actions. As noted, all the suspended board members of District 17 were replaced by African American trustees. Accordingly, plaintiffs' motion for a preliminary injunction premised on a *Fifteenth Amendment* violation is denied, and defendants' motion to dismiss this claim for relief is granted.

Turning to plaintiffs' *Fourteenth Amendment* equal protection claim, plaintiffs claim that Education Law *Section 2590-l* violates equal protection on its face and as applied. As with the *Fifteenth Amendment* claim, plaintiffs equal protection cause of action must fail absent a showing of intentional discrimination in the enactment or application of the statute. *See Baker v. Pataki, 85 F.3d at 926*; *Irby v. Virginia State Board of Elections, 889 F.2d 1352, 1355 (4th Cir. 1989)*, *cert. denied*, *496 U.S. 906, 110 L. Ed. 2d 270, 110 S. Ct. 2589 (1990)*; *see also Ricketts v. City of Hartford, 74 F.3d 1397, 1407 (2d Cir. 1996)* ("It is well established that a claimant under the *Fourteenth Amendment's Equal Protection Clause* … must establish intentional discrimination"). In addition, plaintiffs have failed to show that the statute "can never be applied in a valid manner," **[*38]** a necessary precursor to a facial attack on its validity. [18] *N.Y.S. Club Ass'n v. City of New York, 487 U.S. 1, 11, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988)* (internal quotation omitted). The original version of *Section 2590-l* which provided for the removal or suspension of the school board by the chancellor survived constitutional challenge in *Community School Board v. Macchiarola, 99 Misc. 2d 219, 415 N.Y.S.2d 776 (Sup. Ct. 1979)*; *see also Board of Education of Community School District No. 29 v. Fernandez, 81 N.Y.2d 508, 601 N.Y.S.2d 56, 57, 618 N.E.2d 89 (1993)* (discussing statute in dicta). The *Macchiarola* court found that, while the boards have been granted a kind of tenure and have considerable latitude in the administration of education in their area, they still remain subject to the traditional hierarchy of authority which has been long standing in the educational field of New York State. 415 N.Y.S.2d at 779-80. By the same token, the chancellor's authority, though broad, is still confined by the legislative restrictions included within the statute, and he can only take such steps as are necessary to insure compliance with the law. *Id. at 779*. The amended portions of the statute, *see* N. Y. **[*39]** Educ. Law § 2590-l(3)(a-d), *supra*, do not change the legislative restrictions imposed on the chancellor and, as with the initial act of removal, provide an administrative grievance procedure for one whose suspension has been continued. [19] *See id.* at *§ 2590-l(3)(d)*.

No evidence of discriminatory intent by lawmakers in promulgating the law was produced in *Macchiarola*, nor have plaintiffs produced any evidence of racial animus in the enactment of the amendments. The community school board system was created as an experiment to provide an opportunity for parents and local community members to take a more active and personal role in the education of their youth. If anything, the numerous school districts and large numbers of members serving on **[*40]** each board has expanded the opportunity for members of minorities to participate in the political process at a grass roots level. The defendants argue that the statute authorizing removals or

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[17] Article II, § 1 of the United States Constitution grants discretion to the states in the manner of selecting the members of the electoral college. The Supreme Court has on occasion used this and other provisions to support the proposition that the states can impose certain reasonable restrictions upon persons voting in state or national elections. *See* 3 Ronald D. Rotunda and John E. Nowak, Treatise on Constitutional Law § 18.31 n.3 (1992) (citing cases).

[18] The legislature is presumed to act constitutionally. *See Butts, 779 F.2d at 147* (citing cases). It is a plaintiff's burden to prove otherwise.

[19] There is no evidence that plaintiff, Agnes Green, has availed herself of that administrative remedy.

temporarily continued suspensions merely provides a method for the State of New York to ensure that its schools are being administered in a responsible and honest manner and in compliance with the long established administrative hierarchy.

