No. 16-1207

In the Supreme Court of the United States

RUSSELL BELLANT, ET AL., PETITIONERS

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. If a state law temporarily reorganizes government to address the local unit's financial crisis by shifting authority from locally elected officials to an appointed emergency manager, while allowing voters to retain their voting rights and to keep their locally elected officials in office, does that law fall within the scope of § 2 of the Voting Rights Act?

PARTIES TO THE PROCEEDING

Russel Bellant, Tawanna Simpson, Lamar Lemmons, Elena Herrada, Donald Watkins, Kermit Williams, Duane Seats, Juanita Henry, Mary Alice Adams, William Kincaid, Paul Jordan, Bernadel Jefferson, Dennis Knowles, Jim Holley, Charles E. Williams, Michael A. Owens, Lawrence Glass, Deedee Coleman, and Allyson Abrams were plaintiffs-appellants in the proceedings below.

Michigan Governor Rick Snyder and former Michigan Treasurer Andrew Dillon were defendants-appellees in the proceedings below.

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The Sixth Circuit opinion affirming the district court's dismissal of the plaintiffs' pending claims, Pet. App. 1–28, is reported at 836 F.3d 707. The district court's order dismissing all but one of the plaintiff's claims, Pet. App. 35–76, is not published in the Federal Supplement, but is available at 2014 WL 6474344. The stipulation and order dismissing without prejudice the remaining claim (an equal-protection claim based on race discrimination), Pet. App. 29–34, is unreported. The district court's order denying the plaintiffs' motion for entry of final judgment and denying their motion to stay as moot is not published, but is available at 2015 WL 13035126.

JURISDICTION

The respondents accept the petition's statement of jurisdiction as accurate and complete and agree that this Court has jurisdiction over the petition.

STATUTORY PROVISIONS INVOLVED

52 U.S.C. § 10301 provides:

> § 10301. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation
>
> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any

citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

INTRODUCTION

As this Court has recognized, States have "extraordinarily wide latitude" in "creating various types of political subdivisions and conferring authority on them." *Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60, 71 (1978). This authority to decide how to structure local governments includes the authority to decide whether local officials are locally elected or state appointed. And because local fiscal distress can affect the State as a whole (take Detroit's bankruptcy, for example), States sometimes must exercise that authority. Here, Michigan created mechanisms (including temporarily appointing an emergency manager, based on objective financial criteria) to attempt to rescue those localities from financial emergencies. And that mechanism has indeed been temporary: of the 18 local units of government placed under emergency management, only one unit still is; the other 17 have come out of financial distress and are now under local control or moving toward local control.

The Voting Rights Act does not deprive States of their authority to temporarily change locally elected positions into appointed ones. In contrast to Michigan's emergency manager system, which focuses on the process of governing, the Voting Rights Act focuses on a different process—on how elections should occur, when an elections system is in place. Given this distinction, it is unsurprising that the Sixth Circuit's decision below does not create a circuit split. An emergency manager is an appointed official, and all circuits to address whether § 2 applies to appointed officials agree that it does not. Nor does a temporary reorganization of local government implicate any issue of national importance. Certiorari should be denied.

STATEMENT OF THE CASE

This case challenges Michigan's latest in a series of financial stability laws designed to address financial crises in local units of government. Public Act 436, which took effect in 2013, offers local units a range of options to resolve their financial crises, although from the outset of this case the petitioners have focused primarily on only one of the available options: the temporary appointment of an emergency manager.

A. Michigan's fiscal-responsibility statutes

For the past 29 years, Michigan has enacted various fiscal-responsibility statutes to aid local communities in financial stress. Michigan passed the first, Public Act 101, in 1988 with bipartisan support. Under that Act, any one of 14 conditions triggered an initial financial review of a local governmental unit. If, on review, the state treasurer determined that serious problems existed, an emergency financial manager, with state oversight, would be appointed to oversee the financial operations of the local unit.

Two years later, in 1990, the Legislature passed (again with bipartisan support) Public Act 72, which superseded Public Act 101. Public Act 72 used the same 14 triggers as Public Act 101 had, but added a process for the financial review of school districts. It also broadened the actions an emergency financial manager could take and reappointed emergency financial managers who had been appointed under Public Act 101.

