UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOEL Q. HACK, an individual, and
WREN BEAULIEU-HACK, an individual,

Plaintiffs,

v

Case No.: 2:18-cv-13330
Hon. Marianne O. Battani

THE CHARTER TOWNSHIP OF MILFORD, a Michigan municipal corporation, **TOWNSHIP OF MILFORD BOARD**, a public body, **DONALD D. GREEN**, in his personal capacity and in his official capacity as Supervisor of Milford Township, and **TIMOTHY C. BRANDT**, in his personal capacity and in his official capacity as Building and Zoning Administrator of Milford Township,

Defendants.

PLAINTIFFS' EMERGENCY MOTION TO REMAND COUNTS I, II, III, AND IV, AND INCORPORATED BRIEF IN SUPPORT

Plaintiffs Joel Q. Hack and Wren Beaulieu-Hack (the "Hacks"), through counsel, Maddin, Hauser, Heller & Roth, P.C., file their emergency motion to remand Counts I, II, III, and IV of their five-count complaint—involving declaratory and injunctive relief relating to Milford Township ordinances, and claims under the Michigan Constitution—because those claims predominate and because of the risk of jury confusion in applying the differing state and federal law relating to liability, defenses, and damages. In further support, Plaintiffs refer to their incorporated brief and state as follows:

1. The Hacks are a Jewish couple who recently moved to Milford and who seek to complete construction of their residential driveway.

2. In December of 2017, Defendant The Charter Township Of Milford ("Milford")—through its building administrator, Defendant Timothy C. Brandt—approved the building plans (including the driveway), but Defendants later did an about-face in June of 2018, issued a cease and desist letter, and required the Hacks to submit additional paperwork before proceeding further.

3. The Hacks took what appeared to be the path of least resistance and complied with Milford's late demand—despite there being no requirement to do so under Milford's ordinances.

4. On August 24, 2018, Milford's own engineer approved the Hacks' submitted driveway plan.

5. Afterward, Defendant Donald D. Green, Milford's Supervisor, intervened for unexplained reasons, leading Milford's Board to "table" review of its own engineer's approval.

6. Defendants spent multiple months dragging out the above process, refusing to indicate when a final decision would be made.

7. On October 17, 2018, the Hacks filed their Verified Complaint and Jury Demand against the above-captioned Defendants in the Oakland County

Circuit Court, the Hon. Martha D. Anderson presiding. A copy of the Verified Complaint is attached as **Exhibit 1**.

8. Concurrent with the Hacks filing their Verified Complaint, the Hacks also filed an Emergency Motion and Incorporated Brief for Preliminary Injunction, Speedy Hearing Pursuant to MCR 2.605(D), and Issuance of an Order Requiring Defendants to Show Cause as to Why a Preliminary Injunction and Declaratory Judgment Should Not Issue ("Injunction and Declaratory Relief Motion"). A copy of the Injunction Motion is attached as **Exhibit 2**.

9. The Hacks filed Injunction and Declaratory Relief Motion because they are effectively cut off from their own home due not only to the lack of a driveway (the home sits 300 feet back) but by the substantial water that sits on the rough and muddy path between the County Roads and their home, obstructing egress and ingress and creating safety hazards.

10. Further, Defendants had already unduly delayed construction for approximately half-a-year, and the winter months were setting in, requiring immediate action.

11. On the same day the Hacks initiated their lawsuit, the Hon. Martha D. Anderson entered a Show Cause Order, attached as **Exhibit 3**, ordering Defendants to appear on October 31, 2018 to, *inter alia*, show cause "why a preliminary

injunction should not be issued enjoining Defendants from interfering with Plaintiffs' construction of a driveway." **Ex. B** at ¶ 1.

12. The Verified Complaint contains five counts:

a. Count I, Action for Declaratory Relief and Judgment, requesting a declaration that Plaintiffs' proposed construction of a driveway complies with Milford Township's ordinances and a declaration that Milford was not authorized to impose certain requirements after previously authorizing the driveway. **Ex. 1** at ¶¶ 84–91.

b. Count II, Injunctive Relief, requesting the Court to restrain and enjoin Defendants from further interfering with Plaintiffs' construction of a driveway to connection Plaintiffs' [home] to the County Roads, including Defendants denying emergency vehicles and Plaintiffs ingress and egress to the Residential Property." **Ex. 1** at ¶¶ 92–96.

