

DO DESPERATE TIMES CALL FOR DESPERATE  
MEASURES IN THE CONTEXT OF DEMOCRACY?  
MICHIGAN’S EMERGENCY MANAGER LAW & THE  
VOTING RIGHTS ACT

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ABSTRACT

In an effort to remedy the financial distress Michigan cities faced after the 2007 recession, the Michigan state legislature passed 2012 Public Act 436 ("PA 436"), the "Local Financial Stability and Choice Act." Under PA 436, state-appointed emergency managers act for—and in place of—local governing bodies, and assume all authority of locally elected officials beyond fiscal matters. It was not until 2016 that PA 436 garnered widespread national attention when it was revealed that decisions made by non-elected emergency managers led to the Flint Water Crisis, traumatically impacting some of Michigan’s most vulnerable residents.

Although civil rights groups attempted to challenge the law, their claims to date have been unsuccessful. This article argues that PA 436 qualifies as a voting standard, practice, or procedure under the Voting Rights Act, and should be challenged under that law. PA 436 likely violated Section Two of the Voting Rights Act by effectively denying over half of Michigan's African-American population the right to vote through the replacement of locally elected officials with state appointees. If a judicial remedy is not possible, this article also suggests several policy-based solutions to restoring democracy in Michigan, such as limiting emergency management to finances. The aftermath of PA 436, moreover, serves as a cautionary tale for the future of Michigan and other similarly situated jurisdictions.

I. INTRODUCTION.....	182
II. HOW DID MICHIGAN’S CITIES END UP IN STATES OF EMERGENCY?.....	185
III. THE ACT ITSELF: PA 436.....	189
A. History & Events Leading to PA 436 .....	189

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B. The Substantive and Procedural Elements of PA 436.....	192
i. Broad Discretion of Power and Abuses Under PA 436.....	195
ii. The Most Consequential Exercise of Emergency Manager Control: The Flint Water Crisis.....	199
iii. Differences Between PA 436 and PA 4 .....	208
C. Public Reception: Criticism & Support.....	209
IV. VOTING RIGHTS ACT ANALYSIS OF PA 436 .....	214
A. PA 436, A Voting “Standard, Practice or Procedure” .....	214
B. Critique of the Eastern District Court’s Ruling.....	218
C. Application of Section 2 to PA 436 .....	221
D. A Brief Discussion of the Sixth Circuit’s Voting Rights Act Application .....	225
V. LOOKING TOWARDS THE FUTURE: ALTERNATIVE SOLUTIONS.....	226
A. An Alternative to Emergency Managers: Multi-Member Financial Oversight Boards .....	226
i. North Carolina’s Local Government Commission.....	226
ii. New York’s Municipal Assistance Corporation.....	227
iii. Compliance of Alternative Financial Programs with the Voting Rights Act .....	228
B. An Immediate Return to Democracy by Repealing Emergency Managers’ Broad Powers and Incorporating Communities into the Emergency Management Process.....	229
i. Lessons Learned from PA 72: Limiting Emergency Managers’ Powers.....	229
ii. Community Involvement in Emergency Management of Local Governments .....	230
VI. CONCLUSION.....	231

## I.

### INTRODUCTION

“There is no right more basic in our democracy than the right to participate in electing our political leaders.”<sup>1</sup>

For years the State of Michigan has appointed emergency financial managers to intervene when local municipalities were found to be in financial distress.<sup>2</sup> After the global recession hit in 2007, many of Michigan’s

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1. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440–41 (2014) (plurality opinion).

2. *See* Local Government Fiscal Responsibility Act, 1990 Mich. Pub. Acts 72 (repealed 2012), Local Government Fiscal Responsibility Act, 1988 Mich. Pub. Acts 101 (repealed 1990). Under PA 72 and subsequent laws, dozens of emergency managers have been appointed across the state since 1990. *Emergency Financial Manager/Emergency Manager Appointment History*, MICH.

municipalities faced financial catastrophe. In response, the state legislature passed 2011 Public Act 4 (“PA 4”) and most recently 2012 Public Act 436 (“PA 436”), the “Local Financial Stability and Choice Act.” PA 436 expanded state-appointed emergency manager power beyond fiscal matters. Under PA 436, emergency managers act for and in place of the local governing body and assume all authority of locally elected officials, including the power to enact, repeal, and amend local law.<sup>3</sup> Doing so deprives local voters the opportunity to choose representatives to govern their affairs, effectively silencing the voice of the people.

Since 2011, eight Michigan cities and three Michigan school districts have been subject to emergency manager control.<sup>4</sup> Although many of these entities are now removed from emergency manager control, many are still subject to some form of state-control<sup>5</sup> and experience the negative aftermath of PA 436, as evidenced by the events surrounding Detroit’s bankruptcy and the Flint water crisis.<sup>6</sup> Moreover, many of the municipalities once subject to emergency manager control—including Detroit, Flint, Benton Harbor, and Pontiac—contain large minority populations.<sup>7</sup> At the peak of emergency manager control in 2013, emergency managers governed 52% of Michigan’s African-American population.<sup>8</sup> This meant that over half of African-Americans living in the state were impacted by decisions made by leaders they didn’t elect, leaders that circumvented their local governing boards’ decision-making power pursuant to state law.

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DEP’T OF TREASURY (Feb. 12, 2016), [https://www.michigan.gov/documents/treasury/EM-FM\\_Appointment\\_History\\_2-12-16\\_514604\\_7.pdf](https://www.michigan.gov/documents/treasury/EM-FM_Appointment_History_2-12-16_514604_7.pdf) [<https://perma.cc/PRY4-AHXY>].

3. MICH. COMP. LAWS §§ 141.1549(2), 141.1552(1)(dd) (2016).

4. These cities include: Detroit, Flint, Benton Harbor, Hamtramck, City of Allen Park, City of Lincoln Park, Pontiac, and Ecorse. The school districts include: Detroit Public Schools, Muskegon Heights School District, and Highland Park Schools. *Emergency Financial Manager/Emergency Manager Appointment History*, *supra* note 2. As of December 2016, Detroit Public Schools and Highland Park School District were still subject to emergency manager control. *Financial Emergency Information*, MICH. DEP’T OF TREASURY, [http://www.michigan.gov/treasury/0,4679,7-121-1751\\_51556\\_64472---,00.html](http://www.michigan.gov/treasury/0,4679,7-121-1751_51556_64472---,00.html) [<https://perma.cc/AY4H-PNDG>]. Although Allen Park, Ecorse, Flint, Hamtramck, Lincoln Park, Pontiac, and Muskegon Heights School Districts are removed from emergency manager control, they are still under control by the state through receivership-transition advisory boards as of December 2016. *Id.* Similarly, as of December 2016, Detroit is under a state appointed financial review commission. *See id.* Notably, Benton Harbor is the only municipality completely removed from state-control as of December 2016. *Id.*

5. *Financial Emergency Information*, *supra* note 4.

6. *See* discussion *infra* Parts III(B)(i)–(ii).

7. *See* discussion *infra* Part II.

8. Complaint para. 88, *Phillips v. Snyder*, No. 2:13-cv-11370, 2014 WL 6474344 (E.D. Mich. Mar. 27, 2013); *see also infra* note 224. I consider 2013 the peak of emergency manager control because at this point in time, the greatest number of Michigan localities and school districts (10) were subject to emergency manager control under PA 436.

PA 436 has drawn both fervent support and withering criticism. Some view it as a necessary measure to get Michigan and its municipalities “back on track”<sup>9</sup> while others see it as a blatant violation of basic democratic principles.<sup>10</sup> In 2013, Michigan civil rights groups went to court in *Phillips v. Snyder* to challenge PA 436, arguing that it violated both Section 2 of the Voting Rights Act of 1965 and the Equal Protection Clause of the U.S. Constitution.<sup>11</sup> Section 2 prohibits a voting “standard, practice or procedure” that denies a person’s right to vote on the basis of race.<sup>12</sup> Unlike Fourteenth and Fifteenth Amendment discrimination claims, Section 2 does not require a showing of invidious intent, but instead focuses on the discriminatory impact of a voting standard, practice or procedure in light of the totality of the circumstances.<sup>13</sup> Section 2 applies to both the denial of the right to vote based on race and the dilution of minorities’ voting power.<sup>14</sup>

This article contends that PA 436 likely violated Section 2 of the Voting Rights Act and argues that Plaintiffs’ Section 2 arguments are stronger than the United States District Court for the Eastern District of Michigan recognized in its dismissal of such claims in *Phillips*. Arguably and contrary to the Court’s holding, PA 436 qualifies as a voting standard, practice, or procedure because it functions as a substantive change as to which offices are elected, implicates the effectiveness of a vote, and goes beyond simply regulating the internal affairs of a local government.<sup>15</sup> PA 436 likely violated Section 2 in two distinct ways. First, the state-enacted measure extended beyond the casting of ballots, effectively denying over half of Michigan’s African-American population the right to vote by replacing locally elected officials with state appointees—essentially nullifying votes. Second, by allowing state-elected officials to appoint emergency managers, select municipalities’ majority-minority votes were diluted by the statewide participation of the electorate, while other municipalities continued to select their own local leaders.<sup>16</sup>

This article will also analyze PA 436’s discriminatory impact from a statistical and historical perspective. Part II will explore the often overlooked social, political, and economic factors that contributed to Michigan cities’

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9. Rick Snyder, *Why Michigan Needs Its Emergency Manager Law*, REINVENTING MICHIGAN BLOG (Aug. 2, 2012), [http://www.michigan.gov/snyder/0,4668,7-277-57577\\_60279-283632--,00.html](http://www.michigan.gov/snyder/0,4668,7-277-57577_60279-283632--,00.html) [<https://perma.cc/ABA9-QHZR>].

10. See, e.g., discussion *infra* Part III(C).

11. Complaint, *supra* note 8, paras. 189–94.

12. 42 U.S.C. § 1973(a)–(b) (2012).

13. See discussion *infra* Part IV(B); see also 42 U.S.C. § 1973(b).

14. See 42 U.S.C. § 1973(b); *Voting Rights Act Definition*, LEGAL INFO. INST., [http://www.law.cornell.edu/wex/voting\\_rights\\_act](http://www.law.cornell.edu/wex/voting_rights_act) [<https://perma.cc/ZK85-WEW7>].

15. See discussion *infra* Part IV(A); Order Granting in Part and Denying in Part Defendant’s Motion to Dismiss and Denying Defendants’ Motion to Stay Proceedings at 31, *Phillips v. Snyder*, No. 2:13-cv-11370, 2014 WL 6474344 (E.D. Mich. Nov. 19, 2013) [hereinafter *Phillips Motion to Dismiss Order*].

16. Complaint, *supra* note 8, para. 192.

financial state of emergency. Part III will analyze PA 436, including illustrations of emergency management control and criticism and support for the Act. Part IV will evaluate PA 436 under Section 2 of the Voting Rights Act. Part V will discuss alternative non-discriminatory solutions for the state to confront municipal financial emergencies going forward.

Looking backwards at PA 436 serves as a cautionary tale for the State of Michigan and similarly situated jurisdictions: even in the face of financial hardship, desperate times do *not* call for desperate measures when it comes to democracy.

## II.

### HOW DID MICHIGAN'S CITIES END UP IN STATES OF EMERGENCY?

Both PA 436 supporters and critics are quick to point to the 2007 global recession as the sole source that led to the passage of Michigan's emergency manager law.<sup>17</sup> The 2007 recession led to a "loss of household wealth and income caused by sharp declines in home values, increased foreclosures, and widespread job loss" across the country.<sup>18</sup> Michigan was among those states hit the hardest. Between 2005 and 2008, Michigan's housing prices decreased by more than 10% and foreclosures increased by 32.4%.<sup>19</sup> By August 2009, Michigan's unemployment rate peaked at 15.2%.<sup>20</sup> These events resulted in a decrease in revenue from property and income taxes and an increase in local resident demand for services, leaving Michigan's municipalities with tight budgets, few resources, and financial stress.<sup>21</sup>

While the recession played a role in placing select Michigan municipalities under emergency manager control, there are other social, political, and economic factors predating 2008 that led these cities to a state of financial urgency. Reporters, scholars, and political leaders are willing to talk about these factors, but not in connection with PA 436. Examining these issues in the context of Detroit demonstrates their effects on other smaller similarly situated localities.

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17. See John C. Philo, *Local Government Fiscal Emergencies and the Disenfranchisement of Victims of the Global Recession*, 13 J.L. SOC'Y 71, 72–83 (2011); Complaint, *supra* note 8, para. 43.

18. Philo, *supra* note 17, at 72; see also Phil Pavlov, *Why the Emergency Manager Law Makes Sense*, DOME MAG. (Mar. 23, 2013), <http://domemagazine.com/pavlov/pp032213> [<https://perma.cc/R7XP-YW25>].

19. Philo, *supra* note 17, at 75 n.30 (citing to U.S. DEP'T OF HOUSING & URBAN DEV., REPORT TO CONGRESS ON THE ROOT CAUSES OF THE FORECLOSURE CRISIS, at A-1 (2010), [https://www.huduser.gov/portal/publications/foreclosure\\_09.pdf](https://www.huduser.gov/portal/publications/foreclosure_09.pdf) [<https://perma.cc/4G6E-FSCW>]).

20. News Release, BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, REGIONAL AND STATE EMPLOYMENT AND UNEMPLOYMENT (Sept. 18, 2009), [www.bls.gov/news.release/archives/laus\\_09182009.htm](http://www.bls.gov/news.release/archives/laus_09182009.htm) [<https://perma.cc/8282-M5FW>]. However, "[s]ince 2009, the unemployment rate has decreased but remains near 10%." Philo, *supra* note 17, at 76.

21. Philo, *supra* note 17, at 77.

Dubbed the “Arsenal of Democracy,” Detroit was formerly a place of opportunity and prosperity; “a place where the American dream came true.”<sup>22</sup> In the 1950s, its population peaked at “more than 1.8 million, making it the nation’s fifth-largest city.”<sup>23</sup> Today, the partially abandoned and boarded-up city is home to 677,116 residents.<sup>24</sup> Three main factors have led to the Motor City’s current state: the auto industry, corruption, and racial tensions. As home to the “Big Three”—GM, Ford, and Chrysler, Detroit relied solely on the auto industry and failed to diversify its industry.<sup>25</sup> In the simplest sense, this meant that when the auto-industry left to compete in the foreign market, so did its jobs, leaving hundreds of thousands jobless.<sup>26</sup> In 2010, Detroit’s unemployment rate reached 24.8%.<sup>27</sup> Secondly, Detroit is no stranger to political corruption. Detroit’s leaders and their administrations have contributed to nearly eighty years of corruption ranging from the misuse of local funds to corrupt police practices.<sup>28</sup> Undoubtedly, all of these factors have contributed to Detroit’s high crime rates.<sup>29</sup> Lastly, Detroit has a long history of “unarticulated racism that few ha[ve] acknowledged.”<sup>30</sup> This became a point of contention in the City’s July 1967 race riots, causing forty-three deaths.<sup>31</sup> As a result, “thousands of white

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22. Sharon Cohen, *Autos Troubles, Race at Root of Detroit Collapse*, U.S. NEWS & WORLD REPORT (July 21, 2013), <http://www.usnews.com/news/us/articles/2013/07/21/autos-troubles-race-at-root-of-detroit-collapse> [<https://perma.cc/8FBK-6VBL>].

23. *Id.*

24. Daniel Okrent, *The Tragedy of Detroit*, TIME, Oct. 5, 2009, at 26. Okrent describes Detroit, writing, “on the adjacent business streets, commercial activity is so palpably absent you’d think a neutron bomb had been detonated—except the burned-out storefronts and bricked-over windows suggest that something physically destructive happened as well.” *Id.*; Christine MacDonald, *Detroit Population Rank Lowest Since 1850*, DET. NEWS (May 19, 2016), <http://www.detroitnews.com/story/news/local/detroit-city/2016/05/19/detroit-population-rank-lowest-since/84574198/> [<https://perma.cc/UVB6-FCC2>].

25. Okrent, *supra* note 24.

26. Cohen, *supra* note 22.

27. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, *Unemployment Rates for the 50 Largest Cities*, <http://www.bls.gov/lau/lacilg10.htm> (last modified Apr. 15, 2016) [<https://perma.cc/6BAW-TS7B>].

28. Charlie LeDuff, *From Then Until Now: A Look at Detroit’s Corrupt Political Past*, YOUTUBE (Oct. 9, 2013), <https://www.youtube.com/watch?v=MzNqJ912OoU>; *see also* Okrent, *supra* note 24. For example, former Detroit Mayor, Kwame Kilpatrick was convicted in March 2013 of “two dozen counts that included charges of racketeering and extortion, adding his name to a list of at least 18 city officials who have been convicted of corruption during his tenure. His punishment ranks among the harshest major state and local public corruption cases.” Steven Yaccino, *Kwame M. Kilpatrick, Former Detroit Mayor, Sentenced to 28 Years in Corruption Case*, N.Y. TIMES (Oct. 10, 2013), <http://www.nytimes.com/2013/10/11/us/former-detroit-mayor-kwame-kilpatrick-sentencing.html>.

29. In 2013 Detroit ranked first in both murder rates and violent crime rates among U.S. cities with populations of more than 100,000. Christine MacDonald, *Detroit Led U.S. in Murder, Crime Rates, FBI Says*, DET. NEWS (Nov. 11, 2014), <http://www.detroitnews.com/story/news/local/wayne-county/2014/11/10/detroit-led-us-murder-crime-rates-fbi-says/18793923/> [<https://perma.cc/L2M6-F6SZ>].

30. Okrent, *supra* note 24.

31. *Id.*

Detroiters fle[d] for the suburbs.”<sup>32</sup> Today, Detroit’s African-American residents make up 82.7% of the City’s population.<sup>33</sup> Together, these three factors have contributed to Detroit’s population loss, resulting in declining property values and the erosion of the city’s tax base; “the result is an isolated city.”<sup>34</sup>

Other cities subject to emergency manager control share the same struggles as Detroit.<sup>35</sup> Flint experiences similar issues on a smaller, but equally detrimental, scale. Like Detroit, Flint too relied on the once booming auto industry.<sup>36</sup> In 1978, GM’s Flint operations employed 80,000 people. However, post-outsourcing, GM employed just 8,000 people in Flint by 2006.<sup>37</sup> Left without a major industry, Flint’s “unemployment and poverty rates have soared as many people have [left] the city.”<sup>38</sup> Flint continues to be ranked as one of America’s most dangerous cities.<sup>39</sup> Further, the majority-minority city has faced “decades of structural and institutional discrimination and racism,” including, but not limited to, “Flint’s long history of segregation in housing and education.”<sup>40</sup> Recently, the city government has been repeatedly accused of overt and institutional racism in its decision-making; the population is currently 56.6% African American.<sup>41</sup>

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32. *Id.*

33. U.S. CENSUS BUREAU, *QuickFacts: Detroit city, Michigan*, <https://www.census.gov/quickfacts/table/PST045215/2622000,00> [<https://perma.cc/5GDG-68XX>].

34. Cohen, *supra* note 22.

35. *See supra* note 4 and accompanying text. Neighbors of Detroit, Hamtramck, Lincoln Park, and Allen Park have been placed under emergency manager status since 2011. Hamtramck is a municipality mostly bordered by the City of Detroit. Lincoln Park and the City of Allen Park both are in a thirteen-mile radius of Detroit. It is no surprise that because of their close vicinity to the City, these municipalities face the economic, social, and political effects of Detroit. *See generally* CITY OF HAMTRAMCK, <http://www.hamtramck.us/about/index.php> [<https://perma.cc/WH9S-YYY4>]; LINCOLN PARK, <http://www.lincolnpark.govoffice.com> [<https://perma.cc/BU62-MNSL>]; CITY OF ALLEN PARK, <http://www.cityoffallenpark.org> [<https://perma.cc/M3G2-KPYY>].

36. Christina Sterbenz & Erin Fuchs, *How Flint, Michigan Became the Most Dangerous City in America*, BUS. INSIDER (June 16, 2013, 12:11 PM), <http://www.businessinsider.com/why-is-flint-michigan-dangerous-2013-6> [<https://perma.cc/CGV8-YYUM>] (*citing* CITY OF FLINT, CITY OF FLINT PUBLIC SAFETY PLAN (May 2012), <https://www.cityofflint.com/wp-content/uploads/Reports/PublicSafetyPlan0512.pdf> [<https://perma.cc/3CV8-J2FA>]).

37. *Id.*

38. *Id.*

39. Paulette Parker, *FBI names most-violent cities – and 3 are in Michigan*, MICH. RADIO (Sept. 30, 2015), <http://michiganradio.org/post/fbi-names-most-violent-cities-and-3-are-michigan> [<https://perma.cc/THQ9-HW8E>]; *see also* Molly Young, *Homicide rate spikes as Flint named third most-violent city in nation*, MLIVE (Sept. 30, 2015, 9:21 AM), [mlive.com/news/flint/index.ssf/2015/09/homicide\\_rate\\_spikes\\_as\\_flint.html](http://mlive.com/news/flint/index.ssf/2015/09/homicide_rate_spikes_as_flint.html) [<https://perma.cc/8GXG-KL7X>].

