UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

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

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.

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DEFENDANTS' RESPONSE TO PLAINTIFS' EMERGENCY MOTION TO REMAND COUNTS I, II, III, AND IV (DOC. # 7), BRIEF IN SUPPORT, CERTIFICATE OF SERVICE

UNITED STATES DISTRICT COURT
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v.

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,

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NOW COME the Defendants, **THE CHARTER TOWNSHIP OF MILFORD, TOWNSHIP OF MILFORD BOARD, DONALD D. GREEN** and **TIMOTHY C. BRANDT** and for their Response to Plaintiffs' Emergency Motion to Remand Counts I, II, III, and IV (Doc. # 7), state as follows:

1. Admitted only that, pursuant to their Complaint, Plaintiffs seek to construct a driveway. In further response, Defendants are not aware of Plaintiffs' religious background and explicitly deny any implicit allegation that Plaintiffs' religious beliefs played a role in Defendants' decision concerning the construction of their driveway.

2. Denied in the form and manner stated as untrue. A building permit was issued on November 13, 2017. **(Exhibit A, Building Permit)**. The permit issued to Plaintiffs and their contractor, EBI Incorporated, specifically noted that it was only for the work described and "does not grant permission for additional or related work which requires separate permits." **(*Id.*)**. In approximately June, 2018, the Township received notice that Plaintiffs were bringing fill material on site in order to construct the driveway. A neighboring property owner subsequently complained over the concern that changing the grading in the area could cause flooding. On June 13, 2018, the Township Building Administrator, Timothy Brandt, issued a cease and desist letter to Plaintiffs' builder noting that the filling and grading activity taking place on Plaintiffs' property required review and

approval. **(Exhibit B, 06/13/2018 Letter)**. Pursuant to Section 32-583 of the Milford Code of Ordinances, "it shall be unlawful for any person to use land for filling with materials of any kind without approval of the Township Board and subject to requirements as may be appropriate." **(Exhibit C, Milford Township Ordinance)**.

3. Denied as untrue. Plaintiffs filed the present lawsuit despite Defendants' willingness to accommodate Plaintiffs so that their residential driveway may be constructed in conformity with Township Ordinances.

4. Denied in the form and manner stated as untrue. The Township's engineering consultant, Hubbell, Roth & Clark ("HRC"), reviewed the proposed grading plan and issued a letter indicating that it did not object to the proposed plan but further noted that it was assuming that the existing contours on the plan are from the pre-development of the property and accurately reflect the pre-development conditions. **(Exhibit D, 8/24/2018 Letter)**. HRC was unaware that grade changes had occurred on site.

5. Denied in the form and manner stated as untrue. During a Township board meeting on September 19, 2018, the pending fill permit was discussed. David Mamo, the neighboring property owner who resides adjacent to Plaintiffs, made a presentation regarding how that addition of fill dirt affected flooding on his property. As a result, a motion was made to postpone a decision on the fill and

grade permit until the Township Board received more information from the Township's engineering consultant. **(Exhibit E, 9/19/2018 Board Minutes)**.

6. Denied as untrue. On October 8, 2018, HRC issued a letter recommending the Township approve the requested fill and grade permit subject to three conditions which, to date, Plaintiffs have not complied with. In lieu of conforming to the Township's requests, Plaintiffs decided to file the present lawsuit *before* the Township Board considered the permit request on October 17, 2018. **(Exhibit F, 10/8/2018 Letter; Exhibit G, 10/17/2018 Board Minutes)**.

7. No contest.

8. No contest.

9. Denied in the form and manner stated as untrue. Plaintiffs are not "effectively cut off from their home" because they are permitted to construct their proposed driveway subject to the pre-conditions as outlined by HRC. Additionally, Defendants are informed and believe that Plaintiffs continue to access their home using the driveway and are residing in the structure which has been issued a temporary occupancy permit.

10. Denied as untrue. Defendants have not unduly delayed construction of Plaintiffs' proposed driveway.

11. Neither admitted nor denied as the show cause order speaks for itself.

12. Neither admitted nor denied as Plaintiffs' Complaint speaks for itself. In further response, Defendants deny any and all allegations of wrongdoing.

