In the Supreme Court of the United States

CITY OF FLINT, ET AL.,
Petitioners,
v.
SHARI GUERTIN, ET AL.,
Respondents.

STEPHEN BUSCH, 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

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Respondents' allegations plausibly establish that Michigan and Flint officials acted with deliberate indifference and thus violated Respondents' constitutional right to bodily integrity by knowingly contaminating Respondents' drinking water with lead and harmful bacteria, and then repeatedly lying about evidence of the contamination, causing Respondents and other Flint residents to unknowingly and involuntarily ingest poisonous substances over a period of months.

2. If so, whether Respondents' bodily integrity rights were clearly established under the circumstances, because a reasonable official would have been on notice that it is not constitutionally permissible to knowingly poison the drinking water for an entire city's population.

3. Whether Flint was an "arm of the state" for Eleventh Amendment purposes merely because it was under the control of a state-appointed emergency manager, where Michigan law made clear that Flint, and not the state, would be responsible for paying any judgment.

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INTRODUCTION

In 2014, state and local officials in Michigan rushed the transition of Flint's drinking water source from Lake Huron to the unsafe Flint River. While Flint's residents had previously received safe, clean, fresh water from Lake Huron for years, the Flint River was known to be corrosive—it was 19 times more corrosive than the water that residents were previously receiving, and it was replete with deadly bacteria, including E. coli, Legionella, and other harmful substances.

When the officials changed the source of Flint's drinking water, they did not adequately treat the water or add corrosion-control chemicals as required under EPA regulations. They did this to save money. Petitioners each played key roles in those decisions and their aftermath. And they pressed forward with the switch even when their own employees warned them that Flint's water treatment plant was not ready to handle the river's corrosive water.

In the 18 months after the switch, as evidence mounted of serious harm caused by lead contamination, Legionnaire's disease, and other results of corrosion, Petitioners rejected multiple opportunities to reconnect Flint to Lake Huron. Further, Petitioners repeatedly lied to the EPA and the public about the safety of Flint's drinking water. As a result, many Flint residents do not have potable water to this day and continue to experience serious harms to their health.[1]

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[1] *See, e.g.*, Erica L. Green, *Flint's Children Suffer in Class After Years of Drinking the Lead-Poisoned Water*, N.Y. Times, Nov.

In this action, Flint residents seek accountability from those who personally caused, extended, and exacerbated Flint's water crisis. This case, however, is still at a very early stage of proceedings. The case comes to this Court at the pleadings stage. The district court denied Petitioners' motions to dismiss, and the Sixth Circuit affirmed on an interlocutory appeal. After a careful analysis, the Sixth Circuit concluded that the extensive allegations state a claim for an "executive abuse of power" that invaded Respondents' right to bodily integrity in a way that "shocks the conscience" and thus violates the Fourteenth Amendment. *County of Sacramento v. Lewis*, 523 U.S. 833, 846-847 (1998). *See* Flint Pet.App.19-43. As Judge Sutton observed in his concurrence in the denial of rehearing *en banc*, "[t]his is not a barebones complaint based on implausible allegations. It comes in at 89 pages. And it offers plenty of details that at least plausibly allege public acts of recklessness and intentional misbehavior." *Id.* at 213. The court determined that Petitioners' acts of deliberate indifference were so egregious that "[a]ny reasonable official should have known" that their conduct would "constitute[] conscience-shocking conduct prohibited by the substantive due process clause." *Id.* at 46.

Petitioners attempt to re-frame this case as involving mere negligence or poor judgment. Flint Pet.4, 6, 21; Busch Pet.4, 30. Although Petitioners may wish

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6, 2019, https://www.nytimes.com/2019/11/06/us/politics/flint-michigan-schools.html; Sarah Childress, *We Found Dozens of Uncounted Deaths During the Flint Water Crisis. Here's How*, Frontline, Sept. 10, 2019, https://www.pbs.org/wgbh/pages/frontline/interactive/how-we-found-dozens-of-uncounted-deaths-during-flint-water-crisis/.

to dispute the substance of Respondents' allegations, they may not do so while this case is at the motion to dismiss stage, where Respondents' factual allegations are accepted as true, and all reasonable inferences are drawn in their favor. Petitioners' arguments improperly seek to resolve factual questions on the pleadings. As Judge Gibbons observed in her concurrence in the denial of rehearing *en banc*, "at this stage in the proceeding, it is better to find out what facts will eventually be before the district court." Flint Pet.App. 203. That conclusion accords with this Court's holding that interlocutory appeals in qualified immunity cases may not be used to resolve "fact-related dispute[s]." *Johnson v. Jones*, 515 U.S. 304, 307 (1995).

Even if this Court were inclined to think that the issues raised in the petitions might ultimately warrant certiorari, there are compelling reasons not to intervene at this early stage. This case was filed in 2016, when the Flint Water Crisis was still unfolding. Since then, numerous other cases have been filed incorporating new information that has emerged through discovery, FOIA requests, and investigative journalism. Respondents' allegations, however, are still frozen in time in 2016 when this action was filed. Accordingly, this is a case where the ultimate "answer [to] whether there was a [due process] violation may depend on a kaleidoscope of facts not yet fully developed." *Pearson v. Callahan*, 555 U.S. 223, 239 (2009) (first alteration in original) (citations and internal quotation marks omitted).

Moreover, as Petitioners note, this case is just one of several actions seeking relief against a variety of governmental and private defendants for the Flint

Water Crisis. Flint Pet.5. The district court has consolidated nine of those cases in a single matter. Earlier this year, the district court denied motions to dismiss the due process claims in the consolidated litigation. *In re Flint Water Cases*, 384 F.Supp.3d 802 (E.D. Mich. 2019). An interlocutory appeal of that denial—filed by the Petitioners here, among others—is pending in the Sixth Circuit. *Carthan v. Earley*, Nos. 19-1425, 19-1472, 19-1477, 19-1533 (6th Cir.). The Michigan Supreme Court has also recently granted review of a parallel state-law Flint water class action. *See Mays v. Governor*, 926 N.W.2d 803 (Mich. 2019) (granting leave to appeal).

Petitioners are already subject to discovery on the pending state-law claims against them and against the private defendants. That will remain true regardless of this Court's ruling on these petitions. Unlike in many qualified immunity cases, then, waiting will not prejudice Petitioners. Waiting will give the Michigan Supreme Court time to resolve the state-law claims that are currently pending before it—a resolution that may obviate key issues here. *See* Flint Pet.App.211-213 (Sutton, J., concurring in the denial of rehearing *en banc*). And waiting will give the Sixth Circuit time to resolve the pending interlocutory appeal in the consolidated federal case, where the complaint includes more developed allegations.

