No. 19-_____

In The
Supreme Court of the United States

CITY OF FLINT, et al.,

Petitioners,

v.

SHARI GUERTIN, et al.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Questions Presented are:

1. Whether the substantive due process right to bodily integrity should be extended to protect the public at large from exposure to an environmental toxin resulting from governmental policy decisions.

2. Whether it is plausible that a municipal officer's actions were conscience-shocking where the Respondents admit that the policy decisions were based on the advice and direction of the controlling State regulatory agency and with the advice of expert advisors.

3. If the answer to Questions 1 or 2 is "yes," was the right clearly established?

4. Whether the City, which was under the substantially complete control and authority of the State under Michigan's "Local Financial Stability and Choice Act of 2012," was an arm of the State and thus entitled to immunity from suit under the Eleventh Amendment.

PARTIES TO THE PROCEEDING

Petitioners are Defendants City of Flint, Darnell Earley, Gerald Ambrose, and Howard Croft. The City is a Michigan municipality. During the relevant time period, the City was governed by State-appointed emergency managers. Messrs. Earley and Ambrose are former Emergency Managers who held office sequentially. Mr. Croft is the former Director of the City's Department of Public Works, which includes the Flint Water Treatment Plant.[1]

Respondents are Plaintiffs Shari Guertin, individually and as next friend of her child, E.B., and Diogenes Muse-Cleveland.

The other remaining Defendants are: former Michigan Department of Environmental Quality personnel Liane Shekter-Smith; Steven Busch, Michael Prysby and Bradley Wurfel, as well as two engineering firms – Veolia North America, LLC and Lockwood Andrews & Newnam, Inc.

[1] Petitioners Croft, Earley, and Ambrose will sometimes be referred to as "Individual City Defendants" and, with the City, "City Defendants."

DIRECTLY RELATED CASES[2]

1. United States District Court for the Eastern District of Michigan.

    - *Guertin et al. v. State of Michigan, et al.*, Case No. 16-cv-12412. Opinion and Order entered June 5, 2017.

2. United States Court of Appeals for the Sixth Circuit.

    - *Guertin et al. v. State of Michigan, et al.*, Case No. 17-1698, 17-1699, 17-1745, 17-1752 and 17-1769. Opinion entered January 4, 2019.
    - *Guertin et al. v. State of Michigan, et al.*, Case No. 17-1699 and 17-1745. Order denying rehearing *en banc* entered May 16, 2019.

3. United States Supreme Court.

    - *Busch, et al. v. Guertin et al.*, Application No. 19A111.

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[2] This case is one of 49 pending in the United States District Court for the Eastern District of Michigan that have been consolidated as *In re Flint Water Litigation*, 16-cv-10444. It is unclear to petitioner whether that consolidated case of the member cases are "related" within the meaning of Supreme Court Rule 14. 1(b)(i).

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF APPENDICES:

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

CONSTITUTION AND STATUTES

PETITION FOR A WRIT OF CERTIORARI

The City of Flint, Darnell Earley, Gerald Ambrose, and Howard Croft petition for a writ of certiorari to review the judgment of the Sixth Circuit in this case.

OPINIONS BELOW

The District Court dismissed all claims against Petitioners except for a Section 1983 substantive due process claim asserting a violation of Respondents' right of bodily integrity. The District Court opinion is reported at *Guertin v. State of Michigan*, No. 16-cv-12412, 2017 WL 2418007 (E.D. Mich. June 5, 2017). (Pets.' Appx. 117.)

Petitioners appealed based on the denial of qualified and absolute immunity. A divided panel of the Sixth Circuit affirmed. The opinion is reported at *Guertin v. State of Michigan*, 912 F.3d 907 (6th Cir. 2019). (Pets.' Appx. 1.)

A divided Sixth Circuit denied a petition for rehearing *en banc* with respect to the bodily integrity holding. That denial is reported at *Guertin v. Michigan*, 924 F.3d 309 (6th Cir. 2019). (Pets.' Appx. 201.)

JURISDICTION

The Sixth Circuit issued its decision on January 4, 2019. The Sixth Circuit denied Petitioners' timely request for rehearing and rehearing *en banc* on May 16,

2019. This Court has jurisdiction to grant a writ of certiorari under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Questions 1, 2, and 3 involve Revised Statute § 1979, 42 U. S. C. § 1983, which states in relevant part:

> Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .

Question 4 involves the Eleventh Amendment of the United States Constitution and the Michigan "Local Financial Stability and Choice Act of 2012," (the "Emergency Management Statute") Public Act 436 of 2012. The Eleventh Amendment states in relevant part: "The judicial power of the United States shall not be construed to extend to any suit . . . against one of the United States by citizens of another state. . . ." Relevant portions of the Emergency Management Statute are reproduced in the Appendix. (Pets.' Appx. 356.)

