No. 16-1207

# In The
# Supreme Court of the United States

RUSSELL BELLANT, et al.,

*Petitioners,*

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF ON BEHALF OF AMICUS CURIAE MICHIGAN CIVIL RIGHTS COMMISSION IN SUPPORT OF PETITIONERS

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## STATEMENT OF INTEREST

The Michigan Civil Rights Commission (MCRC or Commission) is an independent body created by Art. V, § 29 of the Michigan Constitution of 1963, for the purpose of protecting persons from discrimination and ensuring fair and equal access to employment, education, and economic opportunities.[1, 2]

The Michigan Constitution charges MCRC with investigating alleged discrimination and "to secure the equal protection of such civil rights without such discrimination." Mich. Const. Art. V, § 29. MCRC

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[1] Pursuant to U.S. Supreme Court Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and no counsel, party, person or entity other than amicus curiae made a monetary contribution intended to fund the preparation or submission of this brief. This brief is being filed pursuant to U.S. Supreme Court Rule 37.2; amici provided ten day notice to, and received consent to file from, both parties.

[2] The Michigan Department of Civil Rights is the statutorily created body "responsible for executing the policies of MCRC." Mich. Comp. Laws § 37.2602(a). The Michigan Attorney General would normally provide counsel and represent the Michigan Civil Rights Commission in matters before this Court (Mich. Comp. Laws § 37.2602(b) provides "[t]he attorney general shall appear for and represent the [civil rights] department or the [civil rights] commission in a court having jurisdiction of a matter under this act."). However, because the Attorney General is already representing a party, and in recognition of MCRC's constitutional independence, the Attorney General has appointed the Department's Director of Law and Policy as a Special Assistant Attorney General to represent MCRC's interests in this case. The contents of this brief represent the opinions and legal arguments of the Michigan Civil Rights Commission and do not necessarily represent the opinions of any other person or entity within Michigan's government.

enforces Michigan's two anti-discrimination statutes, the Elliott-Larsen Civil Rights Act, Mich. Comp. Laws §§ 37.2101 et seq., and the Persons with Disabilities Civil Rights Act, Mich. Comp. Laws §§ 37.1101 et seq. the Commission therefore has a strong interest in ensuring Michigan's residents and visitors receive equal protection under the law.

During 2016, MCRC held three public hearings in Flint pertaining to the contamination of the Flint drinking water. The Commission's findings are documented in our report, *THE FLINT WATER CRISIS: Systemic Racism Through the Lens of Flint* (Feb. 17, 2017) (MCRC Report).[3] One focus of the Commission's investigation was the law that is being challenged in this case, Michigan's *Local Financial Stability and Choice Act*, Public Act 436 of 2012, MCL 141.1541-141.1575 (PA 436). PA 436 created a process whereby the state, in order to rescue lesser jurisdictions that are in financial distress, may remove all governing powers of local officials and reassign them to a state appointed emergency manager.

Flint was under emergency management during the span of the water crisis and the emergency manager made the local decisions that led to and prolonged the lead contamination of Flint's drinking water. In the MCRC Report, and in this brief, the Commission describes how the emergency management process rendered the city's government decision maker

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[3] Available at: http://www.michigan.gov/documents/mdcr/VFlintCrisisRep-F-Edited3-13-17_554317_7.pdf

accountable more to the state's electorate than to the residents who were being governed; this contributed to both the creation and the duration of the crisis.

The Commission avers that its unique constitutional and statutory authority, as well as its investigation of the Flint water crisis, give it a unique perspective on PA 436 which it believes will help inform this Court's decision in this case.

## SUMMARY OF ARGUMENT

MCRC joins Petitioners in arguing that Section 2 (§ 2) of the Voting Rights Act (VRA), 52 U.S.C. § 10301, protects more than simply an individual's right to pull the voting lever. Based upon *Thornburg v. Gingles*, 478 U.S. 30 (1986) and its progeny following the VRA's amendment in 1982, § 2 protects minority voters from standards, practices, or procedures like PA 436 that dilute their vote and thereby abridge their voting rights.