The petitions should be denied.

STATEMENT OF THE CASE

As Judge Griffin wrote below, "[t]his case arises out of the infamous government-created environmental disaster commonly known as the Flint Water Crisis." Flint Pet.App.3. Petitioners insisted on the "cost-saving measure" (*id.*) of switching Flint's water supply from Lake Huron to the Flint River, even though they knew the river's water was highly corrosive and their employees warned them the City's water treatment plant was not prepared. On April 25, 2014, Flint made the switch and "began dispensing drinking water to its customers without adding chemicals to counter the river water's known corrosivity." *Id.* at 4. During the subsequent 18 months, as serious health harms steadily appeared, Petitioners repeatedly rejected opportunities to return to Lake Huron water. Instead, they falsely assured regulators and the public that the water drawn from the river was safe. They thus extended and exacerbated the crisis.

A. The Facts

1. In 2011, Michigan's then-Governor Rick Snyder appointed an emergency manager for the City of Flint. In April 2013, Flint's emergency manager decided to cut costs by changing the City's water source from the Detroit Water and Sewer Department (DWSD), its longtime provider, to the not-yet-formed Karegnondi Water Authority (KWA). Flint Pet.App.265-266.[2] To

[2] Because this case comes to the Court at the motion to dismiss stage, allegations in the complaint must be taken as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

save money during the period before the KWA came online, Petitioners and other state and local officials decided to use water from the Flint River. Flint Pet. App.266.

As the April 2014 date for the switch approached, Petitioner Darnell Earley, then the emergency manager, knew the Flint Water Treatment Plant was not ready but he "forced the transition through in order to meet the aggressive deadline he had self-imposed to cut costs." *Id.* at 266-267. In the days leading up to the switch, the water quality supervisor at the plant, Michael Glasgow, wrote Petitioners Michael Prysby and Stephen Busch—officials at the Michigan Department of Environmental Quality (MDEQ)—that "[i]f water is distributed from this plant in the next couple of weeks, it will be against my direction." *Id.* at 267-268. He explained that he would "reiterate this to management above me, but they seem to have their own agenda." *Id.* at 268.

Although "the proper preparations had not been made," Flint began using Flint River water on April 25, 2014. *Id.* at 269. On that day, Petitioner Howard Croft, Flint's Director of Public Works, announced to the public that the "water is not only safe, but of the high quality that Flint customers have come to expect." *Id.* He did so even though he knew of Glasgow's "concerns regarding the facility's inadequate preparation and monitoring." *Id.* at 270.

2. Flint did not add phosphates or other corrosion-control compounds to the Flint River water even though it "was 19 times more corrosive than the water pumped from Lake Huron by the DWSD." *Id.* at 4, 294. "[W]ithout corrosion-control treatment, lead leached

out of the lead-based service lines at alarming rates and found its way to the homes of Flint's residents." *Id.* The harms were evident immediately, and the evidence steadily accumulated over time: "Within days, residents complained of foul smelling and tasting water. Within weeks, some residents' hair began to fall out and their skin developed rashes. And within a year, there were positive tests for E. coli, a spike in deaths from Legionnaires' disease, and reports of dangerously high blood-lead levels in Flint children." *Id.*

Petitioners were aware of the problems from the beginning. Shortly after the April 2014 switch, Flint residents began to complain that their water was "odorous" and "discolored"—an indication that the new water was corroding the pipes. *Id.* at 274. In August and September, the City discovered fecal coliform bacteria in the water; when Governor Snyder was briefed on the discoveries, he was told that corrosion caused the problem. *Id.* at 275. In October, General Motors made a highly publicized decision to stop using the water at its Flint manufacturing plant due to concerns that it would corrode the machinery. *Id.* Petitioner Prysby "made sure the department's approach was to spin this symptom as not related to public health instead of investigating the underlying problem." *Id.* at 32-33. He urged Petitioners Busch and Liane Shekter Smith to publicly downplay General Motors' decision, out of fear of "branding Flint's water as 'corrosive' from a public health standpoint." *Id.* at 275.

On January 2, 2015, the City sent water customers a notice that it was in violation of the Safe Drinking

Water Act "due to the presence of trihalomethanes"—a further indication that the City's pipes had been corroded. *Id.* Also in January, the University of Michigan-Flint "discovered lead in campus drinking fountains," and "the State of Michigan provided purified water coolers at its Flint offices in response to concerns about the drinking water." *Id.* at 276. In an email to her supervisor that month, Shekter Smith explained her theory that Flint was experiencing "wide-spread" corrosion throughout the "distribution system." *Id.* at 276-277. Yet "State employees continued for many months to tell the general public that the water was safe to drink." *Id.* at 276.

That same month, DWSD offered to waive the reconnection fee and permit Flint to return to using Lake Huron water. *Id.* Petitioner Gerald Ambrose, the new emergency manager, rejected the offer. *Id.* Two months later, Flint's city council "voted 7-1 to end Flint River service and return to DWSD." *Id.* at 282. Ambrose declared the council's vote "incomprehensible" and exercised his absolute power as emergency manager to veto it. *Id.*

3. Petitioners did not merely refuse to reconnect to Lake Huron water. They also made repeated false statements to regulators and the public that exacerbated the crisis. In February 2015, the EPA asked about high lead levels in a Flint resident's water sample. *Id.* at 278. Petitioner Busch responded "that the Flint Water Treatment Plant had an optimized

corrosion control program, despite the fact that it did not." *Id.* at 277.[3]

Even after "the evidence confirmed that, in fact, the lead levels in the water and in residents' blood were rising," Petitioners "worked to discredit the evidence and knowingly and proactively made false statements to the public to persuade residents that the water was safe to consume." Flint Pet.App.177. "Many residents, plaintiffs included, continued to consume the water in reliance on defendants' false assurances." *Id.*

In April 2015, EPA official Miguel Del Toral sent a memorandum to the MDEQ expressing concern that "Flint has essentially not been using any corrosion control treatment." *Id.* at 283. He explained that the City's monitoring results, which identified "very high lead levels" in at least one home, were likely understating the extent of lead contamination. *Id.* Del Toral was "worried that the whole town may have much higher lead levels than the compliance results indicated." *Id.* On June 24, Del Toral shared an even more strongly worded memorandum with Shekter Smith, Busch, and Prysby. *Id.* at 285-286.