The parties disagree over the extent of scrutiny that must be given the equal protection claim under the *Fourteenth Amendment*. Plaintiffs claim without discussion that their right to vote has been implicated by the defendants suspension of Agnes Green and because that right is a fundamental right, *see* *Dunn v. Blumstein, 405 U.S. 330, 336, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972)*, strict scrutiny must be applied to this statute. As made clear in the above discussion, however, it is not at all clear that the ″right to vote″ encompasses a right to not be removed from office once elected. If after further development of the record it becomes clear that the defendants have been denied a fundamental right, then the state would be obliged to establish that the exclusions are necessary to promote **[*41]** a compelling state interest, that is, the court would subject them to strict scrutiny. *See* *Dunn v. Blumstein, 405 U.S. at 337* (emphasis omitted). At this stage, however, for the reasons already noted, plaintiffs have not demonstrated a clear likelihood of success on the merits sufficient to warrant the issuance of a preliminary injunction.

However, this Court is not inclined to accept the defendants' argument that the equal protection claim, once subject to a lesser rational basis review, must be dismissed. Generally, government action that does not disadvantage a fundamental right or a suspect class ″need only be rationally related to a legitimate government purpose″ to survive judicial scrutiny. *Soberal-Perez v. Heckler, 717 F.2d 36, 41 (2d Cir. 1983)*, *cert. denied*, *466 U.S. 929, 80 L. Ed. 2d 186, 104 S. Ct. 1713 (1984)*. Here, the defendants argue that there existed legitimate, important reasons for the chancellor's action in distinguishing between Agnes Green and David Miller, the suspended but re-elected member of school board 16.

The defendants note that Mr. Miller was was the only incumbent re-elected and that his original suspension was predicated on a single **[*42]** circumstance, the board's inability to select a new superintendent. Because the new board has been substantively reconstituted by the voters, the chancellor determined there was no reason to continue Miller's suspension. In contrast, the defendants argue that the community school board on which Ms. Green served was essentially dysfunctional and unable to reach a consensus on most significant educational and administrative matters in the district. When four of the members of this board were returned to office in the May 1996 election, the chancellor concluded that the same deficiencies would continue to plague the board and jeopardize the educational welfare of the community unless he acted to continue the suspension. On this record, there is insufficient evidence to determine as a matter of law whether the chancellor's decision was rationally based or whether it was arbitrary and capricious.

Accordingly, defendants' motion to dismiss the equal protection claim must at this stage be denied.

The defendants note that facially neutral conduct can still constitute discrimination in violation of the *equal protection clause* only upon a showing of intent to discriminate against the suspect **[*43]** class. *See* *Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 265-70, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977)*; *Washington v. Davis, 426 U.S. 229, 240-42, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976)*; *Soberal-Perez, 717 F.2d at 42*. Miller, who was returned to office, is an African American. Moreover, while the four suspended members of CSB 17 were all minorities, three of the trustees who replaced them were African American and one was hispanic. Based on these circumstances, defendants argue that plaintiffs cannot, as a matter of law, prove intent to discriminate.

Plaintiffs, however, argue that the racial animus is apparent when the situation is looked at from the appropriate perspective. As noted, plaintiffs claim that, of the numerous districts targeted for investigation, only district boards comprised of minorities actually suffered any suspensions or continuations of suspensions. Plaintiffs argue that this practice perpetuates discriminatory treatment against minority controlled school boards. Although little concrete evidence or analysis has been presented thus far to support the allegation, plaintiffs have made a sufficient claim to require that defendants' **[*44]** motion to dismiss the equal protection claim must be denied.

I turn next to plaintiffs' argument that Agnes Green's right of access to office as a candidate and their rights of association have been denied in violation of the *First* and *Fourteenth Amendment*. It suffices to note again that plaintiff has failed to allege the discriminatory animus necessary to support a claim for denial of equal protection.

Even assuming that plaintiff's right to become a candidate was implicated by defendants' action, the Constitution contains no express provision guaranteeing such a right. *See* *Storer v. Brown, 415 U.S. 724, 728, 39 L. Ed. 2d 714, 94 S. Ct. 1274 (1974)*. Nonetheless, the rights of candidates and the rights of voters do not lend themselves to easy separation; laws affecting the former tend to have some impact on the

latter. *See* Anderson v. Celebrezze, 460 U.S. 780, 786, 75 L. Ed. 2d 547, 103 S. Ct. 1564 (1983); Fletcher v. Marino, 882 F.2d 605, 614 (2d Cir. 1989). Because every election law invariably imposes some burdens on some voters, the Supreme Court has recently recognized that not every statute that implicates the *First* and *Fourteenth Amendments* requires strict scrutiny **[*45]** analysis. Those regulations that impose "severe restrictions 'must be narrowly drawn to advance a state interest of compelling importance.'" Schulz v. Williams, 44 F.3d 48, 56 (2d Cir. 1994) (*first* and *fourteenth amendment* challenge) (quoting Burdick v. Takushi, 504 U.S. 428, 434, 119 L. Ed. 2d 245, 112 S. Ct. 2059 (1992)). On the other hand, if state election laws impose only "reasonable nondiscriminatory restrictions, the State's important regulatory interests are generally sufficient to justify the restrictions." Schulz 44 F.3d at 55 (internal quotations omitted).

