No. _____

In the Supreme Court of the United States

LIANE SHEKTER-SMITH, STEPHEN BUSCH, MICHAEL PRYSBY, and BRADLEY WURFEL, APPLICANTS,

v.

SHARI GUERTIN, individually and as next friend of her child, E.B., a minor, and DIOGENES MUSE-CLEVELAND,

APPLICATION TO RECALL AND STAY THE MANDATE PENDING THE FILING AND DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI

To the Honorable Sonia Sotomayor,
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Sixth Circuit

Dated: June 7, 2019

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

In a 2-1 decision that conflicts with decisions of this Court and those of other circuits, the Sixth Circuit has greatly expanded the reach of the Fourteenth Amendment's Substantive Due Process Clause. Specifically, this is the first time anywhere in the nation that a court of appeals has recognized a right to bodily integrity based on the alleged failure of government regulators to protect citizens of a community from a risk of exposure to commonly occurring contaminants in drinking water, or the allegedly false statements of an agency spokesperson. Disconcertingly—and contrary to this Court's repeated cautions that government officials are entitled to qualified immunity unless that official has been put on notice by prior, similar cases that their alleged conduct is unconstitutional—the Sixth Circuit denied Michael Prysby, Stephen Busch, Liana Shekter Smith, and Bradley Wurfel (collectively, the "MDEQ Defendants") qualified immunity, despite the absence of a single prior case that supports constitutional liability in such a scenario.

No court, anywhere, has ever held that a government official's regulatory decisions or statements to the press may violate a citizen's constitutional right to bodily integrity. Not only has a constitutional right to bodily integrity never before been recognized in the context of regulatory oversight of public water supplies or public statements by an agency spokesperson, such a constitutional right, if it exists, was not clearly established in a particularized sense in 2014 and 2015, as required by this Court to overcome these Defendants' asserted qualified immunity. Instead of abiding by this Court's recurring directive, the Sixth Circuit's majority opinion reviewed Plaintiffs' claims at an incredibly general level to conclude that Plaintiffs stated a plausible, clearly established constitutional violation akin to intentionally and forcibly injecting an individual with unwanted medication. The circumstances are not even remotely comparable. Consequently, the Sixth Circuit's decision conflicts with multiple decisions of this Court requiring carefully consideration of the threshold issue of qualified immunity: whether the

alleged constitutional right is clearly established based on existing, analogous cases and the specific circumstances confronted by the governmental defendant. These considerations are clearly absent in this case.

Multiple judges on the Sixth Circuit dissented from the panel majority's decision. Judge McKeague, the dissenting member of the Sixth Circuit panel, detailed in his opinion the numerous ways in which the panel majority violated the legal principles set forth by this Court that warn against expansion of the protections traditionally afforded under the Substantive Due Process Clause, as well as this Court's rulings that qualified immunity should be afforded to governmental officials when encountering new or differing legal terrain than that previously explored by the courts: "[I]n case after case around the country, courts have consistently rejected substantive-due-process claims based on the type of conduct alleged here." Appendix 1a, Slip Op., pp. 64-70 & n.8 (McKeague, J., dissenting).

Dissenting from the Sixth Circuit's order denying rehearing en banc, Judge McKeague was joined by Judges Kethledge, Thapar, Larsen, Nalbandian, and Murphy. Appendix 1b, Order denying rehearing en banc. They all concluded that the panel majority inappropriately expanded the reach of substantive due process constitutional rights, and at a very minimum violated this Court's instruction that qualified immunity should be granted to governmental officials when it has previously not been clearly established that their conduct amounted to a constitutional violation. Even the judges who separately concurred in denying the petition for rehearing en banc cast serious doubt on whether a clearly established constitutional right has been raised in this case, issuing many "cautions" about moving forward in this case. Appendix 1b., Rehearing en banc order, pp. 4-10 (Sutton, J. concurring).

Accordingly, MDEQ Defendants submit this motion under Supreme Court Rule 23 and respectfully request that this Court recall and stay the mandate issued by the Sixth Circuit

pending consideration by this Court of the MDEQ Defendants' forthcoming petition for certiorari. There is a reasonable probability that this Court will grant the petition and a more than fair prospect of reversal given the substantial, important federal constitutional questions raised by this case. Moreover, the MDEQ Defendants will be irreparably harmed if the mandate is not stayed and they are required to participate in full discovery in this case based on unclear and undefined substantive due process rights in contravention of their entitlement to qualified immunity, which includes immunity from suit and discovery.

JURISDICTION

The Sixth Circuit issued its opinion on January 4, 2019. The MDEQ Defendants filed a petition for rehearing en banc, which temporarily stayed issuance of the mandate. That petition was denied by a deeply divided Sixth Circuit on May 16, 2019. Before the Sixth Circuit issued the mandate, the MDEQ Defendants filed a timely motion to stay the mandate pending certiorari review by this Court. The MDEQ Defendants' motion to stay the mandate was denied on May 29, 2019 in a 2-1 decision, and the mandate issued that same day despite the MDEQ Defendants' request that the mandate be stayed at least long enough to seek relief from this Court. No action has been taken yet by the District Court since issuance of the mandate, though a status conference in the District Court is scheduled for June 19, 2019. This Court has jurisdiction to recall and enter a stay of the Sixth Circuit's mandate for a reasonable time to enable MDEQ Defendants' to obtain a writ of certiorari from this Court. 28 U.S.C. §§ 1254, 2101(f).