Throughout the summer and early fall of 2015, Petitioner Wurfel, "the public face of the crisis, announced the water was safe to drink, and demeaned, belittled, and aggressively dampened attempts by the scientific community to challenge the government's assertions that Flint did not have a problem with its

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[3] Busch asserts that his statement was not literally a lie. *See* Busch Pet.8. That assertion improperly seeks to resolve factual disputes.

drinking water." *Id.* at 34. When Del Toral's June 2015 memorandum became public and sparked an outcry, Wurfel issued a public statement on behalf of MDEQ that "anyone who is concerned about lead in the drinking water in Flint can relax." *Id.* at 287-288.

In August, Virginia Tech professor Marc Edwards released an analysis that found extremely high lead levels in Flint's water. *Id.* at 291. Wurfel sought to discredit Professor Edwards's findings. *Id.* at 292-296. Wurfel's statements included several false assertions designed to reassure the public that it was safe to drink the water. *Id.* at 293-294, 295-296.

In September, local pediatrician Mona Hanna-Attisha issued her own findings that Flint's children had experienced an increased rate of lead poisoning after the April 2014 switch. *Id.* at 302-303. Wurfel also sought to disparage Dr. Hanna-Attisha's findings and reassure the public that Flint's water was safe. *Id.* at 307.

After 18 months, Governor Snyder finally directed Flint to reconnect to the Detroit water system in October 2015. *Id.* at 133. But the reconnection "did not change the corrosion that had already occurred, and lead has continued to leach from pipes into the water." *Id.* The harms are severe. Lead "is a powerful neurotoxin that can have devastating, irreversible impacts on the development of children." *Id.* at 273. Results of lead exposure in children include "decreased IQ, behavioral problems, hearing impairment, impaired balance and nerve function, infections, skin problems, digestive problems, and psychological disorders." *Id.* In adults, the results of lead exposure include "digestive, cardiovascular, and reproductive problems, kidney

damage, dizziness, fatigue, weakness, depression and mood disorders, diminished cognitive performance, nervousness, irritability, and lethargy." *Id.* at 273-274.

B. Proceedings Below

1. Respondents filed this lawsuit in the District Court for the Eastern District of Michigan seeking relief against the City of Flint, the State of Michigan, and several state and local officials who were personally involved in the decisions that caused and exacerbated the crisis. *Id.* at 119-124.[4] As relevant here, Respondents bring claims under 42 U.S.C. § 1983, claiming that Petitioners deprived them of bodily integrity, in a manner that shocked the conscience, in violation of the Due Process Clause of the Fourteenth Amendment. *Id.* at 137.

Petitioners and other defendants filed nine motions to dismiss, challenging the District Court's subject matter jurisdiction under Federal Rule 12(b)(1), arguing that Plaintiffs' claims should be dismissed under Federal Rule 12(b)(6) for failure to state a claim, and raising defenses of qualified immunity and 11th Amendment sovereign immunity to Plaintiffs' § 1983 claims. The district court granted in part and denied in part the motions to dismiss. *Id.* at 199-200. The court agreed that the claims against the state were barred by the Eleventh Amendment. *Id.* at 157. But it rejected the City's Eleventh Amendment argument. *Id.* And the district court concluded that Respondents' allegations stated a claim for violation of due process

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[4] Respondents also sought relief under state law against the private engineering companies who participated in these decisions. *Id.* at 124. Those claims are not before this Court.

rights against all but three of the individual government defendants. *Id.* at 170-180.[5]

2. On interlocutory appeals by the individual defendants (on qualified immunity) and the City (on the Eleventh Amendment), the Sixth Circuit affirmed in part and reversed in part. *Id.* at 64.

a. The Sixth Circuit concluded that Respondents had stated a claim for violation of clearly established due process rights against seven of the individual defendants: three City officials, Petitioners Earley, Ambrose, and Croft, *id.* at 30-31; and four MDEQ officials, Petitioners Busch, Shekter Smith, Prysby and Wurfel, *id.* at 31-36. But the court found the allegations insufficient against five other defendants: MDEQ Director Daniel Wyant, *id.* at 36-37; Michigan Department of Health and Human Services (MDHHS) Director Nicholas Lyon and Chief Medical Executive Eden Wells, *id.* at 37-40; and MDHHS employees Nancy Peeler and Robert Scott, *id.* at 40-43.

The Sixth Circuit observed that the Due Process Clause has long been understood to protect "the right to bodily integrity, and the right not to be subjected to arbitrary and capricious government action that 'shocks the conscience and violates the decencies of civilized conduct.'" *Id.* at 10-11 (citing *Washington v. Glucksberg*, 501 U.S. 702, 720 (1997); *Lewis*, 523 U.S. at 846-847). By introducing poisonous water into Flint residents' bodies without their consent, the court

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[5] The court found the allegations insufficient against Governor Snyder, Flint water quality supervisor Glasgow, and MDEQ water treatment specialist Patrick Cook. *Id.* at 180.

concluded, the defendants' actions threatened the right to bodily integrity. *Id.* at 16-17.

But it was not enough that those actions invaded the "constitutionally protected liberty interest" in bodily integrity. *Id.* at 19. The Sixth Circuit held that a plaintiff must also "show how the government's discretionary conduct that deprived that interest was constitutionally repugnant." *Id.* The plaintiff must show that the challenged conduct "shocks the conscience." *Id.* at 20.

Where the defendant has "time to deliberate" before acting, the Sixth Circuit concluded, deliberate indifference will shock the conscience. *Id.* at 23-25. Conduct that evinces deliberate indifference necessarily shocks the conscience, because when "'extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking.'" *Id.* at 27 (quoting *Lewis*, 523 U.S. at 853).