Traditionally, cases that have used heightened scrutiny to analyze a statute under the *First Amendment* typically involve "restrictions on voters' access to the polls, candidates' access to the ballot, and the internal workings of political parties." Fletcher, 882 F.2d at 611. In contrast, laws that "implicate, in a limited fashion, a person's right to participate in politics and to serve as an elected official have survived review under the *First Amendment* and have not been subject to strict scrutiny." Id. at 612 (citations omitted). In *Fletcher*, the Second Circuit upheld a state statute which **[*46]** precluded certain municipal employees, political party office holders, and elected officials from also serving as school board members. Defendants argue that subsection 2590-l(3), like the statute validated in *Fletcher*, does not deny the voters the right to vote for candidates of their choice; rather, that the statute merely insures that the school boards are governed by individuals fit to serve. Defendants claim further that the effects of the law of which plaintiffs complain are no more than "'the indirect consequence of laws necessary' to the state's responsibility to ensure that the New York City school system is governed in a fair and honest manner." Id. at 614.

While plaintiff Agnes Green's interest in taking and holding the office for which she was elected is obvious, the defendants have advanced substantial interests to support continuing the suspensions. The challenged statute, on its face and as applied, does not punish particular races, nationalities, or political parties. It only prevents persons who have shown themselves to be incapable of adhering to legislative guidelines within the educational hierarchy from taking office, at least temporarily. [20] The statute **[*47]** authorizing the chancellor to continue the plaintiff's suspension is facially neutral and does not implicate a suspect class. [21]

But unlike *Fletcher* and other cases upholding limitations on the freedom to associate, the statute in question does not impose a purely objective test. The subjective element in the statute creates the possibility for abuse, especially on racial or other suspect lines.

Support for the notion that this discretion can be discriminatorily abused grows when considering the historical **[*48]** argument the plaintiffs levelled in the above equal protection claim. [22] If the evidence bears out this claim, then plaintiffs may well have adequate support for the argument that the statute on its face and in application does not serve important government interests without imposing too great a burden on the rights and interests of the voters and candidates. Accordingly, while plaintiffs' motion for preliminary injunctive relief is denied, defendants' motion to dismiss this claim is denied as well.

Plaintiffs' conclusory claim that the defendants have violated the *Thirteenth Amendment* is without merit. The plaintiffs allege no facts showing "how the statute complained of is used to further the conditions of involuntary servitude, or the "badges and incidents of slavery." City of Memphis v. Greene, 451 **[*49]** U.S. 100, 125, 67 L. Ed. 2d 769, 101 S. Ct. 1584 (1981) (internal quotation omitted). Generally, the *Thirteenth Amendment's* scope does not reach other acts of discrimination, such as those arising in vote denial or dilution challenges. *See* Reed v. Babylon, 914 F. Supp. 843, 892 (E.D.N.Y. 1996) (citing Washington v. Finlay 664 F.2d 913, 927 (4th Cir. 1981), *cert. denied*, 457 U.S. 1120, 73 L. Ed. 2d 1333, 102 S. Ct. 2933 (1982)). In any event, even if the *Thirteenth Amendment's* scope was extended as plaintiffs request, they have made no showing of racial animus. *See* City of Memphis v. Green, 451 U.S. at 126-28. Accordingly,

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[20] The suspension cannot be continued for longer than one year of the three-year term. *See* N.Y. Educ. Law § 2590-l(3).

[21] This is not to say that the challenged statute is automatically entitled to rational basis review. As stated above, for the purposes of these motions, the Court assumes some right of access has been implicated. At a minimum the defendants must demonstrate some substantial interests. No discriminatory inference, however, may be drawn from the face of this particular statute.