The opinion of the District Court is not yet reported, but it is available at 2017 U.S. Dist. LEXIS 85544 and 2017 WL 2418007. *Guertin v Michigan*, No. 16-cv-12412. The opinion of the Sixth Circuit is available at 912 F.3d 907 and reproduced at App. 1a. The Sixth Circuit's opinion denying rehearing en banc is available at 2019 U.S. App. LEXIS 14480 (6th Cir May 16, 2019), and is reproduced at App. 1b. The Sixth Circuit's denial of MDEQ Defendants' motion to the

stay the mandate can be found at 2019 U.S. App. LEXIS 16084 (6th Cir. May 29, 2019), and is reproduced at App. 1c.

STATEMENT OF THE CASE

This is the first case arising from the 2014 switch of Flint, Michigan's water source and the subsequent alleged lead contamination of Flint's public water system in which the United States District Court for the Eastern District of Michigan decided the threshold issue of qualified immunity. Almost 50 additional cases related to Flint's public water system are currently pending in the District Court, and their outcome will be dictated by this Court's decision. The MDEQ Defendants are current or former employees of the MDEQ who played various regulatory oversight roles related to Flint's public water system, and, in the case of Bradley Wurfel, served as the MDEQ's communications director.

The MDEQ Defendants filed motions to dismiss Plaintiffs' numerous federal and state law claims. All claims against them were dismissed either for failure to state a claim or on the basis of qualified immunity, except Plaintiffs' so-called "bodily integrity claim," which is premised on an alleged failure to protect Plaintiffs from a foreseeable risk of harm from exposure to contaminants in their drinking water. The district court denied the MDEQ Defendants (and other governmental defendants) qualified immunity from the bodily integrity claim and held that Plaintiffs had alleged a violation of a clearly established constitutional right to bodily integrity sufficient to support a cause of action.

The MDEQ Defendants appealed the denial of qualified immunity to the Sixth Circuit. In a 2-1 decision, the Sixth Circuit affirmed. Judge McKeague penned a lengthy dissent, which includes a detailed recitation of the relevant facts in this case. App. 1a, Slip Op., pp. 40-70. On May 16, 2019, a deeply divided Sixth Circuit denied the MDEQ Defendants' petition for rehearing en banc. App. 1b.

At the crux of this case is whether the MDEQ Defendants violated Plaintiffs' constitutional right to bodily integrity when they interpreted the federal Safe Drinking Water Act's Lead and Copper Rule ("LCR") (40 C.F.R. § 141.80 *et seq*.) as not requiring the immediate implementation of corrosion control when Flint made the decision to switch its public water source to the Flint River, or (in the case of Bradley Wurfel) made statements to the media. The City of Flint had previously received treated water from the Detroit Water and Sewerage Department ("DWSD"), which was then distributed throughout Flint without additional treatment by the Flint Water Treatment Plant ("FWTP"). Flint's 2013 decision to change water sources to a new water authority prompted DWSD to terminate its contract for providing water to Flint, and Flint decided to use the Flint River as an interim drinking water source until the new water authority was operational. Plaintiffs admit that Flint River water could be treated to meet all SDWA standards, although it would be more difficult to treat.

Given that the FWTP had not previously provided corrosion control treatment in Flint (so there was no corrosion control to be "maintained") and that Flint would be using a new water source with different water chemistry, the MDEQ interpreted the LCR as permitting two, six-month rounds of lead testing to determine what, if any, corrosion control treatment should be implemented. The United States Environmental Protection Agency ("USEPA") later issued a legal opinion that the LCR was ambiguous when applied to Flint's particular circumstances, and MDEQ applied a reasonable interpretation of the LCR. (Petition for Rehearing en banc, p. 13; 11/3/15 EPA Memorandum, *Mays v. City of Flint*, E.D. Mich. Case No. 16-cv-11519 (RE 29-11, PgID 1135-37), Sixth Circuit Case No. 16-2484).

Plaintiffs allege that the lack of corrosion control caused lead to leach from privately owned lead service lines, as well as perhaps from the public water system's distribution system pipes, and into the water consumed in some Flint homes and businesses. "Plaintiffs equate

MDEQ's misinterpretation of the Lead and Copper Rule's corrosion-control requirements with conscience-shocking behavior that caused plaintiffs' exposure to lead." App. 1a, Slip Op. p. 52 (McKeague, dissenting). "As gravely erroneous as the MDEQ's interpretation of the [LCR] appears in hindsight, however, there is no legal support for the conclusion that it amounts to conscience shocking conduct." *Id.* "Indeed, plaintiffs do not allege that any MDEQ employee intentionally misled Flint about the Rule's requirements….the MDEQ provided misguided advice rooted in mistaken interpretations of law—the type of conduct that, though it led to extremely unfortunate consequences here, is classically entitled to protection from suit under the doctrine of qualified immunity. *Id.* at 53.