The court concluded that Petitioners had "[e]xtensive time to deliberate" when they made the decisions at issue, which "took place over a series of days, weeks, months, and years, and did not arise out of time-is-of-the-essence necessity." *Id.* And it found the allegations against each of the Petitioners sufficient to demonstrate deliberate indifference. Petitioners Earley and Croft "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, especially in light of the Flint River's known environmental issues and the problems associated with lead exposure." *Id.* at 30. Petitioner Ambrose's "decisions to twice turn down opportunities to reconnect to the DWSD after he knew of the significant problems with

the water," the court thought, "were especially egregious." *Id.*

Petitioners Busch and Prysby "played a pivotal role in authorizing Flint to use its ill-prepared water treatment plant to distribute drinking water from a river they knew was rife with public-health-compromising complications." *Id.* at 32. And "when faced with the consequences of their actions," Petitioners Busch, Prysby, Shekter Smith, and Wurfel "falsely assured the public that the water was safe and attempted to refute assertions to the contrary." *Id.* The allegations demonstrated that "these MDEQ defendants created the Flint Water environmental disaster and then intentionally attempted to cover-up their grievous decision. Their actions shock our conscience." *Id.* at 33.

Turning to qualified immunity, the Sixth Circuit concluded that the "lack of a comparable government-created public health disaster precedent does not grant defendants a qualified immunity shield. Rather, it showcases the grievousness of [Petitioners'] alleged conduct." *Id.* at 45. It pointed to this Court's statements that "'[t]he easiest cases don't even arise,'" and "'there is no need that the very action in question [have] previously been held unlawful' because . . . 'outrageous conduct obviously will be unconstitutional.'" *Id.* (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009)). It held that "taking affirmative steps to systematically contaminate a community through its public water supply with deliberate indifference is a government invasion of the highest magnitude"—one that "[a]ny reasonable official should have known"

was "conscience-shocking conduct." *Id.* at 46. Relying on this Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002), the Sixth Circuit concluded that "'t[he] obvious cruelty inherent' in defendants' conduct should have been enough to forewarn defendants." Flint Pet.App.45 (quoting *Hope*, 536 U.S. at 745).

b. The Sixth Circuit also held that the City of Flint was not an arm of the state entitled to Eleventh Amendment immunity. *Id.* at 51-64. Under Michigan law, even if a city is under emergency management, any judgment against the city will be satisfied out of municipal funds. *Id.* at 55-56. The Sixth Circuit pointed to the Michigan Court of Appeals' decision in *Boler v. Governor*, 923 N.W.2d 287, 293-296 (Mich. Ct. App. 2018), *appeal denied*, 924 N.W.2d 250 (Mich. 2019), which specifically held that the City of Flint was not acting as an arm of the state under Michigan law while under emergency management—and that the state thus cannot be liable for actions the City's emergency managers took during the water crisis. *See* Flint Pet. App.57-61.

c. Judge McKeague dissented in part. He agreed with the majority's ruling that the City was not entitled to Eleventh Amendment immunity, as well as with its ruling that defendants Wyant, Lyon, Wells, Peeler, and Scott were entitled to qualified immunity. *Id.* at 67. But he would have granted qualified immunity to the other individual defendants as well. *Id.*

3. The Sixth Circuit denied a petition for rehearing *en banc*. Judge Kethledge, joined by four other judges, dissented. *Id.* at 215.

Four judges joined separate concurrences in the denial of rehearing. Judge Gibbons, joined by Judge

Stranch, emphasized that the case remains at the pleading stage. *Id.* at 203-204. Judge Sutton, joined by Judge Bush, similarly emphasized that "[a]t this early stage of the case, we must give the benefit of the doubt to the plaintiffs' preferred theory of the case and allow the discovery process to determine whether plausible allegations in their complaint mature into fact-supported allegations." *Id.* Judge Sutton read this Court's decision in *Hope* as holding that "the egregiousness of the state officials' state of mind" can overcome qualified immunity. *Id.* at 214. Based on that precedent, "it would seem that allegations like these—intentional or reckless poisoning of citizens—plausibly clear the clearly established hurdle and warrant discovery." *Id.*

Noting that "[d]oubt clouds several aspects of the claims that remain in the case," *id.* at 210, Judge Sutton explained that the opportunity for discovery "should help us all in resolving this case fairly," *id.* at 213. He thought that the pending proceedings in the Michigan Supreme Court would also assist the district court's resolution. If the plaintiffs win there, "there will be less, perhaps nothing at all, for the federal courts to remedy" under the Constitution, and even if the plaintiffs lose, "the state courts' explanation may inform the federal claims." *Id.*

REASONS FOR DENYING THE WRIT

Respondents' 89-page complaint "offers plenty of details that at least plausibly allege public acts of recklessness and intentional misbehavior." Flint Pet.

App.213 (Sutton, J., concurring in denial of rehearing *en banc*). Further, nothing in the Sixth Circuit's decision breaks new ground or conflicts with the decisions of another circuit court or of this Court. Rather, it reaffirms this Court's longstanding commitment to safeguarding the right to bodily integrity as a fundamental constitutional right.

Petitioners' arguments largely rest on an alternate narrative, a defendant-friendly reading of the facts that is out of place at the pleading stage. They wish to challenge the lower courts' application of established legal principles to a set of facts that have yet to be fully developed, and that in any event focus on Petitioners' uniquely egregious actions in causing the Flint Water Crisis.

There is no need for this Court to grant review of this "one-off" case. *Id.* at 209. And if this Court were inclined to believe that the fact-specific issues addressed below might warrant review, the pending Sixth Circuit appeal in the consolidated Flint Water Crisis action would provide a better vehicle for doing so.

I. THE DENIAL OF THE INDIVIDUAL PETITIONERS' MOTIONS TO DISMISS DOES NOT WARRANT REVIEW.

The Sixth Circuit concluded that Respondents had cleared the "particularly high hurdle" of alleging deliberate indifference against each of the seven individual Petitioners. Flint Pet.App.29. That holding does not conflict with the holdings of any other circuit. It is also correct.

A. There Is No Conflict Among the Circuits.

1. The Sixth Circuit's Decision Does Not Conflict with Cases Rejecting a Constitutional Right to a Clean Environment.

Petitioners assert that the Sixth Circuit's decision conflicts with numerous decisions rejecting the proposition that there is a constitutional right to a clean environment. Flint Pet.15-17; Busch Pet.21-25. But Respondents' claims are not based on a right to safe drinking water or a right to a healthful environment. Rather, the right Respondents invoke in their complaint —and the right the Sixth Circuit recognized—is the right to bodily integrity, which numerous courts have held protects against government actors knowingly introducing harmful substances into a person's body without their consent.

