UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v

RICHARD D. SNYDER, as Governor of the State of Michigan; ANDREW DILLON, as the former Treasurer of the State of Michigan, R. KEVIN CLINTON as former Treasurer of the State of Michigan, and NICK KHOURI, as Treasurer of the State of Michigan, acting in their individual and/or official capacities,

Defendants.

No. 2:17-cv-13887

HON. GEORGE CARAM STEEH

MAGISTRATE JUDGE R. STEVEN WHALEN

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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Defendants' Reply to Plaintiffs' Response to Defendants' Motion to Dismiss

I. Corrections to Plaintiffs' Statement of Facts

Most of Plaintiffs' statement of facts are not facts, but rather, unsupported, inflammatory statements. For example, they state that "Michigan's emergency manager statute was born from racial politics." (Pls.' Br. in Support of Resp. to Mot. to Dismiss, p. 3, PgID #204.) But as the Sixth Circuit recognized, "[i]mproving the financial situation of a distressed locality undoubtedly is a legitimate legislative purpose…" *Phillips v Snyder*, 836 F.3d 707, 718 (6th Cir. 2017). They also state that "the entire child population of Flint was poisoned." (Pls.' Br. in Support, p. 13.) But that is not fact, as subsequent analysis of blood lead levels has concluded that there was no "environmental emergency" nor were

any children exposed at levels requiring medical treatment, (Gomez, *Journal of Pediatrics*, "Blood Lead Levels of Children of Flint, Michigan: 2006-2016," https://www.sciencedirect.com/science/article/pii/S0022347617317584)[1]

Plaintiffs point out the State's oversight of P.A. 436 options. (Pls.' Br. Support at pp 2–3, PgID #203-204.) But that does not minimize the importance of local-government choice—a key feature of the Act. And not only is there no history of the State declining to accept a local unit's choice of option under P.A. 436, but the Act contains no mechanism for the State to do so.

Relatedly, Plaintiffs state that "in practice" few if any majority-minority cities or school districts had a choice in the option selected. (*Id.* at pp 3, 8, PgID ##204, 209.) But many of those were—as with majority white jurisdiction as well—already placed under emergency management under a predecessor statute. Now, a local unit will have choice in whether to have an emergency manager.

Plaintiffs state that three majority white jurisdictions, Allen Park, Hamtramck, and Lincoln Park were able to choose their option and chose emergency management. That is factually inaccurate. Allen Park was placed under emergency management under P.A. 72; Lincoln Park chose the consent agreement option under P.A. 436 but because a consent agreement could not be

[1] Defendants ask this Court to take judicial notice of this document. *See In re Unumprovident Corp. Sec. Litig.*, 2005 WL 2206727 (E.D. Tenn. Sept.12, 2005) (referencing *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 360–61 (6th Cir. 2001)).

reached within 30 days, under section 8(1) of the Act, the Michigan Department of Treasury then chose the emergency manager option for the City. Only Hamtramck chose its option under P.A. 436—an emergency manager. See http://www.michigan.gov/treasury/0,4679,7-121-1751_51556_64472--,00.html.

Plaintiffs state that certain African-descended communities had a P.A. 436 solution "imposed upon them." Yes, because some jurisdictions—including majority white jurisdictions—were already subject to a "solution" under predecessor statutes. And as Plaintiffs concede (Pls.' Br. Support, p. 10, PgID #211), majority-minority units that were declared to be in financial crisis *after* the passage of P.A. 436 (Pontiac and Benton Harbor school districts and the city of Royal Oak Township) had a chance to select their option, and did so.

Plaintiffs discuss fiscal-indicator and Munetrix fiscal scores (Pls.' Br. Support, pp 11–12, Pg ID #212-213), but neither was used for *any* purpose under P.A. 436. The Act's evaluative criteria were used, and those are facially neutral.

