STATE OF MICHIGAN

COURT OF APPEALS

ELIZABETH BROWN, LORI CHRISTENSON, JAMES CLANCEY, BETSY COFFIA, BARBARA DAVENPORT, BARBARA FORD, EVELYN FOREMAN, DAVID FREDERICK, JUANITA HENRY, JOHN DAVID IVERS, PAUL JORDAN, EMMA KINNARD, EDITH LEE-PAYNE, MARYION LEE, LESLIE LITTLE, MICHELLE MARTINEZ, AHMINA MAXEY, MICHAEL MERRIWEATHER, PATRICK O'CONNOR, LISA OLIVER-KING, TAMEKA RAMSEY, BRENDA REEBER, GEORGE REEBER, SUZANNE SATTLER, MARCIA SIKORA, KIMBERLY SPRING, JACQUELINE STEINGOLD, and IRENE WRIGHT, Plaintiffs-Appellees,	UNPUBLISHED June 26, 2012
v	No. 307291 Ingham Circuit Court
TREASURER OF MICHIGAN and GOVERNOR OF MICHIGAN, Defendants-Appellants.	LC No. 11-000685-CZ

Before: BORRELLO, P.J., and O'CONNELL and TALBOT, JJ.

PER CURIAM.

Defendants appeal by leave granted from the trial court's order denying their request for a protective order. We conclude that the trial court abused its discretion when it denied defendants' motion for a protective order and ordered discovery to proceed. Therefore, we vacate the trial court's order and remand for proceedings consistent with this opinion.

Plaintiffs consist of a group of 28 Michigan residents from various cities across the state. Plaintiffs are challenging the constitutionality of the Local Government and School District Fiscal Accountability Act, 2011, MCL 141.1501 *et seq.*, commonly known as the Emergency

Financial Manager Act (EFMA). Plaintiffs bring five principle constitutional challenges. Count I of their complaint alleges that the EFMA violates Const 1963, art III, § 2,[1] and art IV, § 1[2] (the non-delegation doctrine) through "provisions providing for consent agreements that, without a finding of a financial emergency and without reasonably precise limiting standards, permit the state treasurer to delegate sole discretionary legislative power to a local government's chief administrative officer, the chief financial officer, or other executive officers of the local government." Further, plaintiffs argue that, on its face, the EFMA is unconstitutional because it delegates certain discretionary legislative power and authority to emergency managers.

Count II alleges that the EFMA violates Const 1963, art IV, § 29,[3] which, plaintiffs assert, prohibits the state from enacting local acts "until approved by two-thirds of the members" in the state legislature "and by a majority of the electors voting thereon in the district affected." Plaintiffs assert that, on its face, the EFMA violates Const 1963, art IV, § 29 through its "provisions providing for consent agreements, without a finding of a local financial emergency, that permit the state treasurer to delegate sole discretionary power to adopt local acts to a local government's chief administrative officer, the chief financial officer, or other executive officers of the local government." Additionally, plaintiffs allege that the EFMA violates Const 1963, art IV, § 29 because it grants emergency managers the sole discretionary power and authority to repeal, amend, and enact local laws.

Count III alleges that the EFMA violates the right of local electors to frame, adopt, and amend local charters under Const 1963, art VII, § 22,[4] "through provisions providing for consent

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[1] Const 1963, art III, § 2 provides as follows: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

[2] Const 1963, art IV, § 1 provides as follows: "The legislative power of the State of Michigan is vested in a senate and a house of representatives."

[3] Const 1963, art IV, § 29 provides as follows:

> The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. No local or special act shall take effect until approved by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected. Any act repealing local or special acts shall require only a majority of the members elected to and serving in each house and shall not require submission to the electors of such district.

