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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SHARI GUERTIN, individually and as next friend of her child, E.B., a minor; DIOGENES MUSE-CLEVELAND, *Plaintiffs-Appellees*, *v.* STATE OF MICHIGAN, et al., *Defendants*, CITY OF FLINT, MICHIGAN, HOWARD CROFT, DARNELL EARLEY, and GERALD AMBROSE (17-1699); LIANE SHEKTER-SMITH, DANIEL WYANT, STEPHEN BUSCH, MICHAEL PRYSBY, and BRADLEY WURFEL (17-1745); NANCY PEELER (17-1752); ROBERT SCOTT (17-1769); EDEN WELLS and NICK LYON (17-1698), *Defendants-Appellees*.	Nos. 17-1698/1699/ 1745/1752/1769

Appeal from the United States District Court
for the Eastern District of Michigan at Ann Arbor.
No. 5:16-cv-12412—Judith E. Levy, District Judge.

Argued: June 6, 2018

Decided and Filed: January 4, 2019

Before: McKEAGUE, GRIFFIN, and WHITE, Circuit Judges.

COUNSEL

ARGUED: Zachary C. Larsen, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellants in 17-1698. Frederick A. Berg, Jr., BUTZEL LONG, P.C., Detroit, Michigan, for Appellants in 17-1699. John J. Bursch, BURSCH LAW PLLC, Caledonia, Michigan, for Appellants in 17-1745. Michael S. Cafferty, Detroit, Michigan, for Appellant in 17-1752. Kurt Krause, CHARTIER & NYAMFUKUDZA, P.L.C., East Lansing, Michigan, for Appellant in 17-1769. Paul T. Geske, MCGUIRE LAW, P.C., Chicago, Illinois, for Appellees. Samuel R. Bagenstos, Ann Arbor, Michigan, for Amicus Curiae.

ON BRIEF: Zachary C. Larsen, Richard S. Kuhl, Margaret A. Bettenhausen, Nathan A. Gambill, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellants in 17-1698. Frederick A. Berg, Jr., Sheldon H. Klein, BUTZEL LONG, P.C., Detroit, Michigan, Nikkiya T. Branch, PERKINS LAW GROUP, Detroit, Michigan, Alexander S. Rusek, WHITE LAW PLLC, Okemos, Michigan, William Y. Kim, CITY OF FLINT, Flint, Michigan, Barry A. Wolf, LAW OFFICE OF BARRY A. WOLF PLLC, Flint, Michigan, for Appellants in 17-1699. John J. Bursch, BURSCH LAW PLLC, Caledonia, Michigan, Philip A. Grashoff, Jr., KOTZ SANGSTER WYSOCKI P.C., Bloomfield Hills, Thaddeus E. Morgan, Michael H.

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GRIFFIN, J., delivered the opinion of the court in which WHITE, J., joined, and McKEAGUE, J., joined in part. McKEAGUE, J. (pp. 40–70), delivered a separate opinion concurring in part and dissenting in part.

OPINION

GRIFFIN, Circuit Judge.

This case arises out of the infamous government-created environmental disaster commonly known as the Flint Water Crisis. As a cost-saving measure until a new water authority was to become operational,

public officials switched the City of Flint municipal water supply from the Detroit Water and Sewerage Department (DWSD) to the Flint River to be processed by an outdated and previously mothballed water treatment plant. With the approval of State of Michigan regulators and a professional engineering firm, on April 25, 2014, the City began dispensing drinking water to its customers without adding chemicals to counter the river water's known corrosivity.

The harmful effects were as swift as they were severe. 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. All of this resulted because the river water was 19 times more corrosive than the water pumped from Lake Huron by the DWSD, and because, without 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. The crisis was predictable, and preventable. *See generally Mason v. Lockwood, Andrews & Newnam, P.C.*, 842 F.3d 383, 387 (6th Cir. 2016).

I.

Plaintiffs Shari Guertin, her minor child E.B., and Diogenes Muse-Cleveland claim personal injuries and damages from drinking and bathing in the lead-contaminated water. Plaintiffs' complaint asserted

various claims against numerous state, city, and private-actor defendants. In response to motions to dismiss, the district court granted in part and denied in part the motions. In its written order, the court dismissed many of the original claims and original defendants. Plaintiffs have not filed a cross appeal. The defendants who were not dismissed now appeal and are collectively referred to as "defendants" throughout this opinion. The plaintiffs' sole remaining claim is that defendants violated their right to bodily integrity as guaranteed by the Substantive Due Process Clause of the Fourteenth Amendment. They bring this claim pursuant to 42 U.S.C. § 1983, under which "an individual may bring a private cause of action against anyone who, under color of state law, deprives a person of rights, privileges, or immunities secured by the Constitution or conferred by federal statute." *Wurzelbacher v. Jones-Kelley*, 675 F.3d 580, 583 (6th Cir. 2012).

II.

On this appeal, we decide two substantial issues of public importance. First, viewing each defendant individually, did the district court err in denying defendants' motions to dismiss based upon qualified immunity? Specifically, did plaintiffs plead a plausible Fourteenth Amendment Due Process violation of their right to bodily integrity and was such a constitutional right clearly established when the defendants acted? We join the United States District Court for the Eastern District of Michigan, *In re Flint Water Cases*, 329 F. Supp. 3d 369 (E.D. Mich. 2018), *vacated on other*

grounds (Nov. 9, 2018), and *Guertin v. Michigan*, 2017 WL 2418007 (E.D. Mich. June 4, 2017), the Michigan Court of Appeals, *Mays v. Snyder*, 916 N.W.2d 227 (Mich. Ct. App. 2018), and the Michigan Court of Claims, *Mays v. Snyder*, No. 16-000017-MM (Mich. Ct. Cl. Oct. 26, 2016),[1] in holding that plaintiffs have pled a plausible Due Process violation of bodily integrity regarding some of the defendants. For the reasons that follow, we affirm the district court's order denying the motions to dismiss based upon qualified immunity regarding defendants Howard Croft, Darnell Earley, Gerald Ambrose, Liane Shekter-Smith,[2] Stephen Busch, Michael Prysby, and Bradley Wurfel. However, we reverse the denial of the motions to dismiss regarding defendants Daniel Wyant, Nick Lyon, Eden Wells, Nancy Peeler, and Robert Scott because plaintiffs' complaint alleges mere negligence, and not a constitutional violation against them.

The second issue is whether the City of Flint is entitled to Eleventh Amendment immunity from plaintiffs' suit because the takeover by the State of Michigan of the City of Flint pursuant to Michigan's "Emergency Manager" law transformed the City into an arm of the state. It is not, and we therefore affirm the district court's same holding.

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[1] The Michigan Court of Appeals and Michigan Court of Claims construed the Due Process Clause of the Michigan Constitution and, following Michigan precedent, deemed it coextensive with its federal counterpart. *See*, *e.g.*, *Mays*, 916 N.W.2d at 261.

[2] We have changed the docket to correct plaintiffs' misspelling of Shekter-Smith's name.

III.

We possess jurisdiction under 28 U.S.C. § 1291 and the "collateral-order doctrine," as defendants are appealing the denial of qualified and Eleventh Amendment immunity. *Kaminski v. Coulter*, 865 F.3d 339, 344 (6th Cir. 2017). The district court granted in part and denied in part defendants' motions to dismiss plaintiffs' complaint under Federal Rule of Civil Procedure 12(b)(6). Given this procedural posture, we construe the complaint in the light most favorable to plaintiffs, accept all well-pleaded factual allegations as true, and draw all reasonable inferences in plaintiffs' favor. *Crosby v. Univ. of Ky.*, 863 F.3d 545, 551–52 (6th Cir. 2017). But if we are to affirm, the factual allegations in plaintiffs' complaint must plausibly allege a legally recognized constitutional claim. *See generally Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–58 (2007).

IV.

Qualified immunity shields public officials "from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). It is not a "mere defense to liability"; the doctrine provides "*immunity from suit*." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). This immunity "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions," "protect[ing] all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (internal

quotation marks omitted). A plaintiff bears the burden of showing that a defendant is not entitled to qualified immunity. *Bletz v. Gribble*, 641 F.3d 743, 750 (6th Cir. 2011). To do so, a plaintiff must show "(1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *al-Kidd*, 563 U.S. at 735 (internal quotation marks omitted). The district court concluded plaintiffs met this standard, and we review that decision de novo. *Sutton v. Metro. Gov't of Nashville & Davidson Cty.*, 700 F.3d 865, 871 (6th Cir. 2012).

The assertion of qualified immunity at the motion-to-dismiss stage pulls a court in two, competing directions. On the one hand, the Supreme Court has repeatedly "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (internal quotation marks omitted). But on the other, "[w]hen qualified immunity is asserted at the pleading stage," as defendants did here, "the precise factual basis for the plaintiff's claim or claims may be hard to identify." *Id.* at 238–39 (citation omitted). We have thus cautioned that "it is generally inappropriate for a district court to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity. Although . . . entitlement to qualified immunity is a threshold question to be resolved at the earliest possible point, that point is usually summary judgment and not dismissal under Rule 12." *Wesley v. Campbell*, 779 F.3d 421, 433–34 (6th Cir. 2015) (internal citations, quotation marks, and brackets omitted). The reasoning for our general preference

is straightforward: "Absent any factual development beyond the allegations in a complaint, a court cannot fairly tell whether a case is 'obvious' or 'squarely governed' by precedent, which prevents us from determining whether the facts of this case parallel a prior decision or not" for purposes of determining whether a right is clearly established. *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 428 F.3d 223, 235 (6th Cir. 2005) (Sutton, J., concurring) (brackets omitted).

V.

The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Flowing directly from the protections enshrined in the Magna Carta, *see*, *e.g.*, *Lewellen v. Metro. Gov't of Nashville & Davidson Cty.*, 34 F.3d 345, 348 (6th Cir. 1994), the Due Process Clause significantly restricts government action—its core is "prevent[ing] government from abusing its power, or employing it as an instrument of oppression." *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992) (internal quotation marks and brackets omitted); *see also Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845–46, (1998) ("The touchstone of due process is protection of the individual against arbitrary action of government, [including] the exercise of power without any reasonable justification in the service of a legitimate government objective." (internal quotation marks omitted)). Although the Clause provides no guarantee "of certain

minimal levels of safety and security," it expressly prohibits deprivations by "the State itself." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). That is, "[i]ts purpose [is] to protect the people from the State, not to ensure that the State protect[] them from each other." *Id.* at 196.

There are procedural and substantive due process components. *See Range v. Douglas*, 763 F.3d 573, 588 (6th Cir. 2014). Only the latter component is at issue here. Substantive due process "bar[s] certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). It "specifically protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks and citations omitted). The liberty interests secured by the Due Process Clause "include[] the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.'" *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). These common-law privileges, the Supreme Court has held, specifically embrace the right to bodily integrity, *Glucksberg*, 521 U.S. at 720, and the right not to be subjected to arbitrary and capricious government action that "shocks the conscience and violates the decencies

of civilized conduct." *Lewis*, 523 U.S. at 846–47 (internal quotation marks omitted).

The Supreme Court "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Collins*, 503 U.S. at 125. Substantive Due Process is not "a rigid conception, nor does it offer recourse for every wrongful action taken by the government." *EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 862 (6th Cir. 2012). As such, it "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels*, 474 U.S. at 332. That means a "'careful description' of the asserted fundamental liberty interest" is essential, *Glucksberg*, 521 U.S. at 721 (citation omitted), otherwise the Clause would turn into "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Daniels*, 474 U.S. at 332 (citation omitted). Accordingly, we "focus on the allegations in the complaint to determine how [plaintiffs] describe[] the constitutional right at stake and what the [defendants] allegedly did to deprive [them] of that right." *Collins*, 503 U.S. at 125.

A.

Plaintiffs' complaint deals with the scope of the right to bodily integrity, an 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*, 430 U.S. at 673–74; *see also Davis v. Hubbard*, 506 F. Supp. 915, 930 (N.D. Ohio 1980) ("In the history of the common law, there is perhaps no right which is older than a person's right to be free from unwarranted personal contact." (collecting authorities)).

This common law right is first among equals. As the Supreme Court has said: "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); *cf. Schmerber v. California*, 384 U.S. 757, 772 (1966) ("The integrity of an individual's person is a cherished value of our society."). Absent lawful authority, invasion of one's body "is an indignity, an assault, and a trespass" prohibited at common law. *Union Pac. Ry.*, 384 U.S. at 252. On this basis, we have concluded "[t]he right to personal security and to bodily integrity bears an impressive constitutional pedigree." *Doe v. Claiborne Cty.*, 103 F.3d 495, 506 (6th Cir. 1996).

"[T]his right is fundamental where 'the magnitude of the liberty deprivation that the abuse inflicts upon the victim strips the very essence of personhood.'" *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998) (quoting *Doe*, 103 F.3d at 506–07) (brackets and ellipsis omitted). "We have never retreated . . . from our recognition that *any* compelled

intrusion into the human body implicates significant, constitutionally protected . . . interests." *Missouri v. McNeely*, 569 U.S. 141, 159 (2013) (emphasis added); *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"). And more broadly, it is beyond debate that an individual's "interest in preserving her life is one of constitutional dimension." *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).

Bodily integrity cases "usually arise in the context of government-imposed punishment or physical restraint," but that is far from a categorical rule. *Kallstrom*, 136 F.3d at 1062 (collecting cases). Instead, the central tenet of the Supreme Court's vast bodily integrity jurisprudence is balancing an individual's common law right to informed consent with tenable state interests, regardless of the manner in which the government intrudes upon an individual's body. *See*, *e.g.*, *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 269–70 (1990). Thus, to show that the government has violated one's right to bodily integrity, a plaintiff need not "establish any constitutional significance to the means by which the harm occurs[.]" *Boler v. Earley*, 865 F.3d 391, 408 n.4 (6th Cir. 2017). That is because "individuals possess a constitutional right to be free from forcible intrusions on their bodies against their will, absent a compelling state interest." *Planned*

Parenthood Sw. Ohio Region v. DeWine, 696 F.3d 490, 506 (6th Cir. 2012).

A few examples illustrate the breadth of this tenet. Consider *Washington v. Harper*, which addressed the State of Washington's involuntary administration of antipsychotic medication to an inmate without a judicial hearing. 494 U.S. 210, 213–17 (1990). There, the Supreme Court had "no doubt" that the inmate "possess[ed] a significant liberty interest in avoiding unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." *Id.* at 221–22. This "interest in avoiding the unwarranted administration of antipsychotic drugs is not insubstantial. The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." *Id.* at 229 (citing *Winston v. Lee*, 470 U.S. 753 (1985), and *Schmerber*, 384 U.S. 757). And this is especially so when the foreign substance "can have serious, even fatal, side effects" despite some therapeutic benefits. *Id.* But the extent of this interference, reasoned the Court, is circumscribed by the government's interest (there, administering medication in the custodial setting). *Id.* at 222–27. Examining those interests, the Court permitted the physical intrusion upon a showing of certain circumstances—danger to self or others, and in the inmate's medical interest. *Id.* at 227; *see also Riggins v. Nevada*, 504 U.S. 127, 135–38 (1992) (applying *Harper* to the forced administration of drugs in trial and pretrial settings and focusing upon the state's "overriding justification and a determination of

medical appropriateness" to justify the intrusion); *Sell v. United States*, 539 U.S. 166, 177–86 (2003) (similar).

The Supreme Court's seminal "right to die" case, *Cruzan v. Director, Missouri Department of Health*, provides further explication. At issue in *Cruzan* was whether the parents of an individual in a persistent vegetative state could insist that a hospital withdraw life-sustaining care based on her right to bodily integrity. 497 U.S. at 265–69. Writing for the Court, Chief Justice Rehnquist extensively detailed the line between the common law, informed consent, and the right to bodily integrity: "This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment," *id.* at 269, "generally encompass[es] the right of a competent individual to refuse medical treatment," *id.* at 277, and is a right that "may be inferred from [the Court's] prior decisions." *Id.* at 278–79 (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Breithaupt v. Abram*, 352 U.S. 432 (1957); *Harper*, 494 U.S. 210; *Vitek v. Jones*, 445 U.S. 480 (1980); and *Parham v. J.R.*, 442 U.S. 584 (1979)). And, although the Court assumed as much, "the logic of [these] cases . . . embrace[s] . . . a liberty interest" in "artificially delivered food and water essential to life." *Id.* at 279. As with *Harper*, the Court's main inquiry was not whether the case dealt with the right to bodily integrity, but rather how to balance this right with a competing state interest (the protection of life) in relation to the procedural protections provided (the state's requirement that an incompetent person's wishes to withdraw treatment be

proven by clear and convincing evidence). *Id.* at 280–87; *cf. Winston*, 470 U.S. at 759 (holding that a nonconsensual "surgical intrusion into an individual's body for evidence" without a compelling state need is unreasonable).

This nonconsensual intrusion vis-à-vis government interest line of cases has played out time and time again in the lower courts. *See*, *e.g.*, *United States v. Brandon*, 158 F.3d 947, 953 (6th Cir. 1998) ("[T]he issue of forced medication implicates . . . [the] liberty interest in being free from bodily intrusion.").[3] The numerous cases involving government experiments on unknowing and unwilling patients provide a strong analogy to the Flint Water Crisis.[4] Involuntarily subjecting nonconsenting individuals to foreign substances with no known therapeutic value—often under false pretenses and with deceptive practices hiding the

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[3] Some defendants contend actual and targeted physical force by a government actor is requisite for a bodily integrity invasion. But as set forth, the right to bodily integrity's anchor is control of one's own person by way of informed consent, and thus the method upon which the government enters the body is irrelevant. *Boler*, 865 F.3d at 408 n.4; *see also Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 857 (1992) (plurality op).

[4] *See*, *e.g.*, *Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986); *Lojuk v. Quandt*, 706 F.2d 1456 (7th Cir. 1983); *Rogers v. Okin*, 634 F.2d 650 (1st Cir. 1980), *overruled on other grounds sub nom, Mills v. Rogers*, 457 U.S. 291 (1982); *Bounds v. Hanneman*, 2014 WL 1303715 (D. Minn. Mar. 31, 2014); *Heinrich v. Sweet*, 62 F. Supp. 2d 282 (D. Mass. 1999); *Stadt v. Univ. of Rochester*, 921 F. Supp. 1023 (W.D.N.Y. 1996); *In re Cincinnati Radiation Litigation*, 874 F. Supp. 796 (S.D. Ohio 1995); *Davis v. Hubbard*, 506 F. Supp. 915 (N.D. Ohio 1980).

nature of the interference—is a classic example of invading the core of the bodily integrity protection.

In re Cincinnati Radiation Litigation is a good example. Funded by the Department of Defense, government officials at the University of Cincinnati subjected cancer patients to radiation doses consistent with those expected to be inflicted upon military personnel during a nuclear war. 874 F. Supp. at 802–04. The patients were in "reasonably good clinical condition," and were "primarily indigent, poorly educated, and of lower than average intelligence." *Id.* at 803. At no time did the government actors disclose the risks associated with the massive radiation doses or obtain consent to irradiate the patients at those levels for those purposes—they instead told the patients that the radiation was treatment for their cancer. *Id.* at 803–04. Summarizing the caselaw just mentioned, the *Cincinnati Radiation* court easily concluded that "[t]he right to be free of state-sponsored invasion of a person's bodily integrity is protected by the Fourteenth Amendment guarantee of due process." *Id.* at 810–11. The involuntary and misleading nature of the intrusions was key. The patients could not "be said to exercise that degree of free will that is essential to the notion of voluntariness" because:

> [t]he choice Plaintiffs would have been forced to make was one of life or death. If the Constitution protects personal autonomy in making certain types of important decisions, the decision whether to participate in the Human Radiation Experiments was one that each

> individual Plaintiff was entitled to make freely and with full knowledge of the purpose and attendant circumstances involved. Without actually seizing the Plaintiffs and forcing them to submit to these experiments, the . . . agents of the state[] accomplished the same feat through canard and deception[.]

Id. at 812 (internal quotation marks and citations omitted). Also key was the risk of harm—the plaintiffs received "total and partial body radiation, which caused burns, vomiting, diarrhea and bone marrow failure, and resulted in death or severe shortening of life." *Id.* at 814.

We find the *Cincinnati Radiation* matter especially analogous. In both instances, individuals engaged in voluntary actions that they believed would sustain life, and instead received substances detrimental to their health. In both instances, government officials engaged in conduct designed to deceive the scope of the bodily invasion. And in both instances, grievous harm occurred. Based on the facts and principles set forth in the above cases, we therefore agree with the district court that "a government actor violates individuals' right to bodily integrity by knowingly and intentionally introducing life-threatening substances into individuals without their consent, especially when such substances have zero therapeutic benefit."

Finally, we note what plaintiffs' claim does not entail. There is, of course, "'no fundamental right to water service.'" *In re City of Detroit*, 841 F.3d 684, 700 (6th

Cir. 2016) (quoting *Golden v. City of Columbus*, 404 F.3d 950, 960 (6th Cir. 2005)). Moreover, the Constitution does not guarantee a right to live in a contaminant-free, healthy environment. *See*, *e.g.*, *Lake v. City of Southgate*, 2017 WL 767879, at *4 (E.D. Mich. Feb. 28, 2017) (collecting cases). To this end, several defendants and the dissent cite a California state case involving residents complaining about a city fluoridating its drinking water supply. *See Coshow v. City of Escondido*, 132 Cal. App. 4th 687, 709 (2005). However, *Coshow* is particularly inapposite because it shows the push-and-pulls of competing policy decisions that generally fall outside the scope of a violation of the right to bodily integrity—there, the government publicly introduced fluoride into the water system, a chemical frequently added to public water systems to prevent tooth decay. Here, 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. Therefore, "*Coshow* did not address whether substantive due-process protections might be implicated in the case of intentional introduction of known contaminants by governmental officials, and its reasoning is inapplicable here." *Mays*, 916 N.W.2d at 262 n.16.

B.

Upon a showing of a deprivation of a constitutionally protected liberty interest, a plaintiff must show how the government's discretionary conduct that deprived that interest was constitutionally repugnant.

See Am. Express Travel Related Servs. Co. v. Kentucky, 641 F.3d 685, 688 (6th Cir. 2011) ("[A] plaintiff must demonstrate a deprivation of a constitutionally protected liberty or property interest in order to establish a due process violation based on discretionary conduct of government officials[.]"). We use the "shocks the conscience" rubric to evaluate intrusions into a person's right to bodily integrity. *Lillard v. Shelby Cty. Bd. of Educ.*, 76 F.3d 716, 725 (6th Cir. 1996). Thus, a "plaintiff must show as a predicate the deprivation of a liberty or property interest" and conscience-shocking conduct. *See EJS Props.*, 698 F.3d at 861; *Claybrook v. Birchwell*, 199 F.3d 350, 359 (6th Cir. 2000) (holding that conscience-shocking behavior must be taken "towards the plaintiff's federally protected rights"); *see also Vargas v. City of Phila.*, 783 F.3d 962, 973 (3d Cir. 2015) ("To sustain a substantive due process claim, a plaintiff must show that the particular interest in question is protected by the Fourteenth Amendment and that the government's deprivation of that interest 'shocks the conscience.'"); *United States v. Sanders*, 452 F.3d 572, 577 n.4 (6th Cir. 2006) (similar); *Martinez v. Cui*, 608 F.3d 54, 64 (1st Cir. 2010) (similar).[5]

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[5] In dicta, we stated in *Range* that "[o]ur case law on substantive due process is somewhat conflicted as to whether an underlying constitutionally-protected right must be established in order for a government action to violate one's rights by shocking the conscience," and then cited *EJS Properties* for the proposition that in non-zoning decision contexts "we have held that 'government action may certainly shock the conscience or violate substantive due process without a liberty or property interest at stake.'" 763 F.3d at 589 (quoting *EJS Props.*, 698 F.3d at 861–62). For that statement, *EJS Properties*, in dicta as well, cited two

"[T]he measure of what is conscience shocking is no calibrated yard stick," nor is it "subject to mechanical application." *Lewis*, 523 U.S. at 847, 850. Several "tropes" help explain its meaning, *Range*, 763 F.3d at 589, with the focus again being on "executive abuse of power." *Lewis*, 523 U.S. at 846. *Rochin* is the "benchmark." *Id.* at 846–47. Due-process-violative conduct (there, forced stomach pumping to obtain evidence) "shocks the conscience," infringes upon the "decencies of civilized conduct," is "so brutal and so offensive to human dignity," and interferes with rights "implicit in the concept of ordered liberty." *Rochin*, 342 U.S. at 169, 172–74 (citation omitted); *see also Lewis*, 523 U.S. at 846–47 (collecting authorities). "These are subjective standards, to be sure, but they make clear that the 'shocks the conscience' standard is not a font of tort law, but is instead a way to conceptualize the sort of egregious behavior that rises to the level of a substantive due process violation." *Range*, 763 F.3d at 590. Stated differently, the shocks-the-conscience test is the

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pre-*Lewis* cases, and more importantly, *American Express*—a case involving a constitutional challenge to a state law. 698 F.3d at 861–62. *Range*'s and *EJS Properties*' dicta misconstrue *American Express*, which expressly held "a plaintiff must demonstrate a deprivation of a constitutionally protected liberty or property interest in order to establish a due process violation based on discretionary conduct of government officials," unless the matter involves a constitutional challenge to a state law. *Am. Express*, 641 F.3d at 688–89 (citation omitted). This is consistent with *Lewis*, 523 U.S. at 847 n.8.

way in which courts prevent transforming run-of-the-mill tort claims into violations of constitutional guarantees.

To aid this inquiry, we are to place the alleged heinous conduct on a spectrum, "[t]he bookends [of which] present the easier cases." *Id.* On the one end is conduct that "is categorically beneath the threshold of constitutional due process," mere negligence. *Lewis*, 523 U.S. at 849. Conduct that is "intended to injure in some way unjustifiable by any government interest" represents the other end, for this behavior "would most probably support a substantive due process claim." *Id.* We deal here not with these extremes, but rather in the middle, what the Court has deemed "something more than negligence but less than intentional conduct, such as recklessness or gross negligence." *Id.* (internal quotation marks omitted).

This "middle state[] of culpability 'may or may not be shocking depending on the context,'" *Range*, 763 F.3d at 590 (quoting *Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, 542 F.3d 529, 535 (6th Cir. 2008)), for what may "constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial," *Lewis*, 523 U.S. at 850 (quoting *Betts v. Brady*, 316 U.S. 455, 462 (1942)). "Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of

circumstances before any abuse of power is condemned as conscience shocking." *Id.*

Lewis delineates this dichotomy. The issue there was "whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender." *Id.* at 836. The Court held that "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment. . . ." *Id.* at 854. In so holding, the Court highlighted how the time to deliberate in one circumstance may dictate liability in one situation but not another because "[a]s the very term 'deliberate indifference' implies, the standard is sensibly employed only when actual deliberation is practical[.]" *Id.* at 851. Take a classic deliberate indifference situation—when, for example, a prison official has "time to make unhurried judgments, [with] the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations." *Id.* at 853. It is in these kinds of situations where we would expect plaintiffs asserting substantive due process claims based on deliberate indifference to be most successful. In rapidly evolving situations like prison riots, high-speed chases, and other tense, split-second-reaction-demanding matters, we apply "a much higher standard." *Id.* at 852–54. We look instead to whether the state actor applies force "maliciously and sadistically for the very purpose of causing harm"—in

other words, whether he acted with an intent to harm. *Id.* at 853.

"The critical question in determining the appropriate standard of culpability is whether the circumstances allowed the state actors time to fully consider the potential consequences of their conduct." *Ewolski v. City of Brunswick*, 287 F.3d 492, 510 (6th Cir. 2002) (internal quotation marks and brackets omitted). This "time to deliberate consideration," however, does not "transform any reckless action from a tort to conscience-shocking behavior simply because the government actor had time to appreciate *any* risk of harm. Time is instead one element in determining whether the actor's culpability 'inches close enough to harmful purpose to spark the shock that implicates' substantive due process." *Range*, 763 F.3d at 590 (quoting *Lewis*, 523 U.S. at 853) (brackets omitted). Our focus instead is upon the entirety of the situation—"the type of harm, the level of risk of the harm occurring, and the time available to consider the risk of harm are all necessary factors in determining whether an official was deliberately indifferent." *Id.* at 591.

After *Lewis*, "the key variable is whether actual deliberation is practical, not whether the claimant was in state custody." *Ewolski*, 287 F.3d at 510 n.5. This is because "[c]ustodial settings . . . are not the only situations in which officials may have a reasonable opportunity to deliberate." *Id.* But more importantly, even in non-custodial situations, we have stressed that deliberate indifference claims require "something more":

> [A] something that we have variously described as callous disregard for the risk of injury, or action in an arbitrary manner that shocks the conscience or that indicates an intent to injure. That additional element—be it termed callous disregard or intent to injure—ensures that only the most egregious official conduct can be said to be arbitrary in the constitutional sense.

Schroder v. City of Fort Thomas, 412 F.3d 724, 730 (6th Cir. 2005) (internal citations, quotation marks, and brackets omitted).

We have identified a multitude of considerations when evaluating an official's alleged arbitrariness in the constitutional sense, including the time for deliberation, the nature of the relationship between the government and the plaintiff, and whether a legitimate government purpose motivated the official's act. *Hunt*, 542 F.3d at 536. These factors help elucidate *Lewis*'s broader point that simply making bad choices does not rise to the level of deliberate indifference. Rather, "[f]or us to find deliberate indifference, . . . we must find not only that the governmental actor chose to act (or failed to act) despite a subjective awareness of substantial risk of serious injury, but we also must make some assessment that he did not act in furtherance of a countervailing governmental purpose that justified taking that risk." *Id.* at 541; *see also Schroder*, 412 F.3d at 729 ("Many, if not most, governmental policy choices come with risks attached to both of the competing options, and yet 'it is not a tort for government to govern' by

picking one option over another." (citation omitted)). "Essentially, the more voluntary the plaintiff-government relationship, or the less time the state actor has to deliberate, or the greater the extent to which the state actor is pursuing a legitimate end, the less arbitrary we should deem a bodily injury or death caused by the state actor." *Durham v. Estate of Losleben*, 744 F. App'x 268, 271 (6th Cir. 2018). We agree with the district court that these considerations weigh in favor of finding that the generally alleged conduct was so egregious that it can be said to be "arbitrary in the constitutional sense."[6]

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[6] Several defendants suggest we should depart from this line of authorities and instead reject plaintiffs' claim on the basis of the Supreme Court's pre-*Lewis* decision in *Collins*, where the Supreme Court rejected a substantive due process claim that "the Federal Constitution imposes a duty on the city to provide its employees with minimal levels of safety and security in the workplace" and the city's deliberate indifference to employee safety shocked the conscience. 503 U.S. at 125–26. True, the substantive due process clause "confer[s] no affirmative right to government aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual," *DeShaney*, 489 U.S. at 195, nor does it set a floor for the public's right to be safe and secure, *see Collins*, 503 U.S. at 127. But these general principles have no applicability here—this is not a workplace injury case, plaintiffs do not allege Flint was required to provide them with "certain minimal levels of safety and security," *id.*, and *DeShaney* itself makes clear in the same token that injuries *caused* by the state are of a different ilk. 489 U.S. at 195–96. Nor is there a contention that—unlike many public employees hired to perform inherently dangerous jobs who thus "assumed the risk," *Hunt*, 542 F.3d at 538—Flint residents voluntarily consumed the water in the face of likely lead-exposure. For these reasons, our post-*Collins*, pre-*Lewis* caselaw relied upon by defendants is similarly distinguishable.

Extensive time to deliberate. There is no doubt that the lead-contamination inflicted upon the people of Flint was a predictable harm striking at the core of plaintiffs' bodily integrity, and this known risk cannot be excused on the basis of split-second decision making. All of the alleged decisions by defendants leading up to and during the crisis took place over a series of days, weeks, months, and years, and did not arise out of time-is-of-the-essence necessity. Their "unhurried judgments" were replete with opportunities for "repeated reflection, largely uncomplicated by the pulls of competing obligations," and thus militate in plaintiffs' favor. *Lewis*, 523 at 853; *see also Ewolski*, 287 F.3d at 511–12. In the Court's words, because "[w]hen such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." *Lewis*, 523 U.S. at 853.

Involuntary relationship. In addition to the time to deliberate, the relationship between the City of Flint and its residents matters. At the outset, we acknowledge we deal here not with the typical line of voluntary/involuntary relationships that normally occur in our caselaw. Instead, two factors weigh toward an involuntary relationship. First, Flint's transmission of drinking water to its residents is mandatory on both ends—Flint's Charter and Code of Ordinances mandate that the city supply water to its residents, *see*, *e.g.*, Flint City Charter § 4-203(A), Flint Code of Ord. § 46-7, and as the City expressly argued below, "residents

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See, *e.g.*, *Lewellen*, 34 F.3d 345; *Upsher v. Grosse Pointe Pub. Sch. Sys.*, 285 F.3d 448 (6th Cir. 2002).

are legally required to take and pay for the water, unless they use an approved spring or well." *See* Flint Code of Ord. §§ 46-50(b), 46-51, 46-52. Second, various defendants' assurances of the water's potability hid the risks, turning residents' voluntary consumption of a substance vital to subsistence into an involuntary and unknowing act of self-contamination. As the district court aptly reasoned, "[m]isleading Flint's residents as to the water's safety—so that they would continue to drink the water and Flint could continue to draw water from the Flint River—is no different than the forced, involuntary invasions of bodily integrity that the Supreme Court has deemed unconstitutional." (Citations omitted).[7]

No legitimate government purpose. The decision to temporarily switch Flint's water source was an economic one and there is no doubt that reducing cost is a legitimate government purpose. *See*, *e.g.*, *Garrett v. Lyng*, 877 F.2d 472, 476 (6th Cir. 1989). When a government acts "for the benefit of the public," normally its deliberate choice does not shock the conscience. *See Hunt*, 542 F.3d at 542. There is a caveat to this general rule—acting merely upon a government interest does not remove an actor's decision from the realm of unconstitutional arbitrariness. *Id.* at 543 ("[W]e have held open the possibility that in extreme cases the

[7] *See also Briscoe v. Potter*, 355 F. Supp. 2d 30, 45–47 (D.D.C. 2004) (holding that plaintiffs sufficiently alleged conscience-shocking conduct where defendants knew a post office distribution center was contaminated with anthrax, made affirmative misrepresentations about the facility's safety, and coerced plaintiffs into continuing to work at the facility).

governmental actor's choice to endanger a plaintiff in the service of a countervailing duty would be deemed arbitrary[.]"). Here, jealously guarding the public's purse cannot, under any circumstances, justify the yearlong contamination of an entire community. In the words of the Michigan Court of Appeals, "we can conceive of no legitimate governmental objective for this violation of plaintiffs' bodily integrity." *Mays*, 916 N.W.2d at 262. (Some defendants contend their actions were motivated by other legitimate government purposes, and we address their positions below.)

There is no allegation defendants intended to harm Flint residents. Accordingly, the question is whether defendants acted with "[d]eliberate indifference in the constitutional sense," *Range*, 763 F.3d at 591, which we have "equated with subjective recklessness," *Ewolski*, 287 F.3d at 513 (citing *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)). This is a particularly high hurdle, for plaintiffs must show the government officials "knew of facts from which they could infer a 'substantial risk of serious harm,' that they did infer it, and that they acted with indifference 'toward the individual's rights.'" *Range*, 763 F.3d at 591 (citation omitted). The deliberate-indifference standard requires an assessment of each defendant's alleged actions individually. *See Bishop v. Hackel*, 636 F.3d 757, 767 (6th Cir. 2011). Our focus is on each individual defendant's conduct, their "subjective awareness of substantial risk of serious injury," and whether their actions were made "in furtherance of a countervailing

governmental purpose that justified taking that risk." *Hunt*, 542 F.3d at 541.

C.

Flint defendants (Earley, Ambrose, and Croft). We begin with one of the two sets of defendants who were instrumental in creating the crisis—defendants Croft, Emergency Manager Earley, and Emergency Manager Ambrose. These individuals 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. Earley, for example, "forced the transition through" despite knowing how important it was that "the treatment plant be ready to treat Flint River water" and that "[t]he treatment plant was not ready." Similarly, Croft permitted the water's flow despite knowing "that the City's water treatment plant was unprepared to adequately provide safe drinking water to Flint's residents." The Flint defendants also made numerous statements to the public proclaiming that the water was safe to drink. Defendant Ambrose's decisions to twice turn down opportunities to reconnect to the DWSD after he knew of the significant problems with the water were especially egregious. These and other asserted actions plausibly allege deliberate indifference and "plain[] incompeten[ce]" not warranting qualified immunity. *al-Kidd*, 563 U.S. at 743 (citation omitted). To the extent these defendants claim "mistakes in judgment" because they

reasonably relied upon the opinions of Michigan Department of Environmental Quality (MDEQ) employees and professional engineering firms, *see Pearson*, 555 U.S. at 231, those are facts to be fleshed out during discovery and are not appropriate to resolve at the motion-to-dismiss posture. *See*, *e.g.*, *Wesley*, 779 F.3d at 433–34.

The dissent concludes that Ambrose and Earley were merely "rel[ying] on expert advice" and therefore their actions could not demonstrate a callous disregard for plaintiffs. However, this conclusion ignores *Wesley*'s guidance not to resolve such issues at the motion-to-dismiss stage. It also ignores our obligation to accept plaintiffs' allegations as true and draw reasonable inferences from those allegations. One 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; but the allegations also support a reasonable inference that Earley prioritized a drive to cut costs with deliberate and reckless indifference to the likely results, and Ambrose refused to reconnect to Detroit water despite knowing the substantial risk to Flint residents' health.

For now, we conclude that plaintiffs' complaint plausibly alleges a constitutional violation as to these defendants.

D.

MDEQ Defendants (Busch, Shekter-Smith, Prysby, Wurfel, and Wyant). The MDEQ defendants were the

other set of individuals front and center during the crisis. The allegations against defendants Busch, Shekter-Smith, Prysby, and Wurfel are numerous and substantial. These MDEQ defendants 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. Furthermore, when faced with the consequences of their actions, they falsely assured the public that the water was safe and attempted to refute assertions to the contrary. A few poignant examples further illustrate their culpability:

- Less than two weeks before the switch to Flint water, the Flint water treatment plant's water quality supervisor wrote to Prysby and Busch that he had inadequate staff and resources to properly monitor the water. As a result, he informed Prysby and Busch, "I do not anticipate giving the OK to begin sending water out anytime soon. If water is distributed from this plant in the next couple of weeks, it will be against my direction." Busch and Prysby did not act on this warning. Instead, a few days later, Busch drafted a talking point for a Flint community meeting that highlighted that MDEQ was "satisfied with the City's ability to treat water from the Flint River."
- After General Motors very publicly stopped using Flint River water at its engine plant for fear of corrosion, Prysby made sure the department's approach

was to spin this symptom as not related to public health instead of investigating the underlying problem. He "stressed the importance of not branding Flint's water as 'corrosive' from a public health standpoint simply because it does not meet a manufacturing facility's limit for production."

- On February 27, 2015, Busch lied when he told "the EPA on behalf of MDEQ that the Flint Water Treatment Plant had an optimized corrosion control program." However, Busch knew "[b]y no later than April 2015, *but likely much earlier* . . . that no corrosion control was being used in Flint following the switch to the Flint River as the water source." (Emphasis added).

- In the midst of the crisis and with full knowledge that Flint's water distribution system was corroded and presented significant health issues, Shekter-Smith callously excused Flint's lack of drinking water compliance as "circumstances happen." And after the EPA pressed MDEQ officials for MDEQ's failure to optimize corrosion controls in July 2015, she requested the EPA nonetheless cover her department's decision by "indicat[ing] in writing . . . [its] concurrence that the city is in compliance with the lead and copper rule. . . ." Doing so, she wrote, "would help distinguish between [MDEQ's] goals to address important public health issues

> separately from the compliance requirements of the actual rule which we believe have been and continue to be met in the city of Flint." In other words, "technical compliance" trumped addressing an urgent and catastrophic public health disaster.
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> - On numerous occasions, defendant 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 drinking water. And he suggested that concern regarding the water was at best a short-term problem—that by the time the City had completed its lead-testing, the City would already be drawing from a different water source altogether.

As with the Flint defendants, these MDEQ defendants created the Flint Water environmental disaster and then intentionally attempted to cover-up their grievous decision. Their actions shock our conscience. It is alleged that these defendants acted with deliberate indifference to the plaintiffs' constitutional right to bodily integrity and at a minimum were plainly incompetent.

To the extent these defendants made "honest mistakes in judgment"—in law or fact—in interpreting and applying the Lead and Copper Rule, *see*, *e.g.*,

Pearson, 555 U.S. at 231, that defense is again best reserved for after discovery. *See*, *e.g.*, *Wesley*, 779 F.3d at 433–34. This Rule generally requires public water systems to monitor lead and copper levels and to treat certain elevated levels in accordance with the regulation. 40 C.F.R. § 141.80 *et. seq.* More specifically, it requires a "large system," like Flint, to optimize corrosion control treatment before distribution of water to the public. § 141.81(a)(1). However, MDEQ employees did not follow this dictate; instead, under a "flawed interpretation" of the Rule, they drew up a yearlong sampling program post-switch (broken up into two, six-month monitoring periods) to determine whether corrosion controls were required. In their view, this after-the-fact-wait-and-see approach to corrosion controls allegedly fell within minimum compliance levels of the Rule. Plaintiffs' view is bleaker. They assert MDEQ viewed Flint residents as "guinea pigs" for a year to test lead-compliance theories that were unsupported and unauthorized by the EPA just to pass time until water began flowing from a new water authority. To be sure, plaintiffs' view must be based on reasonable inferences from factual allegations. The district court correctly found that it is.

By the same token, we reject Wurfel's reliance upon two Second Circuit cases involving statements by public officials about the air-quality in lower Manhattan in the days following the September 11 terrorist attacks, *see Lombardi v. Whitman*, 485 F.3d 73 (2d Cir. 2007) and *Benzman v. Whitman*, 523 F.3d 119 (2d Cir. 2008), chiefly for the reason that those matters

involved the balancing of competing governmental interests—restoring public services and protecting public health—during a time-sensitive environmental emergency. We have no such similar facts here on the face of plaintiffs' complaint.

The dissent again asks us to view plaintiffs' allegations in a light favorable to defendants, arguing that Shekter-Smith, Busch, and Prysby simply "misinterpreted the [EPA's] Lead and Copper Rule" and provided "misguided advice rooted in mistaken interpretations of the law." But plaintiffs' allegations, which we must accept, are that Busch, Shekter-Smith, and Prysby authorized use of Flint River water with knowledge of its contaminants and then deceived others to hide the fact of contamination. Moreover, it is improper to conclude at this stage that Shekter-Smith, Busch, and Prysby merely misinterpreted the Lead and Copper Rule because plaintiffs allege that the EPA informed them that they were not complying with EPA requirements, providing them with a memorandum that "identified the problem, the cause of that problem, and the specific reason the state missed it." In response, "Defendants ignored and dismissed" the memorandum. Although the dissent claims that plaintiffs' factual allegations do not support that Wurfel's statements were knowing lies, that is a reasonable inference from plaintiffs' factual allegations.

We cannot say the same with respect to defendant Director Wyant based on the allegations in the complaint. At most, plaintiffs claim Wyant was aware of some of the issues arising with the water supply

post-switch and admitted his department's "colossal failure" after the City reconnected to DWSD. Plaintiffs do not plausibly allege Wyant personally made decisions regarding the water-source switch, nor do they allege he personally engaged in any other conduct that we find conscience-shocking. In short, while the conduct of individuals within his department was constitutionally abhorrent, we may only hold Wyant accountable for his own conduct, not the misconduct of his subordinates. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676–77 (2009). For this reason, the district court erred in denying defendant Wyant's motion to dismiss.

E.

MDHHS Executives (Lyon and Wells). In the complaint before us, plaintiffs' allegations against Michigan Department of Health and Human Services (MDHHS) Director Lyon and Chief Medical Executive Wells are minimal. The complaint sets forth no facts connecting Lyon and Wells to the switch to the Flint River or the decision not to treat the water, and there is no allegation that they took any action causing plaintiffs to consume the lead-contaminated water. Instead, plaintiffs claim generally that Lyon and Wells failed to "protect and notify the public" of the problems with Flint's water shortly before Flint switched back to DWSD. However, the Due Process Clause is a limitation only on government action. *See DeShaney*, 489 U.S. at 195.

We are thus left with allegations of at most questionable actions by Lyon and Wells. The sole allegation against Lyon is that he attempted to "discredit" a study by Dr. Mona Hanna-Attisha, a pediatrician at Hurley Medical Center in Flint, showing significant increases of blood lead levels in children post-water-source switch.[8] Paragraph 289 of plaintiffs' complaint sets forth plaintiffs' entire case against Lyon:

> MDHHS Director Nick Lyon continues trying to discredit Dr. Hanna-Attisha's study despite his own department's knowledge that it shows a real problem. In an e-mail, he stated: "I need an analysis of the Virginia Tech/Hurley data and their conclusions. I would like to make a strong statement with a demonstration of proof that the lead blood levels seen are not out of the ordinary and are attributable to seasonal fluctuations. Geralyn is working on this for me but she needs someone in public health who can work directly with her on immediate concerns/questions."