INTRODUCTION

"The sympathies of every decent person run entirely to the plaintiffs in this case. But sometimes the law, evenhandedly applied, leads to a result contrary to the crush of popular opinion. This is one of those cases."[3]

* * *

This case arises out of the events commonly known as the "Flint water crisis." Respondents allege, and Petitioners assume for present purposes,[4] that Petitioners failed to protect them from exposure to lead, an environmental toxin, as a result of a collection of ill-conceived and badly implemented governmental policy decisions made by the State of Michigan, several of its agencies and their personnel, and the City Defendants. Respondents assert that the substantive due process right of bodily integrity protects them from these bad decisions of the State and City. The District Court found that Respondents had stated a bodily integrity claim[5] and that the City was not entitled to qualified immunity. A divided panel of the Sixth Circuit Court of Appeals, with Judge David W. McKeague dissenting as to the bodily integrity claim, affirmed. The full Sixth

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[3] Kethledge, J., dissenting from denial of rehearing *en banc.* (Pets.' Appx. 215.)

[4] This case remains at the pleading stage. Thus, the City Defendants accept the well-pled allegations as true.

[5] The District Court dismissed all other claims against Petitioners.

Circuit denied rehearing *en banc* over five dissents[6] and with four concurring judges[7] expressing reservations about the result.

This case is fundamentally about whether the public at large has a substantive due process right to be protected from exposure to environmental toxins as a result of bad decisions of the political branches of government. Protecting the public against environmental harms is a very important issue. For example, this issue is likely to play a central role in the 2020 elections. But the fact that it is an important political question does not mean that this Court's existing, intentionally restrained, substantive due process jurisprudence should be radically expanded to encompass judicially created environmental policy.

A second important question exists here: whether local political decision-makers can plausibly be alleged to have acted in a conscience-shocking or recklessly indifferent manner when, as Respondents themselves allege, the City Defendants acted on the advice and at the direction of the State regulatory agency tasked under both federal and state law with regulating the activities in question, and in consultation with highly qualified private expert advisors. Allowing such a claim to go forward will almost inevitably result in excessively risk-averse, stultified, government decision-making, as political bodies and decision-makers will

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[6] Kethledge, Thapar, Larsen, Nalbandian, and Murphy, JJ.

[7] Gibbons, Stranch, Sutton, and Bush, JJ.

not be allowed to rely on the guidance of regulators and the advice of their own technical advisors and experts.

These first two questions necessarily give rise to a third: are the Individual City Defendants entitled to qualified immunity because the alleged constitutional rights are too far afield from existing law to satisfy the "clearly established" prong of the 42 U.S.C. § 1983 inquiry.[8]

Further, under Michigan's unique Local Financial Stability and Choice Act of 2012, (the "Emergency Management Statute") Public Act 436 of 2012, the City was a municipality in name only. In all meaningful respects, Flint was under the complete control of the State. On those facts, it should be found to be an arm of the State, and thus entitled to Eleventh Amendment immunity.

Finally, this petition is of immediate practical moment, as this case is one of a veritable torrent of class action and individual cases consolidated in the Eastern District of Michigan under the name *In re Flint Water Cases*, 16-cv-10444. There are estimated to be approximately 25,000 *Flint Water Litigation* claimants,[9]

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[8] Assessing a qualified immunity defense involves two prongs: "whether the plaintiff has alleged a deprivation of a constitutional right at all . . . [and] whether the right was clearly established." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (internal quotations and citations omitted). These prongs may be addressed in any sequence. *Id.* at 242. Here, Petitioners begin with the first prong.

[9] The 25,000 estimate is based on a "census" conducted by a Special Master appointed by the District Court. *See* First Interim

all of whom raise the same substantive due process claim.

STATEMENT OF THE CASE

Flint, like many older cities, has many water service lines made from or that otherwise contain lead. Complaint ¶ 127 (Pets.' Appx. 273.) Respondents allege that Petitioners and other defendants failed to protect them from that lead by making a risky policy decision to change Flint's drinking water source, *id.* ¶¶ 85-90 (Pets.' Appx. 265), and then failing to treat it with the proper corrosion control chemicals. *Id.* ¶¶ 119-24 (Pets.' Appx. 272.) They allege that the lead exposure that affected the public at large harmed them when they consumed the water. *Id.* ¶ 13 (Pets.' Appx. 244.) They do not allege that Petitioners in any way targeted them.