[4] Const 1963, art VII, § 22 provides as follows:

> Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the

agreements that . . . permit the state treasurer to delegate sole discretionary power to a local government's chief administrative officer, the chief financial officer, or other executive officers of the local government to contravene, and thereby effectively suspend and/or implicitly repeal, the provisions of city and village charters." Further, plaintiffs assert that the EFMA violates the rights vested in local electors by granting emergency managers the sole discretionary power to "effectively suspend and/or implicitly repeal, the provisions of city and village charters."

Count IV alleges that the EFMA violates Const 1963, art I, §§ 17[5] and 23,[6] and art VII, §§ 21,[7] 22,[8] and 34.[9] Specifically, plaintiffs allege that Const 1963, art I, § 17 and § 23 recognize and protect local citizens' rights to a republican form of government and to choose the officials of local government through democratic elections. They further assert that Const 1963, art VII, §§ 21, 22, and 34, establish the right of Michigan citizens to local government, and, on its face, the EFMA violates these provisions by granting:

> a. The State Treasurer power, without the finding of a financial emergency, to delegate the sole discretionary powers and authorities of an emergency manager to a local government's chief administrative officer, the chief financial officer, or other executive officers of the local government; MCL §141.1514a (9);

> legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.

[5] Const 1963, art I, § 17 provides in relevant part: "No person shall . . . be deprived of life, liberty or property, without due process of law."

[6] Const 1963, art I, § 23 provides as follows: "The enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people."

[7] Const 1963, art VII, § 21 provides as follows:

> The legislature shall provide by general laws for the incorporation of cities and villages. Such laws shall limit their rate of ad valorem property taxation for municipal purposes, and restrict the powers of cities and villages to borrow money and contract debts. Each city and village is granted power to levy other taxes for public purposes, subject to limitations and prohibitions provided by this constitution or by law.

[8] See footnote 4.

[9] Const 1963, art VII, § 34 provides as follows: "The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution."

b. Emergency managers sole discretionary power and authority to act for and in the place and stead of the local governing body of cities and villages over matters unrelated to the financial emergency and unrelated to the fiscal policies, practices, and circumstances of the local government. See MCL §141.1515(4), §141.1517(1), §141.1519(1)(dd), (ee), and (ff) and §141.1519(2);

c. Emergency managers sole discretionary power and authority to rule by decree over cities and villages on matters unrelated to the financial emergency and unrelated to the fiscal policies, practices, and circumstances of the local government through powers that permit the emergency manager to contravene, and thereby implicitly repeal, local laws such as city and village charters and ordinances and to explicitly repeal, amend, and enact local laws such as city and village ordinances. See provisions including but not limited to MCL §141.1515(4); § 141.1517(1), § 141.1519(1)(dd), (ee), and (ff) and §141.1519(2); and

d. Emergency managers sole discretionary power and authority to overrule and supersede and assume all the powers and authority of the local governing body and of all local elected officials over matters unrelated to the financial emergency and unrelated to the fiscal policies, practices, and circumstances of the local government. See provisions including but not limited to MCL §141.1515(4); §141.1517(1), §141.1519(1)(dd), (ee), and (ff) and §141.1519(2). [First Amended Complaint, pp 18-19, ¶ 88.]

Count V alleges that the EFMA violates the Headlee Amendment, Const 1963, art IX, § 29,[10] by requiring the local government to pay the compensation, salary, benefits, and expenses of emergency mangers and the employees, agents, appointees, and contractors hired by emergency managers without providing and disbursing monies to cover such costs.

Defendants responded and generally denied the allegations in plaintiffs' complaint.

Subsequently, the Governor submitted an Executive Message to the Supreme Court requesting an early determination of plaintiffs' challenges to the EFMA pursuant MCR 7.305(A).

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[10] Const 1963, art IX, § 29 provides as follows:

> The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs. The provision of this section shall not apply to costs incurred pursuant to Article VI, Section 18.

