NO. 19-350

IN THE

Supreme Court of the United States

STEPHEN BUSCH, MICHAEL PRYSBY, LIANE SHEKTER SMITH, AND BRADLEY WURFEL, *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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

As detailed in the petition and both the Sixth Circuit panel and en banc dissents below, this case involves substantial circuit conflicts over the scope of the constitutional right to "bodily integrity" and what constitutes sufficiently "conscience shocking" behavior to strip a government official of qualified immunity. No decision of this or any Circuit court has ever held that indirect, unintentional intrusions into a person's body by non-forcible means amounts to a constitutional violation. No decision has ever held that individual regulators are liable for constitutional violations when an entity they regulate violates regulations or laws, resulting in alleged contamination of a commodity provided to the public. No decision has ever held that an agency media spokesperson violates an individual's bodily integrity by making public statements made to media members. Indeed, all relevant cases go the opposite way.

Respondents offer no compelling reason why this case should not be reviewed now. No factual development will change the reality that previous cases did not put Petitioners on notice that their regulatory decisions and media statements may give rise to a bodily integrity violation of Constitutional proportions. This is particularly so in light of the absence of any direct, intentional, physical intrusion by any Petitioner of any Respondent.

The Sixth Circuit's erroneous ruling impacts many dozens of federal and state cases involving the so-called Flint water crisis. And other courts have already used the Sixth Circuit's decision outside the context of Flint water cases. All of this will continue until this Court intervenes and ends the confusion. Certiorari is warranted.

ARGUMENT

I. Respondents' reply demonstrates that the Sixth Circuit substantially expanded the Fourteenth Amendment's Substantive Due Process guarantees into a font of tort law.

Respondents' bodily integrity claim against the MDEQ Petitioners transforms traditional environmental tort claims into constitutional violations. This Court and others have consistently rejected such an expansion of the Due Process Clause. Pet. 32–35.

Respondents wrongly say that this is not a case about a constitutional right to clean drinking water or a constitutional right to a contaminant free environment. Opp'n 22–26. Instead, Respondents assert that their claim is founded on a constitutional right to be free from "government actors knowingly introducing harmful substances into a person's body without their consent." *Id.* at 18. But that's not what their Complaint said. It alleged that MDEQ Petitioners (and others) "violated Plaintiffs' right to bodily integrity, insofar as Defendants *failed to protect* Plaintiffs from a foreseeable risk of harm *from exposure to lead contaminated water*." Compl. ¶ 384 (emphasis added). That reality removes many of the vehicle obstacles that Respondents attempt to place in front of this Court's review.

Once Respondents' mistake about the allegations in the Complaint is corrected, the law is clear. Respondents cite *Washington* v. *Harper*, 494 U.S. 210, 229 (1990), for the proposition that "poisoning an individual's drinking water with deliberate indifference to serious, known health risks" violates the Fourteenth Amendment. Opp'n 18. But *Harper* involved "forcible injection of medication into a nonconsenting [inmate]'s body." 494 U.S. at 229. And

even while recognizing that such a forcible injection would constitute a violation of bodily integrity, this Court held that prison officials *could* forcibly inject inmates with antipsychotic drugs if certain procedural protections were provided first. *Id.* at 231–36.

In stark contrast, Respondents do not allege a direct, targeted, forcible intrusion by any MDEQ Petitioner into any Respondent body. Instead, they allege that MDEQ Petitioners' alleged mistaken interpretation of safe drinking water regulations, over time, indirectly resulted in lead leaching from pipes within Flint's water distribution system and the premise plumbing of some Flint homes and into water the City of Flint provided, and that Petitioner Wurfel made allegedly false statements to the press concerning Flint's drinking water. No force. No targeted conduct. No direct injection of anything into Respondents or even into the water. Respondents did not allege that MDEQ Petitioners directly provided water to Respondents, nor could they; MDEQ Petitioners are government regulators and an agency spokesperson, not suppliers of Flint water.

Respondents maintain that because they allegedly consumed lead-contaminated water, there was a nonconsensual bodily intrusion. But courts have consistently rejected this very rationale in the context of both drinking water and public housing. Pet. 23–27, 35–36. That citizens rely on public drinking water or public housing does not render their use of these public services "forced" or "nonconsensual." *Brown* v. *Detroit Pub. Sch. Cmty. Dist.*, 763 F. App'x 497, 503–04 (6th Cir. 2019). No court before the Sixth Circuit has held that regulation inadvertently allowing the provision of contaminated water is akin to a forcible, nonconsensual injection.