13. No contest.

14. Denied as untrue. For the reasons discussed in the attached Brief, 28 U.S.C. § 1367(c) does not justify this Court in denying supplemental jurisdiction.

15. Denied as untrue.

16. Admitted only that Plaintiffs have generally paraphrased the case of *Broad, Vogt & Conant, Inc. v. Alsthom Automation, Inc*. 186 F. Supp. 2d 787 (2002). In further response, it is denied that the facts and reasoning of *Broad* are analogous to this case. In *Broad*, plaintiffs filed a *thirteen* count complaint, containing only *one* federal law claim. The facts in this case are wholly distinguishable because the only state law claims alleged in Plaintiffs' Complaint have *identical* federal law counterparts. Thus, there will be no issues with reconciling differing bodies of law as was the issue in *Broad*.

17. Admitted only that Plaintiffs have generally paraphrased the case of *Broad, Vogt & Conant, Inc. v. Alsthom Automation, Inc*. 186 F. Supp. 2d 787 (2002). In further response, it is denied that the facts and reasoning of *Broad* are analogous to this case. In *Broad*, plaintiffs filed a *thirteen* count complaint, containing only *one* federal law claim. The facts in this case are wholly distinguishable because the only state law claims alleged in Plaintiffs' Complaint

have *identical* federal law counterparts. Thus, there will be no issues with reconciling differing bodies of law as was the issue in *Broad*.

18. Denied as untrue.

19. Denied as untrue.

20. Admitted only that the Oakland County Circuit Court scheduled a show cause hearing for October 31, 2018. The remaining allegations of this paragraph are denied as untrue.

21. Denied as untrue.

WHEREFORE, Defendants respectfully request that this Honorable Court deny Plaintiffs' Motion and grant any other relief this Court deems appropriate.

Respectfully submitted,

O'CONNOR, DEGRAZIA, TAMM & O'CONNOR, P.C.

BY:/s/ Michael J. Bonvolanta

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Dated: December 4, 2018

UNITED STATES DISTRICT COURT
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BRIEF IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFS' EMERGENCY MOTION TO REMAND COUNTS I, II, III, AND IV (DOC. # 7)

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ISSUES PRESENTED

I. Whether this Court should deny Plaintiffs' Motion for Remand where Plaintiffs' Complaint alleges federal constitutional violations over which this Court has original jurisdiction and where any alleged state constitutional violations are analyzed under the same framework as their federal counterpart.

Defendants answer: Yes

This Court should answer: Yes

Plaintiffs would answer: No

CONTROLLING AUTHORITY

I. State law does not "substantially predominate" over federal claims in which this Court has original jurisdiction. 28 U.S.C. § 1331; 28 U.S.C. § 1441; 28 U.S.C. § 1367; *Mettler Walloon, L.L.C. v. Melrose Twp.*, 281 Mich. App. 184, 221; 761 N.W.2d 293 (2008); *Terlecki v. Stewart*, 278 Mich. App. 644, 663; 754 N.W.2d 899 (2008); *Hart v. City of Detroit*, 416 Mich. 488, 494; 331 N.W.2d 438 (1982); *Grimes v. Van Hook-Williams*, 302 Mich. App. 521, 530; 839 N.W.2d 237 (2013).

II. No "exceptional circumstances" exist to justify this Court in declining an exercise of supplemental jurisdiction. 28 U.S.C. § 1331; 28 U.S.C. § 1441; 28 U.S.C. § 1367; *Swartz Ambulance Service, Inc. v. Genesee County*, No. 08-11448, 2008 WL 2914981 (E.D. Mich. July 25, 2008).

INTRODUCTION

This action arises out of Plaintiffs' development of a 3.15-acre parcel of land located at 2610 Pearson Road in Milford Township. On October 17, 2018, Plaintiffs filed suit in the Oakland County Circuit Court *prior to* the Township's decision to impose pre-conditions for the installation of a driveway leading from Pearson Road to the subject property. The Complaint alleges five Counts: declaratory relief and judgment (Count I), injunctive relief (Count II), inverse condemnation (Count III), violation of due process (Count IV), and violation of 42 U.S.C. §§ 1983 and 1988 (Count V). Counts I and II are remedies, not individualized causes of action. Count V alleging violation of § 1983 is likewise not a source of substantive rights but merely provides a method for vindicating federal rights elsewhere conferred. Counts III and IV allege violations of congruent Michigan and U.S. Constitutional provisions.