At the same time the Governor submitted his Executive Message, plaintiffs served interrogatories and requests for production upon defendants. Plaintiffs sought information and documents from the past five years pertaining to emergency managers. Plaintiffs requested detailed information pertaining to the emergency managers appointed in the City of Benton Harbor, the City of Ecorse, the City of Pontiac, and the Detroit Public Schools. Plaintiffs sought correspondence, notes, minutes, and other detailed information regarding the communications between the emergency managers and the Governor and State Treasurer. Additionally, plaintiffs sought detailed information regarding compensation and other costs associated with the emergency managers.

In lieu of answering plaintiffs' discovery request, defendants filed a motion for a protective order, arguing that no factual development was necessary for a determination of whether the EFMA is unconstitutional on its face. Defendants argued that the acts leading up to the appointment of an emergency manager, as well as the subsequent acts taken by the emergency manager, are irrelevant to this question. Additionally, defendants requested a stay pending Supreme Court action on the Governor's Executive Message.

Shortly after defendants filed their motion for a protective order, the trial court entered a stipulated order granting plaintiffs leave to file their first amended complaint. In their amended complaint, plaintiffs did not add any new factual allegations; rather, they merely added the words "as applied and in practice" to each of their prior allegations.

Defendants filed another motion for a protective order, arguing that plaintiffs' amended complaint was still only a facial challenge to the EFMA. Additionally, defendants again requested a stay pending Supreme Court action on the Governor's Executive Message. Plaintiffs opposed defendants' motion for a protective order. Plaintiffs argued that under MCR 2.302(C), defendants had not met their burden of establishing that a protective order was necessary. Further, plaintiffs argued that their amended complaint clearly set forth both "facial" and "as applied" challenges, and that they were entitled to discovery to establish the proof required in each of their asserted claims.

After hearing arguments on the motion for a protective order, the trial court denied defendants' motion from the bench. Defendants filed another motion for a stay of proceedings, arguing that the trial court's previous order regarding discovery was incorrect, and that they were filing an interlocutory appeal from that decision. Defendants argued that, given the large expenditure of resources necessary to comply with the trial court's discovery order, a stay should be entered pending resolution of the interlocutory appeal. The trial court denied defendants' motion.

Defendants filed an application for leave to appeal from the order denying their motion for a protective order. This Court granted defendants' interlocutory appeal and granted a stay as to discovery proceedings in the trial court. *Brown v State Treasurer*, unpublished order of the Court of Appeals, entered December 9, 2011 (Docket No. 307291).

On appeal, defendants argue that the trial court erred when it denied their motion for a protective order and ordered discovery to move forward. "We review for an abuse of discretion a trial court's decision on a motion for a protective order." *Alberto v Toyota Motor Corp*, 289

Mich App 328, 340; 769 NW2d 490 (2010). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

"'Michigan has a strong historical commitment to a far-reaching, open and effective discovery practice. In light of that commitment, [the Supreme Court] has repeatedly emphasized that discovery rules are to be liberally construed . . . to further the ends of justice.'" *Domako v Rowe*, 438 Mich 347, 359; 475 NW2d 30 (1991), quoting *Daniels v Allen Indus, Inc*, 391 Mich 398, 403; 216 NW2d 762 (1974). Under MCR 2.302(B)(1),[11] parties may obtain discovery of matter that is "'relevant to the subject matter involved in the pending action' or that 'appears reasonably calculated to lead to the discovery of admissible evidence.'" *Bauroth v Hammound*, 465 Mich 375, 381; 632 NW2d 496 (2001), quoting MCR 2.302(B)(1). Discovery "should promote the discovery of the true facts and circumstances of a controversy, rather than aid in their concealment." *Domako*, 438 Mich at 360 (citation and internal quotation marks omitted).