Allowing the Sixth Circuit's ruling to stand will authorize constitutional claims against all providers and regulators of drinking water, regardless of their compliance with state and federal safe drinking water regulations. Federal regulations allow small amounts of lead to be present in all drinking water, even bottled water. 40 C.F.R. § 141.80, *et seq.* For example, federal regulations allow 10% of any given community to receive what may be considered water with high levels of lead. *Id.* Even when more than 10% of sampled homes in a community present with lead levels greater than 15 parts per billion, federal regulations merely require public education and an adjustment in water treatment. 40 C.F.R. § 141.81. Unlike other contaminants, lead is only regulated by this treatment technique. There is no maximum contaminant level. Contaminants in drinking water, such as lead, are properly addressed through legislative reform, not the creation of constitutional torts.

II. Respondents' reply effectively concedes that the "right" they assert was not clearly established.

Respondents are unable to cite a single case from this Court, the Sixth Circuit, or elsewhere that put MDEQ Petitioners on notice that their regulatory decisions and alleged conduct would violate Respondents' clearly established, constitutional rights. There is no case with remotely similar circumstances imposing constitutional liability on a public-water provider, much less a case imposing constitutional liability on a mere water regulator or agency spokesperson. The Sixth Circuit's extraordinary contrary conclusion, standing alone, warrants immediate review.

In the absence of any such case, Respondents devote a large portion of their response to demonstrating that MDEQ Petitioners' conduct meets the stringent, rarely applied standard of "outrageous conduct" that "obviously will be unconstitutional" without the need for prior precedent that, in a particularized sense, placed the unconstitutionality of the alleged conduct beyond dispute. Opp'n 31. But Respondents' cited cases are not remotely comparable to the allegations here.

This case involves government officials, acting with limited information and in a quickly changing environment, attempting to interpret an admittedly ambiguous federal regulation regarding lead in public water, and making related statements to the press. That is a far cry from strip searching a student for alleged contraband with no basis for suspecting a danger to students or that the contraband was hidden in her undergarments, *Safford Unified Sch. Dist. No. 1* v. *Redding*, 557 U.S. 364, 377 (2009); punishing an inmate by tying him to a hitching post directly in the sun in a painful position and "under circumstances that were both degrading and dangerous," *Hope* v. *Pelzer*, 536 U.S. 730, 745 (2002); or selling foster children into slavery, *United States* v. *Lanier*, 520 U.S. 259, 271 (1997). That Respondents would choose to rely on such authorities reinforces the wide chasm between what MDEQ Petitioners are alleged to have done and what previous cases have regarded as obviously "outrageous" conduct amounting to a constitutional violation in the absence of prior, established precedent.

Moreover, the Sixth Circuit panel majority recognized that Respondents levied no allegations of intentional conduct against MDEQ Petitioners. App. 27a. To say that *unintentional conduct* satisfies the stringent standard of "obvious cruelty" is inconsistent with the many precedents in this area. Pet. 27. And it opens the door to constitutional torts based on mere government mistake and neglect.

That open door is precisely what is at stake here. Respondents' claims against these Petitioners stem from MDEQ's decision to not require immediate use of a corrosion control chemical when Flint began sourcing its water from the Flint River. This was a regulatory decision, one that the U.S. EPA admitted was a plausible interpretation of the Federal Lead and Copper Rule at the time of Flint's water source switch. Pet. 4. "Qualified immunity [is supposed to] give[ ] government officials breathing room to make reasonable but mistaken judgments about open legal questions [and] protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 743 (2011) (citations omitted). A mistaken application of federal regulations may amount to negligence, but it is insufficient to overcome these Petitioners' entitlement to qualified immunity. *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009); *Singh* v. *Cordle*, __ F.3d __, 2019 WL 4050272, at *5 (10th Cir. Aug. 28, 2019) (qualified immunity "applies regardless of whether the government official's error is a mistake of law"); *Naumovski* v. *Norris*, 934 F.3d 200 (2d Cir. 2019) ("Government officials are thus shielded from liability whenever their actions are based on reasonable mistakes of law"); *Eves* v. *LePage*, 927 F.3d 575, 588 (1st Cir. 2019) ("A reasonable mistake of law does not defeat qualified immunity.").