On October 24, 2018, Defendants removed the action to federal court pursuant to 28 U.S.C. § 1331 in light of the federal constitutional claims. This Court has supplemental jurisdiction over the state law claims based on 42 U.S.C. § 1367(a), as these claims form part of the same case or controversy and arise from the same nucleus of operative fact. See *United Mine Workers v Gibbs*, 383 U.S. 715; 86 S.Ct. 1130; 16 L.Ed.2d 218 (1966).

Plaintiffs subsequently filed the instant Motion for Remand asking this Court to segregate the federal and state constitutional allegations contained in Counts III and IV so that this Court assumes jurisdiction over the federal claims while the state claims are remanded. Plaintiffs further request that this Court remand Counts I and II in their entirety, while retaining jurisdiction over Count V. For the reasons set forth below, Plaintiffs' Motion for Remand should be denied.

FACTUAL AND PROCEDURAL HISTORY

Plaintiffs Joel Hack and Wren Beaulieu-Hack purchased a vacant 3.15-acre parcel of land located at 2610 Pearson Road in Milford Township for $75,000.00. The property is zoned R-1-R, Rural Residential and Plaintiffs submitted an application for a building permit to install a 2,116-foot premanufactured home on a new basement with a new garage. The application did not require, nor did Plaintiffs depict, that any grading or use of fill material would be used during construction.

A permit was issued on November 13, 2017. **(Exhibit A)**. The permit issued to Plaintiffs and their contractor EBI Incorporated specifically noted that it was for only the work described and "does not grant permission for additional or related work which requires separate permits". **(*Id*.)**. Pursuant to the permit, a structure was moved on to the property. In June 2018, the Township received notice that Plaintiffs were bringing fill material on site in order to construct the driveway. The portion of the property between Plaintiffs' house and Pearson Road

is in a low-lying area. According to Plaintiffs' Complaint, the area where the driveway is proposed to be located is covered by water approximately 90% of the year. During heavy rains, the water can be several feet deep. An adjoining property owner complained regarding the grading occurring on Plaintiffs' property because he believed that it would direct water onto his land. On June 13, 2018, Township Building Administrator Timothy Brandt issued a cease and desist letter to Plaintiffs' builder EBI Incorporated indicating that a permit was required to place any additional fill on the property. **(Exhibit B)**. Along with Mr. Brandt's letter, he enclosed a standard Township form for an application for permit to dredge and/or fill. The requirement for a permit is established by Section 32-583 of the Township's Zoning Ordinance. **(Exhibit C)**.

In order to obtain a permit, Plaintiffs were required to submit an application along with plans showing the proposed area where fill was to be placed, the existing and proposed final elevations, location of existing drainage course and the boundaries of wetlands. A topographical/grading survey was submitted by Plaintiffs' engineering consultant, Boss Engineering, on August 14, 2018. The Township's planning consultant, Hubbell, Roth & Clark ("HRC"), reviewed the proposed grading plan and issued a letter on August 24, 2018, and indicated that it did not object to the grading plan. **(Exhibit D)**. In its letter, HRC noted that it assumed the existing contours on the plan are from the pre-development of the

property and accurately reflected the pre-development conditions. **(*Id.*)**. Notably, HRC was unaware that grading had been performed on site to accommodate the location of Plaintiffs' home.

During the Township Board meeting on September 19, 2018, the fill permit was discussed. David Mamo, the neighboring property owner who resides at 2488 Pearson Road, made a presentation regarding how the addition of fill dirt affected his property and noted that there was seasonal ponding on Plaintiffs' land. Mr. Mamo presented evidence to the Township Board of flooding on his property since Plaintiffs' construction activity. **(Exhibit E)**. During the meeting, Township attorney, Jennifer Elowsky, indicated it would be appropriate for the Township Board to direct the issues raised by Mr. Mamo to the Township's engineer and building official. **(*Id.*)**. As a result, a motion was made to postpone a decision on the fill and grade permit until the Township Board received more information from the Township's engineer.