40. MICHIGAN CIVIL RIGHTS COMMISSION, *THE FLINT WATER CRISIS: SYSTEMIC RACISM THROUGH THE LENS OF FLINT* 110 (2017), [http://www.michigan.gov/documents/mdcr/MDCR\\_Flint\\_Water\\_Crisis\\_Report\\_552190\\_7.pdf](http://www.michigan.gov/documents/mdcr/MDCR_Flint_Water_Crisis_Report_552190_7.pdf) [<https://perma.cc/DQ8A-T4XU>]. Examples of Flint’s segregation practices include private discrimination, such as restrictive covenants and government policies, such as mortgage requirements and school district lines. *Id.* at 3.

41. U.S. CENSUS BUREAU, *QuickFacts: Flint city, Michigan*, <https://www.census.gov/quickfacts/table/PST045216/2629000> [<https://perma.cc/BTM5-6YUF>]; *see* John Chapin, *Flint Michigan Sees Spate of Racial Discrimination Charges*, SPERO NEWS (Feb. 25, 2013),

The “Whirlpool Company Town” of Benton Harbor has also been faced with high unemployment after the disappearance of factory jobs.<sup>42</sup> The roughly 90% African-American city<sup>43</sup> suffers from extreme levels of poverty<sup>44</sup> and crime.<sup>45</sup> Benton Harbor has been the hub of racial tensions on the west side of Michigan for years.<sup>46</sup> The city gained national attention on multiple occasions for race riots, most recently in 2003.<sup>47</sup>

It is apparent that in addition to the 2007 global recession, these longer-term political, economic, and social factors played a major role in placing select Michigan cities under emergency management. Reliance on a single industry, corruption, and racial tensions have all led to a decline in municipalities’

<http://www.speroforum.com/a/YAUTNFIZVU8/73706-Flint-Michigan-sees-spate-of-racial-discrimination-charges#.VHZpkEtX9g0> [https://perma.cc/QUM5-GK3Z]; Kemi Fuentes-George, *Flint’s Structural Racism: This Is Why Providing Poisoned Water to the City’s Citizens Seemed like a Reasonable Idea*, SALON (Feb. 7, 2016, 8:00 AM), [http://www.salon.com/2016/02/07/flints\\_structural\\_racism\\_this\\_is\\_why\\_providing\\_poisoned\\_water\\_to\\_the\\_citys\\_citizens\\_seemed\\_like\\_a\\_reasonable\\_idea/](http://www.salon.com/2016/02/07/flints_structural_racism_this_is_why_providing_poisoned_water_to_the_citys_citizens_seemed_like_a_reasonable_idea/) [https://perma.cc/39QH-JB8D]; Gus Burns, *Report Explores Impact of Racism on Flint Water Crisis*, MLIVE (Dec. 5, 2016, 7:00 PM), [http://www.mlive.com/news/detroit/index.ssf/2016/12/report\\_explores\\_impact\\_of\\_raci.html](http://www.mlive.com/news/detroit/index.ssf/2016/12/report_explores_impact_of_raci.html) [https://perma.cc/72AW-GV5J]; Niraj Warikoo, *EPA Backs Flint Residents’ 24-Year Bias Fight over Dirt-Spewing Plant*, DET. FREE PRESS (Jan. 23, 2017, 9:24 PM), <http://www.freep.com/story/news/local/michigan/2017/01/20/epa-backs-flint-residents-waging-bias-fight-over-dirt-spewing-plant/96854762/> [https://perma.cc/7A5R-22XD].

42. As a result of globalization, “Whirlpool closed nearly all of its manufacturing plants in the Benton Harbor area in the 1980s . . . . It closed its last Benton Harbor plant in 2011, eliminating 216 jobs.” Dustin Walsh, *Whirlpool Seeks Socioeconomic Balance in Its 2 Southwest Michigan Homes*, CRAIN’S DET. BUS. (Apr. 10, 2016, 8:00 AM), <http://www.crainsdetroit.com/2016/04/10/NEWS/160419986/whirlpool-seeks-socioeconomic-balance-in-its-2-southwest-michigan> [https://perma.cc/9VEL-VD7Z]. While Whirlpool has made strides to evolve under a post-globalization economy by opening a \$68 million dollar technology campus in downtown Benton Harbor in 2012, the manufacturing jobs that once employed Benton Harbor’s workforce no longer exist as of 2016, Benton Harbor remains one of Michigan’s poorest cities. *Id.*

43. The US Census estimates that as of 2015, 50.3% percent of Benton Harbor’s population is living in poverty. U.S. CENSUS BUREAU, *QuickFacts: Benton Harbor city, Michigan*, <http://www.census.gov/quickfacts/table/PST045215/2607520> [https://perma.cc/J48H-4G8D].

44. *Id.* This is a gross discrepancy from the poverty rate its neighboring city, St. Joseph faces, which is 8.7%. U.S. CENSUS BUREAU, *QuickFacts: St. Joseph city, Michigan*, <http://www.census.gov/quickfacts/table/PST045216/2670960> [https://perma.cc/33QN-B3MV].

45. Whet Moser, *Annals of Benton Harbor: Riots, Race, and Jack Nickalus*, CHI. MAG. (Dec. 20, 2011), <http://www.chicagomag.com/Chicago-Magazine/The-312/December-2011/Annals-of-Benton-Harbor-Riots-Race-and-Jack-Nickalus/> [https://perma.cc/83C5-SSPZ]. Benton Harbor has a “violent crime rate of 1,128 per 50,000 . . . [and] ranks 30<sup>th</sup> nationwide on the list of cities with the most violent crimes per capita.” Brad Devereaux, *Detroit 2nd in the U.S. in Violent Crime Rate, Flint 11th, FBI 2015 Stats Show*, MLIVE (Sept. 26, 2016, 4:47 PM), [http://www.mlive.com/news/index.ssf/2016/09/detroit\\_second\\_in\\_nationwide\\_v.html](http://www.mlive.com/news/index.ssf/2016/09/detroit_second_in_nationwide_v.html) [https://perma.cc/G6KX-QGS5].

46. Moser, *supra* note 45; Jonathan Mahler, *Now That the Factories Are Closed, It’s Tee Time in Benton Harbor, Mich.*, N.Y. TIMES (Dec. 15, 2011), <http://www.nytimes.com/2011/12/18/magazine/benton-harbor.html>; see also Walsh, *supra* note 42 (discussing the racial tensions that exist between Benton Harbor and its neighbor across the St. Joseph River, the City of Saint Joseph, an affluent city “that is 89 percent White.”).

47. *Rioters Torch Cars, Buildings in Michigan*, FOXNEWS.COM (Jun. 18, 2003), <http://www.foxnews.com/story/2003/06/18/rioters-torch-cars-buildings-in-michigan/> [https://perma.cc/X2TG-6XBM].

populations, decreasing their tax base and resulting in fiscal emergencies. For example, by 2010 in a post-recession era, Benton Harbor was suffering from “a \$10 million hole in the city’s pension funds and a rising budget deficit.”<sup>48</sup> Similarly, in 2011 the City of Flint’s debt reached roughly \$20 million.<sup>49</sup> When Detroit filed for bankruptcy in 2013, its budget faced a whopping 18 to 20 billion-dollar deficit.<sup>50</sup>

### III.

#### THE ACT ITSELF: PA 436

##### A. History & Events Leading to PA 436

As John Philo has explained, “[p]rior to the passage of Public Act 436 of 2011 municipal financial emergencies were not unknown to the state of Michigan.”<sup>51</sup> During the Great Depression, Michigan had the fourth highest number of municipalities defaulting on their debt.<sup>52</sup> It was during this time that the federal government adopted Chapter 9 of the federal bankruptcy code, which allows debt-ridden municipalities to use federal bankruptcy procedures in extreme situations.<sup>53</sup> Again, in the economic recessions of the 1970s and 1980s, local governments across the country suffered “widespread financial distress,” particularly in the “industrial Midwest.”<sup>54</sup> In 1986, the Michigan city of Ecorse was placed in receivership.<sup>55</sup>

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48. Nick Carey, *Michigan Town’s Woes a Sign of Tough Choices to Come*, REUTERS (May 11, 2011), <http://www.reuters.com/article/us-usa-debt-municipalities-idUSTRE74A0TK20110511> [<https://perma.cc/D5CV-YL4D>].

49. Kristin Longley, *City of Flint Hopes to Avoid State Takeover of Finances by Borrowing \$20M*, MLIVE (Jan. 10, 2011), [http://www.mlive.com/news/flint/index.ssf/2011/01/city\\_of\\_flint\\_hopes\\_to\\_avoid\\_s.html](http://www.mlive.com/news/flint/index.ssf/2011/01/city_of_flint_hopes_to_avoid_s.html) [<https://perma.cc/NRE9-HUQG>].

50. Monica Davey & Mary Williams Walsh, *Billions in Debt, Detroit Tumbles into Insolvency*, N.Y. TIMES (July 19, 2013), <http://www.nytimes.com/2013/07/19/us/detroit-files-for-bankruptcy.html>.

51. Philo, *supra* note 17, at 82.

52. *Id.* at 80 (citing to Natalie R. Cohen, *Municipal Default Patterns: An Historical Study*, 9 PUB. BUDGETING & FIN. 55, 58–60 (1989)); Complaint, *supra* note 8, para. 32.

53. Philo, *supra* note 17, at 80; 11 U.S.C. § 109(c).

54. Philo, *supra* note 17, at 81.

55. Chastity Pratt Dawsey, *Why Michigan’s Emergency Manager Law Stirs Contempt, Lack of Cooperation*, MLIVE, (July 10, 2014, 8:45 AM), [http://www.mlive.com/politics/index.ssf/2014/07/emergency\\_manager\\_or\\_emperor\\_w.html](http://www.mlive.com/politics/index.ssf/2014/07/emergency_manager_or_emperor_w.html) [<https://perma.cc/M7VP-PNCQ>]; *see also* Complaint, *supra* note 8, para. 35. The City of Ecorse is located in Wayne County, roughly 12 miles southwest of Detroit and directly west of the Detroit River. “Ecorse became a significant economic force in the region when its first steel mill, Michigan Steel Mill, began operation in 1923.” CITY OF ECORSE MICHIGAN, <http://www.ecorsemi.gov> [<https://perma.cc/HD3W-9DRS>]. In 2015, its population was 9,257, comparable to that of Benton Harbor. U.S. CENSUS BUREAU, *QuickFacts: Benton Harbor city, Michigan*, <http://www.census.gov/quickfacts/table/PST045215/2607520> [<https://perma.cc/J48H-4G8D>].

In a response to the 1980s recession and Ecorse's insolvency, the state legislature passed Public Act 101 in 1988 ("PA 101").<sup>56</sup> Under PA 101, the state "relied on local governments to identify fiscal stress" and began appointing emergency financial managers to manage cities' financial affairs.<sup>57</sup> PA 101 was replaced in 1990 with Public Act 72 ("PA 72"), "the Local Government Fiscal Responsibility Act," passed with unanimous bipartisan support.<sup>58</sup> Under PA 72, after the declaration of a financial emergency, "the governor could empower the local emergency financial assistance loan board to appoint an emergency financial manager," who "possessed all the authority of the local government over the finances of the city, including spending and budgetary decisions."<sup>59</sup> Under PA 72, local officials remained in office and maintained "power over policy and administrative matters outside the scope of the emergency financial manager's fiscal authority."<sup>60</sup> Beginning in 2000 with the City of Hamtramck, six Michigan municipalities, as well as the Detroit Public School System, were assigned emergency financial managers under PA 72.<sup>61</sup>

In 2010, *Adams v. Bobb* first challenged the possible abuse of emergency financial manager powers.<sup>62</sup> In this case, the Detroit Public School System's elected school board alleged the district's emergency financial manager overstepped his powers by establishing academic policies and school curriculum.

56. Philo, *supra* note 17, at 83. Indeed, Public Act 101 of 1988, the original emergency manager act, was geared toward preventing a court intervention like that in Ecorse. See JAMES M. HOHMAN, MACKINAC CTR. FOR PUB. POL'Y, PROPOSAL 1 OF 2012: THE REFERENDUM ON PUBLIC ACT 4, at 4 (Oct. 22, 2012), <http://www.mackinac.org/archives/2012/S2012-10.pdf> [<https://perma.cc/RJX6-474R>]; CITIZENS RESEARCH COUNCIL OF MICHIGAN, FINANCIAL EMERGENCIES IN MICHIGAN LOCAL GOVERNMENTS 1-2 (2010), <http://www.crcmich.org/PUBLICAT/2010s/2010/rpt362.pdf> [<https://perma.cc/A5CY-QMA6>].

57. Hohman, *supra* note 56. When Public Act 101 was passed, the ability of the state to replace local elected officials was not apparently considered a major issue. The original bill was part of a larger legislative package meant to provide assistance to Wayne County government, which was struggling to make ends meet at the time. The "controversial part of the package" was not whether elected representatives could be displaced by the state, but instead whether to increase the state's cigarette tax. *Id.*

58. Philo, *supra* note 17, at 83; see also Hohman, *supra* note 56; CITIZENS RESEARCH COUNCIL OF MICHIGAN, *supra* note 56, at 2.

59. Philo, *supra* note 17, at 84-85.

60. *Id.*

61. CITIZENS RESEARCH COUNCIL OF MICHIGAN, *supra* note 56, at iv (detailing that along with Hamtramck, these localities included, City of Highland Park (2001), City of Flint (2002), Village of Three Oaks (2008), City of Ecorse (2009), and the City of Pontiac (2009)). Governor Jennifer Granholm appointed Robert C. Bobb as Emergency Manager for Detroit Public Schools in 2009. See *Office of the Emergency Manager*, DETROIT PUB. SCH., [http://detroitk12.org/admin/emergency\\_manager/robert\\_bobb/](http://detroitk12.org/admin/emergency_manager/robert_bobb/) [<https://perma.cc/X36M-LNDS>]. "Hamtramck, Highland Park, Flint, and Three Oaks' financial emergencies were declared resolved and control over fiscal matters was returned to elected officials in 2007, 2010, 2004, 2009 respectively. Flint was again found in a financial emergency in 2011." Philo, *supra* note 17, at 84 n.98. Hamtramck was found to be in a financial emergency again in 2013 and Highland Park in 2014. See generally *Financial Emergency Information*, *supra* note 4.

62. *Adams v. Bobb*, No. 09-020160-AW (Wayne Cty. Cir. Ct. Dec. 6, 2010).

The court sided with the school board, finding that authority in these areas remained with the board.

Within four months of *Bobb*, PA 72 was replaced with Michigan's first emergency manager law, Public Act 4 ("PA 4").<sup>63</sup> Critics strongly suggest that *Bobb* directly spurred the enactment of PA 4.<sup>64</sup> Signed into law May 16, 2011, the "Local Government and School District Fiscal Accountability Act" transformed emergency financial managers into emergency managers and expanded their powers from local fiscal matters to encompass every issue area facing a municipality or school district that could touch upon finance.<sup>65</sup> Upon confirmation of a financial emergency, PA 4 allowed the governor discretionary power to appoint an emergency city manager over the locality.<sup>66</sup> PA 4 granted emergency managers "broad powers" to "rectify the financial emergency."<sup>67</sup> Perhaps most alarmingly, and the source of controversy, PA 4 "removed all powers from democratically elected officials and transferred all governing power, including the power to make local laws, to emergency managers."<sup>68</sup>

Outraged, opponents of PA 4 "gathered more than 225,885 signatures, 65,000 more than the 161,000 needed to place a referendum on Public Act 4 on the ballot."<sup>69</sup> After resistance from state actors and lobbyists, on August 3, 2012 the Michigan Supreme Court ordered the State Board of Canvassers to certify the petitions and place the referendum on the ballot.<sup>70</sup> On November 6, 2012, voters struck down Public Act 4 "by a margin of [52.67] percent to [47.33] percent."<sup>71</sup>

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63. Philo, *supra* note 17, at 84.

64. Curt Guyette, *Examining the Body of Evidence in Detroit's Bankruptcy Trial*, METRO TIMES (April 1, 2014), <http://www.metrotimes.com/detroit/examining-the-body-of-evidence-in-detroits-bankruptcy-trial/Content?oid=2144001> [<https://perma.cc/SC6W-KKHA>].

65. Philo, *supra* note 17, at 85.

66. See *Democracy Emergency*, SUGAR L. CTR. FOR ECON. & SOC. JUST., <http://www.sugarlaw.org/projects/democracy-emergency/> [<https://perma.cc/MKT7-XAXZ>].

67. Local Government and School District Fiscal Accountability Act, 2011 Mich. Pub. Acts 4, §15(4) (repealed 2012).

68. *Democracy Emergency*, *supra* note 66; see also Local Government and School District Fiscal Accountability Act, 2011 Mich. Pub. Acts 4, §15(4) (repealed 2012).

69. Guyette, *supra* note 64.

70. Complaint, *supra* note 8, para. 64; Guyette, *supra* note 64. After certification of the referendum, all four existing PA 4 emergency managers were converted to PA 72 emergency financial managers, three school districts' emergency managers were converted to PA 72 emergency financial managers, and all three of the state's consent agreements with localities were converted to PA 72 agreements. Complaint, *supra* note 8, paras. 68–70.

71. See Jonathan Oosting, *Michigan Emergency Manager Law: What's Next After Public Act 4 Repeal?*, MLIVE (Nov. 11, 2012), [http://www.mlive.com/politics/index.ssf/2012/11/michigan\\_emergency\\_manager\\_law.html](http://www.mlive.com/politics/index.ssf/2012/11/michigan_emergency_manager_law.html) [<https://perma.cc/XCP6-WLLN>]; 2012 Michigan Election Results, MICHIGAN DEPARTMENT OF STATE (Nov. 6, 2012), <http://miboecfr.nictusa.com/election/results/12GEN/> [<https://perma.cc/TB7P-BV4E>] (providing official 2012 Michigan election results on "State Proposal - 12-1: Referendum: The Emergency Manager Law").

### B. The Substantive and Procedural Elements of PA 436

Almost a month after voters repealed PA 4, the state legislature passed a nearly identical law, Public Act 436 (“PA 436”), during a lame-duck session,<sup>72</sup> and the governor signed it into law on December 26, 2012.<sup>73</sup> PA 436 converted all PA 72 emergency financial managers to emergency managers.<sup>74</sup> In the same language as PA 4, emergency managers are granted “*broad powers* in receivership to rectify the financial emergency and to assure the fiscal accountability of the local government and the local government’s capacity to provide . . . necessary governmental services essential to the public health, safety, and welfare.”<sup>75</sup>

Similar to PA 4, the process of appointing and placing an emergency manager in control is lengthy and discretionary. First, the state financial authority conducts a preliminary review to determine whether probable financial stress exists within a locality based on its existing conditions, as long as the locality meets one of 19 possible criteria.<sup>76</sup> Within thirty days of commencing a preliminary review, the state financial authority must provide a final report to the local emergency financial assistance loan board (“ELB”) and to the state senators and representatives representing the locality.<sup>77</sup> If the ELB makes a finding of probable financial stress, the governor will appoint a review team for that municipality.<sup>78</sup>

72. Guyette, *supra* note 64. *Metro Times* reported that as early as March, 2012, a month after organizers announced more than enough signatures had been collected for the referendum, state officials “began to discuss crafting new legislation that could be enacted if the existing emergency manager law were to be repealed at the polls.” *Id.*

73. MICH. COMP. LAWS §§ 141.1541–1575 (2016); Guyette, *supra* note 64.

74. MICH. COMP. LAWS § 141.1549(10) (2016). *Compare* Local Government and School District Fiscal Accountability Act, 2011 Mich. Pub. Acts 4, §15(4) (repealed 2012), *with* § 141.1549(10).

75. MICH. COMP. LAWS § 141.1549(2) (2016) (emphasis added).

76. MICH. COMP. LAWS § 141.1544(1) (2016). Under the statute, there are 19 possible conditions that may trigger a review to determine whether “probable financial stress” exists. § 141.1544(1)(a)-(s). Different groups may request a preliminary review, including the locality’s governing board or administrative officer, the state senate or house of representatives or electors organized by petition requirements. § 141.1544(1)(a), (g), (c) (respectively). A preliminary request may also be warranted when a municipality defaults on payments to creditors, fails to deposit minimum payments into the local government pension fund, defaults on a bond or note payment or possesses delinquent tax revenues, it has collected for another. § 141.1544(1)(b), (d), (f), (m) (respectively). A preliminary request may also occur when a municipal government violates its statutory obligations, such as the municipal finance or revenue bond act. § 141.1544(1)(h). Notably, § 141.1544(1)(s) provides the state treasurer with the “sole discretion” to determine other facts or circumstances that are indicative of probable financial stress.

77. MICH. COMP. LAWS § 141.1544(2).

78. MICH. COMP. LAWS § 141.1544(3). “The review team will consist of the state treasurer or his or her designee, the director of the department of technology, management, and budget or his or her designee, a nominee of the senate majority leader, a nominee of the speaker of the house of representatives,” and any other state officials or persons the governor deems appropriate based on their experience. *Id.*

Second, the review team shall meet with the local government and “receive, discuss, and consider” information concerning the locality’s fiscal condition.<sup>79</sup> Within sixty days of its appointment, the review team must report to the governor whether one or more statute-specified conditions exists or is likely to occur and must reach the conclusion that a financial emergency exists or not.<sup>80</sup> Third, within ten days after the receipt of the review team report, the governor must determine whether or not a financial emergency exists in the local government.<sup>81</sup> Upon a determination that a financial emergency exists, the governor must provide a written notice of the determination to that government, including “concise and explicit” factual findings.<sup>82</sup>

The chief administrative officer or the governing body of the municipality has [seven] days after the date of notification to request a hearing conducted by the state financial authority or the state financial authority’s designee. Following the hearing, or if no hearing is requested following the expiration of the deadline by which a hearing may be requested, the governor, *in his or her sole discretion based upon the record*, shall either confirm or revoke, in writing, the determination of the existence of a financial emergency.<sup>83</sup>

However, a two-thirds vote of a local governing body may appeal the governor’s determination to the Michigan court of claims within ten business days.<sup>84</sup>

Unlike PA 4, PA 436 allows local officials to choose between four different forms of intervention when a financial emergency exists: a consent agreement,<sup>85</sup>

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79. MICH. COMP. LAWS § 141.1545(3) (2016).