[22] The plaintiffs claim their minority controlled school districts have suffered undue burden and interference with their participatory rights when compared to the non-minority or mixed school districts.

the plaintiffs' motion for preliminary injunctive relief on this ground is denied, and the defendants' motion to dismiss this claim for relief is granted.

Plaintiffs' attack on Chapter 399, *see* N.Y. Educ. Law § 2590-c(4)(b), must be dismissed for lack of standing. Standing, "which is an issue of justiciability, addresses the question whether a federal court may grant relief to a party in the *plaintiff's* position." *Rent Stabilization Ass'n of City of New York v. Dinkins, 5 F.3d 591, 594 n.2 (2d Cir. 1993)* (emphasis in original). Neither **[*50]** plaintiff Green nor any of the other elected board members for CSB 17 were suspended, removed from office, or declared ineligible as candidates pursuant to *Section 2590-c(4)(b)*. Having suffered no injury that can be traced to the enforcement of this statute, *see Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1981)*, plaintiffs have no standing to assert a cause of action alleging the unconstitutionality of this statute, and this claim is dismissed.

Finally, defendants move for the dismissal of the complaint against the Board of Education, the named individual members of the Board, and former schools Chancellor Ramon Cortines, alleging that the complaint lacks any factual allegations that these defendants were involved in the suspension. Plaintiffs have not responded to this argument.

The motion to dismiss on behalf of the Board of Education is denied. The Board of Education is charged with administering school board elections along with the Board of Elections. *See N.Y. Educ. L. § 2590-c*. For purposes of the Voting Rights Act and the remaining constitutional claims, it may be **[*51]** considered a political subdivision. *See United States v. Board of Commissioner's of Sheffield Alabama, 435 U.S. 110, 117-18, 98 S. Ct. 965, 55 L. Ed. 2d 148 (1977)*. Moreover, the board would be a vital part of any remedial relief in fashioning and implementing a new system, should plaintiffs eventually prevail on the merits. As for the individual named board members, plaintiffs have made no showing under *42 U.S.C. § 1983* that any person directly acted to intentionally deprive plaintiffs of a federally ensured right; thus, the complaint is dismissed without prejudice against these persons in their individual capacity. *See generally Gill v. Mooney, 824 F.2d 192, 196 (2d Cir. 1987)* (no supervisory liability under *Section 1983* for conduct of subordinates). The motion to dismiss former Chancellor Cortines is denied without prejudice at this time. Chancellor Crew derived his authority to continue Agnes Green's suspension from the original suspension by Cortines; thus, defendants Cortines' actions contributed to the most recently alleged injury.

The Clerk is directed to mail a copy of the within to all parties.

SO ORDERED.

Dated : Brooklyn, New York

September 5, 1996

Charles P. Sifton

United States District **[*52]** Judge

STATE OF MICHIGAN

30TH JUDICIAL CIRCUIT COURT INGHAM COUNTY

THE DETROIT BOARD OF EDUCATION

Plaintiff,

vs File No. 14-725-CZ

JACK MARTIN, as Emergency Manager
of the Detroit Public Schools,

Defendant.

_____/

MOTION FOR SUMMARY DISPOSITION

BEFORE JOYCE DRAGANCHUK, CIRCUIT COURT JUDGE

Lansing, Michigan – Wednesday, October 1, 2014

APPEARANCES:

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Lansing, Michigan

Wednesday, October 1, 2014

1:55:03 pm

THE COURT: Thank you. Please be seated. First up this afternoon we have the Detroit Board of Education versus Jack Martin as Emergency Manager of the Detroit Public Schools, docket number 14-725-CZ. This is the time set for hearing on the Defendant's Motion for Summary Disposition. And do you want to go ahead with your appearance first on the record please?

MS. BRYA: Good afternoon, your Honor, Michelle Brya, Assistant Attorney General on behalf of Jack Martin, the Detroit Public Schools Emergency Manager.

MR. BOOTH: Good afternoon, Joshua O. Booth, Assistant Attorney General on behalf of Defendant.

THE COURT: Okay, you can go ahead--good ahead, sir, I was going to wait until you were arguing but go ahead.

MR. SANDERS: I apologize.

THE COURT: No, that's okay.

MR. SANDERS: Herb Sanders on behalf of the Detroit Board of Education.

THE COURT: Thank you. You may go ahead.