The issues in this case are purely legal: (1) the scope of the 14th Amendment's substantive due process rights, specifically whether the right to bodily integrity extends to impose liability on (a) state regulators for allegedly failing to protect citizens from a foreseeable risk of harm from exposure to contaminants in public drinking water or (b) agency spokespersons for allegedly inaccurate statements to third party media members; and (2) whether Plaintiffs have alleged a constitutional right that was clearly established in a particularized sense in 2014-2015, as required to overcome the MDEQ Defendants' assertion of qualified immunity. These questions do not require discovery or factual development to decide, and these issues should be decided by this Court now before nearly 50 separate cases move forward with discovery and trials.

REASONS FOR GRANTING THE STAY

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from

the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). *accord United States Postal Serv. v. AFL-CIO*, 481 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers) (granting application for a stay); *United States v. Cook Cnty*., 282 F.3d 448, 450 (7th Cir. 2002) (Ripple, J., in chambers) (staying mandate despite unanimous panel decision and no votes in support of rehearing en banc). Only in a "close case [] may it be appropriate to 'balance the equities' to explore the relative harms" to the parties as well as the public interest. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980). These standards are readily satisfied in this case.

As required by this Court's Rule 23, a stay was first sought from the Sixth Circuit. The Sixth Circuit denied that motion in a 2-1 decision. App. 1c.

I. THERE IS A REASONABLE PROBABILITY THAT THIS COURT WILL GRANT CERTIORARI AND A FAIR PROSPECT THAT THIS COURT WILL REVERSE THE DECISION DENYING QUALIFIED IMMUNITY TO MDEQ DEFENDANTS PRYSBY, SHEKTER SMITH, AND BUSCH.

The Sixth Circuit's decision here is unprecedented. There are no cases in the Sixth Circuit, this Court, or any other Circuit Court of Appeals that have held state regulators can violate a citizen's constitutional substantive due process rights by allegedly failing to protect an individual from a foreseeable risk of harm from exposure to contaminants in drinking water. The Sixth Circuit's deeply flawed interpretation of the substantive due process clause clashes with this Court's repeated caution against (1) expanding the breadth of substantive due process, and (2) denying qualified immunity when the alleged constitutional right is not clearly established in a particularized sense given the context of the case.

The Sixth Circuit also misapprehended the legal principles governing qualified immunity in concluding that discovery was warranted to determine whether these Defendants violated Plaintiffs' clearly established constitutional right; it is clear based on Plaintiffs' Complaint that no discovery in this matter is warranted, and qualified immunity should shield these state

regulators from the burdens of discovery. If the Sixth Circuit's decision is allowed to stand, it will greatly expand the reach of the United States Constitution's Substantive Due Process clause and gut this Court's prior qualified immunity determinations. There is certainly a more than fair prospect that this Court will not let these untenable results stand unconsidered and uncorrected.

A. This Case Raises Important Federal Questions Addressing the Scope of Substantive Due Process Rights That Should Be Decided by This Court.

Do individuals have a right to be protected from the risk of exposure to commonly occurring contaminants in drinking water—or in the air or in the environment—under the United States Constitution's Substantive Due Process Clause? The Sixth Circuit majority's decision holds that such rights and claims exist, although all other courts confronted with these questions have reached the exact opposite conclusion. These are important federal constitutional questions regarding the scope of substantive due process rights under the Fourteenth Amendment that should be considered and decided by this Court. The Sixth Circuit majority opinion attempts to expand substantive due process rights into new territory beyond "the established bodily integrity jurisprudence [and] our Nation's history or traditions" previously recognized by this Court. App. 1a, Slip Op., pp. 60-61 (McKeague, J., dissenting). The sharply divided en banc decision of the Sixth Circuit further supports that these issues of great importance should be decided by this Court.

"[T]he Fourteenth Amendment is not a 'font of tort law to be superimposed on whatever systems may already be administered by the States . . . ." *County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998). "Even when viewed in its best light, the plaintiffs' claim of unconstitutionality takes us to the outer edges of judicial competence." App. 1b, p. 5 (Sutton, J., concurring). The Sixth Circuit majority opinion will open the door to lawsuits against not only environmental regulators and agency spokespersons, but also food inspectors, federal aviation

regulators, drug and medical device regulators, and practically any type of governmental regulator whose work in some way touches upon items or resources that individuals consume or interact with, making it nearly impossible to find anyone willing to accept these important government positions. This Court should not allow such a broad expansion of Fourteenth Amendment protections without careful consideration of this case and its far-reaching ramifications, not only for the Sixth Circuit, but also for this country, both within the realm of environmental law and beyond.

Additionally, as illustrated below, this case raises important federal questions regarding the scope of qualified immunity in the context of substantive due process violations. "[T]he majority's decision on the issue of qualified immunity is barely colorable." App 1b, p. 11 (Kethledge, J, dissenting). Qualified immunity is designed to afford government officials "breathing room to make reasonable but mistaken judgments." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). The MDEQ Defendants ask this Court to restore the promise of qualified immunity to the millions of government workers across the nation who take solace in this doctrine to protect them from personal liability in the regulatory decisions and oversight tasks they are called upon by state, local, and federal governments to make on a daily basis. This Court regularly grants certiorari in cases involving whether a constitutional violation was clearly established as required to overcome qualified immunity, and there is a reasonable probability that certiorari will be granted here. For these reasons, the Sixth Circuit's mandate should be recalled and stayed pending certiorari review by this Court.

B. The Sixth Circuit's Decision Conflicts with Prior Decisions of This Court Defining "Clearly Established" Constitutional Rights For Purposes of Qualified Immunity.