80. *Id.* The statute dictates thirteen different conditions that must be reported including: any of the municipality’s default payments, tax and pension delinquency, unpaid employee salaries or wages, deficits in the general fund, noncompliance with deficit elimination plans, unlawful use of funds, and “any other facts and circumstances indicative of local government financial emergency.” See § 141.1545(3)(a), (b), (c), (e)-(k), (m) (respectively). “The review team report must also be forwarded to the state treasurer, the chief administrative officer and governing body of the local government, the Speaker of the House of Representatives, the Senate Majority Leader, and to the State Senators and Representatives representing the local government.” *How a Financial Emergency Works*, MICH. DEP’T TREASURY, [http://michigan.gov/treasury/0,1607,7-121-1751\\_51556-198770--,00.html](http://michigan.gov/treasury/0,1607,7-121-1751_51556-198770--,00.html) [<https://perma.cc/N96L-87XG>].

81. MICH. COMP. LAWS § 141.1546(1) (2016).

82. MICH. COMP. LAWS § 141.1546(2) (2016).

83. *Id.* (emphasis added).

84. MICH. COMP. LAWS § 141.1546(3)(a)–(b) (2016) (explaining that the court will not set aside the determination of the governor unless it finds that the determination is either “not supported by competent, material, and substantial evidence on the whole record” or “arbitrary, capricious, or clearly and abuse or unwarranted exercise of discretion”).

85. A consent agreement “provides for remedial measures considered necessary to address the municipality’s financial emergency and “provide for the financial stability of the local government.” The consent agreement may utilize state resources to alleviate the financial emergency and is required to submit periodic financial reports to the state treasurer. “In order for the consent agreement to go into effect,” it shall be approved by the municipality’s governing body and approved and executed by the state treasurer. If the consent agreement is breached, the

chapter 9 bankruptcy,<sup>86</sup> a neutral evaluation process<sup>87</sup> or an emergency manager.<sup>88</sup> However, from a practical standpoint, it is questionable whether these options are truly “options.” For example, if the state treasurer determines that the locality breached its consent agreement, the governor may automatically place the municipality into receivership or the neutral evaluation process.<sup>89</sup> Similarly, a municipality’s failure to request a neutral evaluation within a week could result in the automatic appointment of an emergency manager.<sup>90</sup> Lastly, if a resolution is not reached in the neutral evaluation, the locality is subject to Chapter 9 Bankruptcy *upon the approval of the state*.<sup>91</sup> However, bankruptcy is not entirely a realistic option. “Before a Chapter 9 petition may be filed . . . the State must authorize the municipality to file for bankruptcy.”<sup>92</sup> As recent history has shown, states are generally reluctant to authorize Chapter 9 filings.<sup>93</sup> In summation, after a local fiscal emergency is declared, all roads seem to lead to a high likelihood of being placed under emergency manager control in Michigan, largely at the discretion of the state government.<sup>94</sup>

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governor may place the municipality in receivership or in the neutral evaluation process. MICH. COMP. LAWS § 141.1548(1) (2016). “Receivership” refers to the appointment of an emergency manager. § 141.1542(q) (2016). If the neutral evaluation process is not successfully executed, the default option is the appointment of an emergency manager. *See* § 141.1565(1) (2016).

86. *See* MICH. COMP. LAWS § 141.1566 (2016).

87. The “neutral evaluation process” is “a form of alternative dispute resolution or mediation between a local government and interested parties.” MICH. COMP. LAWS § 141.1542(0) (2016). The neutral evaluation process may be monitored by the state. § 141.1565(1) (2016). However, if the local government does not provide proper notice to all interested parties, the state treasurer may require the local government to go into receivership and proceed under Section 9, by appointing an emergency manager. *Id.* If the evaluation process does not resolve all pending disputes between the local government and the interested parties, the governing body of the local government shall adopt a resolution recommending that the local government proceed under Chapter 9 Bankruptcy and submit the resolution to the governor and the state treasurer. § 141.1565(1), (23).

88. *See* MICH. COMP. LAWS § 141.1547 (2016). State officials consider this option an “improvement” from PA 4, which only provided the option of emergency management. Jonathan Oosting, *Snyder Signs Replacement Emergency Manager Law: We ‘Heard, Recognized and Respected’ Will of Voters*, MLIVE (Dec. 27, 2012), [http://www.mlive.com/politics/index.ssf/2012/12/snyder\\_signs\\_replacement\\_emerg.html](http://www.mlive.com/politics/index.ssf/2012/12/snyder_signs_replacement_emerg.html) [<https://perma.cc/ADD3-WL28>].

89. MICH. COMP. LAWS § 141.1546(2).

90. MICH. COMP. LAWS § 141.1565(1).

91. MICH. COMP. LAWS § 141.1565(23).

92. Philo, *supra* note 17, at 81; *see* MICH. COMP. LAWS § 141.1566(1)–(2).

93. Philo, *supra* note 17, at 80. “Overall bankrupt municipalities remain extremely rare. A *Governing* analysis estimated only one of every 1,668 eligible general-purpose local governments (0.06 percent) filed for bankruptcy protection from 2008 through 2012.” *Bankrupt Cities, Municipalities List and Map*, GOVERNING, <http://www.governing.com/gov-data/municipal-cities-counties-bankruptcies-and-defaults.html> [<https://perma.cc/9MPS-LDQD>]. Defying precedent, on July 18, 2013 while under emergency manager control, the City of Detroit filed for Chapter 9 Bankruptcy, becoming the largest municipal bankruptcy filing in American history. Nathan Bomey, *Detroit Becomes Largest U.S. City to Enter Bankruptcy*, USA TODAY (Dec. 3, 2013), <http://www.usatoday.com/story/news/nation/2013/12/03/detroit-bankruptcy-eligibility/3849833/> [<https://perma.cc/SK57-SF8C>].

94. For example, Detroit was first placed under a consent agreement in March 2012 and later under Emergency Management from March 2013 to December 2014. Jonathan Oosting, *State*

*i. Broad Discretion of Power and Abuses Under PA 436*

As was the case under PA 4, PA 436 emergency managers are granted “broad powers” immune from liability.<sup>95</sup> Essentially, emergency managers replace locally elected officials in the municipality to which they are assigned by “act[ing] for and in the place and stead of the local governing body and the office of the chief administrative officer.”<sup>96</sup> Their powers supersede those of locally elected and appointed officials, as evidenced by an emergency manager’s power to issue orders “necessary to accomplish purposes of this act, including, but not limited to, orders for the timely and satisfactory implementation of a financial and operating plan.”<sup>97</sup> An emergency manager may even prohibit access to the local government’s office and resources, if local government officials do not obey their orders.<sup>98</sup> Additionally, an emergency manager may contravene local legislative authority by enacting, repealing, and amending local laws at his or her discretion.<sup>99</sup> The emergency manager may also eliminate and alter “the salary, wages or other compensation” of the chief administrative officer and members of the governing body.<sup>100</sup> At the approval of the governor, an emergency manager may even “discorporate or dissolve the municipal government.”<sup>101</sup>

These broad powers have been exercised throughout Michigan’s municipalities to the detriment of its citizens. Joe Harris, former Benton Harbor emergency manager demonstrated one of the most literal applications of PA 436. In 2011, Harris directly “stripped city officials of their powers” by removing members of the Planning Commission and the Brownfield Redevelopment Authority and replacing them with new appointees, including himself.<sup>102</sup> Many are concerned that emergency manager actions such as this, which remove officials directly related to local planning process, will hasten the gentrification

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*Treasury to Present Detroit City Council with Language of Proposed Consent Agreement*, MLIVE (Mar. 13, 2012), [http://www.mlive.com/news/detroit/index.ssf/2012/03/reports\\_detroit\\_city\\_council\\_n.html](http://www.mlive.com/news/detroit/index.ssf/2012/03/reports_detroit_city_council_n.html) [https://perma.cc/WMM3-4GY2]. Out of seven municipalities placed under Emergency Manager Control since the enactment of PA 4 in 2011, only a few municipalities have remained solely in the consent agreement phase, including Inkster, Wayne County, and Royal Oak Township. *Financial Emergency Information*, *supra* note 4.

95. MICH. COMP. LAWS § 141.1560(1) (2016) (providing emergency manager with immunity from liability); MICH. COMP. LAWS § 141.1549(2) (2016).

96. MICH. COMP. LAWS § 141.1549(2).

97. MICH. COMP. LAWS § 141.1550(1) (2016).

98. MICH. COMP. LAWS § 141.1550(2).

99. MICH. COMP. LAWS § 141.1552(1)(dd) (2016).

100. MICH. COMP. LAWS § 141.1553 (2016).

101. MICH. COMP. LAWS § 141.1552(1)(cc).

102. Chastity Pratt Dawsey, *Politicos Were Out to Get Me, Says Emergency Manager*, BRIDGE MAG. (July 10, 2014), <http://bridgemi.com/2014/07/politicos-were-out-to-get-me-says-emergency-manager/> [https://perma.cc/BS8Q-HED6].

of places like Benton Harbor and “[push] out poor residents to make way for developers” with little checks or balances.<sup>103</sup>

Further exhibiting his power as emergency manager, Harris grossly limited the power of Benton Harbor’s elected City Commission to ministerial functions by decreeing: “Absent prior express written authorization and the approval by the Emergency Manager . . . no City Board, Commission or Authority shall take any action for or on behalf of the City whatsoever other than: i) Call a meeting to order, ii) Approve of meeting minutes, iii) Adjourn a meeting.”<sup>104</sup>

Detroit’s former emergency manager, Kevyn Orr took action under PA 436 to accomplish the city’s financial and operating plan<sup>105</sup> at the expense of its elected officials and their constituents. Months after Detroit’s filing for bankruptcy, Orr publicly announced in October 2013 that he was considering selling the Detroit Institute of Art’s (“DIA”) assets to appease creditors.<sup>106</sup> As a world-class museum, the DIA is home to 66,000 pieces, including Diego Rivera’s iconic Detroit Industry Murals.<sup>107</sup> With city worker and retiree pensions at stake, Orr explained that “everything’s on the table,” adding that, “I have a fiduciary obligation to account for all of the assets of the city of Detroit.”<sup>108</sup> Subsequently, the City of Detroit Arts Commission passed a Resolution to protect the DIA’s collections.<sup>109</sup> While auction appraisals were underway but before Orr’s threat could become a reality, foundations from across the country pooled together to raise the required 366 million dollars to

103. Chris Savage, *The Scandal of Michigan’s Emergency Managers*, NATION (Feb. 15, 2012), <http://www.thenation.com/article/scandal-michigans-emergency-managers/> [https://perma.cc/4F35-R7ML].

104. *Id.*

105. *See generally* CITY OF DETROIT, OFFICE OF EMERGENCY MANAGER KEVYN D. ORR, FINANCIAL AND OPERATING PLAN (2013), [http://www.detroitmi.gov/Portals/0/docs/EM/Reports/City%20of%20Detroit%20-%20Final%20Financial%20&%20Operational%20Plan%20\\_45%20Day%20Pl.pdf](http://www.detroitmi.gov/Portals/0/docs/EM/Reports/City%20of%20Detroit%20-%20Final%20Financial%20&%20Operational%20Plan%20_45%20Day%20Pl.pdf) [https://perma.cc/EM7D-VRMP].

106. David Muller, *Detroit Emergency Manager Says DIA Works ‘on the Table’; Appraisal of Tier One Art Done This Month*, MLIVE (Oct. 14, 2013), [http://www.mlive.com/business/detroit/index.ssf/2013/10/orr\\_says\\_dia\\_works\\_on\\_the\\_tabl.html](http://www.mlive.com/business/detroit/index.ssf/2013/10/orr_says_dia_works_on_the_tabl.html) [https://perma.cc/HE84-HQML]; *see also* Shannon Jones, *Detroit Emergency Manager Escalates Threats Against DIA Art*, WORLD SOCIALIST WEB SITE (Oct. 4, 2013), <https://www.wsws.org/en/articles/2013/10/04/orr-o04.html> [https://perma.cc/2BCZ-7ZEK].

107. David Ng, *Detroit Institute of Arts Collection Worth Billions, Report Says*, L.A. TIMES (July 11, 2014, 10:10 AM), <http://www.latimes.com/entertainment/arts/culture/la-et-cm-detroit-institute-of-arts-20140711-story.html> [https://perma.cc/K9HL-BPYL]; *Industry and Technology as the Indigenous Culture of Detroit*, DET. INST. OF ARTS, <http://www.dia.org/art/rivera-court.aspx> [https://perma.cc/74D2-SX8M].

108. Muller, *supra* note 106.

109. Press Release, Detroit Institute of Arts, City of Detroit Arts Commission Passes Resolution to Protect Detroit Institute of Arts’ Collection (Oct. 17, 2013), [http://www.dia.org/user\\_area/uploads/Arts%20Commission%20Resolution%20News%20Release%2010-17-13.pdf](http://www.dia.org/user_area/uploads/Arts%20Commission%20Resolution%20News%20Release%2010-17-13.pdf) [https://perma.cc/PQS7-BPP7].

save the DIA by raising funds for the pension deficit and converting the DIA to a non-profit.<sup>110</sup>

In another cost-saving effort, Orr's emergency manager administration took control of Detroit's Water and Sewage Department from the mayor and subsequently ordered city water services to be shut off for delinquent residential accounts two months past due beginning in March 2014.<sup>111</sup> At the same time, forty Detroit businesses that owed 9.5 million dollars in unpaid water bills remained untouched.<sup>112</sup> The number of disconnections peaked at 3,000 per week, leaving 27,000 households without water by October 2014.<sup>113</sup> "[T]he city's high unemployment rate and a decline in the overall number of customers as the city's population shrinks rendered the water bills 'increasingly unaffordable to thousands of residents in Detroit living under the poverty line.'"<sup>114</sup>

The shutoff gained international scrutiny when the United Nations classified it as a "violation of the most basic human rights" and urged the City to restore water access to its citizens.<sup>115</sup> U.N. representatives observed that "'the most vulnerable and poorest' of the city's population were being disproportionately affected, including 'a predominant number of African-Americans.'"<sup>116</sup> After thousands of shutoffs and angry protests, Orr restored control of the Detroit

110. Muller, *supra* note 106; Rick Cohen, *The Foundation Tally of Detroit's Unprecedented Grand Bargain*, NONPROFIT Q. (July 7, 2014), <https://nonprofitquarterly.org/2014/07/07/the-foundation-tally-of-detroit-s-unprecedented-grand-bargain/> [<https://perma.cc/Y959-DBRX>].

111. Christine Ferretti, *Up to 25K Face Water Shut-Offs in Detroit*, DET. NEWS (May 5, 2015), <http://www.detroitnews.com/story/news/local/detroit-city/2015/05/04/water-shut-notices-go-detroit-may/26891145/> [<https://perma.cc/TX5B-48VR>]; *In Detroit, City-Backed Water Shut-offs 'Contrary to Human Rights,' Say UN Experts*, UN NEWS CTR. (Oct. 20, 2014), <http://www.un.org/apps/news/story.asp?NewsID=49127#.VtIQSrS5fzK> [<https://perma.cc/5G54-6LLC>]; Maya Srikrishnan, *Detroit Mayor Takes Control Of Water Agency Amid Shutoff Controversy*, L.A. TIMES (July 29, 2014, 5:29 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-detroit-mayor-water-department-20140729-story.html> [<https://perma.cc/U79C-UFC5>] (describing the events leading up to the shutoff of residents' delinquent water accounts in Detroit before Detroit's emergency manager restored control of the City's water and sewage department to the mayor).

112. Mary M. Chapman, *Detroit Shuts Off Water to Residents but Not to Businesses Who Owe Millions*, DAILY BEAST (July 26, 2014), <http://www.thedailybeast.com/articles/2014/07/26/detroit-shuts-off-water-to-residents-but-not-to-businesses-who-owe-millions.html> [<https://perma.cc/AGE9-HE84>].

113. *In Detroit, City-Backed Water Shut-offs 'Contrary to Human Rights,' Say UN Experts*, *supra* note 111.

114. *UN Officials Criticise Detroit Water Shutoffs*, BBC NEWS (Oct. 20, 2014), <http://www.bbc.com/news/world-us-canada-29697767> [<https://perma.cc/WML6-6Y2H>].

115. *In Detroit, City-Backed Water Shut-offs 'Contrary to Human Rights,' Say UN Experts*, *supra* note 111; Michelle Miller, *Detroit Water Shut-Offs Bring U.N. Scrutiny*, CBS NEWS (Oct. 20, 2014), <http://www.cbsnews.com/news/detroit-water-shut-offs-brings-u-n-scrutiny/> [<https://perma.cc/UGC2-XVUM>].

116. *In Detroit, City-Backed Water Shut-offs 'Contrary to Human Rights,' Say UN Experts*, *supra* note 111.

Water and Sewage Department to Mayor Duggan.<sup>117</sup> Duggan “vowed to help needy customers pay their water bills” by creating payment assistance programs.<sup>118</sup> However, the aftermath of the massive shutoffs still looms in Detroit where in the fall of 2015, “the city averaged 2,000 residential shut-offs per week.”<sup>119</sup>

Emergency managers have the ability to alter the salaries and wages of the chief administrative officer and members of the governing body.<sup>120</sup> For example, Flint’s mayor and council member salaries were not fully restored until April of 2015, under the discretion of emergency manager Jerry Ambrose.<sup>121</sup> Ambrose’s resolution to restore salaries also included the requirement mandated by former emergency manager Darnell Earley that “the council and mayor complete certain training.”<sup>122</sup>

Additionally, allegations of financial abuse by emergency managers have surfaced, which is perhaps easy to accomplish when emergency managers are granted broad unchecked powers. In one noteworthy case, “Arther Blackwell II, Highland Park’s former emergency manager, was ordered to repay more than \$250,000 he paid himself.”<sup>123</sup>

Further, PA 436 reinforces emergency managers’ broad power by granting them the authority to take “*any other actions considered necessary*” at their “discretion to achieve the objectives of the financial and operating plan.”<sup>124</sup> For example, an emergency manager’s written financial and operating plan for the local government may include the “modification, rejection, termination and renegotiation of contracts”<sup>125</sup> including “terms and conditions of a collective

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117. Ferretti, *supra* note 111.

118. Christine Ferretti, *Detroit Businesses Face Water Shut-offs*, DET. NEWS (Mar. 16, 2015), <http://www.detroitnews.com/story/news/local/detroit-city/2015/03/16/detroit-businesses-face-water-shut-offs/24879959/> [<https://perma.cc/7XGU-789F>].

119. Joel Kurth, *Detroit Hits Residents on Water Shut-Offs as Businesses Slide*, DET. NEWS (Apr. 1, 2016, 1:21 PM), <http://www.detroitnews.com/story/news/local/detroit-city/2016/03/31/detroit-water-shutoffs/82497496/> [<https://perma.cc/7XC2-86A7>].

120. See MICH. COMP. LAWS § 141.1553 (2016).

121. Ron Fonger, *Flint Emergency Manager Restores Full Salaries for Mayor, City Council*, MLIVE (Apr. 13, 2015), [http://www.mlive.com/news/flint/index.ssf/2015/04/7-million\\_loan\\_could\\_signal.html](http://www.mlive.com/news/flint/index.ssf/2015/04/7-million_loan_could_signal.html) [<https://perma.cc/RNR6-KKAU>].

122. *Id.*

123. Chris Savage, *The Scandal of Michigan’s Emergency Managers*, NATION (Feb. 15, 2012), <http://www.thenation.com/article/scandal-michigans-emergency-managers/> [<https://perma.cc/4F35-R7ML>].

124. MICH. COMP. LAWS § 141.1551 (1)(f) (2016) (emphasis added).

125. MICH. COMP. LAWS § 141.1551(1)(c), (f); *see also* § 141.1150(1)(b) (2016) (reasserting emergency managers’ ability to modify contracts).

bargaining agreement.”<sup>126</sup> For example, Detroit Public Schools, and Benton Harbor have utilized this provision.<sup>127</sup>

During Roy Robert’s term as emergency manager of Detroit Public Schools, he repealed a number of teacher’s collective agreements, “adding into their non-teacher union collective bargaining agreements such common terms as pay cuts, suspension of terminal sick leave . . . and a requirement that employees pay 20 percent of their health insurance premium.”<sup>128</sup> Roberts also modified DPS’ collective bargaining agreement to eliminate special bonuses for “teaching an oversized class, losing a preparation period, receiving advanced certification, and teaching special education. Extra payments if the teacher was assaulted were also ended.”<sup>129</sup> With conditions like these and little bargaining power for teachers, DPS, an already struggling district, may continue to face high teacher turnover rates.<sup>130</sup>

Interestingly, school district emergency managers may also include an “education plan” within the school district’s operating plan.<sup>131</sup> It is noteworthy that PA 436 does not provide any definition or guidance on what an “educational plan” entails, again granting school district emergency managers a broad range of discretion.<sup>132</sup> As a result, emergency managers, who may not have any education experience, are responsible for overseeing the “educational plans” instead of local elected school board members, who may have more education experience.