c. Count III, Inverse Condemnation under both Michigan and the United States' Constitutions, based on Defendants' unlawful and unauthorized interference with Plaintiffs' construction of a driveway constituting a taking. **Ex. 1** at ¶¶ 97–108.

d. Count IV, Violation of Due Process, under both Michigan and the United States' Constitutions, based on Defendants' intentional and unauthorized interference with Plaintiffs' procedural and substantive due process rights **Ex. 1** at ¶¶ 109–116.

e. Count V, Violation of 42 U.S.C. §§ 1983 and 1988 based on Defendants' discriminatory and unlawful interference with Plaintiffs' property rights, acting under color of state law. **Ex. 1** at ¶¶ 117–122.

13. On October 24, 2018, Defendants' removed the action to this Court exclusively based on federal question jurisdiction pursuant to 28 U.S.C. § 1331 and

requested that the Court exercise its supplemental jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367(a).

14. Pursuant to 28 U.S.C. § 1367(c), the Court should decline to exercise supplemental jurisdiction over Plaintiffs' four state law claims (Counts I through IV) for two separate reasons:

a. First, Plaintiffs' state claims predominate this action from both a factual and a legal standpoint: as indicated by Plaintiffs' attached Injunction and Declaratory Relief Motion, Plaintiffs' primary redress is a court order declaring Plaintiffs within their right—under Milford ordinances—to construct a driveway, and a companion order enjoining Defendants from further interfering with construction of that driveway. *See* Counts I and II of Plaintiffs' Verified Complaint. Indeed, Milford Plaintiffs simply seek to construct pursuant to the previously-approved and –issued building permit. The related claims involve exclusively state law, specifically the interpretation and application of Milford's ordinances. Plaintiffs' remaining claims are tangential and merely address the *why* behind Defendants' arbitrary and selective exercise of power under color of state law, and the various theories of relief in

connection therewith. The facts involving the "why" behind Milford's selective enforcement are completely separate and independent from the primary question of whether the Hacks' are permitted to build the driveway under Milford's ordinances. As such, Plaintiffs' state law claims, factually and legally, "substantially predominate[] over the claim or claims over which the district court has original jurisdiction."

b. Second, there are compelling reasons to decline supplemental jurisdiction, including jury confusion and comity considerations. Plaintiffs have pled claims under both the U.S. and Michigan Constitution. This Court has previously recognized that there is "great" risk of jury confusion in differentiating the liability standards (including vicarious liability), available defenses (immunity), and recoverable damages under Michigan and federal claims; "it would be very difficult for a jury to keep them straight." *Padilla v. City of Saginaw*, 867 F. Supp. 1309, 1315 (E.D. Mich. 1994). Indeed, the U.S. Supreme Court held that jury confusion constitutes "exceptional circumstances" warranting declination of supplemental jurisdiction pursuant to 28 U.S.C. § 1367(c)(4).

United Mine Workers v. Gibbs, 383 U.S. 715; 86 S. Ct. 1130 (1966).

15. As such, the very principles animating supplemental jurisdiction—expedience, judicial economy, and convenience—are undercut in this situation.

16. Indeed, this Court has held that "because federal and state law each have a different focus," the "courts and counsel become unduly preoccupied with **substantive and procedural problems** in reconciling the two bodies of law and providing a fair and meaningful proceeding." *Broad, Vogt & Conant, Inc. v. Alsthom Automation, Inc.*, 186 F. Supp. 2d 787, 791 (E.D. Mich. 2002) (remanding state law claims and retaining federal claims) (emphasis supplied).

17. Thus, given these practical problems, "in many cases the apparent judicial economy and convenience to the parties of entertaining supplemental state claims is offset by the problems those claims create." *Id.*

18. The above issues strongly suggest that Court should exercise its discretion by declining supplemental jurisdiction over Counts I, II, III, and IV, and remand the same to the Oakland County Circuit Court for further proceedings.[1]

[1] Counts III and IV advance the same legal theories but under different Constitutions and law: the Michigan and the U.S. Constitutions. Plaintiffs believe it is appropriate and indeed mandatory for this Court to retain jurisdiction over the federal portions of Counts III and IV, but that the Court should remand the state law portions of Counts III and IV. While Plaintiffs believe it unnecessary to amend the Complaint to formally separate these claims, Plaintiffs will do so if the Court concludes this will create better clarity for purposes of remand.