Voting rights are meaningless if eliminating poll taxes and literacy tests merely allows voters to elect someone who will hold a ceremonial title, while the person who will actually govern them is chosen by someone outside their community. The VRA not only guarantees minority populations access to the ballot, it also ensures that the votes they cast are no less meaningful than the votes of others.

The Sixth Circuit wrongly interpreted § 2 of the VRA based upon a literal adoption of an inapplicable

holding that the act does not apply because emergency managers under PA 436 are appointed rather than elected.

PA 436 is so different from the laws this Court has previously addressed that this is a case of first impression. The Writ of Certiorari should be granted so that this Court may consider whether Section 2 applies specifically to voting procedures like the one established by PA 436, that do not merely redistribute voting power, they reassign it elsewhere entirely.

Unlike the vote dilution cases previously addressed by this Court, PA 436 does not involve a local government restructuring itself, or even a state imposing the restructuring of a local government. Political powers are not being shuffled among local officials, they are being usurped and relocated where they are largely outside the reach of local voters, and where the power of their vote is greatly diluted. The problem of applying existing case law to laws like PA 436, and thus the need for this Court's guidance, can be seen by superimposing PA 436 onto the relationship between state and federal governments.

If PA 436 were a typical vote dilution case, it would be like Congress mandating a state government to restructure itself. PA 436 is analogous to Congress giving the President the authority to remove all the power of a state's Governor and its legislature leaving them nominally in office without any decision making ability, and replacing them with a single appointee of the President's choosing. The creation of any such process

cannot be exempted from Voting Rights Act protections simply because the government official now making all the state's decisions is an appointee of an elected official, without even considering that the President is elected nationally.

The state's residents' equal opportunity to participate in the political process is not preserved by permitting them to continue voting for powerless local officials, nor should it matter that they retain some voting power in the form of presidential elections, when residents of the other 49 states still also select their own state government.

Michigan's PA 436 disproportionately removes all governmental authority from officials elected in municipalities with large minority populations. These powers are reassigned by persons outside the jurisdiction being governed. Residents of those municipalities are denied the ability to be governed by the representatives they have chosen.

PA 346 should be subject to scrutiny under Section 2 of the Voting Rights Act.



## ARGUMENT

In January 2016, states of emergency for the city of Flint were declared by the Mayor, Governor and President. These declarations turned the nation's attention to Flint and the "Flint water crisis." As the result of the corrosiveness of improperly treated

municipal water, lead was leaching from the service lines and the city's drinking water had poisoned its residents. Less widely known than the harm that was caused is that during this time the governing powers of Flint's Mayor and city council had been usurped by the state.

Flint began using the Flint River as its source for drinking water in April 2014. Residents' complaints about the water being discolored, odorous, foul tasting and making them sick started almost immediately. Nonetheless, and in spite of multiple boil water warnings for bacteria, tests showing lead in the water, and a spike in legionella, no remedial action was taken by the state in response until October of 2015. From the initial decision to use the river, and for the duration of the crisis, the emergency manager imposed by the state pursuant to the process created by PA 436 was the person making all the decisions of local government "on behalf of" the people of Flint.

Michigan has a population of more than 9,900,000, of which approximately 99,000, or about 1%, live in Flint. Flint itself is a majority-minority city where African Americans constitute about 56% of the population, and Latinos 4%. This compares with Michigan's population which is approximately 14.2% African American and 4.8% Latino.

MCRC found that communities of color had been starkly overrepresented in jurisdictions placed under emergency management. While 10% of Michigan's citizens have lived under emergency management since

2008, the number of Michigan's African American citizens who have done so is 50%.

## I. The Voting Rights Act Must Be Applied To Protect A Voter's Rights To Elect A Decision Maker, Not Merely A Seat Holder.

As Petitioner has correctly pointed out, the Sixth Circuit pinned its roughly two-page analysis rejecting the § 2 claim on just two cases. First, it applied one of its own cases, *Mixon v. Ohio*, 193 F.3d 389 (6th Cir. 1999), to erroneously create a blanket rule that § 2 can never apply to appointive systems, without comparing the facts of its *Mixon* analysis to the facts presented in this case. Second, and without providing any basis for doing so, it expanded a § 5 analysis by this Court stating that "[c]hanges which affect only the *distribution* of power *among* officials," to hold that § 2 could not apply to the removal of powers from officials (directly or indirectly) accountable to majority-minority jurisdictions, and placing that power with officials accountable to a different jurisdiction altogether where roughly 99% of the (majority-white) voters would be unaffected by the exercise of those powers.