*ii. The Most Consequential Exercise of Emergency Manager Control: The Flint Water Crisis*

The Flint water crisis embodies the gravest consequences resulting from the broad powers vested in Michigan’s emergency managers. Water sampled from Flint homes in September 2015 contained dangerous lead levels, some even high

126. MICH. COMP. LAWS § 141.1552(1)(k) (2016). Similarly, under certain conditions, emergency managers can assume and exercise authority over municipalities’ pension funds. § 141.1552(1)(m)(i).

127. See Chastity Pratt Dawsey, *Politicos Were Out To Get Me, Says Emergency Manager*, BRIDGE MAG. (July 10, 2014), <http://bridgemi.com/2014/07/politicos-were-out-to-get-me-says-emergency-manager/> [<https://perma.cc/BS8Q-HED6>]; see also discussion *infra* notes 128–130 (detailing emergency manager modifications of teacher’s collective bargaining agreements in Detroit).

128. Hohman, *supra* note 56.

129. *Id.*

130. RJ Wolcott, *Michigan Gets ‘F’ for Tracking Troubled Teachers*, DET. FREE PRESS (Feb. 15, 2016), <http://www.freep.com/story/news/local/michigan/2016/02/14/michigan-rating-teachers/80371992/> [<https://perma.cc/L4B6-8B5J>].

131. MICH. COMP. LAWS § 141.1551(1)(e) (2016). It is notable that this is the abuse of power the prevailing plaintiffs and the court sought to avoid in *Adams v. Bobb*, No. 09-020160-AW (Wayne County Cir. Ct. Dec. 6, 2010). See discussion *infra* Part III(A).

132. MICH. COMP. LAWS § 141.1551(1)(e), (f).

enough to meet the EPA's definition of "toxic waste."<sup>133</sup> Unsafe levels of lead found in the body can lead to a variety of severe long-term health consequences including irreversible neurological damage, cardiovascular problems, hypertension, kidney damage, and reproductive problems—especially in children and pregnant women/unborn fetuses.<sup>134</sup> President Barack Obama declared a state of emergency for Flint on January 16, 2016.<sup>135</sup> By February 2016, "as many as 8,000 children under age 6 were exposed to unsafe levels of lead in Flint," including a spike in lead poisoning across all age groups and increasing cases of legionnaire disease, some fatal.<sup>136</sup>

On the issue, Chairman Jason Chaffetz (R-UT) of the House Oversight Committee stated, "This is the United States of America—this isn't supposed to happen here . . . . We are not some Third World country where 100,000 people get poisoned."<sup>137</sup> Unable to use water at home or school, children and families now rely on bottled water and hand sanitizer.<sup>138</sup> Individuals and organizations rallied across the state and country to provide resources for the people of Flint. But how did Flint get to this point? And what did PA 436 have to do with it?

133. Christopher Ingraham, *This Is How Toxic Flint's Water Really Is*, WASH. POST (Jan. 15, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/01/15/this-is-how-toxic-flints-water-really-is/?tid=sm\\_fb,%20](https://www.washingtonpost.com/news/wonk/wp/2016/01/15/this-is-how-toxic-flints-water-really-is/?tid=sm_fb,%20) [<https://perma.cc/P854-DXH3>]. Lead in water is measured by parts per billion; levels as low as 5 ppb can be a cause for concern, the EPA recommends homeowners and municipalities take steps to reduce levels of 15 ppb, and ppb levels of 5000 are considered toxic. A Virginia Tech study sampled water from 271 Flint homes, finding level of 27 ppb, at the 90<sup>th</sup> percentile of samples (meaning 10% of homes will have more than this level and 90% will have less) "nearly twice as high as the EPA's . . . guidelines." The highest reading from the sample reached 158 ppb. However, the highest reading obtained outside of the Virginia Tech sample reached a whopping 13,000 ppb, leaving a researcher in "disbelief." *Id.*

134. *Id.*; Matthew Dolan, "Mission Flint" Charts City's Future After Water Crisis, DET. FREE PRESS (Feb. 2, 2016), <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/01/31/mission-flint-charts-citys-future-after-water-crisis/79602582/> [<https://perma.cc/36WB-KHQG>]; Abby Goodnough, *Flint Weighs Scope of Harm to Children Caused by Lead in Water*, N.Y. TIMES (Jan. 29, 2016), <http://www.nytimes.com/2016/01/30/us/flint-weighs-scope-of-harm-to-children-caused-by-lead-in-water.html>.

135. Paul Egan & Todd Spangler, *President Obama Declares Emergency in Flint*, DET. FREE PRESS (Jan. 16, 2016), <http://www.freep.com/story/news/local/michigan/2016/01/16/president-obama-declares-emergency-flint/78898604/> [<https://perma.cc/FW89-VNU5>].

136. Sarah Ganim, Linh Tran & Mallory Simon, *Exclusive: Michigan Legionnaires' Deaths Were Preventable, Official Says*, CNN (Feb. 13, 2016), <http://www.cnn.com/2016/02/12/us/flint-michigan-legionnaires/> [<https://perma.cc/CRK4-JXPH>]. Specifically, the media reports that an outbreak of legionnaire disease in Flint has been tied to the deaths of 12 people. Paul Egan & Matthew Dolan, *Criminal Charges Today in Flint Water Crisis*, DET. FREE PRESS (Apr. 26, 2016), <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/04/19/criminal-charges-coming-wednesday-flint-water-crisis/83251574/> [<https://perma.cc/A8X9-8JLL>].

137. Arthur Delaney & Laura Barron-Lopez, *Congress Seeks Answers on Flint Water Crisis, Doesn't Get Them*, HUFFINGTON POST (Feb. 3, 2016), [http://www.huffingtonpost.com/entry/congress-flint-water-crisis\\_us\\_56b225dde4b01d80b244a9c7](http://www.huffingtonpost.com/entry/congress-flint-water-crisis_us_56b225dde4b01d80b244a9c7) [<https://perma.cc/UHP2-4SKX>].

138. See Monica Davey, *Flint Officials Are No Longer Saying the Water Is Fine*, N.Y. TIMES (Oct. 7, 2015), <http://www.nytimes.com/2015/10/08/us/reassurances-end-in-flint-after-months-of-concern.html>; Abby Goodnough, Monica Davey & Mitch Smith, *When the Water Turned Brown*, N.Y. TIMES (Jan. 23, 2016), <http://www.nytimes.com/2016/01/24/us/when-the-water-turned-brown.html>.

Turn back to March 2013. In an effort to save money, the Flint City council voted to “stop buying Detroit water and join the Karegnondi Water Authority [“KWA”], a new pipeline project that will deliver water from Lake Huron.”<sup>139</sup> A day after joining the KWA, Detroit notified Flint it would stop selling the city water by April 2014.<sup>140</sup> Knowing that the KWA would not be completed for another three years, “Flint was forced to find a new source of drinking water.”<sup>141</sup> By the end of March 2014, Flint’s emergency manager, Darnell implemented and announced the City’s plan to use the Flint River as the new source of Flint’s drinking water.<sup>142</sup> The switch was projected to “save the city five million dollars in less than two years” and was coined “a historic moment for the city of Flint to return to its roots and use [its] own rivers as [its] drinking water supply.”<sup>143</sup>

Within weeks of the switch, citizens began complaining of the “poor tasting and smelling city water.”<sup>144</sup> Mayor Dayne Walling and Emergency Manager Earley assured residents the water was safe. As complaints continued to roll in, General Motors announced in October 2014 that it would stop using the city water at its engine plants out of fear that it could cause corrosion.<sup>145</sup> Upon the discovery of TTHM (“a group of four chemicals formed as a byproduct of disinfecting water”) in the city’s water, Flint City councilmembers urged the city to refrain from using Flint River water.<sup>146</sup> Despite such motions and an offer from Detroit to sell water to Flint again without a four million-reconnection fee, Flint continued to use its own water source under the direction of Earley.<sup>147</sup>

As the controversy ensued, Mayor Walling asked the state for help in addressing the water concerns; state officials assured the city that they were working on the problem.<sup>148</sup> However, former Michigan Department of Environmental Quality (“DEQ”) spokesman Brad Wurfel “shrugged off

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139. *How the Flint Water Crisis Emerged*, MLIVE (Oct. 7, 2015, updated Jan. 17, 2016), [http://www.mlive.com/news/flint/index.ssf/2015/10/how\\_the\\_flint\\_water\\_crisis\\_eme.html](http://www.mlive.com/news/flint/index.ssf/2015/10/how_the_flint_water_crisis_eme.html) [<https://perma.cc/68RY-CY9U>].

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*; Dominic Adams, *Closing the Valve on History: Flint Cuts Water Flow from Detroit After Nearly 50 Years*, MLIVE (Apr. 25, 2014), [http://www.mlive.com/news/flint/index.ssf/2014/04/closing\\_the\\_valve\\_on\\_history\\_f.html](http://www.mlive.com/news/flint/index.ssf/2014/04/closing_the_valve_on_history_f.html) [<https://perma.cc/M3VK-HG24>].

144. *How the Flint Water Crisis Emerged*, *supra* note 139.

145. Ron Fonger, *General Motors Shutting Off Flint River Water at Engine Plant over Corrosion Worries*, MLIVE (Oct. 13, 2014), [http://www.mlive.com/news/flint/index.ssf/2014/10/general\\_motors\\_wont\\_use\\_flint.html](http://www.mlive.com/news/flint/index.ssf/2014/10/general_motors_wont_use_flint.html) [<https://perma.cc/3L6A-9R2N>].

146. *How the Flint Water Crisis Emerged*, *supra* note 139.

147. *Id.*; Ron Fonger, *Flint Report Says Getting Water From Detroit Is Possible But Would Cost \$4 Million Just To Reconnect*, MLIVE (Jan. 17, 2015, 10:00 AM), [http://www.mlive.com/news/flint/index.ssf/2015/01/flint\\_report\\_says\\_going\\_back\\_t.html](http://www.mlive.com/news/flint/index.ssf/2015/01/flint_report_says_going_back_t.html) [<https://perma.cc/5CAT-U6ZB>].

148. *How the Flint Water Crisis Emerged*, *supra* note 139.

concerns from Flint residents that their water was tainted.”<sup>149</sup> In an email he wrote that their worries were “some result of the city’s poor communication efforts, some (I suspect) the result of folks who want to stir the public fear pot for political leverage.”<sup>150</sup>

On March 23, 2015 the Flint City Council voted 7-1 “to ‘do all things necessary’ to reconnect Flint to the Detroit Water and Sewerage Department.”<sup>151</sup> Circumventing the legislative vote, newly appointed emergency manager Jerry Ambrose found it “incomprehensible . . . that (seven) members of the Flint City Council would want to send more than 12 million dollars a year to the system serving Southeast Michigan . . . water from Detroit is no safer than water from Flint.”<sup>152</sup> Contrary to Ambrose’s assertions, lead studies conducted by Virginia Tech in September 2015 revealed that “the corrosiveness of [Flint’s] water [caused] lead to leach into residents’ water” at dangerously high levels.<sup>153</sup> On October 1, 2015, County Officials declared a public health emergency, “urging residents to not drink [Flint’s] water.”<sup>154</sup>

After numerous protests, recommendations, and city council meetings, on October 8, 2015, Governor Rick Snyder announced a multimillion-dollar plan to reconnect Flint to the Detroit water system.<sup>155</sup> However, this state intervention came in too little, too late, as demonstrated by the deadly aftermath Flint is left to deal with on its own, as the City was removed from emergency manager control in April 2015 and federal funding discontinued as of August 14, 2016.<sup>156</sup>

149. Monica Davey & Julie Bosman, *Emails Show Michigan Aides Worried About Flint’s Water a Year Before Acting*, N.Y. TIMES (Feb. 26, 2016), <http://www.nytimes.com/2016/02/27/us/emails-show-michigan-aides-worried-about-flints-water-a-year-before-acting.html>.

150. *Id.*

151. Ron Fonger, *Flint Council Votes to Do ‘All Things Necessary’ to End Use of Flint River*, MLIVE (Mar. 23, 2015), [http://www.mlive.com/news/flint/index.ssf/2015/09/new\\_testing\\_shows\\_flint\\_water.html](http://www.mlive.com/news/flint/index.ssf/2015/09/new_testing_shows_flint_water.html) [<https://perma.cc/89C9-YG3P>].

152. *Id.*

153. *How the Flint Water Crisis Emerged*, *supra* note 139; see Ron Fonger, *Lead Leaches into ‘Very Corrosive’ Flint Drinking Water, Researchers Say*, MLIVE (Sept. 2, 2015), [http://www.mlive.com/news/flint/index.ssf/2015/09/new\\_testing\\_shows\\_flint\\_water.html](http://www.mlive.com/news/flint/index.ssf/2015/09/new_testing_shows_flint_water.html) [<https://perma.cc/UQR3-2R3S>]; see also *supra* text accompanying note 133.

154. Jiquanda Johnson, *Don’t Drink Flint’s Water, Genesee County Leaders Warn*, MLIVE (Oct. 15, 2015), [http://www.mlive.com/news/flint/index.ssf/2015/10/genesee\\_county\\_leaders\\_warn\\_do.html](http://www.mlive.com/news/flint/index.ssf/2015/10/genesee_county_leaders_warn_do.html) [<https://perma.cc/YEY2-KY8M>].

155. *Id.* However, recent email leaks suggest that state actors, including Governor Snyder were aware of dangers to the water supply long before the County public health emergency was declared and failed to take action. Ryan Felton & Nicky Woolf, *Flint Water Crisis: Emails Reveal Governor Snyder Informed of Problems a Year Ago*, GUARDIAN (Jan. 21, 2016), <http://www.theguardian.com/us-news/2016/jan/21/flint-water-crisis-emails-reveal-governor-snyder-informed-of-problems-a-year-ago> [<https://perma.cc/6YVP-Y5HT>].

156. Ron Fonger, *Gov. Snyder Declares End to Flint’s Financial Emergency*, MLIVE (Apr. 29, 2015), [http://www.mlive.com/news/flint/index.ssf/2015/04/governor\\_declares\\_flints\\_finan.html](http://www.mlive.com/news/flint/index.ssf/2015/04/governor_declares_flints_finan.html) [<https://perma.cc/B4FM-T4V6>]; Merrit Kennedy, *Federal State of Emergency over Lead-Laced Water Ends on Flint, Mich.*, NPR (Aug. 14, 2016), <http://www.npr.org/sections/thetwo-way/2016/08/14/489971417/federal-state-of-emergency-over-lead-laced-water-ends-in-flint-mich>.

By practice, emergency managers are untouchable, never having to answer to the citizens they govern, the governing bodies they overtake, and rarely a higher authority.<sup>157</sup> Further, by statute, emergency managers are immune from liability for their decisions as state actors.<sup>158</sup> Former Flint emergency manager Earley demonstrated this unaccountable demeanor when he failed to appear after being subpoenaed before the House Oversight Committee in Washington, D.C.<sup>159</sup> The crisis in Flint serves as yet another example of state-appointed emergency managers controlling municipalities by whatever means they deem “necessary” at the expense of city residents.

However, for the first time, government actors are being held responsible for the decisions (or lack thereof) leading to the Flint Water Crisis. On March 17, 2016, Governor Snyder and U.S. Environmental Protection Agency (“EPA”) Administrator Gina McCarthy appeared before the U.S. House Committee on Oversight and Government for its hearings on Flint.<sup>160</sup> In addition to investigating how the EPA handled the crisis, one question seemed to be the central focus of the hearing, “what did Governor Snyder know and when did he know it?”<sup>161</sup> Despite emails dating back to February 2015 from his administration “showing an awareness among members of his staff that something was dangerously wrong with the water in Flint,”<sup>162</sup> whistleblowers warning of high levels of lead in children’s blood,<sup>163</sup> and public knowledge that “General Motors stopped using Flint water because it was corroding parts at its engine plant in Flint,”<sup>164</sup> Snyder claimed he was unaware of the gravity of the situation until September 2015.<sup>165</sup> He asserted that while “there were numerous

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157. Additionally, emergency managers receive immunity from liability. MICH. COMP. LAWS § 141.1560(1) (2016).

158. MICH. COMP. LAWS § 141.1560(1).

159. Benjamin Siegel, *Flint Water Crisis: Top Lawmaker Asks US Marshals to ‘Hunt’ Down Former Emergency Manager*, ABC NEWS (Feb. 3, 2016), <http://abcnews.go.com/Politics/flint-water-crisis-top-lawmaker-asks-us-marshals/story?id=36687951>.

160. Paul Egan, *Gov. Rick Snyder Apologizes Before Congress for Flint Water Crisis*, DET. FREE PRESS (Mar. 17, 2016), <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/03/17/snyder-apologizes-congress-flint-water-crisis/81900650/> [https://perma.cc/6XB3-TX5L]. Michigan held its own hearings on the Flint Water Crisis on May 10, 2016. However, the Joint Select Committee on The Flint Water Public Health Emergency declined “to take testimony from Gov. Rick Snyder, former Department of Environmental Quality Director Dan Wyant or emergency managers who were involved in the city switching water sources.” Instead, it chose “to focus on policymaking.” Emily Lawler, *Flint Water Committee Ends Hearings Without Testimony from Emergency Managers, Gov. Rick Snyder*, MLIVE (May 10, 2016), [http://www.mlive.com/news/index.ssf/2016/05/flint\\_water\\_committee\\_ends\\_hearings.html](http://www.mlive.com/news/index.ssf/2016/05/flint_water_committee_ends_hearings.html) [https://perma.cc/BD4E-473S].

161. *House Hearing on the Water Crisis in Flint*, N.Y. TIMES, <http://www.nytimes.com/live/flint-water-crisis-hearing/> [https://perma.cc/QY4E-BCBZ].

162. *Id.* In one email, a lawyer for the governor described the situation in Flint as “downright scary.” *Id.*; Davey & Bosman, *supra* note 149.

163. Goodnough, Davey & Smith, *When the Water Turned Brown*, *supra* note 138.

164. *House Hearing on the Water Crisis in Flint*, *supra* note 161; *see also supra* note 145 and accompanying text.

165. *House Hearing on the Water Crisis in Flint*, *supra* note 161.

signs that things were not right with the water . . . [e]very inquiry was met with reassurances by ‘career bureaucrats,’ . . . [t]hat the problems were not serious.”<sup>166</sup> These career bureaucrats included state actors now facing criminal charges for falsifying water quality reports, among others.<sup>167</sup> Snyder says he first became aware of the problem in late September 2015 when “his staff briefed him on high levels in the Flint water supply.”<sup>168</sup> Days later state officials told people in Flint to stop drinking the water.

Governor Snyder and select committee members have asserted that the EPA shares responsibility with the State,<sup>169</sup> beginning when Michigan DEQ officials “failed to require the city to add corrosion-control chemicals as part of the treatment process” after the city switched water sources to save money.<sup>170</sup> Failure to do so caused lead to “leach from pipes, joints, and fixtures” into residents’ taps.<sup>171</sup> “Snyder testified that even after the EPA discovered there was no corrosion control the agency continued to work with” MDEQ officials rather than bringing the issue directly to “his and the public’s attention.”<sup>172</sup> The EPA claimed “that officials repeatedly urged the state to use corrosion control after learning in April that it wasn’t” and acted with “diligence.”<sup>173</sup> Further, McCarthy explained at the hearing, “[t]here was continued discussion back and forth and a lot of it may not be in email, but I am certainly aware that the regional administrator [Susan Hedman] was in conversations with high levels at MDEQ.”<sup>174</sup> Susan Hedman, EPA administrator for Flint formally resigned in January 2016 and “one day after Governor Snyder released 250 pages of emails.”<sup>175</sup> Post-hearing, it remains unclear as to “who” is to blame. However, as Snyder summarized in his testimony, “This was a failure of government at all levels. Local, state, and federal officials – we all failed the families of Flint.”<sup>176</sup>

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166. *Id.*

167. Elliott C. McLaughlin & Catherine E. Shoichet, *Charges Against 3 in Flint Water Crisis ‘Only the Beginning’*, CNN (Apr. 20, 2016), <http://www.cnn.com/2016/04/20/health/flint-water-crisis-charges/> [https://perma.cc/V728-SD8H]; see also *infra* notes 177–184 and accompanying text.

168. *House Hearing on the Water Crisis in Flint*, *supra* note 161.

169. “Lawmakers from both parties were withering in their questioning, but partisan differences emerged early on. Republicans, who have been waging war on the Environmental Protection Agency, were far more critical of the E.P.A. and its reaction to the problem in Flint. Democrats on the committee were more likely to blame Gov. Rick Snyder and the state agencies that he oversaw.” *Id.*

170. Egan & Dolan, *supra* note 136.

171. *Id.*

172. Maureen Groppe, *EPA Chief Defends Action on Flint Water Crisis*, DET. FREE PRESS (Apr. 5, 2016), <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/04/05/epa-mccarthy-flint-water-crisis/82658602/> [https://perma.cc/7WRS-3BR2].

173. *Id.*

174. Groppe, *supra* note 172.

175. Joshua Berlinger & Joseph Nett, *Flint Water Crisis: EPA Regional Administrator Resigns*, CNN (Jan. 21, 2016), <http://www.cnn.com/2016/01/21/health/flint-water-crisis/> [https://perma.cc/6NXP-6XBU].