19. The emergency basis for this Motion is set forth in both the Verified Complaint and the Injunction and Declaratory Relief Motion, wherein the attached pictures and affidavit demonstrate that the Hacks and their home have been effectively cut off from the main roads due to Defendants' refusal to allow a driveway. As winter sets in and the ground hardens, construction of the driveway becomes more problematic.

20. The Oakland County Circuit Court recognized these problems and accordingly scheduled the Show Cause Hearing for October 31, 2018, which was delayed both by this removal and Defendants' engineer, through counsel, indicating afterward that a mutually-acceptable plan had been reached—that turned out to be false, necessitating further litigation and the instant Motion.

21. Concurrence in the relief sought by this Motion was sought and expressly denied by Defendants' counsel.

ACCORDINGLY, Plaintiffs Joel Q. Hack and Wren Beaulieu-Hack respectfully request that this Court enter an order that:

A. Remands Counts I and II;

B. Remands the state portions of Counts III and IV;

C. Retains jurisdiction over the federal portions of Counts III and IV;

D. Retains jurisdiction over Count V; and

E. Grants any other relief that this Court deems just.

Respectfully submitted,

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Dated: November 23, 2018

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOEL Q. HACK, an individual, and
WREN BEAULIEU-HACK, an individual,

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THE CHARTER TOWNSHIP OF MILFORD, a Michigan municipal corporation, **TOWNSHIP OF MILFORD BOARD**, a public body, **DONALD D. GREEN**, in his personal capacity and in his official capacity as Supervisor of Milford Township, and **TIMOTHY C. BRANDT**, in his personal capacity and in his official capacity as Building and Zoning Administrator of Milford Township,

Defendants.

PLAINTIFFS' BRIEF IN SUPPORT OF EMERGENCY MOTION TO REMAND COUNTS I, II, III, AND IV

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QUESTION PRESENTED

Counts I, II, III, and IV of Plaintiffs' five-count Verified Complaint contain state law claims. Should the Court decline to exercise supplemental jurisdiction over Counts I, II, III, and IV and remand them to Oakland County Circuit Court for further proceedings, while retaining jurisdiction over the remaining federal claims?

Plaintiffs answer: Yes

Defendants answer: No

CONTROLLING OR MOST APPROPRIATE AUTHORITY

28 U.S.C. §§ 1367(c)(2) and (c)(4)

United Mine Workers v. Gibbs, 383 U.S. 715; 86 S. Ct. 1130 (1966)

Padilla v. City of Saginaw, 867 F. Supp. 1309 (E.D. Mich. 1994)

Broad, Vogt & Conant, Inc. v. Alsthom Automation, Inc., 186 F. Supp. 2d 787 (E.D. Mich. 2002)

PERTINENT FACTUAL AND PROCEDURAL HISTORY

A. Plaintiffs' acquisition and improvement of the Subject Property, including Milford issuance of the Building Permit.

On June 13, 2016, Plaintiffs Joel Q. Hack and Wren Beaulieu-Hack (the "Hacks") purchased a vacant 3.15-acre parcel of land located in the Charter Township of Milford and commonly known as 2610 Pearson Road, Milford Township, Michigan, 48380 (the "Residential Property") for $75,000. **Ex. 1** at ¶¶ 11 and 12. The Residential Property had previously been vacant and unimproved. *Id.* at ¶ 13.

Plaintiffs retained EBI, Inc. ("EBI") and its owner, William Rogers, to construct a single-family detached residential home on the Residential Property and to obtain all necessary permits and approvals to do so. **Ex. 1** at ¶ 14. The initial contract price to construct the home was $330,000.00. *Id.* at ¶ 15.

In November of 2017, EBI, in compliance with Milford's ordinances, submitted to the Milford Building Department Plaintiffs' application for a single-family detached residence, and accessory buildings, structures, and uses thereto, including a home, garage, driveway, septic system, and other elements incidental to a single-family detached home. **Ex. 1** at ¶ 17. Plaintiffs' application included building plans ("Building Plans"). *Id.*

The Building Plans identified the scope of the proposed improvements, including, among other things, the following construction elements:

a. A single-family, detached residential home, with a new basement and garage;

b. A driveway—10–12 feet wide and 380 feet long—connecting the residential home to the County Roads; and

c. A septic system, as required by state law.