Those decisions were allegedly made to save money,[10] a particularly cogent policy consideration in Flint, which was under the control of an Emergency Manager appointed by and accountable to the Governor and had been placed into financial receivership by the State, due to an ongoing financial crisis. Complaint ¶ 56 (Pets.' Appx. 260.) The Emergency Managers were statutorily mandated to "act for and in the place and

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Report of the Special Master, *In Re Flint Water Cases*, 16-cv-10444, Dkt. # 772 (Pets.' Appx. pp. 220-39.)

[10] *See* Complaint, ¶¶ 86, 91, 94, 345. (Pets.' Appx. pp. 265-67, 320.)

stead of the governing body and the office of chief administrative officer of the local government . . . [in order to] rectify the financial emergency. . . ." Emergency Management Statute, Section 9(2) (Pets.' Appx. 364.)

Respondents further allege that Petitioners acted with a culpable mental state, variously described as "reckless,"[11] "conscience shocking,"[12] "deliberately indifferent,"[13] and others. Respondents allege that this failure invaded their right of bodily integrity:

> 384. In providing Plaintiffs with contaminated water, and/or causing Plaintiffs to consume that water, Defendants violated Plaintiffs' right to bodily integrity, insofar as Defendants failed to protect Plaintiffs from a foreseeable risk of harm from the exposure to lead contaminated water.

Complaint, ¶ 384 (Pets.' Appx. 327.)

However, Respondents also allege that the Michigan Department of Environmental Quality ("MDEQ"), the State agency responsible for implementing and enforcing safe drinking water laws in Michigan, failed to require the City to implement corrosion control measures when using Flint River water and that MDEQ then engaged in what essentially amounts to a cover up of their negligence or indifference.[14]

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[11] *Id.* ¶ 13 (Pets.' Appx. 244.)

[12] *Id.* ¶ 371 (Pets.' Appx. 325.)

[13] *Id.* ¶ 22 (Pets.' Appx. 246.)

[14] *Id.* ¶ 30 (Pets.' Appx. 250.)

Further, Respondents allege that Lockwood, Andrews & Newnam, Inc. ("LAN") was negligent in providing professional engineering services to the City when it consulted and advised the City prior to the switch to the Flint River.[15] Likewise, Respondents allege that Veolia North America, LLC ("Veolia") was negligent in providing professional engineering services to the City in 2015 (after the switch to the Flint River), when the City was investigating concerns about water quality and determining how to respond).[16]

Petitioners' motion to dismiss all claims against them was granted in part and denied in part. The District Court dismissed all state law claims and all constitutional claims against Petitioners except for the substantive due process bodily integrity claim. With respect to that claim, the Court held that:

> [D]efendants violated plaintiffs' fundamental interest by taking conscience-shocking, arbitrary executive action, without plaintiffs' consent, that directly interfered with their fundamental right to bodily integrity.

Opinion and Order Granting in Part and Denying in Part Defendants' Motions to Dismiss ("D. Ct. Op. & Order") (Pets.' Appx. pp. 117-200.)

It further held that the Individual City Defendants were not entitled to qualified immunity because

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[15] *Id.* ¶ 45 (Pets.' Appx. 258.)

[16] *Id.* ¶ 162 (Pets.' Appx. 279.)

the right at issue was clearly established. *Id.* (Pets.' Appx. 43-50.)

The District Court cited and described[17] a series of cases in support of its conclusion, beginning with a series of Supreme Court decisions: *Washington v. Harper*, 494 U.S. 210, 229 (1990), involving "forcible injection of medication"; *Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261, 278 (1990), involving "unwanted medical treatment"; *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), involving "forced sterilization"; and *Winston v. Lee*, 470 U.S. 753, 766-67 (1985), involving "surgical intrusion into a suspect's chest." The District Court then turned to a series of Circuit Court cases: *Barrett v. United States*, 798 F.2d 565, 575 (2d Cir. 1986), involving "administering a dangerous drug to human subjects"; *Lojuk v. Quandt*, 706 F.2d 1456, 1465-66 (7th Cir. 1983), involving "treatment with anti-psychotic drugs"; and *Rogers v. Okin*, 634 F.2d 650, 653 (1st Cir. 1980), vacated and remanded, *Mills v. Rogers*, 457 U.S. 291, 303 (1982), involving the "administration of anti-psychotic drugs." The District Court's own description of these cases illustrates the chasm between existing bodily integrity jurisprudence and the claim at issue here: that is the deliberate, targeted, and non-consensual intrusions of a person's body for medical treatment versus the deliberately indifferent delivery of lead tainted water to a community at large.