MS. BRYA: Thank you, your Honor. The Board of Education cannot remove Emergency Manager, Jack Martin, from

office until January of 2015. He has not served for at least 18 months after his appointment as Emergency Manager under Public Act 436. In their prayer for relief the Detroit Board of Education is asking this Court for two forms of declaratory relief. First, a declaration of when the Board of Education may act to remove Jack Martin from office under Public Act 436.

And secondly, an order compelling the Defendants to comply with MCL 141.1549, a section of Public Act 436. As to when the Board of Education may act the plain language of MCL 141.1549(6)(c) is clear, a governing body can only vote to remove an emergency manager, and I quote, "…if the emergency manager has served at least 18 months after his or her appointment under this Act." Jack Martin was appointed as Emergency Manager of Detroit Public Schools on July 15th, 2013. His 18 month time period has not yet expired and will not expire until January 15th of 2015.

That is the first possible date that the Detroit Board of Education could vote to remove Mr. Martin from office. Any other interpretation of the statutory language in Public Act 436 renders meaningless the phrase, "…after his or her appointment under this Act." That condition must be met in order for the Detroit Board of Education to vote to remove Mr. Martin. That condition is not present here. The Board of Education argues that the Detroit Public

Schools has already been under emergency management for five years, and therefore because that 18 month time period has already expired Mr. Martin can be removed from office. However, the Board does not offer any argument based on the language of the statute or rebut our argument regarding the statute's plain language.

But as previously statement Mr. Martin has not been the Emergency Manager for at least 18 months and cannot be removed. Therefore this Court should declare that he cannot be removed until at least January 15th of 2015 when he will have served as Emergency Manager for at least 18 months. At one point in the Board's complaint it argues that this Court should declare that it may act to remove Mr. Martin. And to that end the Board of Education has passed numerous resolutions to attempt to remove Mr. Martin from office.

But any relief requested in this regard is moot because the Board has already taken action to remove Mr. Martin from office. The Board's second request that this Court compel the Defendants to comply with MCL 141.1549 should be denied. First, that section of PA 436 contains eleven subsections and it is not clear from the Board's complaint or their motion what they're seeking to compel the Defendants to do. And secondly, their complaint and their motion refer to Defendants, meaning plural, multiple

Defendants, and here there's only one Defendant. That is Jack Martin, the Emergency Manager for Detroit Public Schools. To the extent that the Board somehow seeks to compel the governor or treasurer to take some action, they are not parties to this case and therefore this Court does not have jurisdiction to compel them to take any action.

In addition, under this section of PA 436 they're not required to take any action after the Board executes resolutions to remove the emergency manager from office. If the Board is asking this Court to order Mr. Martin to take some action the Board hasn't indicated what action they would like Mr. Martin to take. And again, Public Act 436 doesn't require him to take any action.

If the Board is seeking an order from this Court compelling Mr. Martin to leave office the Board is required to file a writ of quo warranto, and the Board has not done so here. Thus the Board's request for relief in this regard should be denied. In summary, the Board of Education's claims are both procedurally improper and legally without merit. Mr. Martin is the Detroit Public Schools Emergency Manager and cannot be removed by the Board until at least January 15th of 2015. For all these reasons, your Honor, we request that this Court grant Summary Disposition in favor of Mr. Martin.

THE COURT: Thank you.

MS. BRYA: Thank you, your Honor.

THE COURT: Mr. Sanders?

MR. SANDERS: Good afternoon, your Honor. As your Honor is aware Detroit Public Schools have been under some form of emergency management, either Emergency Financial Manager or Emergency Manager since 2009. March 28th of 2013 PA 436 was passed. Eighteen months from the passage of PA 436 would be September 28th of 2014. Jack Martin was not serving at that time; another Emergency Manager was.

Jack Martin was appointed July 15 of 2015. Eighteen months from his date of appointment would be January--excuse me, Jack Martin appointed July 15 of 2013. Eighteen months from his date of appointment would be January 2015. I believe that the Defendants have suggested a very disingenuous reading of the statute. And the basis for my suggestion of that is this. Clearly the statute says that after 18 months of service an Emergency Manager can be removed by a two-thirds vote.