And the two main factual allegations against Wells are equally sparse:

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[8] They also allege Lyon "participated in, directed, and/or oversaw the department's efforts to hide information to save face, and to obstruct and discredit the efforts of outside researchers. He knew as early as 2014 of problems with lead and legionella contamination in Flint's water and instead of fulfilling his duty to protect and notify the public, he participated in hiding this information." (Plaintiffs make the same general allegation against Wells.) But this is precisely the type of "chimerical," "bare assertion[]" *Iqbal* requires we set aside. 556 U.S. at 681.

- On September 29, 2015, Wells received an email from an MDHHS employee asking, "Is it possible to get the same type of data for just children under the age of six? So basically, the city of Flint kids ages six and under with the same type of approach as the attached chart you gave us last week?" Another employee responded that "[i]t's bad enough to have a data war with outside entities, we absolutely cannot engage in competing data analyses within the Department, or, heaven forbid, in public releases." Dr. Wells replied "Agree." Plaintiffs claim this "show[ed] MDHHS continuing efforts to mislead the public, protect itself, and discredit Dr. Hanna-Attisha."

- In response to an email from Dr. Hanna-Attisha showing the tripling of blood lead levels, Wells "responded that the state was working to replicate Hanna-Attisha's analysis, and inquired about Dr. Hanna-Attisha's plans to take the information public." According to plaintiffs, this shows that "[w]hile discouraging her department to look further into Dr. Hanna-Attisha's findings and misleading Dr. Hanna-Attisha, Defendant Wells remained focused on a single task; saving face at the expense of Flint's residents."

At most, plaintiffs have alleged Lyon and Wells were unjustifiably skeptical of Dr. Hanna-Attisha's study and were hoping to assemble evidence to disprove it. This falls well-short of conscience-shocking conduct

and therefore the district court erred in denying their motions to dismiss.

F.

MDHHS Employees (Peeler and Scott). That leaves us with two MDHHS employees, Nancy Peeler and Robert Scott, who jointly worked on projects within MDHHS designed to eliminate lead exposure. As with Lyon and Wells, the allegations against Peeler and Scott relate not to the switch of water sources, but to how they processed—or rather did not process—data relating to lead exposure more than a year later.

In general, plaintiffs allege Peeler and Scott "participated in, directed, and/or oversaw the department's efforts to hide information to save face, and actively sought to obstruct and discredit the efforts of outside researchers. Even when [their] own department had data that verified outside evidence of a lead contamination problem, [they] continued trying to generate evidence to the contrary." Scott "also served a key role in withholding and/or delaying disclosure of data that outside researchers needed to protect the people of Flint." In support of these general allegations, plaintiffs point to the following:

- Beginning in July 2015, Peeler learned there was "an uptick in children with elevated blood lead levels in Flint in July, August, and September 2014," but attributed it to "seasonal variation" instead of the water-source switch.

- On September 11, 2015, Robert Scott e-mailed a copy of a grant proposal by a Virginia Tech professor, Marc Edwards, that "described a 'perfect storm' of 'out of control' corrosion of city water pipes leading to 'severe chemical/biological health risks for Flint residents'" to Peeler and others. Scott stated, "When you have a few minutes, you might want to take a look at it. Sounds like there might be more to this than what we learned previously. Yikes!"

- Following Dr. Hanna-Attisha's study, Scott "tried to recreate [her] numbers," saw "a difference"—"but not as much difference" as found by Dr. Hanna-Attisha—in children's lead-levels pre-and post-switch, but told Peeler that he was "sure this one is not for the public."

- Scott, Peeler, and another MDHHS colleague corresponded about a Detroit Free Press story on Dr. Hanna-Attisha's study. Scott wrote, "The best I could say is something like this: 'While the trend for Michigan as a whole has shown a steady decrease in lead poisoning year by year, smaller areas such as the city of Flint have their bumps from year to year while still trending downward overall.'" Peeler chimed in that her "secret hope is that we can work in the fact that this pattern is similar to the recent past." In plaintiffs' view, this correspondence shows Peeler and Scott "intentionally withheld information that they had a duty to disclose to

the public, and actively sought to hide the lead poisoning epidemic that they had previously failed to discover."

- Scott drafted an apology email to Prof. Edwards explaining why he failed to respond to multiple requests for state data. His unsent email to Edwards explained that he "worked with you earlier this month to get data to you relatively quickly but did not manage to complete the process before I went on annual leave for several days. I neglected to inform you that I'd be away, and I apologize for not informing you.'" Scott did not send the email to Edwards after Peeler told him to "apologize less," "despite," in plaintiffs' words, "the fact that Scott admitted to going on vacation and leaving an unimportant task unfinished as a public health crisis unfolded."

In total, plaintiffs' allegations against Scott and Peeler are: (1) after Dr. Hanna-Attisha released her study on September 24, 2015, Scott tried to "recreate" the study, found a smaller difference in children's lead levels than Dr. Hanna-Attisha's study, and concluded his results were "not for the public"; (2) Scott did not timely provide researchers with requested data; (3) Peeler and Scott knew that elevated lead levels could have been due to corrosion in the city water pipes; and (4) both sought to attribute it to regular fluctuations. In our view, these allegations do not rise to the level of "callous disregard"; plaintiffs do not factually link Scott's and Peeler's *inaction* to causing Flint residents

to consume (or continue to consume) lead-tainted water. Nor do plaintiffs identify a source of law for the proposition that an individual violates the right to bodily integrity just because he failed to "blow the whistle." Plaintiffs have therefore not plausibly alleged Scott and Peeler engaged in conscience-shocking conduct.

In sum, the district court erred in finding that plaintiffs adequately alleged that defendants Wyant, Lyon, Wells, Peeler, and Scott violated plaintiffs' substantive due process right to bodily integrity, but correctly held plaintiffs plausibly alleged such a violation against defendants Earley, Ambrose, Croft, Busch, Shekter-Smith, Prysby, and Wurfel.

VI.

A right is "clearly established" when its "contours . . . [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Notice to officials is paramount; "the salient question" in evaluating the clearly established prong is whether officials had "fair warning" that their conduct was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). In making this determination, "we must look first to decisions of the Supreme Court, then to decisions of this court and other courts within our circuit, and finally to decisions of other circuits." *Baker v. City of Hamilton*, 471 F.3d 601, 606 (6th Cir. 2006) (quotation omitted).

Plaintiffs must generally identify a case with a fact pattern similar enough to have given "fair and clear warning to officers" about what the law requires. *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) (quotation omitted); *see also Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988, 993 (6th Cir. 2017). But such a case need not "be on all fours in order to form the basis for the clearly established right." *See Burgess v. Fischer*, 735 F.3d 462, 474 (6th Cir. 2013). We do not require a prior, "precise situation," *Sutton*, 700 F.3d at 876, a finding that "the very action in question has previously been held unlawful," *Comstock v. McCrary*, 273 F.3d 693, 702 (6th Cir. 2001) (internal quotation marks omitted), or a "case directly on point." *al-Kidd*, 563 U.S. at 741. Instead, the test is whether "existing precedent must have placed the . . . constitutional question beyond debate." *Id.* This means there must either be "controlling authority or a robust consensus of cases of persuasive authority." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014) (internal quotation marks omitted). Finally, "an action's unlawfulness can be 'clearly established' from direct holdings, from specific examples describing certain conduct as prohibited, or from the general reasoning that a court employs." *Baynes v. Cleland*, 799 F.3d 600, 612 (6th Cir. 2015) (citing *Hope*, 536 U.S. at 742–44).

Given the unique circumstances of this case, defendants argue we should defer to the "breathing room" qualified immunity provides and hold that the invasion of plaintiffs' right to bodily integrity via life-threatening substances with no therapeutic benefit

introduced into individuals without their consent was not clearly established before the officials engaged in their respective conduct. The dissent likewise suggests that "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.'" (Quoting *Arrington-Bey*, 858 F.3d at 993 (quoting *White*, 137 S. Ct. at 552)). But the Court has "mad[e] clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741; *see also White*, 137 S. Ct. at 552 (noting that "general statements of the law are not inherently incapable of giving fair and clear warning" where the unlawfulness is apparent (citation omitted)). For the reasons that follow, we decline to erect the suggested "absolute barrier to recovering damages against an individual government actor." *Bletz*, 641 F.3d at 756 (citation omitted).

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 their alleged conduct: "The easiest cases don't even arise," *United States v. Lanier*, 520 U.S. 259, 271 (1997) (citation and internal quotation marks omitted); "there 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).

Knowing the Flint River water was unsafe for public use, distributing it without taking steps to counter its problems, and assuring the public in the meantime that it was safe "is conduct that would alert a reasonable person to the likelihood of personal liability." *Scicluna v. Wells*, 345 F.3d 441, 446 (6th Cir. 2003). As set forth above, taking affirmative steps to systematically contaminate a community through its public water supply with deliberate indifference is a government invasion of the highest magnitude. Any reasonable official should have known that doing so constitutes conscience-shocking conduct prohibited by the substantive due process clause.[9] These "actions violate the heartland of the constitutional guarantee" to the right of bodily integrity, *Stemler v. City of Florence*, 126 F.3d 856, 867 (6th Cir. 1997), and "t[he] obvious cruelty inherent" in defendants' conduct should have been enough to forewarn defendants. *Hope*, 536 U.S. at 745.

Furthermore, the long line of Supreme Court cases discussed above—*Harper, Cruzan, Rochin, Winston*, to name a few—all build on each other from one

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[9] *See also Wright v. City of Phila.*, 2015 WL 894237, at *13 (E.D. Penn. March 2, 2015) ("[I]t would have been clear to a reasonable [government] employee that causing the release of airborne asbestos in Plaintiffs' home and then failing to notify Plaintiffs or acting in any way to mitigate the harm caused by the release, was unlawful under the circumstances.").

foundation: an individual's right to bodily integrity is sacred, founded upon informed consent, and may be invaded only upon a showing of a government interest. The Court could not have been clearer in *Harper* when it stated that "[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." 494 U.S. at 229. Here we have an even more dramatic invasion, for at least in *Harper* the state forced medication—something needed to improve or sustain life—into its citizens; here, government officials caused Flint residents to consume a toxin with no known benefit, did so without telling them, and made affirmative representations that the water was safe to drink.

The same can be gleaned from *Cruzan*. If the common law right to informed consent is to mean anything, reasoned the Court, it must include "the right of a competent individual to refuse medical treatment." 497 U.S. at 277. If an individual has a right to refuse to ingest medication, then surely she has a right to refuse to ingest a life necessity. *Cruzan* instructs as much, recognizing that the "logic" of its bodily integrity cases—i.e., the reasoning—encompasses an individual's liberty interest to refuse "food and water essential to life." *Id.* at 279. And if an individual has a right to refuse the consumption of beneficial water, then certainly any reasonable official would understand that an individual has a right to refuse the consumption of water known to be lead-contaminated, especially when those individuals involved in tainting the water simultaneously vouched for its safety. Put differently,

plaintiffs' bodily integrity claim implicates a clearly established right that "may be inferred from [the Supreme Court's] prior decisions." *Id.* at 278. Before *Cruzan*, a factually identical case had not been decided by the Court. Nonetheless, the Supreme Court held that the right to bodily integrity claim there was compelled by the logic and reasonable inferences of its prior decisions. *Id.* at 270, 278–79. The same is true here.

Several defendants take issue with the district court's definition of the right, contending it deals in generality instead of specificity. *See*, *e.g.*, *al-Kidd*, 563 U.S. at 742 (admonishing courts "not to define clearly established law at a high level of generality"). Our focus, of course, is "whether the violative nature of *particular* conduct is clearly established . . . in light of the specific context of the case." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (internal quotation marks omitted). To be sure, sweeping statements about constitutional rights do not provide officials with the requisite notice. "For example," the Supreme Court has told us, "the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right." *Anderson*, 483 U.S. at 639. But, the deficiencies of a too-general clearly established test have no bearing on the specifics of this case. Here, the right recognized by the district court—and one we adopt as directly flowing from the reasoning of the long line of

bodily integrity and shocks-the-conscience cases—is neither a "general proposition" nor one "lurking in the broad 'history and purposes'" of the substantive due process clause. *al-Kidd*, 563 U.S. at 742. "Any other result would allow *Hope*'s fear of 'rigid, overreliance on factual similarity' in analyzing the 'clearly established' prong of the qualified immunity standard to be realized." *Baynes*, 799 F.3d at 614 (quoting *Hope*, 536 U.S. at 742).[10]

In providing a tainted life-necessity and falsely assuring the public about its potability, government officials "strip[ped] the very essence of personhood" from those who consumed the water. *Doe*, 103 F.3d at 507. They also caused parents to strip their children of their own personhood. If ever there was an egregious violation of the right to bodily integrity, this is the case; the "affront to human dignity in this case is compelling," *United States v. Booker*, 728 F.3d 535, 546 (6th Cir. 2013), and defendants' "conduct is so contrary to fundamental notions of liberty and so lacking of any

[10] Some defendants and the dissent direct us to dicta in a recent District of New Jersey case involving a bodily integrity claim arising out of the discovery of leaded water in the Newark, New Jersey's public-school buildings. *See Branch v. Christie*, 2018 WL 337751 (D.N.J. Jan. 8, 2018). We are not obligated to give this decision, let alone its dicta, any persuasive value. *See Baker*, 471 F.3d at 606. The opinion is bereft of any substantive analysis regarding the right to bodily integrity, and wholly omits discussion of the Supreme Court cases mentioned in detail here. It is also factually distinct in at least one major aspect—here, the government officials participated in the decision to taint Flint's water-supply in the first instance; there, the government officials failed to take action upon discovery of the leaded water.

redeeming social value, that no rational individual could believe . . . [their conduct] is constitutionally permissible under the Due Process Clause." *Doe*, 103 F.3d at 507. We therefore agree with the district court that plaintiffs have properly pled a violation of the right to bodily integrity against Howard Croft, Darnell Earley, Gerald Ambrose, Liane Shekter-Smith, Stephen Busch, Michael Prysby, and Bradley Wurfel, and that the right was clearly established at the time of their conduct. Should discovery shed further light on the reasons behind their actions (as but one example, a governmental interest that trumps plaintiffs' right to bodily integrity), they are free to raise the qualified immunity defense again at the summary judgment stage. *See*, *e.g.*, *Miller v. Maddox*, 866 F.3d 386, 390 (6th Cir. 2017); *see also Wesley*, 779 F.3d at 433–34.[11]

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[11] We deny plaintiffs' pending motion to take judicial notice of pending but unproven criminal charges against some of the defendants and note that that the district court erred in doing so and using them to justify denying qualified immunity. First, although courts may consider judicially noticed facts when evaluating motions to dismiss under Federal Rule of Civil Procedure 12(b)(6), *see*, *e.g.*, *Buck v. Thomas M. Cooley Law Sch.*, 597 F.3d 812, 816 (6th Cir. 2010), we have held that a "criminal indictment qualifies as a matter outside the pleading" therefore necessitating conversion to a Rule 56 motion. *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 420 (6th Cir. 2000) (brackets and internal quotation marks omitted). Second, it was error for the district court to consider the charges for qualified-immunity purposes without engaging in the proper analysis. The Supreme Court has made clear that "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory . . . provision." *Davis v. Scherer*, 468 U.S. 183, 194 (1984). Instead, government officials are "liable for damages only to the extent that there is a clear violation of the

VII.

The final issue is Flint's claim that the district court erred in denying it sovereign immunity. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. It bars suits against a state by its own citizens, and by citizens of another state. *See*, *e.g.*, *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001). "The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." *Id.*

Flint, obviously, is not a state; it is a municipality incorporated under the laws of the State of Michigan. *See People v. Pickett*, 63 N.W.2d 681, 684 (Mich. 1954). The Supreme Court could not be clearer in demarcating between states and their political subdivisions for sovereign immunity purposes: "The bar of the Eleventh Amendment to suit in federal court extends to States and state officials in appropriate circumstances, but does not extend to counties and similar municipal corporations." *Mt. Healthy City Sch. Dist. Bd. of Educ.*

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statutory rights that give rise to the cause of action for damages." *Id.* at 194 n.12. They do not "lose their immunity by violating the clear command of a statute . . . unless that statute . . . provides the basis for the cause of action sued upon." *Id.* Here, the district court failed to consider whether the charges could be considered under this standard.

v. Doyle, 429 U.S. 274, 280 (1977) (internal citations omitted); *see also Jinks v. Richland Cty.*, 538 U.S. 456, 466 (2003) ("[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit."). We have even noted this contrast in one of our previous Flint Water Crisis cases, stating in dicta that the Eleventh Amendment does not apply to "the defendants associated with the City of Flint." *Boler*, 865 F.3d at 410.

Flint readily concedes municipalities do not enjoy sovereign immunity. That would normally end our analysis, but this is not a typical case. At the time of the crisis, Flint was so financially distressed that the State of Michigan had taken over its day-to-day local government operations by way of a statutory mechanism enacted to deal with municipal insolvency—gubernatorial-appointed individuals who "act for and in the place and stead of the governing body and the office of chief administrative officer of the local government." Mich. Comp. Laws § 141.1549(2); *see generally Phillips v. Snyder*, 836 F.3d 707, 711–12 (6th Cir. 2016) (summarizing Michigan's Local Financial Stability and Choice Act (or Public Act 436)). Flint contends it became an arm of the state because of the State of Michigan's takeover. We thus find it more appropriate to resolve whether this extraordinary factor dictates a different outcome. *See Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 n.54 (1978) (suggesting that under some circumstances, local governmental units could be "considered part of the State for Eleventh Amendment purposes"). On de novo review, *see Babcock v. Michigan*, 812 F.3d 531, 533 (6th Cir.

2016), we agree with the district court that the City of Flint is not entitled to Eleventh Amendment immunity.[12]

A.

"The entity asserting Eleventh Amendment immunity has the burden to show that it is entitled to immunity, *i.e.*, that it is an arm of the state." *Lowe v. Hamilton Cty. Dep't of Job & Family Servs.*, 610 F.3d 321, 324 (6th Cir. 2010) (brackets and citation omitted). We have identified four factors relevant to "whether an entity is an 'arm of the State' on the one hand or a 'political subdivision' on the other": "(1) the State's potential liability for a judgment against the entity; (2) the language by which state statutes, and state courts refer to the entity and the degree of state control and veto power over the entity's actions; (3) whether state or local officials appoint the board members of the entity; and (4) whether the entity's functions fall within the traditional purview of state or local government." *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005) (en banc) (internal citations omitted).

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[12] Flint requests that we either certify the question of whether Public Act 436 transforms municipalities into arms of the state to the Michigan Supreme Court, or delay our opinion "until after Michigan courts have had an opportunity to answer it." Certification is not appropriate here—Flint did not make the same request to the district court and we have the appropriate data points to address the issue. *See*, *e.g.*, *In re Amazon.com, Inc., Fulfillment Ctr. Fair Labor Standards Act (FLSA) & Wage & Hour Litig.*, 852 F.3d 601, 607–08 (6th Cir. 2017).

We have characterized the first factor—the state's potential liability for a judgment against the entity—as "the foremost," *id.*, the "most salient," *Town of Smyrna v. Mun. Gas Auth. of Ga.*, 723 F.3d 640, 651 (6th Cir. 2013), and one creating "a strong presumption" on the issue. *Kreipke v. Wayne State Univ.*, 807 F.3d 768, 777 (6th Cir. 2015). Although this "state-treasury inquiry will generally be the most important factor, . . . it is not the sole criterion." *Ernst*, 427 F.3d at 364 (internal quotation marks omitted). This is so because sovereign immunity protects not only a state's purse but also its dignity—"it . . . serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996) (citation omitted). Accordingly, "the last three factors may demonstrate that an entity is an arm of the state entitled to sovereign immunity despite the fact that political subdivisions and not the State are potentially liable for judgments against the entity." *Pucci v. Nineteenth Dist. Court*, 628 F.3d 752, 762 (6th Cir. 2010). To do so, however, they must "far outweigh" the first factor. *Id.* at 761. Applying this test, we conclude the City of Flint has not met its burden to show that it was an "arm of the state" protected by the Eleventh Amendment.[13]

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[13] Citing *Cash v. Granville County Board of Education*, 242 F.3d 219 (4th Cir. 2001), Flint quizzically argues it can separately show it is entitled to Eleventh Amendment immunity under a "sovereign dignity" inquiry independent from the traditional *Ernst* factor test set forth in text. This argument is not well-taken. For one, we are bound by our en banc decision in *Ernst*, not the Fourth Circuit's decision in *Cash*. For another, *Cash* does not

1.

Michigan's potential liability (or rather, lack thereof) weighs heavily against Flint. Michigan law provides that local property tax rolls account for judgments against cities or its officers, *see* Mich. Comp. Laws § 600.6093(1), while the state treasury pays judgments against "arms of the state." *See* Mich. Comp. Laws §§ 600.6458(2), 600.6096(1). Public Act 436 does not change this; in fact, it reinforces this dynamic, providing that any claims, demands, or lawsuits "arising from an action taken during the services of [an] emergency manager" are to "be paid out of the funds of the local government that is or was subject to the receivership administered by that emergency manager." Mich. Comp. Laws § 141.1560(5). Most critically, Public Act 436 "does not impose any liability or responsibility in law or equity upon th[e] state, any department, agency, or other entity of th[e] state, or any officer or employee of th[e] state, or any member of a receivership transition advisory board, for any action taken by any local government under this act, for any violation of the provisions of this act by any local government, or for any failure to comply with the provisions of this

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hold, as Flint suggests, that "[e]ven if a defendant fails the *Ernst* test, it may still enjoy sovereign immunity if the judgment would adversely affect the dignity of the State as a sovereign." Rather, it holds consistent with our caselaw, that the "state purse" factor is foremost, but in certain situations "sovereign dignity factors"—i.e., *Ernst* factors two, three, and four—can lead to a finding of sovereign immunity. *Id.* at 224; *see also Pucci*, 628 F.3d at 761. Put differently, our *Ernst* factors already take state dignity into account when evaluating application of the Eleventh Amendment.

act by any local government." Mich. Comp. Laws § 141.1572. Michigan's lack of potential liability here creates a "strong presumption" against an Eleventh Amendment finding. *See Kreipke*, 807 F.3d at 777.

2.

As to the second factor—state law treatment of, and state control over, the entity—we start with a foundational aspect of Michigan law undisputed by the parties: Municipalities enjoy significant autonomy over local governmental functions. "Michigan is strongly committed to the concept of home rule, and constitutional and statutory provisions which grant power to municipalities are to be liberally construed." *Bivens v. Grand Rapids*, 505 N.W.2d 239, 243 (Mich. 1993). Michigan's Constitution grants cities the "power to adopt resolutions and ordinances relating to its municipal concerns, property and government." Mich. Const. Art. 7, § 22 (1963). The Michigan Supreme Court has also held that home rule cities like Flint "enjoy not only those powers specifically granted, but they may also exercise all powers not expressly denied." *AFSCME v. City of Detroit*, 662 N.W.2d 695, 707 (Mich. 2003) (citation and internal quotation marks omitted). Although state statutes and Michigan's Constitution may limit these broad powers, Michigan's clear preference is that municipalities have "great[] latitude to conduct their business." *Associated Builders & Contractors v. City of Lansing*, 880 N.W.2d 765, 769 (Mich. 2016). Flint asks us to find an exception to these general principles because it was engaged in providing

water services to its citizens and did so while under the control of emergency managers. We decline to do so.

First, citing *Curry v. City of Highland Park*, 219 N.W. 745 (Mich. 1928), Flint claims that when a municipality acts in the interest of public health, like providing water services, it "acts as the arm of the state" under Michigan law. *Id.* at 748. We disagree. For one, *Curry* noted that "the management of water works" is a "matter[] of purely local concern . . . as distinguished from the state at large." *Id.* (citation omitted). But more importantly and as recently illustrated by another Flint Water Crisis case, that is not what Michigan law provides. *See Boler v. Governor*, ___ N.W.2d ___, 2018 WL 2991257 (2018) (per curiam).[14] The import of Michigan's Constitution and its Home Rule City Act, Mich. Comp. Laws § 117.1, *et seq.*, is that "if a municipality is supplying a utility, or specifically waterworks, to its citizens and the citizens are paying for the same, the municipality is operating the waterworks as a business and it is doing so as a businessman or corporation, not as a concern of the state government or arm of the state. It is, after all, serving only a

[14] Michigan's Court of Claims Act grants the Michigan Court of Claims exclusive jurisdiction "[t]o hear and determine any claim or demand, statutory or constitutional . . . against the state or any of its departments or officers." Mich. Comp. Laws § 600.6419(1)(a). The issue presented in *Boler v. Governor* was whether claims arising out of the Flint Water Crisis against Flint were within the exclusive jurisdiction of the Court of Claims. Although it is strictly a statutory interpretation case, we find its analysis persuasive for it provides extensive discussion about the relationship between Michigan and its political subdivisions.

limited number of people within its boundaries, not the state as a whole." *Id.* at *4. Michigan's Home Rule City Act expressly empowers a municipality to "provide for the installation and connection of sewers and waterworks in its charter." *Id.* (citing Mich. Comp. Laws § 117.4b); *see also* Mich. Comp. Laws §§ 117.4c(1), 117.4f. But if, for example, a municipality supplies water for another purpose—"protecting its citizens from fire or natural disaster or anything else that has the potential to have state-wide impact, and it is not profiting from the provision of that water"—then and only then could a municipality's waterworks "perhaps" serve the state's citizenry at large and thus be deemed an arm of the state. *Boler*, ___ N.W.2d ___, 2018 WL 2991257, at *4. And as the Michigan Court of Appeals determined, Flint's provision of water services clearly falls within its "proprietor" function and does not transform the city into an arm of the state. *Id.*; *see also Collins v. City of Flint*, 2016 WL 8739164, at *4 (Mich. Ct. Cl. Aug. 25, 2016).

Second, we are equally unconvinced that Flint's emergency-management status should weigh in Flint's favor. At first blush, Flint's argument here has some facial appeal—generally speaking, Public Act 436 can be a one-way ticket to state receivership. The governor, in consultation with several bodies, determines whether a financial emergency exists, and then provides the entity at issue with four options (one of which is emergency management). *See Phillips*, 836 F.3d at 712. Flint claims these options are illusory because state officials still have significant oversight within

each option, and were nonetheless unavailable to Flint because Public Act 436 kept in place Flint's prior-appointed emergency manager under a prior version of the emergency manager law. *See id.* at 711–12; *see also* Mich. Comp. Laws § 141.1549(10).

Once in receivership, the argument goes, Flint was essentially at the whim of its emergency managers. One need not look beyond Public Act 436's power-authorizing provision to appreciate its breadth:

> Upon appointment, an 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 and to assure the fiscal accountability of the local government and the local government's capacity to provide or cause to be provided necessary governmental services essential to the public health, safety, and welfare. 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* or as otherwise provided by this act and are subject to any conditions required by the emergency manager.

Mich. Comp. Laws § 141.1549(2) (emphasis added). In essence, an emergency manager acts "for and on behalf

of the local government," and may take any "action or exercise any power or authority of any officer, employee, department, board, commission, or other similar entity of the local government, whether elected or appointed, relating to the operation of the local government." § 141.1552(dd)–(ee).

There is also a certain amount of control the state has over the emergency manager. Among other things, an emergency manager "is a creature of the Legislature with only the power and authority granted by statute"; is appointed by the governor; serves at the governor's pleasure, and may be removed by the governor or by impeachment by the Legislature; receives financial compensation from the state treasury; is subjected "to various codes of conduct otherwise applicable only to public servants, public officers and state officers"; and is statutorily obligated to submit certain plans and reports to state officials. *See Mays*, 916 N.W.2d at 256 (citations omitted). On this basis, the Michigan Court of Appeals has held (again, in a Flint Water Crisis matter) that an emergency manager is a "state officer" for purposes of the Court of Claims Act and thus "[c]laims against an emergency manager acting in his or her official capacity therefore fall within the well-delineated subject-matter jurisdiction of the Court of Claims." *Id.* at 257.

The problem with Flint's argument is that Michigan courts have rejected the notion that a city's emergency management status transforms a city into a state entity. In the words of the Michigan Court of Appeals:

> As indicated in the Local Financial Stability and Choice Act, "it is a valid public purpose for this state to take action and to assist a local government in a financial emergency so as to remedy the financial emergency." The primary purpose of the Act, then, was for the State of Michigan to *assist* local governments temporarily during a financial crisis. The emergency manager acts in the place of the chief administrative officer and governing body for and on behalf of the local government only. At all times, then, the City remained a municipality, albeit with a state employee temporarily overseeing the financial management of the municipality affairs. The City was at no time operating as "a means or agency through which a function of another entity i.e., the state is accomplished." No function or purpose of the state was accomplished in the emergency manager overseeing the City. The City was instead always operating as a means through which functions of its own entity were accomplished. The state simply engaged a state employee to temporarily assist the City in performing its functions and serving its local purposes for its citizens.

Boler v. Governor, ___ N.W.2d ___, 2018 WL 2991257, at *6 (alterations and citations omitted); *see also Collins*, 2016 WL 8739164, at *4–5. We agree with this well-reasoned analysis. Moreover, it is consistent with our recent decision in *Phillips*, where we noted Public Act 436 merely reflects states' abilities "to structure their political subdivisions in innovative ways," including by "allocat[ing] the powers of subsidiary bodies

among elected and non-elected leaders and policymakers." 836 F.3d at 715. That is, Public Act "436 does not remove local elected officials; it simply vests the powers of the local government in an emergency manager." *Id.* at 718.

Given this, we conclude the second factor tilts against Flint.

3.

The appointment factor weighs in Flint's favor. Public Act 436 expressly provides that the governor appoints an emergency manager. Mich. Comp. Laws § 141.1549(1). The state attempts to temper this specific appointment language by pointing out that emergency management under Public Act 436 is one of last resort—that upon declaration of financial emergency, a municipality has several options in addition to emergency management, *see* § 141.1547, and may remove an emergency manager after 18 months (or petition the governor to remove the emergency manager earlier). § 1549(6)(c), (11). That may be so, but *Ernst* is specific here—we are to consider *who* appoints the entity at issue, and there is no debating that although a municipality might have some ability to avoid emergency management or to remove an emergency manager, Michigan's governor appoints emergency managers.

4.

Whether the entity's functions fall within the traditional purview of state or local government weighs heavily against Flint. Under Public Act 436, an emergency manager takes the place of a local body; he, in other words, takes over the local government's functions. And as the State of Michigan rightly phrases it, "[t]he City of Flint's functions *are* 'within the traditional purview of local government' because the City of Flint *is* a local government."

Flint has no answer for this obvious point, and instead asks us to narrowly focus on the City's provision of waterworks. It underwhelmingly strings this argument together: Because Michigan's Safe Drinking Water Act provides the MDEQ with "power and control over public water supplies and suppliers of water" and criminalizes the failure to comply with MDEQ rules, *see* Mich. Comp. Laws §§ 325.1003, 325.1021, "the functioning of a waterworks falls within the purview of the State." But even were we to ignore the fact that Public Act 436's command to an emergency manager is to take over *all* of a municipality's functions and not just its utilities, the answer is still the same given our discussion above. Flint even admits as much, telling us "the day-to-day operations of a waterworks generally fall within the purview of local authorities." That MDEQ "exercises the state's police powers, in an oversight capacity, by regulating the water quality" does not dictate a contrary conclusion, for "MDEQ does not own, operate or maintain the water delivery systems, . . . [n]or is it charged with providing water to the

inhabitants of Michigan's cities." *Collins*, 2016 WL 8739164, at *4. Thus, we decline to effectively turn every local governmental body's provision of service into an arm of the state when that service is regulated by the state in some fashion. *Cf. N. Ins. Co. of New York v. Chatham Cty.*, 547 U.S. 189, 194 (2006) (merely "exercis[ing] a slice of state power" does not transform a state's subdivision into an arm of the state (internal quotation marks omitted)).

B.

In sum, Flint has not met its burden to show that when under emergency management, it was an "arm of the state" protected by the Eleventh Amendment. The foremost consideration—the state's potential liability for judgment—counsels against a finding of Eleventh Amendment immunity, and the remaining factors do not "far out-weigh" this factor. *Pucci*, 628 F.3d at 761.

VIII.

For these reasons, we affirm the district court in part, and reverse in part.

CONCURRING IN PART AND DISSENTING IN PART

McKEAGUE, Circuit Judge, concurring in part and dissenting in part. The majority tells a story of intentional poisoning based on a grossly exaggerated version of plaintiffs' allegations. The complaint tells an entirely different story. It is a story of a series of discrete and discretionary decisions made by a variety of policy and regulatory officials who were acting on the best information available to them at the time. In retrospect, that information turned out to be grievously wrong. The result is what has become known as the Flint Water Crisis. 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 way caused or contributed to the Crisis, violated a substantive due process right to bodily integrity. By answering that question with, "obviously, yes," the majority extends the protections of substantive due process into new and uncharted territory and holds government officials liable for conduct they could not possibly have known was prohibited by the Constitution. In doing so, the majority unfairly denies defendants protection from suit under the doctrine of qualified immunity.

As in all cases dealing with the defense of qualified immunity, it is plaintiffs' burden to establish, first, that

the defendants violated a constitutional right and, second, that the right was clearly established at the time the challenged conduct took place. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). I have serious doubts about whether plaintiffs carried their burden at the first prong of the analysis. I am certain they failed to carry their burden at the second. The majority reaches the opposite conclusion by building on a factual narrative of its own invention.

To place the qualified-immunity analysis on firmer footing, I begin with a recitation of the allegations as told by plaintiffs in their complaint. I then turn to qualified immunity's two prongs. As to the first, I doubt that plaintiffs allege that any defendant deprived them of a Fourteenth Amendment substantive-due-process right—both because the conduct actually alleged in the complaint does not appear to be conscience-shocking and because the Due Process Clause has never before been recognized as protecting against government conduct that in some way results in others being exposed to contaminated water. But even if plaintiffs have alleged the violation of a recognized due process right, their claim nonetheless fails at prong two of the qualified-immunity analysis, which asks whether the right was clearly established. The mere fact that no court of controlling authority has ever recognized the type of due process right that plaintiffs allege in this case is all we need to conclude the right is not clearly established. Accordingly, qualified immunity must shield each defendant from suit.

Before moving to the analysis, I note several points of agreement with the majority opinion. First, I join the majority in rejecting the City of Flint's argument that it is entitled to Eleventh Amendment immunity from plaintiffs' suit because the State of Michigan's takeover of the City of Flint, pursuant to Michigan's "Emergency Manager" law, transformed the City into an arm of the state. Additionally, I agree that plaintiffs fail to state a Fourteenth Amendment claim against Michigan Department of Health and Human Services (MDHHS) employees Nick Lyon, Eden Wells, Nancy Peeler, and Robert Scott; and Michigan Department of Environmental Quality (MDEQ) director Daniel Wyant. That is where my agreement ends, however. I respectfully dissent from the denial of qualified immunity for Flint Emergency Managers Darnell Earley and Gerald Ambrose; Flint's Director of Public Works Howard Croft; and MDEQ employees Liane Shekter-Smith, Stephen Busch, Michael Prysby, and Bradley Wurfel.

I

I begin with a review of the facts. Because this case comes before us on appeal from a motion to dismiss for failure to state a claim, I accept all factual allegations as true and construe them in the light most favorable to plaintiffs. *Linkletter v. W. & S. Fin. Grp., Inc.*, 851 F.3d 632, 637 (6th Cir. 2017).

The Flint Water Crisis began when the City of Flint, undergoing extreme financial distress, came

under the leadership of a succession of "Emergency Managers"—temporary city managers appointed by the governor to "act for and in the place and stead of the governing body and the office of chief administrative officer of the local government." M.C.L. § 141.1549(2). One of the City's Emergency Managers was Edward Kurtz. In 2013, Kurtz made a critical fiscal decision that set the City on a path toward the Flint Water Crisis. With the approval of the State of Michigan's treasurer, Kurtz terminated a decades-long contract for water services from the Detroit Water and Sewerage Department (DWSD) and ordered Flint to join the newly-formed and more affordable Karegnondi Water Authority (KWA). The KWA was not yet functional, however. So Kurtz had to choose an interim source of Flint's drinking water. He determined that the best temporary source, from a budgetary standpoint, was the Flint River, treated at the City's own, and then-idle, water treatment plant. He notified the DWSD that Flint would soon cease receiving water from the DWSD.

Before the switch was finalized, Darnell Earley took over as Emergency Manager, assuming the position in November 2013. The City officially switched to the Flint River in April 2014. For decades prior, the Flint water treatment plant was designated for emergency use only. A 2011 "feasibility report" concluded that it would take extensive upgrades to bring it in compliance with "applicable standards" for use as a permanent water source. Plaintiffs allege that Earley "rushed" the switch to meet a "self-imposed" and

"aggressive" deadline, without ensuring that Flint's water treatment plant was ready to properly treat Flint River water, and that he did so for the purpose of cutting costs. But they also assert that, at some point before the April 2014 switch, Flint hired an engineering firm—Lockwood, Andrews, & Newman (Lockwood)—"to prepare Flint's water treatment plant for the treatment of new water sources, including both the KWA and the Flint River." Even though the Flint River water was highly corrosive, plaintiffs allege that Lockwood did not advise the City to set water quality standards or implement corrosion control at the water treatment plant prior to using the River as a drinking water source.

Neither did the MDEQ—the state agency primarily responsible for ensuring compliance with federal and state safe drinking water laws. Relevant here, the MDEQ was tasked with ensuring Flint complied with the federal Lead and Copper Rule. That Rule generally requires public water systems to monitor and treat lead and copper levels in drinking water. 40 C.F.R § 141.80, *et seq*. The MDEQ believed, erroneously as it turns out, that the Rule allowed Flint's water treatment plant to begin distributing Flint River water and then conduct two rounds of six-month testing before determining what method of corrosion control to use to treat the water. So in April 2014, the City began distributing the Flint River water to residents without first implementing corrosion control treatment. Around the time of the switch, the director of Flint's Department of Public Works, Howard Croft, publicly

announced that the City's testing proved the water was safe and "of the high quality that Flint customers have come to expect."

Soon after the transition, however, problems emerged. Residents complained of oddly smelling and discolored water. In October 2014, General Motors stopped using the City water at its engine-manufacturing plant out of fear that high levels of chloride would cause corrosion. Then, after the City attempted to disinfect the water, it discovered trihalomethanes—a potentially toxic byproduct caused by attempting to disinfect the water. That discovery prompted the City to mail a notice to its customers explaining that the City was in violation of the Safe Drinking Water Act but that the water was safe to drink for most people with healthy immune systems. Additionally, plaintiffs say that "[a]s early as January of 2015, the State of Michigan provided purified water coolers at its Flint offices in response to concerns about the drinking water."

On January 9, 2015, the first apparent concerns of lead in Flint's drinking water began to emerge. On that day, The University of Michigan-Flint discovered lead in campus drinking fountains. It is unclear from the complaint whether that discovery was publicized and thus whether any City or State official involved in testing or distributing Flint's water knew about the discovery.

Also around January 2015, and largely in response to citizen complaints, Flint hired another engineering

firm—Veolia North America, LLC (Veolia)—to review the City's water quality. Veolia completed a "160-hour assessment of the treatment plant, distribution system, customer services and communication programs, and capital plans and annual budget." The firm issued a final report in March, in which it concluded that Flint was in "compliance with State and Federal water quality regulations, and based on those standards, the water [was] considered to meet drinking water requirements." Additionally, it stated that discolorations in the water "raise[d] questions" but that the water remained safe to drink.

Around that time, another Emergency Manger, Gerald Ambrose, took over the City's operations. On January 12, 2015, the day before Ambrose assumed his Emergency Manager role, the DWSD offered to waive a 4-million-dollar reconnection fee if the City of Flint resumed using its services. Ambrose declined the offer. Then, in late March, Flint's City Council voted 7-1 to resume services with the DWSD. Ambrose rejected the vote, calling it "incomprehensible."

In the meantime, several MDEQ employees were having internal discussions about Flint's water problems. Liane Shekter-Smith, MDEQ's Chief of the Office of Drinking Water and Municipal Assistance, emailed other MDEQ employees to suggest that the Flint River water was "slough[ing] material off of pipes" in the distribution system rather than "depositing material or coating pipes[.]" She opined that "[t]his may continue for a while until things stabilize."

Soon, an EPA employee became involved in the discussion as well. Miguel Del Toral, the EPA's regional drinking water regulations manager, reached out to the MDEQ on February 27, 2015, to voice his concerns about the possibility of elevated lead levels. Del Toral informed Michael Prysby, an MDEQ engineer, that the MDEQ's specific method for testing lead levels in Flint residents' tap water may be producing test results that underestimated lead levels. He also asked whether the water treatment plant was using optimized corrosion control, which he noted was "required" to be in place. That same day, Stephen Busch, an MDEQ District Supervisor in Lansing, responded to Del Toral stating that the water treatment plant had an "optimized corrosion control program." Two months later, an unidentified individual from the MDEQ informed the EPA that it had no optimized corrosion control treatment in place.

In April 2015, Del Toral again reached out to the MDEQ, this time issuing a memorandum that expressed concern with the lack of corrosion control and Flint's water testing methods. He also told MDEQ employees Busch and Prysby that he believed the MDEQ's sampling procedures did not properly account for the presence of lead service lines. Therefore, Del Toral said he "worried that the whole town may have much higher lead levels than the compliance results indicated[.]" According to plaintiffs, the MDEQ "ignored and dismissed" Del Toral's concerns.

A few months later, plaintiffs say that Busch "claimed that 'almost all' homes in the pool sampled for

lead in Flint had lead services lines," even though this was untrue. Plaintiffs do not indicate to whom Busch made that statement. Later in July, a reporter broke a story announcing that Flint's water was contaminated with lead, citing Del Toral's April 2015 memorandum. In response, Bradley Wurfel, MDEQ's Communications Director, publicly stated that "anyone who is concerned about lead in the drinking water in Flint can relax."

That same month, the EPA and the MDEQ had a conference call to discuss MDEQ's compliance with the Lead and Copper Rule. According to plaintiffs, the EPA pushed for Flint to use optimized corrosion control, but the MDEQ insisted that doing so was "unnecessary and premature." In a follow-up email, MDEQ employee Shekter-Smith asked the EPA to provide a written concurrence that the City was in compliance with the Lead and Copper Rule.

Also in July, MDEQ employees exchanged a series of internal emails discussing how water tests performed by outside sources, which showed that Flint's drinking water had impermissibly high lead levels, compared with the MDEQ's own water testing results, which showed lower lead levels. When a report by a Virginia Tech professor revealing high lead levels surfaced in September 2015, Wurfel made public statements challenging the report and asserting that Flint's drinking water remained in compliance with federal and state laws. During this time, other MDEQ employees maintained that Flint was not required to use corrosion control until unacceptably high levels of lead

had already appeared in the water, which they believed was not yet the case.

Later in September, Croft emailed "numerous officials" to report that the City of Flint had "officially returned to compliance with the Michigan Safe Drinking Water Act" and that it had "received confirming documentation from the [M]DEQ" to that effect. He explained that "[a]t the onset of our plant design, optimization for lead was addressed and discussed with the engineering firm and with the [M]DEQ. It was determined that having more data was advisable prior to the commitment of a specific optimization method. . . . We have performed over one hundred and sixty lead tests throughout the city since switching over to the Flint River and remain within EPA standards."[1]

The MDHHS also began to take a closer look at the outside studies showing high lead levels in Flint's water. Though at least a few MDHHS employees became aware of an increase in blood lead levels in Flint's children in July, the increase was attributed to "seasonal variation"—a summer phenomenon in which children's blood lead levels naturally increase because of more frequent exposure to lead in soil and other seasonal factors. But in September, MDHHS employees began to take a closer look. They circulated a study conducted by a pediatrician at a Flint hospital, Dr.

[1] It is unclear whether the "one hundred and sixty lead tests" were part of the "160-hour assessment" that Veolia conducted in early 2015 as part of its review of the City's water treatment plant.

Mona Hanna-Attisha, which showed elevated blood lead levels in children. The next day, one MDHHS employee attempted to recreate the study but came up with different numbers. The City of Flint also issued a health advisory telling residents to flush pipes and install filters to prevent lead poisoning. On October 1, 2015, the MDHHS officially confirmed Dr. Hanna-Attisha's results.

Finally, on October 16, 2015, Flint reconnected to the DWSD. Two days later, MDEQ Director Daniel Wyant admitted to Michigan's governor that MDEQ "staff made a mistake while working with the City of Flint. Simply stated, staff employed a federal (corrosion control) treatment protocol they believed was appropriate, and it was not." Several MDEQ employees subsequently resigned or were suspended without pay. On January 21, 2016, the EPA issued an Emergency Order identifying the primary cause of increased lead levels in Flint's water as being a lack of corrosion control treatment after the City's switch to the Flint River.