On November 13, 2017, Milford's Building Department approved Plaintiffs' new residence building permit application and issued new residence building permit number PB170265, which expired November 13, 2018 (the "Building Permit") after Defendants interfered with Plaintiffs'. **Ex. 2** at Exhibit C. EBI and Mr. Rogers also obtained other necessary permits incidental to construction of a new residential home, including applying for, and obtaining, a Residential Driveway Permit from the Oakland County Road Commission and an Onsite Sewage Disposal System (Septic System) Permit from the Oakland County Health Division; Oakland County issued the above permits without any issues.

B. Milford begins imposing extrajudicial requirements for construction of the driveway after Supervisor Green's neighbor contacts Milford to complain.

After EBI completed construction of the home on the Residential Property, EBI proceeded with construction of the driveway as set forth in the Building Plans and as authorized by the Building Permit. During this time, the Supervisor of Milford, Defendant Donald Green, contacted Plaintiffs and Mr. Rogers and notified them that Plaintiffs' neighbor was complaining about the construction of

Plaintiffs' home. Supervisor Green is a long-time friend of Plaintiffs' complaining neighbor and after his complaints, Supervisor Green became intimately involved in Plaintiffs' construction project.

Shortly after Supervisor Green's direct involvement, on June 13, 2018, Milford's Building Administrator, Defendant Timothy Brandt, sent a cease and desist letter to EBI, claiming that "[t]he filling and grading activity taking place on the [Residential Property] requires review, approval, and permitting from this office." A copy of the June 13, 2018 letter (with notations added) is attached as **Ex. 2** at Exhibit C. The June 13 letter directed Plaintiffs to complete and submit an application "with engineered grading plans," "to be reviewed by the consulting engineers for the Township and approved by [Milford's] Board of Trustees." *Id.* However, all construction on the Residential Property strictly included construction pursuant to the approved Building Plans and Building Permit, including construction of the aforementioned driveway.

Plaintiffs and their agents discussed the June 13 letter and driveway construction with Milford's agents, including Building Administrator Brandt and Supervisor Green, and were informed that Milford was allegedly concerned with "drainage" of water from the Residential Property to the property of the aforementioned complaining neighbor.

Plaintiffs retained the registered engineering firm, Boss Engineering, to

conduct a topographical and grading survey of the Residential Property and property border adjoining the complaining neighbor's land (the "Topographical/Grading Survey"). A copy of the Topographical/Grading Survey is attached to **Ex. 2** at Exhibit D**.**

On August 14, 2018, Boss Engineering completed the Topographical / Grading Survey, which confirmed what a visual inspection readily revealed: the complaining neighbor's land sits **higher than** Plaintiffs' Residential Property for the entire length of the construction area.

The Topographical / Grading Survey definitively demonstrated that the complaining neighbor's complaints were unfounded and, on August 24, 2018, Milford's own engineering firm—Hubbell, Roth & Clark, Inc. ("HRC")—issued a letter **approving** the Topographical/Grading Plan. A copy of the August 24 Letter is attached to **Ex. 2** at Exhibit E.

After the September 19 Milford Board Meeting, Defendants, without a public hearing or meeting, **directed HRC to revise its August 24 Letter** and demand additional requirements, thus preventing Plaintiffs from constructing the driveway previously reviewed and approved by the Building Department and Defendant Brandt pursuant to the Building Permit. Accordingly, HRC provided Plaintiffs with a letter dated October 8, 2018. A copy of the October 8, 2018 letter is attached to **Ex. 2** at Exhibit G.

In the October 8 letter, HRC candidly admits that it "was directed by Milford Township to **re-review** the proposed fill and grading plans submitted" by Plaintiffs. **Ex. 2** at Exhibit G, *October 8, 2018 HRC Letter* (emphasis added). HRC writes in its October 8 letter that "it appears that certain pre-development conditions **may have been different** than originally presented by the applicant." *Id.* (emphasis added). But HRC provides no factual specificity.

In its October 8, 2018 letter, HRC added multiple conditions before Plaintiffs be allowed to build a simple driveway, including:

a. A drainage area map **showing the area's entire tributary system**;

b. Determine the retention volume created by a 10-year storm;

c. Calculate the preconstruction area of the low spot that contained this volume;

d. Improve an unspecified amount of swales (ditches); and

e. Provide other related calculations.

Ex. 2 at Exhibit G, *October 8, 2018 HRC Letter*.