In 2011, when the national financial situation exacerbated the financial stress of local units of government, including school districts, the Michigan Legislature passed Public Act 4 to replace Public Act 72. That Act added four additional triggering conditions and created an emergency manager position to replace the emergency financial manager position. This new position had expanded powers, including the ability to unilaterally modify union contracts, subject to the approval of the State Treasurer. Emergency financial managers previously appointed under Public Act 72 were reappointed as emergency managers. In 2012, the voters rejected Public Act 4 by referendum, reviving Public Act 72.

B. Public Act 436, the challenged law

The Michigan Legislature then enacted Public Act 436, the Local Financial Stability and Choice Act, Mich. Comp. Laws § 141.1541 *et. seq*., which took effect March 28, 2013. The Legislature reiterated that local fiscal stability is necessary for the State's health, welfare, and safety and that the Act was necessary to protect those interests as well as the credit ratings of the State and its political subdivisions. § 1543.

Because the Legislature intended the Act to be a successor statute to former Acts 101, 72, and 4, the statute converted emergency financial managers who had been operating under Public Act 72 into emergency managers under Public Act 436. 2013 Pub. Acts 436, Enacting section 2. As to identifying new local governments in financial crisis, the Act contains the eighteen triggers from Public Act 4, with one trigger split into two to total nineteen triggers. § 1544 (a)–(s).

Before any actions are taken under the Act, various reviews are required, and these can either be requested by the local government or initiated by the State. If initiated by the State, the local unit is notified and has an opportunity to provide comments to the state financial authority. § 1544(3). And once the local unit is under review, the local unit has an opportunity to provide information concerning its financial condition. § 1544(3).

After a review team recommends that a financial emergency should be declared, § 1545(6)(b)(*iv*), and the Governor determines that a financial emergency exists, § 1546(1)(b), the local unit of government can request an administrative hearing before the state financial authority to contest the Governor's initial determination that a financial emergency exists, § 1546(1)(b)(2). If after the administrative hearing, the Governor confirms the existence of a financial emergency, then, by a two-thirds vote, the unit may appeal to the Court of Claims the Governor's confirmation of a financial emergency. § 1546(3).

The criteria for evaluating a local unit's financial status are objective and neutral. The criteria focus on the overall financial condition and prognosis of a local unit of government that subjects it to review and make no mention of race. §§ 1544(1), 1545(1), 1546(1), 1547(1).

Under Public Act 436, local governments that are in distress but that are not already under emergency management have a few options. They choose for themselves one of four avenues for addressing their financial emergency: a consent agreement, appointment of an emergency manager, neutral evaluation (a

form of alternative dispute resolution or mediation), or Chapter 9 federal bankruptcy, § 1547(1)(a)–(d). The City of Hamtramck, for example, requested the appointment of an emergency manager in 2013. While local governments that were already under emergency management when Public Act 436 took effect would not have had these options, going forward a local unit could end up under emergency management without having chosen that avenue in only two circumstances—if the local unit chooses the consent-agreement avenue but does not actually enter the agreement, or if it has committed a material, uncured breach of a consent agreement.

Once an emergency manager is in place, the Act allows that manager to "act for and in the place and stead of the governing body and the office of the chief administrative officer of the local government" during receivership. § 1549(2). Whereas previous acts tended to separate fiscal management and government restructuring, Public Act 436 merges the two, giving emergency managers greater flexibility to solve local problems.

Under the Act, local officials retain their elected positions. Local elections and voter registration are not suspended or altered, local-government election boundaries are not redrawn, and elected offices are not altered or eliminated. The weight of a local official's vote cast in an affected jurisdiction is the same for all voters in that jurisdiction, regardless of race. And although the salary, wages, and other compensation of the chief administrative officer and members of the local governing body are eliminated, those—along with the duties and responsibilities of office—can be

restored by the emergency manager. Further, vested pension benefits cannot be impaired. § 1553.

The Act also carves out a role for locally elected officials as a check on the decision-making of the emergency manager in some crucial areas. Before the emergency manager can make any changes to collective bargaining agreements, sell local-government assets, or issue debt, those proposals must be submitted to the governing body of the local government. § 1559(1); § 1552(k), (r), & (u); § 1554(d). If the local governing body disapproves the proposed change, the body shall, within seven days of its disapproval, submit an alternative to a board comprised of state officials that would yield substantially the same financial result as the emergency manager's proposal, and if the board adopts the local unit's proposal, the emergency manager must implement it. § 1559(2). There are other checks on the emergency manager's authority, too: an emergency manager cannot sell or transfer public utilities, without voter approval, § 1552(4), and cannot sell assets of more than $50,000 in value without the state treasurer's approval, § 1555(1).