176. *Michigan Gov. Rick Snyder: ‘We All Failed the Families of Flint’*, NPR (Mar. 17, 2016),

Roughly a month after committee hearings in Washington, on April 20, 2016, criminal charges were filed against two state employees and one city employee in Michigan Attorney General Bill Schuette's ongoing criminal investigation of the Flint water crisis.<sup>177</sup> These charges could result in up to five years in prison.<sup>178</sup> The individuals charged include a MDEQ district water supervisor, a district water engineer, and "a former laboratory and water quality supervisor who [then] serve[d] as the City of Flint's utilities administrator."<sup>179</sup> Current "[a]ccusations include misleading federal regulatory officials, manipulating water sampling and tampering with reports."<sup>180</sup> Specifically, city and state officials allegedly submitted falsified information related to the federal Lead and Copper Rule, which governs acceptable levels of those substances in drinking water.<sup>181</sup> Schuette announced these charges are "only the beginning," as more charges are expected as the investigation continues.<sup>182</sup>

Leaders and citizens alike have strongly urged that charges be brought against Flint's former state-appointed emergency managers and that Governor Snyder resign and/or be charged himself.<sup>183</sup> On December 20, 2016, former Flint emergency managers, Darnell Earley and Jerry Ambrose were charged in Genesee District Court "with multiple 20-year felonies for their failure to protect the citizens of Flint from health hazards caused by contaminated drinking water."<sup>184</sup>

State Senator Jim Ananich (D-Flint) said the charges should renew efforts to change the state's emergency manager law, emphasizing that "The emergency

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<http://www.npr.org/sections/thetwo-way/2016/03/17/470792212/watch-michigan-gov-rick-snyder-testifies-on-the-flint-water-crisis>.

177. McLaughlin & Shoichet, *supra* note 167.

178. Stephanie Gosk, 'Failed Us All': 3 Officials Hit With Charges in Flint Water Crisis, NBC NEWS (Apr. 20, 2016), <http://www.nbcnews.com/storyline/flint-water-crisis/3-officials-charged-over-flint-water-crisis-n559186> [<https://perma.cc/C87C-PR4X>].

179. McLaughlin & Shoichet, *supra* note 167.

180. *Id.*

181. Egan & Dolan, *supra* note 136. Further, "officials believe the city got artificially low lead readings because they didn't test the homes most at risk – those with lead service lines or other features putting them at high risk for lead. Among those to be charged is a Flint official who signed a document saying the homes Flint used to test the tap water under the federal Lead and Copper Rule all had lead service lines – a statement investigators allege was false." *Id.*

182. McLaughlin & Shoichet, *supra* note 167.

183. Gosk, *supra* note 178.

184. Press Release, Michigan Attorney General Bill Schuette, Four More Officials Charged in Third Round of Flint Water Crisis Criminal Investigation (Dec. 20, 2016), <http://www.michigan.gov/ag/0,4534,7-164-46849-400211--,00.html> [<https://perma.cc/PLS5-WLP8>] [hereinafter Schuette Press Release]; Roberto Acosta, *Emergency Manager Law Debate Reignited After Flint Water Crisis Charges*, MLIVE (Dec. 20, 2016), [http://www.mlive.com/news/flint/index.ssf/2016/12/charges\\_against\\_former\\_emergen.html](http://www.mlive.com/news/flint/index.ssf/2016/12/charges_against_former_emergen.html).

According to Michigan Attorney General Bill Schuette, Earley and Ambrose, along with other ex-City of Flint executives, "also face felony charges of false pretenses and conspiracy to commit false pretenses related to their roles in a process that led to the issuance bonds to pay for a portion of the [Karegnondi Water Authority] project." Schuette Press Release, *supra* note 184.

manager law is a disaster that caused a disaster and the fact that the attorney general has sufficient evidence to charge two emergency managers is proof that we must change it.”<sup>185</sup> These charges have once again brought federal attention to Flint. In light of the emergency manager criminal charges, U.S. Representative Elijah Cummings (D-Maryland) has urged U.S. Representative Jason Chaffetz (R-Utah), Chairman of the House Committee on Oversight and Government Reform, to reopen the committee’s congressional investigation of Flint and to subpoena Governor Snyder to produce key documents that were requested in the initial committee investigation nearly a year ago.<sup>186</sup> Representative Cummings has stated, “[I]t is beyond irresponsible for the Committee to close its investigation without demanding full accountability and transparency from [Governor Snyder]. The families of Flint deserve no less.”<sup>187</sup>

The Flint water crisis begs the question: why did it have to get to this point for the public at large to see the pitfalls of PA 436? The statute was in effect and circumventing local democracy across the state of Michigan since March 2013,<sup>188</sup> but it didn’t gain statewide and national attention until the Flint water crisis became the subject of national news beginning in late 2015 and in the 2016 Presidential Campaign.<sup>189</sup> Snyder ran a successful gubernatorial campaign, “pledging to run the state more like the businesses that generated his substantial wealth.”<sup>190</sup> Inadvertently or not, this platform ignored basic democratic principles in an effort to save money.

In 2013, PA 436 was originally defended by at least one politician as a tool to “get Michigan’s finances back in order . . . and build a better state for our children and grandchildren to embrace.”<sup>191</sup> However, it has accomplished the opposite result. Instead of building a better future for Michigan’s youth,

185. Acosta, *Emergency Manager Law Debate Reignited*, *supra* note 184.

186. Press Release, Rep. Elijah Cummings, Cummings Renews Call For Congressional Subpoena for Michigan Governor After New Criminal Charges Filed on Flint (Dec. 20, 2016), <https://democrats-oversight.house.gov/news/press-releases/cummings-renews-call-for-congressional-subpoena-for-michigan-governor-after-new> [<https://perma.cc/MN88-Z5KP>].

187. *Id.*

188. *Local Financial Stability and Choice Act*, MICH. LEGISLATURE, <http://legislature.mi.gov/doc.aspx?mcl-act-436-of-2012> [<https://perma.cc/94DV-V9E5>]. Specifically, PA 436 became effective March 28, 2013. *Id.*

189. See *supra* notes 133–138 and accompanying text; Mark Preston, *CNN to Hold Democratic Presidential debate in Flint, Michigan*, CNN (Mar. 5, 2016), <http://www.cnn.com/2016/02/07/politics/cnn-democratic-debate-flint-michigan-hillary-clinton-bernie-sanders/> [<https://perma.cc/3WHL-L36H>].

190. Lenny Bernstein & Joby Warrick, *Michigan Gov. Snyder Confronts the Perils of Running Government Like a Business*, WASH. POST (Mar. 13, 2016), [https://www.washingtonpost.com/national/health-science/michigan-gov-snyder-confronts-the-perils-of-running-government-like-a-business/2016/03/13/29d0256c-e705-11e5-b0fd-073d5930a7b7\\_story.html](https://www.washingtonpost.com/national/health-science/michigan-gov-snyder-confronts-the-perils-of-running-government-like-a-business/2016/03/13/29d0256c-e705-11e5-b0fd-073d5930a7b7_story.html) [<https://perma.cc/8TX7-LEXY>].

191. Phil Pavlov, *Why the Emergency Manager Law Makes Sense*, DOME MAG. (Mar. 23, 2013), <http://domemagazine.com/pavlov/pp032213> [<https://perma.cc/R7XP-YW25>] (Michigan State Senator Phil Pavlov (R-St. Clair) explaining his support for PA 436).

“thousands of [Flint] children may have been poisoned for life by lead.”<sup>192</sup> Instead of getting Michigan’s finances back on track, the State will spend millions in an attempt to correct seemingly irreversible damage. As of March 2016, it is estimated that the costs to respond to Flint’s public health and infrastructure emergency will exceed \$140 million.<sup>193</sup> While the state will seek “federal funds and other resources” to assist, “the Michigan Legislature has approved \$67.4 million for Flint” and Governor Snyder has requested additional appropriations of \$165 million.<sup>194</sup> As of August 2016, the State had already spent \$5 million to defend Governor Snyder, the Michigan Department of Environmental Quality, and the Michigan Department of Health and Human Services.<sup>195</sup>

Alarming, Snyder claims “the crisis has an estimated economic impact of 4% loss in personal income to the local economy, which amounts to \$115 million per year.”<sup>196</sup> Notably, the City of Flint had already spent \$18.4 million “trying to stabilize the water even before . . . the state first acknowledged a significant problem.”<sup>197</sup> In February 2017, with little notice or time to prepare, the State of Michigan informed the City of Flint that “the [state-sponsored] credits currently being applied to the water portion of Flint utility customers’ accounts “will no longer be provided after February 28, 2017, as well as

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192. Bernstein & Warrick, *supra* note 190.

193. On top of the long-term physical health consequences, the Flint water crisis has created a mental health crisis among the people of Flint. Health care workers have already observed chronic consequences including “profound stress, worry, depression and guilt.” Abby Goodnough & Scott Atkinson, *A Potent Side Effect to the Flint Water Crisis: Mental Health Problems*, N.Y. TIMES (Apr. 30, 2016), <http://www.nytimes.com/2016/05/01/us/flint-michigan-water-crisis-mental-health.html>; see Paul Egan, *Snyder in FEMA Appeal: Flint Costs to Top \$140 Million*, DET. FREE PRESS (Mar. 3, 2016), <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/03/03/snyder-appeals-fema-denial-funding-flint/81258936/> [https://perma.cc/6PWC-X2G5]. Further, it is estimated that the capital costs to replace lines affected by the Flint water crisis could cost the U.S. more than \$275 billion. Matthew Dolan, *Flint Water Crisis Could Cost U.S. \$300 Billion*, USA TODAY (Mar. 5, 2016), <http://www.usatoday.com/story/news/nation-now/2016/03/05/flint-water-crisis-could-cost-us-300-billion/81359834/> [https://perma.cc/HGF7-YKD8]; Goodnough, *Flint Weighs Scope of Harm*, *supra* note 134.

194. Fundraising efforts have been initiated to raise money and awareness for the people of Flint. For example, the Community Foundation of Greater Flint has dedicated itself “to help the effort to find interventions for children possibly impacted by ingesting lead-poisoned water.” Rochelle Riley, *Is Lieutenant Governor Ready to Inherit Flint Water Crisis?*, DET. FREE PRESS (Mar. 24, 2016), <http://www.freep.com/story/news/columnists/rochelle-riley/2016/03/20/riley-lieutenant-governor-ready-inherit-flint-water-crisis/81930254/> [https://perma.cc/8M7D-ZBZF]; see also Egan, *supra* note 193. Additionally, the costs of investigating the Flint water crisis are projected to cost as much as \$4.9 million. Matthew Dolan, *Flint Water Crisis Probe Costs Triple, May Hit \$5 Million*, DET. FREE PRESS (Jun. 27, 2016), <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/06/27/flint-water-criminal-costs-triple-5-million/86444776/> [https://perma.cc/L9YA-8Z5K].

195. Ron Fonger, *State Spends \$5 Million to Defend Gov. Snyder, Workers in Flint Water Crisis*, MLIVE (Aug. 19, 2016), [http://www.mlive.com/news/index.ssf/2016/08/gov\\_snyder\\_plans\\_to\\_raise\\_spen.html](http://www.mlive.com/news/index.ssf/2016/08/gov_snyder_plans_to_raise_spen.html) [https://perma.cc/8YGF-BBLW].

196. Egan, *supra* note 193.

197. *Id.*

“funding for Flint’s connection to the Great Lakes Water Authority (GLWA), which amounts to about \$1.2 million a month.”<sup>198</sup>

Demonstrating remorse during his congressional testimony, Snyder said, “I’m going to have to live with this for the rest of my life.”<sup>199</sup> To which the committee’s ranking Democrat, U.S. Representative Elijah Cummings (D-Maryland) replied, “You have to live with it, but many of these children will never be what God intended them to be when they were born.”<sup>200</sup>

### *iii. Differences Between PA 436 and PA 4*

In addition to allowing for different types of fiscal intervention, PA 436 contains four other provisions that distinguish it from PA 4.<sup>201</sup> First, PA 436 allows municipalities to remove emergency managers who have served for *at least* eighteen months “by a 2/3 vote of the governing body of the local government.”<sup>202</sup> Second, if a municipality’s local governing body disapproves of an emergency manager’s “proposed action,” the governing body may “submit to the local emergency financial assistance loan board an alternative proposal that would yield substantially the same financial result.”<sup>203</sup> The loan board then assesses both plans and approves the one that best serves the public interest.<sup>204</sup> However, in theory, the exercise of power by these local governing boards to intervene may be nullified if an emergency manager succeeds in dissolving the said governing bodies.<sup>205</sup> Based on a plain reading of PA 436, it is questionable whether this is a drafting flaw or an intentional method of ensuring local governing boards cannot seek recourse against emergency managers, although

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198. Jiquanda Johnson, *State to Stop Paying Flint’s Water Bill, Ending Credits for Residents*, MLIVE (Feb. 9, 2017), [http://www.mlive.com/news/flint/index.ssf/2017/02/state\\_to\\_end\\_water\\_relief\\_cred.html](http://www.mlive.com/news/flint/index.ssf/2017/02/state_to_end_water_relief_cred.html) [<https://perma.cc/32YE-E6SU>]. Notably, state officials justified the discontinuation of state funding based on “testing showing Flint’s water had a 90<sup>th</sup> percentile value of 8 ppb of lead.” *Id.* However, leaders like State Senate Minority Leader Jim Ananich (D-Flint) argue that this is “barely below the threshold (for lead).” *Id.* Similarly, Congressman Dan Kildee (D-Michigan), who represents Flint, referred to the decision as “disappointing,” stating that “the city still today must buy usable water from other communities instead of treating its own water at the city plant . . . because of decisions by unelected emergency managers that got the city into this emergency in the first place. Flint families still need the state to step up and do more until the city can treat its own water.” Press Release, Statement by Congressman Dan Kildee on State of Michigan Halting Flint Water Credits and Payments (February 9, 2017), <http://dankildee.house.gov/statement-by-congressman-dan-kildee-on-state-of-michigan-halting-flint-water-credits-and-payments/> [<https://perma.cc/79LL-JX9L>].

199. Egan, *supra* note 193.

200. *Id.*

201. Oosting, *supra* note 88. These four types of fiscal intervention available for municipalities under PA 436 are: a consent agreement, chapter 9 bankruptcy, a neutral evaluation process or an emergency manager. *See* discussion *supra* Part III(B).

202. MICH. COMP. LAWS § 141.1549(6)(c) (2016) (emphasis added).

203. MICH. COMP. LAWS § 141.1559(2) (2016).

204. *Id.*

205. MICH. COMP. LAWS § 141.1552(1)(cc) grants emergency city managers the power to “discorporate or dissolve the municipal government.”

there is nothing in the legislative history that would illustrate whether this oversight is intentional or not.

Third, different from PA 4, PA 436 includes an appropriation of \$5 million to the Michigan Department of Treasury to administer the act and provide funding.<sup>206</sup> State actors, including Governor Rick Snyder, expressed that the appropriation's purpose is to help already struggling cities ease the cost of paying for emergency city managers and teams of consultants.<sup>207</sup> The appropriation provision makes the law immune to referendum.<sup>208</sup> Fourth, PA 436 differs from PA 4 in receivership processes for local governments. Like PA 4, PA 436 places a local government that selects the emergency manager option or defaults into emergency manager status under receivership.<sup>209</sup> However, under PA 436, a municipality may be removed from receivership “[w]hen the financial conditions that were the basis of the financial emergency are corrected in a sustainable fashion” determined at the discretion of the governor<sup>210</sup> or by the two-thirds local governing body removal process discussed above.<sup>211</sup> Whereas, under PA 4, the state treasurer determined whether a local government shall be removed from receivership.<sup>212</sup> Additionally, under PA 436 “before removing a municipality from receivership, the governor may appoint a receivership transition advisory board to monitor the affairs of the local government until the receivership is terminated.”<sup>213</sup> Notably, “receivership transition advisory boards” did not exist under PA 4.

### C. Public Reception: Criticism & Support

PA 436 has been heavily criticized by state-based advocates and national civil rights groups. State rights groups like the Sugar Law Center have dubbed it an “emergency for democracy,” and a national news program called it “ground

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206. MICH. COMP. LAWS § 141.1575 (2016).

207. Guyette, *supra* note 64.

208. *See* MICH. CONST. art. II, § 9 (“the power of referendum does not extend to acts making appropriations for state institutions.”); *see also* Oosting, *supra* note 88. This pertinent fact is not widely known; for example, in granting Defendant’s motion to dismiss, the District Court for the Eastern District of Michigan mistakenly asserted that “[t]he residents . . . can again repeal the enactment as they did its predecessor [PA 4].” Phillips Motion to Dismiss Order, *supra* note 15, at 31.

209. *How a Financial Emergency Works*, *supra* note 80. *Compare* Local Financial Stability and Choice Act, 2012 Mich. Pub. Acts 436 with Local Government and School District Fiscal Accountability Act, 2011 Mich. Pub. Acts 4, §15(4) (repealed 2012).

210. *How a Financial Emergency Works*, *supra* note 80; *see also* MICH. COMP. LAWS § 141.1562 (2016).

211. *See supra* note 202 and accompanying text.

212. Local Government and School District Fiscal Accountability Act, 2011 Mich. Pub. Acts 4, §15(9) (repealed 2012).

213. MICH. COMP. LAWS § 141.1563 (2016). A transition advisory board consists of the state treasurer and other state officials or professionals appointed by the governor. The board “serves at the pleasure of the governor” and reviews local budgets, collective bargaining agreements, deficits and “any other duties assigned by the governor.” § 141.1563(3), (5).

zero for US politics.”<sup>214</sup> Many see PA 436 as a re-write of PA 4 and a blatant disregard of the 2012 referendum, which struck PA 4 down.<sup>215</sup> While Governor Snyder claims PA 436 improves upon the old version voters rejected, “critics say there are too many similarities and are gearing up for another fight.”<sup>216</sup>

Because of its resemblance to the older law, PA 436 is still subject to much of the same criticism associated with PA 4. According to PA 436’s opponents, it “strip[s] locally elected officials of their power”<sup>217</sup> and “totally decimates democracy.”<sup>218</sup> The Reverend Jesse Jackson even referred to emergency managers as “dictators” with “broad powers.”<sup>219</sup> Even before the Flint water crisis ensued, State Representative Woodrow Stanley (D-Flint) expressed that the emergency manager legislation “[w]ill [h]urt, [n]ot [h]elp, [c]ities” by placing the power to control local matters in the “hands of a private individual or . . . company” sent by the state.<sup>220</sup> Stanley further expressed that “[i]t defies logic that someone assigned by Lansing” without ties to the community “knows the best way to resolve these troubles . . . . It’s offensive to the residents in our struggling communities.”<sup>221</sup> PA 436 has also been criticized for violating Michigan’s Home Rule Cities Act, which grants residents of the state’s cities the right to have “home rule over the structure of local government and governance of local affairs,” by electing their local government’s “essential” officers.<sup>222</sup>

214. *Democracy Emergency*, *supra* note 66; Rachel Maddow, *Why a Michigan High School Is Ground Zero for US Politics*, MSNBC (Apr. 22, 2011), <http://www.nbcnews.com/video/rachel-maddow/42725827#42725827>.

215. Chastity Pratt Dawsey, *Emergency Manager Or Emperor? Why Michigan’s Law Stirs Contempt*, BRIDGE MAG. (July 10, 2014), <http://bridgemi.com/2014/07/emergency-manager-or-emperor-why-michigans-law-stirs-contempt/> [<https://perma.cc/2FG4-VURR>]; *see infra* discussion Part II(B).

216. Jonathan Oosting, *Critics Expected to Test Michigan’s New Emergency Manager Law at Ballot Box, in Court*, MLIVE (Jan. 2, 2013), [http://www.mlive.com/news/index.ssf/2013/01/critics\\_expect\\_to\\_test\\_michiga.html](http://www.mlive.com/news/index.ssf/2013/01/critics_expect_to_test_michiga.html) [<https://perma.cc/4L98-CTDS>].

217. *7 Things To Know About Michigan’s Emergency Manager Law*, MICH. RADIO (Dec. 6, 2011), <http://michiganradio.org/post/7-things-know-about-michigans-emergency-manager-law> [<https://perma.cc/T5R9-P8DY>].

218. Chris Lewis, *Does Michigan’s Emergency-Manager Law Disenfranchise Black Citizens?*, ATLANTIC (May 9, 2013), <http://www.theatlantic.com/politics/archive/2013/05/does-michigans-emergency-manager-law-disenfranchise-black-citizens/275639/> [<https://perma.cc/BJE8-NVS2>]; Press Release, Rep. Woodrow Stanley, *Stanley: Emergency Financial Manager Legislation Will Hurt, Not Help, Cities* (Feb. 17, 2011) (on file with the *N.Y.U. Review of Law & Social Change*) [hereinafter Stanley Press Release].

219. Jesse Jackson, *Time for an Uprising in Benton Harbor*, L.A. SENTINEL (May 28, 2011), <https://lasentinel.net/time-for-an-uprising-in-benton-harbor.html> [<https://perma.cc/QE3A-Y55W>].