The error in the reasoning of both the Circuit and the District Courts in this matter is that they apply language from other court opinions based only upon form without considering the substance of the language, and particularly without examining the context in which the language was used. Judicial opinions should not be subject to the kind of literal

constructionism that may be appropriate for legislation, wherein apparently straightforward language is applied as written even if the application may not be consistent with the author's intent.[4] Judicial interpretation, even when stating a rule, is dependent upon the facts presented in a specific case, and should not be literally applied by another court to factual situations not contemplated by the original court. Further, even in constructionism, the plain meaning of language cannot be determined without considering its context.

More to the point, the Sixth Circuit focuses solely on the officeholder, while all but ignoring the voter whose rights the Voting Rights Act (VRA) is intended to protect. Electing a powerless title holder is not the same as electing a decision maker. It cannot be sufficient that a local officeholder retains an office after all the local powers of that office are stripped away. This is a meaningless distinction which would essentially allow the protections afforded by the VRA to be easily evaded.

The Sixth Circuit begins its opinion by describing how:

> When the finances of a Michigan municipality or public school system are in jeopardy, a state

[4] One of the fundamental principles of legislative constructionism is that it is the legislature's responsibility to correct its own language if it does not clearly say what they intended. Such reasoning would either indicate that courts later be afforded the opportunity to redraft opinions if they are 'wrongly' interpreted, or that subsequent courts should do so, which is precisely what petitioners are requesting.

> law allows for the temporary appointment of an emergency manager to right the ship. *An emergency manager's powers in pursuing this end are extensive and arguably displace all of those of the local governmental officials*. *Phillips v. Snyder*, 836 F.3d 707, 710 (6th Cir. 2016) (emphasis added).

Yet, in spite of this recognition that essentially all of the powers of the local government officials are given to the state appointed emergency manager, the court then goes on to state essentially the opposite in order to be able to argue the applicability of *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992). Specifically, the Sixth Circuit first notes that "*Presley* did contemplate that a '*de facto* replacement of an elective office with an appointive one' was not within its holding," *Phillips* at 721, citing *Presley* at 508. However, in the next sentence the court dismisses this concern by construing Petitioners' admission that the formerly empowered local officials "still retain some (although limited) powers under PA 436" to mean that "[petitioners] agree that there was no replacement of an elective office with an appointive one in this case." *Phillips* at 721. Even if this characterization were correct, it wholly ignores the point. This Court's statement in *Presley* that there may be facts warranting a finding that a transfer of power to an appointee would warrant the finding of a "*de facto*" replacement of a local official cannot be dismissed simply by proclaiming that there was no *literal* replacement. At the very least, Petitioners should have been afforded the opportunity to present evidence that PA 436 as applied constituted the

very sort of "*de facto* replacement" this Court foresaw and exempted from its holding in *Presley*.

Not only did the Sixth Circuit overextend its prior holding, the *Mixon* opinion itself placed an improper emphasis on the title held by a local government official and other semantic reasoning, while failing to pay proper attention to the reality of guaranteeing an individual's vote. At their core, neither the Voting Rights Act nor this Court's interpretation of it have ever been about a government official's title, nor do they really distinguish between elected officials and their appointees. The focus is and has been on the relationship between the power of a citizen's vote and the official who wields the power it confers.