The Act's options are temporary by design. The Act sets forth the outer limit of a financial manager's appointment (18 months from the time of appointment under this Act). § 1549. Local units can petition the governor for removal before the 18-month period, § 1549(11), or, after 18 months, can, by a two-thirds vote, remove the emergency manager, § 1549(6)(c). And because an emergency manager continues only until the financial emergency is rectified, § 1549(7), local units may be removed from emergency management as soon as their financial condition adequately

improves. Once a financial emergency has been alleviated, the Act authorizes the Governor to appoint a receivership transition advisory board to monitor local government affairs until receivership is terminated. § 1563.

The Governor, on his or her own initiative or on recommendation from a receivership transition advisory board, may determine that the financial conditions of a local government have not been corrected "in a sustainable fashion" and appoint a new emergency manager. § 1564. The Governor may also remove, or the Legislature may impeach or convict, an emergency manager. § 1549(3)(d).

C. Public Act 436's effects

Since the Act took effect, 13 local units of government and 5 school districts have been under emergency management. But currently, with the exception of one school district (Highland Park Schools), no local governments in Michigan are subject to emergency management. Six local units formerly subject to some remedial option under the Act have returned to complete self-governance (Detroit, Benton Harbor, River Rouge, Allen Park, Highland Park, and Inkster), and Wayne County has resumed partial local control. Six municipalities (Flint, Lincoln Park, Ecorse, Hamtramck, Pontiac, and Muskegon Heights School District) are under the monitoring of receivership transition advisory boards; the City of Detroit is subject to a financial review commission, pursuant to its final bankruptcy court order; and Royal Oak Township, Benton Harbor Area Schools, and Pontiac Public Schools are subject to consent agreements.

Http://www.michigan.gov/treasury/0,4679,7-121-1751_51556_64472---,00.html.

D. Lower-court decisions upholding the Act

The plaintiffs' complaint asserted a wide variety of claims against Michigan's Governor and Michigan's Treasurer—claims under substantive due process, the Guarantee Clause, the Equal Protection Clause, the Voting Rights Act, and the First and Thirteen Amendments. The Governor and Treasurer moved to dismiss all claims, but while the action was pending, the Detroit bankruptcy was also pending. The district court stayed and administratively closed the case based on Chapter 9's automatic-stay provision, 11 U.S.C. §§ 362, 922.

The plaintiffs filed an amended complaint, adding new claims and deleting the Detroit plaintiffs. The defendants again moved to dismiss all claims and also moved to stay the proceedings pending final decisions in related cases involving the plaintiffs. The district court granted in part and denied in part the defendants' motion to dismiss and denied the motion to stay.

As to the Voting Rights Act claim (the issue here), the district court held that Public Act 436 is not a "standard, practice or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race . . . ." Pet. App. 64. Relying on this Court's decision in *Presley* v. *Etowah County Commission*, 502 U.S. 491, 504 (1992), the district court held that the plaintiffs challenged a temporary reorganization of government, not a voting standard or procedure, Pet. App. 68, and noted that

they cannot "attempt to restructure government under the auspices of the Voting Rights Act," Pet. App. 68. The court noted that "both before and after the enactment of PA 436, the electorate can elect their city council members and mayors." Pet. App. 66.

The court dismissed all claims except the equal-protection claim based on race discrimination, holding that there were factual issues as to that claim. Pet. App. 64. Plaintiffs filed a motion for reconsideration, which the district court denied. Discovery proceeded on that equal-protection claim. After extensive discovery, the parties agreed to dismiss that count without prejudice, and the district court closed the case. Pet. App. 29–34.

On appeal, the Sixth Circuit agreed with the district court, holding that Michigan's statute does not violate § 2 of the Voting Rights Act. Pet. App. 24. The court explained that "VRA § 2 does not apply, because this is not a case involving a voting qualification or prerequisite to voting or standard, practice, or procedure resulting in the denial of a right to vote." Pet. App. 26. Describing the § 2 claim as an "attempt to fit a square peg into a round hole," the court explained that "Michigan made a choice between allocating certain powers to appointed individuals rather than elected ones" and that § 2 does not provide plaintiffs an avenue for recovery" based on that choice. Pet. App. 24. The Sixth Circuit noted that the plaintiffs' "elected officials still retain some (although limited) powers under PA 436." Pet. App. 26. And, like the district court, the Sixth Circuit found support in *Presley*'s holding, 502 U.S. at 504, that the Voting Rights Act

did not cover "[c]hanges which affect only the distribution of power among officials" and "delegate[e] . . . authority to an appointed official." Pet. App. 25, 26.