As pointed out in Judge McKeague's dissent from the panel opinion, as well as the five-judge dissent from the Sixth Circuit's order denying rehearing en banc, the Sixth Circuit's

majority opinion creates a conflict with several decisions of this Court by defining Plaintiffs' bodily integrity claim at a very general level for purposes of determining whether the alleged right was clearly established. It is Plaintiffs' burden to overcome the assertion of qualified immunity by establishing that "existing law" rendered "the constitutionality of the officer's conduct 'beyond debate.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2019). Plaintiffs, and the court, must be able to "identify a case where an offic[ial] under similar circumstances . . . was held to violate" the constitutional right asserted. *White v. Pauly*, 137 S. Ct. 548 (2017). None exists.

To be clearly established, a constitutional right's "contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). The constitutional right alleged by Plaintiffs must be analyzed at "a high degree of specificity." *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015). Plaintiffs are required to "identify a case with a similar fact pattern," one "that would have given 'fair and clear warning to officers' about what the law requires." *White*, 137 S. Ct. at 552. This demanding standard protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

This Court requires rigorous application of the "clearly established" analysis in the context of substantive due process rights, one of "the vaguest of constitutional doctrines." App. 1b, p. 11 (Kethledge, J., dissenting). Identifying a case that is on all fours factually with the conduct alleged is especially important when dealing with alleged substantive due process claims, where the inherent legal ambiguity is best discerned through "carefully refined . . . concrete examples." *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997). By the same token, the "shocks the conscience" standard applicable to constitutional claims of bodily integrity makes it imperative that truly comparable cases have previously defined the specific contours of

the constitutional right in the context at hand. App 1b, p. 7 (Sutton, J., concurring). Here, the Sixth Circuit "acknowledged this statement of law, but then proceeded to find fair warning in the general tests set out in" prior dissimilar cases; "In so doing, it was mistaken." *Brosseau v Haugen*, 543 U.S. 194 (2004).

C. There is No Clearly Established Constitutional Right to Be Protected By State Regulators From a Foreseeable Risk of Harm From Exposure to Contaminants in Drinking Water.

There are no prior decisions from this Court, the Sixth Circuit, or any other circuit court that put the MDEQ Defendants on notice that their alleged conduct was clearly prohibited and might violate Plaintiffs' right to bodily integrity at the time and in the particular circumstances they confronted. *Wesby*, 138 S. Ct. at 590. Plaintiffs have not pointed to a single factually similar, controlling case that demonstrates Plaintiffs had a clearly established constitutional right to be protected from a foreseeable risk of harm from exposure to contaminants in their drinking water. The Sixth Circuit majority opinion acknowledges this, and that there are no allegations that the MDEQ Defendants *intentionally* contaminating the water supply. App 1a, p. 18.

Despite this, the Sixth Circuit and the district court relied on dissimilar cases of intentional, forcible intrusion into a person's body to hold that Plaintiffs alleged a clearly established constitutional right to bodily integrity. The dissimilarity should have cautioned the Sixth Circuit "to adopt the tenor of restraint when it comes to extending the right to bodily integrity in a new direction." App. 1b, p. 6 (Sutton, J., concurring). And the disparate cases did not put the MDEQ Defendants on notice that their regulatory oversight decisions of a public water system, if mistaken, could amount to a constitutional violation. "[T]o describe these fact patterns is to question their applicability here. Not one of them involves the provision of a public utility in a time of economic hardship." *Id.* "There is no allegation defendants intended to harm Flint residents." App. 1a, Slip Op., p. 18. No previous case decided by this Court, the Sixth

Circuit, or another circuit put the MDEQ Defendants on notice that "a series of erroneous and unfortunate policy and regulatory decisions and statements that, taken together, allegedly caused plaintiffs to be exposed to contaminated water" amounted to a constitutional violation. App. 1a, Slip Op., p. 68 (McKeague, J., dissenting).

Critically, Plaintiffs did not allege that the MDEQ Defendants "'knowingly introduce[ed] life-threatening substances into plaintiffs' bodies against their will; rather, Plaintiffs allege that the MDEQ Defendants '*fail[ed] to protect* plaintiffs from a foreseeable risk of harm from the *exposure to lead contaminated water*.'" App. 1a, Slip Op., p. 47 (McKeague, J., dissenting). As the five-judge dissent from the Sixth Circuit's order denying rehearing en banc summarized:

> What the majority opinion does, in response, is simple; it changes the level of generality at which it describes the putative right, until the description is general enough to reach the plaintiffs' allegations of negligence. Specifically, what the court first describes as a "constitutional right [of persons] to be free from *forcible intrusions on their bodies against their will*," Maj. Op. at 9 (emphasis added), on the next page becomes a sweeping right of "nonconsenting individuals" to be free of "foreign substances with no known therapeutic value[,]" Maj. Op. at 10—in short a constitutional right to be free of unwanted substances. That putative right is violated every day, indeed every time that virtually any of us takes a breath. But more to the point, *the majority's formulation elides what the prior cases require—namely that the officer's injection or intrusion of the 'foreign substance' into the plaintiff's body be intentional*.

App. 1b, p. 13 (Kethledge, J., dissenting) (emphasis added). The panel majority's opinion, "in other words, does exactly what the Supreme Court has repeatedly told us not to do." *Id.* (quotation omitted).