II

To make it past qualified immunity's first prong, a plaintiff must plead facts showing that a government official violated a constitutional right. *al-Kidd*, 563 U.S. at 735. Plaintiffs assert that their claim falls under the fundamental right to bodily integrity, a right guaranteed by the substantive component of the Fourteenth Amendment's Due Process Clause. *Albright v. Oliver*, 510 U.S. 266, 272 (1994). We measure whether the

deprivation of a right to bodily integrity—or any other substantive-due-process right—actually occurred by determining whether a defendant's alleged conduct was so heinous and arbitrary that it can fairly be said to "shock the conscience." *Lillard v. Shelby Cty. Bd. of Educ.*, 76 F.3d 716, 725 (6th Cir. 1996). At times we have treated these two elements (deprivation of a constitutional right and conscience-shocking behavior) as separate methods of stating a substantive-due-process claim. *Range v. Douglas*, 763 F.3d 573, 588 (6th Cir. 2014). At other times we have concluded they are both required. *See Am. Express Travel Related Servs. Co., Inc. v. Kentucky*, 641 F.3d 685, 688 (6th Cir. 2011). But whether these are two separate methods of establishing a substantive-due-process violation or are two required elements of doing so does not change the outcome in this case. Plaintiffs' allegations show neither conscience-shocking conduct nor the violation of a fundamental right.

To demonstrate why, I turn back to the allegations in plaintiffs' complaint. The complaint is particularly important here, because substantive due process is an undefined area where "guideposts for responsible decisionmaking . . . are scarce and open-ended" and "judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). We must, therefore, "focus on the allegations in the complaint to determine how [plaintiffs'] describe[ ] the constitutional right at stake and what [defendants] allegedly did to deprive [plaintiffs] of that

right." *Id.* The majority pays lip service to that command but abandons it in the analysis. Although the majority describes the bodily integrity right at stake as the right to be free from a government official "knowingly and intentionally introducing life-threatening substances into individuals without their consent," the right plaintiffs allege was violated is altogether different.

Plaintiffs' complaint specifically states: "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." That claim makes clear where defendants allegedly went wrong. It was not in knowingly introducing life-threatening substances into plaintiffs' bodies against their will; it was in allegedly "*fail[ing] to protect* plaintiffs from a foreseeable risk of harm from the *exposure to lead contaminated water*" (emphasis added).

And that claim, as framed by plaintiffs, immediately encounters two roadblocks to establishing a due process violation: (1) a policymaker's or regulator's unwise decisions and statements or failures to protect the public are typically not considered conscience-shocking conduct, and (2) the Due Process Clause does not generally guarantee a bodily integrity right against exposure to contaminated water or other types of environmental harms. These two roadblocks raise serious doubts about whether plaintiffs meet the first prong of

the qualified immunity analysis. I review each of these problems with plaintiffs' claim in turn, starting first with whether defendants' alleged conduct rises to the conscience-shocking level.

A

The first roadblock to plaintiffs' due process claim is that the conduct alleged fails to meet the "high" conscience-shocking standard. *Range*, 763 F.3d at 589. Plaintiffs' "failure to protect from foreseeable harm" theory sounds in classic negligence. But negligence—even gross negligence—does not implicate the Due Process Clause's protections. *Daniels v. Williams*, 474 U.S. 327, 331–33 (1986). "The Due Process Clause 'does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society[.]'" *Collins*, 503 U.S. at 128 (citation omitted). Rather, it serves to limit the government from using its power as an "instrument of oppression." *DeShaney v. Winnebago Cty. Dep't. of Soc. Servs.*, 489 U.S. 189, 195 (1989) (citation omitted). Accordingly, substantive due process is implicated only by government actions (and sometimes failures to act) that are "so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that [they] amount[ ] to a brutal and inhumane abuse of official power literally shocking to the conscience." *Lillard*, 76 F.3d at 725 (citation omitted). Normally, meeting that standard requires plaintiffs to show an intent to injure through some affirmative act, but, depending on the context, even a deliberately indifferent

failure to act may constitute conscience-shocking behavior. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). In the context of a non-custodial case such as this one, to show conscience-shocking behavior based on deliberate indifference, a plaintiff must show something akin to "callous disregard or intent to injure." *Schroder v. City of Fort Thomas*, 412 F.3d 724, 730 (6th Cir. 2005) (citing *Lewis*, 523 U.S. at 846); *see also Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, 542 F.3d 529, 538 (6th Cir. 2008) ("[I]n order to succeed on a § 1983 claim in a non-custodial setting, a plaintiff must prove either intentional injury or 'arbitrary conduct intentionally designed to punish someone[.]'" (citation and emphasis omitted)).

In all cases, we are required to perform an "exact analysis of the circumstances before" condemning "any abuse of power . . . as conscience shocking." *Lewis*, 523 U.S. at 850. The majority eschews that requirement. Instead of reviewing the defendant-specific allegations in context, it cherry-picks a few "examples" from plaintiffs' complaint and strings them together to form a narrative not told by plaintiffs. In compounding that error, the majority draws inconsistent, even contradictory, conclusions about the level of culpability the allegations entail. In one breath, the majority says plaintiffs plausibly allege that defendants "knowingly and intentionally introduc[ed] life-threatening substances into individuals without their consent." But in another breath, it says "[t]here is no allegation defendants intended to harm Flint residents." In yet another, the majority says defendants "systematically

contaminate[d]" the Flint community. I will leave it to the reader to reconcile how conduct may constitute a knowing, intentional, and systematic attempt to contaminate another without also being motivated by an intent to harm that person. I, for one, fail to follow that logic. It is only by this imprecise analysis that the majority concludes these defendants acted in a conscience-shocking manner.

A more exact, defendant-specific analysis shows otherwise. The following analysis reveals that plaintiffs do not allege the additional "callous disregard or intent to injure" element that applies to non-custodial deliberate-indifference claims. I review the allegations against Flint's Emergency Managers (Darnell Earley and Gerald Ambrose),[2] Flint's Department of Public Works Director (Howard Croft), and the MDEQ employees (Liane Shekter-Smith, Stephen Busch, Michael Prysby, and Bradley Wurfel) in turn. Additionally, I explain why I agree with the majority that the case against the MDHHS executives and employees (Nick Lyon, Eden Wells, Nancy Peeler, and Robert Scott) and the MDEQ Director (Daniel Wyant) must be dismissed.

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[2] Plaintiffs also bring a claim against the City of Flint, which necessarily rises and falls with their claim against the Emergency Managers. Because the Emergency Managers were acting on behalf of the City, their policy decisions concerning the source of the City's water were also policy decisions of the City. Accordingly, plaintiffs' claim implicates the City only to the extent the Emergency Managers' decisions were unconstitutional.

1

Flint Emergency Managers Darnell Earley and Gerald Ambrose. First, consider plaintiffs' allegations against Emergency Managers Earley and Ambrose. According to plaintiffs, Earley "rushed" the switch to the Flint River to meet a "self-imposed" and "aggressive" deadline as a cost-saving measure without ensuring the water treatment plant was adequately equipped to treat the water. Ambrose later rejected opportunities to return to the DWSD despite residents' complaints and other evidence pointing to the water's high corrosivity. The majority concludes that both Emergency Managers approved the initial and ongoing use of the Flint River as a water source despite knowing the City's water treatment plant was not equipped to treat the water. Not so.

Consider the Emergency Managers' decisions in context, starting with the initial switch under Earley's leadership. Recall that before the switch, the City consulted with the Lockwood 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." And although the MDEQ noted that the KWA was "a higher quality source [of] water" than the Flint River, it never indicated that use of the Flint River would place residents at risk of lead contamination. 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.

The majority, with the luxury of hindsight, believes that whether Earley or Ambrose reasonably relied on the opinions of the MDEQ or professional engineering firms is better left for summary judgment. But that belief suggests that the Due Process Clause may obligate managers of a municipal budget or other government officials to reject the advice of industry and regulatory experts based on the risk that those experts are wrong. Such a conclusion cuts against the "presumption that the administration of government programs is based on a rational decisionmaking process that takes account of competing social, political, and economic forces." *Collins*, 503 U.S. at 128. Indeed, "[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*, 412 F.3d at 729. 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. *See*, *e.g.*, *White v. Lemacks*, 183 F.3d 1253, 1258 (11th Cir. 1999) ("[W]hen governmental action or inaction reflects policy decisions about resource allocation (as is often the case), those decisions are better made 'by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country.'" (quoting *Collins*, 503 U.S. at 129)).

Finally, the majority asserts that concluding that Ambrose and Earley were relying on experts places an inappropriately "benign construction on the factual allegations." Yet the majority cites no factual allegations supporting any other conclusion. Instead, it accepts plaintiffs' various "labels and conclusions"—for instance, that Ambrose and Earley "knew" about risks to Flint residents—as sufficient support for their claim. This cuts against the Supreme Court's directive that plaintiffs allege facts, not conclusions, to state entitlement to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The bottom line is that plaintiffs do not allege that any industry or regulatory expert informed Earley or Ambrose that the City's water treatment plant was not equipped to treat Flint River water

or that the water was not being treated with corrosion control. In fact, plaintiffs allege just the opposite. Professional engineering firms and the MDEQ repeatedly affirmed that Flint's drinking water complied with applicable law. Accordingly, the Emergency Managers' approval of the plant's initial and ongoing use of the Flint River as a water source does not plausibly demonstrate callous disregard for or an intent to injure plaintiffs, let alone any effort to "systematically contaminate" the Flint community.

2

MDEQ employees Liane Shekter-Smith, Stephen Busch, Michael Prysby, and Bradley Wurfel. Next consider the claims against the various MDEQ employees. Plaintiffs contend that every MDEQ employee misinterpreted the Lead and Copper Rule. Under the MDEQ's erroneous interpretation of the Rule, the City could begin distributing Flint River water to residents and then conduct two six-month rounds of lead testing before treating the water with corrosion control. Without immediate treatment, the water accumulated lead as it flowed through the City's pipes. And over time, plaintiffs' drinking water became contaminated with allegedly unhealthy levels of lead. Plaintiffs equate the MDEQ's misinterpretation of the Lead and Copper Rule's corrosion-control requirements with conscience-shocking behavior that caused plaintiffs' exposure to lead.

As gravely erroneous as the MDEQ's interpretation of the Rule appears in hindsight, however, there is no legal support for the conclusion that it amounted to conscience-shocking conduct. On the contrary, a mistake of law is the classic type of conduct that qualified immunity protects from suit. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) ("The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" (citation omitted)); *Gavitt v. Born*, 835 F.3d 623, 640–41 (6th Cir. 2016). That should end the case against these defendants.

The majority concludes, however, that the MDEQ's misinterpretation may have been intentional. According to the majority, plaintiffs' allegations present the "bleak[]" possibility that the MDEQ may have used Flint residents as "guinea pigs" to test lead-compliance theories unsupported by the law. None of plaintiffs' factual allegations make that inference a reasonable one. This is not a conspiracy case. Plaintiffs do not assert that the MDEQ employees maliciously *agreed* to a certain incorrect interpretation of the Lead and Copper Rule to exempt Flint from using corrosion control. And it is implausible that each MDEQ employee *individually* set out to advance the same incorrect interpretation of the Rule just to save the City money. Indeed, plaintiffs do not allege that any MDEQ employee intentionally misled Flint about the Rule's requirements. Instead, plaintiffs' allege that the MDEQ provided misguided advice rooted in mistaken

interpretations of law—the type of conduct that, though it led to extremely unfortunate consequences here, is classically entitled to protection from suit under the doctrine of qualified immunity.

Still, the majority takes plaintiffs' allegations a step further, making the sweeping assertion that the MDEQ employees "created" the Flint Water Crisis by knowingly approving distribution of Flint River water with the use of an ill-prepared water treatment plant and then deceiving the public about the consequences of that decision. The allegations do not support that theory, however.

First, plaintiffs do not allege facts showing that Shekter-Smith, Busch, Prysby, or Wurfel personally approved the City's use of the Flint River and the Flint water treatment plant. Rather, plaintiffs say that the decision was made by Kurtz, Flint's 2013 Emergency Manager, with approval from the State's treasurer. Moreover, plaintiffs fail to allege that any of these MDEQ employees knew that the Flint water treatment plant was incapable of treating Flint River water. To be sure, plaintiffs allege that "all Defendants" were aware of a 2011 "feasibility report" rejecting the use of the Flint River at the time because of costs associated with bringing the treatment plant in compliance with "applicable standards." But plaintiffs provide no further context surrounding the report's creation and who knew about its contents. On the other hand, plaintiffs allege that, prior to the switch, Flint's Utilities Administrator told Prysby and Busch that the water treatment plant had "developed a system of redundant

electrical systems, treatment processes and adequate finished water storage" after consulting with the MDEQ and an engineering firm. And after that, Busch informed Wurfel that the MDEQ was "satisfied with the City's ability to treat water from the Flint River[.]" These allegations thus do not suggest that any MDEQ employee knew the treatment plant was actually incapable of properly treating Flint River water and approved its use anyway.

Nor do the majority's "poignant examples" of a handful of plaintiffs' allegations show an attempt by any MDEQ employee to knowingly mislead the public about Flint's alleged noncompliance with drinking water laws or to falsely assure residents of the water's safety.

Prysby. Take Prysby, an MDEQ engineer, first. The majority latches on to a single email sent from Prysby to a couple other MDEQ employees in October 2014. In it, Prysby opines that the fact that a General Motors engine-manufacturing plant stopped using Flint River water because of its corrosive nature did not mean that the water should be labeled "'corrosive' from a public health standpoint." According to the majority, that statement shows that Prysby was more interested in spinning the water's corrosive nature as unconnected to public health instead of investigating problems with the water. But a "[n]egligent failure to investigate . . . does not violate due process." *Wilson v. Lawrence Cty.*, 260 F.3d 946, 955 (8th Cir. 2001) (citations omitted). And no other allegation against Prysby demonstrates anything more than a failure to act—plaintiffs'

remaining allegations name Prysby as merely a recipient of various emails but they do not identify any specific actions taken by him. Plaintiffs thus do not plausibly allege that Prysby created the Flint Water Crisis and then deceived the public about it.

Busch. Nor do the allegations support such a finding when it comes to Busch. The complaint references a number of Busch-authored emails, but the majority references only two internal emails exchanged between MDEQ employees and between Busch and EPA employee Del Toral. The majority concludes that Busch lied in the latter email, when he informed Del Toral in February 2015 that Flint's water treatment plant "had an optimized corrosion control program" in place, which demonstrates conscience-shocking behavior. But the complaint contains no factual allegations supporting the conclusion that Busch's statement was a lie. Flint *did* have a corrosion control "program" in place—a program that permitted a two-round testing period after the plant became operational and before plant administrators chose a particular method of corrosion control *treatment.* The MDEQ believed the Lead and Copper Rule allowed for that type of program. Even though the MDEQ was wrong, that error does not support the allegation that Busch lied to the EPA about the existence of a corrosion control program. Moreover, plaintiffs do not allege that Busch personally knew that Flint was distributing water without corrosion control treatment until April 2015. So even if Busch meant "treatment" when he said "program" in the February email, the factual allegations do not support the

conclusion that he knew the statement was false. In sum, neither that statement nor the various other internal emails in which Busch expressed support for the MDEQ's interpretation of the Lead and Copper Rule or his belief that the water treatment plant was capable of treating Flint River water plausibly demonstrate that Busch created the Flint Water Crisis and then attempted to deceive the public.

Shekter-Smith. The allegations likewise fail to demonstrate that Shekter-Smith acted in a conscience-shocking manner. The majority focuses on two of Shekter-Smith's emails.

In the first, Shekter-Smith requested that an EPA official indicate his agreement "that the city [was] in compliance with the lead and copper rule." That, she explained, would help the MDEQ "distinguish between [its] goals to address important public health issues separately from the compliance requirements of the actual rule[.]" The majority's take on that email is that Shekter-Smith cared more about "technical compliance" with the Lead and Copper than addressing an urgent health crisis. Whatever weight Shekter-Smith actually assigned each of those concerns, all that her email exhibits is an attempt to address them separately. This is hardly conscience-shocking conduct.

In the second email, Shekter-Smith responded to a question from Jon Allan, Director of the Michigan Office of the Great Lakes, about the MDEQ's statewide goals related to health-based standards. Under those goals, "98 percent of population [sic] served by

community water systems" and "90 percent of the non-community water systems" would be providing "drinking water that meets all health-based standards" by 2020. Allan asked why MDEQ had any goal less than "100 percent," saying, "How many Flints Do you intend to allow???" Shekter-Smith replied:

> The balance here is between what is realistic and what is ideal. Of course, everyone wants 100 percent compliance. The reality, however is that it's impossible. It's not that we 'allow' a Flint to occur; circumstances happen. Water mains break, systems lose pressure, bacteria gets into the system, regulations change and systems that were in compliance no longer are, etc. Do we want to put goal [sic] in black and white that cannot be met but sounds good? Or do we want to establish a goal that challenges us but can actually be accomplished? Perhaps there's a middle ground?

This second email likewise shows nothing more than Shekter-Smith's concern with meeting agency goals—in this instance, goals related to the statewide administration of safe drinking water. The propriety of certain agency goals, however, falls outside the purview of the Due Process Clause. Indeed, we presume that agency goal-setting consistent with its regulatory duties takes into account "competing social, political, and economic forces" of which judges do not have full view. *Collins*, 503 U.S. at 128. In this instance, Shekter-Smith was apparently seeking to establish a goal that could "actually be accomplished." That concern is not conscience-shocking, regardless of how it sounds in

view of what happened in Flint. These two emails, in short, do not demonstrate that Shekter-Smith created the Flint Water Crisis and subsequently attempted to deceive the public.

Wurfel. Of all the MDEQ employees, the majority's intentional-public-deception theory really implicates only one individual: Wurfel, the Department's Director of Communications. He is the only MDEQ employee alleged to have made public statements about Flint's drinking water. The majority characterizes Wurfel's statements as attempts to demean, belittle, and aggressively dampen challenges to the government's assertion that Flint's drinking water was safe. But however his statements may be characterized, they were not conscience-shocking.

His first statement came in July 2015, after a reporter broke a story claiming that there was lead in Flint's drinking water. Wurfel publicly responded by saying that "anyone who is concerned about lead in the drinking water in Flint can relax." Then, in September 2015, after two doctors released separate reports about studies showing unsafe levels of lead in Flint residents' water, Wurfel placed the blame for the lead on the service lines in residents' homes even though there was, according to plaintiffs, evidence that at least some residents' service lines were plastic. Wurfel later called the doctors' testing results "perplex[ing]," explaining that they did not match the City's testing results, which he asserted were "done according to state and federal sampling guidelines and analyzed by certified

labs." On two other occasions in September, Wurfel asserted the doctors' studies were inaccurate.

Though plaintiffs assert Wurfel's statements were knowing lies, their factual allegations do not support that conclusion. *See Twombly*, 550 U.S. at 555. As plaintiffs' complaint alleges, Wurfel made his public statements after other MDEQ employees represented both that Flint's water treatment plant was prepared to treat Flint River water and that Flint's water testing results showed Flint was in compliance with the requirements of the Lead and Copper Rule. The allegations do not show that Wurfel was given contrary information by any City or State official. Accordingly, plaintiffs do not demonstrate that Wurfel intentionally attempted to deceive the public about the safety of Flint's drinking water or the City's compliance with drinking water laws. At most, they show a mistake of law or fact, made at least in partial reliance on the representations of other State employees. It is certainly unfortunate that Wurfel announced those mistaken beliefs to the public. But that he did so does not strip him of the protection of qualified immunity. *Pearson*, 555 U.S. at 231. Wurfel's handful of statements in July and September do not evince a knowing and intentional attempt to deceive the public about known deficiencies in Flint's water treatment procedures or any conduct designed to intentionally contaminate the public.

The allegations against the MDEQ employees, in sum, do not plausibly demonstrate a callous disregard for or intent to injure plaintiffs, let alone any effort to

"systematically contaminate" the Flint community. What they show instead is a series of internal emails and a handful of public statements regarding the requirements of the Lead and Copper Rule and the water's safety. Even if the MDEQ employees made mistakes in interpreting the Rule, those mistakes are not conscience-shocking.[3]

3

Flint Director of Department of Public Works, Howard Croft. Next, I turn to the allegations against Croft, which come nowhere near the high conscience-shocking standard. Plaintiffs assert that Croft "caused and allowed unsafe water to be delivered to Flint's residents," but they fail to allege that Croft was actually involved in the City's decision to use to the Flint River as a water source or that he played any part in

[3] Rather than viewing plaintiffs' allegations in a light most favorable to defendants, all this conclusion does is hold plaintiffs to their burden of presenting *factual* allegations that provide a plausible basis for their claim. *Twombly*, 550 U.S. at 555. Plaintiffs do not provide any factual allegations supporting the conclusion that the MDEQ's interpretations were more than mistakes. According to the majority, plaintiffs allege that Shekter-Smith, Busch, and Prysby knew Flint was not in compliance with applicable law because EPA employee Del Toral made that clear in a memorandum that these defendants "ignored and dismissed." But while that memorandum allegedly expressed "concern[]" with Flint's lack of corrosion control and water testing methods, it did not conclude that Flint was in violation of the Lead and Copper Rule. Plaintiffs do not allege that Del Toral or any other EPA official informed the MDEQ that Flint was flouting federal drinking water requirements.

determining whether and when the treatment plant would use corrosion control. The majority finds that single, conclusory allegation sufficient to make the plausible inference that Croft played an affirmative role in approving the transition to the Flint River. What makes that conclusion especially confounding is the majority's simultaneous rejection of allegations against other defendants that are just as conclusory as this one. For example, the majority finds that plaintiffs' allegation that MDHHS executive Nick Lyon "participated in, directed, and/or oversaw the department's efforts to hide information to save face, and to obstruct and discredit the efforts of outside researchers" as the kind of "bare" and "chimerical" assertions *Iqbal* mandates be set aside. But the allegation that Croft "caused and allowed unsafe water to be delivered to Flint's residents" is not any more detailed than the "chimerical" assertion against Lyon. 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.

4

MDHHS executives Nick Lyon and Eden Wells; MDHHS employees Nancy Peeler and Robert Scott; and

MDEQ Director Daniel Wyant. Finally, a brief word about the MDHHS executives, the MDHHS employees, and MDEQ Director Wyant, all of whom the majority correctly dismisses from this case. I agree with the majority that most of the allegations against the MDHHS executives and employees have to do with negligence (i.e., failing to timely notify the public of the possibility of increased lead in the water) rather than any affirmative action involving them in the decision to use the Flint River as a water source without simultaneously implementing corrosion control treatment. I agree as well that once those allegations are discarded, plaintiffs' remaining allegations—going to these defendants' attempts to "discredit" studies from outside sources—are too sparse to demonstrate conduct rising to the level of conscience-shocking.

And as to MDEQ Director Wyant, I concur with the majority's conclusion that none of plaintiffs' allegations show that he was personally involved with the decision to use the Flint River as a water source or otherwise engaged in any conscience-shocking behavior.

Accordingly, I join the majority in concluding that plaintiffs' allegations against these defendants engaged in conscience-shocking behavior or otherwise infringed on plaintiffs' due process rights.

For all of these reasons, I do not believe plaintiffs' allegations suggest that any individual defendant's actions or failures to act shock the conscience. This presents a significant roadblock that seems to prevent plaintiffs from establishing a violation of substantive

due process and thus proceeding past the first prong of the qualified-immunity analysis.

B

The second roadblock to plaintiffs' substantive-due-process claim—which also suggests they cannot proceed past qualified immunity's first prong—is that their claim does not appear to arise from the deprivation of a recognized fundamental right to bodily integrity. As should be clear by now, the right reconstructed by the majority is entirely distinct from the one asserted in plaintiffs' complaint and is thus, unsurprisingly, devoid of support from plaintiffs' factual allegations.

So what is the bodily integrity right plaintiffs allege? According to the complaint, defendants' alleged conduct amounted to a failure to protect from exposure to lead-contaminated water. But although plaintiffs frame the claim that way in their complaint, they insist their claim does not flow from a right to receive clean water. Plaintiffs are right to avoid advancing that theory because the Due Process Clause guarantees neither a right to live in a contaminant-free environment, *Collins*, 503 U.S. at 125–26, nor a fundamental right to water service. *In re City of Detroit*, 841 F.3d 684, 700 (6th Cir. 2016) (quoting *Golden v. City of Columbus*, 404 F.3d 950, 960 (6th Cir. 2005)). Still, it is hard to understand plaintiffs' claim 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?

The majority avoids grappling with that issue by turning, inappropriately, to abstract concepts of personal autonomy and informed consent that it divines from several inapposite cases. In so doing, the majority's analysis runs contrary to the "restrained methodology" outlined by the Supreme Court in *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). To apply that methodology, we look to "concrete examples involving fundamental rights found to be deeply rooted in our legal tradition." *Id.* at 722. Those examples reveal the "outlines of the 'liberty' [interests] specially protected by the Fourteenth Amendment[.]" *Id.* Because the Due Process Clause's substantive component protects only those rights that are an integral part of our "Nation's history and tradition," courts "have always been reluctant to expand" the Clause's coverage into new territory. *Id.* at 720–21. Looking to concrete examples regarding what those historic rights are "tends to rein in the subjective elements that are necessarily present in due-process judicial review." *Id.* at 720, 722.

In *Glucksberg*, the Court showed us how to use that "restrained methodology." There, the Supreme Court dismissed a claim by state physicians that the Due Process Clause guaranteed a right to physician-assisted suicide. *Id.* at 721–24. The physicians argued that recognizing such a right would be consistent with the "self-sovereignty" principles underlying a person's interest in choosing between life and death, which were articulated in *Cruzan v. Missouri Department of*

Health, 497 U.S. 261 (1990). *Id.* at 723–24. In rejecting that argument, the *Glucksberg* Court clarified that *Cruzan* assumed, though did not definitively decide, that a competent person had a right to refuse unwanted lifesaving medical treatment. *Id.* at 720. That assumption, however, "was not simply deduced from abstract concepts of personal autonomy." *Id.* at 725. It instead arose from the "common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment[.]" *Id.* The specific right to physician-assisted suicide found no support in the examples outlined in the Court's jurisprudence or in our Nation's history or traditions and was therefore not protected by substantive due process. *Id.* at 723–24.

Likewise, no concrete examples arising from the established bodily integrity jurisprudence or from our Nation's history or traditions support the right asserted here—protection from policy or regulatory decisions or public statements that, somewhere down the line, result in exposure to contaminated water.

We have previously interpreted the bodily integrity right as "the right against forcible physical intrusions of the body by the government." *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 506 (6th Cir. 2012) (citations omitted). The right is outlined most explicitly in *Rochin v. California*, 342 U.S. 165 (1952). There, the Court held that the Due Process Clause prohibits a state from securing evidence in support of a conviction by using a vomit-inducing solution to forcibly extract the evidence from a suspect's

stomach. *Id.* at 172–74. That intrusion on an individual's body, the Court explained, was "too close to the rack and the screw" to be constitutionally permissible. *Id.* at 172. Since then, the Court has concluded that similar types of physically intrusive law enforcement searches implicate the right to bodily integrity. Those include a "compelled physical intrusion beneath [a suspect's] skin and into [the] veins to obtain a" blood sample, *Missouri v. McNeely*, 569 U.S. 141, 148 (2013), and a nonconsensual surgery to retrieve a bullet from a suspect's chest. *Winston v. Lee*, 470 U.S. 753, 767 (1985). In this Circuit, we have concluded that obtaining evidence by "anally prob[ing]" an individual "without his consent" when he was "naked and handcuffed, . . . paralyzed, [and] intubated" was such a grave bodily integrity violation that it rendered the Fourth Amendment search unreasonable. *United States v. Booker*, 728 F.3d 535, 537, 547 (6th Cir. 2013) (citation omitted).

In the medical context, too, the Court has underscored the right's guarantee against direct, physical intrusions into an individual's body at the hands of a government official. In *Washington v. Harper*, for instance, the Court emphasized the significance of an inmate's "liberty interest in avoiding the unwanted administration of antipsychotic drugs." 494 U.S. 210, 221, 223 (1990). *Riggins v. Nevada*, 504 U.S. 127, 135 (1992) affirmed the magnitude of that liberty interest—avoiding the unwanted administration of drugs—for pretrial detainees as well. Later, in *Cruzan*, the Court explained that the general principles underlying

Harper and *Riggins* suggested that "a competent person [has] a constitutionally protected right to refuse lifesaving hydration and nutrition." 497 U.S. at 280; *Glucksberg*, 521 U.S. at 720 (explaining that *Cruzan* "assumed, and strongly suggested, that the Due Process Clause protects" such a right without expressly concluding that it did (citing *Cruzan*, 497 U.S. at 278–79)). In the same vein, cases from the Supreme Court and our Circuit suggest that the right to bodily integrity is implicated by government interference with a woman's right to obtain an abortion. *See id.* at 726–27; *Planned Parenthood Sw. Ohio Region*, 696 F.3d at 507.

These cases delineate the contours of the right to bodily integrity in terms of intrusive searches or forced medication. None of them is compatible with the "careful description" of the right at issue here: protection from exposure to lead-contaminated water allegedly caused by policy or regulatory decisions or statements.[4] Even the few district court or sister circuit

[4] Even *In re Cincinnati Radiation Litigation*, 874 F. Supp. 796 (S.D. Ohio 1995), the one district court case the majority finds "especially analogous," fails to close the gap. There, the court concluded that government officials violated medical patients' right to bodily integrity by devising a program that subjected unwitting cancer patients to high doses of radiation under the guise of performing cancer treatment. *Id.* at 803–04. But whether the Due Process Clause protects hospital patients from being intentionally subjected to harmful medical treatment without their consent is not the determinative issue here. What we should care about is whether and when it protects an indeterminate number of public citizens from certain regulatory decisions or statements that have some impact on the quality of public drinking water or any other environmental resource.

cases cited by the majority do not clarify the contours of plaintiffs' alleged right. All except one of those cases deal with medical professionals performing government-sponsored invasive procedures or harmful experiments on unsuspecting patients.[5] The last one deals with police officers who coerced individuals to ingest marijuana while those individuals were under the officer's control.[6] So those cases further elaborate the ways in which medical or law enforcement personnel may interfere with an individual's right to bodily

[5] *Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986) (state psychiatric hospital administered injections of a synthetic mescaline compound furnished by the Unites States as part of an experimental program that tested the suitability of the substance as a chemical warfare agent); *Lojuk v. Quandt*, 706 F.2d 1456 (7th Cir. 1983) (Veterans Affairs psychiatrist subjected patient to electroconvulsive therapy without the patient's consent); *Rogers v. Okin*, 634 F.2d 650 (1st Cir. 1980), *overruled on other grounds sub nom, Mills v. Rogers*, 457 U.S. 291 (1982) (state administered antipsychotic drugs to both voluntary and involuntary patients at state mental health facilities); *Heinrich v. Sweet*, 62 F. Supp. 2d 282 (D. Mass. 1999) (U.S. Government conspired with health institutions to conduct "extensive, unproven and dangerous medical experiments on over 140 terminally ill patients, without their knowledge or consent"); *Stadt v. Univ. of Rochester*, 921 F. Supp. 1023 (W.D.N.Y. 1996) (government physicians injected patient with plutonium without her knowledge or consent); *In re Cincinnati Radiation Litigation*, 874 F. Supp. 796 (S.D. Ohio 1995) (government and university physicians subjected cancer patients to radiation experiments without their knowledge under the guise that they were receiving cancer treatment); *Davis v. Hubbard*, 506 F. Supp. 915 (N.D. Ohio 1980) (inadequate medical treatment).

[6] *Bounds v. Hanneman*, 2014 WL 1303715 (D. Minn. Mar. 31, 2014) (officers forced plaintiffs to ingest a substantial amount of marijuana, against their will, in order to observe how they would react).

integrity. But they say nothing about how non-custodial policy or regulatory decisions or statements affecting the quality of an environmental resource may do so. In short, neither our Nation's history and traditions nor governing bodily integrity jurisprudence suggests that the conduct alleged here is comparable to a "forcible physical intrusion[] of the body by the government." *Planned Parenthood Sw. Ohio Region*, 696 F.3d at 506. "The mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it." *Reno v. Flores*, 507 U.S. 292, 303 (1993).

In sum, because the conduct alleged does not appear to rise to the level of conscience-shocking, and because I believe it does not demonstrate the deprivation of a recognized fundamental right, I have serious doubts about whether plaintiffs state a substantive due process claim sufficient to carry them past prong one of the qualified-immunity analysis.

III

The second prong of the qualified-immunity analysis looks to whether the alleged constitutional right was "clearly established" at the time the government official acted. *al-Kidd*, 563 U.S. at 735. This presents the most fundamental problem for plaintiffs' case. To the extent plaintiffs do successfully allege the violation of a constitutional right, the novelty of that right just shows that it was not clearly established at the time the alleged events unfolded. Therefore, the doctrine of qualified immunity shields every defendant from suit.

For a right to be clearly established, its contours must be "sufficiently clear that every reasonable official would have understood that *what he is doing* violates that right[.]" *Mullenix v. Luna*, 136 S. Ct. 305, 308(2015) (emphasis added) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). 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. *Id.* at 308 (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.

Here, that means plaintiffs must be able to point to controlling cases extending substantive due process protections to the following individuals:

- A high-level government executive who makes a decision (or proceeds with a project) while relying on expert opinions that the decision or project is lawful and safe (Earley and Ambrose).

- A regulator who misinterprets environmental laws and provides bad advice to government policymakers (MDEQ employees).
- A city or state regulator who, based on the erroneous advice of other regulators, publicly announces that a government-provided resource is safe for consumption when it is not (Wurfel, Croft, or others who made public statements).

As 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. "This alone should have been an important indication to the majority that [the defendants'] conduct did not violate [plaintiffs'] 'clearly established' right." *White*, 137 S. Ct. at 552.

In fact, in case after case around the country, courts have consistently rejected substantive-due-process claims based on the type of conduct alleged here. *Branch v. Christie* is one such case. 2018 WL 337751 (D.N.J. Jan. 8, 2018). *Branch* dealt with a bodily integrity claim brought by parents of New Jersey public school children against several state officials for "knowingly expos[ing] the children . . . to water that was contaminated with unsafe levels of lead," and "concoct[ing] a scheme to cover up the health hazard." *Id.* at *1. The parents said that state employees caused the lead contamination by "cancel[ling] work orders to change outdated and lead-saturated filters," and "allowing several filters to be used for upwards of five

years." *Id.* (internal quotation marks and citation omitted). Once the public became aware of the unsafe lead levels in the school's drinking fountains, state employees "undertook a course of providing misinformation to parents, telling the community that the water was safe." *Id.* (internal quotation marks and alterations omitted). The *Branch* court dismissed the parents' claims, finding "no authority" supporting their bodily integrity theory. *Id.* at *8. As the court explained, "[t]he liberty interest in bodily integrity guarantees the 'right generally to resist enforced medication,' the right to be 'free from medical invasion,' and the right to an abortion," but "*not* to guarantee . . . a right to minimum levels of safety" or protection from contaminated water. *Id.* at *7 (citations omitted).

Here, as in *Branch*, government officials allegedly exposed others to water contaminated with lead. And here, as in *Branch*, certain government officials allegedly attempted to hide the lead contamination. The *Branch* court could find no authority indicating that such conduct violated a substantive due process right—not even the Supreme Court's bodily integrity cases were close to on point. That court's conclusion shows how unclear it would have been for the regulators and policymakers in this case to have anticipated that their actions might have violated an established bodily integrity right.

Coshow v. City of Escondido, a state court case, also sheds light on the novelty of plaintiffs' asserted right. 132 Cal. App. 4th 687 (Cal. Ct. App. 2005). There, the California Court of Appeals rejected residents'

bodily integrity claims against the City of Escondido and California's Department of Health Services over their decision to add fluoride to public drinking water. *Id.* at 698. The residents asserted that adding fluoride to the water exposed the public to unnecessary health risks. *Id.* But the court held that, just as the Constitution did not guarantee any "right to a healthful or contaminate-free environment," it likewise did not guarantee a right to receive fluoride-free drinking water from the City. *Id.* at 709–10. This was so even though the fluoride might have contained "trace levels of lead and arsenic[.]" *Id.* at 700. The court reasoned that the residents' claim came down to an asserted right to receive "public drinking water of a certain quality." *Id.* at 708–09. And it held that the "mere novelty" of that claim indicated it was not "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 751 (1987)). Accordingly, the court held that the right to fluoride-free drinking water was not protected by substantive due process. *Id.*

Just as in *Coshow*, the novelty of plaintiffs' claim here shows that it is not clearly established. The majority attempts to draw a disingenuous distinction between this case and *Coshow.* It reasons that, in *Coshow*, adding fluoride to drinking water served the beneficial purpose of preventing tooth decay while, in this case, adding lead to water served no countervailing governmental interest. I certainly do not quibble with the premise that adding lead to water furthers no discernable beneficial purpose. But that is not what

happened here. No government official made a conscious decision to introduce lead into Flint's water. Instead, the Emergency Managers made a conscious and legitimate policy decision to switch to the Flint River as a water source to cut costs—and they did so in reliance on guidance from engineering firms and the MDEQ. That hardly demonstrates that the decision to switch to the Flint River was made with no countervailing governmental interest in mind. The government officials' resource-allocation decisions during a budgetary crisis did not constitute obvious violations of the right to bodily integrity because of the grave health consequences they allegedly caused in hindsight.

Moreover, that some governmental officials made public statements about the safety of Flint's water does not make the unlawfulness of any defendant's conduct any more obvious. As the Second Circuit put it, "no court has ever held a government official liable for denying substantive due process by issuing press releases or making public statements"—regardless of whether the public statements were true or false. *Benzman v. Whitman*, 523 F.3d 119, 125, 127 (2d Cir. 2008) (rejecting residents' substantive due process claims against EPA officials for making "substantially exaggerated" statements regarding air quality after the September 11 terrorist attacks). *Benzman* invoked the principles underlying a similar post-September-11 case, *Lombardi v. Whitman*, 485 F.3d 73 (2d Cir. 2007). In *Lombardi*, workers who performed search, rescue, and cleanup services at the World Trade Center site in

the aftermath of the terrorist attacks alleged that the EPA violated their right to bodily integrity by falsely assuring them that it would be safe to work without respiratory protection. *Id.* at 74. Relying on those assurances, several workers went without that protection and later suffered adverse health effects. *Id.* at 75. Without definitively deciding whether the alleged false assurances interfered with the workers' fundamental right to bodily integrity, the court found that they were nevertheless not conscience-shocking. *Id.* at 82–83. In so deciding, the court expressed concern with imposing broad constitutional liability on EPA officials for making false statements in the course of fulfilling the agency's mission. The court reasoned that "the risk of such liability will tend to inhibit EPA officials in making difficult decisions about how to disseminate information to the public in an environmental emergency." *Id.* at 84. Accordingly, absent any allegation of an intent to harm, the court declined to extend substantive due process to cover what was "in essence a mass tort for making inaccurate statements." *Benzman*, 523 F.3d at 127–28.

This case implicates similar, albeit not identical, concerns to those invoked in *Lombardi* and *Benzman*. As the majority points out, there is no allegation that any defendant here intended to harm a Flint resident. And like the EPA regulators in *Lombardi* and *Benzman*, Wurfel made public statements pursuant to his official role as MDEQ's Director of Communications. To be sure, those statements countered evidence about Flint water's lead levels presented in two

separate outside studies. But they were also consistent with information provided to Wurfel by officials from his own department. That information was, in retrospect, misguided. Plaintiffs do not assert, however, that Wurfel made any knowingly false statements for the purpose of causing harm. The same goes for Croft. When he issued a press release asserting that Flint's water was of a "high quality," at least one engineering firm and the MDEQ had concluded that the water treatment plant was capable of adequately treating Flint's water. In other words, the allegations do not show that Croft made a knowingly false public statement for the purpose of causing harm. Given the absence of any such allegation, and because no court has ever concluded that the Due Process Clause covers the public statements of government officials, it can hardly have been apparent to Wurfel or Croft that their statements clearly violated plaintiffs' due process right to bodily integrity.

Due to the lack of controlling precedent and the many cases suggesting substantive due process does not protect plaintiffs' asserted right, the majority again falls back on its exaggerated characterization of defendant's actions and statements, likening them to the "systematic" poisoning of an entire community. Advancing that narrative, the majority concludes that this case is one of the "easy" ones that should never have arisen in the first place. *See United States v. Lanier*, 520 U.S. 259, 271 (1997). "Of course, in an obvious case, [general] standards," (or reasoning) "can 'clearly establish' the answer, even without a body of relevant

case law." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (citation omitted). But this is not one of those cases. As already demonstrated, the majority's systematic poisoning narrative has no basis in plaintiffs' factual allegations.[7] This is not a case about a government official knowingly and intentionally introducing a known contaminant into another's body without that person's consent. It is a case about a series of erroneous and unfortunate policy and regulatory decisions and statements that, taken together, allegedly caused plaintiffs to be exposed to contaminated water.

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[7] What is more, the majority's exaggerated narrative runs contrary to what is publicly known in the aftermath of the Flint Water Crisis. For instance, plaintiffs point out that the state has brought criminal charges against various defendants and ask us to take judicial notice of those charges as providing context for their bodily integrity claim. Of course, I agree with the majority that it is inappropriate to consider those charges for the purpose of deciding plaintiffs' constitutional claim. But I note that even if it were appropriate to consider them, the charges would not support plaintiffs' assertion that defendants' conduct is so obviously unlawful that qualified immunity does not shield them from plaintiffs § 1983 suit. In fact, they prove just the opposite. If the defendants' actions are obviously unlawful, then one would expect relatively speedy probable-cause determinations. Reality suggests otherwise. Consider this: the state issued its complaint against Lyon on June 14, 2017, but the court did not find probable cause to bind him over for trial until August 24, 2018. In the meantime, the trial judge spent around 11 months on preliminary examinations just to find probable cause existed. Other defendants, such as MDEQ Employee Shekter-Smith and MDHHS Executive Peeler, have not even been bound over yet, despite the state filing complaints against them as early as July 2016. These cases have languished unusually long in probable cause proceedings. That alone suggests that the egregiousness of defendants' actions is not so apparent as the majority makes it out to be.

The proper framing of the factual narrative exposes how far off base are the bodily integrity cases relied upon by the majority. How could those cases have provided any practical guidance to government officials like Earley, Ambrose, Croft, or the MDEQ employees? For instance, how should *Rochin*'s prohibition against induced vomiting to obtain evidence have informed Earley's oversight of the switch from the DWSD to the Flint River and what professional opinions he was entitled to rely upon when the City made the switch? And how should it have informed Ambrose's decision to continue using the Flint River as a water source and what professional opinions he was entitled to rely upon in doing so? What about the MDEQ employees? How should *Riggins*'s limits on the state's ability to administer antipsychotic drugs to pretrial detainees have changed what kind of advice the MDEQ employees gave the City about federal corrosion-control requirements? Or what about the fact that *Cruzan* allows a state to demand clear and convincing evidence that an incompetent patient no longer desires life support before cutting it off? How should that have influenced the content of Wurfel's (or any other defendant's) public statements about the water's quality? The answer to these questions is—clearly—not established.

And although the right plaintiffs allege is not established, various courts have certainly considered it—and rejected it. *See Branch*, 2018 WL 337751; *Coshow*, 132 Cal. App. 4th 687; *Benzman*, 523 F.3d 119;

Lombardi, 485 F.3d 73.[8] But ignoring those cases, the majority turns, curiously, to a few federal and state cases arising from the Flint Water Crisis itself. The majority begins its opinion with the proclamation that it joins a few decisions concluding that some of these same defendants, and some others, violated various Flint residents' substantive due process rights. Those cases offer weak support for the majority's position. Oddly, one of the decisions it cites is the very case before us on appeal, *Guertin v. Michigan*, 2017 WL 2418007 (E.D. Mich. June 4, 2017). The second is

[8] The number of cases rejecting similar environmentally based claims is significant. *See Kaucher v. Cty. of Bucks*, 455 F.3d 418, 420, 428–30 (3d Cir. 2006) (rejecting a substantive-due-process claim by corrections officials who contracted a disease allegedly due to the jail's unsanitary conditions and provision of false and misleading information about the extent of the sanitary problem); *Walker v. City of E. Chicago*, No. 2:16-cv-367, 2017 WL 4340259, at *6 (N.D. Ind. Sept. 29, 2017) (rejecting a substantive-due-process claim that the government allowed a housing authority to "build and operate public housing in an area with contaminated soil, thus increasing their risk of injury"); *In re Camp Lejeune N. Carolina Water Contamination Litig.*, 263 F. Supp. 3d 1318, 1325, 1359 (N.D. Ga. 2016) (rejecting a substantive-due-process claim by service members against government officials at the Marine base where they lived based on the officials' failure to monitor water quality and notify service members of the presence of toxic substances in the water); *Naperville Smart Meter Awareness v. City of Naperville*, 69 F. Supp. 3d 830, 839 (N.D. Ill. 2014) (rejecting a substantive-due-process claim by residents of a city asserting that radio frequency waves emitted by "smart meters" that the city installed in their homes posed health risks); *J.S. ex rel. Simpson v. Thorsen*, 766 F. Supp. 2d 695, 712 (E.D. Va. 2011) (rejecting a substantive-due-process claim brought by an elementary student that school officials knowingly concealed the school's mold problems to the detriment of the student's health).

authored by the same judge as authored *Guertin*, and its bodily integrity analysis block-quotes more than 2,000 words from the *Guertin* analysis. *In re Flint Water Cases*, 329 F. Supp. 3d 369, 397–400 (E.D. Mich. 2018), *vacated on other grounds* (Nov. 9, 2018). And that case appears to follow the same analytical errors as the state case to come before it—that is, just like the state case, it makes several logical leaps to conclude that policy and regulatory decisions and statements are on par with an intentional introduction of a contaminant into another's body. *Mays v. Snyder*, 916 N.W.2d 227 (Mich. Ct. App. 2018); *Mays v. Snyder*, No. 16-000017-MM (Mich. Ct. Cl. Oct. 26, 2016). These few cases and their redundant analyses provide a weak foundation on which to build a new bodily integrity jurisprudence.