The petitioners filed a motion for rehearing en banc, which the Sixth Circuit denied. Pet. App. 77–78.

REASONS FOR DENYING THE PETITION

I. There is no circuit conflict on whether § 2 of the Voting Rights Act applies to appointed positions.

The petitioners assert that the Sixth Circuit's decision conflicts with a decision from the Eleventh Circuit as to whether the Voting Rights Act applies to appointed offices. Pet. 12. But there is no such conflict.

A. The Eleventh Circuit's *Dillard* opinion *supports* the holding below.

The petitioners identify a single case, *Dillard* v. *Crenshaw County*, 831 F.2d 246, 251 (11th Cir. 1987), that they say conflicts with decisions of the Sixth and Eighth Circuits. (Pet. 22–24.) But *Dillard* does not conflict with sister circuit holdings that § 2 does not apply to appointed offices; in fact, that case did not even involve an appointed office.

In *Dillard*, a group of African-American plaintiffs asserted that the county's proposal for a five-member commission (each elected by a single district) violated § 2 of the Voting Rights Act because it also retained the position of an *elected* at-large chairperson. 831 F.2d at 248. The Eleventh Circuit indeed rejected the

proposed at-large chair position as violating § 2 because that "election method" would give different weight to different voters. *Id.* at 253. But *Dillard* expressly recognized that unelected positions are not subject to the Voting Rights Act: "[An] unelected position would not be subject to the Voting Rights Act." 831 F.2d at 251 n.12. In short, the Eleventh Circuit would reject a claim like the one the plaintiffs present here.

Consistent with the Eleventh Circuit's statement, the Sixth and Eighth Circuits have each held that § 2 is limited to elected officials and does not apply to appointed offices. See *Mixon* v. *Ohio*, 193 F.3d 389, 408 (6th Cir. 1999) ("[W]e . . . and hold that Section 2 of the Voting Rights Act does not apply to appointive offices."); *African-American Citizens for Change* v. *St. Louis Bd. of Police Comm'r*, 24 F.3d 1052, 1054 (8th Cir. 1994) (holding that "§ 2 of the Voting Rights Act does not apply to appointed officials"); accord *Chisom* v. *Roemer*, 501 U.S. 380, 401 (1991) ("Louisiana could, of course, exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed.").

What's more, the Fourth and Fifth Circuits have said the same, although in dicta. *Irby* v. *Virginia State Bd. of Elections*, 889 F.2d 1352, 1357 (4th Cir. 1989) (stating that it was "more probable than not that Section 2 is not applicable to appointive offices"); *Searcy* v. *Williams*, 656 F.2d 1003, 1010 (5th Cir. 1981), aff'd 455 U.S. 984, 1010 (1982) (finding it unnecessary to reach the § 2 question but nevertheless stating that because the case "involved an appointive rather than an elective scheme," "the district court was correct in

holding that voting rights did not apply"). And here, the petitioners concede that emergency managers are appointed officials. Pet. 2, 4.

Attempting to salvage their reliance on *Dillard*, the petitioners assert that the Eleventh Circuit held that "even if the decision to fill a position by appointment lies outside of the statute's ambit, Section 2 applies '[o]nce a post is opened to the electorate.'" Pet. 12 (quoting *Dillard*, 831 F.2d at 251). But the context of that quote reveals that the Eleventh Circuit was not suggesting (as the petitioners would have it) that the Voting Rights Act precludes a State from changing an elected position to an appointed one. Rather, its context confirms that the statement referred to election practices: "Once a post is opened to the electorate, and if it is shown that *the context of that election* creates a discriminatory but corrigible *election practice*, it must be open in a way that allows racial groups to participate equally." *Dillard*, 831 F.3d at 251 (emphasis added). *Dillard* in fact involved an election scheme, and the court even noted that "at-large procedures that are discriminatory in the context of one election scheme are not necessarily discriminatory under another scheme." *Id.* at 250; see also *id.* ("The nine factors suggested by Congress rely to a significant degree on a review of the history as *tainted by* the infirm *election procedure*.") (second emphasis added).

The petitioners also draw the wrong inference from that phrase in *Dillard*. The statement that § 2 applies "[*o*]*nce* a post is open to the electorate," *Dillard*, 831 F.2d at 251 (emphasis added), implies that § 2 does *not* apply if the post is *not* open to the electorate—i.e. if it is an appointed post—consistent

with *Dillon's* footnote 12 and with *Mixon*, *St. Louis*, and *Chisom*.