Additionally, the MDEQ Defendants' interpretation of the LCR in this situation is not analogous—or frankly comparable—to the conscience-shocking behavior previously held by this Court to support a substantive due process bodily integrity claim. This Court has staunchly held that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Lewis,* 523 U.S.at 849. As Judge McKeague explained, "a

policymaker's or regulator's unwise decisions and statements or failures to protect the public are typically not considered conscience-shocking conduct." App. 1a, Slip Op., p. 48 (McKeague, J., dissenting). "As gravely erroneous as the MDEQ's interpretation of the Rule appears in hindsight, however, there is no legal support for the conclusion that it amounted to conscience-shocking conduct." *Id.* at p. 52. "Indeed, plaintiffs do not allege that any MDEQ employee intentionally misled Flint about the Rule's requirements….the MDEQ provided misguided advice rooted in mistaken interpretations of law—the type of conduct that, though it led to extremely unfortunate consequences here, is classically entitled to protection from suit under the doctrine of qualified immunity. *Id.* at 53. "[N]egligence—even gross negligence—does not implicate the Due Process Clause's protections." *Id.* (citing *Daniels v. Williams*, 474 U.S. 327, 331-33 (1986)). That is because the Due Process Clause is not supposed to be a substitute for common law tort liability. *Collins v. Harker Heights*, 503 U.S. 115, 128 (1992).

Additionally, Plaintiffs' allegations that "Defendants failed to protect Plaintiffs from a foreseeable risk of harm from the exposure to lead contaminated water" is a far cry from the cases of rape and torture that have been found to be "obvious" violations for which no factually analogous case is required, and to which the sixth Circuit majority opinion turned for support in denying these Defendants' assertion of qualified immunity. *United States v. Lanier*, 520 U.S. 259, 269 (1997); *Hope v. Pelzer*, 536 U.S. 730, 738 (2002). "A comparison between this case and the bodily integrity cases invoked by the claimants shows a yawning gap." App. 1b, p. 6 (Sutton, J. concurring). "[T]he 'bodily integrity' caselaw fails to provide the 'high degree of specificity', *Wesby*, 138 S. Ct. at 590 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (per curiam)), necessary to overcome qualified immunity, at least as to the claim here." App. 1b, p. 12 (Kethledge, J., dissenting). These reasons support a recall and stay of the Sixth Circuit's mandate pending review by this Court of the MDEQ Defendants' full petition for certiorari.

D. The Sixth Circuit's Decision Conflicts With Decisions in Other Circuits.

"A principal purpose for which [this Court] use[s] [its] certiorari jurisdiction….is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. U.S.*, 500 U.S. 344, 347 (1991). "[I]n case after case around the country, courts have consistently rejected substantive-due-process claims based on the type of conduct alleged here." App. 1a, Slip Op., pp. 64-70 and n.8 (McKeague, J., dissenting) (discussing numerous cases). To be sure, neither this Court nor any Circuit Court has previously held that regulatory oversight by a government official can amount to a violation of the constitutional right to bodily integrity. The right to bodily integrity has consistently been interpreted as prohibiting "forcible physical intrusion of the body by the government." App. 1a, Slip Op., pp. 61-63 (McKeague, J., dissenting) (quoting *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 506 (6th Cir. 2012), and discussing the other cases on which the panel majority relies). These cases "say nothing about how non-custodial policy or regulatory decisions or statements affecting the quality of an environmental resource" violate the same right. *Id.* at 63. "None of them is compatible with the 'careful description' of the right at issue here: protection from exposure to lead-contaminated water allegedly caused by policy or regulatory decisions or statements." *Id.* at 62.

Unsurprisingly, then, courts across circuits have routinely refused to extend due process protection to include a right to be protected from contaminants in water or the environment or a right to receive contaminant free water. These cases include:

- *Branch v. Christie*, in which the court rejected claims against state officials who were alleged to have "knowingly exposed [school] children . . . to water that was contaminated with unsafe levels of lead," and "concoct[ing] a scheme to cover up the health hazard." 2018 WL 337751, at *1 (D.N.J. Jan. 8, 2018). While the right to bodily integrity guarantees the "right generally to resist enforced medication," and to

be "free from medical invasion," the right does not guarantee "a right to minimum levels of safety" or protection from contaminated water. *Id.* at *7.

- *Coshow v. City of Escondido*, where the court rejected the plaintiffs' bodily-integrity claims against city officials who knowingly added fluoride to public drinking water. 132 Cal. App. 4th 687 (Cal. Ct. App. 2005). The court so held even though the fluoride might have contained "trace levels of lead and arsenic." *Id.* at 700. And unlike the officials in *Coshow*, none of the MDEQ defendants here "made a conscious decision to introduce lead into Flint's water." Slip Op., p. 66 (McKeague, J., dissenting).

- *Kaucher v. Cty. of Bucks*, where the Third Circuit rejected a substantive due process claim by corrections employees who became ill due to a jail's unsanitary conditions and officials' false and misleading statements about the scope of the problem. 455 F.3d 418, 420, 428-30 (3d Cir. 2006)

- *Walker v. City of E. Chicago*, in which the federal court rejected a claim based on officials allowing a housing authority to "build and operate public housing in an area with contaminated soil." 2017 WL 4340259, at *6 (N.D. Ind. Sept. 29, 2017).