Petitioners' actions shock the conscience and thus violate the Constitution because Petitioners intentionally—and over many months—acted with deliberate indifference to the serious health risks they knew they were imposing on Flint residents. A mere failure to keep the environment clean, without these culpable actions, would not violate the Constitution. Conversely, poisoning an individual's drinking water with deliberate indifference to serious, known health risks does. *See Washington v. Harper*, 494 U.S. 210, 229 (1990). This is true even if the vector of harm were not environmental pollution. As the Sixth Circuit explained in an earlier Flint Water Crisis case, there is no "constitutional significance to the means by which the harm occurs." *Boler v. Earley*, 865 F.3d 391, 408 n.4 (6th Cir. 2017) (emphasis added), cert. denied, 138 S.Ct. 1281, 1285, 1294 (2018).

Only two of the right-to-clean-environment cases Petitioners cite were published opinions by federal courts of appeals. Neither involved deliberate indifference. One, *Concerned Citizens of Nebraska v. U.S. Nuclear Regulatory Comm'n*, 970 F.2d 421, 426–27 (8th Cir. 1992), concluded that the mere release of low-level radiation into the surrounding environment, without any showing of deliberate indifference or harm, did not violate the Ninth Amendment. The other, *Kaucher v. County of Bucks*, 455 F.3d 418, 428-29 (3d Cir. 2006), involved unsanitary conditions at a jail. The court explicitly noted that "defendants' conduct does not exhibit deliberate indifference." *Id.* at 428. Here, the allegations show multiple acts of deliberate indifference causing serious harm to Flint residents. *Concerned Citizens* and *Kaucher* are therefore inapposite.

Nor do any of the unpublished court of appeals cases cited by Petitioners involve facts approaching the egregiousness of the misconduct alleged here. The decisions in *Hood v. Suffolk City Sch. Bd.*, 469 F. App'x 154, 159 (4th Cir. 2012) and *Greene v. Plano Indep. Sch. Dist.*, 103 F. App'x 542, 544-45 (5th Cir. 2004) involved mold in schools—not poisoning the water system of an entire city. Crucially, *Hood* and *Greene* were brought by school employees. This Court's decision in *Collins v. City of Harker Heights*, 503 U.S. 115 (1992) held that the Due Process Clause does not afford public employees a remedy for unsafe working conditions. As the Sixth Circuit explained, deliberately indifferent actions that contaminated a city's water system—and thus poisoned the general public, who made no choice to work for the City or assume the risk—are very different from providing unsafe working

conditions. Flint Pet.App.26 n.6 (concluding that a deliberate-indifference analysis deriving from *Lewis*, rather than *Collins*'s rule of nonliability for workplace injuries, applies when harm to the general public is at issue).

Petitioners also point to cases rejecting constitutional challenges to the fluoridation of public drinking water systems. As the Sixth Circuit explained, Flint Pet.App.19, those cases are factually distinguishable. Their holdings that water fluoridation is "a reasonable and proper exercise of the police power in the interest of public health," *Coshow v. City of Escondido*, 132 Cal. App.4th 687 (2005)—one that is "rationally related to the state's interest in promoting public health," *Foli v. Metro. Water Dist. of S. California*, 592 F. App'x 634, 635 (9th Cir. 2015)—say nothing about the constitutionality of knowingly introducing toxic substances into individuals' drinking water. Unlike in the fluoridation cases, "defendants make no contention that causing lead to enter Flint's drinking water was for the public good or that they provided notice to Flint residents about the lead-laced water." Flint Pet.App.19.

2. The Sixth Circuit's Decision Does Not Conflict with the Second Circuit's Decisions in Post-9/11 Cases.

The Petitioner MDEQ officials assert that the Sixth Circuit's decision conflicts with the Second Circuit's decisions in *Lombardi v. Whitman*, 485 F.3d 73 (2d Cir. 2007), and *Benzman v. Whitman*, 523 F.3d 119 (2d Cir. 2008). Busch Pet.23, 31, 34-35. The Sixth Circuit appropriately found those cases inapposite. Flint Pet.App.35-36.

In *Lombardi*, the Second Circuit rejected due process claims brought by paramedics and law-enforcement officers who "performed search, rescue and clean-up work" at Ground Zero immediately after the 9/11 terrorist attacks. *Lombardi*, 485 F.3d at 74. The plaintiffs alleged that the defendant officials reassured them with false statements about the healthfulness of the air in the area. *See id.* The court emphasized that the defendants did not in any way cause the terrorist attack. *See id.* at 80. They "were required to make decisions using rapidly changing information" and to do so "without all of the data that decision-makers would normally desire." *Id.* at 82, 83 (internal quotation marks omitted). Relying on *Lombardi*, the Second Circuit in *Benzman* rejected similar claims brought by individuals who lived and worked in Lower Manhattan. *See Benzman*, 523 F.3d at 127-129.

The informational chaos in the aftermath of 9/11—an unprecedented terrorist attack—has nothing in common with the evidence of harm that steadily accumulated over the course of months during the Flint Water Crisis. In contrast to the 9/11 terrorist attacks, the Flint Water Crisis resulted entirely from decisions made by the Petitioners and others with whom they worked. Petitioners had ample opportunities to avoid the crisis before switching to the Flint River, and they had ample opportunities to reverse and mitigate the effects of their prior decisions over the 18 months after the switch. As the Sixth Circuit observed, the "crisis was predictable, and preventable." Flint Pet. App.4.

Further, as the Sixth Circuit noted, *Lombardi* and *Benzman* "involved the balancing of competing

governmental interests—restoring public services and protecting public health—during a time-sensitive environmental emergency." Flint Pet.App.36. Here, by contrast, there were no "push-and-pulls of competing policy decisions" because "defendants make no contention that causing lead to enter Flint's drinking water was for the public good." *Id.* at 19. Because there was no countervailing exigency, the Sixth Circuit's decision does not conflict with *Lombardi* and *Benzman*.

B. The Sixth Circuit's Correct, Fact-Specific Holding That the Complaint States a Claim Does Not Merit Review.

At least since this Court's decision in *Lewis*, the standard for determining if an official's actions violate the due process right to bodily integrity is whether they "shock the conscience" and therefore constitute an "abuse of power." *Lewis*, 523 U.S. at 846. *See also id.* at 847 n.8 (describing the shocks-the-conscience test as the "threshold question" in any "case challenging executive action on substantive due process grounds"). Where government actors have "time to make unhurried judgments" and "the chance for repeated reflection," actions taken with deliberate indifference necessarily shock the conscience. *Id.* at 853. As this Court explained in *Lewis*, "[w]hen such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." *Id.*

The Sixth Circuit carefully analyzed the allegations in the complaint and concluded that they stated a claim for violation of that settled due process standard against each of the individual Petitioners. There is no basis for disturbing the Sixth Circuit's

holding, particularly at this early stage of the case before discovery.