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[17] The case descriptions in this paragraph are quoted directly from the District Court's Opinion at pp. 67-69. (Pets.' Appx. pp. 108-12.)

A divided panel of the Sixth Circuit affirmed. It held that Petitioners' right of bodily integrity was violated, largely relying on cases which involved on their face targeted physical "intrusions" and "invasions."[18]

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[18] The following are direct quotes from the majority discussion of this Court's case law on which it relied, with only minor edits for grammar. A review of the majority's discussion of Sixth Circuit and District Court case law supports the same point:

> "[A]n indispensable right recognized at common law as the right to be free from . . . unjustified intrusions on personal security and encompass[ing] freedom from bodily restraint and punishment." *Ingraham* [*v. Wright*, 430 U.S. 651 (1977) (internal quotation marks and citations omitted)]; (Panel Op. at 7.)
>
> "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).
>
> "[A]ny compelled intrusion into the human body implicates significant, constitutionally protected . . . interests." *Missouri v. McNeely*, 569 U.S. 141, 159 (2013); *see also Rochin v. California*, 342 U.S. 165, 172 (1952) (forcibly pumping a detainee's stomach to obtain evidence was "too close to the rack and the screw to permit of constitutional differentiation"). (Panel Op. at 8.)
>
> "*Washington v. Harper*, 494 U.S. 210 (1990) [held that] inmate 'possess[ed] a significant liberty interest in avoiding unwanted administration of antipsychotic drugs. . . .'" (Panel Op. at 9.)
>
> *Cruzan v. Director, Missouri Department of Health*, [the Court stated] . . . "This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment." (Panel Op. at 9-10.)

The majority panel found *In re Cincinnati Radiation Litigation*, 874 F. Supp. 796 (S.D. Ohio 1995), a case involving non-consensual intentional medical experimentation conducted from 1960 to 1972 that was designed to study the effects of massive doses of radiation on human beings in preparation for a possible nuclear war, "especially analogous" despite the lack of any allegation in this matter that the City Defendants intentionally targeted any particular person for any particular reason. Panel Op. at 11. (Pets.' Appx. 18.)

The majority also found that Petitioners acted with deliberate indifference. It reasoned that they "were among the chief architects of Flint's decision to switch water sources and then use a plant they knew was not ready to safely process the water," Panel Op. at 19. The majority downplayed the MDEQ's and expert engineers' role as a fact issue, *id.*, notwithstanding that all of the pertinent facts were ***admitted*** by Respondents. Specifically, Respondents admit that the MDEQ approved the use of the River without requiring corrosion control or water quality parameters, Complaint ¶¶ 113, 155 and 161, (Pets.' Appx. pp. 271, 278 and 279) and thereafter continued to assure the City and others that the water was safe and complied with "all current state and federal requirements." *Id.* ¶¶ 160, 191, 205 and 207. (Pets.' Appx. pp. 279, 284 and 288.)

"*Winston* [*v. Lee*, 470 U.S. 753, 759 (1985)] [held] 'that a non-consensual "surgical intrusion into an individual's body for evidence" without a compelling state need is unreasonable.' " (Panel Op. at 10) (Pets.' Appx. 16.)

Respondents likewise admit that the City sought the advice of two expert engineering firms. First, the City hired Defendant LAN "to prepare Flint's water treatment plant for the treatment of new water sources." Complaint, *id.* ¶¶ 107-09, 111. (Pets.' Appx. 270.) Later, in 2015, when several water quality problems were discovered, they hired Defendant Veolia "to conduct a review of the City's water quality . . . including treatment processes, maintenance procedures, and actions taken." *Id.* ¶¶ 162-63 (Pets.' Appx. 279.) Veolia assured the City that the water was "in compliance with drinking water standards." Complaint ¶ 166 (Pets.' Appx. 280.) It also noted that "[s]afe [equals] compliance with state and federal standards and required testing." As a result, Respondents admit that each of these experts failed to competently advise the City Defendants. *Id.* ¶¶ 434-40 and 453-55. (Pets.' Appx. pp. 337-38 and 340.)

REASONS TO GRANT THE PETITION

I. This Court should decide whether the right to bodily integrity should be expanded to include a right to protection from exposure to environmental toxins.

A. The Panel Majority's holding is unrooted in this Court's substantive due process jurisprudence.

In *Washington v. Glucksberg*, 521 U.S. 702 (1997), this Court rejected a claimed substantive due process

right to assisted suicide rooted in "abstract concepts of personal autonomy," *id.* at 725. The Court explained that:

> [W]e ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. . . . We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the [judiciary]. *Id.* at 720 (internal quotations and citations omitted).
>
> To restrain that judicial overreach:
>
> First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are objectively deeply rooted in this Nation's history and tradition. . . . Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.