- *In re Camp Lejeune N. Carolina Water Contamination Litig.*, which rejected a claim by service members who alleged that government officials failed to monitor water quality and notify them of toxic substances. 263 F. Supp. 3d 1318, 1325, 1359 (N.D. Ga. 2016).

- *Naperville Smart Meter Awareness v. City of Naperville*, where a court rejected a claim that radio waves from devices city officials installed in homes posed health risks. 69 F. Supp. 3d 830, 839 (N.D. Ill. 2014).

- And *J.S. ex rel. Simpson v. Thorsen*, which rejected a claim by a student that elementary school officials knowingly concealed a mold problem that affected the student's health. 766 F. Supp. 2d 695, 712 (E.D. Va. 2011).

This issue has never been considered by this Court. The Sixth Circuit opinion's conflicts with these other decisions and makes it reasonably probable that this Court will grant the petition for certiorari and reverse, so a recall and stay of the mandate is warranted.

II. THERE IS A REASONABLE PROBABILITY THAT THIS COURT WILL GRANT CERTIORARI WITH RESPECT TO THE BODILY INTEGRITY CLAIM AGAINST FORMER MDEQ DIRECTOR OF COMMUNICATIONS BRADLEY WURFEL.

Defendant Bradley Wurfel was MDEQ's former Director of Communications. He was responsible for communicating MDEQ's mission, program goals and overall work to the public.

He managed and oversaw a public information officer, digital media coordinator, and a web content manager; and relied on department staff at various levels to supply data, information and professional perspective. Although the position entailed a substantial amount of autonomy, it did not involve substantive regulatory activities such as permitting, enforcement, rule or policy promulgation, or contested case review. He had no role in the regulation of the FWTP, and he had no direct communication with any Plaintiffs. He is alleged to have merely communicated with other government officials and third party media members. Despite these facts, the district court denied Mr. Wurfel's motion to dismiss, and the majority subsequently affirmed that denial.

The Court should independently grant this Motion—and the forthcoming petition for certiorari—because the majority's decision conflicts with preexisting decisions from the Second Circuit; conflicts with this Court's precedent; and addresses an important question of law that this Court should examine, namely whether governmental spokespersons can be held liable for bodily integrity violations based on communications with third party media members.

A. The Majority's Decision Conflicts with Decisions from the U.S. Court of Appeals for the Second Circuit.

There is a direct split between the Sixth Circuit and Second Circuit concerning whether government officials may be held liable for violations of substantive due process based solely on statements to members of the press.

In *Benzman v. Whitman*, 523 F.3d 119 (2d Cir. 2008), the court addressed allegations that U.S. Environmental Protection Agency ("EPA") officials misled residents of New York by publically stating that the air quality following the September 11, 2001 terrorist attacks was safe. The court held that allegations that a government official "knew that her statements were false and 'knowingly' issued false press releases" were insufficient and affirmed dismissal of Plaintiffs' § 1983 claims. *Id*. at 129. Notably, the *Benzman* court also explained that "no court

has ever held a government official liable for denying substantive due process by issuing press releases or making public statements." *Id*. at 125.

In a similar Second Circuit case, *Lombardi v. Whitman*, 485 F.3d 73 (2d Cir. 2007), the court also addressed allegations that EPA officials misled individuals performing search and rescue efforts in the immediate aftermath of the 9/11 attacks concerning air quality, but explained that a fear of personal liability "should not be allowed to inhibit or control policy decisions of government agencies, even if some decisions could be made to seem gravely erroneous in retrospect," because "the risk of such liability will tend to inhibit . . . officials in making difficult decisions about how to disseminate information to the public in an environmental emergency." *Id*. at 84. The same considerations justifying dismissal in *Lombardi* and *Benzman* warrant dismissal here.

The Sixth Circuit majority distinguished the claims against Mr. Wurfel from the claims in *Lombardi* and *Benzman* because "those matters involved the balancing of competing governmental interests … during a time-sensitive environmental emergency." App 1a, Slip. Op., p. 21. But the majority's brief analysis of this issue failed to adequately consider the details of *both* Second Circuit cases. While it may be true that *Lombardi* involved an extremely time-sensitive environmental emergency (*i.e*., public statements made to individuals performing search and rescue efforts in the immediate aftermath of 9/11), the same cannot be said for *Benzman*. There, the plaintiffs included individuals who resided, attended school, or worked in lower Manhattan or Brooklyn, and there was no immediate emergency (like that found in *Lombardi*) which would have required the EPA to make public statements reassuring the public that they could return to their homes, jobs, or schools. *Benzman*, 523 F.3d at 123. In fact, the *Benzman* plaintiffs emphasized this exact point:

> The Plaintiffs here seek to distinguish *Lombardi* on the ground that the considerations favoring prompt appearance at ground zero by first responders and other workers in order to minimize loss of life and injury and to clear debris find no analogue in the decision of [EPA Administrator] Whitman to assure area residents that it was safe to return. We agree that the considerations weighing upon Government officials in the two cases differ. While it was obviously important to have the *Lombardi* plaintiffs at ground zero promptly even if health risks would be encountered, the balance of competing governmental interests faced in reassuring people that it was safe to return to their homes and offices was materially different from that faced in *Lombardi*. [*Id*. at 128.]