1. Petitioners Rely on Factual Arguments Inappropriate for a Motion to Dismiss.

a. Petitioners' Conduct Reflected Deliberate Indifference, Not Mere "Bad Decisions."

Petitioners attempt to recharacterize the facts as merely involving "bad decisions," Flint Pet.4, 21, or a series of unfortunate events, Busch Pet.25-26. But this case is at the pleading stage. As the Sixth Circuit emphasized, "[o]ne can place a benign construction on the factual allegations and draw inferences so that the facts amount to a negligent mismanagement of priorities and risks." Flint Pet.App.31. At this stage, however, a court must draw all reasonable inferences in the plaintiffs' favor. The Sixth Circuit panel, *id.* at 31, 34-35, as well as the judges concurring in the denial of *en banc* review, *id.* at 203-204 (Gibbons, J.), 213 (Sutton, J.), correctly determined that the complaint properly pleaded a constitutional violation.

The voluminous facts pled in the complaint, fairly construed, plausibly allege that Petitioners' actions go well beyond bad decisions or negligence. Petitioners forced the switch to the Flint River in April 2014 even though they knew Flint's water treatment plant was not ready; they did not add corrosion control to the water even though they knew it was 19 times more corrosive than the water the City had been using before; they continued to use the Flint River without corrosion control in the face of mounting evidence of serious health risks, rejecting multiple opportunities to switch back to Lake Huron water; and they extended

the crisis by repeatedly lying to the EPA and the general public in an effort to falsely reassure them that the water was safe. The consequence was widespread corrosion and lead contamination, and the delivery of poisonous water directly into Flint residents' homes. *See* Flint Pet.App.6. These actions bespeak deliberate indifference, not mere negligence.

For the same reasons, Petitioners are incorrect to say that the complaint challenges mere omissions, Busch Pet.29, or a "fail[ure] to protect" the public, Flint Pet.6; Busch Pet.4. The Petitioners did not simply fail to protect Flint residents against harm caused by others. *Cf. DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989). They affirmatively acted to cause serious harm to Flint residents.

b. Petitioners' Asserted Reliance on the Advice of Others Does Not Undermine the Allegations of Deliberate Indifference.

Petitioners argue that they were acting in reliance on the advice of others and thus cannot be held liable. The petitioner City officials argue that they relied on the MDEQ as well as the engineering-company defendants. Flint Pet.11-12, 17-21. The petitioner MDEQ officials, in turn, argue that they relied on the City's reliance on the engineering-company defendants. Busch Pet.2-3. Once again, though, these arguments ask this Court to engage in impermissible factfinding.

The Petitioner City officials note that "the MDEQ approved the use of the River without requiring corrosion control or water quality parameters, and thereafter continued to assure the City and others that the water was safe and complied with 'all current state

and federal requirements.'" Flint Pet.11. Those are among the facts that demonstrate that the MDEQ officials were deliberately indifferent. But they by no means undermine the claim that Earley, Ambrose, and Croft were deliberately indifferent as well.

At the time of the April 2014 switch, Petitioners Earley and Croft knew more than just that the MDEQ had approved the use of the river. They also knew that Glasgow—the City's water quality supervisor—was urgently telling them that the Flint Water Treatment Plant was not ready to handle the changeover. Yet they forced the switch anyway. *See* p. 3, *supra*.

After the switch, Petitioners received mounting evidence that the water was corroding the pipes, causing lead contamination, and resulting in serious health harms. Almost immediately, Flint residents complained about the color and smell of the new water. Over the summer, the City discovered fecal coliform bacteria in the water—a sign of corrosion. That October, General Motors announced that it would no longer use Flint water out of fear that it would corrode the company's machinery. By January 2015, the City knew that the water system had a high level of trihalomethanes—another sign of corrosion. That same month saw the University of Michigan-Flint and state office buildings in the City take steps to move away from using the local drinking water. *See* p.4, *supra*.

In the face of this accumulating evidence of harm, Earley and Ambrose refused to reconnect to Lake Huron water. Ambrose twice refused even after the DWSD offered to waive any reconnection fee. He went so far

as to veto a 7-1 city council vote to reconnect. *See* p. 4, *supra*.

Whatever inferences Earley, Ambrose, and Croft might have drawn from the MDEQ's approval of using Flint River water, there was nothing in that approval that should have led them to disregard the evidence of corrosion that was accumulating in front of them. The complaint's allegations plausibly allege that they were deliberately indifferent in disregarding that evidence.

Petitioners' purported reliance on the engineering-company defendants is similarly misplaced. Petitioners note that, at the time of the April 2014 switch, defendant Lockwood Andrews Newnam, Inc. (LAN) did not advise the City to use corrosion control. Busch Pet.2; Flint Pet.12. And they note that in February 2015 defendant Veolia "assured the City that the water was in compliance with drinking water standards." Flint Pet.12 (internal quotation marks omitted). *See also* Busch Pet.3. These allegations tend to demonstrate that LAN and Veolia violated their duties under state law—an issue that is currently being litigated in the district court. But they do not undermine the claim that the Petitioners were deliberately indifferent as well.

At the time they made the switch, Petitioners "knew that the important limitation was that the treatment plant be ready to treat Flint River water." Flint Pet.App.267. In fact, "[t]he treatment plant was not ready"—as Glasgow informed his superiors—but they "forced the transition through" anyway. *Id.* Notwithstanding LAN's own wrongdoing, these allegations

are sufficient at the pleading stage to demonstrate deliberate indifference.

And as the evidence of corrosion and associated harms accumulated following the switch, Petitioners had more than LAN's predictive judgment to go on in making their decisions. They had actual experience that the failure to use corrosion control had been a grievous error. Yet, rather than heed that experience as a reasonable official would, Petitioners disregarded it. That is plainly deliberate indifference—"know[ing] of and disregard[ing] an excessive risk" to bodily integrity and health. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

As for Petitioners' purported reliance on Veolia, two points are crucial: First, what Veolia said was that the water complied with state and federal regulatory standards. Flint Pet.App.280. There was no reason for Petitioners to take Veolia's statement as authorizing them to disregard the mounting evidence of serious health risks. It is axiomatic that conduct can violate the Constitution even if it complies with statutes and regulations. Second, Veolia did not issue its interim report until February 18, 2015. *Id.* at 279-280. Petitioners could not have relied on its statements before that time.