In sum, the majority's opinion is a broad expansion of substantive due process, which contradicts the traditional understanding that due process does not "supplant traditional tort law" or impose a duty on the government to ensure environmental safety. *Collins*, 503 U.S. at 126 (citation omitted). What is more, it effectively "convert[s] the rule of qualified immunity . . . into a rule of virtually unqualified liability" for government officials making policy or regulatory decisions or statements that have any effect on a publicly consumed environmental resource. *White*, 137 S. Ct. at 552 (ellipses in original) (citation omitted). That turns qualified immunity on its head.

IV

The majority's conclusion that the defendants violated plaintiffs' clearly established right to bodily integrity has some facial appeal, of course, because we sympathize with the Flint residents' plight. It is wrong, however, on both the facts and the law. For all of the above reasons, I join the majority in its denial of sovereign immunity to the City of Flint and in dismissing various defendants from the case. But I dissent from its denial of qualified immunity to Earley, Ambrose, Croft, Shekter-Smith, Busch, Prysby, and Wurfel.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 17-1698/1699/1745/1752/1769

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

Plaintiffs - Appellees,

v.

STATE OF MICHIGAN, et al.,

Defendants,

CITY OF FLINT, MICHIGAN, HOWARD CROFT, DARNELL EARLEY, and GERALD AMBROSE (17-1699); LIANE SHEKTER-SMITH, DANIEL WYANT, STEPHEN BUSCH, MICHAEL PRYSBY, and BRADLEY WURFEL (17-1745); NANCY PEELER (17-1752); ROBERT SCOTT (17-1769); EDEN WELLS and NICK LYON (17-1698),

Defendants - Appellees.

Before: McKEAGUE, GRIFFIN, and WHITE, Circuit Judges.

JUDGMENT

(Filed Jan. 4, 2019)

On Appeal from the United States District Court
for the Eastern District of Michigan at Ann Arbor.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED IN PART and REVERSED IN PART.

ENTERED BY ORDER OF THE COURT

/s/ Deb S. Hunt
Deborah S. Hut, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Shari Guertin, Shari Guertin as next friend of her child, E.B., a minor, and Diogenes Muse-Cleveland,

Plaintiffs,

v.

State of Michigan, Richard Snyder, Michigan Department of Environmental Quality, Michigan Department of Health and Human Services, City of Flint, Howard Croft, Michael Glasgow, Darnell Earley, Gerald Ambrose, Liane Scheckter-Smith, Daniel Wyant, Stephen Busch, Patrick Cook, Michael Prysby, Bradley Wurfel, Eden Wells, Nick Lyon, Nancy Peeler, Robert Scott, Veolia North America, LLC, and Lockwood, Andrews & Newman, Inc.,

Defendants. /

Case No. 16-cv-12412

Judith E. Levy
United States District Judge

Mag. Judge Mona K. Majzoub

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS [50, 52, 59, 69, 70, 96, 102, 103, 105]

(Filed Jun. 5, 2017)

This is a Flint water case. Plaintiffs Shari Guertin, her minor child E. B., and Diogenes Muse-Cleveland allege that at all relevant times they were residents of Flint, Michigan, where defendants caused the lead in the potable water to rise to dangerous levels and then actively concealed it from residents, causing plaintiffs harm when they consumed and bathed in the water over an extended period of time. Defendants filed motions to dismiss, and the Court held a hearing on March 27, 2017. For the reasons set forth below, each motion is granted in part and denied in part.

I. Background

Plaintiffs are residents of Flint, Michigan, and allege that defendants are legally responsible for harm that was caused when plaintiffs drank and bathed in water that was contaminated with dangerous levels of lead. (Dkt. 1 at 4-5.)[1] Defendants' main challenges to plaintiffs' complaint are under Rule 12(b)(1) as a facial challenge to subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim, so the following background is drawn from the complaint in the

[1] Plaintiffs clarified at the hearing on the motions to dismiss that paragraph sixteen of the complaint applies to plaintiff Diogenes Muse-Cleveland. (*See* Dkt. 1 at 5.)

light most favorable to plaintiffs and accepting all allegations as true. *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012); *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994).

a. The defendants

Defendant City of Flint is where the relevant harms occurred, and its officials made some of the decisions that ultimately led to plaintiffs' harms. (Dkt. 1 at 5.) Defendant Darnell Earley, Flint's Emergency Manager from November 1, 2013, through January 12, 2015, made the decision "to rush the distribution of water from the Flint River without proper treatment, including corrosion control." (*Id.*) Defendant Earley made the decision to switch to Flint River water and made false and misleading statements representing that the water was safe to drink, even after he became aware that it was not. (*Id.* at 7-8.)

Defendant Howard Croft, Flint's Department of Public Works Director, and defendant Michael Glasgow, a water treatment plant operator for Flint, knew that Flint's water treatment plant was inadequate, and nonetheless caused and allowed unsafe water to be delivered to Flint's residents and did not disclose that Flint's water was unsafe. (*Id.* at 6-7.) Defendant Croft also made a number of false statements about the safety and quality of Flint's water that he knew to be untrue. (*Id.* at 6.)

Defendant State of Michigan directs, controls, and operates defendants Michigan Department of Environmental Quality ("MDEQ") and Michigan Department

of Health and Human Services ("MDHHS"). (*Id.* at 7.) Defendant Richard Snyder, as Governor of Michigan, participated in, directed, and facilitated the state's decision to transition Flint's water source to the Flint River, and participated in, directed, and facilitated the state's insufficient response to protect plaintiffs from defendant State of Michigan's actions. (*Id.*)

Defendant Gerald Ambrose, Flint's Emergency Manager from January 13, 2015, until April 28, 2015, and a financial advisor regarding Flint's financial emergency from January 2012 until December 2014, was involved in and directed the state's decision to transition Flint to Flint River water, and made false and misleading statements representing that the water was safe to drink. (*Id.* at 7-8.)

Defendant MDEQ is the state agency responsible for implementing safe drinking water laws, rules, and regulations in Michigan. Defendant MDEQ, through its employees, violated the federal Lead and Copper Rule by failing to require corrosion control for Flint River water, misled the federal Environmental Protection Agency ("EPA"), conducted illegal and improper sampling of Flint's water, lied to the public about the safety of Flint's water, and attempted to publicly discredit outside individuals who offered independent evidence of the water's contamination. (*Id.* at 8-9.) These defendants ignored voluminous evidence of the crisis they had created until the point when their denials could no longer withstand outside scrutiny. (*Id.* at 9.)

Defendant Liane Shekter Smith,[2] Chief of the Office of Drinking Water and Municipal Assistance for MDEQ until she was removed from her position on October 19, 2015, knowingly participated in, approved of, and caused the decision to transition to Flint River water, and knowingly disseminated false statements to the public that the water was safe to drink, leading to the continued consumption of lead-contaminated water. (*Id.*)

Defendant Daniel Wyant, the Director of MDEQ until his resignation on or about December 29, 2015, participated in, directed, and oversaw defendant MDEQ's repeated violations of federal water quality laws, failure to properly study and treat Flint River water, and defendant MDEQ's systemic denial, lies, and attempts to discredit outside observers who were publicly reporting that the water in Flint contained dangerous levels of lead. (*Id.*) He knowingly disseminated false statements to the public that led to the continued consumption of lead-contaminated water. (*Id.* at 9-10.)

Defendant Stephen Busch, the District Supervisor assigned to the Lansing District Office of defendant MDEQ, participated in MDEQ's repeated violations of federal water quality laws, the failure to properly study and treat Flint River water, and defendant MDEQ's program of systemic denials, lies, and attempts to discredit honest outsiders. (*Id.* at 10.) He

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[2] Plaintiffs incorrectly spelled defendant Liane Shekter Smith's name as "Liane Sheckter-Smith" in the case caption, but the Court uses the correct spelling of her name in this opinion and order.

personally falsely reported to the EPA that Flint had enacted an optimized corrosion control plan and provided assurances to plaintiffs that the water was safe to drink when he knew that such assurances were false. (*Id.*)

Defendant Patrick Cook, the Water Treatment Specialist assigned to the Lansing Community Drinking Water Unit of defendant MDEQ, participated in, approved, and assented to the decision to allow Flint's water to be delivered to residents without corrosion control or proper study or testing. (*Id.* at 10-11.)

Defendant Michael Prysby, the Engineer assigned to District 11 (Genesee County) of MDEQ, participated in, approved, and assented to the decision to switch the water source, failed to properly monitor or test the Flint River water, and provided assurances to plaintiffs that the Flint River water was safe when he knew those statements to be untrue. (*Id.* at 11.)

Defendant Bradley Wurfel, the Director of Communications for MDEQ until he resigned on December 29, 2015, repeatedly denied the water situation as it unfolded and attempted to discredit opposing opinions. (*Id.* at 11-12.) He repeatedly made public statements that created, increased, and prolonged the risks and harms facing plaintiffs, which he knew were false. (*Id.* at 12.) He was eventually relieved of his duties for his "persistent [negative] tone and derision" and his "aggressive dismissal, belittlement and attempts to discredit the individuals involved in [conducting independent studies and tests]." (*Id.*)

Defendant MDHHS, through decision-making employees, deliberately hid information that would have revealed the public health crisis in Flint, which MDHHS had earlier failed to detect. (*Id.*) MDHHS's failure to properly analyze data led it to conclude that there was no increase in lead contamination in Flint's children, and MDHHS resisted and obstructed the efforts of outside researchers and the county health department to determine whether that was actually true and correct. (*Id.*)

Defendants Eden Wells, Chief Medical Executive within the Population Health and Community Services Department of MDHHS, Nick Lyon, Director of MDHHS, and Nancy Peeler, an MDHHS employee in charge of its childhood lead poisoning prevention program, participated in, directed, and oversaw the Department's efforts to hide information to save face and to obstruct the efforts of outside researchers. (*Id.* at 12-13.) Defendants Wells and Lyon knew as early as 2014 of problems with lead and legionella contamination in Flint's water and participated in hiding this information. (*Id.* at 12-13.) And defendant Peeler continued to try to generate evidence that there was no lead contamination problem even when her own Department had data that verified outside evidence to the contrary. (*Id.* at 13.)

Defendant Robert Scott, at all relevant times Data Manager for MDHHS's Healthy Homes and Lead Prevention Program, also participated in, directed, and oversaw the Department's efforts to hide information to save face and actively sought to obstruct and

discredit the efforts of outside researchers. (*Id.* at 14.) And he continued to try to generate evidence that there was no lead contamination problem even when his own Department had data that verified outside evidence to the contrary. (*Id.*) He served a key role in withholding and delaying disclosure of data that outside researchers needed to conduct independent research. (*Id.*)

Defendant Veolia North America, LLC, a Delaware corporation with its principal office in Illinois, provided negligent professional engineering services in reviewing Flint's water system and declaring the water safe to drink. (*Id.* at 14-15.) Defendant Lockwood, Andrews & Newnam, Inc., a Texas corporation with its principal office in Texas, provided negligent professional engineering services in preparing Flint's water treatment facility to treat water from the Flint River. (*Id.* at 15.)

b. The events

Under the federal Safe Drinking Water Act, the EPA is responsible for setting rules regulating drinking water, including the Lead and Copper Rule. (*Id.*) Put simply, the law requires sampling of public water systems, and when results indicate that lead is present at levels that exceed the lead action level set in the Lead and Copper Rule, water systems are required to notify the public, the state, and the EPA of the lead action level "exceedance." When the levels have the potential to cause serious adverse health effects from short-term exposure, the water system must issue the

notifications within twenty-four hours. *See* 42 U.S.C. § 300g-3(c)(2)(C); 40 C.F.R. § 141.80(c).

In 2010, the EPA commissioned a report noting, among other things, that defendant MDEQ's practice of calculating the amount of lead in water "does not meet the requirements of Federal Regulations, since it is required that all 90th percentiles be calculated," something MDEQ would not do unless a potential violation had been identified. (Dkt. 1 at 18.) The report also noted that MDEQ did not conduct the required number of water samples for lead. (*Id.*) Defendant MDEQ also violated "the letter and spirit" of the Lead and Copper Rule by failing to require corrosion control for Flint River water and by misinforming the EPA about whether corrosion control was being utilized. (*Id.* at 19.) MDEQ's former director "explicitly admitted" that the state agency did not follow the rule. (*Id.* at 20.)

In November 2012, Flint's Emergency Manager suggested joining the Karegnondi Water Authority to save costs. (*Id.*) On March 7, 2014, defendant Earley sent a letter to the Detroit Water and Sewerage Department from which Flint had been receiving its water supply, stating "[w]e expect that the Flint Water Treatment Plant will be fully operational and capable of treating Flint River water prior to the date of termination. In that case, there will be no need for Flint to continue purchasing water to serve its residents and businesses after April 17, 2014." (*Id.* at 21.) On March 26, 2014, defendant Busch e-mailed defendant Shekter Smith and another colleague stating that starting up the Flint plant "for continuous operation will carry

significant changes in regulatory requirements so there is a very gray area as to what we consider for startup." (*Id.* at 22.)

However, defendant Glasgow informed defendant MDEQ on April 17, 2014, that he "assumed there would be dramatic changes to [MDEQ's] monitoring" and did "not anticipate giving the OK to begin sending water out anytime soon. If water is distributed from this plant in the next couple of weeks, it w[ould] be against [his] direction. [He] need[ed] time to adequately train additional staff and to update [MDEQ's] monitoring plans before [he would] feel [MDEQ was] ready." (*Id.* at 22.) According to Glasgow, "management above" seemed "to have their own agenda." (*Id.*)

On April 25, 2014, Flint officially began using the Flint River as its primary water source, despite the fact that the proper preparations had not been made and defendant Glasgow's clear warning to the contrary. (*Id.* at 23.) Defendant Croft stated in a press release that "[t]he test results have shown that our water is not only safe, but of the high quality that Flint customers have come to expect." (*Id.*)

When Flint was receiving its water from the Detroit Water and Sewerage Department, it was already treated to prevent corrosion, but the water from the Flint River was not. (*Id.* at 24.) Defendant Lockwood was hired to make Flint's plant sufficient to treat water from its new source. (*Id.*) Defendants State of Michigan, MDEQ, and Lockwood did not implement any corrosion control for the new water source, which it

required due to the lead pipes in Flint's water system. (*Id.* at 24-26.) Defendants were put on notice that this was an issue when residents of Flint began complaining almost immediately about discoloration and odor, among other things. (*Id.* at 26.)

In August and September 2014, Flint issued two boil-water advisories after fecal coliform bacteria was discovered in the water. (*Id.* at 27.) On October 13, 2014, General Motors ceased using Flint River water at its engine plant because the company determined that high levels of chloride would corrode its car parts. Discussing General Motors' decision, defendant Prysby wrote to defendants Busch, Shekter Smith, and others that the Flint River water had elevated chloride levels that "although not optimal" were "satisfactory." (*Id.* at 28.) He "stressed the importance of not branding Flint's water as 'corrosive' from a public health standpoint simply because it does not meet a manufacturing facility's limit for production." (*Id.*)

In October of 2014, defendant Snyder received a briefing in which officials blamed iron pipes, susceptible to corrosion and bacteria, for the two boil-water advisories. (*Id.*) On January 2, 2015, Flint mailed a notice to its water customers indicating that the city had been in violation of the Safe Drinking Water Act due to the presence of trihalomethanes, which was a result of attempts to disinfect the water. (*Id.*) And on January 9, 2015, the University of Michigan-Flint discovered lead in the water coming out of campus drinking fountains. (*Id.*)

As early as January 2015, defendant State of Michigan began providing purified water coolers at its Flint offices for state employees in response to concerns about the drinking water, while government officials, including many defendants, continued to tell Flint residents that the water was safe to drink. (*Id.*) On January 12, 2015, the Detroit Water and Sewerage Department offered to waive a four-million dollar reconnection fee to transition Flint back to water provided by the Detroit Water and Sewerage Department. Defendant Ambrose, as Emergency Manager, declined the offer. (*Id.*)

On January 29, 2015, defendant Shekter Smith emailed MDEQ deputy director Jim Sygo that a "change in water chemistry can sometimes cause more corrosive water to slough material off of pipes as opposed to depositing material or coating pipes in the distribution system," and that this "may continue for a while until things stabilize." (*Id.* at 29.) She noted that because "it appears wide-spread, it's most likely a distribution system problem." (*Id.*)

On February 6, 2015, an Emergency Manager staff member wrote to defendant Prysby, asking whether he knew if defendant MDEQ had ever conducted a "source water assessment" for the Flint River. (*Id.*) After an initial response stating that he did not know, Prysby later responded that a study on the Flint River as an emergency intake had been conducted in 2004. The 2004 study noted that the Flint River was a highly sensitive drinking water source susceptible to contamination. (*Id.*)

On February 27, 2015, in response to concerns about dangerously high levels of lead in a resident's water sample, defendant Busch told the EPA on behalf of defendant MDEQ that the Flint Water Treatment Plant had an optimized corrosion control program, despite knowing it did not. (*Id.*) In an email to defendants Prysby and Busch, the EPA's regional drinking water regulations manager Miguel Del Toral noted high levels of particulate lead in the water sample, and inquired about optimized corrosion control. (*Id.* at 30.) He relayed that defendant MDEQ's testing method—flushing the line before compliance sampling—impermissibly skewed the test results to show fewer lead particles than were generally present. (*Id.*)

During this time, an email from an employee in defendant MDEQ noted that the switch to the Flint River "put the city in the business of water production, where they had historically been in the business of water transmission," stating that "once the city connects to the new KWA system in 2016, this issue w[ould] fade into the rearview." (*Id.* at 31.) Also during this time, defendant Veolia was hired to review Flint's public water system, including treatment processes, maintenance procedures, and actions taken. (*Id.*) Veolia issued an interim report on February 18, 2015, stating that Flint's water was "in compliance with drinking water standards," and noting that "[s]afe [meant] complian[t] with state and federal standards and required testing." (*Id.*) Veolia dismissed medical concerns by stating that "[s]ome people may be sensitive to any water." (*Id.* at 32.)

Defendant Veolia issued its final report on March 12, 2015, stating that "a review of water quality records for the time period under our study indicates compliance with State and Federal water quality regulations." (*Id.*) Veolia recommended that adding polyphosphate to the water would minimize discoloration. (*Id.*)

On April 24, 2015, defendant MDEQ stated to the EPA that Flint did not have optimized corrosion control in place, contradicting MDEQ's previous statement made two months prior. (*Id.* at 33.) That same month, EPA regional drinking water manager Del Toral issued a memorandum to the MDEQ, stating:

> I wanted to follow up on this because Flint has essentially not been using any corrosion control treatment since April 30, 2014, and they have (lead service lines). Given the very high lead levels found at one home and the pre-flushing happening in Flint, I'm worried that the whole town may have much higher lead levels than the compliance results indicated, since they are using pre-flushing ahead of their compliance sampling.

(*Id.* at 34.) On May 1, 2015, defendant Cook responded that "[a]s Flint will be switching raw water sources in just over one year from now, raw water quality will be completely different than what they currently use. Requiring a study at the current time will be of little to no value in the long term control of these chronic contaminants." (*Id.* at 35.)

On June 24, 2015, Del Toral sent a memorandum to the chief of the EPA's Region 5 Ground Water and Drinking Water Branch, and included on the email defendants Shekter Smith, Cook, Busch, and Prysby. (*Id.* at 35-36.) He expressed concern at the lead levels and lack of mitigating treatment, detailing Lee-Anne Walters' experience. Walters had contacted the EPA with the lead-level results in her potable water, which defendant MDEQ had told her was coming from the plumbing in her own home. (*Id.* at 36.) Del Toral's inspection revealed that her plumbing was entirely plastic and noted that blood tests showed her child had elevated blood lead levels. (*Id.*)

On July 9, 2015, ACLU-Michigan reporter Curt Guyette publicly broke the story about lead in Flint's drinking water, citing Del Toral's Memorandum and exposing the lack of corrosion control in Flint's drinking water. Defendant Wurfel responded: "Let me start here—anyone who is concerned about lead in the drinking water in Flint can relax." (*Id.* at 38.)

On August 27, 2015, Virginia Tech Professor Marc Edwards released an analysis of lead levels in homes he sampled in Flint. More than half of the samples came back above 5 parts-per-billion, and more than 30% of them came back over 15 ppb, which would be unacceptable even at the 90th percentile. (*Id.* at 40-41.) In September 2015, Professor Edwards published a report of his findings. (*Id.* at 42-43.) Defendant Wurfel made a number of statements to qualify, distinguish, or otherwise downplay these results. (*Id.* at 41-42, 43-44.)

On September 17, 2015, defendant Wyant wrote a letter in response to an inquiry from various legislators, stating that "the MDEQ does not review or receive draft memos from the USEPA, nor would we expect to while it is a draft," despite the memorandum it had received months earlier from Del Toral. (*Id.* at 46.) On September 23, 2015, defendant Croft sent an email to numerous officials stating that "Flint has officially returned to compliance with the Michigan Safe Drinking Water Act," recent "testing has raised questions regarding the amount of lead that is being found in the water," and "over one hundred and sixty lead tests [have been performed] throughout the city since switching over to the Flint River and remain within EPA standards." (*Id.*)

On July 28, 2015, MDHHS epidemiologist Cristin Larder emailed defendant Peeler and MDHHS employee Patricia McKane, noting an increase in blood lead levels in Flint residents just after the switch and concluding that the issue "warrant[ed] further investigation." (*Id.* at 48.) Defendant Peeler responded by attributing the increase to seasonal variation. (*Id.*)

On September 24, 2015, Dr. Hanna-Attisha presented the results from her study at a press conference, which showed post-water transition elevation of blood-lead levels in Flint children. (*Id.* at 50.) MDHHS employees "were uniformly dismissive of Dr. Hanna-Attisha's results." (*Id.*) But the day after Dr. Hanna-Attisha released her study, the City of Flint issued a health advisory, telling residents to flush pipes and install filters to prevent lead poisoning. (*Id.* at 51.)

On September 28, 2015, defendant Wurfel publicly stated that he "wouldn't call [Dr. Hanna-Attisha's statements] irresponsible. [He] would call them unfortunate." And he again declared Flint's water safe to drink. (*Id.* at 53.) The same day, defendant Lyon stated that he "would like to make a strong statement with a demonstration of proof that the lead blood levels seen are not out of the ordinary and are attributable to seasonal fluctuations." (*Id.* at 54.)

Plaintiffs cite numerous inter- and intra-department communications, alleging they show attempts to cover up the issue. (*Id.* at 54-58.) By October 12, 2015, defendant Snyder received a proposal to reconnect Flint to the Detroit Water and Sewerage Department. And on October 16, 2015, Flint reconnected to the Detroit Water and Sewerage Department. This did not change the corrosion that had already occurred, and lead has continued to leach from pipes into the water. (*Id.* at 58.)

On October 18, 2015, defendant Wyant stated to defendant Snyder:

> [S]taff made a mistake while working with the City of Flint. Simply stated, staff employed a federal (corrosion control) treatment protocol they believed was appropriate, and it was not. . . . I believe now we made a mistake. For communities with a population above 50,000, optimized corrosion control should have been required from the beginning. Because of what I have learned, I will be announcing a

> change in leadership in our drinking water program.

(*Id.* at 58-59.)

On October 21, 2015, defendant Snyder appointed a task force to investigate the Flint water crisis. (*Id.* at 59.) On December 29, 2015, the task force issued a letter detailing its findings: "Although many individuals and entities at state and local levels contributed to creating and prolonging the problem," the "primary responsibility for what happened in Flint rests with the [MDEQ]. . . . It failed in that responsibility and must be held accountable for that failure." (*Id.* at 59-60.) Among other things, the task force found that "the agency's response was often one of aggressive dismissal, belittlement, and attempts to discredit [outside, independent] efforts and the individuals involved," and "the MDEQ seems to have been more determined to discredit the work of others—who ultimately proved to be right—than to pursue its own oversight responsibility." (*Id.* at 60.) The task force stated "we are particularly concerned by recent revelations of MDHHS's apparent early knowledge of, yet silence about, elevated blood lead levels detected among Flint's children." (*Id.* at 61.)

In October 2015, defendant Shekter Smith was reassigned so as to have no continued oversight responsibility regarding Flint's drinking water. On December 5, 2015, the City of Flint declared a state of emergency. On December 23, 2015, the Michigan Auditor General provided an investigative report on the crisis, finding

that corrosion control should have been maintained from the beginning and that improper sample sites had been selected by defendant MDEQ. On December 30, 2015, defendants Wyant and Wurfel resigned. (*Id.*) On January 4, 2016, Genesee County declared its own state of emergency. (*Id.* at 62.)

On January 21, 2016, Susan Hedman, former EPA Region 5 Administrator, resigned over her involvement in the Flint Water crisis.[3] That same day, the EPA issued an Emergency Order, based on its finding that "the City of Flint's and the State of Michigan's responses to the drinking water crisis in Flint have been inadequate to protect public health and that these failures continue." (*Id.* at 62.) At one of the several hearings conducted before the U.S. Congress, the EPA Deputy Assistant Administrator testified:

> [Defendant] MDEQ incorrectly advised the City of Flint that corrosion-control treatment was not necessary, resulting in leaching of lead into the city's drinking water. . . . EPA regional staff urged MDEQ to address the lack of corrosion control, but was met with resistance. The delays in implementing the

[3] In paragraph forty-three, plaintiffs state that Hedman could not yet be named as a defendant pursuant to the Federal Tort Claims Act, but that if their anticipated FTCA claims to the EPA were rejected, they might seek to amend their complaint in order to add claims against Hedman. (Dkt. 1 at 14.) Plaintiffs clarified at the hearing that this was a drafting mistake; plaintiffs have not filed an FTCA administrative claim, and they have otherwise taken no action to bring suit against Hedman, nor do they intend to.

> actions needed to treat the drinking water and in informing the public of ongoing health risks raise very serious concerns.

(*Id.* at 64.)

On January 22, 2016, defendants Shekter Smith and Busch were suspended without pay. Defendant Shekter Smith's firing was announced on February 5, 2016. (*Id.* at 63.)

c. Plaintiffs' claims

Plaintiffs bring fifteen claims. In Count 1—against defendants City of Flint, Croft, Glasgow, State of Michigan, Snyder, Earley, Ambrose, MDEQ, Shekter Smith, Wyant, Busch, Cook, Prysby, and Wurfel—plaintiffs bring a 42 U.S.C. § 1983 claim, alleging a deprivation of a contractually created property right in violation of substantive due process. According to plaintiffs, these defendants violated their property right "when, ceasing to provide [p]laintiffs with safe, potable water, they provided [p]laintiffs with poisonous, contaminated water." (*Id.* at 64-65.)

In Count 2—against defendants City of Flint, Croft, Glasgow, State of Michigan, Snyder, Earley, Ambrose, MDEQ, Shekter Smith, Wyant, Busch, Cook, Prysby, and Wurfel—plaintiffs bring a § 1983 claim, alleging a deprivation of a contractually created property right in violation of procedural due process. According to plaintiffs, these defendants deprived them of their contractually based property right to purchase

and receive safe, potable drinking water without notice or a hearing. (*Id.* at 65-66.)

In Count 3—against defendants City of Flint, Croft, Glasgow, State of Michigan, Snyder, Earley, Ambrose, MDEQ, MDHHS, Shekter Smith, Wyant, Busch, Cook, Prysby, Wurfel, Wells, Peeler, Lyon, and Scott, *i.e.*, all defendants except Veolia and Lockwood—plaintiffs bring a § 1983 claim, alleging a state-created danger in violation of substantive due process. According to plaintiffs, these defendants each acted to expose them to toxic, lead-contaminated water by making, causing to be made, and/or causing or making representations that the water was safe to drink, and these actions and omissions were objectively unreasonable in light of the facts and circumstances confronting them, in violation of plaintiffs' Fourteenth Amendment rights. (*Id.* at 66-68.)

In Count 4—against defendants City of Flint, Croft, Glasgow, State of Michigan, Snyder, Earley, Ambrose, MDEQ, MDHHS, Shekter Smith, Wyant, Busch, Cook, Prysby, Wurfel, Wells, Peeler, Lyon, and Scott, *i.e.*, all defendants except Veolia and Lockwood—plaintiffs bring a § 1983 claim, alleging a violation of their substantive due process right to bodily integrity. According to plaintiffs, these defendants caused their harm by exposing them to lead-contaminated water and otherwise hiding the contamination from them, and as a result, plaintiffs suffered bodily harm and their rights to bodily integrity were violated. (*Id.* at 68-70.)

In Count 5—against defendants City of Flint and State of Michigan—plaintiffs allege a breach of contract. According to plaintiffs, these defendants offered to sell potable water, plaintiffs agreed to pay for potable water, and these defendants materially and irreparably breached the contract with plaintiffs by failing to provide potable, safe drinking water. (*Id.* at 70-71.)

In Count 6—against defendants City of Flint and State of Michigan—plaintiffs allege a breach of implied warranty. According to plaintiffs, these defendants directly promised to provide water that was fit for human consumption and/or impliedly promised that the water was fit for human consumption, and did not. (*Id.* at 71-72.)

In Count 7—against all defendants—plaintiffs allege a nuisance. According to plaintiffs, defendant caused foul, poisonous, lead-contaminated water to be delivered to their homes, resulting in the presence of contaminants in their properties and persons, and substantially and unreasonably interfering with their comfortable living and ability to use and enjoy their homes. (*Id.* at 72-73.)

In Count 8—against all defendants—plaintiffs allege a trespass. According to plaintiffs, defendants' negligent, grossly negligent, willful, and wanton conduct and failures to act caused contaminants to enter plaintiffs' property. (*Id.* at 74-75.)

In Count 9—against defendants City of Flint and State of Michigan—plaintiffs allege unjust enrichment. According to plaintiffs, these defendants received and

retained the benefits of the funds paid by plaintiffs for contaminated water that was and is unfit for human consumption. (*Id.* at 75.)

In Count 10, plaintiffs allege negligence/professional negligence/ gross negligence against defendant Veolia. According to plaintiffs, Veolia undertook, for consideration, to render services that it should have recognized as necessary for the protection of plaintiffs and their property, thus creating a duty to plaintiffs to exercise reasonable care to protect that undertaking; plaintiffs relied on Veolia to perform its duty; Veolia breached its duty; and plaintiffs were directly and proximately harmed by Veolia's breach. (*Id.* at 75-78.)

In Count 11, plaintiffs allege negligence/professional negligence/gross negligence against defendant Lockwood. According to plaintiffs, Lockwood undertook, for consideration, to render services that it should have recognized as necessary for the protection of plaintiffs and/or their property, thus creating a duty to plaintiffs to exercise reasonable care to protect that undertaking; plaintiffs relied on Lockwood to perform its duty; Lockwood breached its duty; and plaintiffs were directly and proximately harmed by Lockwood's breach. (*Id.* at 78-79.)

In Count 12—against defendants Snyder, Croft, Glasgow, Earley, Ambrose, Shekter Smith, Wyant, Busch, Cook, Prysby, Wurfel, Wells, Peeler, and Scott—plaintiffs allege gross negligence. According to plaintiffs, these defendants owed plaintiffs an independent

duty of care, breached the duty of care, and plaintiffs suffered harm. (*Id.* at 80-83.)

In Count 13—against defendants Snyder, Croft, Glasgow, Earley, Ambrose, Shekter Smith, Wyant, Busch, Cook, Prysby, Wurfel, Wells, Peeler, and Scott—plaintiffs allege intentional infliction of emotional distress. According to plaintiffs, these defendants' outrageous conduct was intentional and reckless, in conscious disregard for the rights and safety of plaintiffs, and caused, prolonged, and obscured plaintiffs' exposure to lead-contaminated water. (*Id.* at 82-83.)

In Count 14—against defendants Snyder, Croft, Glasgow, Earley, Ambrose, Shekter Smith, Wyant, Busch, Cook, Prysby, Wurfel, Wells, Peeler, and Scott—plaintiffs allege negligent infliction of emotional distress. According to plaintiffs, these defendants were in a special relationship to them, being charged with providing them safe water, the distress they caused from plaintiffs suffering and having to see family members suffer from lead exposure was highly foreseeable, and defendants' negligent acts caused plaintiffs and their loved ones harm. (*Id.* at 83-85.)

In Count 15—against defendants Snyder, Croft, Glasgow, Earley, Ambrose, Shekter Smith, Wyant, Busch, Cook, Prysby, Wurfel, Wells, Peeler, and Scott—plaintiffs allege that these defendants engaged in proprietary functions when selling potable water to plaintiffs, *i.e.*, to produce a pecuniary profit for the governmental agencies, not supported by taxes and fees,

and thus these defendants do not get governmental immunity. (*Id.* at 85-87.)

Plaintiffs seek an order declaring defendants' conduct unconstitutional; an order of equitable relief to remediate the harm caused by defendants' unconstitutional conduct including repairs to property, establishment of a medical monitoring fund, and appointing a monitor to oversee the water operations of Flint for a period of time deemed appropriate by the court; an order for an award for general damages; an order for an award of compensatory damages; an order for an award of punitive damages; an order for an award of actual reasonable attorney fees and litigation expenses; and an order for all such other relief the court deems equitable. (*Id.* at 88.)

II. Standard

a. Rule 12(b)(1)

"Motions to dismiss for lack of subject matter jurisdiction fall into two general categories: facial attacks and factual attacks." *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). Relevant here, "[a] facial attack is a challenge to the sufficiency of the pleading itself." *Id.* (emphasis in original). When considering a facial attack, "the court must take the material allegations of the [complaint] as true and construed in the light most favorable to the nonmoving party." *Id.*

To survive such an attack, "the plaintiff's burden to prove federal question subject matter jurisdiction is

not onerous." *Musson Theatrical, Inc. v. Fed. Express Corp.*, 89 F.3d 1244, 1248 (6th Cir. 1996) (citing *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996)). "The plaintiff must show only that the complaint alleges a claim under federal law, and that the claim is 'substantial.'" *Id.* "[T]he plaintiff can survive the motion by showing any arguable basis in law for the claim made." *Id.* "Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of [the Supreme Court], or otherwise completely devoid of merit as not to involve a federal controversy.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (quoting *Oneida Indian Nation of New York v. Cty. of Oneida*, 414 U.S. 661, 666 (1974)).

b. Rule 12(b)(6)

When deciding a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must "construe the complaint in the light most favorable to the plaintiff and accept all allegations as true." *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A plausible claim need not contain "detailed factual allegations," but it must contain more than "labels and conclusions" or "a formulaic recitation of the elements

of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

III. Analysis

Because defendants challenge the sufficiency of plaintiffs' complaint on both subject-matter jurisdiction and sufficiency-of-the pleadings grounds, the Court first addresses defendants' jurisdictional arguments.

a. Whether the Court has subject-matter jurisdiction

i. Standing

Defendants Lockwood and Scott argue that plaintiffs fail to establish Article III standing, and thus the complaint should be dismissed under Rule 12(b)(1). (*See, e.g.*, Dkt. 59 at 15-16; *see* Dkt. 96 at 49.) Specifically, they argue that plaintiffs only plead they were "'damaged' or 'injured' in some unspecified way," and that failing to plead that "their blood lead levels are even elevated, just that they were exposed to lead-contaminated water," is insufficient to plead a concrete injury. (*See, e.g.*, Dkt. 59 at 16-17.)

This argument is frivolous. At the beginning of the complaint, plaintiffs allege that they all consumed lead-contaminated water, that the water was contaminated with lead because of defendants' actions, and that they suffered injuries including hair, skin, digestive, and organ problems; physical pain and suffering;

disability; brain and developmental injuries including cognitive deficits; and aggravation of pre-existing conditions. (Dkt. 1 at 4-5.) There is no question that plaintiffs sufficiently pleaded a "concrete and particularized" injury, they "suffered an injury in fact," there is "a causal connection between the injury and the conduct complained of," and a favorable decision from this Court would likely redress plaintiffs' injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Accordingly, the motions to dismiss based on plaintiffs' failure to plead a concrete injury is denied.

ii. Preemption

Defendants against whom the four § 1983 claims are made—all defendants except for Veolia and Lockwood—argue that the federal Safe Drinking Water Act ("SDWA" or "Act") has a comprehensive remedial scheme that preempts plaintiffs' federal claims. (*See* Dkts. 52 at 17, 69 at 25, 70 at 24, 96 at 25, 102 at 35, 103 at 23, 105 at 15.)

Plaintiffs allege that the state violated their substantive and procedural due process rights to property created by a contract for water with the city and state, their substantive due process right to be free from a state-created danger, and their substantive due process right to bodily integrity. According to defendants, the SDWA provides the exclusive remedy for claims based on unsafe public drinking water. (*See, e.g.*, Dkt. 103 at 24.) They argue that the Act's remedial scheme is so comprehensive that Congress intended the Act to

preempt all other federal remedies, including constitutional claims brought under § 1983.

Plaintiffs respond that defendants apply the wrong preemption analysis, that which applies to § 1983 claims for federal *statutory* violations, but the correct test here is that which applies to § 1983 claims for violations of the Constitution. (*See* Dkt. 123 at 24.) Plaintiffs argue that because the contours of the rights afforded under the Constitution are substantially different from those under the SDWA, Congress did not intend the enforcement scheme in the SDWA to displace constitutional claims under § 1983. (*Id.* at 24-31.)

When Congress intends a statute's remedial scheme to "be the exclusive avenue through which a plaintiff may assert [the] claims," § 1983 claims are precluded. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 252 (2009) (quoting *Smith v. Robinson*, 468 U.S. 992, 1009 (1984)). And when, as here, a § 1983 claim is based on a constitutional right, "lack of congressional intent may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution." *Id.* When "the contours of such rights and protections diverge in significant ways, it is not likely that Congress intended to displace § 1983 suits enforcing constitutional rights." *Id.*

Among the several Supreme Court cases that have addressed the issue, this case is in line with those finding that the federal statute does not preempt § 1983 claims for violations of the Constitution.

In *Smith v. Robinson*, the Supreme Court held that the Education of the Handicapped Act preempted § 1983 due process and equal protection claims because Congress had placed "on local and state educational agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child," and "the procedures and guarantees set out in the [statute]" were "comprehensive." 468 U.S. 992, 1011 (1984). In light "of the comprehensive nature of the procedures and guarantees set out in" that statute, the Court found "it difficult to believe that Congress also meant to leave undisturbed the ability of a handicapped child to go directly to court with an equal protection claim to a free appropriate public education." *Id.*

And in *Rancho Palos Verdes v. Abrams*, the Court similarly held that the Telecommunications Act's detailed and restrictive administrative and judicial remedies "are deliberate and are not to be evaded through § 1983." 544 U.S. 113, 124 (2005). In both cases, "the statutes at issue required plaintiffs to comply with particular procedures and/or to exhaust particular administrative remedies," and a direct route to court through § 1983 "would have circumvented these procedures and given plaintiffs access to tangible benefits—such as damages, attorney's fees, and costs—that were unavailable under the statutes." *Fitzgerald*, 555 U.S. at 254.

In contrast, the Supreme Court held in *Fitzgerald* that the relief available under Title IX—withdrawal of federal funding from institutions not in compliance

with the law and an implied right of action permitting injunctive relief and damages—was evidence that Congress did not intend to preempt § 1983 claims based on violations of the Equal Protection Clause. *Id.* at 255. The Court noted that "we should 'not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim,'" and declined to do so as to Title IX in light of the fact that there was only an implied remedy under the statute and because of the "divergent coverage of Title IX and the Equal Protection Clause." *Id.* at 255-58.

Under the SDWA, the states are charged with "primary enforcement responsibility." *See* 42 U.S.C. § 300g-2. And the Administrator of the EPA can sue in federal court for civil penalties of up to $25,000 for each day in which the statute or regulations are violated. *Id.* at § 300g-3.

There is a citizen-suit provision as well. "[A]ny person may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of any requirement prescribed by or under" the Act. 42 U.S.C. § 300j-8(a)(1). District courts have jurisdiction "to enforce in an action brought under this subsection any requirement prescribed by or under this title or to order the Administrator to perform an act" that is non-discretionary. *Id.* at (a)(1)-(2). The SDWA has been interpreted to provide only for prospective injunctive relief for ongoing violations. *See Mattoon v. City of Pittsfield*, 980 F.2d 1, 6-7 (1st Cir. 1992) (SDWA only authorizes suit for continuous or intermittent violation, not for past harm); *Batton v. Ga. Gulf*, 261

F. Supp. 2d 575, 598 (M.D. La. 2003) ("The defendants nevertheless are correct that the SDWA does not permit a private right of action for the recovery of compensatory damages. . . ."). The citizen-suit provision also provides that the Court may award costs and attorney's fees when appropriate.

But the Act includes a robust savings clause: "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any requirement prescribed by or under this title or to seek any other relief." 42 U.S.C. § 300j-8(d)-(e).

Reading these provisions together, the relevant provisions of the Act can be summarized as follows: the Act is enforced primarily by the states; the Administrator of the EPA may enforce the Act by bringing civil suits and enforcement actions; private citizens may enforce the Act by suing anyone in violation of the Act for injunctive relief, costs, and attorney's fees; and the Act explicitly does not restrict "any right" under "any statute or common law" to enforce any requirement prescribed by the Act or regulations or for "any other relief."

As in *Smith*, Congress here placed "on local and state [] agencies the primary responsibility for developing a plan to" provide for and enforce the safe drinking water requirements of the SDWA. 468 U.S. at 1011. But as in *Fitzgerald*, the SDWA's protections are "narrower in some respects and broader in others" than the constitutional claims plaintiffs bring here. *See* 555 U.S.

at 256. For example, the SDWA provides for citizen suits "against *any person* . . . who is alleged to be in violation of any requirement prescribed by or under" the Act, 42 U.S.C. § 300j-8(a)(1) (emphasis added), whereas the Constitution only reaches government officials and limited classes of private persons acting as the government. *See, e.g.*, *Fitzgerald*, 555 U.S. at 256. And the Act requires conduct that may give rise to a claim under the SDWA, such as for violation of water quality reporting requirements, that would not likely give rise to constitutional claims.

On the other hand, the Court can contemplate conduct related to drinking water that might violate the Constitution, but would not be proscribed by the Act. For example, allegations related to the *rates* charged for water, rather than the *quality* of water, could conceivably form the basis of constitutional claims that the SDWA does not reach; such might be the case if government officials charged differing rates for water service based on race. These significant differences in the contours of the statutory and constitutional rights and protections suggest that Congress did not intend to preempt constitutional claims under § 1983.

And the savings clause is explicit evidence that Congress did not mean to preempt the constitutional claims in this case. Defendants argue that the savings clause is only meant to apply to "any remedy available under *state* law," and a parallel savings clause in *Rancho Palos Verdes* did not prevent the Supreme Court from finding that the Telecommunications Act

preempted the § 1983 claims in that case. (*See, e.g.*, Dkt. 102 at 15 n.4 (emphasis in original).)

But that holding of *Rancho Palos Verde* does not apply here. In that case, the Supreme Court held that the savings clause did not "save" the § 1983 constitutional claim because any § 1983 claim that could have been brought before the operation of the Telecommunications Act was preserved. *See Rancho Palos Verdes*, 544 U.S. at 126 (the savings clause "has no effect on § 1983 whatsoever. . . . [T]he claims available under § 1983 prior to the enactment of the TCA continue to be available after its enactment"). In contrast, finding preemption in this case would certainly affect, for example, plaintiffs' § 1983 bodily integrity claim, which would have been available before the SDWA but no longer if preemption applies.