Moreover, with respect to the "competing governmental interests" referenced by the majority, the *Benzman* Court explained that they were dispositive in assessing a qualified-immunity defense:

> As the Complaint alleges, quoting a report from the EPA's Office of Inspector General, the White House Council on Environmental Quality ("CEQ") "'influenced, through the collaboration process, the information that EPA communicated to the public through its early press releases when it convinced EPA to add reassuring statements and delete cautionary ones.'" Complaint ¶ 132. The realistic choice for Whitman was either to accept the White House guidance and reassure the public or disregard the CEQ's views in communicating with the public. A choice of that sort implicates precisely the competing governmental considerations that Lombardi recognized would preclude a valid claim of denial of substantive due process in the absence of an allegation that the Government official acted with intent to harm. [*Id*. at 128.]

Therefore, the competing interests at issue in *Benzman* resulted in the EPA Administrator's choice between accepting guidance from the White House CEQ or disregarding its views in communicating with the public. Here, Mr. Wurfel faced similar competing interests. Numerous other individuals involved in the regulation and operation of the FWTP represented that the FWTP was being operated safely and in accordance with the Safe Drinking Water Act. Just as the EPA Administrator faced a choice over whether to accept guidance from the White House CEQ, Mr. Wurfel faced a choice between accepting the technical positions of those operating and overseeing the FWTP or disregarding these views in communicating with the public.

Thus, the majority's attempt to distinguish this case from *Benzman* was misguided. The Second Circuit's rationale cannot be confined to a hyper-limited set of extremely exigent emergency situations, and the competing interests involved in *Benzman* were analogous to those here. Additionally, the *Benzman* court emphasized that even if Whitman's statements were not "wise" or the EPA's performance was deficient, her public statements did not shock the conscience, and that the *Benzman* complaint failed to adequately show that Whitman's statements were made with knowing falsity. *Id*. at 128-29. Similarly here, even if Mr. Wurfel's statements were erroneous, the factual allegations against him do not support a conclusion that these statements were intentional lies or that they shock the conscience. Instead, as Judge McKeague noted, "[a]t most, they show a mistake of law or fact, made at least in partial reliance on the representations of other State employees." App. 1a, Slip Op. p. 56 (McKeague, J., dissenting).

This Court should grant this Motion—and the forthcoming petition for certiorari—so that it may resolve the split between the Second and Sixth Circuits and clarify whether, and under what facts, governmental spokespersons may be held liable based on communications with third party media members.

B. The Sixth Circuit's Decision Conflicts with Prior Decisions of this Court.

i. The Decision Conflicts with Supreme Court Precedent Requiring the Need for Existing Law to Demonstrate that Mr. Wurfel's Alleged Conduct was Unconstitutional.

As set forth in more detail above, *see supra* pp. 9-11, recent decisions of this Court make clear that to overcome qualified immunity, "existing law" must have rendered "the constitutionality of the officer's conduct 'beyond debate.'" *Wesby*, 138 S. Ct. at 589. Regarding the bodily integrity claim against Mr. Wurfel, not only have Plaintiffs failed to identify any case wherein an officer acting under similar circumstances (*i.e.*, communicating with third-party

media members) was held to have violated a plaintiff's substantive due process rights, the only cases considering such a scenario (*Benzman* and *Lombardi*) have reached the *opposite* conclusion and held that such statements did *not* violate substantive due process. There is no way that existing law rendered the constitutionality of Mr. Wurfel's alleged conduct beyond debate, and Mr. Wurfel should therefore have been dismissed based on his qualified immunity. A stay pending resolution of the forthcoming petition for certiorari is warranted.

ii. The Sixth Circuit Failed to Consider the Full Text of the Relevant Articles and Emails Upon Which Plaintiffs Rely.

In *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), this Court reiterated that to survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." (Citations and quotations omitted.) Importantly, when considering whether a complaint contains sufficient factual matter to state a claim to relief (as this Court requires), "[d]ocuments attached to a motion to dismiss may be considered part of the pleadings if they are mentioned in the complaint and are central to the plaintiffs' claims." *Haviland v. Metro Life Ins. Co*., 730 F.3d 563, 565 n.1 (6thCir. 2013)).

As to Mr. Wurfel, Plaintiffs merely allege that he received and conveyed information from and to other government officials, and that he made out-of-context statements to the media. Thus, when considering the claims against Mr. Wurfel, the district court (and Sixth Circuit) should have considered the full text of these articles and emails. For example, Plaintiffs allege that, in July 2015, Mr. Wurfel made a statement to a reporter that, based on MDEQ sampling, those concerned about the high lead levels identified in the home of Leanne Walters "could relax." Compl. ¶ 204. This allegation does not, however, include the remainder of the statements

attributable to Mr. Wurfel in the same article, which warned that "anyone with a home that's more than 30 years old should contact their city and get their water tested"; that "[o]ld homes sometimes have lead service connections with city water systems"; and that "[l]ead can get into drinking water that way[.]"Other statements from Mr. Wurfel that the district court (and Sixth Circuit) would have had to address had they considered the full text of the relevant articles and emails include: an acknowledgment that the FTWP had not optimized its water treatment; a recommendation that "anyone with lead pipes in their premise plumbing" should be aware and that these will "impart lead in water"; and a warning that anyone with lead pipes or plumbing is likely "ingesting some level of lead." *Guertin,* 16-cv-12412, Dkt. No. 70, Pg. ID 3626; Dkt. No. #70-1.