The closer one looks, the more apparent it is that *Dillard* does not conflict with this case. As already noted, the *Dillard* opinion turned on the fact that at-large commissioners would be elected, not that they would be appointed, as emergency managers are. *Id.* at 253 ("Given that the chairperson would be elected . . . we agree with the district court that 'the members . . . would have their voting strength and influence diluted."). *Dillard* also involved a permanent, not a temporary, decision, and did not involve state power over locals. See *Highland Farms Dairy*, *Inc.* v. *Agnew*, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.").

Moreover, the *Dillard* holding arose from a unique set of facts. The Eleventh Circuit appeal followed a district-court preliminary injunction and a stipulation from all counties involved in the lower-court action that their schemes in fact violated § 2 of the Voting Rights Act. On appeal, the Eleventh Circuit cautioned that "the election of the chairperson should not be assessed in a vacuum, but rather, in its full context." *Dillard*, 831 F.3d at 251. So that appellate court employed a totality-of-circumstances test and evaluated the new system, in part, based on the historical record. *Id.* at 250. As the court noted, the issue before it was "whether the at-large position . . . *in combination with the racial facts and history of Calhoun County*" failed to correct "the original violation" of § 2. *Id.* at 248 (emphasis added). The historical record for Calhoun County, was notable—no African-American had

ever been elected and the commission had, over time, "skewed power heavily into the hands of the chairperson," such that there was lack of checks on the "authority of the commission over the chairperson." *Id*. at 248, 252. These facts weighed heavily into the court's determination that the at-large chairperson would dilute the voting strength and influence of the other committee members. *Id*. at 251–253.

Unlike Calhoun County, the parties here have not stipulated that there was racial discrimination in the Michigan jurisdictions that were subject to Public Act 436. Nor did the district court make findings on that point. And the full context of Public Act 436 indicates that its criteria are neutral, its remedies temporary, and its purpose to address persistent financial troubles of local units in order to protect the credit of the local unit and the State as a whole.

II. This case does not raise issues of national importance.

Although the petitioners claim that the decision below implicates issues of national importance, they do not directly state what those issues are. The issue that can most readily be discerned is the petitioners' repeated references to the City of Flint's water situation (known to many in the nation) and the fact that Flint was under an emergency manager at the time the decisions were being made with respect to the City's drinking-water source. Pet. 11–12. But this is not an issue that implicates the Voting Rights Act.

A. The result of a governing decision is not a voting issue.

The petitioners conclude that the Flint River water caused widespread lead poisoning, Legionnaire's Disease, and other significant harms (though the State contests those factual assertions, which are currently being litigated in both state and federal courts) and argue that the Flint situation "demonstrates the harms of depriving accountable local officials of their power." Pet. 11. The Michigan Civil Rights Commission amicus also focuses heavily on alleged results of emergency manager decisions in Flint. Comm'n Br. 2–3, 12, 13, 15–24. But the result of a *governing* decision, good or bad—by either an emergency manager or locally elected officials—does not implicate *voting*.

The measure of Public Act 436's facial constitutionality is not its application in the City of Flint or elsewhere. It is whether Michigan has the power to structure—and thus, to temporarily restructure—its local government units when locally elected officials have been unable to achieve fiscal stability and when significant local and state interests are at stake. It does.

B. The petitioners misunderstand the Act's impact on minorities.

To the extent the petitioners suggest that this case is of national importance because of Public Act 436's impact on minority communities, although racial equality obviously matters, the Act was not designed to target minorities, as the Michigan Civil Rights Commission amicus acknowledges, ("[W]e are not suggesting that Public Act 436] was designed with

racial animus . . . ."). Comm'n Br. 13. Indeed, despite extensive discovery, the petitioners voluntarily agreed to dismiss the race-discrimination claim without prejudice. Pet. App. 29–34.