Seen this way it is clear that the key to understanding *Presley*, and indeed the VRA as a whole, is this Court's finding as noted above, that the VRA does not apply to "Changes which affect only the *distribution of power among officials*." *Presley* at 506-507 (emphasis added). Thus, the power to make decisions that affect a city's roads stays local, whether made by an elected road commissioner, an elected road commission, or even by someone appointed by the city's Mayor. Nor does it necessarily matter whether individual commissioners are elected at large, or by (fairly drawn) districts. In each case, local powers remain in the hands of locally elected officials and appointees chosen by locally elected officials. The VRA does not distinguish between the right to vote for both a Mayor and a parks manager, or a Mayor who appoints someone to manage the parks. The VRA does not distinguish between

whether local officials are elected and directly accountable to the voter, or appointed by someone who is elected and directly accountable. What is critical to the power of the vote, however, is that it is what holds government officials accountable to the people they govern.

The Sixth Circuit's overstatement of its own judicial instruction "that § 2 of the VRA does not cover appointive systems" (*Phillips* at 720, citing *Mixon v. Ohio*, 93 F.3d 389, 407-408 (6th Cir. 1999)) is a reflection of the fact that there has not yet been a VRA case where the "appointive system" was not redistributing power "among" local officials. There is no precedent for redistributing power to the appointee of a higher and geographically much larger (majority-white) political entity. Cases like *Presley*, which rule only that different redistributions of power "among" local officials is outside the purview of the VRA, cannot be controlling when the decision making authority of locally elected officials is stripped and provided to government officials who are answerable only to the statewide electorate. Such a procedure literally dilutes the vote of the local residents affected.

When, as is the case here, the local residents whose votes are being diluted are disproportionately African American, and the local officials whose power is removed disproportionally represent majority-minority jurisdictions, the Voting Rights Act provides affected voters with the opportunity for a full judicial review on the merits.

## II. Vote Dilution Is Not A Side Effect Of PA 463, The Act's Very Purpose Is To Create A Process For Removing Local Residents' Right To Choose The Officials Who Will Make The Decisions That Affect Them.

The voters in cities like Flint had 100% of the local voting power until an emergency manager was appointed by the state. An emergency manager, like any appointee, is essentially accountable to a voting constituency of one, the appointer. In this case that is the Governor, who in turn is accountable to the entire state electorate. For Flint's 99,000 residents, this meant an emergency manager who was accountable to slightly over 9,923,000 Michiganders, roughly 99% of whom did not live in the community the appointee governed. PA 436 does not create the kind of vote dilution that may or may not be present when voting districts are gerrymandered. Here it is straightforward and unambiguous. PA 436 is a process that, in the words of the VRA, provides affected voters with "less opportunity than other members of the electorate to participate in the political process." 52 U.S.C. § 10301(b).

This is by design. The very concept and intent of having a state appointed emergency manager is to replace locally elected officials. PA 436 appears to be premised on some combination of two questionable assumptions. First, that locally elected officials need to be replaced because they must be responsible for creating (or at least allowing the conditions that created) the financial distress. And second, that the right of local voters to select local government decision makers

must be suspended lest they continue to choose the same 'kind' of officials that led to the financial distress. As we noted in the MCRC Report on the Flint water crisis:

> The present emergency manager law replaces local control, but also provides the replacing manager with special powers that local government did not have. This appears to be based upon an illogical assumption that, while the outside manager cannot succeed without the special powers, local government could not succeed even with them.
>
> An unelected appointee should not be brought in if there is a capable elected mayor to give the needed authority to, and special authority should not be given to an appointee automatically. Both steps may be necessary, but the necessity needs to be established separately, not assumed. MCRC Report at 123.

Indeed, if locally elected officials were appointed, or given the same extra powers and authority as the state appointed emergency manager, there would be no VRA implications.

To be clear, "[t]he Commission recognizes that some 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." MCRC Report at 122. We are not disputing that PA 436 is a well-intentioned attempt to do so, and we are not suggesting that it was designed with racial animus or overt intent to dilute the votes of African Americans in particular. That, however, has been the result. This Court

has long made it clear that when amending the VRA in 1982, Congress expressly directed a determination of whether Section 2 was violated was to be based on a "results test," without requiring any showing of intent. *See, e.g., Holder* at 923-924.[5]

And PA 436's results have indeed been disparate. As noted in the MCRC Report, "If you live in Michigan, there is a 10% chance that you have lived under emergency management since 2009. But if you are a black Michigander, the odds are 50/50."[6] MCRC Report at 109.