Reliance on Veolia thus cannot justify Petitioners' refusal to add corrosion control or reconnect to Lake Huron water as the evidence of harm accumulated throughout the summer and fall of 2014. It cannot justify the efforts of Petitioners Prysby, Busch, and Shekter Smith to publicly downplay the risks during that time. And it cannot justify Petitioner Ambrose's rejection of the DWSD's offer to reconnect—a rejec-

tion that came in January 2015, before Veolia's interim report.

Nor can the Veolia report justify the multiple actions described in the complaint that were taken by the Petitioner MDEQ officials to mislead the EPA and the public throughout 2015. In its February 2015 interim report, Veolia explicitly acknowledged that the City was not using corrosion control. Flint Pet. App.280. Less than two weeks later, Petitioner Busch "told the EPA on behalf of MDEQ that the Flint Water Treatment Plant had an optimized corrosion control program, despite the fact that it did not." *Id.* at 277.

Busch asserts that he did not tell the EPA that Flint was using "corrosion control" but instead that the City "had a corrosion control 'program' in place." Busch Pet.8 (internal quotation marks and citations omitted). That statement was literally true, he says, because Flint's "program" consisted of waiting to decide whether to add corrosion control to the water. *Id.* That is precisely the sort of factual dispute that cannot be resolved on a motion to dismiss.

In any event, Busch's *post hoc* interpretation of his statement to the EPA is implausible. EPA regulations use the phrase "optimal corrosion control" to refer to the treatment of water to prevent corrosion—not to mere watching and waiting. *See* 40 C.F.R. § 141.82(a), (c)(1). As soon as EPA official Del Toral learned in April that Flint was not using corrosion control, he expressed surprise and alarm—something he would not have done if Busch's February statement had been understood as suggesting that the City was simply waiting to decide whether to use corrosion control. *See* p. 5, *supra*. And then-Governor Snyder's

office publicly acknowledged that "MDEQ inaccurately reported information about Flint's corrosion control to EPA, stating that Flint had an optimized corrosion control program when, in fact, it was not employing corrosion control treatment." Office of Gov. Rick Snyder, *Flint Water Advisory Task Force, Final Report* 28 (Mar. 2016), https://goo.gl/HJfmwh.

Similarly, nothing in Veolia's report supported Petitioner Wurfel's efforts to publicly discredit Del Toral's June 2015 memorandum and the findings of lead contamination and lead poisoning that Drs. Edwards and Hanna-Attisha issued during the summer of 2015. *See* p. 5, *supra*. The Veolia report was prepared before Edwards and Hanna-Attisha released their findings and thus could not have taken them into account. Wurfel's efforts to convince the public to disregard those findings were his own responsibility.

c. The MDEQ Petitioners' Asserted Mis-interpretation of Federal Statutes and Regulations Does Not Undermine the Allegations of Deliberate Indifference.

The Petitioner MDEQ officials insist that their conduct reflected an honest, if mistaken, interpretation of the SDWA's Lead and Copper Rule. Busch Pet.3-4, 28, 30. But the question is not whether Petitioners violated any statute or regulation. It is whether they took actions that were deliberately indifferent to the serious health risks they were causing. As the Sixth Circuit explained in an earlier Flint Water Crisis case, the SDWA does not occupy the field in this area. A government official can engage in deliberate indifference that violates the Constitution even if

there is no violation of the statute. *See Boler*, 865 F.3d at 408

In any event, a supposed misinterpretation of the Lead and Copper Rule cannot explain much of the MDEQ Petitioners' conduct. If Busch honestly thought that the City was complying with the Rule, for example, there would have been no need for him to lie to the EPA about whether Flint maintained corrosion control. And an honest but erroneous interpretation of federal regulations would not explain why Prysby, Busch, and Shekter Smith sought to publicly downplay the import of General Motors' decision to stop using Flint water. Nor would it explain why Wurfel worked so aggressively to publicly undermine the factual findings of Drs. Edwards and Hanna-Attisha —as well as of the EPA's own official Del Toral. There is no basis for resolving these questions against the Respondent-Plaintiffs on a motion to dismiss.

2. This Court Need Not Review the Sixth Circuit's Correct Application of Qualified Immunity Principles to the Extraordinarily Egregious Facts Alleged Here.

The individual Petitioners argue that the Sixth Circuit was required to grant them qualified immunity unless it could point to "a case with a similar fact pattern" that found liability. Busch Pet.21; *accord* Flint Pet.23 (arguing that plaintiffs must "'identify[ ] a factually similar case'" to overcome immunity) (quoting Flint Pet.App.103). Petitioners are incorrect.

This Court has repeatedly emphasized that the crucial question is not whether there is a "a case directly on point" but whether "existing precedent"

has "place[d] the lawfulness of the particular [action] beyond debate." *City of Escondido v. Emmons*, 139 S.Ct. 500, 504 (2019) (internal quotation marks omitted). The Court has "expressly rejected" any "requirement that previous cases be 'fundamentally similar'" or "'materially similar.'" *Hope*, 536 U.S. at 741. The crucial question is whether the law at the time gave the defendants "fair warning" that their actions were unconstitutional. *Id.*

Where an action is marked by "obvious cruelty," that fact itself can provide notice that the action is unconstitutional. *Id.* at 745; *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009) ("outrageous conduct obviously will be unconstitutional"). In the most obvious cases of unconstitutionality, there may be no precedents addressing identical facts because "[t]he easiest cases don't even arise." *Lanier*, 520 U.S. at 271 (internal quotation marks omitted). But "it does not follow that if such a case arose, the officials would be immune." *Id.* (internal quotation marks omitted).

The Court's statements in *Hope* and *Lanier* precisely describe this case. Here, "[t]he lack of a comparable government-created public health disaster precedent does not grant defendants a qualified immunity shield. Rather, it showcases the grievousness of their alleged conduct." Flint Pet.App.45. Indeed, the "'obvious cruelty inherent' in defendants' conduct should have been enough to forewarn defendants" that their conduct would violate Plaintiffs' constitutionally protected bodily integrity rights. *Id.* at 46.