220. Stanley Press Release, *supra* note 218.

221. *Id.*

222. Philo, *supra* note 17, at 100. Michigan’s constitutional home rule amendment can be found at Art. VII, Section 22 of the Michigan Constitution. Art. VII, Section 22 grants municipalities the legislative power to adopt local laws, thus barring state officials the power to legislate local affairs. Additionally, the Home Rule Cities Act requires local charters to provide for the election of the chief administrative officer and local legislative body. *See* MICH. COMP. LAWS § 117 (2016). Arguably, PA 436 violates both the constitutional and statutory home rules powers by

Civil rights groups have contended that Michigan has disproportionately intervened in African-American communities. The NAACP and other critics have noted that historically the state-appointed emergency managers controlled “municipalities where a majority of the state’s African-Americans live, including Detroit.”<sup>223</sup> At the peak of emergency manager control in 2013, 52% of Michigan’s African-American population was under emergency management.<sup>224</sup> At that same time, only about 2% of Michigan’s white citizens live in municipalities ran by emergency managers.<sup>225</sup> Reverend Jesse Jackson has even compared “Benton Harbor to Selma, circa 1965, because of the disenfranchisement of its largely black electorate” as a result of emergency manager laws.<sup>226</sup>

However, many state actors stand behind PA 436. PA 436’s bill sponsor State Senator Phil Pavlov (R-St. Clair) expressed that the Act “plays a big role” in “get[ting] Michigan’s finances back in order, creat[ing] a job-friendly environment, and build[ing] a better state.”<sup>227</sup> He explains that the Act helps “remedy and prevent” financial emergencies that affect all taxpayers in Michigan. The new emergency manager law is different than the last because it “allowed for better preventative measures” by identifying signs of trouble earlier and restoring financial stability more quickly.<sup>228</sup> Additionally, PA 436 allows

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essentially replacing locally elected officials with state-appointed emergency managers and contravening elected officials’ power to legislate and govern.

223. *Id.*

224. This number reflects the 52% percent of Michigan’s African-American population reported in the Phillips complaint filed on March 27, 2013. *See* Complaint, *supra* note 8, para. 88. This number includes all municipalities subject to consent agreements. Notably, when the District Court for the Eastern District of Michigan dismissed eight of the Plaintiffs’ nine claims, including Voting Rights Act claims on November 16, 2014, 48% (almost half) of Michigan’s African-American population remained under emergency management. This difference took the updated cities subject to an emergency management and those that had emergency managers removed into account as of November 16, 2014. The most notable difference is the removal of Pontiac from emergency manager control; the 52.1% African-American city is still in receivership, but in a transition advisory board phase. *Financial Emergency Information, supra* note 4. The updated 48% was derived by totaling the African-American populations for all six municipalities and three school districts placed under emergency manager control (658,031) and dividing it by the total amount of African-Americans in the State of Michigan (1,415,074). The result yielded .4650. By including the total African-American populations of the three Michigan municipalities subject to a consent agreement, the total number of African-Americans subject to emergency manager control or consent agreement increases to 682,637 out of the state’s total African-American population (1,415,074), yielding a percentage of 48%. *Financial Emergency Information, supra* note 4. All updated statistics are based on the United States Census Bureau’s 2013 population estimations. *See, e.g., QuickFacts, supra* note 33. It is also important to note that this number considers only African-American populations and not other minority groups.

225. *See* Phillips Motion to Dismiss Order, *supra* note 15, at 21–22.

226. Whet Moser, *Annals of Benton Harbor: Riots, Race, and Jack Nickalus*, CHI. MAG. (Dec. 20, 2011), <http://www.chicagomag.com/Chicago-Magazine/The-312/December-2011/Annals-of-Benton-Harbor-Riots-Race-and-Jack-Nickalus/> [<https://perma.cc/83C5-SSPZ>].

227. Pavlov, *supra* note 191.

228. *Id.*

the state to lend its “technical expertise” to work with cities and local officials “through financial problems before they reach a critical stage.”<sup>229</sup>

In response to race allegations, Sara Wurful, spokeswoman for Governor Snyder has stated, “The extreme nature of financial emergencies dictates state intervention in a municipality, not the skin color of its residents.”<sup>230</sup> According to Pavlov, “while protestors and litigants feel that they are looking out for their best interests, the state has to step in to protect taxpayers across Michigan when a city or school district can’t pay its bills.”<sup>231</sup> Michael Murphy, an attorney for the State argued that this is purely a monetary issue, “[t]he analysis is based upon money, not the color of the community. The only color we’re dealing with here is green.”<sup>232</sup> Murphy also described the law as a “unique statute” during “a unique time that requires unique solutions.”<sup>233</sup>

On March 27, 2013, Michigan civil rights groups filed *Phillips v. Snyder* on behalf of a “broad coalition of plaintiffs” in the United States District Court for the Eastern District of Michigan.<sup>234</sup> Plaintiffs challenged the validity of PA 436 under the First, Thirteenth, and Fourteenth Amendments.<sup>235</sup> Most pertinent to this paper are Plaintiffs’ claims under Section 2 of the Voting Rights Act.<sup>236</sup> On July 25, 2013 the case was put on hold on when the United States Bankruptcy Court for the Eastern District of Michigan in the City of Detroit’s Chapter 9 Bankruptcy proceeding issued a stay on all pre-bankruptcy federal civil litigation against Michigan state officials pending the outcome of the Detroit bankruptcy proceeding.<sup>237</sup> After a series of amended complaints and a motion to dismiss Plaintiffs’ amended complaint, the District Court for the Eastern District of Michigan finally heard oral argument on Defendants’ motion to dismiss in a courtroom full of “nearly 100 union members, retirees, activists, residents and employees” on April 30, 2014.<sup>238</sup>

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229. *Id.*

230. Dawsey, *supra* note 215.

231. *Id.*

232. Curt Guyette, *Schuetter, Orr Obstruct Scrutiny of PA 436*, METRO TIMES (May 5, 2014), <http://www.metrotimes.com/detroit/schuetter-orr-obstruct-scrutiny-of-pa-436/Content?oid=2202131> [<https://perma.cc/8L3W-9CK3>].

233. *Id.*

234. *Phillips v. Snyder*, CTR. FOR CONST. RTS., <http://ccrjustice.org/phillips> [<https://perma.cc/9TEM-LW7Q>]. This suit was filed against Governor Rick Snyder and State Treasurer Andy Dillon. Plaintiffs include local elected officials, unelected citizens, and members of the governing boards of various religious and civil rights organizations.

235. Complaint, *supra* note 8, para. 1.

236. Complaint, *supra* note 8, para. 187.

237. *Phillips v. Snyder*, CTR. FOR CONST. RTS., *supra* note 234 (noting that a second case brought by the Detroit branch of the NAACP remains on hold).

238. Guyette, *supra* note 232. Specifically, plaintiffs amended their complaint on November 6, 2013 to remove all claims arising out of the operation of PA 436 in the City of Detroit pursuant to the Bankruptcy Court’s order relieving *Phillips v. Snyder* from the stay order. On March 5, 2014 Snyder and Dillon moved to dismiss Plaintiff’s amended complaint. *Phillips v. Snyder*, CTR. FOR CONST. RTS., *supra* note 234.

On November 16, 2014, the Eastern District issued an order to dismiss eight of the Plaintiffs' nine claims, including Voting Rights Act Section 2 claims.<sup>239</sup> Specifically, the District Court dismissed the latter by concluding that PA 436 did not qualify as a voting standard, practice, or procedure within the meaning of Section 2.<sup>240</sup> However, the court found that plaintiffs pled a "plausible equal protection claim based on the racial impact of PA 436's implementation."<sup>241</sup>

The court reasoned that for an Equal Protection claim, a plaintiff is not required to show "racial discrimination was dominant in the reasoning for state action to trigger strict scrutiny, but only that it was a motivating factor."<sup>242</sup> Since it is "inherently difficult to prove discriminatory intent," the court will examine objective factors to determine such intent including the legislative and factual history as well as statistics "to demonstrate the absence of a rational, nonracial purpose for a certain policy."<sup>243</sup> Accordingly, the Eastern District found Plaintiffs' statistics alleging that nearly half "of Michigan's African-American population resides in cities with an [emergency manager]" while "only about 2% of Michigan's white citizens live in communities governed by an [emergency manager]" were sufficient to support an Equal Protection pleading.<sup>244</sup> Additionally, the court found the disparities between white and majority-minority municipalities under the Michigan Department of Treasury's scoring system used to determine cities' financial health, as well as the enormous discretion placed in the state to make potentially "discriminatory decisions" supportive of Equal Protection pleadings.<sup>245</sup> The Eastern District Court's decision not to dismiss plaintiff's Equal Protection Claim is important to note because its analysis based on data can be used to demonstrate that if PA 436 qualifies as a "voting standard, practice or procedure," PA likely violated Section 2 of the Voting Rights Act, as demonstrated by its discriminatory impact on Michigan's African American voters.

The *Phillips* plaintiffs filed an appeal on March 10, 2016 in the Sixth Circuit Court of Appeals.<sup>246</sup> The case was argued on August 4, 2016.<sup>247</sup> On September

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239. Phillips Motion to Dismiss Order, *supra* note 15, at 37–38. Specifically, Plaintiffs' Equal Protection claim alleges that PA 436 treats situated persons differently in a manner that has a disproportionate impact on African-American citizens. *Id.* On December 15, 2014, the United State District Court for the Eastern District of Michigan denied plaintiffs' motion for a rehearing. Order Denying Motion for Reconsideration, Phillips v. Snyder, No. 2:13-cv-11370, 2014 WL 6474344 (E.D. Mich. Dec. 15, 2014); *see also Phillips v. Snyder*, CTR. FOR CONST. RTS., *supra* note 234.

240. *See infra* discussion Part IV(A).

241. Phillips Motion to Dismiss Order, *supra* note 15, at 20.

242. *Id.* at 21 (citing *United States v. City of Birmingham*, 727 F.2d 560, 565 (6th Cir. 1984)).

243. *Id.*

244. *Id.* at 21–22.

245. *See infra* discussion Part IV(B); Phillips Motion to Dismiss Order, *supra* note 15, at 22.

246. Brief of Plaintiffs-Appellants, Phillips v. Snyder, 836 F.3d 707 (6th Cir. 2016), <https://ccrjustice.org/sites/default/files/attach/2016/03/Brief%20of%20Plaintiffs-Appellants%203.10.16.pdf> [<https://perma.cc/LWY2-C448>].

12, 2016, the Sixth Circuit issued its opinion affirming the Eastern District Court's dismissal of plaintiffs' claims, including a narrow and short discussion of plaintiff's VRA Section 2 claim.<sup>248</sup> On October 11, 2016, the *Phillips* plaintiffs filed a request for rehearing en banc with the U.S. Court of Appeals for the Sixth Circuit, which has yet to be decided.<sup>249</sup>

#### IV.

#### VOTING RIGHTS ACT ANALYSIS OF PA 436

##### A. PA 436, A Voting "Standard, Practice or Procedure"

In order for PA 436 to be subject to Section 2, it must qualify as a voting "standard, practice or procedure" that "results in the denial or abridgment" of a person's right to vote based on race.<sup>250</sup> There is little precedent on what a voting "standard, practice or procedure" means under Section 2. However, Section 5 of the Voting Rights Act uses nearly identical language, providing that a jurisdiction must seek preclearance whenever it "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 on [the date the jurisdiction became covered]."<sup>251</sup> An analysis of Section 5 case law demonstrates that a voting standard, practice or procedure extends beyond the actual process of casting ballots and includes substantive changes as to which offices are elected, including PA 436.<sup>252</sup>

247. Oral Argument, *Phillips v. Snyder*, 836 F.3d 707 (6th Cir. 2016) (No. 15-2394), [http://www.opn.ca6.uscourts.gov/internet/court\\_audio/aud2.php?link=audio/08-04-2016%20-%20Thursday/15-2394%20Catherine%20Phillips%20v%20%20Richard%20Snyder.mp3&name=15-2394%20Catherine%20Phillips%20v%20%20Richard%20Snyder](http://www.opn.ca6.uscourts.gov/internet/court_audio/aud2.php?link=audio/08-04-2016%20-%20Thursday/15-2394%20Catherine%20Phillips%20v%20%20Richard%20Snyder.mp3&name=15-2394%20Catherine%20Phillips%20v%20%20Richard%20Snyder).

248. *Phillips v. Snyder*, 836 F.3d 707 (6th Cir. 2016). Additionally, the Sixth Circuit dismissed plaintiff's equal protection claim, finding that PA 436 passes rational basis review. The Court explained that an emergency manager's vast powers serve a rational relationship to Michigan's legitimate government purpose of solving financially distressed locality's problems. *See id.* at 718. However, despite the Sixth Circuit's dismissal of plaintiff's Equal Protection Claims, the lower court's analysis and use of population data in upholding such a claim is still helpful when analyzing PA 436's impact. *See also* infra discussion at IV(D) for a description of the Sixth Circuit's opinion affirming the Eastern District Court.

249. Petition of Plaintiffs-Appellants For Rehearing *En Banc*, *Phillips v. Snyder*, 836 F.3d 707 (6th Cir. 2016), <https://ccrjustice.org/sites/default/files/attach/2016/10/6th%20Cir%20Petition%20for%20En%20Banc%20Rehearing.pdf> [<https://perma.cc/S3B2-99Q3>].

250. 42 U.S.C. § 1973 (2012).

251. 42 U.S.C. § 1973c(a) (2012).

252. While VRA Section 2 and VRA Section 5 differ in "structure, purpose, and application," as discussed *infra*, Section 5 and its relevant case law can be used to interpret Section 2, especially where Section 2 remains silent in providing a definitional basis for a voting standard, practice, or procedure. *See Holder v. Hall*, 512 U.S. 874, 882–83 (1994); *see also Presley v. Etowah Cnty. Comm'n*, 502 U.S. 491 (1992); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (demonstrating that practice and procedure extends beyond the act of voting itself). Notably, the *Phillips* plaintiffs do not apply this textual analysis. Instead, they continue to distinguish a Section 2 voting "standard, practice, or procedures" from that of Section 5 and argue that Section 2 applies to a "broad array of standards, practices, or procedures" without citing to any relevant case law.

The Supreme Court recognizes four categories of changes that qualify for Section 5 coverage as voting standards, practices or procedures: “(1) changes in the manner of voting; (2) changes in candidacy requirements and qualifications; (3) changes in the composition of the electorate that may vote for candidates for a given office; and (4) changes affecting the creation or abolition of an elective office.”<sup>253</sup> This section focuses on the fourth category, which the Court has described as “substantive changes as to which offices are elective.”<sup>254</sup> Like the other categories, this fourth category “has a direct relation to voting and the election process.”<sup>255</sup>

*Allen v. State Board of Elections* was one of the first cases to address the extent of coverage Section 5 provided to voting standards, practices or procedures.<sup>256</sup> In *Allen*, the Court consolidated four cases where states passed new state election laws. Most pertinent to this discussion is No. 26, an amendment to the Mississippi Code.<sup>257</sup> This amendment provided that in eleven specified counties, the county superintendent of education shall be appointed by the board of education. Before No. 26, the counties had the option of electing or appointing the superintendent. The Court read the VRA’s definitions to mean that “voting” as it applied to section 5 “shall include all action necessary to make a vote effective in any” election and was “not limited to registration, listing, or other action required by law prerequisite to voting, casting a ballot, and having such a ballot counted properly.”<sup>258</sup> The Court rejected Mississippi’s narrow interpretation that Section 5 covers “only those state enactments which prescribe *who* may register to vote.”<sup>259</sup> Instead, the “Voting Rights Act was aimed at the subtle, as well as the obvious state regulations which have the effect of denying citizens their right to vote because of their of race.”<sup>260</sup>

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Brief of Plaintiffs-Appellants, *supra* note 246, at 38–41; *see also* Brief in Support of Plaintiffs’ Response to Defendant’s Motion to Dismiss 26–27, *Phillips v. Snyder*, No. 2:13-cv-11370, 2014 WL 6474344 (E.D. Mich. Dec. 15, 2014), [https://ccrjustice.org/sites/default/files/assets/Phillips\\_Doc%2045-1%20Pls%20Br%20ISO%20of%20Response%20to%20Def%20MtD.pdf](https://ccrjustice.org/sites/default/files/assets/Phillips_Doc%2045-1%20Pls%20Br%20ISO%20of%20Response%20to%20Def%20MtD.pdf) [<https://perma.cc/SC8W-KLF8>].

253. *Presley*, 502 U.S. at 492 (discussing the four categories developed by the Court in *Allen*).

254. *Id.* at 503.

255. *Id.*

256. 393 U.S. 544 (1969).

257. *Id.* at 550–51. The other three laws in question involved an amendment to the Mississippi Code that changed district voting to at-large voting for county supervisors, an amendment to the Mississippi Code that altered the requirements for independent candidates, and a change issued by the Virginia Board of Elections to election judges altering the process for write-in ballots. *Id.* at 550–52. All four cases were remanded to their respective District Courts “with instructions to issue injunctions restraining the further enforcement of the enactments” until the States could “adequately demonstrate compliance with [Section] 5.” *Id.* at 572.

258. *Id.* at 565. However, Justice Harlan disagreed, finding that Congress intended to focus only on the techniques that prevented blacks from voting and that Congress did not attempt to restructure state governments. *Id.* at 583 (Harlan, J., dissenting).

259. *Id.* at 564 (emphasis added).

260. *Id.*

Accordingly, the Court held that the four state statutes were subject to Section 5 coverage as a “standard, practice or procedure with respect to voting” including the substantive change in No. 26. Under No. 26, “[t]he power of a citizen’s vote is affected; after the change, [the voter] is prohibited from electing an officer formerly subject to the approval of the voters.”<sup>261</sup> In summation, the *Allen* Court clearly articulated that the Section 5 definition of a voting standard, practice, or procedure extends beyond changes directly affecting the casting of a ballot and includes “all actions necessary to make a vote effective”, including substantive changes as to which offices are elected.<sup>262</sup>

A later case challenged the applicability of the four *Allen* categories to changes in a governing body’s internal affairs. In *Presley v. Etowah Cnty. Comm’n*, the Court held that a local resolution altering the internal power of a road commission did not have a direct relation to voting and was thereby not a voting standard, practice or procedure covered by Section 5.<sup>263</sup> As a result of a consent decree agreed to as part of an earlier vote dilution lawsuit, the Etowah County Road Commission restructured from a four-member elected commission with a fifth-member chairman to a six-member elected commission.<sup>264</sup> The new commission included the four previous commissioners and two newly elected commissioners including Presley, who was black and Williams, who was white.<sup>265</sup>

At issue was the commission’s Common Fund Resolution, which altered the previous practice of allowing each commissioner full authority to determine how to spend the funds allocated to his district.<sup>266</sup> The Court found the changes brought forth by the Common Fund Resolution did not fall into any of the four *Allen* categories.<sup>267</sup> The Resolution had “no bearing on the substance of voting power, for it d[id] not increase or diminish the number of officials for whom the electorate may vote. Rather, [it] concern[ed] the internal operations of an elected body.”<sup>268</sup> From a practical administrative stance, the Court found it necessary to distinguish changes in rules governing voting from changes in the routine

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261. *Id.* at 568.

262. *Id.* at 562. It is important to note that the Court only decided if the voting changes were covered by Section 5 and did not consider whether the changes had a discriminatory purpose or effect.

263. *Presley v. Etowah Cnty. Comm’n*, 502 U.S. 491, 510 (1992).

264. *Id.* at 495–97.

265. *Id.* at 496.

266. *Id.* at 503–04. The Court declined to determine whether the “Road Supervision Resolution” (which foreclosed the two new commissioners from exercising any authority over roads and reassigned the new commissioners to other functions) qualified as a voting, standard or procedure because the district court had determined that it qualified for preclearance under Section 5. Whereas the district court held that the Common Fund Resolution was not subject to preclearance. *Id.* at 497–98.

267. *Id.* at 492, 502–04.

268. *Id.* at 503.

organization of government,<sup>269</sup> believing it was impossible that Congress intended to subject *all* decisions of covered jurisdictions to federal review.<sup>270</sup> Thus, the Court formulated the rule that “changes which affect only the distribution of power among officials are not subject to Section 5 because such changes have no direct relation to, or impact on, voting.”<sup>271</sup>

In dismissing the plaintiffs’ Section 2 claims in *Phillips v. Snyder*, the Eastern District Court asserted that PA 436 does not qualify as a voting standard, practice, or procedure that denies or abridges the right to vote based on race, thus falling outside of the scope of Section 2 of the Voting Rights Act.<sup>272</sup> More specifically, the court viewed PA 436 more analogous to the law at issue in *Presley* as opposed to the law at issue in *Allen*. According to the court, PA 436 is “not an impediment to their ability to vote, such as an identification requirement, a felon disenfranchisement provision or a problem with polling locations or hours.”<sup>273</sup> The Eastern District cited to *Presley* to explain that PA 436 is merely a “change in the routine organization and functioning government” and does not have a “direct relation to, or impact on voting.”<sup>274</sup>

The court found PA 436 to be similar to the Common Fund Resolution in *Presley* because it does not “change [ ] an elective office to an appointive one.”<sup>275</sup> Instead, “[b]efore and after the enactment of PA 436, the electorate can elect their city council members and mayors.” The court recognized that such changes including the “internal operations of an elected body and the distribution of power among officials” are “dramatic and meaningful,” but do not qualify as a voting standard, practice, or procedure.<sup>276</sup> The court also cited to *Holder v. Hall* to demonstrate that “a plaintiff cannot maintain a § 2 challenge to the size of a government body . . .”<sup>277</sup> However, this point does not appear to apply to PA 436 and the Eastern District does not clearly demonstrate otherwise. Notably, at issue in *Holder* was a vote dilution claim attributable to the change in the size of the government body, which, as *Phillips* plaintiffs point out, is very different

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269. *Id.* at 504.