And dismissal of the racial-discrimination claim was appropriate: the criteria of the Act are neutral. As the Sixth Circuit pointed out, "[I]t is the overall financial condition and prognosis of a local unit of government that will subject it to review and the possible appointment of an emergency manager," Mich. Comp. Laws § 141.1547(1), not its relative wealth or racial makeup. Pet. App. 60. Any community whose financial books are not in order is subject to review under the Act. Pet App. 60. Predominantly white communities have been subject to the Act, just as have predominantly black communities. In fact, four of the 14 jurisdictions under emergency management when this lawsuit was filed were more than 50% white, with two overwhelmingly so: Allen Park (92.9% white and only 2.1% black); Lincoln Park (84.2% white and only 5.9% black); Hamtramck (53.6% white), and Wayne County (52.3% white). See 2010 US Census Figures, https://www.census.gov/2010census/popmap/ipmtext.php?fl=26. (The Village of Three Oaks, which was subject to emergency management under Public Act 436's predecessor statute, Public Act 72, was also overwhelmingly white (93.2% white and only 1.1% black). See *id.*

Although the petitioners' statistic on the percentage of minorities subject to emergency management (52%) in 2012 seems striking, Pet. 11, it does not show the full picture about the scope of the Act's impact on racial communities. An overwhelmingly large portion

of Michigan's African-American population (that is, 46%) reside in two of the 14 cities that were in financial crisis—Flint and Detroit. The percentage of African Americans under emergency management in 2012 drops significantly if those two cities are taken out of the mix—down to roughly 10% percent if Detroit is taken out of the equation and down to roughly 6% if both Detroit and Flint are taken out. Https://www.census.gov/2010census/popmap/ipmtext.php?fl=26. And both Detroit and Flint had objective financial difficulties.

As to the nature of the impact on minorities, emergency management under Public Act 436 does not, contrary to the petition, "deprive [locally elected officers] of [all] power," Pet. 25, "strip[ ] the voters in those jurisdictions of their ability to elect representatives of their choice to govern them," Pet. 2, or make elections meaningless, Pet. 18. While it does temporarily transfer power away from locally elected officials, the Act does not alter or suspend elections, redraw election boundaries, eliminate elected offices, or even permanently convert elected offices to appointed offices. And the weight of a local-official vote cast in an affected jurisdiction is the same for all voters in that jurisdiction, regardless of race. Moreover, consistent with its temporary nature, the Act contemplates the local government's input into the decision to have an emergency manager in the first place. Mich. Comp. Laws § 141.1546(1)(b). It also creates a new duty for the local governing body: approving or disapproving the emergency manager's changes to collective bargaining agreements, selling of local-government assets, or issuance of debt—crucial decisions that will have long-term effects on the local unit. § 1559(1); § 1552(k), (r),

& (u); § 1554(d). If the local governing body disapproves a proposed emergency manager action in one of these areas, it has the opportunity to submit its own alternative plan to achieve the same financial result as the emergency manager's proposal. § 1559(2).

C. The challenged law is unique, and the scenario where a local unit has no say in the remedy of emergency management will not recur.

By the petitioners' own admissions throughout this litigation, Public Act 436's scope is "unprecedented." E.g., Pls.' C.A. Br. at x (explaining "the uniqueness of the application of federal constitutional principles to Michigan's unprecedented statutory scheme."). Thus, the issues raised in the petition would have limited applicability.

Additionally, while local governing bodies, such as some of the communities represented by the petitioners, had no specific say in whether they were placed under emergency management, that scenario will not recur under Public Act 436. All but one local unit with reappointed emergency financial managers or financial managers have come out of emergency management, and only the six units currently under the supervision of a receivership transition advisory board could ever return to emergency management (assuming their financial condition worsens). See Mich. Comp. Laws § 141.1564. Thus, the petitioner's argument that "Michigan has *not* chosen to select municipal officers by appointment," Pet. 17, is neither accurate nor relevant to future application of the Act.

Going forward, for new local units subject to the Act, it is the local governing body of the financially distressed unit itself that ultimately chooses its remedy. For example, on July 1, 2013, the financial review team, and ultimately the Governor, determined that the City of Hamtramck was in a financial emergency, and an emergency manager was appointed at the City's request. (The emergency manager departed on December 18, 2014.)

The only other scenarios that could trigger the involuntary appointment of an emergency manager under the Act are where the local unit selected the consent agreement option and failed to agree on a consent agreement within the agreed upon time frame or has materially breached a consent agreement and that breach remains uncured. § 1548(1). But in those scenarios, the local governing body understands that by failing to actually enter the agreement or by choosing not to abide by its consent agreement, it might find itself under emergency management.

III. The Sixth Circuit correctly held that Michigan's Public Act 436 does not fall under § 2 of the Voting Rights Act.

The Sixth Circuit was correct in its analysis. Its holding that Public Act 436 does not fall under § 2 of the Voting Rights Act is consistent both with the plain text of the Voting Rights Act and with this Court's decisions in *Holder* v. *Hall*, 512 U.S. 874 (1994), *Presley*, and other cases.