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[5] "As the Court concluded in *Gingles*, the 1982 amendments incorporated into the Act, and specifically into § 2(b), a 'results test' for measuring violations of § 2(a). That test was intended to replace, for § 2 purposes, the 'intent test' the Court had announced in *Bolden* for voting rights claims under § 2 of the Voting Rights Act and under the Fourteenth and Fifteenth Amendments. Section 2(a) thus prohibits certain state actions that may 'resul[t] in a denial or abridgement' of the right to vote, and § 2(b) incorporates virtually the exact language of the 'results test' employed by the Court in *White v. Regester*, and applied in constitutional voting rights cases before our decision in *Bolden*. The section directs courts to consider whether 'based on the totality of circumstances,' a state practice results in members of a minority group 'hav[ing] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *Holder v. Hall*, 512 U.S. 874, 923-924 (1994) (concurring opinion by Thomas) (citations omitted).

[6] 9.7% of all Michiganders, 49.8% of African Americans. *See*, *e.g.*, Richard C. Sadler and Andrew R. Highsmith, *Rethinking Tiebout: The Contribution of Political Fragmentation and Racial/ Economic Segregation to the Flint Water Crisis*, Environmental Justice (2016) at 7.

It will no doubt be argued that PA 436 can withstand judicial review because the State can show that it is a necessary process that cannot be effectively structured in a way that is more in keeping with Section 2. We take no position on this ultimate question. Like Petitioners, the State should have the opportunity to present its case in District Court where it can be considered on the merits.

Similarly, it might be argued that Petitioners must meet the three *Gingle* conditions applied to redistricting cases involving vote dilution claims.[7] We would argue that because PA 436 is designed to dilute votes, the test is inapplicable, but even if it is applied, a simple comparison of the officeholders elected in Flint to those elected statewide should show each of the requirements can be met. More to the point, this too is a question that should be addressed on remand, as it should be answered based on a record established by the parties.

## III. The Very Real Effects Of Vote Dilution In Flint.

The Michigan Civil Rights Commission submits that its experience holding public hearings during

[7] "[A] plaintiff must prove three threshold conditions: first, 'that [the minority group] is sufficiently large and geographically compact to constitute a majority in a single-member district'; second, 'that it is politically cohesive'; and third, 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.'" *Growe v. Emison*, 507 U.S. 25, 40 (1993), citing *Gingles*, at 50-51.

2016 to take testimony from the people of Flint, Michigan as well as experts in various areas of concern, including emergency management, provided it with a unique perspective of the consequences when local voters, particularly those living in a majority-minority community, have the power of their vote taken away. MCRC documented these findings in the report, *THE FLINT WATER CRISIS: Systemic Racism Through the Lens of Flint.*[8]

MCRC did not find that the lead contamination was intentional, or that it was caused by racists. We found that irrespective of whether the immediate crisis "involved bad actors, race-based decisions, criminal neglect, government negligence, or simply a lack of empathy for 'the other,'" Flint's history made it "abundantly clear that race played a major role in developing the policies and causing the events that turned Flint into a decaying and largely abandoned urban center, a place where a crisis like [lead in the public water system] was all but inevitable." *Id*. at 114. The MCRC Report concludes that the root of Flint's crisis was not the overt (intentional) acts of discrimination of the past, but systemic racism that permits decision makers to produce and reproduce disparate outcomes without taking steps to address them.

The overt racism of the past and the systemic racism of the present are certainly relevant to the totality

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[8] Available at: http://www.michigan.gov/documents/mdcr/VFlint CrisisRep-F-Edited3-13-17_554317_7.pdf.

of the circumstances language of Section 2 (discussed in more detail by Petitioners) that this Court has indicated includes "the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process." *Gingles*, at 44-45.[9]

The full picture of how implementing the PA 436 process has abridged the rights of the majority-minority voters in Flint, by denying them an equal opportunity to participate in the legal process, is best

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[9] Citing S. Rep. No. 97-417, 97th Cong. 2nd Sess. 28 (1982), U.S. Code Cong. & Admin. News 1982, pp. 177, 205, the Court stated: "[T]he Senate Report specifies factors which typically may be relevant to a § 2 claim: the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or 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; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. [Senate Report 28-29.] The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous may have probative value." *Id*., at 29.