C. Procedural posture.

On October 17, 2018, the Hacks filed their Verified Complaint and Jury Demand against the above-captioned Defendants in the Oakland County Circuit Court, the Hon. Martha D. Anderson presiding. **Ex. 1**.

The Hacks concurrently filed an Emergency Motion and Incorporated Brief for Preliminary Injunction, Speedy Hearing Pursuant to MCR 2.605(D), and Issuance of an Order Requiring Defendants to Show Cause as to Why a Preliminary Injunction and Declaratory Judgment Should Not Issue ("Injunction and Declaratory Relief Motion"). **Ex. 2**.

On the same day, Judge Anderson issued a Show Cause Order. **Ex. 3**. The Show Cause hearing was scheduled for October 31, 2018, but on October 24, 2018, Defendants removed the state court action to this Court.

On November 14, 2018, Plaintiffs' undersigned counsel met at the Hack residence with Milford's counsel, as well as the parties' respective engineers, based on the representation that Milford's engineer had come to an agreement on the Hacks' proposed plan. However, it was clear during the November 14 meeting that Milford's engineer was taking direction from Milford's counsel and was not prepared to give any opinion on the Hacks' plan, instead cryptically stating that he would need to meet with "Township officials" at some undefined period of time in the future. This misrepresentation led to further delay, including the filing of this motion to remand.

To date, Plaintiffs' Residential Property remains under significant amounts of water (now routinely freezing), which blocks ingress and egress for Plaintiffs and visitors, and presented a safety risk in the event emergency vehicles needed to

access the property and home. **Ex. 1** at ¶ 65. Further, light trucks and SUVs can only get through the water due to gravel that was initially placed on the location for the driveway. *Id.* at ¶ 63. With each passing day, the gravel is washed away by water and use, making passage increasingly difficult and risky. *Id.* at ¶ 64.

ARGUMENT

A. The standard for motions to remand.

In reviewing a motion to remand, courts heed the limited scope of the federal jurisdictional statutes and the overriding constitutional limits to federal district court jurisdiction. *Her Majesty the Queen of Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 339 (6th Cir. 1989). Therefore, courts construe removal statutes narrowly, resolving uncertainties in favor of remand. *Id.*

B. Pursuant to 28 U.S.C. § 1367(c)(2), a District Court may decline to exercise supplemental jurisdiction over a claim where "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction." Here, Plaintiffs' claims predominate where Counts I, II, III, and IV contain state law claims involving Milford's ordinances and the Michigan Constitution and the core of this case involves interpretation and application of state law.

Section § 1367(c)(2) expressly allows this Court to decline supplemental jurisdiction where the state claims "predominate." "If it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals."

United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726–27; 86 S. Ct. 1130 (1966). The United States Supreme Court has also recommended that district courts examine "the circumstances of the particular case, the nature of the state law claims, the character of the governing state law, and the relationship between the state and federal claims." *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 173, 118 S. Ct. 523, 534, 139 L. Ed. 2d 525 (1997).

Applying these principles, this Court routinely declines to exercise supplemental jurisdiction. *See, e.g., Battle v. Park Geriatric Vill. Nursing Facility*, 948 F. Supp. 33, 35 (E.D. Mich. 1996) (holding that state law claims predominate and remanding 10 of 14 claims).

Here, four of the five counts contain state law claims (I, II, III, and IV) and three counts contain federal claims (III, IV, and V). Perhaps more importantly, the gravamen of this case is a legal question applied to the factual circumstances of the Hacks' residential driveway: is Milford authorized under its ordinances to halt construction of the Hacks' residential driveway and, if so, is Milford prevented from doing so where Milford previously issued a building permit authorizing construction of the driveway? Put differently, the character of Plaintiffs' complaint involves land use law and Milford's authority, or lack thereof, to interfere with Plaintiffs' use of its land.

Plaintiffs' federal claims, while related to land use, are attenuated, requiring Plaintiffs to prove different elements and involving completely different questions. The federal claims principally address the unlawful motivations that led to the following:

1. Defendant Green and the Milford Board's decision to direct that a cease and desist letter be sent to the Hacks six months after issuance of the Hacks' building permit; and
2. Afterward, Defendant Green and the Milford Board ignoring, and then slow-pedaling review of, its own engineer's recommendation that Milford approve the Hacks' driveway.