Pursuant to the motion by the Township Board, on October 8, 2018, Michael P. Darga of HRC, reissued a letter regarding the re-review of the fill and grade plans submitted on behalf of Plaintiffs. **(Exhibit F)**. In the review letter, it was noted that the grading plans submitted with Plaintiffs' initial application appeared to have presented different pre-development conditions than what was originally

present. **(*Id.*)**. Mr. Darga recommended the fill and grade permit be conditioned on the following:

> 1. The applicant must submit to the Township a drainage area map showing the entire tributary area to 2610 Pearson Road, determine the retention volume created a 10-year storm, and calculate the pre-construction area of the low spot that contained this volume. This information can be used to determine if additional retention volume needs to be provided with the proposed grading plan and if additional topographic information needs to be shown on adjacent properties.
>
> 2. The applicant must improve the proposed swales, according to Township standards, to divert water from behind the home to the low area. It appears that the current site grading may be impeding the flow of water from the east and not allowing it to make it to the low area.
>
> 3. The plans should include calculations to verify that any proposed culvert is properly sized to facilitate drainage to the low point west of the driveway. **(*Id.*)**.

The application for the fill permit was to be considered at the Township Board's October 17, 2018 meeting.

On October 17, 2018, the day of the Township Board's meeting, Plaintiffs filed this lawsuit in the Oakland County Circuit Court. In their 122-paragraph Complaint, Plaintiffs alleged that the Township's decision to request HRC to revisit its review of the fill permit was the result of a relationship between Township Supervisor Don Green and Plaintiffs' neighbor. It is claimed that a fill and grading permit is not required by ordinance and that the Township already approved the driveway when it issued the building permit.

The Township Board held a public hearing regarding Plaintiffs' application for a grade and fill permit on the evening of October 17, 2018. Plaintiffs were present at the meeting and represented by counsel. The Township Board voted to approve the permit subject to the three conditions recommended by the Township's engineering consultant. **(Exhibit F; Exhibit G)**.

STANDARD OF REVIEW

28 U.S.C. § 1441(a) states in pertinent part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Pursuant to 28 U.S.C. § 1367(a), "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."

LAW & ARGUMENT

Plaintiffs do not dispute that the federal constitutional allegations contained in Counts III and IV, as well as Count V in its entirety, should remain with this

Court. Nor do they appear to dispute that all claims alleged in the Complaint form part of the same case or controversy for purposes of 28 U.S.C. § 1367(a). Plaintiffs only request that this Court decline to exercise supplemental jurisdiction over any claims founded on state law on the grounds that (A) contrary to the allegations in their Complaint, Plaintiffs' state claims predominate in this action, and (B) issues of jury confusion and comity militate against this Court considering state law claims. Contrary to Plaintiffs' averments, these considerations are unfounded and do not preclude this Court from accepting jurisdiction of this action in its entirety.

A. State Law Does Not Substantially Predominate Over The Claims In Which This Court Has Original Jurisdiction.

Plaintiffs incorrectly argue that state claims predominate this action from both a factual and legal standpoint. **(Dkt. 7, Pg.ID 165)**. Pursuant to 28 U.S.C. § 1367(c)(2), a district court may decline to exercise supplemental jurisdiction over a claim if "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction". In other words, "[o]nce it appears that a state claim constitutes the real body of a case . . . the state claim may fairly be dismissed." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 727; 86 S. Ct. 1130; 16 L. Ed. 2d 218 (1966). However, "[w]hen a district court exercises its discretion not to hear state claims under § 1367(c)(2), the advantages of a single suit are lost. For that reason, § 1367(c)(2)'s authority should be invoked only

where there is an important countervailing interest to be served by relegating state claims to the state court." *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 789 (3d Cir.1995). "This will normally be the case only where 'a state claim constitutes the real body of a case, to which the federal claim is only an appendage.'" *Id*. quoting *Gibbs*, 383 U.S. at 727. Where, as here, the "state claim[s] [are] so closely tied to questions of federal policy . . . the argument for exercise of pendent jurisdiction is particularly strong." *Gibbs, at* 727.