A. The decision below is consistent with the text of the Voting Rights Act.

The decision below is consistent with the text of the Voting Rights Act. The petitioners' attempt to fit Public Act 436 within the scope of § 2 of the Voting Rights Act is, as the Sixth Circuit panel unanimously recognized, an "attempt to fit a square peg into a round hole." Pet. App. 24.

1. Public Act 436 is not a voting standard, practice, or procedure under subsection (a).

To fall within the scope of § 2 of the Voting Rights Act, Public Act 436 must be a "voting qualification or prerequisite to voting," or a voting "standard, practice or procedure. § 10301(a). It is not.

The petitioners raise the fact that § 2 not does follow the phrase "standard, practice or procedure" with the phrase "with respect to voting" as did § 5. Pet. 18. From that textual difference they draw the conclusion that § 2 applies whenever a change in the authority of elected offices denies minority voters equal opportunity "to participate in the political process and elect representatives of their choice." Pet. 22. But the plain language of subsection (a) makes clear that "the standard, practice, or procedure" being challenged must result in the "denial or abridgement of *the right . . . to vote . . . .*" § 10301(a) (emphasis added). In short, the text of § 2 makes clear that it applies to standards, practices, or procedures that govern the voting process.

The legislative history of § 2 further confirms that it still deals with *the electoral process*, not with the ins and outs of running a unit of government, and certainly not to temporary governance decisions that keep intact both the electoral process and local officials' elected positions. See Rep. No. 97-417 at 28 (1982) (explaining that Congress intended amended § 2 to extend more broadly to "practices, which, while episodic and not involving *permanent* structural barriers, result in the denial of equal access to any phase *of the electoral process* for minority group members.") (emphasis added). And although the Senate Report extended § 2 beyond "formal or official bars to registering and voting," *id*. at 30 (1983), that very language still limits § 2 to electoral mechanisms (registering and voting).

Public Act 436's temporary remedies do not deny citizens the right to vote, make their vote count any less, or completely strip locally elected officials of any role in governance. Nor do they lead to a de facto denial of the right to vote. Considering Public Act 436 as a whole, not just the provisions the petitioners cite, demonstrates that local governance has a role in choosing emergency management and plays a role, albeit a more limited one, while the emergency manager is in power. E.g., § 1559(1) & (2); § 1552(k), (r), & (u); § 1554(d). Both the Sixth Circuit, Pet. App. 24–26, and the district court, Pet. App. 68, agreed on this point. Therefore, contrary to Petitioner's representation, elections for mayor and city councilmembers in jurisdictions with emergency managers are not just "sham[s]." Pet. 11. Put simply, a temporary financial fix that leaves elected officials in place and performing some, although not all, of their former duties, is not a

practice or procedure concerning voting. It is not related to the individual voter or the voting process, and thus, is not rooted in any way to the text of § 2, subsection (a).

The petitioners' broad reading of subsection (a) would also have broad consequences. Every local or state governance decision and every response to a financial situation, to another emergency, or to changing circumstances would potentially subject some government official to suit based on reduced opportunity to participate in the political process and, therefore, to actually have "elected representatives of their choice." § 10301(b). Thus, modification of a subcommittee assignment system, a budget that makes it more difficult for a locally elected official to accomplish meaningful projects, annexation, and bankruptcy could all result in § 2 litigation. Congress did not intend such a result, nor is it clear that Congress would have the authority to set such rules about the internal structure of state governments. E.g., *Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (" 'The number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the state.' ") (alternation in original). Instead, as this Court has recognized, state and local governments have to be able to "exercise power in a responsible manner within the federal system." *Presley*, 502 U.S. at 507.

Accordingly, the Sixth Circuit was correct in holding that the "VRA § 2 does not apply, because this is not a case involving a voting qualification or prerequisite under 10301(a) voting or standard, practice, or

procedure resulting in the denial of a right to vote." Pet. App. 26. Since this is a threshold inquiry, the Court need not consider any other statutory language or legislative history, and does not reach the well-known *Gingles* test, the Senate Factors, or the totality-of-circumstances test.