It is our contention that after 18 months of being under emergency management the Board can act for removal. To the extent that the statute is not read in that manner and it is the particular Emergency Manager that must serve 18 months then the removal authority of the Board becomes null and void because technically the governor could then appoint a new Emergency Manager every 17 months into

perpetuity, continuously. I don't believe that that was the intent of the legislature and I believe that it's very disingenuous to provide for a process of removal, provide for a process of removal under receivership and then say to a government that has had its democracy deprived and its citizens deprived of their right to vote for their elected officials that this is illusory.

It means nothing because we can continue to dictate into perpetuity. So we are here seeking a declaratory judgment from this Court as to when the Detroit Board of Education may seek removal of Jack Martin in accordance with PA 436. I provided Defendants with a copy of a new resolution voted on just two days ago, September 29th, 2014 seeking the removal of Jack Martin and also seeking the removal out from under receivership. I apportioned to my brief very similar resolutions passed in July of this year. If the Court would allow I'd like to approach and provide you with a copy.

THE COURT: You may, thank you.

MR. SANDERS: Thank you, your Honor. Your Honor, just to address a couple of the arguments that have been made by the Defendants, one I believe is that it's been suggested that the only means by which the Board may seek relief or declaration concerning their rights would be by a writ of quo warranto. Clearly that is not the case.

Particularly MCR 2.605 provides that the existence of another adequate remedy does not preclude a judgment for declaratory relief. We potentially could seek and potentially will seek a writ of quo warranto depending upon what your Honor rules. But to suggest that that is our only means of declaring what our rights are at this time I believe is contrary to MCR 2.605.

Additionally, a writ of mandamus might be another option. But because there are other options MCR 2.605 clearly indicates that that should not and does not preclude us from seeking declaratory relief or your Honor from providing it. Moreover, it's been suggested that in order for us to receive the relief we are seeking that the governor should be a party to the litigation. It's our contention that we are simply seeking a clarification of our rights under the statute and that Jack Martin, an agent of the governor, is serving in the capacity of Emergency Manager.

However, MCR 2.205, necessary joinder of parties, states that it is not required that all parties who might be subject to the results of a declaratory judgment be a part of the litigation. But to the extent it is believed they should be it says that the court may seek to make them a party to the litigation. And if their jurisdiction may only be obtained by consent than MCR 2.205 states that the court

may proceed with the action to prevent a failure of justice. So it is our contention that the governor is not a necessary party to this litigation. Moreover, that our position is bolstered by MCR 2.065(f) which indicates that after the granting of declaratory relief further necessary and proper relief may be granted after reasonable notice and hearing against the parties whose rights have been determined by the declaratory judgment.

So your Honor can grant the relief, declare the rights, and give further relief if there are other necessary parties that should be a party. Additionally, per 2.205, your Honor can summon any other parties to be a party. Moreover, as it relates to necessary joinder of parties I believe that counsel for Defendant, Jack Martin, is indeed counsel for the other necessary parties they have suggested, being the governor and or treasurer. They're his attorney. They can bring him here.

Clearly, your Honor, we need guidance as to how we can and should proceed under the law. For our resolutions which have been sent to the governor and served upon the governor to simply be ignored and we fish around trying to figure out what our rights are under the statute is not appropriate. We ask this Court to declare our rights and we ask that this Court declare our rights in a manner that does not allow for disingenuous reading and interpretation of the

statute. Thank you, your Honor.

THE COURT: Thank you.

MS. BRYA: Thank you, your Honor. If I can just briefly respond to a couple of arguments that opposing counsel made. First of all, there were comments made about a writ of quo warranto, and I believe opposing counsel's argument is that a writ of quo warranto is not necessary here; however, we disagree with that position.

I think the law is well settled in this area. The only way to remove a public officer from office is to file a writ of quo warranto. And that is what the Board of Education is trying to do in this case. While the Board characterizes their claim as a claim for declaratory relief the substance of that is a claim for quo warranto, a challenge to the validity of Mr. Martin's position as Emergency Manager for Detroit Public Schools.