In this case, state law does not "substantially predominate" over the federal claims in order to justify remand. As an initial matter, Counts I and II are remedies, *not* substantive causes of action, and therefore should not be considered by this Court in determining whether they "predominate" over the federal claims. Count I requests "declaratory relief and judgment". It is well-settled that "declaratory relief is a remedy, not a claim." *McCann v. U.S. Bank, N.A.*, 873 F. Supp. 2d 823, 848 (E.D. Mich. 2012) quoting *Mettler Walloon, L.L.C. v. Melrose Twp.*, 281 Mich. App. 184, 221; 761 N.W.2d 293 (2008). Count II of the Complaint similarly requests injunctive relief which is also a remedy, not a standalone cause of action. *Cronin v. Bank of America*, No. 12-13249, 2013 WL 2626739, at *6 (E.D. Mich. June 11, 2013) **(Exhibit H)**; *Terlecki v. Stewart*, 278 Mich. App. 644, 663; 754 N.W.2d 899 (2008) ("It is well settled that an injunction is an equitable remedy, not an independent cause of action."). Thus, these

"Counts" should not be considered for purposes of § 1367(c)(2) because they are not, in fact, causes of action and cannot be considered to "predominate" over the federal claims.

In fact, the only substantive causes of action alleged in Plaintiffs' Complaint are found in Counts III and IV - both alleging violations pursuant to largely identical state and federal constitutional provisions. Count III alleges a taking pursuant to the Fifth and Fourteenth Amendments of the United States Constitution and the Constitution of the State of Michigan. "The Taking Clause of the state constitution is substantially similar to that of the federal constitution." *Tolksdorf v. Griffith*, 464 Mich. 1, 2; 626 N.W.2d 163 (2001); *City of Kentwood v. Estate of Sommerdyke*, 458 Mich. 642, 656; 581 N.W.2d 670 (1998); see also *Ligon v. City of Detroit*, 276 Mich. App. 120, 124; 739 N.W.2d 900 (2007) ("Both the state and federal constitutions prohibit the taking of private property for public use without just compensation."). The Michigan Supreme Court has recognized in the context of takings claims that state and federal "constitutional guarantees are coextensive". *Ealy v. City of Utica*, No. 200125, 1998 WL 1988693, at *4 (Mich. Dec. 1, 1998) **(Exhibit I)**. Consistently, the Michigan Supreme Court has also recognized that claims for inverse condemnation are actionable under both the Michigan and United States Constitutions. *Hart v. City of Detroit*, 416 Mich. 488, 494; 331 N.W.2d 438 (1982). In *Peterman v. State Dep't of Nat. Res.*, 446 Mich.

177, 184; 521 N.W.2d 499 (1994), the Court declined to analyze state and federal takings claims separately because "the federal guarantee is no more protective than the state guarantee." *Id*. at fn. 10.

Similarly, Count VI of the Complaint alleges due process violations pursuant to the Fifth and Fourteenth Amendments of the United States Constitution as well the Michigan Constitution. Here too these provisions are nearly identical and courts have recognized that the Michigan Constitution's due process clause is co-extensive with that of the United States Constitution's. *Cummins v Robinson Twp.*, 283 Mich App 677, 700-701; 770 NW2d 421 (2009); *Grimes v. Van Hook-Williams*, 302 Mich. App. 521, 530; 839 N.W.2d 237 (2013) ("The due process guarantee of the Michigan Constitution is coextensive with its federal counterpart.") In *People v. Sierb*, 456 Mich. 519, 523; 581 N.W.2d 219 (1998), the Court interpreted the state provision as coextensive with the federal provision for purposes of an appeal. In doing so, the Court noted:

> Absent definitive differences in the text of the state and federal provision, common-law history that dictates different treatment, or other matters of particular state or local interest, courts should reject the "unprincipled creation of state constitutional rights that exceed their federal counterparts." *Sitz v. State Police*, 443 Mich. 744, 763, 506 N.W.2d 209 (1993). *Id*. at 523-524.