It bears repeating that there is no previous case putting these state officials on notice that their regulatory decisions or statements to media members violated a clearly established constitutional right to bodily integrity. The Court should grant the petition and correct the Sixth Circuit's diminishment of this Court's carefully calibrated doctrine of qualified immunity.

III. The Sixth Circuit's decision conflicts directly with the Second Circuit's *Benzman* decision.

An independent ground for granting the petition is to resolve the split between (a) the Sixth Circuit's decision here, which allowed a § 1983 substantive due process claim to proceed against Mr. Wurfel based solely on alleged public statements to the press, and (b) the Second Circuit's holding in *Benzman* v. *Whitman*, 523 F.3d 119 (2d Cir. 2008), which denied a substantive due process claim against a government spokesperson for similar statements. Respondents try to distinguish *Benzman* because that case involved press statements after the 9/11 terrorist attacks and because the public official in *Benzman* had to balance "competing governmental interests." Opp'n 20–22. Respondents also emphasize the "informational chaos" following the 9/11 terrorist attacks and contrast it to the situation unfolding in Flint over a number of months. *Id.* at 21. But these purported distinctions do not resolve the conflict.

While there are differences between the 9/11 terrorist attacks and the alleged problems with Flint's water supply, *Benzman* did not involve EPA statements made to first responders performing emergency search and rescue efforts, like the statements made in *Lombardi* v. *Whitman*, 485 F.3d 73

(2d Cir. 2007). Rather, and more akin to the case here, *Benzman* involved guidance to individuals who resided, attended school, or worked in lower Manhattan or Brooklyn (i.e., the general public) in the aftermath of the 9/11 attacks. This case and *Benzman* are therefore not meaningfully distinguishable, and the public agency spokespersons in each case deserve similar treatment.

Moreover, the outcome in *Benzman* did not turn on any "informational chaos." There, as here, the plaintiffs alleged *intentionally false* press statements and sought damages via substantive due process claims. 523 F.3d at 129. Whether "informational chaos" occurred is therefore irrelevant because plaintiffs in both cases alleged intentionally false press statements, not mass confusion.

Finally, while Respondents frame the "competing governmental interests" in *Benzman* as a competition between "restoring public services and protecting public health," these were not the competing interests at issue. Contra Opp'n 21–22. As the *Benzman* court explained:

> [T]he considerations weighing upon Government officials in [*Benzman* and *Lombardi*] differ. While it was obviously important to have the *Lombardi* plaintiffs at ground zero promptly even if health risks would be encountered, the balance of competing governmental interests faced in reassuring people that it was safe to return to their homes and offices was materially different from that faced in *Lombardi*. [523 F.3d at 128.]

Instead, the competing governmental interests in *Benzman* were the EPA Administrator's choice between (i) accepting guidance from the White House Council on Environmental Quality (CEQ), or (ii) "disregard[ing] the CEQ's views in communicating with the public." *Id*. These competing governmental interests directly mirror the competing interests faced by Mr. Wurfel: a choice between (i) accepting the technical guidance and positions of MDEQ officials regulating Flint's drinking water, or (ii) disregarding these views in communicating with the press. Thus, the "competing governmental interests" involved in *Benzman* are not a distinguishing factor as Respondents suggest, but rather an analogous factor further highlighting the split between the Second and Sixth Circuits.

IV. This case is a proper vehicle for review and will dictate the outcome of all related cases while influencing hundreds of cases across the nation.

Respondents argue that this case is not a proper vehicle for review because it would be better (for Respondents) if this Court waited to review a substantially similar Flint water case that was decided *after this case* and that wholeheartedly adopted the *decision in this case*. Such delay would be inefficient and backwards. This petition seeks review of the Sixth Circuit's binding legal decisions that will be relied upon in deciding all related, federal (and likely state) Flint water cases. There is no amount of factual development that would alter this Court's review of the Sixth Circuit' decision to create a clearly established constitutional right to bodily integrity that never previously existed.

Not only is the Sixth Circuit's decision binding on the many dozens of related Flint cases, Pet. 36, other courts are starting to use the decision to support an expansion of the Due Process Clause's reach into areas of environmental law and beyond. *Id.* at 36–37. And all those cases are relying on an opinion that does "exactly what the Supreme Court has repeatedly told us not to do." App. 200a (Kethledge, J., dissenting from rehearing en banc).

Pandora's Box has already been opened; this Court should act and close it. Immediately.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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