Proving these unlawful motivations involve completely different kinds of proof and witnesses, including review and approval of other building permit applications involving driveways in Milford and the process Defendants followed (which would otherwise be irrelevant to the Hacks' specific project).

In contrast, Milford will surely attempt to defend against the state law claims by referring to the specifics of the Hacks' driveway project and how it allegedly implicates Milford ordinances, justifying Milford's interference. Defendants' motivations have nothing to do with that analysis. Indeed, Plaintiffs were able to advance their Motion for Injunction and Declaratory Relief because it involves applying Milford's ordinances to largely uncontested facts relating to the Hacks'

driveway project. Conversely, the Hacks must conduct discovery to flesh out their federal claims through discovery, demonstrating the distinct nature of the Hacks' federal claims.

C. Pursuant to 28 U.S.C. § 1367(c)(4), a District Court may decline to exercise supplemental jurisdiction over a state claim where, "in exceptional circumstances, there are other compelling reasons for declining jurisdiction." Exceptional circumstances exist here.

This Court recognizes that jury confusion is compelling reason for declining supplemental jurisdiction. *Padilla v. City of Saginaw*, 867 F. Supp. 1309, 1315 (E.D. Mich. 1994).

Counts III and IV of Plaintiffs' Verified Complaint involve Michigan constitutional claims and their federal analogues. However, the state and federal law widely differs on issues of liability, available defenses, and liability, which this Court recognizes poses a "great" risk of jury confusion. *Id.*

Principles of comity, particularly as it relates to constitutional law, constitute a separate compelling reason this Court should decline to exercise supplemental jurisdiction.

1. The Court should not hear the state claims due to jury confusion.

"One example of this exceptional circumstances under 28 U.S.C. § 1367(c)(4) might be the possibility of jury confusion. . . ." *Padilla*, 867 F. Supp. 1309, 1315 (E.D. Mich. 1994) (citing *Gibbs* and Wright, Miller & Cooper, *Federal Practice & Procedure*).

The *Padilla* case is instructive in the present circumstances. *Padilla* involved both state and federal claims, including "violation of Michigan and federal civil rights" against the City of Saginaw and certain Saginaw agents. *Padilla*, 867 F. Supp at 1311. The plaintiff in *Padilla* filed a motion to remand the entire case. *Id.* The Hon. Robert Cleland refused to remand some counts, but agreed that many counts, including "the Michigan constitutional claims," should be remanded based on the "great" risk of jury confusion. *Padilla*, 867 F. Supp at 1317.

Judge Cleland noted that "[t]he state claims and federal claims have different legal standards, rules of vicarious liability and immunity, and recoverable damages, and it would be very difficult for a jury to keep them straight." *City of Saginaw*, 867 F. Supp. 1309, 1315 (E.D. Mich. 1994).

Specifically, there were three substantive differences between the state and federal law that would be confusing for the jury:

1. *Michigan and federal laws of immunity differ*. Immunity under federal law turns on the objective reasonableness of the officials' actions, *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), and municipalities do not receive the benefit of any such immunity. *See Owen v. City of Independence*, 445 U.S. 622, 638, 100 S. Ct. 1398, 1409, 63 L.Ed. 2d 673 (1980). In Michigan,

however, immunity for board members and municipal agents is set forth in Michigan's Governmental Tort Liability Act, MCL 691.1401, *et seq.*, and provides varying levels of immunity based on different tests for different municipal agents.

2. *Recoverable damages are different under Michigan and federal law for Plaintiffs' types of claims*. For example, under federal law, a § 1983 plaintiff may recover punitive damages against individual defendants but not against municipalities. *City of Newport v. Fact Concerts, Inc.* 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981). Under state law, a plaintiff ordinarily may not recover punitive damages at all. *Padilla*, 867 F. Supp. at 1316. Judge Cleland noted that "[i]t would undoubtedly be difficult for jurors to segregate mentally the state claims from the federal claims and award appropriate damages; they might be tempted to award damages not recoverable under state law on theories not actionable under federal law." *Id.*

In this case, Plaintiffs are suing two Milford officials, as well as the entire Milford Board. Just as in *Padilla*, *supra*, the Milford Defendants have invoked governmental immunity and qualified immunity as affirmative defenses. ECF No. 5, Page ID 151 at ¶¶ 4, 12. Defendants have also cited Michigan's Governmental

Tort Liability Act, MCL 691.1401, *et seq.* to bar Plaintiffs' claims against Milford's agents and employees. *Id.* at ¶¶ 8, 11.