illustrated when MCRC's long view of history is superimposed with the timelines included in two other reports on the Flint water crises: The Governor's *Flint Water Advisory Task Force Final Report*[10] (March 21, 2016) (GTF Report), and the legislature's *Report of the Joint Select Committee on the Flint Water Emergency* (October 19, 2016) (JSC Report).[11]

The Select Committee's report includes a timeline of "Key Response Events" that begins September 2, 2015 with a report by a Virginia Tech Professor[12] indicating that water being pumped from the Flint River is causing lead to leach into resident's water.[13] The first indication of a state response is the October 2, 2015 announcement of an action plan that includes providing bottled water to Flint residents.

The Governor's Task Force begins with a "Summary Timeline of Key Events."[14] The timeline notes that Flint's emergency manager made the decision to switch the city's water supply from Detroit to the still under development Karegnondi Water Authority in April 2013. That decision was then followed by the

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[10] Available at: https://www.michigan.gov/documents/snyder/FWATF_FINAL_REPORT_21March2016_517805_7.pdf.

[11] Available at: https://misenategopcdn.s3.amazonaws.com/99/publications/Final%20Report%20of%20the%20Joint%20Select%20Committee.pdf.

[12] Not only is this not a "response" by the state, the Michigan Department of Environmental Quality disputed the professor's test results and conclusions. GTF Report at Appendix X, p. 16.

[13] JSC Report at 8.

[14] GTF Report at 16.

emergency manager's June 2013 decision to use the Flint River as an interim water supply. In spite of expressed concerns about the use of the Flint River, the switch was completed in April 2014,[15] the Timeline Summary of Key Events continues until the city stopped using the Flint River and returned to water supplied by Detroit on October 16, 2015. The timeline includes roughly 40 dates, between April 2014 and October 2015, on which there were either public or internal events questioning the use of Flint River water and the health of those who drank it.[16]

The Legislature's JSC Report timeline thus picks up where the GTF Report ends, with the former describing events that preceded the beginning of the state's response to problems created by the decisions of the emergency manager it appointed to run Flint. Flint's residents were not silent during these 18 months, they were just unheard. Immediately after the switch, people complained about the water quality. The complaints could not easily have been dismissed as imaginary – the water physically looked, tasted and smelled foul.

At our hearings, Flint residents told us: "And all of these people out here, they stood outside and told City Hall, the water is bad, it's discolored, it's repulsive, it smells." "We have been under siege for two years. And for well over a year we were screaming, and nobody

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[15] *See, e.g.*, GTF Report at 17.

[16] The vast majority of the 150 events on the detailed timeline similarly should have raised concerns.

listened." "I drove people to Lansing (the capitol) on a regular basis, way before it even came out in the media, we were crying about the water." MCRC Report at 113.

The residents of Flint raised objections to many of the decisions that resulted in them being poisoned. They even took to the streets in protest. They carried plastic bottles of visibly discolored water to local meetings and the state capitol. At one point Michigan's Flint State Office Building even provided water coolers and bottled water to state employees. And yet nothing was done for the residents. Even after some tests showed there was a problem, state decision makers questioned the tests, not the water.

Events that should have served as warnings during this period included: boil water advisories due to E. Coli bacteria, increased cases of legionella, and tests showing high lead levels.[17] On October 13, 2014, roughly six months after the city's switch to the Flint River and one full year before the state would begin providing bottled water to voters in Flint, General Motors announced it would no longer use water supplied by the city because it was too corrosive to use in automobile manufacturing.

On March 23, 2015, Flint's City Council voted to return to water supplied by Detroit and stop using the Flint River. The vote had no effect because only the emergency manager had the power to make decisions

[17] GTF Report at 17.

for the city. Another six-months would pass before the switch was made.

The period of time between switching to the Flint River as a source for Flint's drinking water in April of 2014, and switching back in October of 2015, is a vivid example of what can happen when the powers of the locally elected political leadership of a majority-minority city is stripped away and given to someone appointed by and answerable to leadership elected statewide. The votes of residents were not only diluted; their voices went unheard. What may appear complicated as a matter of legal theory becomes very clear when looked at through the eyes of Flint's residents.