In this case, the state claims alleged by Plaintiffs cannot be deemed to "substantially predominate" over the federal claims because they provide the same

rights and the analysis under either is identical.[1] District Courts are directed to consider judicial economy and convenience in determining whether to exercise pendant jurisdiction. *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 172; 118 S. Ct. 523; 139 L. Ed. 2d 525 (1997). It would be an utter waste of judicial time and energy, as well as that of the parties, to do as Plaintiffs suggest and separate identical state and federal claims so they can be litigated in different forums. For these reasons, Plaintiffs' Motion for Remand must be denied.

B. No "Exceptional Circumstances" Exist For This Court To Decline To Exercise Jurisdiction.

Pursuant to 28 U.S.C. § 1367(c)(4), district courts may decline to exercise supplemental jurisdiction "in exceptional circumstances". Plaintiffs argue that issues of jury confusion and principles of comity constitute compelling reasons for this Court to decline supplemental jurisdiction. **(Dkt. 7, Pg. ID 183)**. These considerations are not applicable to the facts of this case.

[1] The facts and allegations in the present case are wholly distinguishable from those of *Battle v. Park Geriatric Vill. Nursing Facility*, 948 F. Supp. 33 (E.D. Mich. 1996) – a case relied upon by Plaintiffs. **(Dkt 7, Pg. ID 181)**. In *Battle*, a former employee brought a fourteen count state court action against her former employer alleging a myriad of causes of action including breach of contract and malicious prosecution premised largely on state law. The court ultimately decided that remand was proper because 10 of the 14 claims involved state law thus predominating over the federal claims. However, contrary to *Battle*, the only state claims Plaintiffs have pled in the present action are identical to the federal allegations.

1. Jury Confusion Is Not An "Exceptional Circumstance" Because The State And Federal Laws At Issue Are Co-Extensive.

Plaintiffs largely rely on *Padilla v. City of Saginaw*, 867 F. Supp. 1309 (1994), to support the position that remand of the state law claims is appropriate. In that case, the court held that there was a great potential for jury confusion if the state and federal claims were tied together. Therefore, the court declined to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c). That case involved the use of force by a police officer which plaintiff claimed violated both the Michigan and United States Constitutions. The court held that, because there were different standards for evaluating reasonableness depending on which provision was at issue, it would be difficult for the jury to understand and apply the different standards in the same case. The court reached a similar conclusion regarding the fact that the threshold for determining immunity in an excessive force case differs under Michigan and federal law.

The considerations at issue in *Padilla* are not at issue in the present case. As discussed in Section A, *supra*, the standards for analyzing Plaintiffs' state and federal claims are the same. *Padilla* on the other hand dealt with the notably differing standards for analyzing the Fourth Amendment and state claims for assault and battery in the context of a police investigation. *Id*. at 1315-1316. Further, *Padilla* was concerned with differing questions of state and federal immunity. Here, Plaintiffs only state law claims are founded upon the Constitution

to which Michigan's Governmental Tort Liability Act, MCL 691.1401, *et seq*. would not apply. *Rodwell v. Forrest*, No. 289038, 2010 WL 2076933, at *4 (Mich. Ct. App. May 25, 2010). The problems articulated in *Padilla* simply do not arise in this case.

This facts of this case are much more akin to the facts of *Swartz Ambulance Service, Inc. v. Genesee County*, No. 08-11448, 2008 WL 2914981 (E.D. Mich. July 25, 2008) (J. Battani) **(Exhibit J)**. In *Schwartz*, plaintiffs filed suit in state court challenging a municipal ordinance and seeking injunctive, declaratory and monetary relief. Defendants subsequently removed the action to federal court. Directly on point with the allegations of this action, the plaintiffs in *Schwartz* alleged inverse condemnation and due process which they sought to remand to state court. In denying the motion in part, this Court noted:

> ***The Court finds no basis under the statute [§ 1367] for remanding those claims that are parallel to the federal claims, including Counts III (inverse condemnation)***, IV (restraint of trade), V (monopoly), VI (equal protection), ***VII (due process)***, VIII (impairment of contract), ***IX (violation of takings clause)*** and X (void for vagueness). ***These are the claims that arise out of the state and federal constitutions or state and/or federal statutes. A remand of these claims wastes judicial resources, forces the parties to litigate virtually the same claims in separate forums, and raises the possibility of inconsistent judgments.*** *Id*. [emphasis added].