II. Plaintiffs' facial challenge is moot.

Plaintiffs argue their claims are not moot because (1) some of Plaintiffs' jurisdictions are still "suffering the continuing effects of P.A. 436," (2) and some of them that had emergency managers imposed on them still "remain[ ] under P.A. 436 restrictions." (Pls.' Br. Support, p 16, Pg ID #217.) The "effects" of an emergency manager once that emergency manager has been removed and the local

unit is out of receivership does not constitute an active controversy that would survive Defendants' mootness challenge. Nor have Plaintiffs' allegations focused on these residual effects. As to "restrictions," Detroit is under the supervision of the Financial Review Commission, which means it no longer is subject to P.A. 436. And the old DPS exists only to pay debt. It is no longer subject to P.A. 436 and previous EM orders are no longer binding on it. There are no longer any emergency managers anywhere in the State (Highland Park Schools' emergency manager just exited); only two school districts are under consent agreements (Benton Harbor and Pontiac); and only Muskegon Heights has an RTAB. Thus, the partial suspension of self-governance that forms the basis for Plaintiffs' claims (R. 1, Compl., ¶¶ 75, 76, PgID #19) has ended and, therefore, a decision by this Court would not affect *this* matter as it has been framed.

Plaintiffs also argue that the capable-of-repetition-yet-evading-review exception applies here. (Pls. Br. Support, p. 18, Pg ID #219.) For this exception to apply, there must be a "reasonable expectation" that these jurisdictions will be subject to the same action again, *Fed. Election Comm'n v. Wis. Right to Life, Inc*, 551 U.S. 449, 462 (2007), and Plaintiffs bear the burden of proof. *Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005). Plaintiffs have not shown a reasonable expectation that they will once again be subject to P.A. 436. Although some jurisdictions have been in financial crisis multiple times, eleven jurisdictions

that have emerged from P.A. 436 or a predecessor statute have managed not to reenter: Benton Harbor, Ecorse, DPS, Pontiac, Village of Three Oaks, Allen Park, Inkster, Inkster Schools, Highland Park Schools, Lincoln Park, and Wayne County.

Plaintiffs say the exception should apply simply because the Act "remains in full force and effect" and "can be enforced at any time. . ." (*Id*. at p. 19, Pg ID #220.) But the Act's existence does not mean Plaintiffs will again be subject to it.

Finally, Plaintiffs argue that the statute could continuously evade review since Defendants have sole control of how long receivership lasts. (Pls.' Br. in Support, p 20, Pg ID #221.) But that suggests that Defendants are rushing jurisdictions through receivership, contrary to Plaintiffs' argument that their jurisdictions are languishing without self-governance.

III. Plaintiffs lack standing.

The fact that emergency-management or consent-agreement options were applied to these Plaintiffs in the past (*id*. at p. 23, Pg ID #224) does not give them greater standing than any other citizen with respect to showing *future harm*. Nor does the mere fact that they live in predominantly minority communities make it less speculative that their specific jurisdictions will experience economic crisis and be subject to P.A. 436 in the future.

With respect to their as-applied challenge, Plaintiffs divide Plaintiffs into Benton Harbor/Pontiac residents, and Detroit residents.

Benton Harbor/Pontiac: Plaintiffs argue that Watkins, Kermit Williams, Seats, Henry, and Adams still have standing because they "continue to be subject to [the provisions of PA 436] today." (*Id*. at 24–25, Pg ID #225-226.) But as residents these individuals have no personal stake in the outcome of the controversy. Benton Harbor was returned to self-governance on July 1, 2016—long before this complaint was filed on December 1, 2017—so they cannot show, as they must for declaratory relief, "actual present harm or a significant possibility of future harm." *See Grendell v. Ohio Supreme Court*, 252 F.3d 828 (6th Cir. 2001). That Benton Harbor might once again be determined to be in financial crisis and subject to P.A. 436 is entirely speculative. *See General Retirement Sys of City of Detroit v. Snyder,* 822 F. Supp. 2d 868, 695–96 (E.D. MI, 2011) (no standing for declaratory relief because numerous actions on the part of the emergency manager and State Treasurer would have to have occurred with respect to P.A. 4 in order for the complained-about constitutional violations to occur)

Likewise, Pontiac has emerged from an RTAB and is no longer subject to P.A. 436. Pontiac schools are subject to consent agreement, which is not the crux of Plaintiffs' complaint. (See Compl., ¶¶ 2, 27, 71, 75, 85, 87, 99, 100, PgID ##3, 8, 18, 19, 22, 23, 26, 27).