What is perhaps the most striking about the three separate reports on the Flint water crisis issued by this Commission, the Legislature's Select Committee, and the Governor's Task Force is the similarity of their conclusions with respect to PA 436. Each finds that the emergency managers' lack of accountability to local voters played a significant role in creating, exacerbating, and prolonging the crisis.

While none of these conclusions was made specifically in reference to § 2 or the VRA, they certainly read as though they could have been:

> The Joint Select Committee found:
>
> "[T]he legislature should consider alternatives to the emergency manager option that allow for more community input and better motivated decision-making." JSC Report at 30.

"Citizens have a right to petition their government for redress of grievances and this right must be preserved even when the government is under emergency management. Unfortunately, PA 436 leaves little to no formal opportunity for the public to comment directly to the emergency manager, particularly before he or she makes key policy decisions. While an elected city council and mayor remain in place during emergency management to act as a conduit of public opinion, the ultimate *decision making authority generally lies with the emergency manager*. If the elected officials do not have a good relationship with the manager, the voice of the public may never reach the person who is actually making the decisions that affect them." *Id*. at 31.

The Committee record reflects that this lack of communication with residents was a problem during the Flint crisis. *Id*.

The Governor's Task Force held:

"The role of the emergency manager (EM) under the Emergency Manager Law, PA 436, is clear and unambiguous. Though they report directly to the Department of Treasury, EMs have complete authority and control over municipal decisions." GTF Report at 39.

"The Flint water crisis occurred when state-appointed emergency managers replaced local representative decision making in Flint, removing the checks and balances and public accountability that come with public decision-making. Emergency managers made key

decisions that contributed to the crisis, from the use of the Flint River to delays in reconnecting to DWSD once water quality problems were encountered. Given the demographics of Flint, the implications for environmental injustice cannot be ignored or dismissed." *Id*. at 1.

"We cannot begin to explain and learn from these events – our charge – without also highlighting that the framework for this decision-making was Michigan's Emergency Manager Law. This law replaces the decision-making authority of locally elected officials with that of a state-appointed emergency manager." *Id*. at 2.

" . . . Flint residents, who are majority Black or African American and among the most impoverished of any metropolitan area in the United States, did not enjoy the same degree of protection from environmental and health hazards as that provided to other communities. Moreover, by virtue of their being subject to emergency management, Flint residents were not provided equal access to, and meaningful involvement in, the government decision-making process." *Id*. at 54.

Thus we concluded:

"Presently the biggest difference between a local government official and an emergency manager is that the emergency manager does not have the residents' interests as its first priority." MCRC Report at 111.

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## CONCLUSION

There was one constant in the testimony we heard from both Flint citizens and experts. The chair of the Governor's Flint Water Advisory Task Force, Ken Sikkema, put it this way:

> There was this question that everybody was asking, and that was; "Hey, if this had happened in an upscale, white community, like (frankly) where I live, would this have happened?" I mean everybody on the street was asking that question, and by asking the same question, everybody had the same answer. The answer was "no, it probably wouldn't have." MCRC Report at 13.[18]

While our experience in Flint has shaped our perspective and is the focus of much of this brief, the Commission stresses that the vote dilution, voter disenfranchisement, and lack of accountability witnessed is not unique to Flint, only the extent of the harm caused is. We have recommended, and continue to recommend, that Michigan's emergency manager law be amended in ways that will more effectively involve residents in *their* political process to better address the causes of financial distress. *See, e.g.*, MCRC Report at 122-124. We submit this brief in support of Petitioners in this case because we believe Petitioners' voices, and the voices of many other residents facing similar situations, should be heard. They were, and they remain,

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[18] Citing testimony of Hearing 3, session 2 at 54:44.

entitled to have their claim that PA 436 violates Section 2 of the Voting Rights Act heard and reviewed on the merits of the facts they present.

The Petition for a Writ of Certiorari in this case should be granted.

Respectfully submitted,

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