2. Public Act 436 is not part of the process leading to nomination or election under subsection (b).

The petitioners also focus on the "political process" language of subsection (b). But again, subsection (a) is the threshold inquiry, and subsection (b) cannot expand the scope of subsection (a). Too, the phrase "political process" must be considered in the context of the sentence in which it appears—"if, based on the totality of the circumstances, it is shown that the political process *leading to nomination or election* in the State or political subdivision . . . ." 52 U.S.C. § 10301(b) (emphasis added). Public Act 436 does not involve the political process leading to nomination or election, and that is the only way a violation of subsection (a) can be established.

The petitioners further rely on the definition of "vote"—"all action necessary to make a vote effective," 52 U.S.C. § 10310(c)(1)—and on the "totality of circumstances" test articulated in 52 U.S.C. § 10301(a) and (b). Pet. 13. But that definition is applicable and the totality-of-circumstances test triggered only if the requirements of (a) and (b) are met. Again, they are not met here. And again, temporary emergency management allows the vote to be effective. Citizens cast their vote, have their ballot properly counted, and

have the winning candidate take office and remain in office.

B. The decision below is consistent with this Court's decisions in *Presley*, *Hall*, and other cases.

The decision below comports with *Presley*. In *Presley*, this Court held that "[c]hanges which affect only the distribution of power among officials . . . have no direct relation to, or impact on, voting." *Id*. at 506. In that case, newly elected county commissioners who were black alleged that their respective counties violated § 5 of the Voting Rights Act when they transferred certain authority from an elected commissioner to a county engineer appointed by commission without seeking clearance. *Id*. at 491.

As the Sixth Circuit acknowledged, *Presley* dealt with a § 5 claim, not a § 2 claim. Pet. App. 25. But *Presley*'s rationale is nevertheless applicable here, because both sections are tethered to voting. Pet App. 25 (quoting § 2's language: "voting qualification or prerequisite to voting, or standard, practice, or procedure . . . [resulting] in a denial or abridgement of the right . . . to vote. . ."). As is true here, *Presley* was about the amount of authority an official would have. The plaintiffs' chief complaint was that a citizen casting a ballot for commission would vote "for an individual with less authority than before the resolution," so the value of the vote was diminished. *Presley*, 502 U.S. at 504. Yet this Court recognized that many state and local issues "having nothing to do with voting affect the power of elected officials," including new or modified programs and changes in operating procedures. *Id*.

Public Act 436 is also consistent with *Holder* v. *Hall*, a case in which this Court expressed doubt as to whether "Congress contemplated that a racial group could bring a § 2 dilution challenge to an appointive office (in an attempt to force a change to an elective office) by arguing that the appointive office diluted its voting strength in comparison to the proposed elective office." 512 U.S. at 884. And again, the petitioners acknowledge that emergency managers are appointed. Am. Compl. ¶ 169a.

Hall considered a vote-dilution challenge to the size of a county commission, and this Court held that a plaintiff cannot maintain a § 2 challenge to the size of a governing body. 512 U.S. at 874–75. By way of another example, the Court also explained that it was "quite improbable" to suggest that a § 2 challenge to a town's existing political boundaries, in an attempt to force it to annex surrounding land, diluted a racial group's voting strength. *Id.* at 884. The same is true here. It is improbable to suggest that Michigan's temporary reorganization of local government for the purpose of attempting to remedy a financial crisis dilutes minorities' voting strength. Neither is there a reasonable benchmark against which to measure Public Act 436's remedial measures. And where there is no reasonable benchmark, the "voting practice cannot be challenged as dilutive under § 2." *Id.* at 881.

Finally, and most fundamentally, Public Act 436 is consistent with this Court's cases recognizing the relationship between a State and its local governments. This Court has emphasized "the extraordinarily wide latitude that States have in creating various

types of political subdivisions and conferring authority upon them." *Holt Civic Club*, 439 U.S. at 71; see also *Sailors* v. *Bd. of Educ.*, 387 U.S. 105, 110–11 (1967) (upholding Michigan's appointive system for selecting county school board members and explaining that "[v]iable local governments may need many innovations, numerous combinations of old and new devices, great, flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation.").

As even amicus Michigan Civil Rights Commission recognizes, " '[S]ome sort of state-imposed emergency powers may be necessary when a community faces a fiscal emergency that it is unable to address on its own.' " Comm'n Br. 13 (citing its report on the Flint water situation). Michigan has done just that through Public Act 436—to protect the entire State. The Act's remedies are temporary, and the local governing body has input into both the choice and the application of those remedies. Elections are not suspended, nor are locally elected officials ousted from office. The Act does not implicate § 2 of the Voting Rights Act.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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