Detroit. Plaintiffs argue that Bellant, Simpson, Herrada, Holley, Owens, Coleman, and Lemmons have standing because they "continue to be subject to [the

provisions of PA 436] today." (*Id.* at pp. 27–28, Pg ID ##228-229.) But again, neither Detroit nor the old DPS is currently subject to the Act, so these individuals cannot show actual present harm. Nor have they shown that they would once again be determined to be in financial crisis and subject to P.A. 436. They lack standing.

Finally, Detroit Plaintiffs argue that even if are not currently under P.A. 436 receivership, "as long as PA 436 exists and there is a possibility that it could be enforced against them," (*id.* at p. 28, Pg ID #229), they have standing. Again, that is insufficient for standing purposes.

IV. Plaintiffs cannot sustain their equal-protection claim.

Plaintiffs fail to respond to Defendants' argument that the Sixth Circuit has already concluded that P.A. 436 as "facially entirely neutral with respect to race," and that PA 436 is applied to a financially endangered community, is not discriminatory. (Defs. Mot. to Dismiss, pp. 26–27, Pg ID ##227-228, citing *Phillips*, 836 F.3d at 718, 722). The Sixth Circuit opinion in *Phillips* is law of the case, *see Hanover Ins. Co. v. Am. Engineering Co.*, 105 F.3d 306, 312 (1997), and is fatal to Plaintiffs' equal protection facial challenge.

Also, as Defendants discussed in their motion to dismiss, pp. 27–32, the factors for determining whether the Act was motivated by a discriminatory purpose or is unexplainable on grounds other than discrimination, are not met here. And unlike *Batson v Kentucky*, 476 U.S. 79 (1986) on which Plaintiffs rely (Pls.' Br.

Support, p. 36, Pg ID #237), any discriminatory impact on majority-minority communities can be explained on non-racial grounds—financial status. Likewise, unlike in *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 534 (6th Cir. 2002), communities in financial crisis are not similarly situated to those that are able to manage their resources.

Finally, Plaintiffs argue that the statistical disparity between African-descended population under P.A. 436 emergency managers and white communities governed by emergency managers is stark enough to create an inference of discriminatory intent sufficient to plead a plausible claim. But again, the PA 436 criteria for determining financial crisis is facially neutral, and jurisdictions that are, objectively, in financial crisis are not similarly situated to those that are not.

Where facially neutral legislation is challenged on the grounds that it discriminates on the basis of race, the enactment will be required to withstand strict scrutiny only if the plaintiff can prove that it 'was motivated by a racial purpose or object,' or 'is unexplainable on grounds other than race.' " *Moore v. Detroit Sch. Reform Bd.,* 293 F.3d 352, 368 (6th Cir. 2002) (quoting *Hunt v. Cromartie,* 526 U.S. 541, 546 (1999)). Mere awareness of discriminatory consequences is inadequate. *Personnel Admin. of Massachusetts v. Feeney,* 442 U.S. 256, 279 (1979). The requirement of discriminatory purpose "implies that the decisionmaker

... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id*.

Plaintiffs cannot prove that P.A. 436 was motivated by a racial purpose or object. The Act's application to various local units of government is explainable by whether those jurisdictions met the Act's neutral criteria. And even if Plaintiffs could show that P.A. 436 has a racially disparate impact, without more, that is insufficient to establish a violation of the Fourteenth Amendment. See *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 264–65 (1977).[2]

CONCLUSION AND RELIEF REQUESTED

For the reasons stated here and in Defendants' motion to dismiss, Defendants respectfully ask this Court to grant their motion to dismiss.

Respectfully submitted,

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[2] Defendants also note that Plaintiffs agreed to stipulate to dismissal of the former Treasurers. (Pls.' Br. Support, pp. 33-34, Pg ID #234-235.)

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2018, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such. I also mailed the foregoing paper via US Mail to all non-ECF participants.

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