The lower courts' failures to consider and address the full context of Mr. Wurfel's alleged statements provide yet another, independent basis to grant this Motion and forthcoming petition.

C. The Sixth Circuit's Decision Addresses an Important Question of Federal Law that Has Not Been, but should be, Settled by this Court.

With respect to the claim against Mr. Wurfel, the majority's decision addresses an important question that this Court should resolve—whether public officials can be held liable for substantive due process violations based on allegedly inaccurate statements to third party media members. The consequences of the majority's decision will have far-reaching consequences and open the door to lawsuits against governmental spokespersons—and possibly even elected officials—at all levels of federal, state, and local government. Even ignoring the potential First Amendment implications involved, the impact from a rash of improvident lawsuits could be disastrous and lead public officials to remain silent during times of national crisis out of fear that they may be held liable for inaccurate statements.

The Second Circuit recognized the potential for such consequences in *Lombardi*, explaining:

> If anything, the importance of the EPA's mission counsels against broad constitutional liability in this situation: the risk of such liability will tend to inhibit EPA officials in making difficult decisions about how to disseminate information to the public in an environmental emergency. Knowing that lawsuits alleging intentional misconduct could result from the disclosure of incomplete, confusingly comprehensive, or mistakenly inaccurate information, officials might default to silence in the face of the public's urgent need for information.

485 F.3d at 84. Here, the same policy considerations are present, and this Court should grant this Motion (and the anticipated petition for certiorari) so that it may address this important issue and clarify whether (and under what facts) governmental spokespersons may be held liable for bodily integrity violations based solely on communications with third party media members.

III. GOOD CAUSE EXISTS FOR A STAY PENDING THE FILING AND DISPOSITION OF A PETITION FOR CERTIORARI.

Good cause exists for a stay pending the filing and disposition of the MDEQ Defendants' certiorari petition because otherwise the MDEQ Defendants will suffer irreparable harm. *Hollingsworth*, 558 U.S. at 190; *Nanda v. Bd. of Trs. of the Univ. of Illinois*, 312 F.3d 852, 853 (7th Cir. 2002). Additionally, the balance of the equities and public interest strongly support a stay given this taxpayer-supported litigation and the potential ramifications for environmental regulators nationwide if this decision is enforced and relied on pending full review by this Court. This includes the close to 50 related cases asserting substantially identical bodily integrity claims against these Defendants that will likely be decided in the interim, in reliance on the Sixth Circuit's decision in this case. Additionally, alleged lead contamination in other public water systems is now being litigated across the nation, in Chicago, Illinois, and Fresno, California, among others. These cases, and the governmental regulators in those states, will similarly be affected by the Sixth Circuit's decision being given full effect without first receiving a thorough

vetting by this Court. In contrast, staying the Sixth Circuit's mandate would cause no cognizable injury, let alone irreparable harm, to Plaintiffs other than a modest delay in discovery.

Conversely, the MDEQ Defendants will be irreparably harmed because they will be forced to undergo timely, costly discovery absent a stay, based on claims that are vague and, if existing at all, are on "the outer edges of judicial competence," under circumstances where the district court also already demonstrated an unwillingness to "match allegations to individual defendants." App. 1b, pp. 5, 7 (Sutton, J., concurring). Such a process erodes the shield that qualified immunity provides to governmental officials. Qualified immunity is intended to protect government officials from discovery and the inconveniences of defending a litigation, not just from liability. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). A public official is entitled to have the defense of qualified immunity decided *before* the case proceeds to discovery. *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Doe v. Miller*, 418 F.3d 950 (8th Cir. 2005) (recognizing that entitlement to qualified immunity when asserted prior to discovery may warrant a stay of the mandate to avoid irreparable harm to the government defendants).

The MDEQ Defendants' entitlement to qualified immunity should be fully considered by this Court via their petition for certiorari before these Defendants are burdened with discovery, and before the Sixth Circuit's decision is given full effect in the related, pending district court cases in Michigan and similar cases in other parts of the country. The public interest also supports a stay in this case, as this suit against state officials is at taxpayer expense. Allowing costly discovery against these Defendants to proceed, given the reasonable probability that their petition for certiorari will be granted, is against the public interest.

CONCLUSION AND RELIEF REQUESTED

"No official—no matter how blameworthy he might be on moral grounds—can be expected to recognize in advance that a court will recast a legal rule so that it applies to conduct

to which it has never applied before." App. 1b, p. 13 (Kethledge, J., dissenting). This Court has authority under 28 U.S.C. § 1651(a) to stay the court of appeals' ruling and its corresponding mandate, which contravenes prior decisions of this Court and, with one fell swoop of the Sixth Circuit's pen, unravels and greatly expands upon the carefully and narrowly crafted constitutional rights recognized under the United States Constitution's Due Process Clause. Accordingly, the MDEQ Defendants respectfully request that this Court recall and stay the mandate pending this Court's resolution of a certiorari petition.

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Respectfully Submitted,

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APPENDIX

A. **Opinion and Order of the Sixth Circuit Court of Appeals**

B. **Order Denying Petition for Rehearing En Banc**

C. **Sixth Circuit's Order Denying MDEQ Defendants' Motion to Stay the Mandate**