"'While Michigan is strongly committed to open and far-reaching discovery, a trial court must also protect the interests of the party opposing discovery so as not to subject that party to excessive, abusive, or irrelevant discovery requests.'" *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 35-36; 645 NW2d 610 (2002) (citation omitted). Under MCR 2.302(C), a protective order may be granted on a showing of good cause and reasonable notice. A protective order is issued to protect a party "from annoyance, embarrassment, oppression, or undue burden or expense." *Id.*

In this case, defendants argue the need for a protective order because plaintiffs' discovery requests sought irrelevant information. Specifically, defendants argue that because plaintiffs' complaint asserts only facial challenges to the EFMA, discovery will not provide any relevant information to assist in the resolution of this issue. "A facial challenge is a claim that the law is 'invalid *in toto*—and therefore incapable of any valid application . . . .'" *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11 n 20; 740 NW2d 444 (2007), quoting *Steffel v Thompson*, 415 US 452, 474; 94 S Ct 1209; 39 L Ed 2d 505 (1974) (emphasis in original). "A party challenging the facial constitutionality of a statute faces an extremely rigorous standard, and must show that no set of circumstances exists under which the [a]ct would be valid." *Id.* at 11 (internal quotation marks and citation omitted). "The

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[11] MCR 2.302(B)(1) provides as follows:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things, or electronically stored information and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

constitutionality of an act must rest on the provisions of the act itself, and not on the compensating actions of those affected by the act." *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 304; 586 NW2d 894 (1998).

Because the focus of a facial challenge is on the text of the statute itself, discovery is generally not necessary. See *Gen Electric Co v Johnson*, 362 F Supp 2d 327, 337 (D DC 2005) ("[A] facial challenge to the text of a statute does not typically require discovery for resolution because the challenge focuses on the language of the statute itself."); see also *New Hampshire Motor Transp Ass'n v Rowe*, 324 F Supp 2d 231, 232 (D Me, 2004) ("[D]iscovery . . . is not necessary to a ruling on a facial preemption challenge."). The same is not true for "as applied" challenges. "An 'as applied' challenge considers the specific application of a facially valid law to individual facts." *In re Request for Advisory Opinion*, 479 Mich at 11 n 20, citing *Crego v Coleman*, 463 Mich 248, 269; 615 NW2d 218 (2000). "'When faced with a claim that application of a statute renders it unconstitutional, the Court must analyze the statute "as applied" to the particular case.'" *Keenan v Dawson*, 275 Mich App 671, 680; 739 NW2d 681 (2007), quoting *Crego*, 463 Mich at 269. Because the focus is on the application of a law to a specific set of facts, discovery would generally be relevant to resolution of the issues raised in the complaint.

In this case, plaintiffs argue their complaint sets for both "facial" and "as applied" challenges. Further, plaintiffs argue that discovery is necessary for both their facial and as applied challenges. Plaintiffs' arguments are without merit. Plaintiffs have not asserted as applied challenges to the EFMA, and discovery is not necessary for the resolution of plaintiffs' facial challenges.

In this case, an "as applied" challenge would necessarily allege that emergency managers are taking specific actions pursuant to the EFMA that are unconstitutional. However, no such allegations are made in plaintiffs' amended complaint. And plaintiffs do not assert that specific actions being taken pursuant the EFMA are unconstitutional. Rather, plaintiffs allege that the EFMA is unconstitutional because it violates several sections of the state constitution. A similar argument was made in *Dawson v Secretary of State*, 274 Mich App 723; 739 NW2d 339 (2007). In *Dawson*, the plaintiffs filed a complaint seeking a declaration that certain sections of Michigan's driver's responsibility law were unconstitutional because they violated both the federal and state double jeopardy and equal protection guarantees. *Id.* at 727. In evaluating the plaintiffs' argument, this Court noted that the plaintiffs' challenge was "framed in the abstract, not based on the application of the particular facts. Thus, [the] plaintiffs challenge[d] the facial validity of the provisions." *Id.* at 730. In the present case, plaintiffs' complaint is also framed in the abstract and is not based on the application of any particular facts.