270. *Id.*

271. *Id.* at 506. In his dissent, Justice Stevens strongly suggested that transfers of authority are covered under Section 5 when “they implicate the decision-making authority of elected officials.” *Id.* at 509 (Stevens, J., dissenting). Stevens expressed his concern that the “recalcitrant white majorities could be expected to devise new stratagems to maintain their political power if not closely scrutinized.” *Id.* at 517. According to Stevens, “a change in the reallocation of decision making authority in an elective office . . . is indistinguishable from, and just as unacceptable as, gerrymandering boundary lines or switching elections from a district to an at-large basis.” *Id.* at 521.

272. Phillips Motion to Dismiss Order, *supra* note 15.

273. *Id.*

274. *Id.* at 27–28.

275. *Id.* at 29 (citing *Presley*, 502 U.S. at 506–07).

276. *Id.* at 30.

277. *Id.* (citing *Holder v. Hall*, 512 U.S. 874, 882 (1994)).

from the effect of PA 436, which ultimately eliminates the effectiveness of votes cast by Michigan's minority voters.<sup>278</sup>

### *B. Critique of the Eastern District Court's Ruling*

The Eastern District's ruling failed to consider the full range of doctrinal and practical issues raised by PA 436. Most concerning is the fact that the court failed to analyze *Allen*, and instead relied almost entirely on *Presley*.<sup>279</sup> Arguably, the court wrongly equates PA 436 with the Common Fund Resolution in *Presley* as only a change to the internal operations of an elected body without recognizing that elected officials' power is nonexistent or greatly diminished under PA 436.<sup>280</sup> Lastly, the court limits itself to a narrow reading of a vote denial to mean an actual impediment of the right to vote, such as identification requirements.<sup>281</sup> I recommend taking a different approach from the Eastern District's ruling. Instead, PA 436 falls somewhere between *Allen* and *Presley*, qualifying as a voting standard, practice, or procedure that denies the right to vote.

First, as a change affecting the abolition of an elective office, PA 436 falls under the fourth category of a voting standard, practice or procedure outlined in *Allen*.<sup>282</sup> PA 436 effectively abolishes locally elected officials' offices for extended periods of time by replacing elected officials with state appointed emergency managers and surrendering locally elected officials' powers to emergency managers. PA 436 is similar to No. 26 in *Allen* because it changes the selection process of officials from elections to appointment. Furthermore, the Court's definition of "voting" as the inclusion of all action necessary to make a vote effective in any election encompasses PA 436 because by blatantly giving

278. Brief of Plaintiffs-Appellants, *supra* note 246, at 41.

279. Phillips Motion to Dismiss Order, *supra* note 15, at 27–29.

280. MICH. COMP. LAWS § 141.1549(2) (2016) (providing that "[f]ollowing appointment of the emergency manager and during the pendency of the receivership, the governing body . . . shall not exercise any of the powers of those offices except as may be specially authorized by the in writing by the emergency manager"). Additionally, the court described PA 436 as merely a "temporary reorganization of government, not a voting standard or procedure." Phillips Motion to Dismiss Order, *supra* note 15, at 29. While it is true that emergency managers are not in control indefinitely, they are in control for at least 18 months. MICH. COMP. LAWS § 141.1549(6)(a)-(c) (describing indefinite length of tenure of the emergency manager, including provision allowing for removal by the legislature only after 18 months). During that time, local elected officials' powers are diminished or greatly reduced, thus, effectively abolishing locally elected officials' offices per *Allen*. MICH. COMP. LAWS § 141.1549(2).

281. Phillips Motion to Dismiss Order, *supra* note 15, at 27.

282. Interestingly, Phillips plaintiffs rely little on *Allen* in their Sixth Circuit Brief, using *Allen* briefly to demonstrate that the VRA's legislative history suggests that Congress intended to address "any state enactment which altered the election law of a covered state *even in a minor way*." Brief of Plaintiffs-Appellants, *supra* note 246, at 41 (first citing *Presley v. Etowah Cnty. Comm'n*, 502 U.S. 491, 506 (1992), and then citing *Allen v. State Bd. of Elections*, 393 U.S. 544, 569-70 (1969)). I suggest more deference should be given to *Allen* despite the fact that it revolved around VRA Section 5 claims.

locally elected officials' decision making power to appointed emergency managers, the state is making individuals' votes ineffective.

Second, it is important to distinguish PA 436 from *Presley*. Like the Common Fund Resolution in *Presley*, PA 436 does alter the internal power of local officials. However, PA 436 alters the internal power of localities on a much grander scale, unlike the "constant and minor adjustments" promulgated by the Common Fund Resolution.<sup>283</sup> Unlike the Common Fund Resolution, PA 436 substantively affects the locality's voting power by replacing locally elected officials with state-appointed emergency managers whom are granted the power to "act for and in the place" of the locally elected body and chief administrative officer.<sup>284</sup> Among this broad power is the highly discretionary ability for the emergency manager to issue orders as "necessary to accomplish" the purposes of PA 436.<sup>285</sup> This power is often executed by directly circumventing and even ignoring the authority of local elected officials, as demonstrated by emergency managers' disregard for the decisions made by local councils in cities including Detroit, Benton Harbor, and Flint.<sup>286</sup>

Different from the minor changes of the Common Fund Resolution in *Presley*,<sup>287</sup> PA 436 allows an emergency manager to overrule local legislative authority by "enacting, repealing, and amending local laws at his or her discretion," as displayed by the actions of Flint's two most recent city managers leading to the City's water crisis.<sup>288</sup> Also unlike the law at issue in *Presley*, emergency managers may disincorporate or even dissolve the municipal government.<sup>289</sup> Fortunately, emergency managers have not completely dissolved municipal governments, but local officials have been removed from governing bodies at the command of emergency managers, as evidenced by the removal of local planning commission and authority board members by Benton Harbor's emergency manager in 2011.<sup>290</sup> Thus, the plain language of PA 436 and numerous real-life examples fully demonstrate that PA 436 is not merely changing the internal powers of locally elected authority; it is diminishing them.

Third, a voting standard, practice or procedure which denies a person's right to vote based on race is a broader category of acts than simply working to exclude minorities from the polls.<sup>291</sup> In *Gomillion v. Lightfoot*, the Court

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283. *Presley*, 502 U.S. at 510.

284. MICH. COMP. LAWS § 141.1549(2) (2016).

285. MICH. COMP. LAWS § 141.1550(1) (2016).

286. See discussion *supra* Part III(B)(i)–(ii).

287. The *Phillips* plaintiffs recognize a distinction between PA 436 and *Presley*, but argue that PA 436 is "squarely distinguishable" from *Presley*, "which involved the shifting of some, but not all, the authority of elected officials to appointed ones," as PA 436 does. Brief of Plaintiffs-Appellants, *supra* note 246, at 41.

288. MICH. COMP. LAWS § 141.1550(1) (2016); see also discussion *infra* Part III(B)(ii).

289. MICH. COMP. LAWS § 141.1552(1)(cc) (2016).

290. See discussion *infra* Part III(B)(i).

291. See generally *Myers v. Anderson*, 238 U.S. 368 (1915) (striking down Maryland's grandfather clause); *Lane v. Wilson*, 307 U.S. 268 (1939) (invalidating a twelve-day one-time

invalidated an Alabama act that redistricted the City of Tuskegee from a square shape to a twenty-eight sided figure.<sup>292</sup> The redistricting deprived blacks of their right to vote in local elections in violation of the Fifteenth Amendment.<sup>293</sup> Thus, the redistricting act in *Gomillion* served as a voting standard, practice or procedure that denied the right to vote based on race, even though the denial was an effect of redrawing municipal boundaries.<sup>294</sup>

PA 436 functions as a state-enacted measure that redistributes power once vested in locally elected officials to state-appointed emergency managers. Similar to the redistricting act in *Gomillion*, PA 436 effectively denies minority citizens' right to vote by stripping locally elected officials of their authority to make decisions. People in the affected cities still get to vote; but they're being denied a chance to vote for the individuals who will actually govern their affairs. The members of majority-minority communities are the ones that often face the brunt of emergency manager decisions, as demonstrated by the "predominant number of African-Americans" directly impacted by the Detroit water shutoff in 2014.<sup>295</sup>

PA 436 should qualify as a voting standard, practice or procedure because it is a substantive change as to which offices are elected, it implicates the effectiveness of a vote, and extends beyond merely regulating the internal affairs of local government.<sup>296</sup> Furthermore, these broad discretionary powers granted under PA 436 effectively deny the right to vote by nullifying minorities' votes, as evidenced by the majority-minority communities subjected to and directly impacted by emergency manager control. Perhaps if emergency managers' powers were instead limited to only the financial power granted by its predecessor, PA 72, such powers would be more analogous to the law at issue in *Presley* and thus more likely to be permissible under Section 2. The foregoing reasons strongly suggest that the Eastern District dismissed the *Phillips* Plaintiffs' Section 2 claims based on a narrow reading of case law without considering PA 436's practical effects on local elections.

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voter registration for black citizens in Oklahoma); *Louisiana v. United States*, 380 U.S. 145 (1965) (striking down Louisiana's interpretation test permitted by its State Constitution that targeted black voters). Many of these Fifteenth Amendment cases included Fourteenth Amendment claims. It is equally important to recognize that the Court invalidated poll taxes as well. However, poll tax claims fell under the Fourteenth Amendment's Equal Protection clause. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1969).

292. 364 U.S. 399 (1960).

293. *Id.* at 346. Like many other cases involving Fifteenth Amendment claims, the *Gomillion* Court also found the redistricting scheme violated the Fourteenth Amendment's due process and equal protection clauses. *Id.* at 343.

294. *Id.* at 347.

295. *In Detroit, City-Backed Water Shut-Offs 'Contrary to Human Rights,' Say UN Experts*, *supra* note 111.

296. *See Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).

C. Application of Section 2 to PA 436

If PA 436 indeed qualifies as a voting standard, practice, or procedure within the meaning of Section 2, the next question is whether it constitutes a denial or abridgment of the right to vote on account of race.<sup>297</sup> PA 436 violates Section 2 in two distinct ways. First, because officials elected by municipalities' majority-minority electorates are essentially powerless under emergency managers, PA 436 nullifies minority citizens' votes, thereby denying their right to vote. Second, by allowing state-elected officials to appoint emergency managers, select municipalities' majority-minority votes are diluted by the statewide participation of the electorate.<sup>298</sup>

Under Section 2, a voting "standard, practice, or procedure" that "results in the denial or abridgement" of the right to vote based on race can be

established if, based on the *totality of the 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 [minority group members] . . . 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.<sup>299</sup>

This latest version of Section 2 is a stark contrast from its original 1965 text, which required a showing that a discriminatory voting practice, standard, or procedure was motivated by an invidious purpose or intent.<sup>300</sup> In reality this provided little Section 2 relief, as courts continued to reject challenges to voting practices, standards, and procedures even when "minority voters were completely shut out of the political process, for insufficient evidence of discriminatory intent."<sup>301</sup> As a response, Congress amended Section 2 in 1982 by eliminating the "invidious intent" requirement and replacing it with the aforementioned "results" standard based on the "totality of circumstances."

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297. See 42 U.S.C. § 1973(b).

298. Complaint, *supra* note 8, para. 192.

299. 42 U.S.C. § 1973(a)-(b) (2012) (emphasis added).

300. See *City of Mobile v. Bolden*, 446 U.S. 55, 62-63 (1980).

301. Frank R. Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 736 (1983). For example, in *Bolden*, the Court disregarded the fact that the nature of Mobile's at-large voting system tended to naturally disadvantage minorities and upheld the voting scheme because plaintiffs lacked proof that it purposefully discriminated against blacks. *Bolden*, 446 U.S. at 75. The *Bolden* Court refused to consider past discrimination, reasoning, "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Id.* at 74. In Justice White's *Bolden* dissent he emphasized the importance of weighing the evidence of past discrimination and considering the totality of circumstances. *Id.* at 94 (White, J., dissenting). Perhaps not so ironically, this became the standard developed for Section 2 after its 1982 amendment, discussed *infra*.

Importantly, this amendment marked a return to considering the effects of past discrimination when evaluating voting standards, practices, and procedures.<sup>302</sup>

Thus, as currently drafted, Section 2 does not require plaintiffs to prove discriminatory intent to establish a violation. The question is instead whether, considering the totality of the circumstances, minority voters have been denied an equal opportunity to participate in the political process and elect representatives of their choice under PA 436.

At the peak of emergency manager control in 2013, PA 436 violated Section 2 by denying half of Michigan's African-Americans the right to vote. *Gomillion* indicates that what it means to have a vote denied or abridged is to “despoil[ ] minority citizens of their enjoyed voting rights.”<sup>303</sup> As discussed in Section IV, Part A, PA 436 effectively denies Michigan's African-American population the right to vote by replacing locally elected officials with state-appointed emergency managers, “effectively silencing the voice of the people they are supposed to serve.”<sup>304</sup> Therefore, like the redistricting in *Gomillion*, PA 436 has the effect of denying African-Americans of their right to vote.<sup>305</sup> PA 436 is “not immune from attack” simply because it is a state action restructuring local government in the name of a fiscal emergency.<sup>306</sup>

Unlike a Fifteenth Amendment analysis, a Section 2 violation does not require a showing of invidious intent, but rather a discriminatory result in light of the totality of the circumstances.<sup>307</sup> Although the State argues that PA 436 is not a race issue, statistics show that PA 436 had the result of denying up to 52% of Michigan's African-Americans their electoral voice post-emergency manager takeover.<sup>308</sup> Moreover, data suggests that the State of Michigan has a higher likelihood of designating emergency managers to cities with a majority

302. See *White v. Regester*, 412 U.S. 755 (1973) (holding that the Texas House of Representatives reapportionment plan was not invidiously discriminatory, but the disestablishment of two multimember districts in plan was justified because of the history of discrimination against the blacks and Latinos residing there); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (holding that the repudiation of at-large elections for police, jury, and school board would be justified in view of a variety of factors, including past racial discrimination).

303. *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960).

304. Press Release, Congressman John Conyers, 31 Members of Congress Introduce the Emergency Financial Manager Reform Act of 2016 (Mar.17, 2016), <https://conyers.house.gov/media-center/press-releases/congressman-john-conyers-31-members-congress-introduce-emergency> [<https://perma.cc/ASL7-UZ4P>] (quoting Rep. Brenda Lawrence (MI-14)).

305. *Gomillion*, 364 U.S. at 347.

306. *Id.*

307. See 42 U.S.C. § 197 (b) (2012); *Myers v. Anderson*, 238 U.S. 368, 379–80 (1915) (striking down Maryland's grandfather clause under the Fifteenth Amendment); *Lane v. Wilson*, 307 U.S. 268, 274–75 (1939) (invalidating a twelve-day one-time voter registration for black citizens in Oklahoma); *Louisiana v. United States*, 380 U.S. 145, 154–55 (1965) (striking down Louisiana's interpretation test permitted by its State Constitution that targeted black voters). It is interesting to note that the Fifteenth Amendment shares nearly identical phrasing as Section 2, providing that the right to vote “shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S. CONST. art. XV.

308. See discussion *supra* Part III.

population of racial and ethnic minorities than similarly situated or even worse-off cities with a majority white population.<sup>309</sup> The Michigan Department of Treasury uses a scoring system to determine the financial health of the State's municipalities. Cities with fiscal scores between 5 and 7 are placed on a "watch list."<sup>310</sup> "Scores between 8 and 10 result in the community receiving consideration for review."<sup>311</sup> Based on the most recent 2009 data, "six out of seven communities (85%) with a majority population of racial and ethnic minorities received EMs when they had scores of 7. At the same time, none of the twelve communities (0%) with a majority white population received an EM despite having scores of 7 or higher."<sup>312</sup>

It is telling that the Eastern District paid deference to these statistics when upholding the *Phillips* Plaintiffs' Equal Protection claims at the pleading stage.<sup>313</sup> These statistics present a problem for the Defendants; even if the State could demonstrate that these numbers do not reflect the discriminatory intent required for an Equal Protection claim, the disparate effect established by the statistics is presumably sufficient for a Section 2 violation.

Like the *White* Court, a court would be likely to consider the effects of past discrimination when evaluating the totality of circumstances surrounding PA 436 in connection with vote denial claims. Cities once under emergency manager control (particularly Detroit, Flint, and Benton Harbor) have long histories of racial tensions and discrimination.<sup>314</sup> These factors have led to violence, riots, and disparities on many levels. Discrimination has impacted areas such as education, employment, and health for blacks in these cities, which inevitably hinders their ability to participate in the political process. Interestingly, these same race factors played a role in the decline of these cities, leading to their state of fiscal emergency.<sup>315</sup> Overall, a Section 2 vote denial claim seems feasible because of PA 436's practical implications and its discriminatory effect demonstrated by statistics and the totality of the circumstances.

PA 436 prompts a creative vote dilution claim under Section 2. Plaintiffs in *Phillips v. Snyder* contend that by allowing state-elected officials to appoint emergency managers, select municipalities' majority-minority votes are diluted by the statewide participation of the electorate, while localities without emergency managers get to vote directly.<sup>316</sup> Effectively, it is the state electorate as a whole selecting who will govern the cities ran by emergency managers, and not the local electorate.

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309. *Phillips* Motion to Dismiss Order, *supra* note 15, at 21–22.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*; *see also* discussion *supra* Part III(C).

314. *See* discussion *supra* Part II.

315. *Id.*

316. Complaint, *supra* note 8, para. 192.

Vote dilution claims are subject to a three-factor *Gingles* test.<sup>317</sup> However, vote dilution claims traditionally apply to redistricting plans, like the multi-member districting plan at issue in *Gingles*.<sup>318</sup> Accordingly, *Gingles* might not be applicable or might need to be modified given that the claims asserted by the *Phillips* Plaintiffs differ from the usual redistricting plan. However, a dilution claim has the potential to survive in this case even if the usual *Gingles* factors apply.

Presumably, if a court were to consider a PA 436 vote dilution claim, it would evaluate the following three *Gingles* factors. First, the minority group of each city in receivership would have to show that it is “sufficiently large and geographically compact to constitute a majority.”<sup>319</sup> In the cities with large African-American populations this wouldn’t be a problem.<sup>320</sup> However, it may be for municipalities like Hamtramck (once subject to emergency management), whose African-American population is less than 20%.<sup>321</sup> Second, the minority group would have to show it is politically cohesive.<sup>322</sup> These cities’ minority groups have demonstrated their political cohesiveness by electing local officials to chief administrative and local governing board positions before they were subject to emergency management. Third, the minority would need to show that the majority votes sufficiently as a bloc to defeat the minority’s preferred candidates.<sup>323</sup> Here, the entire state electorate acts as a bloc by electing state officials who appoint the emergency managers to replace local officials elected by the cities’ minorities. Therefore, it seems highly likely that the *Phillips* Plaintiffs could sufficiently meet all three *Gingles* factors required to succeed in a vote dilution claim. However, as highlighted, a court may have some skepticism, as dilution claims have typically been applied to redistricting schemes and not states as a whole.

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317. In its first review of a case brought under the Voting Rights Act’s 1982 Amendment, the Supreme Court held a North Carolina multimember redistricting plan for the State’s Senate and House of Representatives “impaired black citizens’ ability to elect representatives of their choice” in five of the six contested districts by establishing and evaluating the following factors:

- 1) The minority group at issue must demonstrate that it is sufficiently large and geographically compact to constitute a majority single-member district,
- 2) The minority group must show it is politically cohesive, and
- 3) The minority group must demonstrate that the majority votes sufficiently as a bloc (absent of special circumstances) usually to defeat the minority’s preferred candidates.

*Thornburg v. Gingles*, 478 U.S. 30, 35, 50–51 (1986).

318. *Id.* at 31.

319. *Id.* at 50.

320. Detroit, Flint, and Benton Harbor’s African-American populations make up 82.7%, 56.6%, and 89.2% of their populations, respectively. *QuickFacts: Detroit*, *supra* note 33; *QuickFacts: Flint*, *supra* note 41; *QuickFacts: Benton Harbor*, *supra* note 43.

321. U.S. CENSUS BUREAU, *QuickFacts: Hamtramck city*, <https://www.census.gov/quickfacts/table/PST045215/2636280> [https://perma.cc/6U4L-7962].

322. *Gingles*, 478 U.S. at 51.

323. *Id.*

Additionally, the Senate Judiciary Committee issued a report suggesting several factors for courts to consider when determining if, within the totality of the circumstances, the operation of a voting practice, standard, or procedure violates Section 2 as a vote dilution claim.<sup>324</sup> Keeping consistent with the *White-Zimmer* totality of the circumstances approach, “there is no requirement that any particular number of factors be proved or that a majority of them point one way or another.”<sup>325</sup> Out of the seven factors, historic discrimination seems to be the only applicable factor for a PA 436 vote dilution claim.<sup>326</sup> This factor along with the satisfaction of the *Gingles* test may be strong enough to persuade a court that PA 436 has a discriminatory result that dilutes African-Americans’ votes in municipalities subject to emergency manager control.

#### *D. A Brief Discussion of the Sixth Circuit’s Voting Rights Act Application*

As mentioned above, on September 12, 2016, the Sixth Circuit dismissed plaintiffs’ VRA Section 2 claims in less than two pages and repeatedly classified PA 436 as an “appointive system.”<sup>327</sup> Nearly identical to the Eastern District, and contrary to the VRA Section 2 analysis this article suggests, the Sixth Circuit applied a narrow interpretation of *Presley* to reason that Section 2 “does not apply, because this is not a case involving a voting qualification or prerequisite to voting or standard, practice, or procedure resulting in the denial of a right to vote.”<sup>328</sup> Plaintiffs’ rehearing en banc request is still pending before the Sixth Circuit.