Id. at 720-21, internal quotations and citations omitted.

The Panel Opinion sharply deviates from these standards. It roots its holding in a "constitutional right to be free from forcible intrusions on their bodies against their will, absent a compelling state interest." Panel Op. at 9 (*quoting Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 506 (6th Cir. 2012)).

But, as Judge McKeague explained, this "abstract level of generality," Dissenting Op. p. 61 (Pets.' Appx. 98), is at odds with the Supreme Court's guidance, is not "deeply rooted in our legal tradition," and is contradicted by the pertinent case law. Controlling case law recognizes specific rights against being subjected to unconsented to medical experimentation or medical procedures, i.e., forcible intrusions directed against particular persons. The non-targeted introduction of an environmental contaminant which ultimately is consumed by members of the public at large is not a "forcible intrusion" in any sense that has been recognized by any court. Indeed, *all relevant case law* has rejected expanding the right of bodily integrity into a right of the public at large to be free from exposure to environmental contaminants.

Judge McKeague's dissent correctly noted that "[a]s the majority acknowledges, Plaintiffs point to no factually similar controlling case in which a court found that such conduct violated a constitutional right to bodily integrity." Dissenting Op. p. 65 (Pets.' Appx. 104.) Instead, the majority relies on cases that address issues untethered to the claims here. *Planned Parenthood*, *supra*, involved abortion rights. *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) rejected a claimed due process right of students to be free of corporal punishment. *Doe v. Claiborne Cty.*, 103 F.3d 495, 506 (6th Cir. 1996) involved a student's "right to be free from sexual abuse at the hands of a public school teacher." *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998) involved the disclosure of information that put plaintiff police officers' lives at risk.

Nishiyama v. Dickson Cty., 814 F.2d 277, 280 (6th Cir. 1987) (*en banc*), *abrogated on other grounds as recognized in Jones v. Reynolds*, 438 F.3d 685, 694-95 (6th Cir. 2006) involved allowing an imprisoned felon to use a police car, thereby enabling him to murder plaintiff. *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 269-70 (1990) involved the right to refuse unwanted medical treatment. The remaining Supreme Court and Circuit cases relied upon by the majority involved either forced medical treatment or medical experimentation without informed consent. Further, as Judge McKeague recognized, all but one of the out-of-circuit cases cited by the majority involve unconsented medical experimentation involving "direct, physical intrusions into an individual's body at the hands of a government official." *See* Dissenting Op. p. 62 and p. 63, n. 15. (Pets.' Appx. pp. 98-99.)

B. Courts have repeatedly rejected a substantive due process right to be protected from environmental contaminants.

The majority erred not only by relying on abstractions, but by disregarding an overwhelming body of case law rejecting Plaintiffs' asserted substantive due process right. Judge McKeague discussed two of the cases, *Branch v. Christie*, No. 16-2467 (JMV) (MF), 2018 WL 337751 (D.N.J. Jan. 8, 2018) and *Coshow v. City of Escondido*, 132 Cal. App. 4th 687 (Cal. Ct. App. 2005), Dissenting Op. pp. 64-66, (Pets.' Appx. pp. 103-11), and cites numerous others at Dissenting Op. p. 69,

n. 8. (Pets.' Appx. 112.) There are many more.[19] Simply stated, "whenever federal courts have faced assertions of fundamental rights to a 'healthful environment' or to freedom from harmful contaminants, they have invariably rejected those claims." *Lake v. City of Southgate*, No. 16-10251, 2017 WL 767879, at *4 (E.D. Mich. Feb. 28, 2017).[20]

The majority brushes these cases aside by asserting that Plaintiffs' claim "does not entail . . . a right to live in a contaminant-free, healthy environment." Panel Op. p. 13 (Pets.' Appx. pp. 18-19.) But that is what Plaintiffs themselves allege – the right to "protect[ion] . . . from a foreseeable risk of harm from the exposure to lead contaminated water." Complaint ¶ 384 (Pets.' Appx. 327.) As Judge McKeague explained, "it is hard to understand plaintiffs' claim