Allowing plaintiffs' constitutional claims to proceed would not "circumvent" the SDWA's "procedures and give access to tangible benefits . . . that were unavailable under" the Act. *Fitzgerald*, 555 U.S. at 254. The procedural requirements for seeking remedies available under the SDWA still apply to claims for violations of the SDWA, because, as Congress intended, the SDWA preempts § 1983 claims for *statutory* violations of the Act. The SDWA's notice requirements must be satisfied before bringing suit *under the Act*: before bringing suit *to enforce the provisions of the SDWA*, plaintiffs must give sixty days' notice of SDWA violations to the Administrator, the alleged violators, and to the state. 42 U.S.C. § 300j-8(b)(1)(A). If the Administrator, the Department of Justice, or the state "is

diligently prosecuting a civil action in federal court," plaintiffs may not bring a suit *to enforce the Act*, but may "intervene as a matter of right." *Id.* at § 300j-8(b)(1)(B).

But the procedural requirements and remedial restrictions under the Act are not intended to preempt § 1983 claims for violations of the Constitution. The "protections guaranteed by the two sources of law" are "narrower in some respects and broader in others," *Fitzgerald*, 555 U.S. at 256, and Congress explicitly included a robust savings clause that preserves the constitutional claims in this case. Because the SDWA does not preempt plaintiffs' constitutional claims, they must be addressed on the merits. *See, e.g.*, *Rietcheck v. City of Arlington*, No. 04-CV-1239-BR, 2006 U.S. Dist. LEXIS 1490, at *10 (D. Or. Jan. 4, 2006) ("Plaintiffs here . . . bring their First Claim under § 1983 to enforce their constitutional rights to be free from state-created danger, which is an entirely different kind of claim and is only tangentially related to safe drinking water. The Court, therefore, concludes Plaintiffs' First Claim brought under § 1983 is not preempted by the SDWA because Plaintiffs do not seek to vindicate any right addressed by the SDWA.").[4]

[4] On February 2, 2017, in *Mays v. Snyder*, now assigned to this Court, Judge John Corbett O'Meara found the opposite. *See Mays v. Snyder*, No. 15-14002, 2017 U.S. Dist. LEXIS 14274, at *11 (E.D. Mich. Feb. 2, 2017). That case is now on appeal. This Court declined to stay this case *sua sponte* until the Court of Appeals issues its opinion and order.

iii. Eleventh Amendment Immunity

The governmental defendants, *i.e.*, all defendants except for Veolia and Lockwood, argue that the Eleventh Amendment bars plaintiffs' claims against the State of Michigan, state agencies, and state officials in the official capacities, as well as the City of Flint and city defendants in their official capacities, who would not generally be protected by the Eleventh Amendment, because they were acting as an arm of the state. (*See* Dkts. 52 at 21, 69 at 25, 70 at 24, 96 at 46, 102 at 31, 103 at 27, 105 at 14.) "Eleventh Amendment immunity constitutes a jurisdictional bar, and unless [it] is expressly waived, a state and its agencies may not be sued for damages and injunctive relief in federal court." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100-01 (1984).

Because the city defendants (City of Flint, the emergency managers, and other municipal employees of the city) were not acting as an arm of the state, they are not entitled to Eleventh Amendment Immunity. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) ("The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances, . . . but does not extend to counties and similar municipal corporations. The issue here thus turns on whether the [municipality] is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend.") (internal

citations omitted). To determine whether the city defendants are an arm of the state, the following factors must be considered:

> (1) the State's potential liability for a judgment against the entity; (2) the language by which state statutes and state courts refer to the entity and the degree of state control and veto power over the entity's actions; (3) whether state or local officials appoint the board members of the entity; and (4) whether the entity's functions fall within the traditional purview of state or local government.

Kreipke v. Wayne State Univ., 807 F.3d 768, 775 (6th Cir. 2015) (quoting *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005)). The first factor is "the foremost factor" and given substantial weight. *Id.* at 776.

As to the first factor, the City of Flint, and not Michigan, would be liable for any judgment entered against it while under emergency management. MICH. COMP. LAWS § 141.1560(5) (funds "shall be paid out of the funds of the local government that is or was subject to the receivership administered by that emergency manager"). The city defendants argue that they are arms of the state under MICH. COMP. LAWS § 600.6458(2), because that provision requires the state to pay the liabilities of an "arm of the state" if the arm is unable to pay, but this assumes the conclusion. That the state may be on the hook for judgments against arms of the state does not make the City of Flint an arm of the state. Because this first prong weighs heavily against finding that the City of Flint is an arm of the state, the

city defendants must make a showing that this "near-determinative factor" is outweighed by the other three factors. *See Pucci v. Nineteenth Dist. Court*, 628 F.3d 752, 761 (6th Cir. 2010).

But the second factor, regarding who between the city and state has the most control over the provision of water services, also weighs against finding that the City of Flint was an arm of the state. The city defendants argue that the state stripped them of home rule by appointing an emergency manager, but under state law, an emergency manager is a municipal agent and thus not subject to the protections of Eleventh Amendment Immunity. *See Kincaid v. City of Flint*, 311 Mich. App. 76, 87-88 (2015). The city defendants cannot show that they are an arm of the state, and thus are not protected by the Eleventh Amendment.

The state defendants (State of Michigan, state agencies, and state officials in their official capacities) argue that the allegedly injunctive relief plaintiffs seek—repairs to property, a medical monitoring fund, and a monitor to oversee the water operations of Flint for a period of time deemed appropriate by the Court—is in essence retroactive and thus barred by the Eleventh Amendment. (*See, e.g.*, Dkt. 103 at 30-31.) The individual defendants acknowledge that suit is brought against them in their official and unofficial capacities, but insofar as they are sued in their official capacities, they seek immunity under the Eleventh Amendment. (*See, e.g.*, Dkt. 104 at 14.)

To obtain relief against the state, plaintiffs must allege an "ongoing violation of federal law" and seek "relief properly characterized as prospective," because the state has not waived sovereign immunity. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002).

The closest plaintiffs come to pleading an ongoing violation of federal law in the complaint is alleging that "the damage had been done[,] lead has continued to leach from pipes into the water," and "the water [] continues to poison them." (*See* Dkt. 1 at 44, 58.) Even accepting, as plaintiffs argued at the hearing, that defendants continue to violate the SDWA and the Lead and Copper Rule (Dkt. 147 at 70), the only remedy available to plaintiffs premised on a violation of the SDWA and its regulations is the injunctive relief permitted under the SDWA's citizen-suit provision. The SDWA preempts actions under § 1983 for statutory violations of the Act. (*See infra* at a.ii.)

In *Concerned Pastors for Social Action v. Khouri*, a case brought under the SDWA, the court held that injunctive relief similar to the relief plaintiffs seek here was permissible. 194 F. Supp. 3d 589, 603 (E.D. Mich. 2016). There, the plaintiffs (Concerned Pastors for Social Action, Melissa Mays, the ACLU of Michigan, and the Natural Resources Defense Council, Inc.) properly pleaded ongoing violations of the SDWA and Lead and Copper Rule due to irreversible damage to Flint's lead service lines, which thus continued to leach lead into the drinking water. *Id.* at 602-03. The district court held that it could order the replacement of lead service

lines, health-risk mitigation, and monitoring, among other relief, because such relief would be prospective injunctive relief to remedy the ongoing violations of the Act and its regulations. *Id.* at 603. The parties ultimately entered into a comprehensive settlement agreement providing for most of the equitable relief plaintiffs seek in this case and much more, and the Court retains jurisdiction to enforce it. *See Concerned Pastors for Soc. Action v. Khouri*, No. 16-cv-10277 (E.D. Mich. terminated Mar. 28, 2017) (Dkts. 147, 152, 154).

Even assuming that plaintiffs have sufficiently pleaded an ongoing violation of constitutional law, as opposed to ongoing violations of the SDWA and Lead and Copper Rule, they seek "equitable relief *to remediate the harm caused*" (*id.* at 88 (emphasis added)), which is the very relief they are not permitted to seek against the state under the Eleventh Amendment. *See Verizon Md., Inc.*, 535 U.S. at 645. Only when the fiscal consequences to the state are ancillary to a prospective injunction—for example, enjoining a state from terminating subsistence benefits to indigent individuals without notice and a hearing in violation of the Due Process Clause, which undoubtedly results in more money being paid out of the state fisc, *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970)—would such fiscal consequences not violate the Eleventh Amendment. *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974). Here, the fiscal consequences to the state for paying for property damage or a medical monitoring fund are not ancillary to enjoining an ongoing violation of federal law.

Plaintiffs' request for an injunction for a monitor to oversee the water operations of Flint for a period of time deemed appropriate by the Court is impermissible for a different reason. Plaintiffs do not request prospective injunctive relief for which such monitor could be ordered to provide oversight. All that remains without the equitable relief of repairs to plaintiffs' property and a medical monitoring fund is declaratory relief, damages, costs, and fees. The Court would be ordering a monitor to oversee water operations in Flint without any accompanying injunction against the municipality that such monitor would be overseeing, which is not relief that this Court can order.

Accordingly, plaintiffs' claims as to defendants State of Michigan, MDEQ, MDHHS, and the state, MDEQ, and MDHHS employee defendants in their official capacities only, must be dismissed. The claims may proceed against the city defendants in their official and individual capacities and the state official defendants in their individual capacities.

iv. Federal Absolute Immunity

The MDEQ employee defendants and defendant Wurfel argue that they are absolutely immune because federal law authorized and controlled their actions, and the absolute immunity afforded federal officials should be extended to the state officials here. (*See, e.g.*, Dkt. 102 at 31-32 (citing *Butz v. Economou*, 438 U.S. 478, 490 (1978)); *see* Dkt. 70 at 27-29.)

As the case cited by these defendants makes abundantly clear, federal officials are generally entitled only to *qualified* immunity. *Butz*, 438 U.S. at 507. "[I]n a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to [] qualified immunity . . . , subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." *Id.* Only officials exercising judicial or quasi-judicial functions, such as executive action "analogous to those of a prosecutor" exercising prosecutorial discretion, "should be able to claim absolute immunity." *See id.* at 515; *see also Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (absolute immunity is limited to judicial and quasi-judicial functions).

Nothing about the governmental defendants' alleged actions in this case indicate they were performing judicial or quasi-judicial functions. Defendants highlight the federal SDWA, which grants wide latitude to the states as the primary enforcement means of the statute. (*See, e.g.*, Dkt. 102 at 32-33.) The actions that the state actors are alleged to have taken are the very essence of "executive officials exercising discretion," for which they are entitled only to qualified immunity. *See Butz*, 438 U.S. at 507. The motions to dismiss based on absolute immunity are denied.

v. Whether the Court of Appeals has exclusive jurisdiction over this case

Defendants City of Flint, Earley, Ambrose, Croft, and Glasgow argue that this case is effectively an appeal of the Emergency Administrative Order that the EPA issued on January 21, 2016, pursuant to its emergency powers under the SDWA, and such order is a final order that can only be appealed to the Court of Appeals under the Act. (*See* Dkts. 52 at 20-21.) According to these defendants, plaintiffs' relief requires finding numerous facts that might conflict with the Administrative Order, and thus amounts to an appeal of it. (*Id.* at 20-21.) Plaintiffs respond that this Court should reject the argument as the court did in *Concerned Pastors for Social Action v. Khouri.* (*See, e.g.*, Dkt. 122 at 25-26.)

In that case, defendants similarly argued that the plaintiffs' claims were "an implicit request for judicial review of the [January 21] EPA order." *Concerned Pastors for Soc. Action v. Khouri*, 194 F. Supp. 3d 589, 596 (E.D. Mich. 2016). The court rejected the argument because the relief plaintiffs sought, although parallel to "the EPA's directives to the Flint and Michigan respondents," and which might "augment those orders," was "wholly collateral to the SDWA's review provisions." *Id.* at 599.

The SDWA's exclusive review provision is even less applicable to this case than *Concerned Pastors.* The *Concerned Pastors* plaintiffs brought their case directly under the SDWA, seeking relief using its citizen

suit provision, see *id.* at 596, whereas plaintiffs in this case do not bring any claim under the SDWA. And like the plaintiffs there, the plaintiffs in our case are "not a party to the action between the EPA and the City of Flint," nor are they "identified as 'Respondents' in the EPA's emergency order." *Id.* at 598. They are "not seeking to enjoin the EPA Order either explicitly or implicitly." *Id.* Federal statutory provisions providing for exclusive jurisdiction in the Courts of Appeals are meant to "bar litigants from 'requesting the District Court to enjoin action that is the outcome of the agency's order.'" *Id.* at 598-99 (quoting *F.C.C. v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984)). Because the relief plaintiffs seek would not do so, defendants' motion to dismiss on this basis is denied.

b. Whether plaintiffs engage in improper group pleading under Rule 8 of the Federal Rules of Civil Procedure

Some defendants argue that plaintiffs engaged in improper group pleading and thus failed to give defendants "fair notice of what the . . . claim[s are] and the grounds upon which [they] rest." (*See, e.g.*, Dkt. 52 at 25-26 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see* Dkts. 102 at 29-31, 105 at 18.) The complaint clearly describes the specific conduct plaintiffs allege as to each individual defendant. Defendants have more than fair notice of the claims against them, so the motions to dismiss on this basis are denied.

c. Federal claims

As set forth above, plaintiffs' claims cannot proceed against the State of Michigan, MDEQ, MDHHS, or individual state officials in their official capacities because they have immunity under the Eleventh Amendment. The remaining governmental defendants and individual state officials in their individual capacities argue they are entitled to qualified immunity and also that plaintiffs fail to plead any constitutional claim. The Court undertakes a two-step analysis to determine whether a defendant is entitled to qualified immunity. First, "viewing the facts in the light most favorable to plaintiff[s], [the Court] determine[s] whether the allegations give rise to a constitutional violation." *See Shreve v. Franklin Cty.*, 743 F.3d 126, 134 (6th Cir. 2014). Second, the Court "assess[es] whether the right was clearly established at the time of the incident." *See id.* The Court may undertake either step first, with certain limitations not applicable here, *Camreta v. Greene*, 563 U.S. 692, 694 (2011); *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), and addresses each federal claim in that order.

i. Count 1

In Count 1, plaintiffs bring a § 1983 claim against defendants City of Flint, Croft, Glasgow, Snyder, Earley, Ambrose, Shekter Smith, Wyant, Busch, Cook, Prysby, and Wurfel, alleging that these defendants deprived plaintiffs of a property right to which they are entitled pursuant to a state-created contract, in

violation of substantive due process.[5] According to plaintiffs, these defendants violated their property right to clean water "when, ceasing to provide [p]laintiffs with safe, potable water, they provided [p]laintiffs with poisonous, contaminated water." (Dkt. 1 at 64-65.) Although this is a tremendously serious allegation, plaintiffs fail to plead the existence of a constitutionally protected fundamental interest, and a substantive due process claim cannot be based on a state-created contract right alone. The motions to dismiss this claim are granted.

"[A]n entitlement under state law to water and sewer service d[oes] not constitute a protectable property interest for purposes of substantive due process." *Mansfield Apartment Owners Ass'n v. City of Mansfield*, 988 F.2d 1469, 1476 (6th Cir. 1993) (quoting *Ransom v. Marrazzo*, 848 F.2d 398 (3d Cir. 1988)); *see Bowers v. City of Flint*, 325 F.3d 758, 763 (6th Cir. 2003) ("[M]ost, if not all, state-created contract rights, while assuredly protected by procedural due process, are not protected by substantive due process.") (quotations omitted). Rather, "[s]ubstantive due process protects fundamental interests, not state-created contract rights." *Thomson v. Scheid*, 977 F.2d 1017, 1020

[5] Plaintiffs also bring this claim against the State of Michigan, MDEQ, and the individual state defendants in their official capacities. As set forth above, plaintiffs' claims against these defendants are barred by Sovereign Immunity. Hereinafter, defendants entitled to Sovereign Immunity are excluded from any analysis of the merits of a claim in which they are included by plaintiffs.

(6th Cir. 1992) (citing *Charles v. Baesler*, 910 F.2d 1349 (6th Cir.1990)).

Plaintiffs fail to identify any authority to show they have a constitutionally protected fundamental interest in clean water. And the Sixth Circuit has explicitly said that they do not. Because plaintiffs base this substantive due process claim solely on an alleged property right to clean water created by a contract with the state, this claim is dismissed.

ii. Count 2

In Count 2, plaintiffs bring a § 1983 claim against defendants City of Flint, Croft, Glasgow, Snyder, Earley, Ambrose, Shekter Smith, Wyant, Busch, Cook, Prysby, and Wurfel, alleging that these defendants deprived plaintiffs of a property right to which they are entitled pursuant to a state-created contract, in violation of procedural due process. According to plaintiffs, defendants deprived them of their contractually based property right to purchase and receive safe, potable drinking water without notice or a hearing. (Dkt. 1 at 65-66.) Defendants argue that plaintiffs fail to plead the existence of a state-created property interest or that the procedural protections afforded by the state are constitutionally infirm. (*See, e.g.*, Dkt. 52 at 29.) Because plaintiffs fail to plead both, the motions to dismiss this claim are granted.

To establish a procedural due process violation under § 1983, plaintiffs must show: (1) that they had a protected life, liberty, or property interest; (2) that they

were deprived of that protected interest; and (3) that the state did not afford them adequate procedural rights before depriving them of their protected interest. *Wedgewood Ltd. P'ship I v. Twp. of Liberty, Ohio*, 610 F.3d 340, 349 (6th Cir. 2010).

As noted above, "state-created contract rights" are "assuredly protected by procedural due process." *Bowers*, 325 F.3d at 763. And other courts have found that "continued utility service is a property right within the meaning of the due process clause" requiring predeprivation notice and a hearing. *Bradford v. Edelstein*, 467 F. Supp. 1361, 1369 (S.D. Tex. 1979); *see, e.g.*, *Keating v. Neb. Pub. Power Dist.*, 562 F.3d 923, 925 (8th Cir. 2009) (reversing district court dismissal of § 1983 claim when plaintiffs alleged that "state officials deprived them of their procedural due process rights when those officials ordered them to cease drawing water from the Niobrara Watershed without providing prior notice or a hearing"); *see generally Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19 (1978) ("Ordinarily, due process of law requires an opportunity for 'some kind of hearing' prior to the deprivation of a significant property interest.").

But property interests "are created and their dimensions are defined by existing rules or understandings that stem from . . . state law." *See Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). So, "property interests are created by state law"; "whether a substantive interest created by the state rises to the level of a constitutionally protected property interest is a question of federal constitutional law." *Bowers*, 325 F.3d at 765

(quotations omitted). "[O]nly those interests to which one has a legitimate claim of entitlement, including but not limited to statutory entitlements, are protected by the due process clause." *Id.*

Plaintiffs fail to plead that they have a contract with the state or City of Flint under Michigan law, and thus fail to establish the first element required to make out their procedural due process claim. *See Wedgewood Ltd. P'ship I*, 610 F.3d at 349. Under Michigan law, "a contract requires mutual assent." *Kloian v. Domino's Pizza, L.L.C.*, 273 Mich. App. 449, 453 (2006). But there is no mutual assent when a "transaction between the parties with respect to the 'exchange' of money for services was wholly devoid of free and open bargaining, the hallmark of contractual relationships." *Borg-Warner Acceptance Corp. v. Dep't of State*, 433 Mich. 16, 22 (1989). Specifically, if defendant City of Flint is "not legally capable of declining to" provide water services or "otherwise altering the basic nature of its duty," and plaintiffs cannot choose "not to pay the required fee," there is no mutual assent to form a contract. *See id.*; *see, e.g.*, *Lufthansa Cargo A.G. v. Cty. of Wayne*, 142 F. App'x 265, 266 (6th Cir. 2005) (defendant legally required to provide service, and charge of fee for service "does not create an implied contract under Michigan law absent consideration in return").

Plaintiffs claim that they "entered into a contract for the purchase and sale of potable, safe drinking water" with the "City of Flint." (Dkt. 1 at 70.) But the City of Flint, through its City Counsel (and possibly the emergency managers in this case), sets the rate for

water, see Flint Code of Ord. § 46-52(b)(1), (c)(1), which residents must pay to receive water service. *See* Flint Code of Ord. §§ 46-50, 46-51. And water service "may be denied to any consumer *who is in default* to the Division of Water Supply," a division of the Department of Public Works, which suggests that such service may not be denied if a consumer is not in default. *Id.* at §§ 46-16 (emphasis added). Although Flint Code of Ord. § 46-16 defines plaintiffs as consumers, water as a commodity, and the relationship between plaintiffs and Flint as "that of vendor and purchaser," there is no "mutuality" as required by Michigan contract law. *See Borg-Warner Acceptance Corp.*, 433 Mich. at 22.

And even if plaintiffs had adequately pleaded the existence of a state-created contract right, they fail to plead that the procedures afforded them by the state are constitutionally inadequate. To overcome defendants' motions to dismiss, plaintiffs must plead with particularity that the process afforded them under state law was inadequate, including post-deprivation damages remedies to redress the alleged breach of contract. *See Vicory v. Walton*, 721 F.2d 1062, 1063 (6th Cir. 1983) ("[I]n section 1983 damage suits for deprivation of property without procedural due process the plaintiff has the burden of pleading and proving the inadequacy of state processes, including state damage remedies to redress the claimed wrong."). Plaintiffs do not sufficiently plead that state procedures were inadequate, so their procedural due process claim is dismissed.

iii. Count 3

In Count 3, plaintiffs bring a § 1983 state-created danger claim, alleging that all defendants except Veolia and Lockwood violated their substantive due process rights. According to plaintiffs, defendants each acted to expose them to toxic, lead-contaminated water by making, causing to be made, and causing or making representations that the water was safe to drink, and these actions and omissions were objectively unreasonable in light of the facts and circumstances confronting them. (Dkt. 1 at 66-68.)

Defendants argue that plaintiffs fail to plead this claim because they do not allege an act of violence inflicted by a third party or danger specific to plaintiffs as opposed to the public at large. (*See, e.g.*, Dkt. 52 at 31.) Plaintiffs respond that it "is illogical to claim that public officials cannot be held liable for creating a danger and injuring a plaintiff, whereas they may be held liable if they created or increased a risk of harm that was carried out by a private third party." (*See* Dkt. 122 at 37.) Because plaintiffs fail to plead that defendants subjected them to a special danger as distinguished from the public at large, the motions to dismiss this claim are granted.

To prevail on a state-created danger claim, plaintiffs must establish three elements: (1) an affirmative act on the part of the government that creates or increases the risk to plaintiffs, (2) a special danger to plaintiffs as distinguished from the public at large, and (3) the requisite degree of state culpability. *Stiles v.*

Grainger Cty., 819 F.3d 834, 854 (6th Cir. 2016). Even assuming plaintiffs can establish a state-created danger claim for harm directly caused by state actors, as opposed to private third-parties, plaintiffs fail to show that defendants in this case created a special danger to plaintiffs as distinguished from the public at large.

In the Sixth Circuit, the second prong of a state-created danger claim is satisfied when "the government could have specified whom it was putting at risk, nearly to the point of naming the possible victim or victims." *Jones v. Reynolds*, 438 F.3d 685, 696 (6th Cir. 2006). But when "the victim was not identifiable at the time of the alleged state action/inaction," the Sixth Circuit holds "that a § 1983 suit may not be brought under the 'state created danger' theory." *Id.* at 697.

For example, a plaintiff cannot satisfy this standard when "officers never interacted with [decedent]," no "evidence ha[d] been put forward suggesting that the officers had any reason to know that they were putting [the plaintiff] at risk by their action/inaction," and the crowd plaintiff was among when she was injured "contained at least 150 people." *Id.*; *see also Schroder v. City of Fort Thomas*, 412 F.3d 724, 729 (6th Cir. 2005) (failing to enforce or lower the speed limit on a residential street "did not create a 'special danger' to a discrete class of individuals (of which the [plaintiffs'] son was a member), as opposed to a general traffic risk to pedestrians and other automobiles"); *Jones v. City of Carlisle*, 3 F.3d 945, 949-50 (6th Cir. 1993) (holding that an epileptic driver was "no more a danger to [the plaintiff] than to any other citizen on the City streets"); *Janan*

v. Trammell, 785 F.2d 557, 560 (6th Cir. 1986) (holding that the release of an inmate on parole, who eventually murdered a citizen, did not violate the Due Process Clause because "there is [no] showing that the victim, as distinguished from the public at large, faces a special danger"). Plaintiffs fail to plead the second element of their state-created danger claim, so it is dismissed.[6]

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[6] It seems there is little difference between the state-created danger standard of constitutional liability and the shocks-the-conscience standard of constitutional liability. *See, e.g.*, *Henry v. City of Erie*, 728 F.3d 275, 282 (3d Cir. 2013) (to establish claim under state-created danger theory, plaintiff must show that "a state actor acted with a degree of culpability that shocks the conscience," among other elements similar to those in the Sixth Circuit); *Jones v. Reynolds*, 438 F.3d 685, 695 (6th Cir. 2006) (state-created danger case citing *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998), which address shocks-the-conscience standard). Here, plaintiffs could not identify, and the Court could not independently find, any case law in the Sixth Circuit in which a state-created danger claim was permitted to proceed against the government for harm that was caused directly, as opposed to harm that was caused by a third party. *But see Jones*, 438 F.3d at 695 (noting in *dicta* that "[h]ad the officers organized or participated in this race, the issue would cease to turn on whether they were responsible for harm caused by a private actor and would turn instead on whether they had caused the harm themselves"). Given that the state-created danger theory arises from the Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), one way courts of appeals interpret the doctrine is that liability attaches to the state only "when it fails to protect [a plaintiff] from third-party harms that it helped create." *See Barber v. Overton*, 496 F.3d 449, 458 n.1 (6th Cir. 2007) (Cook, J., concurring) (quoting *Butera v. District of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001) ("We join the other circuits in holding that, under the State endangerment concept, an individual can assert a substantive due process right to

iv. Count 4

In Count 4, plaintiffs bring a § 1983 substantive due process claim, alleging that all defendants except Veolia and Lockwood unlawfully violated their fundamental interest in bodily integrity. Defendants argue that only a forcible physical intrusion into a person's body against the person's will without a compelling state interest will suffice, and also that plaintiffs fail to plead that defendants were motivated by malice or sadism. (*See, e.g.*, Dkt. 52 at 32-33; *see* Dkts. 69 at 30-33 and 39-41, 70 at 27-32 and 38-39, 96 at 32-35, 102 at 39-44 and 57-62, 103 at 33-36 and 47-52, 105 at 15-16.) Because plaintiffs sufficiently plead that the conduct of many of the individual governmental defendants was so egregious as to shock the conscience and violate plaintiffs' clearly established fundamental right to bodily integrity, the claim is only dismissed as to defendants Snyder, Glasgow, and Cook.

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protection by the District of Columbia from third-party violence when District of Columbia officials affirmatively act to increase or create the danger that ultimately results in the individual's harm.")). Because plaintiffs otherwise fail to plead the elements of a state-created danger claim under the Sixth Circuit's formulation, the Court need not decide whether plaintiffs can maintain a state-created danger action against government actors for harm they caused directly; the Court merely highlights that state-created-danger claims likely collapse into shocks-the-conscience claims, like that which plaintiffs pursue in Count 4 of their complaint. *See Martinez v. Cui*, 608 F.3d 54, 64 (1st Cir. 2010) ("*Lewis* clarified that the shocks-the-conscience test, first articulated in *Rochin v. California* [], governs *all* substantive due process claims based on executive, as opposed to legislative, action.") (emphasis in original).

"The touchstone of due process is protection of the individual against arbitrary action of the government," and the Supreme Court has defined such a violation as "executive abuse of power as that which shocks the conscience" in the "constitutional sense." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998). To plead this claim against each executive official in this case, "plaintiffs must show[] not only that the official's actions shock the conscience, but also that the official violated a right otherwise protected by the substantive Due Process Clause." *See Martinez v. Cui*, 608 F.3d 54, 64 (1st Cir. 2010) (citing cases).

It has long been held that one's right to bodily integrity is a fundamental interest under the Constitution. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) ("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."); *see Albright v. Oliver*, 510 U.S. 266, 272 (1994) ("The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity."). As to the first prong of the qualified immunity analysis, plaintiffs' "allegations give rise to a constitutional violation." *Shreve*, 743 F.3d at 134. They have a fundamental interest in bodily integrity under the Constitution, and, as set forth below, defendants violated plaintiffs' fundamental interest by taking conscience-shocking, arbitrary executive action, without

plaintiffs' consent, that directly interfered with their fundamental right to bodily integrity. *Lewis*, 523 U.S. at 845-46; *Cui*, 608 F.3d at 64; *see generally Siegert v. Gilley*, 500 U.S. 226, 232 (1991) ("A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all."). As to the second prong of the qualified immunity analysis, a series of Supreme Court cases over the last seventy-five years makes clear that defendants violated plaintiffs' clearly established rights.

The Court may consider decisions by the United States Supreme Court, the Sixth Circuit, and district courts within the Sixth Circuit to determine whether the law has been clearly established. *Higgason v. Stephens*, 288 F.3d 868, 876 (6th Cir. 2002). Decisions from other circuits may be considered "if they 'point unmistakably to the unconstitutionality of the conduct complained of and [are] so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting.'" *Barrett v. Stubenville City Sch.*, 388 F.3d 967, 972 (6th Cir. 2004) (quoting *Ohio Civil Serv. Emps. Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988)) (alterations in original).

In 1990, the Court held that the "forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's

liberty." *Washington v. Harper*, 494 U.S. 210, 229 (1990); *see also Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) ("[A] competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment."). Whether such intrusion is consensual has been a key consideration in determining the constitutionality of such invasion of an individual's person since at least 1942, when the Supreme Court held that the forced sterilization of adults is unconstitutional. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *see also Winston v. Lee*, 470 U.S. 753, 766-67 (1985) (the potentially harmful, nonconsensual surgical intrusion into a suspect's chest to recover a bullet without a compelling need is unconstitutional).

That defendants here violated plaintiffs' clearly established right to be free from conscience-shocking, arbitrary executive action that invades their bodily integrity without their consent is further exemplified by courts of appeals' decisions interpreting these Supreme Court cases. *See, e.g.*, *Barrett v. United States*, 798 F.2d 565, 575 (2d Cir. 1986) (no qualified immunity, because actions of defendants violated New York law by administering a "dangerous drug to human subjects without adequate warning or notice of the risk involved," and thus defendants "could be held responsible in damages for the consequences"); *Lojuk v. Quandt*, 706 F.2d 1456, 1465-66 (7th Cir. 1983) (noting that "compulsory treatment with anti-psychotic drugs may invade a patient's interest in bodily integrity, personal security and personal dignity. . . . , [and] compulsory treatment may invade a patient's interest in

making certain kinds of personal decisions with potentially significant consequences," in holding that these fundamental interests are implicated by compulsory electro shock therapy—"It should be obvious in light of this liberty interest that the state cannot simply seize a person and administer [electro shock therapy] to him without his consent"); *Rogers v. Okin*, 634 F.2d 650, 653 (1st Cir. 1980) ("[A] person has a constitutionally protected interest in being left free by the state to decide for himself whether to submit to the serious and potentially harmful medical treatment that is represented by the administration of antipsychotic drugs."), *vacated and remanded Mills v. Rogers*, 457 U.S. 291, 303 (1982) (only applies to *involuntarily* admitted patients).[7]

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[7] *See also Wright v. City of Phila.*, No. 10-1102, 2015 U.S. Dist. LEXIS 25278, at *37-38 (E.D. Pa. Mar. 2, 2015) (it is clearly established that the substantive due process right to bodily integrity is violated when the state allows individuals to suffer from prolonged asbestos exposure in part because "[t]he health effects associated with asbestos exposure have been within the public's knowledge for years"); *Athans v. Starbucks Coffee Co.*, No. CV-06-1841-PHX-DGC, 2007 U.S. Dist. LEXIS 21412, at *9 (D. Ariz. Mar. 23, 2007) (citing Supreme Court, Ninth Circuit, and Fourth Circuit cases to find that a pro se plaintiff states a claim by alleging "intentional poisoning" by a government official); *Bounds v. Hanneman*, No. 13-266 (JRT/FLN), 2014 U.S. Dist. LEXIS 43947, at *27-29 (D. Minn. Mar. 31, 2014) (denying qualified immunity because "a reasonable officer should have known that providing an illicit drug to a citizen, where such provision was not required by the officer's legitimate duties, violates clearly established law"); *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 818 (S.D. Ohio 1995) ("[B]etween 1960 and 1972 the right to due process as enunciated in *Rochin* [*v. California*, 342 U.S. 165 (1952)] was sufficiently clear to lead a reasonable government official to

It would be readily apparent to any reasonable executive official, given this landscape, that a government actor violates individuals' right to bodily integrity by knowingly and intentionally introducing life-threatening substances into such individuals without their consent, especially when such substances have zero therapeutic benefit. *Cf. Harper*, 494 U.S. at 229 (noting that although "therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects"). This is not a case in which there are only a "few admittedly novel opinions from other circuit or district courts," which would be insufficient "to form the basis for a clearly established constitutional right." *Barrett*, 388 F.3d at 972. The breadth and depth of the case law "point[s] unmistakably to the unconstitutionality of the conduct complained of" here, which was "so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting." *Id.* (quoting *Seiter*, 858 F.2d at 1177).

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the conclusion that forcing unwitting subjects to receive massive doses of radiation was a violation of due process."); *Thegpen v. Dillon*, No. 88 C 20187, 1990 U.S. Dist. LEXIS 3132, at *9-11 (N.D. Ill. Feb. 1, 1990) (clearly established that "compulsory treatment with anti-psychotic drugs may invade a patient's interest in bodily integrity"); *Osgood v. District of Columbia*, 567 F. Supp. 1026, 1033 (D.D.C. 1983) ("[t]here is no serious dispute" that administering psychotropic drugs against an inmate's will violated the Due Process Clause of the Fifth Amendment).

Taking plaintiffs' allegations as true and in the light most favorable to them, as the Court must, the violation of plaintiffs' clearly established rights is adequately pleaded against defendants City of Flint, Earley, Ambrose, Wyant, Shekter Smith, Busch, Prysby, Wurfel, Wells, Lyon, Peeler, Scott, and Croft.

Plaintiffs plead (with particularity as to which defendant did what) that these defendants were the decision makers responsible for knowingly causing plaintiffs to ingest water tainted with dangerous levels of lead, which has no therapeutic benefits, and hiding the danger from them. The emergency managers and individual state employees switched the source of Flint's water from the Detroit River to the Flint River, then knowingly took deliberate action that violated federal and state, civil and possibly even criminal law, which caused the lead levels in Flint's water to rise to dangerous levels.[8] They knew that their actions were exposing the residents of Flint, including plaintiffs, to dangerous levels of lead. Lead poisoning caused plaintiffs to suffer from severe medical problems with their hair, skin, digestive system, and organs, as well as

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[8] Defendants Earley, Ambrose, Shekter Smith, Busch, Prysby, Peeler, Scott, and Croft, among others, all face felony and misdemeanor criminal charges stemming from the Michigan Attorney General's Flint Water Investigation. *See generally Flint Water Investigation*, STATE OF MICHIGAN ATTORNEY GENERAL BILL SCHUETTE, http://www.michigan.gov/ag/0,4534,7-164-78314---,00.html (last visited May 31, 2017). *Cf. Lyons v. Stovall*, 188 F.3d 327, 332 n.3 (6th Cir. 1999) ("[I]t is well-settled that 'federal courts may take judicial notice of proceedings in other courts of record'. . . .") (quoting *Granader v. Public Bank*, 417 F.2d 75, 82-83 (6th Cir. 1969)).

brain and other developmental injuries including cognitive deficits, among other issues. (Dkt. 1 at 65.)

And when the evidence confirmed that, in fact, the lead levels in the water and in residents' blood were rising, these defendants 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. They did so, even though their own testing revealed the opposite. Many residents, plaintiffs included, continued to consume the water in reliance on defendants' false assurances.

It cannot be that such actions are not "so egregious, so outrageous, that [they] may fairly be said to shock the contemporary conscience." *See Lewis*, 523 U.S. at 847 n.8. Nor can it be said that reasonable officials would not have had fair notice that such actions would violate the Constitution, *i.e.*, that defendants were violating plaintiffs' clearly established right to bodily integrity and to be free from arbitrary, conscience shocking executive action. As recently reiterated by the Sixth Circuit, immunity does not extend to "the plainly incompetent or those who knowingly violate the law." *Arrington-Bey v. City of Bedford Heights*, No. 16-3317, 2017 U.S. App. LEXIS 3429, at *8 (6th Cir. Feb. 24, 2017) (quoting *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548, 551 (2017)). And particularly with respect to the individual governmental defendants who are facing felony and misdemeanor criminal charges pursuant to the Michigan Attorney General's Flint Water Investigation, qualified immunity cannot and should not protect them from civil liability for the constitutional

violations that are pleaded against them. *Id.*; *see Barrett*, 798 F.2d at 575 (no qualified immunity for defendants who knowingly violated state criminal law).

Again, plaintiffs' involuntariness here is key. *See Riggins v. Nevada*, 504 U.S. 127, 137-38 (1992) (forced administration of antipsychotic medication during trial violated Fourteenth Amendment); *Harper*, 494 U.S. at 229 ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty."); *Cruzan*, 497 U.S. at 278 ("[A] competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment."); *Rochin v. California*, 342 U.S. 165, 172 (1952) ("Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents. . . . This is conduct that shocks the conscience."). Plaintiffs' exposure to dangerous levels of lead was involuntary on two levels.

First, it was involuntary because these defendants hid from plaintiffs that Flint's water contained dangerous levels of lead. Misleading Flint's residents as to the water's safety—so that they would continue to drink the water and Flint could continue to draw water from the Flint River—is no different than the "forced, involuntary invasions of bodily integrity that the Supreme Court has deemed unconstitutional." *See Heinrich ex rel. Heinrich v. Sweet*, 62 F. Supp. 2d 282, 313-14 (D. Mass. 1999) (utilizing false pretenses to engage patients in participating in radiation treatments with no therapeutic value no different than "forced, involuntary

invasions of bodily integrity that the Supreme Court has deemed unconstitutional"). Second, it was involuntary because under state and municipal law, plaintiffs were not permitted to receive water in any other way. *See* Flint Code of Ord. §§ 46-25, 46-26, 46-50(b). The city defendants themselves make this argument. (*See* Dkt. 52 at 37.) Even had plaintiffs wanted to receive water from a different source, they would not have been permitted to.

Defendants claim they had a legitimate state interest in lowering the cost of Flint's water services. Accepting that as true, any such cost-cutting measure cannot justify the harm that was knowingly inflicted on plaintiffs without their consent. This is especially so given that Michigan law "forbids the price [of any water sold] to exceed[ ] 'the actual cost of service as determined under the utility basis of rate-making.' " *Davis v. City of Detroit*, 269 Mich. App. 376, 379 (2006) (quoting MICH. COMP. LAWS § 123.141).

The alleged actions of defendants City of Flint, Earley, Ambrose, Wyant, Shekter Smith, Busch, Cook, Prysby, Wurfel, Wells, Lyon, Peeler, Scott, and Croft are so egregious that "[e]ven absent the abundant case law that has developed on this point since the passage of the Bill of Rights, the Court would not hesitate to declare that a reasonable government official must have known that by instigating and participating in" the knowing provision of lead-laden water and then intentional and active concealment of this truth to the residents of Flint, who were not legally permitted to obtain alternative water service, "he would have been acting

in violation of those rights." *See In re Cincinnati Radiation Litig.*, 874 F. Supp. at 815. For these reasons, the motions to dismiss are denied as to these defendants.

Plaintiffs fail to plead with particularity that defendant Snyder was directly responsible for being involved in the decision making himself—rather, according to plaintiffs, he should be responsible because he appointed the emergency managers who are also defendants in this case. And they plead that defendant Glasgow argued that if "water is distributed from this plant in the next couple of weeks, it w[ould] be against [his] direction," but that "management above" overrode him. Finally, plaintiffs plead that defendant Cook was involved in the decision to switch to Flint River water without proper study or corrosion control, but fail to plead that he was involved in misleading the public after it became apparent that lead was rising to dangerous levels in the drinking water. Plaintiffs fail to allege that these three defendants violated clearly established law, so Count 4 must be dismissed as to them.

d. State claims

The governmental defendants argue that they have state statutory immunity for violations of state tort law and that plaintiffs otherwise fail to plead the state-law claims. Defendants Veolia and Lockwood argue that plaintiffs fail to plead their claims and that certain relief plaintiffs seek is unavailable in Michigan. The arguments are addressed in that order.

i. Whether the governmental defendants have state statutory immunity for violations of state tort law

Under MICH. COMP. LAWS § 691.1407, "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function," *id.* at § 691.1407(1), and "the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her . . . executive authority." *Id.* at § 691.1407(5).

As to lower level government employees, "each officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the officer[or] employee . . . while in the course of employment or service . . . while acting on behalf of a governmental agency if all of the following are met: (a) [the officer or employee] is acting or reasonably believes he or she is acting within the scope of his or her authority"; "(b) [t]he governmental agency is engaged in the exercise or discharge of a governmental function"; and (c) the officer's or employee's "conduct does not amount to gross negligence that is the proximate cause of the injury or damage." *Id.* at § 691.1407(2).

For such lower level employees, Michigan case law requires not only that the employee be grossly negligent, but also that the employee's actions were *the*

proximate cause of the injury for a tort claim to proceed. An employee's action is the proximate cause of the injury if it is "the one most immediate, efficient, and direct cause, of the [plaintiffs]' injuries." *Robinson v. City of Detroit*, 462 Mich. 439, 446 (2000). "There cannot be other more direct causes of plaintiff's injuries." *White v. Roseville Pub. Schs.*, No. 307719, 2013 Mich. App. LEXIS 342, at *10 (Mich. Ct. App. Feb. 21, 2013). If no reasonable juror could find that a lower level official was "*the one* most immediate" cause of plaintiffs' injuries, the claims as to those officials must be dismissed. *Robinson*, 462 Mich. at 463.

The exception to the immunity statute is when plaintiffs seek "to recover for bodily injury or property damage arising out of the performance of a proprietary function." MICH. COMP. LAWS § 691.1413. A proprietary function is "any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees." *Id.*

Plaintiffs argue that the governmental defendants are not entitled to governmental immunity because their primary purpose in selling water to plaintiffs was to produce a pecuniary profit for the state and its agencies, and the municipalities' and state's sale of water is not normally supported by taxes and fees. (Dkt. 1 at 85.)

Michigan courts have held that the "operation of the water department is not a proprietary activity," *i.e.*, is not excepted from governmental immunity, in part

because Michigan law "requires the price of any water sold to be based on, and forbids the price to exceed, 'the actual cost of service as determined under the utility basis of rate-making.'" *Davis v. City of Detroit*, 269 Mich. App. 376, 379 (2006) (quoting MICH. COMP. LAWS § 123.141). Thus, the proprietary function exception to state governmental immunity does not apply.

Aside from making the proprietary function/non-governmental function argument, plaintiffs seem to concede that the emergency managers are the highest appointed executive officials of the city. The tort claims against the emergency managers are thus dismissed. So too for defendant Croft, Flint's Director of the Department of Public Works.

Similarly, the MDEQ employee defendants argue that defendant Shekter Smith is entitled to absolute immunity as the highest appointed executive official of her agency—she is the Chief of the Office of Drinking Water and Municipal Assistance for MDEQ. MICH. COMP. LAWS § 691.1407(5). Defendant Wyant, as the former Director of MDEQ, also claims absolute immunity from the tort claims (Dkt. 69 at 22), as does defendant Wurfel, as the Director of Communications of MDEQ. (Dkt. 70 at 40.) Plaintiffs do not argue that any of these defendants are not the highest appointed or elected officials of their levels of government. Rather, plaintiffs argue that none of the MDEQ employee defendants are absolutely immune because they "knowingly l[ied] to EPA and the public as 'performing oversight,' and the lies alleged [] did not serve the ends of regulatory oversight"; because they used their office for

an illegitimate purpose, according to plaintiffs, they are not entitled to immunity. (Dkt. 123 at 46-50.)

But whether something is considered a governmental function is defined by the *general* activity performed, not the specific conduct of the individual employees. *Smith v. State*, 428 Mich. 540, 608 (1987). Michigan courts would find that these MDEQ employee defendants were performing a governmental function, so they are entitled to immunity under the state immunity statute. The tort claims against defendants Shekter Smith, Wyant, and Wurfel are thus dismissed.

Finally, the State Defendants argue that defendants Snyder, Lyon, and Wells are entitled to absolute immunity under the state immunity statute. (*See* Dkt. 103 at 21.) Because under Michigan law they are the highest "elective or highest appointive executive official" of their departments (see Dkt. 144 (defendant Wells entitled to absolute immunity)), and they were acting in the scope of their executive authority, the tort claims against them are dismissed.

As to defendant Glasgow, a lower level employee, no reasonable jury could find that he is the one defendant most directly responsible for plaintiffs' harm. Plaintiffs allege that defendant Glasgow stated "[i]f water is distributed from this plant in the next couple of weeks, it w[ould] be against [his] direction," because he "need[ed] time to adequately train additional staff and to update [MDEQ's] monitoring plans before [he would] feel [MDEQ was] ready." (Dkt. 1 at 22.) They

allege that defendant Glasgow stated "management above" seemed "to have their own agenda." (*Id.*) At the very least, the "management above" would be more directly responsible for plaintiffs' harms. Thus, the tort claims are also dismissed as to defendant Glasgow.