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324. 42 U.S.C. § 1973 (2012). These factors include: (1) the history of official voting-related discrimination in the state or political subdivision; (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 of political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority-vote requirements, and prohibitions against bullet voting; (4) the exclusion of members of the minority group from candidate slating processes; (5) the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; (6) the use of overt or subtle racial appeals in political campaigns; and (7) the extent to which members of the minority group have been elected to public office in the jurisdiction. *See* S. Rep. No. 97-417, at 28–29 (1982). Notably, *Phillips* plaintiffs point out that the “[Eastern] District’s Court order omits the ‘Senate Factors’ from its analysis.” Brief of Plaintiffs-Appellants, *supra* note 246, at 43.

325. Parker, *supra* note 301, at 755.

326. *See* discussion *supra* Part II.

327. *Id.* at 720–21.

328. *Phillips*, 836 F.3d at 721 (6th Cir. 2016). Additionally, the Sixth Circuit relied on *Mixon v. Ohio* to dismiss the *Phillips* plaintiffs’ Section 2 claims. *Id.* at 720 (citing *Mixon v. Ohio*, 193 F.3d 389 (6th Cir. 1999)). In *Mixon*, Ohio voters challenged a state statute that provided for once-elected Cleveland School District school board members to be appointed by the Mayor of Cleveland. *Mixon*, 193 F.3d 389. The Court dismissed plaintiffs’ Voting Rights Act claim, reasoning, “Section 2 only applies to elective, not appointive systems.” *Id.* at 407. The Court also asserted that “a state’s choice between an elective and an appointive system” is outside the scope of the Voting Rights Act. *Id.* (citing *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1358 (4th Cir. 1989)). In *Phillips*, the Sixth Circuit asserted that “*Mixon* is analogous to the present case . . . . In enacting PA 436, Michigan made a choice between allocating certain powers to individuals

## V.

## LOOKING TOWARDS THE FUTURE: ALTERNATIVE SOLUTIONS

Now, more than ever, something must be done to revive Michigan's cities. However, the problem lies deeper than finances. As discussed, there are many political, economic, and social issues that have contributed to the current state of these cities. Nonetheless, correcting municipal finances is a step in the right direction towards municipal improvement. This can be achieved without curtailing the basic elements of democracy by depriving Michigan's minority citizens' right to vote.

First, I suggest entertaining the idea of creating multi-member oversight bodies with limited financial powers to intervene when a city is faced with a fiscal emergency, as opposed to a single state-appointed emergency manager. This type of an approach has worked successfully for jurisdictions with municipalities facing financial crises including North Carolina and New York.

Second, if the State of Michigan continues to appoint emergency managers, I suggest limiting emergency managers' powers to financial matters, without expanding into broad policy-making functions, similar to the emergency financial managers under PA 72.<sup>329</sup> Doing so can effectively be achieved by incorporating the communities in which Emergency Managers serve.

*A. An Alternative to Emergency Managers: Multi-Member Financial Oversight Boards*

*i. North Carolina's Local Government Commission*

One of the oldest intervention programs in the country and a result of the Great Depression, North Carolina's Local Government Commission ("LGC") imposes budget controls and advises troubled cities, counties, and special districts.<sup>330</sup> The Commission's professional staff and nine-member board<sup>331</sup>

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rather than elected ones." *Phillips*, 836 F.3d at 720–21. However, PA 436 is distinguishable from *Mixon*. In *Mixon*, the state redesignated power from elected school board members to mayoral-appointed school board members, who had the same function and title. Under PA 436, the state is redesignating power from locally elected officials to state emergency managers appointed by the governor, with widely different functions than the local officials they replace. This is quite the departure from the state's "choice between an elective system and an appointed one." *Mixon*, 193 F.3d at 407.

329. Philo, *supra* note 17, at 84–85.

330. *Local Government Commission*, N.C. DEPT. ST. TREASURER, <https://www.nctreasurer.com/slg/Pages/Local-Government-Commission.aspx> [<https://perma.cc/9493-762V>]; *see generally* N.C. GEN. STAT. ANN. § 159-3 (West, Westlaw through Chapters 93, 95 to 101 of the 2016 Regular Session of the General Assembly, pending changes received from the Revisor of Statutes); PEW CHARITABLE TRUSTS, THE STATE ROLE IN LOCAL GOVERNMENT DISTRESS 34 (2013), [http://www.pewtrusts.org/~media/assets/2013/07/23/pew\\_state\\_role\\_in\\_local\\_government\\_financial\\_distress.pdf](http://www.pewtrusts.org/~media/assets/2013/07/23/pew_state_role_in_local_government_financial_distress.pdf) [<https://perma.cc/9D5T-9A5R>].

331. The nine-member board includes "the State Treasurer, the Secretary of State, the State Auditor, the Secretary of Revenue, and five others by appointment (three by the Governor, one by the General Assembly upon the recommendation of the President Pro Tempore and one by the

including members who have served as elected officials themselves, uses a proactive approach to detect early signs of financial strife for municipalities by putting local governments on a watch list.<sup>332</sup> If municipalities on the watch list “cannot correct their difficulties, the commission can step in and run their day-to-day operations, including raising taxes [and approving and selling bonds] until local officials resolve the underlying crisis.”<sup>333</sup> Praised for its collaborative approach and understanding of political sensitivities, the Commission gives local officials a chance to work out its problems before the Commission is “forced to assume control.”<sup>334</sup> Thus far, the Commission has taken financial control over four cities and one water and sewer district since its formation seventy years ago.<sup>335</sup> It is attributed as “a major reason why North Carolina local government issuers have been able to weather [the] recession to this point.”<sup>336</sup>

*ii. New York's Municipal Assistance Corporation*

Similarly, in 1975, the State of New York created the Municipal Assistance Corporation (“MAC”) for the City of New York to address the City Government’s “severe fiscal crisis” at a time when the City was unable to pay its bills and the “specter of bankruptcy was very real.”<sup>337</sup> At its creation, MAC consisted of a Board of Directors made up of nine private citizens with powers limited to borrowing from state revenue and exercising “policing powers over City fiscal practices.”<sup>338</sup> These policing powers were limited to “overseeing the budget, managing loan procedures, and restructuring personnel to reduce payroll spending.”<sup>339</sup> The MAC’s success in NYC is largely attributed to the collaborative approach between “private institutions and individuals dedicated to restoring [New York City’s] fiscal health”<sup>340</sup> and selling “almost \$10 billion in

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General Assembly upon the recommendation of the Speaker of the House). The State Treasurer serves as Chair and selects the Secretary of the Commission, who heads the administrative staff serving the Commission.” *Local Government Commission, supra* note 330.

332. PEW CHARITABLE TRUSTS, *supra* note 330, at 34.

333. *Id.*

334. *Id.*

335. *Id.*

336. Stephen C. Fehr, *North Carolina Agency Is Local Government Lifeline*, PEW CHARITABLE TRUSTS (June 6, 2012), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2012/06/06/north-carolina-agency-is-local-government-lifeline> [https://perma.cc/M5H7-5QMF].

337. *Municipal Assistance Corporation for the City of New York (MAC)*, WILLIAM & ANITA NEWMAN LIBRARY & BARUCH C., [http://www.baruch.cuny.edu/library/alumni/online\\_exhibits/amfl/mac/mac\\_finding\\_aid\\_index.htm](http://www.baruch.cuny.edu/library/alumni/online_exhibits/amfl/mac/mac_finding_aid_index.htm) [https://perma.cc/W385-DEGW].

338. *Id.*

339. Lindsey Smith, *7 Things to Know About Michigan's Emergency Manager Law*, MICH. RADIO NEWSROOM (Dec. 6, 2011), <http://michiganradio.org/post/7-things-know-about-michigans-emergency-manager-law#stream/0> [https://perma.cc/UQ3T-WWU3].

340. *Municipal Assistance Corporation for the City of New York (MAC)*, *supra* note 337.

bonds to keep the city solvent.”<sup>341</sup> After MAC’s bailout “saved the city” it “settled its final accounts and voted itself out of existence.”<sup>342</sup> Ever since, only one other city in New York, Troy, has created its own MAC.<sup>343</sup> Since 1995, Troy’s four-member MAC has been “authorized to sell bonds and notes to provide funds for various purposes, including the repayment of certain of the City’s obligations.”<sup>344</sup>

*iii. Compliance of Alternative Financial Programs with the Voting Rights Act*

Unlike PA 436, North Carolina’s LGC and New York’s MAC do not present any Voting Rights Act violations. First, neither state law qualifies as a voting standard, practice or procedure within the meaning of Section 2. Under the standard established by the *Allen* Court,<sup>345</sup> neither state law has a direct relation to voting and the election process because neither amounts to a change affecting the creation or abolition of an elective office. Rather, North Carolina’s LGC was created as an independent state entity which plays an advisory role over municipalities identified as having a need for financial oversight. Similarly, New York’s MAC provides financial oversight to struggling cities with limited policing powers granted by the state.

North Carolina and New York’s statutory measures to remedy local financial catastrophes are more analogous to the law upheld in *Presley*, as both laws do not affect local residents’ voting power and are instead concerned with the internal operations of an elected body by providing financial oversight and expertise. In contrast, Michigan’s PA 436 takes it a step further by granting individual state-appointed emergency managers the ability to not only oversee and take control of local financial matters, but to act for and in place of local governing bodies and assume all authority of locally elected officials, including the power to enact, repeal, and amend local laws outside the realm of finances.<sup>346</sup>

Secondly, even if it were possible to qualify these laws as a voting standard, practice, or procedure, such an argument would likely fail under a Section 2 analysis. To be successful, evidence based on the totality of the circumstances would have to exit showing North Carolina’s and New York’s laws constitute a denial or abridgment of the right to vote on account of race.

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341. *Municipal Assistance Corp., New York’s 1975 Savior, Says ‘See Ya’*, N.Y. DAILY NEWS (Sep. 27, 2008), <http://www.nydailynews.com/news/money/municipal-assistance-corp-new-york-1975-savior-ya-article-1.325509>.

342. *Id.*

343. See *Municipal Assistance Corporation*, CITY OF TROY, <http://www.troyny.gov/Government/mac.aspx> [https://perma.cc/S54Y-UM79].

344. *Id.*

345. *Presley v. Etowah Cnty. Comm’n*, 502 U.S. 491, 492 (1992) (discussing *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969)).

346. MICH. COMP. LAWS §§ 141.1549(2), 141.1552(1)(dd) (2016).

*B. An Immediate Return to Democracy by Repealing Emergency Managers' Broad Powers and Incorporating Communities into the Emergency Management Process*

*i. Lessons Learned from PA 72: Limiting Emergency Managers' Powers*

While PA 436 emergency managers may be able to accomplish their agendas more quickly by overriding local officials' authority, this does not serve as a justification to disregard basic principles of democracy. Most simply, a return to democracy could begin by repealing PA 436 provisions that grant emergency managers the power to replace elected officials; enact, repeal, and amend local laws; disincorporate or dissolve the municipal government; and most importantly, the power to execute PA 436 and the financial operating plan by "any means necessary." This type of change would be most similar to PA 72's emergency financial managers, whose statutory powers were limited strictly to financial matters.

Under PA 72, the local emergency financial assistance loan board<sup>347</sup> would appoint an emergency *financial* manager whose main responsibility was the "timely and satisfactory implementation of [the local government's] financial plan . . ." <sup>348</sup> The financial plan was a written plan developed in consultation with the local government at issue.<sup>349</sup> The financial plan created the local government's framework for conducting operations based on available resources and provided for the payment of outstanding debts and obligations.<sup>350</sup> Additionally, PA 72 proscribed 17 additional actions for emergency financial managers, including the power to "amend, revise, approve, or disapprove the budget of the unit of local government," require the local government's finance officer to make special financial reports, "examine all records and books of account," "review payrolls," and adjust salaries.<sup>351</sup>

Notably, PA 72 emergency financial managers had the ability to renegotiate existing labor contracts "and act as an agent of the local government in collective bargaining with employees or representatives and approve any contract or agreements."<sup>352</sup> This is similar to emergency managers' powers under PA 436, however, PA 436 takes it a step further by allowing emergency managers to not only renegotiate contracts, but to also modify, reject, and terminate contracts, including collective bargaining agreements.<sup>353</sup> Again, this demonstrates the

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347. Local Government Fiscal Responsibility Act, 1990 Mich. Pub. Acts 72, § 18(1) (repealed 2013).

348. *Id.* § 19 (repealed 2013).

349. *Id.* § 20(1) (repealed 2013).

350. *Id.* § 20(a)-(b) (repealed 2013).

351. *Id.* § 21(b), (d), (e), (g), (q) (repealed 2013).

352. *Id.* § 21(h) (repealed 2013).

353. MICH. COMP. LAWS §§ 141.1551(1)(c), (f), 141.1552(1)(k) (2016); *see also* § 141.1150(1)(b) (reasserting emergency managers' ability to modify contracts).

broad and arguably unnecessary powers granted to emergency managers under PA 436.

Further, PA 72 explicitly stated that emergency financial managers may “[e]xercise the authority and responsibilities of the chief administrative officer and governing body concerning the adoption, amendment, and enforcement of ordinances or resolutions *affecting the financial condition* of the unit of local government.”<sup>354</sup> This language demonstrates the ways in which PA 72 sought to limit emergency financial manager’s broad range of powers to financial purposes. Integrating similar language as PA 72 and restricting emergency manager’s powers to financial-related duties would indeed mark Michigan’s return to democracy while allowing for emergency *financial* managers (and not “emergency managers”) to lend their financial expertise municipalities facing financial emergencies.

*ii. Community Involvement in Emergency Management of Local Governments*

As Representative Stanley suggests, designating a state-mandated broad range of authority to state-appointed officials from outside the community damages citizens’ democratic rights.<sup>355</sup> Instead, the State should work towards fostering relationships with these municipalities to promote growth and improvement as successful jurisdictions like North Carolina and New York have.<sup>356</sup> This could be accomplished by allowing more local involvement in resolving local financial emergencies and not leaving so much pure discretion with state actors, particularly the governor. These objectives can be achieved in two ways.

First, if the state is going to appoint emergency managers, or more favorably, emergency managers with powers limited to financial concerns, candidates should be selected that have not only the required experience, but also ties to the community, thus making them answerable to their peers and constituents even after their appointment concludes. For example, when selecting the third Pontiac emergency manager in 2011, the state appointed Louis Schimmel, a Pontiac native who had more of a local perspective and personal stake than similarly situated emergency managers.<sup>357</sup>

Second, I recommend actively including community members throughout an emergency manager’s appointment, as New York’s MAC facilitated during

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354. 1990 PA 72, § 21(p) (emphasis added).

355. See Stanley Press Release, *supra* note 218.

356. See *supra* discussion Parts V(A)(i)–(ii); *supra* notes 341–342, 348 and accompanying text.

357. Leonard Gilroy & Michael LaFaive, *From Traditional to Contract City: Navigating Financial Distress in Pontiac*, REASON FOUND. (Mar. 24, 2014), <http://reason.org/news/show/pontiac-contract-city-schimmel#sthash.p7d1mutK.dpuf> [<https://perma.cc/CPA2-RP5L>].

its lifespan in New York City.<sup>358</sup> In Michigan, this could be achieved by creating local boards comprised of community residents that meet regularly with emergency managers to voice concerns based on community feedback. In turn, this would build trust between citizens and emergency managers and create a level of transparency past emergency management administrations have lacked. Further, legislatively mandating the creation of a local advisory boards as a state requirement would ensure that such boards come into existence and play an active role in emergency management.

Finally, chief administrative officers and legislative bodies should have a presence and active role throughout emergency management to ensure that they can continue to effectively represent the public, including the constituents who elected them. Aside from removing broad discretionary emergency manager powers from PA 436, the State should encourage emergency managers to work collectively with the municipality's elected officials already in office, instead of encouraging emergency managers to disregard officials' governing power. Doing so will help restore power to the citizens subject to emergency management. Likewise, the State should consider the input of both community members and local officials when reviewing emergency manager candidates. Collaboration of this kind has proven successful in both North Carolina and New York.

Fixing a municipality's financial woes alone will only go so far. Without fixing the other social, political, and economic issues, there is no guarantee that a municipality might not wind up back in receivership. Addressing these historic concerns will help revive these struggling cities' populations, which will provide more tax revenue and relieve the high burden of underfunded local services. These cities could benefit from state programs geared towards economic revival and social initiatives. This is beyond a "green issue," people's lives and the cultures of Michigan's cities are at stake. The State cannot rely on local fiscal acts alone to fix its municipalities. The New York Times Editorial Board summarized the situation well: "The lesson from Michigan is that emergency managers succeed only if they work with the communities they serve. The aim should be to shore up local governments, not simply to cut costs in ways that lead to new disasters."<sup>359</sup>

## VI.

### CONCLUSION

Raising Section 2 claims under PA 436 presents a number of challenges. First, a court will have to accept PA 436 as a voting, standard, practice or procedure. Although the Eastern District ruled otherwise, there are strong arguments that PA 436 qualifies as a voting standard, practice or procedure

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358. See *supra* discussion Part V(A)(ii); *supra* note 348 and accompanying text.

359. Editorial, *When State Control Damages a City*, N.Y. TIMES (Feb. 4, 2016), <http://www.nytimes.com/2016/02/04/opinion/when-state-control-damages-a-city.html>.

because it serves as a substantive change as to which offices are elected and implicates the effectiveness of votes.

Effectively, at one point PA 436 denied nearly half of Michigan's African-American population the right to vote by replacing locally elected officials with state-appointed emergency managers. However, a Section 2 claim only requires a showing of discriminatory effect, which lies within the statistics. Moreover, the totality of the circumstances demonstrates a long history of past racial discrimination in many of these cities, which coincidentally contributed to their current fiscal situation. Additionally, these two factors along with the satisfaction of the three-part *Gingles* test support a vote dilution claim under PA 436. Essentially, the state electorate dilutes the votes of majority-minority communities in select municipalities by allowing state-elected officials to appoint emergency managers. However, in order for a court to accept this vote dilution claim, it will have to be willing to expand such claims beyond traditional redistricting schemes. A successful Section 2 claim would restore democracy in these affected cities and force the state to reevaluate its measures.

PA 436 appears to be a hasty decision made by the state legislature in an attempt to resolve municipalities' fiscal catastrophes. Its aftermath has resulted in denying Michigan's African-Americans the right to vote and causing irreparable harm to municipalities across the state. Moreover, the effects of emergency manager takeovers in majority-minority cities still loom, as evidenced most recently in the Flint Water Crisis. Further, the 2016 presidential election demonstrated a low-turnout rate for African American voters in Michigan, including Detroit and Flint.<sup>360</sup> Polling data like this suggests a deeper sense of disempowerment within the African American communities of cities subject to or once subject to emergency manager control. These communities have witnessed firsthand the replacement of their locally elected leaders by state-appointed emergency managers, leaving them without a voice when it comes to local matters that affect their everyday lives and creating a general distrust with the government, at all levels, including federal.

While it is imperative to fix the financial state of many of these cities, there are plenty of ways to do so without throwing basic democratic principles out the

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360. Ron Fonger, *Weaker Democratic support in Detroit, Flint made Trump stronger in Michigan*, MLIVE (Nov. 09, 2016, 2:38 PM), [http://www.mlive.com/news/index.ssf/2016/11/detroit\\_flint\\_voting\\_muscle\\_we.html](http://www.mlive.com/news/index.ssf/2016/11/detroit_flint_voting_muscle_we.html) [<https://perma.cc/XK7F-U6UE>] (noting that African American turnout was down in Michigan, especially in Detroit and Flint). Further, in 2012, President Barack Obama won Michigan by 350,000 votes, whereas "[Hillary] Clinton lost [Michigan] by roughly 10,000." Omri Ben-Shahar, *The Non-Voters Who Decided The Election: Trump Won Because Of Lower Democratic Turnout*, FORBES (Nov 17, 2016, 04:30 PM), <http://www.forbes.com/sites/omribensshahar/2016/11/17/the-non-voters-who-decided-the-election-trump-won-because-of-lower-democratic-turnout/#539328f240a1>. More specifically, Wayne County, where Detroit is situated, gave 595,253 votes to Obama in 2012, and 518,000 for Clinton in 2016. *Id.* "Mo[r]e than 75,000 [Detroit] Obama voters did not bother to vote for Clinton . . . they did not become Trump voters—Trump received only 10,000 votes more than Romney did in [Wayne] county. They simply stayed at home." *Id.*

window. If a court does not strike down PA 436 under the Voting Rights Act, there are realistic alternative solutions to restoring democracy in the State of Michigan, either through legislative or administrative changes. Reform can start now, beginning with policy-based solutions, such as the creation of a multimember financial review board to serve financially distressed municipalities. Or, if the State decides to continue with emergency management, emergency managers' powers should be limited strictly to financial matters, and the communities in which they serve should be actively included throughout the emergency management process.

The denial of the right to vote pursuant to PA 436 and the grave consequences of this measure serve both as a cautionary tale and a call for reform. First, PA 436 should function as a warning to Michigan and other similarly situated jurisdictions of what happens when basic democratic principles are circumvented. Second, PA 436 beckons reform in order to prevent such events from reoccurring. It is time the citizens once again control the fate of their municipalities, beginning with the basic right to vote for local officials and to give their votes meaning. Even in the face of an emergency, desperate times do not call for desperate measures when it comes to democracy.