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[19] *See Lake v. City of Southgate*, No. 16-10251, 2017 WL 767879, at *4 (E.D. Mich. Feb. 28, 2017) (collecting cases); *Concerned Citizens of Neb. v. U.S. Nuclear Regulatory Comm'n*, 970 F.2d 421, 426-27 (8th Cir. 1992) ("[W]e are unable to conclude that a right to an environment free of any non-natural radiation is so 'deeply rooted in this Nation's history and tradition,' as to render it fundamental."); *MacNamara v. Cty. Council of Sussex Cty.*, 738 F. Supp. 134, 142-43 (D. Del. 1990), *aff'd*, 922 F.2d 832 (3d Cir. 1990) ("[T]he only cases the court has found on the issue clearly state that there is no constitutional right to a healthful environment."); *Upper W. Fork Watershed Ass'n v. Corps of Eng'rs, U.S. Army*, 414 F. Supp. 908, 931-32 (N.D. W.Va. 1976), *aff'd sub nom. Upper W. Fork River Watershed Ass'n v. Corps of Eng'rs, U.S. Army*, 556 F.2d 576 (4th Cir. 1977) ("[C]laims about environmental degradation cannot be elevated to Constitutional levels.").

[20] But *c.f. Juliana v. United States*, 217 F. Supp. 3d 1224, 1248-50 (D. Or. 2016) (recognizing "the right to a climate system capable of sustaining human life").

independent from the right to receive clean water. If the Constitution does not guarantee the right to receive clean water on the one hand, how may it guarantee the right not to be exposed to contaminated water on the other?" Dissenting Op. at p. 60 (Pets.' Appx. pp. 96-97.)

In summary, under *Glucksberg*, *supra*, the relevant question is whether existing substantive due process case law provides "concrete examples" of the right which Plaintiffs claim was violated. The cases cited by the majority do not provide such concrete examples. Indeed, concrete examples of such a right do not exist and all cases indicate to the exact opposite. This Court should review whether the Sixth Circuit was correct in creating a new substantive due process right to be protected from exposure to environmental toxins.

II. This Court should decide whether it is plausible that the decisions of government officials acting with the approval of regulatory enforcers and the advice of recognized experts can be found to be conscience-shocking.

As both the majority and dissenting opinions recognized, each of Respondents' allegations, including that Petitioners acted with the requisite mental state, must pass the *Twombly*[21] "plausibility" threshold. Panel Op. p. 5, Dissenting Op. p. 51. (Pets.' Appx. pp. 82-83.) This means that Plaintiffs must plausibly allege conduct by each City Defendant that was

[21] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-58 (2007).

conscience-shocking. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846-55 (1998).

Respondents' allegations fall far short of the plausibility threshold, for reasons persuasively expressed by Judge McKeague:

> [B]efore the switch, the City consulted with the [LAN] engineering firm to ready its treatment plant. The engineering firm did not advise the City to implement corrosion control. Neither did the MDEQ. In fact, the MDEQ informed the City that it was "satisfied with the water treatment plant's ability to treat water from the Flint River." . . . Fast-forward to early 2015, when Ambrose rejected two opportunities to reconnect to the DWSD. At that time, the City had hired the Veolia engineering firm to review its water quality and treatment procedures. After a 160-hour assessment, Veolia concluded that Flint's water complied with applicable laws and did not advise Flint to use corrosion control.
>
> The Emergency Managers' reliance on expert advice does not demonstrate a callous disregard for or intent to injure plaintiffs. Earley and Ambrose were budget specialists, not water treatment experts. They did not oversee the day-to-day operations of the water treatment plant, nor did they carry any responsibility for ensuring its compliance with federal or state laws. Accordingly, their reliance on the industry and regulatory experts who were tasked with preparing the water treatment and ensuring its compliance with safe drinking

> water laws does not demonstrate conscience-shocking behavior.

Dissenting Op. p. 50 (Pets.' Appx. pp. 81-82.)[22]

The role of MDEQ, LAN and Veolia *are not* disputed facts. To the contrary, they are admitted on the face of the Complaint. Thus, there is no need for discovery to resolve the question of whether Respondents have plausibly alleged that the Individual City Defendants acted with a culpable mental state.

Moreover, the need of each of the Individual City Defendants must be separately considered:

> The question this case presents is not whether the collective result of the officials' actions – the water crisis – caused any harm. It did. The question is, rather, whether any official's discrete decisions or statements, which in any

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[22] The quoted language was specifically directed to the allegations against the Emergency Managers. As to Petitioner Howard Croft, Judge McKeague correctly concluded that the Complaint was devoid of meaningful allegations against him:

> [T]he allegation that Croft "caused and allowed unsafe water to be delivered to Flint's residents" is . . . "chimerical". . . . There are only two other allegations against Croft. The first is that, at an unidentified point in time, he said in a press release that the City's water was "of the high quality that Flint customers have come to expect." The second is that in September 2015, he emailed "numerous officials" to inform them that the MDEQ had confirmed Flint's compliance with "EPA standards." These allegations do not demonstrate that Croft engaged in any behavior that may fairly be construed as conscience-shocking.