And defendants Prysby (an engineer at MDEQ), Cook (a water treatment specialist at MDEQ), and Busch (the district supervisor for MDEQ), are lower level employees nonetheless entitled to immunity. As with defendant Glasgow, even if plaintiffs sufficiently pleaded that defendants Prysby, Cook, and Busch were grossly negligent, reasonable jurors could not find that any one of them was *the* proximate cause of plaintiffs' injuries. As alleged, defendants "Cook, Busch, and Prysby were undeniably aware that no corrosion control was being used in Flint" by "no later than April 2015." (Dkt. 1 at 34.) This was long after the water allegedly began to harm plaintiffs. Plaintiffs say it was "likely much earlier," but this is insufficient to show that defendants Cook, Busch, and Prysby were the proximate cause of their injuries. Thus, the state tort claims against them are dismissed.

Finally, even accepting as true that plaintiffs sufficiently allege Nancy Peeler, a lower level employee at MDHHS, acted with gross negligence, plaintiffs fail to show that she was the proximate cause of their injuries. Taking plaintiffs' allegations as true, defendant Peeler, at all relevant times an MDHHS employee in charge of its childhood lead poisoning prevention program, participated in, directed, and oversaw the Department's efforts to hide information to save face, and

to obstruct the efforts of outside researchers. (Dkt. 1 at 12-13.) And she tried to generate evidence that there was no lead contamination problem, even when her own Department had data that verified outside evidence to the contrary. (*Id.* at 13.) Moreover, when MDHHS epidemiologist Cristin Larder emailed defendant Peeler, among others, noting an increase in blood lead levels in Flint just after the switch and concluding that the issue "warrant[ed] further investigation," Peeler attributed it to seasonal variation. (*Id.* at 48.) But given that lead levels were already rising in plaintiffs' blood by the time Peeler is alleged to have acted, Michigan courts would likely hold that a reasonable juror could not find that she was *the* proximate cause of the harm. Thus, the claims against her must be dismissed.[9]

Plaintiffs argue that dismissal is premature, and "it should be sufficient that [d]efendant's alleged actions, taken as true . . . , could be 'the' proximate cause of the Flint crisis." (Dkt. 121 at 30.) But it is not enough to say any defendant's actions were "among" those that caused plaintiffs' harm. (*Id.*) Rather, the test is whether a jury could reasonably find, if plaintiffs proved their allegations, that a defendant, individually, was the most direct cause of the harm.

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[9] Plaintiffs do not directly address defendant Scott, but they similarly fail to plead how he—a data manager at MDHHS who attempted to refute outside evidence of rising lead levels—is *the* proximate cause of plaintiffs' injuries. The state tort claims as to defendant Scott are thus dismissed.

As this case highlights, the more governmental actors that are involved in causing a massive tort in Michigan, the less likely it is that state tort claims can proceed against the individual government actors, given the way the state immunity statute operates. Because the harm that befell plaintiffs was such a massive undertaking, and took so many government actors to cause, the perverse result is that none can be held responsible under state tort law, at least based on plaintiffs' pleadings; it is nearly impossible to point to any one of the defendants as *the* most proximate cause of plaintiffs' injuries. *White*, 2013 Mich. App. LEXIS 342, at *10 ("There cannot be other more direct causes of plaintiff's injuries.").

It is plaintiffs' burden to plausibly plead who was most directly responsible for the harm. They fail to do so here, so all of the lower-level governmental employees are immune from plaintiffs' state tort claims. Accordingly, plaintiffs' Counts 7 (nuisance), 8 (trespass), 12 (gross negligence), 13 (intentional infliction of emotional distress), and 14 (negligent infliction of emotional distress) are dismissed as to all remaining governmental defendants, based on state statutory immunity.

ii. Breach of contract

In Count 5, plaintiffs allege that defendants City of Flint and State of Michigan breached the contract defendants had with plaintiffs for the sale and purchase of safe, potable water. As set forth above,

plaintiffs fail to sufficiently plead that they had such a contract under Michigan law. *See supra* III.c.ii. Plaintiffs claim for breach of contract is thus dismissed.

iii. Breach of implied warranty

In Count 6, plaintiffs allege that defendants City of Flint and State of Michigan are liable for a breach of implied warranty. According to plaintiffs, these defendants directly or impliedly promised to provide water that was fit for human consumption and later admitted that the water supplied was contaminated and thus not fit for human consumption, in breach of implied warranty. (Dkt. 1 at 71-72.)

Defendants argue that the implied warranty claim must fail, because implied warranty claims exist only under Michigan's version of the UCC and such a contract would be one for services, but the UCC only applies to contracts for goods. Defendants also argue that even if the UCC did apply here, plaintiffs failed to comply with the UCC's notice requirements for bringing an implied warranty claim. (Dkt. 52 at 39.) Plaintiffs implicitly agree, arguing that the state's UCC would never "apply to the supply of public drinking water to consumers." (Dkt. 122 at 45.) And they fail to establish, and do not even argue, that implied warranty claims exist outside the UCC. (*Id.* at 44-46.)

"Warranties of merchantability and fitness for a particular purpose are, by their nature, inapposite to a contract for services like that at issue here." *De Valerio v. Vic Tanny Int'l*, 140 Mich. App. 176, 180 (1984).

Plaintiffs could not provide, in their briefs or at the hearing, and the Court could not independently find, any Michigan case law in which implied warranty claims were adjudicated as to contracts for services. Because breach of implied warranty claims exist only under the Michigan UCC, and the alleged contract here (which, as set forth above, does not actually exist) would be one for services and not goods for which the state's UCC is inapplicable, plaintiffs' breach of implied warranty claim is dismissed.

iv. Nuisance

Plaintiffs allege that all defendants are liable for nuisance, because they caused lead-contaminated water to be delivered to plaintiffs' homes, which substantially and unreasonably interfered with their comfortable living and ability to use and enjoy their homes. (Dkt. 1 at 72-73.)

As noted above, all of the governmental defendants are entitled to immunity from state tort liability. That leaves the private defendants. Defendants Veolia and Lockwood argue that the claim fails because they did not control the nuisance. (Dkts. 50 at 14-16, 59 at 19-22.)

To plead a private nuisance claim in Michigan (plaintiffs only respond to the motions to dismiss as to private nuisance, so we need not address public nuisance claims), plaintiffs must show that defendants committed "a nontrespassory invasion of [their] interest in the private use and enjoyment of land." *Adkins*

v. Thomas Solvent Co., 440 Mich. 293, 302 (1992). Plaintiffs must show that defendants were "in control, either through ownership or otherwise," which "must be something more than merely issuing a permit or regulating activity on the property which gives rise to the nuisance." *McSwain v. Redford Twp.*, 173 Mich. App. 492, 498 (1988). Put differently, Michigan courts do not impose liability when a "defendant has not either created the nuisance, owned or controlled the property from which the nuisance arose, or employed another to do work which he knows is likely to create a nuisance." *Id.* at 499.

Plaintiffs argue that "control" is satisfied because defendants Veolia and Lockwood had the "power to prevent the injury." (Dkt. 117 at 22.) But the case cited by plaintiffs for this proposition—a defective premises case—holds that the "power to prevent the injury . . . rests primarily upon him who has control and possession" of the premises. *Sholberg v. Truman*, 496 Mich. 1, 10-11 (2014). Plaintiffs' argument assumes the conclusion. To plead their claim, plaintiffs are required to sufficiently allege that Veolia or Lockwood had sufficient control and possession of the premises to establish that either had the power to prevent the injury.

Plaintiffs plead that Lockwood, "an engineering firm, was hired to prepare Flint's water treatment plant for the treatment of new water sources." According to plaintiffs, they were "responsible for providing engineering services to make Flint's inactive water treatment plant sufficient to treat water from each of

its new sources." Plaintiffs elsewhere note that Lockwood was "the consultant." (Dkt. 1 at 21.)

Plaintiffs plead that Veolia "was hired to conduct a review of the City's water quality, largely in response to citizen complaints." Veolia's "task was to review Flint's public water system, including treatment processes, maintenance procedures, and actions taken." According to plaintiffs, "Veolia had an opportunity to catch what [d]efendant [Lockwood] had missed or refused to warn about." However, Veolia concluded that the water was "in compliance with . . . state and federal standards and required testing." (*Id.* at 31.)

Because control under Michigan law "must be something more than merely issuing a permit or regulating activity on the property," see *McSwain*, 173 Mich. App. at 498, defendants Veolia and Lockwood, in their role as consultants and advisors, cannot be held liable for the alleged nuisance. Their "control" is even less than that of a regulating or permit-granting authority. Moreover, plaintiffs plead that defendant MDEQ was "Flint's 'primacy agency,'" and thus "responsible for ensuring that Flint set water quality standards and properly treated its water" (Dkt. 1 at 25), further undercutting their argument that defendants Veolia and Lockwood were in control of the nuisance. The claim is therefore dismissed.

v. Trespass

Plaintiffs allege that all defendants are liable for trespass, because they willfully caused contaminants

to enter plaintiffs' property and plaintiffs' bodies. (Dkt. 1 at 74.) Again, because the governmental defendants are immune from state tort liability, this claim remains only as to defendants Veolia and Lockwood. Defendants Veolia and Lockwood argue that the claim fails because they did not intentionally invade plaintiffs' land with a tangible object. (*See* Dkts. 50 at 16, 59 at 22.)

In Michigan, "claims of trespass and nuisance are difficult to distinguish and include overlapping concepts." *Traver Lakes Cmty. Maint. Ass'n v. Douglas Co.*, 224 Mich. App. 335, 344 (1997). But Michigan courts have "recognized a desire to 'preserve the separate identities of trespass and nuisance," *Wiggins v. City of Burton*, 291 Mich. App. 532, 555 (2011), and thus trespass requires "proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession." *Adams v. Cleveland-Cliffs Iron Co.*, 237 Mich. App. 51, 67 (1999). When "the possessor of land is menaced by noise, vibrations, or ambient dust, smoke, soot, or fumes, the possessory interest implicated is that of use and enjoyment, not exclusion, and the vehicle through which a plaintiff normally should seek a remedy is the doctrine of nuisance." *Id.*

Put differently, although the intrusion of particulate matter may give rise to a claim of nuisance, the "tangible object" requirement for trespass is not met by such intrusion. *Id.* at 69. This is so because particulate matter "simply become[s] a part of the ambient circumstances of th[e] space." *Id.* Plaintiffs argue that they

are permitted to plead in the alternative, and defendants actions "either constitute[] a nuisance or trespass." (Dkt. 117 at 23.) But for different reasons, plaintiffs fail to plead either.

Even if particulate matter were sufficient to satisfy the tangible object requirement to plead a trespass in Michigan, plaintiffs fail to plead that Veolia and Lockwood *intended* for the particulate matter to invade plaintiffs' property. "Trespass is an intentional tort, meaning it is based on an intentional act," specifically requiring "an intentional and unauthorized invasion." *Swiderski v. Comcast Cablevision of Shelby, Inc.*, No. 227194, 2002 Mich. App. LEXIS 806, at *8 (Mich. Ct. App. June 4, 2002). For these reasons, plaintiffs' claim of trespass is dismissed.

vi. Unjust enrichment

Plaintiffs allege that defendants City of Flint and State of Michigan received the benefits of funds paid by plaintiffs for water, that they utilized these funds for the government, and that retaining the benefit of these funds would be unjust. (Dkt. 1 at 75.)

Defendant City of Flint argues that an unjust enrichment claim is a tort claim, and thus governmental immunity applies. (Dkt. 52 at 46.) Defendant cites one case in which the Michigan Court of Appeals characterizes tort claims to include "common law misappropriation and unjust enrichment." *See Polytorx v. Univ. of Mich. Regents*, Nos. 318151, 320989, 2015 Mich. App. LEXIS 939, at *19 (Mich. Ct. App. May 7, 2015). But

that case was about the statute of limitations. *Id.* (holding that there is a three-year statute of limitations); *see, e.g.*, *Trudel v. City of Allen Park*, Nos. 304507, 304567, 312351, 2013 Mich. App. LEXIS 1855, at *49 (Mich. Ct. App. Nov. 14, 2013) (citing MICH. COMP. LAWS § 600.5813).

The Michigan Supreme Court has held that "'tort liability' as used in [MICH. COMP. LAWS §] 691.1407(1) encompasses all legal responsibility arising from non-contractual civil wrongs for which a remedy may be obtained in the form of compensatory damages." *Mick v. Kent Cty. Sheriff's Dep't (In re Estate of Bradley)*, 494 Mich. 367, 397 (2013); *see id.* at 409 (McCormack, J., dissenting) ("[U]njust enrichment. . . . is based on principles of equity; it sounds in neither contract nor tort, yet it shares characteristics of both."). And unjust enrichment claims are equitable claims only available when there is no express contract. But plaintiffs could not identify, and this Court could not independently find, any case in which Michigan statutory immunity was extended to state actors for claims of unjust enrichment.

Whether the governmental defendants are entitled to immunity from unjust enrichment claims is a complicated and unsettled area of state law. Accordingly, the Court declines to exercise jurisdiction over this claim. 28 U.S.C. § 1367(c)(1) ("The district courts may decline to exercise supplemental jurisdiction over a claim . . . [if] the claim raises a novel or complex issue of State law."); *see, e.g.*, *Arrington v. City of Raleigh*, 369 F. App'x 420, 423 (4th Cir. 2010) (district court

abused discretion by retaining jurisdiction over claim involving "state law immunity issues [that] are both novel and complex").

vii. Negligence/professional negligence/ gross negligence against defendant Veolia

Plaintiffs allege that defendant Veolia, by agreeing to work for defendant City of Flint on the switch from the Detroit River to the Flint River as its municipal water source, undertook a duty to plaintiffs and carelessly and negligently caused plaintiffs' harm. (Dkt. 1 at 75-76.)

Defendant Veolia argues that there is no independent cause of action for gross negligence in Michigan, and ordinary negligence claims cannot be brought against Veolia as professionals, thus only the professional negligence claim is proper. (Dkt. 50 at 20.) Veolia does not argue that the professional negligence claim should be dismissed as a matter of law.

Defendant Veolia is correct that "gross negligence is not an independent cause of action under Michigan law." *Buckner v. Roy*, No. 15-cv-10441, 2015 U.S. Dist. LEXIS 108371, at *23 (E.D. Mich. Aug. 18, 2015). Plaintiffs do not adequately address Veolia's argument that gross negligence is used as a standard in certain types of claims rather than an independent cause of action, instead stating in conclusory terms that they have sufficiently alleged an action for gross negligence. (*See* Dkt. 117 at 19.)

In Michigan, gross negligence is used as a standard for a plaintiff's tort claim to proceed against a defendant with whom the plaintiff has signed a waiver of liability. *See Xu v. Gay*, 257 Mich. App. 263, 269 (2003) ("A contractual waiver of liability also serves to insulate against ordinary negligence, but not gross negligence."). The case plaintiffs cite to support their argument that gross negligence is an independent claim is merely an application of this principal. *See Sa v. Red Frog Events, LLC*, 979 F. Supp. 2d 767, 778-79 (E.D. Mich. 2013) (waiver of liability did not apply because plaintiff adequately pleaded gross negligence). Because gross negligence is not an independent cause of action in Michigan, the claim is dismissed.

As to ordinary negligence, Veolia argues that because plaintiffs' claim arises from actions taken in "the course of a professional relationship" and raises questions of its professional judgment "beyond the realm of common knowledge and experience," the claim is one of professional negligence. (Dkt. 50 at 20-21 (citations omitted).) According to Veolia, the ordinary negligence claim is precluded because Veolia is sued as a water treatment professional. (*Id.* at 21.) Veolia quotes plaintiffs' allegations, which identify Veolia as a "professional engineering service[]" that was required to "exercise independent judgment . . . in according with sound professional practices." (*Id.* at 22.)

Plaintiffs respond that they have plausibly alleged that Veolia violated both standards of care—that of a reasonable person and that of a reasonable

professional—and thus both claims should remain. (Dkt. 117 at 20-21.)

The cases Veolia cites are generally medical malpractice cases, which are distinct from plaintiffs' negligence claim here. In Michigan, malpractice actions do not include actions against engineers. *Nat'l Sand, Inc. v. Nagel Constr., Inc.*, 182 Mich. App. 327, 340 (1990). Rather, even assuming a "malpractice" action could be brought against an engineer, it would simply mean that ordinary "negligence by an engineer is malpractice," not "that an action against engineer is a malpractice action." *Id.* at 339; *see, e.g.*, *Bacco Constr. Co. v. Am. Colloid Co.*, 148 Mich. App. 397, 416 (1986) (sustaining ordinary negligence action against engineer for harm caused by miscalculations).

The professional negligence claim is dismissed. Because Veolia does not argue that plaintiffs otherwise fail to sufficiently plead an ordinary negligence claim, the claim survives.

viii. Negligence/professional negligence/ gross negligence against defendant Lockwood

Plaintiffs make the same negligence/professional negligence/gross negligence claims against defendant Lockwood as they make against defendant Veolia, and defendant Lockwood makes similar arguments as those made by defendant Veolia in its motion to dismiss. (*See* Dkt. 59 at 25-26.) For the same reasons as those set forth above, the professional negligence and

gross negligence claims are dismissed but the ordinary negligence claim survives.

ix. Punitive damages/joint and several liability

Defendants Veolia and Lockwood argue that punitive damages are not recoverable in Michigan unless authorized by statute, which is not the case here, and thus plaintiffs' request for such damages must be barred. (Dkts. 50 at 20, 59 at 26.) Plaintiffs respond indirectly, arguing that exemplary damages are permitted. (Dkts. 50 at 24-25, 59 at 20-21.)

Punitive damages "are generally not recoverable in Michigan" with the exception of when "they are expressly authorized by statute." *Casey v. Auto Owners Ins. Co.*, 273 Mich. App. 388, 400 (2006). And when a plaintiff does not identify "any statute that would grant them punitive damages," dismissal of a request for punitive damages is proper. *Id.* Plaintiffs do not do so here, so their request for punitive damages is dismissed.

Plaintiffs are correct, though, as to exemplary damages; "exemplary damages are distinct from punitive damages and are designed to compensate plaintiffs for humiliation, outrage, and indignity resulting from a defendant's wilful, wanton, or malicious conduct." *Fellows v. Superior Prods. Co.*, 201 Mich. App. 155, 158 (1993) (quotations omitted). Rather than punishment for bad acts, for which punitive damages are awarded, exemplary damages are intended to

compensate for emotional harms that are not adequately compensated by pecuniary or compensatory damages. *Id.* Although the punitive damages request should be dismissed, plaintiffs may be entitled to exemplary damages. Their request for exemplary damages may proceed.

Defendant Veolia also argues that plaintiffs cannot recover joint-and-several liability in Michigan. (Dkt. 50 at 27.) Michigan has replaced joint-and-several liability with fair-share liability. *See Smiley v. Corrigan*, 248 Mich. App. 51, 55 (2001). Plaintiffs concede the point. (Dkt. 117 at 12.) Thus, any claim for joint-and-several liability is dismissed.

IV. Conclusion

For the reasons set forth above, the motions to dismiss (Dkts. 50, 52, 59, 69, 70, 96, 102, 103, 105) are each GRANTED IN PART and DENIED IN PART.

Plaintiffs' Counts 1 (substantive due process property claim), 2 (procedural due process property claim), 3 (substantive due process state-created danger claim), 5 (breach of contract claim), 6 (breach of implied warranty claim), 7 (nuisance claim), 8 (trespass claim), 12 (gross negligence claim), 13 (IIED claim), and 14 (NIED claim) are DISMISSED WITH PREJUDICE.

Plaintiffs' Count 4 (substantive due process bodily integrity claim) is DISMISSED WITH PREJUDICE as to defendants Shekter Smith, Busch, Prysby, Wurfel, Wells, Lyon, and Peeler in their official capacities.

Count 4 is DISMISSED WITH PREJUDICE as to defendants State of Michigan, MDHHS, MDEQ, Snyder, Cook, and Glasgow in its entirety.

The Court declines to exercise supplemental jurisdiction over Count 9 (unjust enrichment claim), so it is DISMISSED WITHOUT PREJUDICE.

Plaintiffs' Counts 10 and 11 (professional negligence and gross negligence claims) are DISMISSED WITH PREJUDICE.

Plaintiffs' Count 15 (proprietary function claim) is not an independent cause of action, and so is DISMISSED WITH PREJUDICE.

Accordingly, plaintiffs' Count 4 (substantive due process bodily integrity claim) may proceed against defendants City of Flint, Earley, Ambrose, Wyant, and Croft, and defendants Shekter Smith, Busch, Prysby, Wurfel, Wells, Lyon, and Peeler in their individual capacities. Plaintiffs' Counts 10 and 11 (ordinary negligence claims) may proceed against defendants Veolia and Lockwood, respectively.

IT IS SO ORDERED.

Dated: June 5, 2017
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

[Certificate Of Service Omitted]

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 19a0003p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SHARI GUERTIN, individually and as next friend of her child, E.B., a minor; DIOGENES MUSE-CLEVELAND, *Plaintiffs-Appellees*, *v.* STATE OF MICHIGAN, et al., *Defendants*, CITY OF FLINT, MICHIGAN, HOWARD CROFT, DARNELL EARLEY, and GERALD AMBROSE (17-1699); LIANE SHEKTER-SMITH, DANIEL WYANT, STEPHEN BUSCH, MICHAEL PRYSBY, and BRADLEY WURFEL (17-1745);, *Defendants-Appellants*.	Nos. 17-1699/1745

Appeal from the United States District Court
for the Eastern District of Michigan at Ann Arbor.
No. 5:16-cv-12412—Judith E. Levy, District Judge.

Decided and Filed: May 16, 2019

Before: McKEAGUE, GRIFFIN, and WHITE,
Circuit Judges.

COUNSEL

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GIBBONS, J. (pg. 3), delivered a separate concurring opinion in which STRANCH, J., joined. SUTTON, J. (pp. 4–10), delivered a separate concurring opinion in which BUSH, J., joined. KETHLEDGE, J. (pp. 11–13), delivered a separate dissenting opinion in which THAPAR, LARSEN, NALBANDIAN, and MURPHY, JJ., joined.

ORDER

The court received petitions for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision. The petitions then were circulated to the full court.[1] Less than a majority of the judges voted in favor of rehearing en banc.

Therefore, the petitions are denied.

CONCURRENCE

GIBBONS, Circuit Judge, concurring in the denial of rehearing en banc. I write separately to note that at this stage in the proceeding, it is better to find out what facts will eventually be before the district court, rather than to prematurely attempt to determine what law would apply to those hypothetical facts. In reading the 89-page complaint, this court could find many iterations of possible allegations. As Judge Sutton notes, some of those possible allegations would not permit

[1] Judge Readler recused himself from participation in this decision.

finding a constitutional violation. Still, others would permit such a finding.

When considering a 12(b)(6) motion to dismiss, it is not our job to find the facts. Our job is, and only is, to determine whether any possible allegation plausibly states a claim under which relief can be granted. To decide any other issue would be judicial overreach. To discuss anything further would be an advisory opinion. Both the majority and dissent rushed to articulate a standard before the facts had been fully discovered.

The plaintiffs, with whom every opinion expresses sympathy, are entitled to the full benefit of the rule's broad standard. That means that, so long as they have pled plausible allegations that would constitute a constitutional violation, they are entitled to discovery. The 12(b)(6) standard "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct]." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). We must "let district courts do what district courts do best—make factual findings—and steel ourselves to respect what they find." *Taglieri v. Monasky*, 907 F.3d 404, 408 (6th Cir. 2018) (en banc).

CONCURRENCE

SUTTON, Circuit Judge, concurring in the denial of rehearing en banc. If bad facts run the risk of making bad law, terrible facts run the risk of disfiguring law and silencing it altogether. In their complaint, the plaintiffs in this traumatic case plant the seeds of two potential stories. One speaks of local officials who bungled their response to a water crisis and in the process inadvertently polluted the water supply for the people of Flint, Michigan. The other speaks of local officials who intentionally poisoned Flint's water supply. In each telling, the claimants invoke the Due Process Clause of the Fourteenth Amendment. In each telling, the claimants invoke the most far-reaching and the least guide-posted permutation of that guarantee: substantive due process. And in each telling, the claimants seek hundreds of millions of dollars in retroactive money damages for the alleged constitutional violations.

Each story leads to a different end.

Negligent, even grossly negligent, conduct by local officials does not generally violate citizens' substantive due process rights. Least of all would these actions clearly violate such rights, as there is very little that is clear about substantive due process. If that's what happened here, this litigation needs to end—promptly. It is a distraction to the key goal (fixing Flint's water supply), and it is unfair to the public servants to boot.

Their mistakes may deserve public criticism, but they do not deserve the tag of violating clearly established constitutional rights and what comes with it: exposure to crippling monetary judgments.

But an intentional or reckless effort to poison Flint's water supply is another matter. If that's what happened, the case must proceed.

So which account is the right account? It's too early to say. At the pleading stage of a case, plaintiffs are entitled to make plausible allegations in their complaint and use the discovery process to ferret out support for their preferred account through depositions, emails, and documents. At 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.

In view of the starkly different nature of these two accounts and in view of the starkly different outcomes for each of them, I would have written the majority opinion—permitting this case to proceed to discovery—in a different key. At least five features of this unfortunate case warrant a tone of caution.

Cautionary feature one. This is a money damages case against public officials in their individual capacities. We do not lightly allow citizens to tap private pockets or the public treasury by suing the public officials that a majority of them selected to handle these jobs. That's why claimants must show that (1) the

officials violated their constitutional rights and (2) the officials were on notice of the prohibition because they violated well-established constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Only when the unconstitutionality of a local official's actions is "beyond debate," only when "every reasonable official would have understood that what he is doing violates that right," will we deny him protection. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quotation omitted). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). That is a rigorous standard.

Cautionary feature two. Even when viewed in its best light, the plaintiffs' claim of unconstitutionality takes us to the outer edges of judicial competence. Unlike claims anchored in the U.S. Constitution's text, substantive due process cases offer little guidance about the reach of our authority, inviting a free-floating inquiry devoid of textual rhyme or reason. That's why we are directed to proceed slowly in this area "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of" any two judges on this court. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). And that's why the U.S. Supreme Court warns us that "the Fourteenth Amendment is not a font of tort law to be superimposed upon whatever systems may already be administered by the States." *County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998) (quotation omitted).

But "a font of tort law" layered onto the state courts' remedial laws is just what we seem to be getting in this case. Our job is not to invoke highly abstract rights to facilitate money damages actions under § 1983 but to stoop to examine the details of the cases to make sure they plainly mark the lines of constitutional trespass and alert public officials to their metes and bounds. A comparison between this case and the bodily integrity cases invoked by the claimants shows a yawning gap. Sure, the U.S. Supreme Court has prohibited investigators from forcibly pumping a suspect's stomach to recover swallowed evidence, *Rochin v. California*, 342 U.S. 165, 172 (1952), has allowed a prisoner (in some cases) to forgo unwanted antipsychotic medication, *Washington v. Harper*, 494 U.S. 210, 221–22 (1990), and has assumed a right to refuse life-saving medical treatment, *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 (1990).

But to describe these fact patterns is to question their applicability here. Not one of them involves the provision of a public utility in a time of economic hardship. Not one of these decisions, innovative at the time, involves a retroactive money damages action against public officials in their individual capacities. And all of them caution us to adopt the tenor of restraint when it comes to extending the right to bodily integrity in a new direction.

The precedent the panel majority found "especially analogous" to today's case, *Guertin v. Michigan*, 912 F.3d 907, 921 (6th Cir. 2019), has no business in the inquiry. It is a district court case. *See In re*

Cincinnati Radiation Litig., 874 F. Supp. 796 (S.D. Ohio 1995). And district court decisions do not mark appellate law—the relevant benchmark for ascertaining well-established constitutional law. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011); *Hall v. Sweet*, 666 F. App'x 469, 481 (6th Cir. 2016).

Cautionary feature three. Even aside from the one-off nature of these cases, the inscrutable nature of the inquiry by itself gives pause. While many acts of public officials might theoretically affect the right to bodily integrity, only an official who "shocks the conscience" violates the right. *Lewis*, 523 U.S. at 846. Missing from this case so far is any recognition that the purpose of the test is to restrain judges, not empower them; to remove claims from the constitutional arena, not to expand nebulous notions of substantive due process. *See id.* at 846–49. Also missing is an appreciation of the imperative that we not apply the "clearly established" prong of qualified immunity at a nose-bleed level of generality, but rather must find precedent "particularized to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 551–52 (2017) (per curiam) (quotation omitted). Whatever else the shocks-the-conscience test means in the context of an effort to pierce public employees' qualified immunity, it at a minimum requires "an exact analysis of circumstances," *Lewis*, 523 U.S. at 850, measured by truly comparable cases. In the often "unfamiliar territory" that cases like this one present, "mechanical application" of prior precedent usually does little good. *Id.*

Cautionary feature four. All of this means that our court and the district court must carefully match allegations to individual defendants to determine whether the plaintiffs can show that each official engaged in conscience-shocking behavior—and clearly established behavior at that. Doubt clouds several aspects of the claims that remain in the case. By the plaintiffs' own account, the defendants relied on independent experts in making the most crucial decisions. How could that conduct show intentional misconduct—intentional poisoning of the people of Flint—given that the officials, aware of their own limitations, sought outside help? That does not sound like intentional or reckless behavior.

A like concern arises from the allegations against individual defendants still in the case. Take Darnell Earley as one example of this problem. He served as Flint's emergency manager from November 2013 until January 12, 2015. The complaint alleges that he "made the decision to switch to Flint River water," R. 1 at 7, then "forced the transition through" before Flint's treatment plant was ready in order to keep up with his "aggressive deadline," R. 1 at 21. He also allegedly made false and misleading statements that Flint's water was safe. But the complaint does not allege that he knew those statements were false. It instead says that the government hired an outside engineering firm to make sure the city properly treated the water. Those experts did not recommend that the city set water quality standards or implement corrosion control before using the river's water. And the first report of lead

in Flint's drinking water did not come until January 9, 2015. That's only four days before Gerald Ambrose replaced Earley as the emergency manager and around the same time that officials employed a second outside engineering firm to investigate complaints. (That firm also concluded that the water was safe.) I struggle to see how Earley's actions, all consistent with outside experts' advice, rise to the threshold of a clearly established substantive due process violation. The same may be true of other individual defendants.

Cautionary feature five. A similar case already exists in state court. Based on the same events, several individuals filed a putative class action in the Michigan courts against most of the same defendants under the substantive due process guarantee of the Michigan Constitution. *See Mays v. Snyder*, 916 N.W.2d 227, 240, 242 (Mich. Ct. App. 2018). The Michigan Court of Appeals denied the defendants' motions for summary disposition as to the state law due process bodily integrity claims, and that case continues to wind its way through the Michigan court system. *Id.* at 242–43, 277.

Would it not make sense for the federal courts to wait and see what relief the Michigan Constitution provides before determining whether the state defendants violated the Due Process Clause of the U.S. Constitution? Before deciding whether someone may sue a State for depriving him of property or liberty or life without due process, the federal courts first consider the judicial process the State provides him to remedy his alleged injuries. *Parratt v. Taylor*, 451 U.S. 527, 543–44 (1981); *see Hudson v. Palmer*, 468 U.S. 517, 533

(1984); *see also Albright v. Oliver*, 510 U.S. 266, 283–86 (1994) (Kennedy, J., concurring in the judgment). For that reason, if the underlying state and federal claims in today's case turned on process in its conventional sense, the federal courts presumably would stay their hand to determine what process the State provided. If that approach makes sense in the context of *procedural* due process, it makes doubly good sense in the context of *substantive* due process. Otherwise, we give claimants more leeway when they raise the most inventive of the two claims, rewarding them for asking us to do more of what we should be doing less.

This is not a new concept. For some time, the federal courts have tried to avoid federal constitutional questions when they can. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). One way to further that goal is to learn whether the substantive due process protections of the Michigan Constitution or any other state laws redress the plaintiffs' injuries. Because the "open-ended" nature of substantive due process claims lacks "guideposts for responsible decisionmaking," *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992), we should welcome input from the Michigan courts about what process, substantive or otherwise, is due under state law. Better under these circumstances, it seems to me, to hold the federal substantive due process claims in abeyance—and avoid prematurely creating new federal constitutional tort regimes—until the plaintiffs have had a chance to vindicate their rights in state court. *Cf. Browder v. City of Albuquerque*, 787 F.3d

1076, 1083–85 (10th Cir. 2015) (Gorsuch, J., concurring).

All of this by the way will prove beneficial whether the plaintiffs win or lose in state court. If they win, there will be less, perhaps nothing at all, for the federal courts to remedy under federal substantive due process. If they lose, the state courts' explanation may inform the federal claims.

Having urged our court and the district court to address these claims with caution and restraint, I must accept a dose of my own medicine. Two features of this case offer some support for these decisions—sufficient support to wait and see before granting a petition to review the case as a full court. One reasonable explanation for waiting to review the dispute is the stage of the case—Rule 12(b)(6)—from which these decisions arose. This 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. The point of discovery is to allow claimants and the courts to determine whether facts support plausible claims. That opportunity should help us all in resolving this case fairly.

A second reasonable explanation for waiting to review this case as a full court is the hard-to-pin-down nature of the clearly established inquiry. The officials, it is true, can be found liable only if this lawsuit falls into the narrow category of cases so egregious, so obvious, that *all* reasonable officials *must* have known

what they did was wrong. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002). What's tricky is figuring out what counts as reckless or intentional behavior—in the context of a clearly established conscience-shocking standard of care. For better or worse, the case law seems to present a sliding scale—the more evidence of unforgiveable intent, the less necessity to identify a case just like this one. That is what seemed to happen in *Hope v. Pelzer*. The facts were unique. No correctional officials before then, at least in a litigated case, had thought to chain inmates to a hitching post in the unrelenting heat of the Alabama sun for seven hours as a form of prison discipline. What permitted the U.S. Supreme Court to hold that the state officials violated clearly established norms turned not on any one precedent but on the egregiousness of the state officials' state of mind. *Id.* at 741, 745. So long as that is an appropriate approach to qualified immunity claims, it would seem that allegations like these—intentional or reckless poisoning of citizens—plausibly clear the clearly established hurdle and warrant discovery. *See Wesley v. Campbell*, 779 F.3d 421, 433–34 (6th Cir. 2015); *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Village Sch. Dist.*, 428 F.3d 223, 235 (6th Cir. 2005) (Sutton, J., concurring); *see also Jacobs v. City of Chicago*, 215 F.3d 758, 774–76 (7th Cir. 2000) (Easterbrook, J., concurring in part and concurring in the judgment).

That discovery should proceed does not eliminate a role for the district court. One would hope that the court, in view of the seriousness of the allegations and

the potential protections of qualified immunity at summary judgment, would not deploy a laissez-faire approach to document and deposition discovery. Carefully tailored and prompt discovery should answer whether the intentional and reckless poisoning allegations hold up. If not, this case needs to return to the court of public opinion, where one suspects it should have remained all along.

DISSENT

KETHLEDGE, Circuit Judge, dissenting from the denial of rehearing en banc. To state the obvious, the sympathies of every decent person run entirely to the plaintiffs in this case. But sometimes the law, even-handedly applied, leads to a result contrary to the crush of popular opinion. This is one of those cases.

Respectfully, the majority's decision on the issue of qualified immunity is barely colorable. To overcome qualified immunity, the plaintiffs must show that "existing law" made not merely the legality, but "the *constitutionality* of the [state] officer's conduct 'beyond debate.'" *District of Columbia v. Wesby*, 138 S.Ct. 577, 589 (2018) (emphasis added) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). Here, the putative constitutional violation concerns the vaguest of constitutional doctrines, namely substantive due process. The doctrine purports to protect—"specifically," no

less—"those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Maj. Op. at 6-7 (quoting *Washington v. Glucksberg*, 512 U.S. 702, 720-21 (1997)). That formulation (along with any number of alternative ones) is more oratory than legal rule, which has made the doctrine malleable enough to generate an array of constitutional rights over the years. Those include, to cite only a handful: the right to work unlimited hours in a bakery, *Lochner v. New York*, 198 U.S. 45, 53 (1905); the right to procreate, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); the right to charge certain minimum railroad rates, *Ex parte Young*, 209 U.S. 123, 149 (1908); the right to teach schoolchildren in German, *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923); and the right not to pay "grossly excessive" punitive damages, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996).

But just as crowbars are not made out of tin, substantive due process's easy malleability makes it a notably poor instrument for prying away an officer's qualified immunity. For to overcome that immunity in a case (like this one) where the claim is constitutional, the "contours" of the relevant constitutional rule "must be so well defined that it is 'clear to a reasonable officer' " that his conduct would violate the rule. *Wesby*, 138 S.Ct. at 590 (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). That requirement—often repeated by the Supreme Court, but sometimes, as here, overlooked—

presents two obstacles to the majority's decision in this case. The first concerns the particular "fundamental right" (or rule) that the majority relies upon, namely a "right to bodily integrity[.]" Maj. Op. at 7. The sheer vagueness of that formulation illustrates that its "contours" are shapeless rather than crisp, subjective rather than objective, unknowable until judicially announced. Even the majority acknowledges (as it stretches the right further) that the right presents "far from a categorical rule." Maj. Op. at 8.

The second problem is related: the "bodily integrity" caselaw fails to provide the "high 'degree of specificity[,]'" *Wesby*, 138 S.Ct. at 590 (quoting *Mullenix v. Luna*, 136 S.Ct. 305, 309 (2015) (per curiam)), necessary to overcome qualified immunity, at least as to the claim here. Instead that caselaw for the most part provides a handful of data points, which form more of a dusty nimbus than a planetary ring. But the caselaw does reveal a *sine qua non* for the right's violation: that the officer's invasion of the plaintiff's bodily integrity be *intentional*. To cite the majority's own examples: the right protects against "forcible injection" of "antipsychotic medication[,]" *Washington v. Harper*, 494 U.S. 210, 220-21, 229 (1990); against forcible stomach-pumping, *Rochin v. California*, 342 U.S. 165, 172 (1952); and, in a district court case, against conducting medical experiments upon cancer patients without their consent, *In re Cincinnati Radiation Litigation*, 874 F.Supp. 796, 803 (S.D.Ohio 1995). Nobody forcibly injects or stomach-pumps or conducts medical experiments upon another person by accident. Yet the claim at issue here, as the plaintiffs themselves make it,

indisputably sounds in negligence: that "Defendants violated Plaintiffs' rights to bodily integrity, insofar as Defendants failed to protect Plaintiffs from *a foreseeable risk of harm*"—the classic formulation, as any first-year law student knows, of a negligence claim—from "exposure to lead contaminated water." Compl. ¶ 384 (emphasis added). And even the majority concedes that "[t]here is no allegation defendants intended to harm Flint residents." Maj. Op. at 18. Thus, the only manner in which the majority's "examples illustrate the breadth" of the right to bodily integrity, Maj. Op. at 9, is to show that the right is inapposite here.

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

No official—no matter how blameworthy he might be on moral grounds—can be expected to recognize in advance that a court will recast a legal rule so that it applies to conduct to which it has never applied before. That in part is why the Supreme Court has "repeatedly stressed that courts must not 'define clearly established law at a high level of generality[.]'" *Wesby*, 138 S.Ct. at 590 (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014)). Yet that is precisely what our court's opinion does here. The Supreme Court has also repeatedly said that courts must not turn substantive due process into "a font of tort law to be superimposed upon whatever systems may already be administered by the States[.]" *Daniels v. Williams*, 474 U.S. 327, 332 (1986) (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)). Yet our court's opinion does that too, by expanding substantive due process to reach claims based on negligence rather than intent. Our court's opinion, "in other words, does exactly what the Supreme Court has repeatedly told us not to do." *Etherton v. Rivard*, 800 F.3d 737, 757 (6th Cir. 2015) (dissenting opinion), *rev'd sub nom. Woods v. Etherton*, 136 S.Ct. 1149 (2016) (per curiam).

I respectfully dissent from the order denying rehearing en banc.

ENTERED BY ORDER OF
THE COURT

/s/ Deb S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re **FLINT WATER CASES**	**Civil Action No. 5:16-cv-10444-JRL-MKM (consolidated)** **Hon. Judith E. Levy** **Mag. Mona K. Majzoub**

FIRST INTERIM REPORT OF THE SPECIAL MASTER REGARDING DATA COMPILATION BASED ON RESPONSES TO THE AMENDED ORDER REGARDING COLLECTION OF DATA

(Filed Feb. 22, 2019)

The Court's Amended Order Regarding the Collection of Data (Dkt. 673) ("Order") requires that Reporting Counsel provide certain specified claims data to the Special Master. Specifically, the Order states that Reporting Counsel:

> provide the data specified herein and in the data collection instrument ("Census Template") (attached as Exhibit A in Dkt. 614) for: (a) all plaintiffs who are named in any case included in In re Flint Water Cases; (b) all named plaintiffs in any case pending in the Eastern District of Michigan asserting claims of injury or damage resulting from the Flint water contamination; (c) all named plaintiffs in any action pending in Genesee County Circuit Court or the Michigan Court of Claims asserting injury or damage resulting from the

> Flint Water contamination; and (d) all persons (including entities) who have entered into an engagement or retainer agreement with a Reporting Counsel with respect to the Flint water contamination but who have not yet filed any action.

Order at 7. The Order further specifies:

> Reporting Counsel shall provide the information identified in the Census Template for each "injured party" subject to this Order. To assure that the information is provided in a consistent and usable format, Reporting Counsel shall provide the information using an excel version of the Census Template that the Special Master will provide to counsel. If Reporting Counsel maintain data in a format that is not readily transferred to an Excel format, then Reporting Counsel shall propose an alternative format provided that the same information categories are included and that the data is compiled in an electronic format (such as a database).

Id. at 8. The Census Template, in PDF format, is attached at Exhibit A. The Order further states:

> If more than one firm represents a plaintiff or prospective plaintiff, counsel shall designate one firm as the Reporting Counsel. All counsel representing plaintiffs in this proceeding shall be responsible for ensuring that all claims relating to the Flint water contamination are registered in accordance with this Order and shall coordinate with Reporting Counsel to

> avoid submission of the same claim by multiple counsel.

Id. at 8. Additionally, the Order provides that the Special Master "will establish a secure FTP or similar site and Reporting Counsel shall post the reports to that site." *Id.* at 9.

PROCESS AND RESULTS

The Special Master established a secure site for each law firm that submitted claim data. Only the designated law firm and the Special Master have access to the law firm's site. The Special Master created and circulated an electronic data collection template to enable the firms to compile data in a uniform format. As of December 28, 2018, nine law firms had provided claim data. (One firm provided updated claim data in January 2019, and three firms provided updated claim data in February 2019. Two additional firms provided data in February 2019. The new and updated submissions made in February 2019 are not reflected in the counts discussed in this First Interim Report.)[1]

The Special Master has compiled and analyzed the data and has provided to each Reporting Counsel a report confirming the data received and outlining certain

[1] The firms submitting data as of December 28, 2018 were: Berezofsky Law Group, LLC; Cuker Law Firm, LLC; Goodman, Hurwitz & James, P.C.; Levy Konigsberg LLP; Marc J. Bern & Partners LLP; Napoli Shkolnik PLLC; Pitt McGehee Palmer & Rivers P.C.; The Sanders Law Firm, PC; and Sawin Law Firm, Ltd.

questions and requesting, in some cases, clarifications, updates or additional data. The Order provides that Reporting Counsel are to provide updated data at 45-day intervals. The Special Master will work with the Reporting Counsel to address any issues and to obtain information relevant to a full understanding of the claim data.

SUMMARY OF AGGREGATE CLAIM DATA

Data provided by Reporting Counsel identified a total of 26,664 injured party records.[2] (The Census Template requested identification by injured party rather than by case in order to obtain a count of individual plaintiffs/claimants.)

The Special Master has identified 3,021 injured party records that appear to be duplicates. That is, there are 3,021 records where the first and last name and date of birth match another record. Some of these apparent duplicates appear within the data submission of a single Reporting Counsel and other apparent duplicates appear in multiple Reporting Counsels' submissions. In the former case, the duplication in some cases may be submission of multiple "claims" for the same claimant as two separate injured parties listed on the report (*e.g.*, both as a property owner and

[2] The use of the term "injured party" in this First Interim Report is simply a term of convenience to indicate a person's assertion of claims of injury or damage from alleged contaminant exposure and should not be construed as any finding, conclusion or determination of any injury, damage or contaminant exposure by any specific person.

individual claim), while in other cases the records may simply be duplication of the same claim. The Special Master has provided each Reporting Counsel with a list of all apparent duplicate injured parties and will work with the Reporting Counsel to determine the appropriate treatment of each such injured party for purposes of determining the aggregate number of individual parties as of the date of the data submission. Generally, however, it is reasonable to assume that the total number of non-duplicate injured parties identified in the data submitted to date is approximately 25,154 (26,664 minus one half of the potential duplicates).