Plaintiffs' argument that their amended complaint clearly sets forth both "facial" and "as applied" challenges is premised on the fact that their amended complaint states that "on its face, as applied and in practice," the EFMA violates several sections of the state constitution. The inclusion of the words "as applied and in practice" is insufficient to transform the nature of the plaintiffs' challenge. As a general rule, substance prevails over the particular wording used in a complaint. See *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 481, 486; 642 NW2d 406 (2002). Plaintiffs' labels are not what matter. *Doe v Reed*, ___ US ___; 130 S Ct 2811, 2817; 177 L Ed 2d 493 (2010). The important inquiry is to identify plaintiffs' claims and the

relief that would follow. *Id.* As discussed above, plaintiffs' claims are based on the mechanisms of the EFMA, not any specific acts being taken under it. Further, the relief requested is not against the specific acts of any emergency manager. Rather, plaintiffs seek a declaration that the EFMA is unconstitutional and an injunction preventing current and future managers from implementing or exercising authority and powers conveyed under various sections of the act. See *id.* Therefore, the substance of plaintiffs' complaint is a facial challenge to the EFMA.

Nonetheless, plaintiffs argue that discovery is necessary for their facial challenges. In regard to Count I, plaintiffs assert that the EFMA violates Const 1963, art III, § 2 because PA 4 delegates legislative power to emergency managers. Plaintiffs argue that before a judicial determination can be made on this count, a factual determination needs to be made as to whether the emergency manager is an official or agent of the executive branch, or another entity of state or local government. This argument is unpersuasive. The factual inquiry plaintiffs refer to would only be relevant to an "as applied" challenge because it implies that the EFMA could be applied constitutionally.

In regard to Count II, plaintiffs assert that the EFMA violates Const 1963, art IV, § 29 because it permits emergency managers to repeal, amend, and enact local laws without a two-thirds vote from each house and without approval by the local electors. Plaintiffs argue that a factual inquiry is necessary to determine the number and nature of legislative acts enacted by emergency managers. As discussed above, however, this argument would only be relevant under an "as applied" challenge. Plaintiffs' complaint does not allege that emergency managers are repealing, amending, and enacting local laws in violation of the constitution. Rather, plaintiffs assert that the EFMA gives emergency managers the power to take such actions, and therefore violates the constitution. Under these circumstances, the number and nature of legislative acts taken by emergency managers is not relevant.

The same analysis holds true in regard to Count III. Count III alleges that that the EFMA violates Const 1963, art VII, § 22 because it allows emergency managers to contravene and repeal sections of city charters. Plaintiffs argue that discovery is necessary so that they can properly determine the nature and scope of emergency managers' violations of the constitution. Again, such an inquiry is not relevant to plaintiffs' facial challenges.

In regard to Count V,[12] plaintiffs argue that the EFMA violates the Headlee Amendment because it imposes new and increased activities upon local governments without making an appropriation to pay for increased costs. Plaintiffs argue that discovery is necessary to confirm that the costs imposed by the EFMA are not de minimus or offset by corresponding savings. Again, plaintiffs' argument would only be relevant to an as applied challenge, which plaintiffs have not pleaded.

Because plaintiffs' complaint only asserts facial challenges to the EFMA, discovery is not necessary, nor is plaintiffs' requested discovery relevant. Although Michigan is "committed to open and far reach discovery," *Bloomfield Charter Twp*, 253 Mich App at 35, the court rules

[12] Plaintiffs make no argument in their brief with respect to Count IV.

only permit a party to obtain discovery of material that is "relevant to the subject matter involved in the pending action," MCR 2.302(B)(1). As discussed above, none of the information sought by plaintiffs is relevant to their facial challenges to the EFMA. Therefore, plaintiffs are not entitled to the requested discovery, see 2.302(B)(1), and a protective order was appropriate, *Bloomfield Charter Twp*, 253 Mich App at 35-36. Thus, the trial court abused its discretion when it denied defendants' motion for a protective order and ordered discovery to move forward.

The trial court's order denying defendants' motion for a protective order is vacated. The issue is remanded to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Peter D. O'Connell
/s/ Michael J. Talbot