Petitioner Flint officials argue that the *Hope-Lanier* analysis should apply only in "rare[]" instances. Flint Pet.24. True enough, but the "government-created

public health disaster" at issue here is much rarer than the prisoner abuse and sexual assault that were held to violate clearly established law in *Hope* and *Lanier*, respectively. "[T]aking affirmative steps to systematically contaminate a community through its public water supply with deliberate indifference is a government invasion of the highest magnitude." Flint Pet.App.46. Given the magnitude of the risk to Plaintiffs' lives, and their prolonged consumption of toxic drinking water, Defendants' "protracted failure even to care" is "truly shocking." *Id.* at 27. Petitioners thus had fair warning that they were violating the Constitution.

Petitioners nonetheless protest that the Sixth Circuit described clearly established law at too high a level of generality, Flint Pet.24, and that cases involving government officials targeting particular individuals for invasions of bodily integrity are too far removed from this case to provide fair warning. Busch Pet.32-33. But knowingly causing individuals to involuntarily consume a poisonous substance undoubtedly invades their bodily integrity, whether they are targeted or not. In any event, the question of whether Petitioners' conduct shocks the conscience turns on the Petitioners' subjective mental state—whether they acted with deliberate indifference.

Once the Sixth Circuit found a triable issue of deliberate indifference, then, it correctly concluded that Petitioners were not entitled to immunity. *See* Flint Pet.App.214 (Sutton, J., concurring in denial of rehearing *en banc*). There was no need for the court to identify a prior case finding deliberate indifference in an identical fact setting. Here, the Petitioners' culpable

mental state is enough to "alert a reasonable person to the likelihood of personal liability." *Id.* at 46 (internal quotation marks omitted).

II. THE DENIAL OF THE CITY'S MOTION TO DISMISS ON ELEVENTH AMENDMENT GROUNDS DOES NOT WARRANT REVIEW.

The Sixth Circuit correctly rejected Flint's claim to sovereign immunity. The court of appeals applied well established standards to an unusual set of facts and concluded that the City was not acting as an arm of the state. The City's challenge to the correctness of that ruling presents no issue meriting review by this Court.

Although municipalities generally are not entitled to immunity under the Eleventh Amendment, *Lincoln County v. Luning*, 133 U.S. 529 (1890), the City argues that this case was different because of the power that the state-appointed emergency managers had over municipal affairs. *See* Flint Pet.25. The City candidly acknowledges that this is a case of first impression and that "Michigan's Emergency Management Statute is truly extraordinary." Flint Pet.25. The City does not even attempt to show a conflict among the circuits. Rather, it argues that the court of appeals improperly failed to distinguish its prior holding in *Ernst v. Rising*, 427 F.3d 351 (6th Cir. 2005) (*en banc*), which set forth the Sixth Circuit's analysis for determining when an entity is an "arm of the state" for Eleventh Amendment purposes. Flint Pet.27. But this Court generally does not grant certiorari to resolve an intra-circuit conflict, let alone to tell a lower court that it should have distinguished one of its own prior cases.

In any event, the Sixth Circuit was correct. The court applied the analysis from *Ernst*, Flint Pet.App. 53-54, which itself applied this Court's key "arm of the state" precedents. *See Ernst*, 427 F.3d at 359 (relying on, *inter alia*, *Regents of the Univ. of California v. Doe*, 519 U.S. 425 (1997), and *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994)). As the Sixth Circuit explained, "the state's potential liability for a judgment against the entity" is the "foremost" factor in determining whether that entity is an arm of the state. Flint Pet.App.54 (internal quotation marks omitted); *see Hess*, 513 U.S. at 51 ("Eleventh Amendment's core concern is not implicated" unless the state is "in fact obligated to bear and pay the resulting indebtedness of the enterprise").

Under Michigan law, it is the municipality—not the state—that must pay any judgment incurred while the entity is under emergency management. *See* Mich. Comp. L. §§ 141.1560(5), 141.1572. The Michigan Court of Appeals has specifically held that Flint was not acting as an arm of the state under Michigan law while under emergency management—and thus the state cannot be liable for the actions its emergency managers took during the water crisis. *See Boler*, 923 N.W.2d at 293-296. The court explained that the emergency manager exercised a local power, not a state power: "The emergency manager, in place of the chief administrative officer and governing body, acts for and on behalf of the local government only." *Id.* at 295. *See* Mich. Comp. L. § 141.1552(dd). The Sixth Circuit thus correctly concluded that Flint was not an arm of the state under the Eleventh Amendment. The court's application of settled law to a unique set of facts does not warrant review.

III. THIS CASE IS A POOR VEHICLE FOR REVIEW.

This Court "rarely grant[s] review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case." *Salazar-Limon v. City of Houston*, 137 S.Ct. 1277, 1278 (2017) (Alito, J., concurring in the denial of certiorari). *See* S.Ct. R. 10. As Judge Sutton emphasized, that concern is especially acute here, where the egregious facts alleged in the pleadings have yet to be developed through discovery. Flint Pet.App.213. As explained above, Petitioners' constitutional arguments turn centrally on disputed interpretations of the allegations in the complaint. This Court ought not to rule on those arguments absent factual development.

In *Johnson*, *supra*, this Court held that the resolution of factual issues is inappropriate in qualified-immunity interlocutory appeals. Resolving factual issues is the daily work of trial judges, but "appellate judges enjoy no comparative expertise in such matters." *Johnson*, 515 U.S. at 316. Fact questions—particularly when, as here, they involve the determination of defendants' mental state—"can consume inordinate amounts of appellate time." *Id.* Even if the Court were to believe that the questions presented might at some point warrant review, it ought not to decide them now, "in the context of a less developed record," rather than after discovery or trial, "on a record that will permit a better decision." *Id.* at 317.

Waiting will not prejudice Petitioners' interests. Petitioners are already responding to third-party discovery requests in the district court on the state-law claims against the engineering-company defendants. Unlike in other qualified immunity cases, then, a grant

of certiorari at this stage cannot be justified as protecting against the burdens of discovery.

Even if the Court were to believe that the questions presented might warrant intervention at the motion-to-dismiss stage, it should wait to make any such determination until the Sixth Circuit decides the pending *Carthan* appeal. If the Sixth Circuit sustains the complaint in that case, it is likely that the defendants will again petition and provide the Court the opportunity to decide whether review is merited with the full set of factual allegations in view. It will also offer the chance to avoid deciding questions unnecessarily in the event that the state-court *Mays* litigation, pending in the Michigan Supreme Court, obviates any of the issues here. There is, in any event, no basis for review now.

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted by Respondents Counsel,

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