As to damages, Defendants have raised the following as an affirmative defense: "Plaintiffs' claim for money damages for alleged violations of the Michigan Constitution's procedural and substantive due process guarantees do not state a claim as a matter of law because there is no damage remedy provided by the Michigan Constitution. *Jones v Powell*, 462 Mich 329, 335 (2000); *Smith v Dept. of Public Health*, 428 Mich 540 (1987)." ECF No. 5, Page ID 151 at ¶ 22.

Defendants are plainly aware of the different types of immunity and damages available under Michigan and federal law, and are invoking both. Thus, this Court and a jury will be required to address both bodies of law. Judge Cleland was certainly faced with a similar situation in *Padilla*, leading him to head off the confusion caused by conflicting laws on similar claims.

Indeed, the very principles animating supplemental jurisdiction—expedience, judicial economy, and convenience—are undercut in this situation involving conflicting state and federal law. "The attempt to reconcile these two distinct bodies of law often dominates and prolongs pre-trial practice, complicates the trial, makes the jury instructions longer, confuses the jury, results in inconsistent verdicts, and causes post-trial problems with respect to judgment interest and attorney fees." *Broad, Vogt & Conant, Inc. v. Alsthom Automation,*

Inc., 186 F. Supp. 2d 787, 791 (E.D. Mich. 2002). Thus, "in many cases the apparent judicial economy and convenience to the parties of entertaining supplemental state claims is offset by the problems those claims create." *Id.* Under such circumstances, the United States Supreme Court has held that federal courts should pause:

> [Supplemental jurisdiction] lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them.

Gibbs, 383 U.S. 715 at 726.

This Court should decline to exercise supplemental jurisdiction under the circumstances and challenges present in this case.

2. Comity principles militate against supplemental jurisdiction.

As a general principle, the United States Supreme Court has cautioned that "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *Gibbs*, 383 U.S. at 726. Indeed, the United States Supreme Court has approvingly adopted the stance that "federal courts should not be overeager to hold on to the determination of issues that might be more appropriately left to settlement in state court litigation." *Gibbs*, 383 U.S. at 727. The *Gibbs* Court provided that guidance specifically in the context of pendent/supplemental jurisdiction. *Id.*

The Sixth Circuit has not yet addressed comity principles in the context of supplemental jurisdiction, but sister circuits have. The Second Circuit has held that "a district court ought not reach out for . . . issues, thereby depriving state courts of opportunities to develop and apply state law." *Young v. New York City Transit Auth.*, 903 F.2d 146, 164 (2d Cir.1990). Specifically, supplemental jurisdiction should not be exercised merely because "the exercise of such judicial power is desirable or expedient." *United States v. Town of North Hempstead*, 610 F.2d 1025, 1029 (2d Cir.1979).

These comity principles were applied in the case of *Hone v. Cortland City Sch. Dist.*, 985 F. Supp. 262 (N.D.N.Y. 1997), which involves claims based on the New York Constitution. The *Hone Court* held that exercising supplemental jurisdiction over claims based on the New York Constitution "would violate fundamental principles of federalism and comity" because "New York State has a definite interest in determining whether its own laws comport with the New York Constitution." *Hone*, 985 F. Supp. at 273.

In the present case, Counts I and II involve Milford's ordinances and Counts III and IV contain claims under the Michigan Constitution. While this Court can—and often does—interpret, apply, and enforce Michigan law, the nature of these claims and the differing state and federal states applicable to them implicate comity principles and suggest that the Court decline supplemental jurisdiction.

ACCORDINGLY, Plaintiffs Joel Q. Hack and Wren Beaulieu-Hack respectfully request that this Court enter an order that:

A. Remands Counts I and II;

B. Remands the state portions of Counts III and IV;

C. Retains jurisdiction over the federal portions of Counts III and IV;

D. Retains jurisdiction over Count V; and

E. Grants any other relief that this Court deems just.

Respectfully submitted,

/s/ R.J. Cronkhite
R.J. Cronkhite (P78374)
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Dated: November 23, 2018

CERTIFICATE OF SERVICE

I hereby certify that on **November 23, 2018**, I electronically filed the above document(s) with the Clerk of the Court using the ECF system, which will send notification of such filing to those who are currently on the list to receive e-mail notices for this case.

/s/ R.J. Cronkhite
Attorney for Plaintiffs