Many submissions were missing information. Most importantly, there are 5,135 individuals identified as injured parties whose dates of birth were not provided in the submissions. Once the missing dates of birth are provided, the Special Master may identify additional duplicates. Additionally, of course, the dates of birth are important for determining the number of individual injured parties who are (or were at the time of exposure) minors. As explained below, various records are missing certain dates or information about water or blood lead level testing.

In some cases, the data was provided in formats different than that requested in the Census Template. In order to provide this First Interim Report, the Special Master has (as much as feasible) reconciled and conformed the data. The numbers provided below are not adjusted to account for duplicate claims pending confirmation and are subject to further refinements

and revisions as updates and clarifications are received from Reporting Counsel.

INJURED PARTY AND CLAIM TYPES

The Census Template requested that claims be identified as an injured party type of either individual, business or other. The breakdown of injured party types identified in the submissions are set forth in the chart below.

Injured Party Type	Grand Total
Individual	26,009
Property Owner	583
Business/Business Owner	54
Other	3
Blank	15
Total	26,664

The Census Template asked for information on whether the claim type was for personal injury (PI), wrongful death (WD), property damage (PD), or a combination thereof. The breakdown of claim types identified in the submissions are set forth in the chart below.

Claim Type	
PI and WD total	23,943
PI; BI; PI,ED[3]	*21,018*
PI and PD	*2,870*
WD; PI and WD	*30*
WD and PD	*25*
PD-only	638
Don't know/blanks	2,083
Total	26,664

The Census Template requested information intended to determine whether claims of injury are based primarily on lead exposure or whether there are claims of injury due to exposure to other substances. The Census Template asked Reporting Counsel to describe the nature of the exposure or injury other than lead exposure. Based on the data submitted, it appears that this question was interpreted differently by Reporting Counsel and therefore it may be necessary to obtain clarification. For example, some firms listed the physical symptoms complained of; others listed allegations of toxic exposure; and some listed the type of claimant – such as a property owner or business owner. The various personal injury types identified in the submissions for claims identified in the data as personal injury or wrongful death are set forth in the chart below.

[3] "ED" was identified by Reporting Counsel as emotional distress.

Personal Injury Types (*consolidated*)[4]	**Total**
E-coli, TTHMs and other bacteria	10,657
Lead exposure (and others)	8,008

[4] The Special Master categorized the responses provided by Reporting Counsel into the chart categories as follows:

- *E-coli, TTHMs and other bacteria*: consists of responses of "e-coli, TTHMs and other bacteria."
- *Lead exposure (and others)*: includes "Lead + Other," "Lead+ Other," "lead," "Lead Exposure."
- *Residence/Family/Business*: includes "Business – Own," "Business – Rent," "Employee," "Family Member – Owner," "Family Member – Rent," "Former Residence – Owner," "Former Residence – Rent," "Former Residence Family Member – Owner," "Former Residence Family Member – Rent," "Residence – Own," "Residence – Rent," "Own."
- *Hair loss/skin rash/irritation*: includes "hair loss," "rash, hair loss," "skin irritation," "skin irritation, hair loss," "skin rash," "skin rash, hair loss," "skin rash/irritation," "Skin Rashes" "skin rashes, hair loss."
- *PI*: includes "PI."
- *Legionella Exposure/Possible Legionella Exposure (and others)*: includes "e. coli, TTHMs, Legionella, Pneumonia and other bacteria," "ID/possible legionella," "Lead Exposure and Possible Legionella Exposure," "Lead and Legionella Exposure," "Lead Exposure and Potential Leigonella Exposure," "Lead/Legionella + Other," "Legionella, e-coli, TTHMs and other bacteria," "Legionella/ID," "Possible Legionnares."
- *Infectious disease (and other)*: includes "infectious disease," "hair loss, infectious disease," "skin rash, hair loss, infectious disease," "skin rash, hair loss, infectious disease," "skin rash, infectious disease."
- *Gastro-Intestinal*: includes "Gastro-Intestinal."
- "*#N/A*": consists of responses provided as "#N/A."
- *Blank:* consists of records that were blank (no response provided).

Residence/Family/Business	3,570
Hair loss/skin rash, rotation	417
PI	164
Legionella Exposure/Possible Legionella Exposure (and others)	26
Infectious disease (and other)	15
Gastro-Intestinal	3
"#N/A"	415
Blank	668
Total	23,943

AGE OF INJURED PARTIES

The following chart provides a breakdown of the age of injured parties for individuals for whom date of birth was provided as of year-end 2014.

Injured Parties by Age as of Year End 2014[5] (No Adjustment for Duplicates)	
6 or younger *(DOBs 2008-2014)*	3,189
7-11 *(DOBs 2003-2007)*	2,125
12-17 *(DOBs 1997-2002)*	1,843
Subtotal under 18 (DOBs 1997-2014)	*7,157*
Post 2014 DOBs *(DOBs 2017-18)*	89
Post 2014 DOBs *(DOBs 2015-16)*	657

[5] Age as of year-end 2014 and based on DOBs provided in data. No adjustment for potential duplicates.

Subtotal under 18 between 2014-18 (DOBs 1997-2018)	*7,903*
18+ (DOBs pre-1997)	12,989
Total with DOBs	20,892
Blank or invalid DOBs	*5,135*
Grand Total	26,027
Business/Property Owner	637
Grand Total	26,664

The following chart provides a breakdown of age groups as of year-end 2018.

Injured Parties by Age as of Year End 2018[6] (No Adjustment for Duplicates)	
6 or younger *(DOBs 2012-2018)*	2,127
7-11 *(DOBs 2007-2011)*	2,251
12-17 *(DOBs 2001-2006)*	2,334
Subtotal under 18 (DOBs 2001-2018)	*6,712*
18+ *(DOBs 2001)*	14,180
Total with DOBs	20,892

[6] Age as of year-end 2014 and based on DOBs provided in data. No adjustment for potential duplicates.

Blank or Invalid DOBs	*5,135*
Total	26,027
Business/Property Owner	637
Grand Total	26,664

WATER TESTING

A total of 6,419 injured parties reported having one or more water tests performed. in many cases, the dates of testing and results were not provided. The following chart provides a breakdown of dates of water testing based on the test that was first identified in the data.[7]

Date of Water Test Performed	
Blank/Invalid	1,565
2014	2
2015	220
2016	4,236
2017	339
2018	57
Total	6,419

[7] An addendum to the reporting sheet provided the opportunity to include additional testing dates and results. Dates of such additional tests are not reflected in this chart.

The age of the individual injured parties as of year-end 2014 for those reporting that a water test was performed is summarized in the following chart.

Water Tests Performed: Injured Parties by Age as of Year End 2014	
6 or younger (DOBs 2008-2014)	675
7-11 (DOBs 2003-2007)	482
12-17 (DOBs 1997-2002)	395
Subtotal under 18 (DOBs 1997-2014)	*1,552*
Post 2014 DOBs (DOBs 2017-18)	12
Post 2014 DOBs (DOBs 2015-16)	129
Subtotal under 18 between 2014-18 (DOBs 1997-2018)	*1,693*
18+ (DOBs pre-1997)	3,426
Total with DOBs	5,119
Blank or invalid DOBs	*1,058*
Total Non-Business/Property	**6,177**
Business/Property Owners	*242*
Total	**6,419**

The Census Template also requested information on the results of the water testing. The Special Master is working with several Reporting Counsel to clarify and confirm the data that was received so that the Special Master can accurately report on this information.

BLOOD LEAD LEVEL TESTING

A total of 4,035 injured parties report having one or more blood lead level tests performed. Again, in many cases the dates of testing and results were not provided. The age of the injured parties as of year-end 2014 for those reporting that a blood test was performed is summarized in the following chart.

Blood Lead Level Testing: Injured Parties by Age as of Year End 2014	
6 or younger (DOBs 2008-2014)	1,231
7-11 (DOBs 2003-2007)	761
12-17 (DOBs 1997-2002)	396
Subtotal under 18 (DOBs 1997-2014)	*2,388*
Post 2014 DOBs (DOBs 2017-18)	8
Post 2014 DOBs (DOBs 2015-16)	215
Subtotal under 18 between 2014-18 (DOBs 1997-2018)	*2,611*
18+ (DOBs pre-1997)	1,399
Total with DOBs	4,010
Blank or invalid DOBs	25
Grand Total	4,035

The Census Template also requested information on the results of the blood lead level testing. The

Special Master is working with several Reporting Counsel to clarify and confirm the data that was received so that the Special Master can accurately report on this information.

COGNITIVE FUNCTION TESTING

The data reflects 12 injured parties reported having a cognitive function test performed.

Date: February 22, 2019 */s/ Deborah E. Greenspan*
Deborah E. Greenspan
Special Master

[Certificate Of Service Omitted

EXHIBIT A

Injured Party Type		
Injured Party Name	Last Name or Business Name	
	First name	
Injured Party DOB (mm/dd/yyyy)		
Address of Injured Party as of 4/25/14 (if other addresses since 4/25/14, add in Addendum)	Street	
	Apt #	
	City	
	State	
	Zip	
Does Injured Party Allege Exposure Other than at Residence (Y/N) (if Yes, provide requested description in Addendum)		
Type of Claim: PI (Personal Injury), Wrongful Death (WD), and/or Property Damage (PD)		

Personal Injury Type – Identify if allegation of exposure and injury is due to factor other than led (e.g., Legionella)		
Water Test	Water Test(s) Performed? (if multiple provide add'l date(s) and results in Addendum)	
	Date of Water Test if known	Month
		Day
		Year
	Who Performed the Water Test	
	Results of Water Test - Lead Level in Water (mg/dL)	

Blood Lead Level Test	Blood Lead Level Test(s) Performed? *(if multiple provide add'l date(s) and results in Addendum) (if this question is left blank, the response will be deemed "no.")*	
	Date of Blood Lead Level Test if known	Month
		Day
		Year

	Result of Blood Lead Level Test (mg/dL)
Cognitive Function Test	Cognitive function test performed? *(if this question is left blank, the response will be deemed "no.")*
Case Filing Information (if filed)	Case Name
	Filing Judisdiction
	Case Number
Law Firm of Record (if different than firm completing form)	Laws Firm Name
	Attorney Last Name
	Attorney First Name

ADDENDUM		
Injured Party Name	Last Name or Business Name	
	First Name	
If Additional Residence of Injured Party after 4/25/14, Provide Additional Address and Dates Here:	Start Date	Month
		Day
		Year
	End Date	Month
		Day
		Year

	Street	
	Apt #	
	City	
	State	
	ZIP	
If Second Additional Residence of Injured Party after 4/25/14, Provide Second Additional Address and Dates Here:	Start Date	Month
		Day
		Year
	End Date	Month
		Day
		Year
	Street	
	Apt #	
	City	
	State	
	ZIP	
If Exposure at Location(s) other than Residence - provide a name and description of such location (e.g., name of school or business jobsite or "multiple locations")		
If Multiple Water Tests - Second Test	*Date of Water Test if Known*	Month
		Day
		Year
	Who performed the Water Test	
	Results of Water Test – Lead Level in Water (mg/dL)	

If Multiple Water Tests - Third Test	*Date of Water Test if Known*	Month
		Day
		Year
	Who performed the Water Test	
	Results of Water Test - Lead Level in Water (mg/dL)	
If Multiple Water Tests - Fourth Test	Date of Water Test if Known	Month
		Day
		Year
	Who performed the Water Test	
	Results of Water Test - Lead Level in Water (mg/dL)	
If Multiple Blood Lead Level Tests - Second Test	*Date of Blood Lead Level Test if known*	Month
		Day
		Year
	Result of Blood Lead Level Test (mg/dL)	
If Multiple Blood Lead Level Tests - Third Test	*Date of Blood Lead Level Test if known*	Month
		Day
		Year
	Result of Blood Lead Level Test (mg/dL)	

If Multiple Blood Lead Level Tests - Fourth Test	*Date of Blood Lead Level Test if known*	Month
		Day
		Year
	Result of Blood Lead Level Test (mg/dL)	

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SHARI GUERTIN, individually and as next friend of her child, E. B., a minor, and DIOGENES MUSE-CLEVELAND; Plaintiffs, v. STATE OF MICHIGAN, RICHARD SNYDER (individually and in his official capacity as Governor of Michigan); STATE OF MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY; STATE OF MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; CITY OF FLINT, a Michigan municipal corporation; VEOLIA NORTH AMERICA, LLC, a Delaware Corporation; LOCKWOOD, ANDREWS & NEWNAM, INC., a Texas corporation; DARNELL EARLEY (individually, and in his official capacity as Emergency Manager); GERALD AMBROSE (individually, and in his official capacity as Emergency Manager); DANIEL WYANT (individually and in his official capacity as Director of MDEQ); LIANE SHEKTER-SMITH (individually and in her official capacity as Chief of the Office of Drinking	)	Case No.

Water and Municipal Assistance)
for MDEQ); STEPHEN BUSCH)
(individually and in his official)
capacity as District Supervisor)
for MDEQ); PATRICK COO)
(individually and in his capacity)
as Water Treatment Specialist)
for MDEQ); MICHAEL PRYSBY)
(individually and in his capacity as)
an Engineer for MDEQ); BRADLEY)
WURFEL (individually and in)
his capacity as Director of)
Communications for MDEQ);)
EDEN WELLS (individually and)
in her capacity as Chief Medical)
Executive for MDHHS); NICK)
LYON, (individually and in his)
capacity as Director of MDHHS);)
NANCY PEELER (individually)
and in her official capacity as an)
employee of the MDHHS); ROBERT)
SCOTT (individually and in his)
official capacity as an employee)
of MDHHS); HOWARD CROFT)
(individually and in his official)
capacity as Flint's Director of)
Public Works);and MICHAEL)
GLASGOW (individually and)
in his official capacity as an)
employee of the City of Flint),)
)
Defendants.)

COMPLAINT AND JURY DEMAND

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

MUSE-CLEVELAND, by and through their attorneys, complaining against Defendants herein, state as follows:

INTRODUCTION

1. This case arises from the poisoning of Plaintiffs, residents of the City of Flint, Michigan, with lead from Flint's pipes and service lines, as a result of the switch of Flint's drinking water supply to the Flint River, without the use of any corrosion control.

2. Defendants created and maintained this condition when the State of Michigan subsumed the authority of the local government; and also through the actions of the state's regulatory and administrative entities and employees.

3. In 2014, Defendants discovered that dangerous levels of lead were leaching into Flint's drinking water. Not only did Defendants fail to take any measures to eliminate this danger, as required by federal law, but they actually took affirmative steps to downplay the severity of the contamination from its citizens. In so doing, Defendants negligently and recklessly exposed Plaintiffs to devastating and irreversible health problems.

4. Plaintiffs seek recovery from Defendants for injuries, damages and losses suffered by Plaintiffs as a result of exposure to the introduction of lead and other toxic substances from Defendants' ownership, use, management, supervision, storage, maintenance,

disposal, and release of highly corrosive water from the Flint River into the drinking water of Flint, Michigan.

5. The actions of the City of Flint and the State of Michigan, along with their agencies and employees in inflicting immeasurable harm on Plaintiffs amounts to violations of Plaintiffs' constitutional rights.

6. The injuries to Plaintiffs resulted not only from the acts of the individual Defendants but from the policy and/or practice of the State of Michigan, its agencies, and the City of Flint.

7. Defendants, acting for the state and/or city under color of law, deprived Plaintiffs of their constitutional rights.

8. The State of Michigan and/or City of Flint provided a mantle of authority to the individual Defendants that enhanced their power as harm-causing individual actors.

9. The individual Defendants' conduct was so dominated by governmental authority that the individual Defendants must be deemed to act with the authority of the government.

10. Plaintiffs bring this action for damages against those Defendants named in their individual capacities who acted under color of law in depriving Plaintiffs of their constitutional rights, and against the City of Flint.

11. Plaintiffs bring this action for prospective relief only as against the State of Michigan, the Michigan

Department of Environmental Quality, and the Michigan Department of Health and Human Services.

12. The health effects of lead poisoning are well known. The CDC has noted that: "No safe blood level in children has been identified. Even low levels in blood have been shown to affect IQ, ability to pay attention, and academic achievement." Lead impacts nearly every organ and system in the human body. Lead causes multitudinous and serious injuries to the nervous system, which can lead to convulsions, coma and brain death. It causes learning and behavioral disorders, memory loss, nausea, anemia, hearing loss, fatigue, colic, hypertension, and myalgia. Moreover, children under the age of 6 years old are more susceptible to the toxic effects of lead than are adults since the brain and central nervous system are not completely developed.

13. As a direct and proximate result of Defendants' negligent, grossly negligent, and reckless conduct, Plaintiffs were directly exposed to hazardous and toxic substances known to cause disease, and that this exposure caused or contributed to Plaintiffs' injuries. Therefore, the doctrine of joint and several liability should be extended to apply to each Defendant herein, in their individual capacity.

14. As a direct and proximate result of the Defendants' conduct, Plaintiffs have suffered injuries and currently suffer and will continue to suffer damages and losses which include, but are not limited to, physical and psychological injuries, learning and other permanent disabilities, pain, mental anguish, emotional

distress, the loss of household services, the cost of medical, educational and rehabilitation expenses and other expenses of training and assistance, and loss of earnings, income, and earning capacity. Such injuries, damages and losses are reasonably likely to continue to occur in the future.

PARTIES

15. Plaintiff SHARI GUERTIN is, and has at all times relevant hereto been, a resident of Flint connected to Flint's water system and a paying consumer of Flint water. SHARI GUERTIN and her minor child, E. B., have been exposed to extremely high levels of lead due to the actions of the Defendants, having bathed in and consumed lead contaminated water.

16. Plaintiff is, and has at all times relevant hereto been, a resident of Flint connected to Flint's water system. Plaintiff has been exposed to extremely high levels of lead due to the actions of the Defendants, having bathed in and consumed lead contaminated water.

17. As a result of Defendants' actions, Plaintiffs have suffered injuries including but not necessarily limited to: various health problems (including without limitation, hair, skin, digestive and other organ problems), physical pain and suffering, mental anguish, fright and shock, disability, denial of social pleasures and enjoyments, embarrassment, humiliation, and mortification, medical expenses, wage loss, brain and/or developmental injuries including (without limitation)

cognitive deficits, lost earning capacity, aggravation of pre-existing conditions, contract damages and property damages (including but not limited to damaged plumbing and lost real property value).

18. Defendant City of Flint ("Flint" or "the City") is a Michigan municipal corporation located in Genesee County, Michigan.

19. Through its Department of Public Works, Flint distributes water to its nearly 100,000 residents.

20. When Flint Emergency Manager Darnell Earley, as the City's final policymaking authority, made the decision, on behalf of the State of Michigan and the City, to rush the distribution of water from the Flint River without proper treatment, including corrosion control, Plaintiffs were poisoned.

21. It was the official custom, policy, and/or practice of the City, for which it is directly responsible, that led to the violations of Plaintiffs' constitutional rights described herein.

22. The actions of lower level City employees, not named as defendants herein, in delivering residents unsafe water were constrained by policies not of their own making. Flint's water treatment employees were inadequately trained, in light of the duties assigned to them the need for more training was obvious, and the inadequacy was so likely to result in the violation of constitutional rights that Flint's policy makers can reasonably said to have been deliberately indifferent to the need for additional training. The City is liable

because through its policy makers it violated the constitutional rights of Plaintiffs, including but not limited to the rights to bodily integrity and to be free from state created danger.

23. Defendant Howard Croft was at all relevant times Flint's Department of Public Works Director acting within the scope of his employment and/or authority under color of law. He is sued herein in his individual and official capacities. At all relevant times Croft knew that the City's water treatment plant was unprepared to adequately provide safe drinking water to Flint's residents. He nonetheless caused and allowed unsafe water to be delivered to Flint's residents and did not disclose that Flint's water was unsafe. Defendant Croft also made numerous false statements about the safety and quality of Flint's water that he knew to be untrue. Defendant Croft violated clearly established constitutional rights of Plaintiffs, including but not limited to the rights to bodily integrity and to be free from state created danger. Defendant Croft's actions further constitute gross negligence, as he had a substantial lack of concern and/or willful disregard for whether an injury resulted to Plaintiffs.

24. Defendant Michael Glasgow was at all relevant times a water treatment plant operator for the City of Flint acting within the scope of his employment and/or authority under color of law. He is sued herein in his individual and official capacities. Glasgow knew that the City's water treatment plant was unprepared to adequately provide safe drinking water to Flint's residents. He nonetheless allowed unsafe water to be

delivered to Flint's residents and did not disclose that Flint's water was unsafe. Defendant Glasgow violated clearly established constitutional rights of Plaintiffs, including but not limited to the rights to bodily integrity and to be free from state created danger. Defendant Glasgow's actions further constitute gross negligence, as he had a substantial lack of concern and/or willful disregard for whether an injury resulted to Plaintiffs.

25. Defendant State of Michigan ("Michigan" or "the State") directs, controls, and operates Defendant Michigan Department of Environmental Quality ("MDEQ") and Defendant Michigan Department of Health and Human Services ("MDHHS"). The State also stood in the shoes of the City of Flint at all times relevant hereto, having absorbed the authority of the City of Flint.

26. Defendant Richard Snyder ("Governor Snyder") is the Governor of Michigan. He is sued herein in his individual and official capacities. He was at all times acting within the scope of his employment and/or authority under color of law. Governor Snyder participated in, directed, and facilitated the State's decision to transition Flint's water source from safe, treated water to untreated corrosive water that would deliver lead into Plaintiffs' home. He also participated in, directed, and facilitated the State's insufficient response to protect Plaintiffs from the State's actions.

27. Under color of state law, Governor Snyder violated clearly established constitutional rights of

Plaintiffs, including but not limited to the rights to bodily integrity and to be free from state created danger.

28. Defendant Darnell Earley ("Earley") was Governor Snyder's Emergency Manager in Flint from November 1, 2013, through January 12, 2015, and at all times relevant hereto was acting within the scope of his employment and/or authority under color of law. He is sued herein in his official and individual capacities. Earley made the decision to switch to Flint River water. Earley made false and/or misleading statements representing that the water was safe to drink as it poisoned thousands. Earley violated clearly established constitutional rights of Plaintiffs, including but not limited to the rights to bodily integrity and to be free from state created danger. Earley's actions constitute gross negligence, as he had a substantial lack of concern and/or willful disregard for whether an injury resulted to Plaintiffs.

29. Defendant Gerald Ambrose ("Ambrose") was Governor Snyder's Emergency Manager in Flint from January 13, 2015, until April 28, 2015, and was at all times relevant hereto acting within the scope of his employment and/or authority under color of law. He is sued herein in his official and individual capacities. Defendant Ambrose was also an employee of the State of Michigan as a financial advisor for Flint's financial emergency from January 2012, until December 2014. He was involved in and directed the State's decision to transition Flint from safe, treated water on an aggressive timeline to corrosive, untreated water from an

unprepared water treatment plant. He also made false and/or misleading statements representing that the water was safe to drink as it poisoned thousands. Defendant Ambrose violated clearly established constitutional rights of Plaintiffs, including but not limited to the rights to bodily integrity and to be free from state created danger. Defendant Ambrose's actions constitute gross negligence, as he had a substantial lack of concern and/or willful disregard for whether an injury resulted to Plaintiffs.

30. Defendant Michigan Department of Environmental Quality ("MDEQ") is the state agency responsible for implementing safe drinking water laws, rules, and regulations in Michigan, and Flint specifically. The MDEQ failed to require corrosion control for Flint River water in violation of the federal Lead and Copper Rule, misled the federal EPA, conducted illegal and improper sampling of Flint's water, lied to the public about the safety of Flint's water, and attempted to publicly discredit outside individuals that offered evidence of the water's contamination. The MDEQ was consistently more concerned with satisfying its own perceptions of technical rules than carrying out its duty to the people of Flint, ignoring voluminous evidence of the crisis it had created until its denial could no longer withstand outside scrutiny.

31. Defendant Liane Shekter-Smith ("Shekter-Smith") was at all relevant times Chief of the Office of Drinking Water and Municipal Assistance for MDEQ, acting within the scope of her employment and/or authority under color of law, until she was removed from

her position on October 19, 2015. She is sued herein in her individual and official capacities. Defendant Shekter-Smith was grossly negligent in that she knowingly participated in, approved of, and caused the decision to transition Flint's water source to a highly corrosive, inadequately studied and treated alternative. She disseminated false statements to the public that led to the continued consumption of dangerous water despite knowing or having reason to know that the water was dangerous. Defendant Shekter-Smith violated clearly established constitutional rights of Plaintiffs, including but not limited to the rights to bodily integrity and to be free from state created danger. Defendant Shekter-Smith's actions constitute gross negligence, as she had a substantial lack of concern and/or willful disregard for whether an injury resulted to Plaintiffs.

32. Defendant Daniel Wyant ("Wyant") was at all relevant times the Director of MDEQ until Governor Snyder accepted his resignation on or about December 29, 2015, acting within the scope of his employment and/or authority under color of law. He is sued herein in his official and individual capacities. Wyant participated in, directed, and oversaw the MDEQ's repeated violations of federal water quality laws, the failure to properly study and treat Flint River water, and the MDEQ's program of systemic denial, lies, and attempts to discredit honest outsiders. He disseminated false statements to the public that led to the continued consumption of dangerous water despite knowing or having reason to know that the water was dangerous.

Defendant Wyant violated clearly established constitutional rights of Plaintiffs, including but not limited to the rights to bodily integrity and to be free from state created danger. Defendant Wyant's actions constitute gross negligence, as he had a substantial lack of concern and/or willful disregard for whether an injury resulted to Plaintiffs

33. Defendant Stephen Busch ("Busch") was at all relevant times the District Supervisor assigned to the Lansing District Office of the MDEQ and was acting within the scope of his employment and/or authority under color of law. He is sued herein in his official and individual capacities. He participated in MDEQ's repeated violations of federal water quality laws, the failure to properly study and treat Flint River water, and the MDEQ's program of systemic denial, lies, and attempts to discredit honest outsiders. He personally falsely reported to the EPA that Flint had enacted an optimized corrosion control plan, providing assurances to Plaintiffs that the water was safe when he knew or should have known that these assurances were false, or were no more likely to be true than false. Defendant Busch violated clearly established constitutional rights of Plaintiffs, including but not limited to the rights to bodily integrity and to be free from state created danger. Defendant Busch's actions constitute gross negligence, as he had a substantial lack of concern and/or willful disregard for whether an injury resulted to Plaintiffs.

34. Defendant Patrick Cook ("Cook") was at all relevant times Water Treatment Specialist assigned to

the Lansing Community Drinking Water Unit of the MDEQ and was acting within the scope of his employment and/or authority under color of law. He is sued herein in his official and individual capacities. Cook is individually liable because he, as the Lansing Community Drinking Unit manager, in a grossly negligent manner, participated in, approved, and/or assented to the decision to allow Flint's water to be delivered to residents without corrosion control or proper study and/or testing. Defendant Cook violated clearly established constitutional rights of Plaintiffs, including but not limited to the rights to bodily integrity and to be free from state created danger. Defendant Cook's actions constitute gross negligence, as he had a substantial lack of concern and/or willful disregard for whether an injury resulted to Plaintiffs.

35. Defendant Michael Prysby ("Prysby") was at all relevant times an the Engineer assigned to District 11 (Genesee County) of the MDEQ and was acting within the scope of his employment and/or authority and was acting within the scope of his employment and/or authority under color of law. He is sued herein in his official and individual capacities. Prysby is individually liable because he, as the engineer assigned to District 11, participated in, approved, and/or assented to the decision to switch the water source, failed to properly monitor and/or test the Flint River water, and provided assurances to Plaintiffs that the Flint River water was safe when he knew or should have known those statements to be untrue, or no more likely to be true than false. Defendant Prysby violated clearly

established constitutional rights of Plaintiffs, including but not limited to the rights to bodily integrity and to be free from state created danger. Defendant Prysby's action constitute gross negligence, as he had a substantial lack of concern and/or willful disregard for whether an injury resulted to Plaintiffs.

36. Defendant Bradley Wurfel ("Wurfel") was at all relevant times the Director of Communications for MDEQ and was acting within the scope of his employment and/or authority under color of law. He is sued herein in his official and individual capacities. Wurfel resigned his position on December 29, 2015. Wurfel served as the MDEQ's principal means of public deception, repeatedly denying the increasingly obvious disaster as it unfolded and attempting to discredit the only reliable people in the picture. Wurfel would eventually be relieved of his duties for his "persistent [negative] tone and derision" and his "aggressive dismissal, belittlement and attempts to discredit the individuals involved in [conducting independent studies and tests]."

37. Defendant, Wurfel repeatedly made public statements that created, increased, and prolonged the risks and harms facing Plaintiffs. Defendant Wurfel violated clearly established constitutional rights of Plaintiffs, including but not limited to the rights to bodily integrity and to be free from state created danger. He made such statements knowing that they were false or that they were no more likely to be true than false. Defendant Wurfel's actions constitute gross negligence, as he had a substantial lack of concern and/or

willful disregard for whether an injury resulted to Plaintiffs.

38. Defendant Michigan Department of Health and Human Services ("MDHHS") is the state agency responsible for public health. Instead of protecting public health, MDHHS deliberately hid information that would have revealed the public health crisis in Flint, which MDHHS had earlier failed to detect. MDHHS's failure to properly analyze data led it to conclude that there was no increase in lead contamination in Flint's children, and it resisted and obstructed the efforts of outside researchers and the county health department to determine whether that was the actually true and correct.

39. Defendant Eden Wells ("Wells"), was at all relevant times Chief Medical Executive within the Population Health and Community Services Department of the MDHHS and was acting within the scope of her employment and/or authority under color of law. She is sued herein in her official and individual capacities. Wells participated in, directed, and/or oversaw the department's efforts to hide information to save face, and to obstruct the efforts of outside researchers. Further, Wells knew as early as 2014 of problems with lead and legionella contamination in Flint's water and instead of fulfilling her duty to protect and notify the public, she participated in hiding this information. Defendant Wells violated clearly established constitutional rights of Plaintiffs, including but not limited to the rights to bodily integrity and to be free from state created danger. Defendant Wells's actions constitute

gross negligence, as she had a substantial lack of concern and/or willful disregard for whether an injury resulted to Plaintiffs.

40. Defendant Nick Lyon was at all relevant times Director of MDHHS and was acting within the scope of his employment and/or authority under color of law. He is sued herein in his official and individual capacities. He participated in, directed, and/or oversaw the department's efforts to hide information to save face, and to obstruct and discredit the efforts of outside researchers. He knew as early as 2014 of problems with lead and legionella contamination in Flint's water and instead of fulfilling his duty to protect and notify the public, he participated in hiding this information. Defendant Lyons violated clearly established constitutional rights of Plaintiffs including but not limited to the rights to bodily integrity and to be free from state created danger. Defendant Lyons' actions constitute gross negligence, as he had a substantial lack of concern and/or willful disregard for whether an injury resulted to Plaintiffs.

41. Defendant Nancy Peeler was at all relevant times a MDHHS employee in charge of its childhood lead poisoning prevention program, acting within the scope of her employment and/or authority under color of law. She is sued herein in her official and individual capacities. She participated in, directed, and/or oversaw the department's efforts to hide information to save face, and actively sought to obstruct and discredit the efforts of outside researchers. Even when her own department had data that verified outside evidence of

a lead contamination problem, she continued trying to generate evidence to the contrary. Defendant Peeler violated clearly established constitutional rights of Plaintiffs, including but not limited to the rights to bodily integrity and to be free from state created danger. Defendant Peeler's actions constituted gross negligence, as she had a substantial lack of concern and/or willful disregard for whether an injury resulted to Plaintiffs.

42. Defendant Robert Scott was at all relevant times Data Manager for MDHHS's Healthy Homes and Lead Prevention Program, acting within the scope of his employment and/or authority under color of law. He is sued herein in his official and individual capacities. He participated in, directed, and/or oversaw the department's efforts to hide information to save face, and actively sought to obstruct and discredit the efforts of outside researchers. Even when his own department had data that verified outside evidence of a lead contamination problem, he continued trying to generate evidence to the contrary. He also served a key role in withholding and/or delaying disclosure of data that outside researchers needed to protect the people of Flint. Defendant Scott violated clearly established constitutional rights of Plaintiffs, including but not limited to the rights to bodily integrity and to be free from state created danger. Defendant Scott's actions constitute gross negligence, as he had a substantial lack of concern and/or willful disregard for whether an injury resulted to Plaintiff.

43. Susan Hedman, former EPA Region 5 Administrator, cannot yet be named as a Defendant pursuant to the Federal Tort Claims Act ("FTCA"). Plaintiffs note that if their anticipated FTCA claims to the EPA are rejected, they may seek to amend their complaint in order to add claims against Ms. Hedman.

44. Defendant Veolia North America, LLC ("Veolia") is a Delaware corporation with its principal office in Illinois. Veolia is a Defendant in this action based on its provision of negligent professional engineering services in reviewing Flint's water system and declaring the water safe to drink. Veolia maintains an office in Wayne County, Michigan, transacts business in the State of Michigan, including the business it performed for the City of Flint in 2015, and has committed a tort in the State of Michigan, among bases for personal jurisdiction under MCL 600.705. Each of these bases extends to this District specifically.

45. Defendant Lockwood, Andrews & Newnam, Inc. ("LAN") is a Texas corporation with its principal office in Texas. LAN is a Defendant in this action based on its provision of negligent professional engineering services in preparing Flint's water treatment facility to treat water from the Flint River. LAN maintains an office in Flint, Genesee County, Michigan, regularly conducts business in the Eastern District of Michigan, and has committed a tort in the State of Michigan, among bases for personal jurisdiction under MCL 600.705. Each of these bases extends to this District specifically.

JURISDICTION & VENUE

46. This Court has jurisdiction over Plaintiffs' 42 U.S.C. § 1983 claims pursuant to 28 U.S.C. § 1331, as those claims arise under the Constitution and laws of the United States. This Court has jurisdiction over Plaintiffs' remaining claims pursuant to 28 U.S.C. § 1367 because they are so related to claims in this action within the Court's original jurisdiction that they form part of the same case or controversy under Article III of the United States.

47. This action does not present novel or complex issues of State law that predominate over claims for which this Court has original jurisdiction.

48. There are no compelling reasons for declining supplemental jurisdiction over those of Plaintiffs' claims that do not arise under 42 U.S.C. § 1983.

49. All Defendants reside in this district within the meaning of 28 U.S.C. § 1391(c). This Court has personal jurisdiction over all Defendants because a Michigan state court would have personal jurisdiction under MCL 600.701 and MCL 600.705.

50. Venue in this District is appropriate pursuant to to 28 U.S.C. § 1391(b)(1) and (2).

51. Mich. Comp. Laws 600.6440 exempts actions against State agencies from the jurisdiction of the Michigan Court of Claims where the claimant has an adequate remedy in the federal courts.

FACTS

52. The outrageous actions of Defendants in this matter have caused harm to Plaintiffs.

53. The actions of those state employees sued in their individual capacities, acting under color of law, in failing to protect Plaintiffs and then obscuring their mistake as Plaintiffs continued to suffer, constitute gross negligence and/or constitutional violations for which they are not afforded immunity.

54. Two private entities contributed to this public health catastrophe when they negligently undertook to provide services for Flint's water system, resulting in the poisoning of thousands, including Plaintiffs.

55. As a direct and proximate result of Defendants' actions and/or failures to act, Plaintiffs' constitutional and other rights have been violated and they have suffered serious physical, mental, and emotional injury, as well as property damage, as described in this complaint.

The State of Michigan Completely Overtook and Replaced Flint's Representative City Government

56. At all times between December, 2011 and April 30, 2015, the City of Flint was under the control and authority of an Emergency Manager appointed by, and serving at the pleasure of, Governor Snyder.

57. Michael Brown served Governor Snyder as Flint's emergency manager from December of 2011, until August of 2012.

58. Ed Kurtz served Governor Snyder as Flint's emergency manager from August of 2012, until July of 2013.

59. Michael Brown again served Governor Snyder as Flint's emergency manager from July of 2013, until October of 2013.

60. Defendant Earley served Governor Snyder as Flint's emergency manager from October of 2013, until January of 2015.

61. Defendant Ambrose served Governor Snyder as Flint's emergency manager from January of 2015, until April 30, 2015.

62. Therefore, at all relevant times prior to April 30, 2015, Flint's local government was under the control of the State of Michigan.

The MDEQ, as a Matter of Pattern, Practice, Custom, and Policy, Has Failed to Adequately Protect Michigan Citizens Against Lead Contaminated Drinking Water

63. In 2010, the EPA commissioned a report that indicated problems with the MDEQ's ability to ensure safe drinking water.

64. The report noted that funding cuts caused important MDEQ drinking water positions to be filled

"with staff from other programs that have been cut or eliminated. . . . While this practice preserves jobs, it decreases the technical knowledge of staff[.]"

65. The report flatly stated that "[t]raining for new staff would also be appreciated on fundamental public health issues and compliance decisions."

66. The report also indicated a number of technical shortcomings with the way the MDEQ regulated the state's drinking water, particularly as it related to lead contamination.

67. Specifically, the report noted that while federal regulations require water utilities to certify that the drinking water of 90% of homes in a given community contain no more than 15 parts per billion ("ppb") of lead, MDEQ had a practice of not even calculating "90th percentiles" unless a potential exceedence had been identified. This "does not meet the requirements of Federal Regulations, since it is required that all 90th percentiles be calculated."

68. The report also noted that MDEQ did not conduct the required number of water samples for lead, apparently in an effort to conserve agency resources.

69. Organizational and individual actions and failures of the MDEQ, such as those illustrated in the report, directly resulted in the Flint catastrophe.

The MDEQ Failed to Follow the U.S. Environmental Protection Agency's Lead and Copper Rule in Flint And to Take Reasonable Action to Prevent Flint's Residents

70. The United States Environmental Protection Agency ("EPA") is responsible for setting rules under the Safe Drinking Water Act.

71. Enforcement and implementation of those rules is delegated to state environmental agencies. In the case of Michigan, that agency is the MDEQ.

72. The EPA's Lead and Copper Rule ("LCR") has been enacted to establish protocols to ensure that public water systems do not allow unsafe levels of lead or copper to contaminate their drinking water supply.

73. While failing to protect Plaintiffs, the MDEQ violated both the letter and spirit of the LCR.

74. Specifically, the MDEQ violated the letter and spirit of the LCR in at least the following ways:

a. By failing to require corrosion control for Flint River water from the time Flint began drawing it;

b. By misinforming the EPA about whether corrosion control was being utilized;

c. By improperly conducting sampling.

75. Instead of taking any preventative measures, the MDEQ determined it was sufficient to conduct two rounds of six-month lead sampling, using Flint's

residents, including Plaintiffs, as guinea pigs in a process of trial and error.

76. The first round of lead sampling was conducted between July and December 2014, and the second between January and June 2015. Despite the fact that the sampling procedures were woefully inadequate, the tests showed rising lead levels in Flint's water.

77. In conducting the sampling required under the LCR, the MDEQ collected an insufficient number of samples, consistent with MDEQ's pattern, practice, policy, and custom.

78. Further, the LCR requires at least 50% of homes sampled to be verified as having lead pipes, with the remaining 50% to have been built before 1986 and known to have lead solder.

79. Flint's data was essentially useless because the MDEQ failed to require that the appropriate number of samples be drawn from these "high risk" homes.

80. Because an insufficient number of samples were taken from a pool of homes that were not properly determined to be "high risk," the City of Flint has not had a valid LCR sampling event since the switch to the Flint River.

81. The MDEQ, through its former director, has explicitly admitted that it did not follow the LCR, and that it should have required corrosion control.

82. Had the MDEQ followed the LCR, it would have required water quality parameters and optimized corrosion control on the Flint River water from the very beginning, which likely would have prevented the entire public health catastrophe that has caused Plaintiffs to suffer injuries and damages.

83. Instead, the MDEQ engaged in a pattern of obfuscation and aggressive denial since the time the source of Flint's water was changed.

84. At all relevant times, MDEQ and its employees (incorrectly) insisted, despite overwhelming information to the contrary, that it was minimally in compliance with technical rules. No effort was made to do a single thing more, even when it became obvious that Defendants had created a public health catastrophe, until outside observers forced Defendants into action.

Under the State's Authority, Flint's Water Supply Was Switched to the Flint River Without the Provision of Any Corrosion Control, Causing Poisonous Lead from Thousands of Pipes to Leach Into Plaintiffs' Drinking Water

85. For decades prior to April 25, 2014, the City of Flint received safe, clean, treated drinking water from the Detroit Water and Sewer Department ("DWSD").

86. In November of 2012, Emergency Manager Ed Kurtz wrote to Treasurer Andy Dillon suggesting

that Flint join the yet-to-be-formed Karegnondi Water Authority (KWA) due to cost savings over DWSD.

87. In April, 2013, Dillon gave Kurtz permission to notify the DWSD that it would be terminating service and switching to the KWA in the coming years.

88. On April 16, 2013, Kurtz ordered that Flint would switch its long term water supplier from the DWSD to the KWA.

89. The KWA depended on an infrastructure that had not yet been built.

90. While waiting for the KWA to come online, the Emergency Manager ordered that instead of temporarily remaining with DWSD, Flint would switch to the Flint River as a temporary source for the City's water.

91. The temporary use of the Flint River was also designed as a cost-cutting measure.

92. The Flint River was studied for use as a primary water source in a 2011 feasibility report, of which Defendants were aware. At that time, the Flint River was rejected because the costs to prepare Flint's water treatment plant to treat Flint River water to applicable standards were estimated to be in the tens of millions of dollars.

93. On March 7, 2014, Defendant Earley, who had replaced Kurtz, sent a letter to the DWSD stating "[w]e expect that the Flint Water Treatment Plant will be fully operational and capable of treating Flint River

water prior to the date of termination. In that case, there will be no need for Flint to continue purchasing water to serve its residents and businesses after April 17, 2014."

94. Even Defendant Earley knew that the important limitation was that the treatment plant be ready to treat Flint River water. The 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.

95. Defendant Michael Glasgow, the water treatment plant's laboratory and water quality supervisor informed the MDEQ on April 16, 2014, that he was "expecting changes to our Water Quality Monitoring parameters, and possibly our DBP on lead & copper monitoring plan . . . Any information would be appreciated, because it looks as if we will be starting the plant up tomorrow and are being pushed to start distributing water as soon as possible . . . I would like to make sure we are monitoring, reporting and meeting requirements before I give the OK to start distributing water."

96. The next day, Defendant Glasgow wrote to MDEQ, including Defendants Prysby and Busch, noting that he "assumed there would be dramatic changes to our monitoring. I have people above me making plans to distribute water ASAP. I was reluctant before, but after looking at the monitoring schedule and our current staffing, I do not anticipate giving the OK to begin sending water out anytime soon. If water is

distributed from this plant in the next couple of weeks, it will be against my direction. I need time to adequately train additional staff and to update our monitoring plans before I will feel we are ready. I will reiterate this to management above me, but they seem to have their own agenda."

97. The rushed nature of the transition to Flint River water is also evident by a request made by Defendant Earley's assistant to the treasury for a contract to be expedited in order to meet the "aggressive timeline" of the switch.

98. On March 26, 2014, Defendant Busch emailed Defendant Shekter-Smith and another colleague the following: "One of the things we didn't get to today that I would like to make sure everyone is on the same page on is what Flint will be required to do in order to start using their plant full time. Because the plant is setup for emergency use, they could startup at any time, but starting up for continuous operation will carry significant changes in regulatory requirements so there is a very gray area as to what we consider for startup."

99. Defendant Ambrose participated in, directed, and/or assented to the decisions to terminate DWSD service and begin premature Flint River water service when he served as a financial advisor to the two Emergency Managers that preceded him.

100. On April 24, 2014, Daugherty Johnson, Flint's Utilities Administrator, sent an email to Howard Croft, Mike Prysby, and Stephen Bush, stating: "As

you are aware, the City has undergone extensive upgrades to our Water Treatment Plant and its associated facilities. Our intentions and efforts have been to operate our facility as the primary drinking water source for the City of Flint. Through consultation with your office and our engineering firm we've developed a system of redundant electrical systems, treatment processes and adequate finished water storage[.]"

101. An April 23, 2014 email from Defendant Busch to Defendant Wurful developed talking points for an upcoming Flint meeting. Among them, Busch offers: "While the Department is satisfied with the City's ability to treat water from the Flint River, the Department looks forward to the long term solution of continued operation of the City of Flint Water Treatment Plant using water from the KWA as a more consistent and higher quality source water."

102. On April 25, 2014, Flint officially began using the Flint River as its primary water source, despite the fact that the proper preparations had not been made.

103. The same day, then Flint Mayor Dayne Walling publically declared "It's regular, good, pure drinking water, and it's right in our backyard."

104. Flint DPW Director Howard Croft also stated in a press release that "The test results have shown that our water is not only safe, but of the high quality that Flint customers have come to expect. We are proud of that end result."