They've not followed the proper requirements under the Court Rules to file for a writ of quo warranto, and that's the process that must be followed in order for them to challenge Mr. Martin's position as Emergency Manager. And secondly, just to clarify one of the other statements that opposing counsel made, I believe his comment was that we were somehow arguing that the governor needed to be a party to this case and that was not our argument. We were responding to some of the allegations in his complaint--or

in the Board's complaint and motion which implied that perhaps they were asking for some declaration from this Court directing the governor to take some action. And to that extent we don't believe that this Court has jurisdiction to do that because the governor is not a party to this action. And again, your Honor, for the reasons that I've stated before, and we won't rehash those reasons, I know you've read our briefs and heard the arguments and we certainly appreciate that, but we believe based on the plain language of the statute that Mr. Martin is properly in office and the Board cannot vote to remove him from office until January of 2015.

THE COURT: Thank you.

MS. BRYA: Thank you, your Honor.

MR. STEVENS: May I briefly, your Honor?

THE COURT: Very briefly. I don't usually do more than on rebuttal.

MR. STEVENS: I understand. Your Honor, I just want to make it clear what we are seeking is for clarification under the statute. We're not asking for an order removing Mr. Martin. We're asking for an order declaring what our rights are as it relates to that process. Thank you, your Honor.

THE COURT: Thank you. I guess I'll address the timing issue first. The statute says,

"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 two-third vote of the governing body of the local government."

The Plaintiff pleads with me not to read this in a disingenuous way, but I don't think I'm being disingenuous by reading it exactly as it is written. And that's my duty as a judge is to read it exactly as it's written if it's clear and unambiguous and apply it. Not to change it the way I think it should be or in a way that I think it could have been worded better, but to apply it as written. Counsel is rather polite in suggesting that this means something else and that we shouldn't read it in a disingenuous way.

Maybe it was written in a disingenuous way because I do agree with Counsel that it would allow, the way it is written clearly, it would allow the governor to appoint a new Emergency Manager every 17 months. And in that case this--the Board could not make their two-thirds vote to have him removed, and that is exactly what the statute says. I didn't write it. I'm only obliged to enforce it. And had the legislature wanted to say something different, such as once there has been an Emergency Manager in place for a period of 18 months then there'd maybe be a different

result. And it would have been an easy thing to do that. If the legislature had wanted to write it that way it's quite easy to do. But they didn't. They specifically said 18 months after his or her appointment. The only way I can apply that is to apply it to these specific Emergency Manager that has been appointed, Mr. Jack Martin.

And he has not served for 18 months after his appointment under the Act. That would take place in January of 2015. This is, as has been discussed, a complaint for declaratory judgment. There has to be an actual controversy in existence in order for this Court to rule on--to make a declaratory judgment ruling. It has to be something that's necessary to guide the Plaintiff's future conduct. The complaint seeks a declaration that it may act to remove Emergency Manager Jack Martin. That issue is not actually in controversy. For one, it's premature because the 18 months have not elapsed.

But two, the Board has voted and the Board may vote after Mr. Martin has been in place for 18 months. This Court has nothing further that it can rule on with respect to a declaratory judgment ruling other than what the Board has already done. They have voted to remove him, although again, I would add prematurely. The Plaintiff has made the point, and it's a well-made point, that the declaratory judgment rule says it does not preclude seeking other

relief; however, the Court must and should look at an action and assess whether a different label has been attached to it than what it really is. And in this case if the Board were asking me to order that Jack Martin is removed then what they would really be asking for is a writ of quo warranto, and the requirements for a write of quo warranto have not been met.

There is no other relief in the complaint that I could grant for which there is an actual controversy that would be necessary to guide future conduct other than to declare that Jack Martin is not eligible for removal until he, Jack Martin, has served at least 18 months after his appointment. So for those reasons I am granting the Defendant's Motion for Summary Disposition under C(8) and C(10). And do you have an order that you want to submit now, or do you want to submit one under the Seven Day Rule?

MS. BRYA: I believe we have one here, your Honor. If we could just have a quick moment. May I approach, your Honor?

THE COURT: Yes.

MS. BRYA: Thank you.

THE COURT: Okay, you can take this original with your copies down to the first floor Clerk's Office. They'll stamp them for you.

MS. BRYA: Thank you, your Honor.

THE COURT: Thank you.

(At 2:19:09 proceeding ended)

STATE OF MICHIGAN)
)
COUNTY OF INGHAM)

I certify that that this transcript, consisting of (17) pages, is a complete, true, and correct transcript of the proceedings and testimony taken in this case on Wednesday, October 1, 2014.

October 4, 2014

Toni Coltman, CER 8226
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