Like here, the plaintiffs in *Schwartz* incorrectly argued that their claims alleging violations of federal law are subsumed, and therefore predominated, by their state counterparts. This Court disagreed and rightfully recognized that these

"claims clearly invoke federal law; the existence of a state counterpart in no way qualifies the claims as matters in which state law predominates." *Id*., fn. 2. As already decided in *Schwartz*, it is proper for this Court to accept jurisdiction in this action.

2. Principles Of Comity Do Not Warrant A Denial Of Supplemental Jurisdiction.

Relying upon cases from outside the Sixth Circuit, Plaintiffs argue that this Court should not deprive the Michigan state court of an opportunity to apply state law. **(Dkt. 7, Pg. ID 188)**. However, this argument is not persuasive where the state law to be applied is identical to that of its federal counterpart. See *Tolksdorf*; *Cummins*.

Plaintiffs rely upon *Hone v. Cortland City Sch. Dist.*, 985 F. Supp. 262, 266 (N.D.N.Y. 1997) in support of their argument that "comity" principles militate against this Court's exercise of supplemental jurisdiction. **(Dkt 7, Pg. ID 187-188)**. As an initial matter, this case is from outside the Sixth Circuit and does not govern. More importantly, *Hone* is distinguishable. In *Hone*, the plaintiff brought federal claims, as well as state claims for defamation and malicious inducement to terminate plaintiff's employment. *Id*. at 268. The court dismissed all the federal claims and declined to exercise jurisdiction of the remaining state law claims pursuant to 28 U.S.C. § 1367(c)(3). 28 U.S.C. § 1367(c)(3) provides that "[t]he district courts may decline to exercise supplemental jurisdiction over a claim . . . if

. . . the district court has dismissed all claims over which it has original jurisdiction."

In the present case, 28 U.S.C. § 1367(c)(3) is not a proper avenue to decline supplemental jurisdiction because this Court has not yet dismissed the claims over which it has original jurisdiction. Comity principles are also not at issue where, as here, Plaintiffs' only assert two state claims for inverse condemnation and due process that are analogous to their federal counter part. Accordingly, this Court's exercise of supplemental jurisdiction would not deprive the state court from deciding novel issues of state law. *See Hone* at 273.

As noted by Plaintiffs, the Sixth Circuit has not addressed comity principles in the context of supplemental jurisdiction. **(Dkt. 7, Pg. ID 188)**. However, this Court has recognized that federal courts should accept jurisdiction of pendant state claims under similar circumstances:

> Federal courts must be cognizant of their "unflagging obligation to exercise the jurisdiction conferred upon them by the coordinate branches of government and duly invoked by litigants." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). The exercise of federal question jurisdiction is not discretionary and is not overridden by the directive to construe removal statutes narrowly. *See generally* Moore's Federal Practice § 107.41[1][e], at 107–203 (Rev.2000) ("Federal question jurisdiction is not discretionary with the court."). In sum, Plaintiffs' argument that remand is called for when state law claims predominate is unpersuasive, and cannot "pry loose from this Court an entire case in which a federal claim has been found." *Majeske v. Bay City Bd. of Educ.*, 177 F.Supp.2d 666 (E.D.Mich.2001) (courts lack "discretionary authority to remand a

> case and decline federal jurisdiction over a federal-question-based claim merely because state law claims otherwise predominate"). *Swartz Ambulance Service, Inc.*, *supra* **(Exhibit J)**.

Because there are no comity issues in this case, and because judicial economy would be better served by litigating this case in one forum, Plaintiffs' Motion for Remand must be denied.

WHEREFORE, Defendants respectfully request that this Honorable Court deny Plaintiffs' Motion and grant any other relief this Court deems appropriate.

Respectfully submitted,

O'CONNOR, DEGRAZIA, TAMM & O'CONNOR, P.C.

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PROOF OF SERVICE

Jemmis F. Lawrence states that on December 4, 2018, on behalf of Defendants she served the attached *Defendants' Response to Plaintiffs' Emergency Motion to Remand Counts I, II, III and IV, Brief in Support* and *Proof of Service* upon counsel of record via e-filing with the ECF Filing system to their e-mail addresses of record.

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