Dissenting Op. at p. 58 (Pets.' Appx. pp. 94-95.)

> way caused or contributed to the Crisis, violated a substantive due process right to bodily integrity.

Dissenting Op. at p. 40 (Pets.' Appx. 65.)

The question of whether Respondents' allegations are plausible is not relevant only to the particular allegations here. Instead, it implicates fundamental questions regarding the respective competencies and boundaries of the political and judicial branches of government:

> "[i]t is in the very nature of deliberative bodies to choose between and among competing policy options, and yet a substantive due process violation does not arise whenever the government's choice prompts a known risk to come to pass." *Schroder* [*v. City of Fort Thomas*, 412 F.3d 724, 729 (6th Cir. 2005)]. Yet under the majority's conscience-shocking analysis, a whole host of policy decisions would now be subject to constitutional review, in direct contravention of the presumption of rational regulatory decisionmaking.

Id. at 51. *See also Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, 542 F.3d 529, 540 (6th Cir. 2008) ("Where the substantive due process claim arises out of a governmental actor's attempt to discharge duties which it is required by law or public necessity to undertake, courts are particularly unlikely to find the action arbitrary, even if the actor was imprudent in choosing one legitimate goal over another," *citing County of Sacramento v. Lewis*, 523 U.S. 833, 855 (1998). *See also*

Ziglar v. Abbasi, ___ U.S. ___, 137 S. Ct. 1843, 1866 (2017) ("permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties" (internal quotation and citation omitted). Stated differently, turning allegedly bad policy decisions and implementation into a substantive due process violation will result in worse, not better, decision-making and diminish, rather than improve, the effectiveness of the political branches.

In summary, Respondents have pled that Messrs. Croft, Earley, and Ambrose acted upon the advice of a professional engineering firm in preparation for the switch to the Flint River and further relied upon another professional engineering firm that reviewed the status of the Flint water system approximately halfway through the Flint water crisis. Further, Respondents alleged that this reliance was done under the watchful eye of State government regulators tasked with enforcing water quality regulations. The Sixth Circuit's conclusion that the Individual City Defendants' conduct could nevertheless plausibly be found to be conscience-shocking or deliberately indifferent and constitutionally prohibited represents a radical expansion of existing law. It is also an expansion that has profound ramifications for all government policy-making, not merely the unfortunate events in Flint. This expansion of substantive due process deserves this Court's review.

III. This Court should decide whether the alleged right was clearly established.

Even if a bodily integrity violation occurred, it was not clearly established, as required to hold the Individual City Defendants liable. As this Court has repeatedly instructed:

> Under our cases, the clearly established right must be defined with specificity. "This Court has repeatedly told courts . . . not to define clearly established law at a high level of generality." *Kisela* [*v. Hughes*], 584 U.S., at ___ [138 S. Ct. 1148, 1152 (2018)] (internal quotation marks omitted).
>
> * * *
>
> [A defendant] cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it. *Supra*, 138 S. Ct. at 1153.

City of Escondido v. Emmons, ___ U.S. ___, 139 S. Ct. 500, 503 (2019) (*Kisela* quotation altered in original).

As a corollary:

> Because "[t]he dispositive question is whether the violative nature of *particular* conduct is clearly established," we look to how existing precedent applies to each defendant's actions in the "specific context of the case" before us. [*Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)] (internal quotation marks and citation omitted).

> Plaintiffs must be able to "identify a case with a similar fact pattern" to this one "that would have given 'fair and clear warning to officers' about what the law requires." *Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988, 993 (6th Cir. 2017) (*quoting White v. Pauly*, 137 S. Ct. 548, 552 (2017)). Identifying a factually similar case is especially important in the realm of substantive due process, where the inherent ambiguity of what the law protects is best discerned through "carefully refined . . . concrete examples[.]" *Glucksberg*, 521 U.S. at 722.

Dissenting Op. pp. 63-64 (Pets.' Appx. pp. 103-05.)

The Panel Opinion acknowledges that these requirements are not satisfied, but insists that:

> The lack of a comparable government-created public health disaster precedent . . . showcases the grievousness of their alleged conduct: . . . "[T]here is no need that the very action in question [have] previously been held unlawful" because "[t]he unconstitutionality of outrageous conduct obviously will be unconstitutional," *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009) (internal quotation marks omitted); and "[s]ome personal liberties are so fundamental to human dignity as to need no specific explication in our Constitution in order to ensure their protection against government invasion." *Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489, 499 (6th Cir. 2008).

But these and other cases[23] are far rarer and more constrained than the abstract generalities which the majority quotes suggest. Although there needn't always be a case directly on point, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

There is a "yawning gap"[24] between the facts and issues of the cases on which the Sixth Circuit majority relies and those presented here. The right at issue cannot be "beyond debate" when it sharply divided both the panel and entire Sixth Circuit bench. The right at issue cannot be "beyond debate" when the majority could not cite to a single case – not from this Court, not from any Circuit and not from any District Court – finding that exposure of the public at large to an environmental toxin due to bad policy decisions violated substantive due process. It cannot be "beyond debate" when every court to have considered the issue has rejected such a radical expansion. The clearly established prong is not satisfied here and certiorari is

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[23] *Hope v. Pelzer*, 536 U.S. 730 (2002) is another case where the Court denied qualified immunity in "novel circumstances." *Id.* at 741. But, as the Tenth Circuit recently recognized, this holding in *Hope* "appears to have fallen out of favor, yielding to a more robust qualified immunity. *See . . . Mullenix*, 136 S. Ct. at 308, 312 (2015)." *N.E.L. v. Douglas Cty.*, 740 Fed. App'x 920, 928 (10th Cir. 2018).

[24] Sutton, J., concurring in the Sixth Circuit's denial of rehearing *en banc* (Pets.' Appx. 208.)

necessary to correct the majority's evisceration of the clearly established requirement.

IV. This Court should decide whether a municipality under the complete control of the State is an arm of the State, entitled to Eleventh Amendment immunity.

While municipalities typically do not enjoy sovereign immunity, "arms of the state" do. *Ernst v. Rising*, 427 F.3d 351, 358 (6th Cir. 2005) (*citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)). This Court's Eleventh Amendment jurisprudence has never been confronted with a situation where a state government, entitled to immunity under the Eleventh Amendment, has by statute taken total or near-total control of a municipality's government, such that the municipality had no meaningful ability to act independently. Indeed, even Plaintiffs have alleged that the City was subject to State control under the EM law. Complaint, ¶¶ 56, 62. (Pets.' Appx. pp. 260-61.) Given those facts, the City was an arm of the State, entitled to Eleventh Amendment immunity.

Michigan's Emergency Management Statute is truly extraordinary. In a nutshell, under the Statute, the City was a municipality in name only. In every other respect, it was controlled and operated by the State as much as any other State department or agency.

A few excerpts from the Statute prove the point. Under Section 9(2):

> [A]n emergency manager shall act for and in the place and stead of the governing body and the office of chief administrative officer of the local government. The emergency manager shall have broad powers in receivership to rectify the financial emergency. . . . Following appointment of an emergency manager and during the pendency of receivership, the governing body and the chief administrative officer of the local government shall not exercise any of the powers of those offices except as may be specifically authorized in writing by the emergency manager. . . .

(Pets.' Appx. 364.) Under Section 9(3)(d):

> [T]he emergency manager shall serve at the pleasure of the governor. An emergency manager is subject to impeachment and conviction by the legislature as if he or she were a civil officer . . . of the state.

(Pets.' Appx. pp. 364-65.) Under Section 13:

> [D]uring the pendency of the receivership, the salary, . . . of the chief administrative officer and members of the governing body of the local government shall be eliminated. . . . The emergency manager may restore, in whole or in part, any of the salary . . . of the chief administrative officer and members of the governing body during the pendency of the receivership, for such time and on such terms as

> the emergency manager considers appropriate. . . .

(Pets.' Appx. 380.)

The Sixth Circuit's analysis regarding this issue rests on a foundation of distinguishable case law. The primary case cited was *Ernst v. Rising*, 427 F.3d 351 (6th Cir. 2005) (*en banc*). That case examined whether an entity created by statute to manage retirement plans for state judges was an arm of the State. *Id.* at 355-56.

Here, the situation is qualitatively different. Michigan's Emergency Manager Statute does not create a new entity but instead provides for the takeover of an existing entity by a State official. That official is accountable only to other State officials, and thus acts in furtherance of State objectives. Michigan's courts recognized this distinction in a state-court suit arising out of the Flint water crisis. "Further, there is no doubt that the [Emergency Managers] were acting, at all times relevant to plaintiffs' claims, as employees or officers of the state of Michigan and its agencies." *Mays v. Snyder*, 323 Mich. App. 1, 104, 916 N.W.2d 227, 256 (Mich. Ct. App. 2018).

In summary, under the Michigan Emergency Manager Statute, labeling the City as a municipality is little more than a legal fiction. Instead, it was an arm of the State, entitled to Eleventh Amendment immunity. The Panel decision to the contrary was erroneous.

CONCLUSION

Petitioners request that this Court grant their petition for a writ of certiorari.

Respectfully submitted,

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