105. Croft's statement was made despite Mr. Glasgow's known concerns regarding the facility's inadequate preparation and monitoring.

106. This April 25, 2014 transition put Flint in the business of water treatment, where it had previously only been in the business of water distribution, highlighting the need for proper training of employees and analysis of water treatment processes.

107. Defendant LAN, an engineering firm, was hired to prepare Flint's water treatment plant for the treatment of new water sources, including both the KWA and the Flint River.

108. Flint's water treatment plant had not needed to treat the water received from DWSD, as DWSD provided the water in an already treated state.

109. Defendant LAN was responsible for providing engineering services to make Flint's inactive water treatment plant sufficient to treat water from each of its new sources.

110. Defendant LAN carelessly and negligently failed in its task. Its actions facilitated the transfer of Flint's water source to river water without the proper treatment.

111. That treatment, necessary to protect against the poisoning of thousands of Flint residents, including Plaintiffs, and would have cost a relatively small amount of money.

112. An important consideration any time a water system changes sources is to account for differences in those sources. According to the EPA, "it is critical that public water systems, in conjunction with their primacy agencies and, if necessary, outside technical consultants, evaluate and address potential impacts resulting from treatment and/or source water changes." Various factors specific to individual water sources necessitate different treatments, including but not limited to the use of chemical additives.

113. Neither the State of Michigan (on its own or through its control over the City of Flint), the MDEQ, nor LAN required water quality standards to be set for the Flint River water that would be delivered to Flint's residents. Further, none of them required corrosion control be implemented to ensure that corrosive water was not delivered throughout Flint's aging water system.

114. The MDEQ, as Flint's "primacy agency," was responsible for ensuring that Flint set water quality standards and properly treated its water.

115. LAN, as Flint's outside contractor, had a duty to recognize the need for corrosion control and advise that it should be implemented.

116. The water obtained from the Flint River was substantially more corrosive than the treated water Flint had been receiving from DWSD.

117. Water becomes more corrosive when it contains greater quantities of chloride, which can enter the water from manmade and natural sources.

118. Flint River water is known to contain about 8 times more chloride than the treated water that Flint had been receiving from DWSD.

119. It is well known that corrosive water that is not properly treated results in the corrosion of pipes, such that the metals in the pipes will leach into drinking water.

120. Phosphates are often added to corrosive water as a method of corrosion control, to prevent metals from leaching into the water.

121. Incredibly, at the time of the switch to Flint River water, no phosphates were being added to the water supply.

122. In fact, nothing whatsoever was being done to account for the corrosive nature of the Flint River water, despite the clear duties of the City of Flint, the MDEQ, the State as Flint's manager, and LAN as the consultant.

123. As a result of the failure to properly treat water from the Flint River, corrosive water was delivered throughout the Flint Water System.

124. The corrosive water predictably corroded metal pipes, causing them to leach into water.

125. The corrosive nature of the water was almost immediately apparent. Soon after the switch,

Flint residents began complaining about discolored water – clearly indicating that iron or other metals were leaching into the water.

126. It is important that a new source of water be properly studied and treated to ensure that its use will not result in the corrosion of pipes in the delivery system. This is particularly important where portions of the delivery system, included but not limited to service lines, are made of lead.

127. An estimated 15,000 of Flint's 30,000 residential service lines are composed at least partially of lead.

128. Setting standards and optimal ranges for water quality is necessary to prevent widespread impacts from substandard or dangerous water.

129. Lead is a powerful neurotoxin that can have devastating, irreversible impacts on the development of children. There is no safe level of lead as its effects are harmful even at low

130. Lead exposure in children causes heightened levels of lead in the blood and body, resulting in problems including decreased IQ, behavioral problems, hearing impairment, impaired balance and nerve function, infections, skin problems, digestive problems, and psychological disorders. Lead also causes serious health effects in adults, including digestive, cardiovascular, and reproductive problems, kidney damage, dizziness, fatigue, weakness, depression and mood

disorders, diminished cognitive performance, nervousness, irritability, and lethargy.

131. Lead contamination is not the only problem that is caused when corrosive water is distributed in a public water system.

132. When water corrodes iron pipes, the iron leaching into the water system can consume chlorine. This can eliminate the chlorine necessary to prevent the growth of microorganisms that can cause disease.

133. With chlorine consumed by iron, the risk of infection by organisms such as legionella increases.

134. Corrosion of iron water pipes is obvious when it occurs, as the water appears discolored.

135. The corrosion of iron pipes can also result in an increase in water main leaks and breaks.

136. The signs of iron corrosion are a warning sign that lead corrosion may also be present, since both are caused by the same phenomenon.

137. Almost immediately after the water source was changed to the Flint River, signs of trouble with Flint's water quality began to surface.

138. Within weeks, many residents began to complain about odorous, discolored water.

139. As complaints rolled in, Flint Mayor Walling called the water a "safe, quality product," and claimed that "people are wasting their precious money buying bottled water."

140. In August and September, 2014, the City of Flint issued two boil water advisories after fecal coliform bacteria was discovered in the water.

141. On October 13, 2014, General Motors ceased the use of Flint River water at its engine plant because of fears that it would cause corrosion due to high levels of chloride.

142. Discussing General Motors' decision, Defendant Prysby wrote to Defendants Busch, Shekter-Smith and others that the Flint River water had elevated chloride levels. He stated that "although not optimal" the water was "satisfactory." He noted that he had "stressed the importance of not branding Flint's water as 'corrosive' from a public health standpoint simply because it does not meet a manufacturing facility's limit for production."

143. In October of 2014, Governor Snyder received a briefing that blamed iron pipes, susceptible to corrosion and bacteria, for the two boil water advisories.

144. On January 2, 2015, the City of Flint mailed a notice to its water customers indicating that it was in violation of the Safe Drinking Water Act due to the presence of trihalomethanes, which was a product of attempting to disinfect the water. It was claimed that the water was safe to drink for most people with healthy immune systems.

145. On January 9, 2015, the University of Michigan – Flint discovered lead in campus drinking fountains.

146. With the Flint water quality problems now being recognized, on January 12, 2015, DWSD offered to waive a 4 million dollar reconnection fee to transition back to DWSD water. Defendant Ambrose, as Emergency Manager, declined the offer.

147. On January 21, 2015, enraged Flint residents attended a meeting a Flint City hall, bringing jugs of discolored water and complaining about the water's smell and taste.

148. As early as January of 2015, the State of Michigan provided purified water coolers at its Flint offices in response to concerns about the drinking water, while State employees continued for many months to tell the general public that the water was safe to drink.

149. In a January 29, 2015, e-mail to MDEQ deputy director Jim Sygo, Defendant Shekter-Smith made statements indicating her personal knowledge of the Flint River's corrosivity. "I'm theorizing here, but most likely what they are seeing is a result of differing water chemistry. A change in water chemistry can sometimes cause more corrosive water to slough material off of pipes as opposed to depositing material or coating pipes in the distribution system. This may continue for a while until things stabilize. It would be unusual for water leaving the plant to have color like people are seeing at their taps. Generally this is a distribution

system problem or a premise plumbing issues. Since it appears wide-spread, it's most likely a distribution system problem."

150. On February 6, 2015, an Emergency Manager staff member wrote to Defendant Prysby, described as the MDEQ's "most knowledgeable staff member on the Flint and Genesee County water supply issues," asking whether he knew if MDEQ had ever conducted a "source water assessment" for the Flint River. After an initial response stating that he did not know, Prysby later responded that a study on the Flint River as an emergency intake had been conducted in 2004.

151. The 2004 study noted that the Flint River was a highly sensitive drinking water source that was susceptible to contamination, yet apparently even Defendant Prysby did not consult it before approving the Flint River as a source.

152. On February 27, 2015, in response to concerns about extremely high levels of lead in a resident's water sample, Defendant 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.

153. MDEQ was required to know whether Flint had an optimized corrosion control program, because ensuring the existence of that program was the express responsibility of MDEQ.

154. MDEQ did, in fact, know that no optimized corrosion control had been implemented, since MDEQ was involved in the decision not to implement corrosion control.

155. MDEQ did not require the use of corrosion control, and it did not set water quality parameters for the Flint River source water, both of which it was required to do.

156. The effect of this inexplicable failure was the exposure of Plaintiffs to poisonous water that caused a wide variety of health effects, including developmental problems in young children.

157. Also on February 27, 2015, the EPA's regional drinking water regulations manager. Miguel Del Toral, began to voice his concerns about the likely cause of the high lead levels detected in Flint. In an email to Defendant Prysby that date (which was also copied to Defendant Busch) Del Toral attributed those levels to particulate lead, which would mean that the MDEQ's testing methods of "pre-flushing" water from homes would bias samples low. He also inquired about optimized corrosion control, which he noted was required that Flint was "required to have" in place.

158. At another point in February, 2015, Governor Snyder received a briefing on Flint's water problems from MDEQ director Dan Wyant, which included resident complaints about discolored, low quality tap water, and a letter from a state representative indicating that his constituents were "on the verge of civil unrest."

159. Snyder took no significant action in response to the Flint residents' pleas.

160. Around the same time, an MDEQ e-mail explained away "hiccups" in the transition to Flint's water system, discounting the possibility of imminent threats to public health, and noting that the switch to the Flint River "put the city in the business of water production, where they had historically been in the business of water transmission." It was claimed that "once the city connects to the new KWA system in 2016, this issue will fade into the rearview."

161. The MDEQ e-mail also noted that "MDEQ approved the use of river as a source[.]"

162. In early 2015, Defendant Veolia was hired to conduct a review of the City's water quality, largely in response to citizen complaints. Veolia thereafter negligently declared the water safe.

163. Veolia's task was to review Flint's public water system, including treatment processes, maintenance procedures, and actions taken.

164. As water treatment professionals, Veolia had an opportunity to catch what Defendant LAN had missed or refused to warn about – that corrosive water was being pumped through lead pipes into the homes of Flint residents without any corrosion control.

165. Veolia issued an interim report on its findings, which it presented to a committee of Flint's City Council on February 18, 2015.

166. In its interim report, Veolia indicated that Flint's water was "in compliance with drinking water standards." It also noted that "[s]afe [equals] compliance with state and federal standards and required testing."

167. In other words, Veolia publically declared Flint's corrosive water, which was leaching heavy metals from service lines, safe.

168. Defendant Veolia's interim report also noted that the discoloration in Flint's water "raises questions," but "[d]oesn't mean the water is unsafe."

169. The interim report noted that among Veolia's "next steps" were to "carry out more detailed study of initial findings" and "[m]ake recommendations for improving water quality."

170. In response to potential questions about "[m]edical problems," Veolia's interim report dismissively claimed that "[s]ome people may be sensitive to any water."

171. Veolia issued its final "Water Quality Report" dated March 12, 2015.

172. In the final report, Veolia noted that it had conducted a "160-hour assessment of the water treatment plant, distribution system, customer services and communication programs, and capital plans and annual budget."

173. The final report claims that "a review of water quality records for the time period under our study

indicates compliance with State and Federal water quality regulations."

174. The final report states that "the public has also expressed its frustration of discolored and hard water. Those aesthetic issues have understandably increased the level of concern about the safety of the water. The review of the water quality records during the time of Veolia's study shows the water to be in compliance with State and Federal regulations, and based on those standards, the water is considered to meet drinking water requirements."

175. Specifically addressing the lack of corrosion control, the final report notes that "[m]any people are frustrated and naturally concerned by the discoloration of the water with what primarily appears to be iron from the old unlined cast iron pipes. The water system could add a polyphosphate to the water as a way to minimize the amount of discolored water. Polyphosphate addition will not make discolored water issues go away. The system has been experiencing a tremendous number of water line breaks the last two winters. Just last week there were more than 14 in one day. Any break, work on broken valves or hydrant flushing will change the flow of water and potentially cause temporary discoloration."

176. Therefore, in addition to missing the connection between the lack of corrosion control and lead contamination, Veolia made a permissive "could" suggestion aimed only at reducing aesthetic deficiencies

while suggesting that Flint's drinking water met all applicable requirements and was safe to drink.

177. As a result of Veolia's actions, Plaintiffs continued to be exposed to poisonous water beyond February and March of 2015.

178. As evidence of problems mounted, the state and the MDEQ repeatedly denied the dangers facing Flint's residents, insisting that their water was safe to drink.

179. On March 23-24, 2015, Flint's powerless City Council voted 7-1 to end Flint River service and return to DWSD. Defendant Ambrose declared that vote "incomprehensible" and rejected the proposal.

180. Defendant Ambrose then publically declared that "Flint water today is safe by all Environmental Protection Agency and Michigan Department of Environmental Quality standards, and the city is working daily to improve its quality . . . water from Detroit is no safer than water from Flint."

181. On April 24, 2015, the MDEQ finally admitted to the EPA that Flint did not have optimized corrosion control in place, expressly contradicting its statement from two months prior.

182. By no later than April 2015, but likely much earlier, Defendants Cook, Busch, and Prysby were undeniably aware that no corrosion control was being used in Flint following the switch to the Flint River as the water source..

183. The MDEQ, Defendants Cook, Busch, and Prysby also knew that at least one EPA employee (EPA Region 5 groundwater and drinking water regulations manager, Miguel Del Toral ("Del Toral")) disagreed with their assertion that the MDEQ was adhering to EPA requirements in its oversight of Flint's compliance with the LCR.

184. The flawed interpretation used by MDEQ and its employees amounted to a one year "free pass" for the system, during which Flint's residents would be used as guinea pigs to see whether they should have been protected in the first place.

185. The MDEQ, Defendants Cook, Busch, and Prysby were expressly told by Del Toral that their sampling procedures skewed lead level results and did not properly account for the presence of lead service lines.

186. In April 2015, Del Toral issued a memorandum to the MDEQ, stating: "I wanted to follow up on this because Flint has essentially not been using any corrosion control treatment since April 30, 2014, and they have (lead service lines). Given the very high lead levels found at one home and the pre-flushing happening in Flint, I'm worried that the whole town may have much higher lead levels than the compliance results indicated, since they are using pre-flushing ahead of their compliance sampling."

187. Del Toral, a national expert in the field, identified the problem, the cause of that problem, and the specific reason the state had missed it. Defendants ignored and dismissed him.

188. MDEQ's director, Defendant Wyant, was expressly aware of Del Toral's comments and concerns.

189. On May 1, 2015, Defendant Cook sent an email to Del Toral disagreeing with Del Toral's interpretation of his own agency's rules and vehemently resisting calls for a water quality. Cook noted that "[a]s Flint will be switching raw water sources in just over one year from now, raw water quality will be completely different than what they currently use. Requiring a study at the current time will be of little to no value in the long term control of these chronic contaminants."

190. Apparently, Defendant Cook and the MDEQ believed they could simply run out the clock on Flint's water quality problem, in conscious disregard for the safety of the public, including Plaintiffs, as the water source would be changing in the near future

191. Cook also falsely claimed that "the City of Flint's sampling protocols for lead and copper monitoring comply with all current state and federal requirements. Any required modifications will be implemented at a time when such future regulatory requirements take effect.

192. While Cook attempted to defend himself and the MDEQ, he completely ignored Del Toral's well founded concerns that the MDEQ was missing lead in Flint's public drinking water. Instead, he was focused on insisting that the MDEQ had technically complied with applicable rules. It had not.

193. On June 24, 2015, Del Toral authored an alarming memorandum to Thomas Poy, the chief of the EPA's Region 5 Ground Water and Drinking Water Branch, more fully stating his concerns about the problems with MDEQ's oversight of Flint (the "Memorandum").

194. Del Toral's Memorandum noted that Flint was not providing corrosion control treatment for mitigating lead and copper levels, "[a] major concern from a public health standpoint." Further, "[r]ecent drinking water sample results indicate the presence of high lead results in the drinking water, which is to be expected in a public water system that is not providing corrosion control treatment. The lack of any mitigating treatment for lead is of serious concern for residents that live in homes with lead service lines or partial lead service lines, which are common throughout the City of Flint."

195. The Memorandum additionally noted that, "[t]he lack of mitigating treatment is especially concerning as the high lead levels will likely not be reflected in the City of Flint's compliance samples due to the sampling procedures used by the City of Flint for collecting compliance samples. . . . This is a serious concern as the compliance sampling results which are reported by the City of Flint to residents could provide a false sense of security to the residents of Flint regarding lead levels in their water and may result in residents not taking necessary precautions to protect their families from lead in the drinking water . . . [o]ur concern . . . has been raised with the [MDEQ]."

196. Del Toral's Memorandum also noted that a Flint resident, Ms. Lee-Anne Walters, who had directly contacted the EPA had alarming results of 104 ug/L and 397 ug/L1, especially alarming given the flawed sampling procedures used by the MDEQ. The MDEQ had told the resident that the lead was coming from the plumbing in her own home, but Del Toral's inspection revealed that her plumbing was entirely plastic.

197. The memorandum also noted blood tests showed Ms. Walters's child had elevated blood lead levels, and that additional sample results from resident-requested samples showed high levels of lead.

198. Among those cc'd on the Memorandum were Defendants Liane Shekter-Smith, Patrick Cook, Stephen Busch, and Michael Prysby.

199. On May 11, 2015, Jon Allan, director of the Michigan Office of the Great Lakes, e-mailed Defendant Shekter-Smith for her reactions to the following language in a proposed report "By 2020, 98 percent of population served by community water systems is provided drinking water that meets all health-based standards . . . By 2020, 90 percent of the non-community water systems provide drinking water that meets all health-based standards." Responding the same day, MDEQ Water Resources Division Chief William Creal replied: "I think you are nuts if you go with a goal less than 100 percent for (drinking water) compliance in the strategy. How many Flints to you intend to allow???"

200. Defendant Shekter-Smith responded the next day: "The balance here is between what is realistic and what is ideal. Of course, everyone wants 100 percent compliance. The reality, however, is that it's impossible. It's not that we 'allow' a Flint to occur; circumstances happen. Water mains break, systems lose pressure, bacteria gets into the system, regulations change and systems that were in compliance no longer are, etc. Do we want to put goal in black and white that cannot be met but sounds good? Or do we want to establish a goal that challenges us but can actually be accomplished? Perhaps there's a middle ground?"

201. Defendant Shekter-Smith's May 12, 2015 email comments reflect her obvious awareness at that time that Flint's water did not meet health based standards, and her callous "circumstances happen" statement demonstrated her deliberate indifference to the results.

202. In approximately July 2015, Defendant Busch claimed that "almost all" homes in the pool sampled for lead in Flint had lead service lines. This was patently untrue and was made with no basis in fact, and the effect of this mistake made the lead testing results even more unreliable. Busch knew that this statement was not true, because Flint's records available at that time were insufficient to allow him to make such a determination.

203. On July 9, 2015 ACLU-Michigan reporter Curt Guyette publicly broke the story about lead in Flint's drinking water, citing Del Toral's Memorandum

and exposing the lack of corrosion control in Flint's drinking water.

204. Four days later, Defendant Wurfel issued the following public statement: "Let me start here- anyone who is concerned about lead in the drinking water in Flint can relax."

205. On July 21, 2015, the EPA and MDEQ conducted a conference call regarding MDEQ's implementation of the LCR. EPA pushed for optimized corrosion control (which MDEQ had previously falsely told the EPA that Flint was using), while MDEQ claimed it was unnecessary and premature.

206. MDEQ could not have been more wrong. Far from being premature, it was already too late to fully protect the people of Flint.

207. In an e-mail follow-up to that call, sent to an EPA employee, Defendant Shekter-Smith stated "while we understand your concerns with the overall implementation of the lead and copper rule (the "LCR"); we think it is appropriate for EPA to indicate in writing (an email would be sufficient) your concurrence that the city is in compliance with the lead and copper rule as implemented in Michigan . . . This would help distinguish between our goals to address important public health issues separately from the compliance requirements of the actual rule which we believe have been and continue to be met in the city of Flint."

208. Defendant Shekter-Smith's statement indicates that she and the MDEQ were more concerned

about proving technical compliance with the LCR than "address[ing] important public health issues."

209. Again, Defendant Shekter-Smith statements demonstrate a deliberate indifference to whether an injury resulted to Flint's residents, including Plaintiffs.

210. On July 22, 2015, Governor Snyder's chief of staff, Dennis Muchmore, sent an email indicating his awareness of the problems with Flint's water and the state's inadequate response. He noted: "I'm frustrated by the water issue in Flint. I really don't think people are getting the benefit of the doubt. Now they are concerned and rightfully so about the lead level studies they are receiving from DEQ samples. Can you take a moment out of your impossible schedule to personally take a look at this? These folks are scared and worried about the health impacts and they are basically getting blown off by us (as a state we're just not sympathizing with their plight)."

211. Linda Dykema, director of the MDHHS Division of Environmental Health sent an email to a number of department employees attempting to discredit Del Toral, who to this point was the only government employee actively trying to protect Flint's residents, including Plaintiffs, from lead poisoning. She claimed "[r]egarding the EPA drinking water official quoted in the press articles, the report that he issued was a result of his own research and was not reviewed or approved by EPA management. He has essentially acted outside his authority."

212. On July 24, 2015, Defendant Wurfel wrote an e-mail to Defendants Busch, Prysby, Shekter-Smith and Wyant, stating: "Guys, the Flint Ministers met with the Governor's office again last week. They also brought along some folks from the community – a college prof and GM engineer – who imparted that 80 water tests in Flint have shown high lead levels. Could use an update on the January/June testing results, as well as recap of the December testing numbers, and any overview you can offer to edify this conversation."

213. Defendant Busch responded the same day in email to Defendant Wurfel copied to all others on the original e-mail, claiming that the second round of Flint drinking water testing showed a 90th percentile level of 11 parts per billion, almost double the prior round's results.

214. Even with MDEQ's terribly flawed sampling methods showing that lead levels had nearly doubled since the first six month testing, and even with outside evidence of even higher levels, Defendants showed no concern and took no immediate action to protect the people of Flint, including Plaintiffs.

215. Defendant Busch also noted in his e-mail that Flint would be completing "a study (within 18 months) and are allowed a period of additional time (2 additional years) to install the selected treatment for fully optimized corrosion control.

216. MDEQ and its employees would have allowed the continued poisoning of Flint's residents,

including Plaintiffs, over three more years without even attempting to reduce the water's corrosiveness.

217. On July 24, 2015, Defendant Wurfel wrote the following to recipients including Mr. Muchmore and Defendant Wyant: "Guys, here's an update and some clarification on the lead situation in Flint. Please limit this information to internal for now . . . By the tenants of the federal statute, the city is in compliance for lead and copper. That aside, they have not optimized their water treatment . . . Conceivably, by the time we're halfway through the first timeline, the city will begin using a new water source with KWA . . . and conceivably, the whole process starts all over again. In terms of near-future issues, the bottom line is that residents of Flint do not need to worry about lead in their water supply, and DEQ's recent sampling does not indicate an eminent [sic] health threat from lead or copper."

218. In August, 2015, the EPA pressed MDEQ to move faster on implementing corrosion control in Flint.

219. On August 23, 2015, Virginia Tech Professor Marc Edwards wrote MDEQ to inform them that he would be conducting a study of Flint's water quality.

220. On August 27, 2015, Professor Edwards's preliminary analysis was released. More than half of the first 48 samples he tested came back above 5 ppb, and more than 30% of them came back over 15ppb, which would be unacceptable even as a 90th percentile. He called the results "worrisome."

221. In an e-mail response to a Governor's office inquiry regarding the high lead levels in residents' homes and the discrepancy between those numbers and the state's test results, Defendant Wurfel stated "[d]on't know what it is, but I know what it's not. The key to lead and copper in drinking water is that it's not the source water, or even the transmission lines (most of which are cast iron). It's in the premise plumbing (people's homes)."

222. This statement was made despite the facts that about half of Flint's homes are connected to lead service lines, and that it was clear by this point that Ms. Walters's home had plastic plumbing.

223. Wurfel then blamed Del Toral, the ACLU, and others taking action to help Flint's residents, stating: "This person is the one who had EPA lead specialist come to her home and do tests, then released an unvetted draft of his report (that EPA apologized to us profusely for) to the resident, who shared it with ACLU, who promptly used it to continue raising hell with the locals . . . [I]t's been rough sledding with a steady parade of community groups keeping everyone hopped-up and misinformed."

224. On August 28, 2015, an EPA employee notified Defendant Shekter-Smith and other MDEQ employees that "Marc Edwards (Virginia Tech) is working with some of the citizens in Flint and they are finding lead at levels above five parts per billion and some above 15 parts per billion. There's no indication of whether any of these homes were also sampled and

analyzed by Flint and will now be part of their compliance calculations. Virginia Tech sent out 300 bottles and have gotten 48 back. We are not involved in this effort by Dr. Edwards."

225. On September 2, 2015, Defendant Wurfel engaged in further efforts to discredit Marc Edwards, this time in a press release. He stated: "[W]e want to be very clear that the lead levels being detected in Flint drinking water are not coming from the treatment plant or the city' transmission lines . . . The issue is how, or whether, and to what extent the drinking water is interacting with lead plumbing in people's homes. . . . the results reported so far fail to track with any of the lead sampling conducted by the city. In addition, Virginia Tech results are not reflected by the blood lead level testing regularly conducted by the state department of community health that have not shown any change since Flint switched sources."

226. Defendant Wurfel knew this statement to be false, or had no reason to believe that it was true. For example, it was obvious by this point that Ms. Walters's home had plastic plumbing.

227. On September 6, 2015, another Wurfel attempt to discredit Edwards's results was published through Michigan Public Radio: "The samples don't match the testing that we've been doing in the same kind of neighborhoods all over the city for the past year. With these kinds of numbers, we would have expected to be seeing a spike somewhere else in the other lead monitoring that goes on in the community."

228. Tragically, had the MDEQ or MDHHS been doing their jobs, they would indeed have seen spikes in all other forms of lead monitoring. Even worse, the MDEQ had been told exactly why its testing failed to reveal extremely high levels of lead.

229. Dr. Edwards published a report in early September, 2015, with startling findings. Among them: "FLINT HAS A VERY SERIOUS LEAD IN WATER PROBLEM"; "101 out of 252 water samples from Flint homes had first draw lead more than 5 ppb"; "Flint's 90th percentile lead value is 25 parts per billion . . . over the EPA allowed level of 15ppb that is applied to high risk homes . . . How is it possible that Flint 'passed' the official EPA Lead and Copper Rule sampling overseen by MDEQ?"; "Several samples exceeded 100ppb and one sample collected after 45 seconds of flushing exceeded 1,000 ppb[.]."

230. Additional Edwards findings included that "[o]n average, Detroit water is 19 times less corrosive than the Flint River water currently in use"; "even with phosphate, Flint River water has 16 times more lead compared to the same condition using Detroit water."

231. Therefore, the Flint River water was so corrosive that even the obvious, necessary measure of adding corrosion control may not have been enough to make it totally safe

232. This would have been known if the water were properly treated or studied before the switch. Instead, by and through the actions of Defendants

herein, the residents of Flint, including Plaintiffs, were used as guinea pigs in a "test then treat" scenario that ensured at least one year of absolutely no protection from lead contamination.

233. Edwards predicted that "in the weeks and months ahead MDEQ and Flint will be forced to admit they failed to protect public health as required under the Federal Lead and Copper Rule." He was entirely correct.

234. Another scurrilous attack by Defendant Wurfel on Professor Edwards and his team occurred on September 9, 2015, when Wurfel told a reporter: "[T]he state DEQ is just as perplexed by Edwards's results as he seems to be by the city's test results, which are done according to state and federal sampling guidelines and analyzed by certified labs."

235. This statement by Defendant Wurfel was made with full knowledge that at least one EPA employee had told MDEQ that its testing was not being conducted according to federal guidelines.

236. Defendant Wurfel also claimed that Professor Edwards' team "only just arrived in town and (have) quickly proven the theory they set out to prove, and while the state appreciates academic participation in this discussion, offering broad, dire public health advice based on some quick testing could be seen as fanning political flames irresponsibly."

237. Again, Wurfel and MDEQ publically attempt to discredit the people working to protect the public,

including Plaintiffs, while providing false assurances to Flint's residents, including Plaintiffs, about the water that continues to poison them.

238. On September 10, 2015, Dr. Yanna Lambrinidou, a member of the EPA National Drinking Water Advisory Council Lead and Copper Rule workgroup wrote to Defendants Wurfel and Busch, requesting information on "optimal water quality parameter ranges" that MDEQ should have set for Flint's water. However, no such information existed, because MDEQ had never created it.

239. Busch responded 101 previous water quality parameter ranges would have been established for the City of Flint's wholesale finished water supplier, the Detroit Water and Sewerage Department, not the City of Flint itself. As the City of Flint has not yet established optimized corrosion control treatment, the MDEQ is not yet at the point of regulatory requirements where the range of water quality parameters would be set."

240. Water quality parameter ranges ensure safe levels of things like PH, nitrates, and phosphates.

241. Dr. Lambrinidou replied "Do you mean that MDEQ never set optimal water quality parameter ranges specifically for Flint before Flint's switch to Flint River water? It is my impression, please correct me if I'm wrong, that under the LCR, all large systems – whether they are consecutive or not – must have optimal water quality parameter ranges designated by states specifically for them (at the time when these

systems are deemed to have optimized their treatment). Is there language in the LCR I am missing that allows a utility not to have optimal quality parameter ranges established specifically for it? My second question is this: If the City of Flint had no optimal water quality parameter ranges established specifically for it in the past, how did it achieve LCR compliance? Isn't it the case that utility-specific optimal water quality parameter ranges (and maintenance of these ranges) are required for all large systems to avoid an LCR violation?"

242. Busch's response reiterated his contention that Flint was not required to implement corrosion control until unacceptably high levels of lead had already appeared in the water. This callous response, on September 25, 2015, indicated Busch's deliberate indifference to the health and welfare of Flint's residents, including Plaintiffs.

243. A September 10 e-mail from the EPA's Jennifer Crooks to Defendant Shekter-Smith, summarizing an apparent EPA-DEQ conference call, acknowledged that Professor Edwards's study "[was] putting added pressure on MDEQ, and EPA to ensure that Flint addresses their lack of optimized corrosion control treatment in an expedited manner in order to protect the residents from exposure to high lead levels." Further, "EPA acknowledged that to delay installation of corrosion control treatment in Flint would likely cause even higher levels of lead over time as Flint's many lead service lines are continuously in contact with corrosive water."

244. In a September 17, 2015 letter, Defendant Wyant wrote a letter in response to an inquiry from various legislators, disavowing any responsibility for reacting to Del Toro's alarm-sounding Memorandum: "With respect to the draft memo referenced in your letter, the MDEQ does not review or receive draft memos from the USEPA, nor would we expect to while it is a draft.

245. Wyant's statement was made despite the fact that he and the MDEQ were fully aware of Del Toral's Memorandum and the concerns it raised, and as though this apparent MDEQ policy justified ignoring Del Toral.

246. On September 15, 2015, MLive published an article entitled "Virginia Tech professor says Flint's tests for lead in water can't be trusted." Edwards is quoted as recommending a return to DWSD, stating "Flint is the only city in America that I'm aware of that does not have a corrosion control plan in place to stop this kind of problem."

247. On September 23, 2015, an e-mail from Defendant Croft to numerous officials included the following: "I am pleased to report that the City of Flint has officially returned to compliance with the Michigan Safe Drinking Water Act and we have received confirming documentation from the DEQ today . . . Recent testing has raised questions regarding the amount of lead that is being found in the water and I wanted to report to you our current status. At the onset of our plant design, optimization for lead was addressed and

discussed with the engineering firm and with the DEQ. It was determined that having more data was advisable prior to the commitment of a specific optimization method. Most chemicals used in this process are phosphate based and phosphate can be a 'food' for bacteria. We have performed over one hundred and sixty lead tests throughout the city since switching over to the Flint River and remain within EPA standards."

248. Defendant Croft's statement was made despite his knowledge that the samples the city had taken were insufficient to draw any conclusions

249. Defendant Croft's widely disseminated message makes no mention of the flawed lead testing results.

250. On September 25, 2015, Snyder Chief of Staff Dennis Muchmore sent an e-mail to Governor Snyder and others that treated the situation in Flint as a political inconvenience instead of a humanitarian crisis. He stated: "The DEQ and [MDHHS] feel that some in Flint are taking the very sensitive issue of children's exposure to lead and trying to turn it into a political football claiming the departments are underestimating the impacts on the populations and are particularly trying to shift responsibility to the state . . . I can't figure out why the state is responsible except that Dillon did make the ultimate decision so we're not able to avoid the subject. The real responsibility rests with the County, city, and KWA[.]"

251. In addition to ignoring the fact that the state had taken over Flint, Muchmore's evasion of

state responsibility ignores the role of the MDEQ and MDHHS in this crisis.

252. Where MDEQ caused, obscured, and lied about the lead problem, MDHHS should have discovered and revealed it.

253. Instead, the MDHHS obscured, obfuscated, and intentionally withheld information which conclusively showed that the children of Flint were being poisoned. It took the work of an outside doctor to force MDHHS to acknowledge its failures.

254. While MDEQ ignored and criticized the very people it should have been gratefully listening to in Del Toral and Dr. Edwards, the MDHHS extended the same treatment to Dr. Mona Hanna-Attisha, a pediatrician at Flint's Hurley Hospital.

255. In a July 28, 2015, email from MDHHS epidemiologist Cristin Larder to MDHHS employees Nancy Peeler and Patricia McKane, Larder identifies an increase in blood lead levels in Flint just after the switch to river water, and concludes only that the issue "warrant[s] further investigation."

256. On the same day, Nancy Peeler sent an e-mail admitting an uptick in children with elevated blood lead levels in Flint in July, August, and September 2014, but attributing it to seasonal variation.

257. MDHHS took no actions as outsiders began to discover and reveal Flint's lead problem. Instead, it withheld data and obstructed those researchers while actively attempting to refute their findings.

258. In a September 10, 2015, e-mail from MDHSS health educator Michelle Bruneau to colleague Kory Groestch, regarding a talking points memorandum, she states: "[M]ay be a good time to float the draft out to the others because if we're going to take action it needs to be soon before the Virginia Tech University folks scandalize us all."

259. Again, instead of acting to help the people of Flint, including Plaintiffs, the State and its employees were concerned with protecting themselves.

260. In a September 11, 2015, e-mail to Linda Dykema and Kory Groestch of the MDHHS, Defendant Shekter-Smith wrote: "Since we last spoke, there's been an increase in the media regarding lead exposure. Any progress developing a proposal for a lead education campaign? We got a number of legislative inquiries that we are responding to. It would be helpful to have something more to say." DHHS's Bruneau responded to Groetsch: "Told ya," and incredibly, includes a "smiley face" emoticon.

261. Groetsch then responds to Shekter-Smith that Bruneau has written only "the bones" of a health education and outreach plan.

262. The same day, Robert Scott, the data manager for the MDHHS Healthy Homes and Lead Prevention program, was e-mailed a copy of a grant proposal for Professor Edwards's study Edwards's grant proposal described a "perfect storm" of "out of control" corrosion of city water pipes leading to "severe chemical/biological health risks for Flint residents."

Scott forwarded the grant proposal to MDHHS employees Nancy Peeler, Karen Lishinski, and Wesley Priem, with the note[w]hen you have a few minutes, you might want to take a look at it. Sounds like there might be more to this than what we learned previously. Yikes!"

263. On September 22, 2015, MDHHS Environmental Public Health Director Lynda Dykema, emailed MDHHS' Geralyn and Defendant Peeler, among others. She stated: "Here is a link to the VA Tech study re city of Flint drinking water . . . It appears that the researchers have completed testing of a lot of water samples and the results are significantly different than the city and DEQ data. It also appears that they've held public meetings in Flint, resulting in concerns about the safety of the water that have arisen in the last few days."

264. On the same day, Dr. Mona Hanna-Attisha requested from Robert Scott and others at MDHHS full state records on blood tests, likely to compare to her own data. She notes "[s]ince we have been unable to obtain recent MCIR blood lead data for Flint kids in response to the lead in water concerns, we looked at all the blood lead levels that were processed through Hurley Medical Center[.]" She tells the MDHHS that despite being denied data access from the state, she has found "striking results."

265. Dr. Hanna-Attisha had heard complaints from Flint residents about their water and found out that no corrosion control was being used. She developed

a study using her hospital's data, comparing lead levels in blood samples taken before and after the switch in the water supply.

266. On September 24, 2015, Dr. Hanna-Attisha released a study showing post-water-transition elevated blood-lead levels in Flint children at a press conference. Dr. Hanna-Attisha had essentially done the job that the MDHHS should have done.

267. Earlier that day, MDHSS employee Angela Minicuci circulated a memorandum of "Flint Talking Points" in anticipation of Dr. Hanna-Attisha's study. It noted that her results were "under review" by MDHHS, but that her methodology was different, implying that her methodology was unorthodox or improper. "Looking at the past five years as a whole provides a much more accurate look at the season trends of lead in the area," MDHHS claimed. "MDHHS data provides a much more robust picture of the entire blood lead levels for the Flint area."

268. Also regarding Dr. Hanna-Attisha's findings, Governor Snyder's press secretary e-mailed a number of state employees the following: "Team, [h]ere's the data that will be presented at the Hurley Hospital press conference at 3 p.m. As you'll see, they are pointing to individual children, a very emotional approach. Our challenge will be to show how our state data is different from what the hospital and the coalition members are presenting today."

269. Here again, the State and the individual Defendants in this action were more concerned about

protecting their own respective reputations than the lives of Flint residents, including Plaintiffs. It never addressed the most important – and obvious question – what if Dr. Hanna Attisha was right?

270. MDHHS employees were uniformly dismissive of Dr. Hanna-Attisha's results. Wesley Priem, manager of the MDHHS Healthy Homes Section, wrote to MDHHS' Kory Groetsch: "This is definitely being driven by a little science and a lot of politics."

271. The same day the results were released, Robert Scott emailed Nancy Peeler, noting that he had tried to "recreate Hurley's numbers," and says he sees "a difference between the two years, but not as much difference as they did." Despite the fact that this constitutes MDHHS's first internal recognition that their own methodology could have been wrong and that Flint children had been poisoned, Scott added "I'm sure this one is not for the public."

272. As this was going on, Professor Edwards forcefully requested blood lead data from Mr. Scott. In an email, the Professor notes that the State had failed to provide the records to Dr. Hanna-Attisha's team, and accusing the MDHHS of "raising . . . obstacles to sharing it with everyone who asks." Professor Edwards claims to have been requesting the data since August, and notes that he has sent Scott ten e-mails on the subject.

273. The next day, Scott drafted a remarkable response, but never sent it to Professor Edwards on the advice of Defendant Peeler. Included in the would-be

response: "I worked with you earlier this month to get data to you relatively quickly but did not manage to complete the process before I went on annual leave for several days. I neglected to inform you that I'd be away, and I apologize for not informing you."

274. Despite the fact that Scott admitted to going on vacation and leaving an important task unfinished as a public health crisis unfolded, Peeler tells him to "apologize less."

275. The day after Dr. Hanna-Attisha releases her study, the City of Flint issues a health advisory, telling residents to flush pipes and install filters to prevent lead poisoning.

276. The same day, Robert Scott responded to an email from colleagues about Detroit Free Press interest in doing a lead story. At 12:16 p.m., Free Press reporter Kristi Tanner sent an email to Angela Minicuci at MDHHS saying Tanner had looked at the lead increase in Flint as shown in DHS records between 2013-2014 and 2-14-2015 and Tanner is concluding that the increase "is statistically significant."

277. Scott writes to Minicuci: "The best I could say is something like this: 'While the trend for Michigan as a whole has shown a steady decrease in lead poisoning year by year, smaller areas such as the city of Flint have their bumps from year to year while still trending downward overall.'

278. Nancy Peeler, also a party to the conversation, writes back to Scott and Minicuci: "My secret hope

is that we can work in the fact that this pattern is similar to the recent past."

279. This conversation unfolded the very day after Scott told Peeler that his own review of the data showed increased post-switch lead levels, but that his findings were not to be made public.

280. Peeler and Scott intentionally withheld information that they had a duty to disclose to the public, and actively sought to hide the lead poisoning epidemic that they had previously failed to discover.

281. Also on September 25, MDHHS's Lasher sent an email to Mr. Muchmore, Defendant Wyant, Defendant Wufel, and others, repeating criticisms of Dr. Hanna-Attisha's findings using quotation marks in reference to the "data" that she reviewed and calling her sample size into question.

282. Those MDHHS employees not actively engaged in the cover-up showed no urgency whatsoever to this public health crisis. Cristin Larder sent an e-mail to a number of colleagues: "After looking at the data Kristi send you and talking with Sarah, I realize I do not have access to the data I need to answer her specific question about significance. I won't be able to get access before Monday. Sorry I wasn't able to be helpful right now." Angela Minicuci responded: "Not a problem, let's connect on Monday."

283. The MDHHS apparently could not be troubled with an ongoing public health emergency on the weekend.

284. As this crisis unfolded, Governor Snyder received briefings from Mr. Muchmore, which were more focused on political reputation preservation than helping the people of Flint, including Plaintiffs.

285. Muchmore referred to the people raising concerns about Flint's lead as the "anti everything group," and claimed that it was the responsibility of the City of Flint (overtaken by Snyder's Emergency Manager) to "deal with it." Still, by September 26, 2015, Muchmore had told the governor that finding funds "to buy local residents home filters is really a viable option," and had identified service lines to homes as a likely cause of the problem.

286. The Governor took no immediate action to protect the rights, health, and safety of Flint's residents while his subordinates continued to insist that the water was safe and discredit those who presented evidence to the contrary.

287. On September 28, 2015, another incredible Defendant Wurfel public statement was released. He claimed that the Flint situation is turning into "near hysteria," and saying of Dr. Hanna-Attisha's statements "I wouldn't call them irresponsible. I would call them unfortunate." He again declares Flint's water safe.

288. On September 28, 2015, State Senator Jim Ananich sent a letter to Governor Snyder, noting "Mt is completely unacceptable that respected scientific experts and our trusted local physicians have verified that the City of Flint's drinking water is dangerous for

our citizens, especially our most vulnerable young people." He called for immediate action, but the Governor continued to wait.

289. The same day, MDHHS Director Nick Lyon continues trying to discredit Dr. Hanna-Attisha's study despite his own department's knowledge that it shows a real problem. In an e-mail, he stated: "I need an analysis of the Virginia Tech/Hurley data and their conclusions. I would like to make a strong statement with a demonstration of proof that the lead blood levels seen are not out of the ordinary and are attributable to seasonal fluctuations. Geralyn is working on this for me but she needs someone in public health who can work directly with her on immediate concerns/questions."

290. Incredibly, and in blatant violation of state law, at all relevant times the state's "top doctor," MDHHS chief medical executive Dr. Eden Wells was attending to her responsibilities part time while also working at the University of Michigan. Dr. Wells did not become a full time state employee until February 1, 2016, and her mandatory responsibilities at the state prior to that time may have involved as little as eight (8) hours per week.

291. Dr. Wells was the sole medical doctor working as an executive for the department.

292. Dr. Wells's predecessor, Dr. Gregory Holtzman, has noted that as a full time employee, he "kept quite busy."

293. Other outsiders continued to put pressure on the MDHHS to be more transparent.

294. Genesee County Health Officer Mark Valacak wrote an e-mail to department employees, demanding "to know whether you have confirmed with the lead program staff at MDHHS that he state results that purport that lead levels have not shown a significant increase since the changeover of the water supply for the city of Flint indeed represent Flint city zip codes only and not Flint mailing addresses. As I mentioned to you both this morning, Flint mailing addresses include outlying areas like Flint and Mundy Townships which obtain their water from the Detroit water authority."

295. Valacak's email pointed out further flaws in MDHHS methodology.

296. In the face of continued state denials, a September 29, 2015, article in the Detroit Free Press publically claimed "Data that the State of Michigan released last week to refute a hospital researcher's claim that an increasing number of Flint children have been lead-poisoned since the city switched its water supply actually supports the hospital's findings, a Free Press analysis has shown. Worse, prior to the water supply change, the number of lead-poisoned kids in Flint, and across the state, had been dropping; the reversal of that trend should prompt state public health officials to examine a brewing public health crisis."

297. Dr. Hanna-Attisha could see the problem and the Free Press could see the problem with the state's

own data, and yet the MDHHS found signs of a lead problem but ignored it.

298. Finally, Governor Snyder was forced to admit that there was an emergency he could no longer ignore. His Executive Director sent an e-mail on September 29, 2015 to Mr. Muchmore, Nick Lyon, and Defendant Wyant, among others, soliciting information for a meeting regarding emergency management and noting that Dr. Wells "should be speaking with Hurley."

299. A September 29, 2015, internal e-mail between MDHHS employees refers to the situation in Flint as sounding "like a third world country" and openly wondering when the federal government might be able to step in.

300. The same day, MDHHS employees discuss efforts made by Genesee County to obtain MDHHS data. Ms. Lasher writes "I understand that we are still reviewing the data – but the county has basically issued a ransom date that they want this information by tomorrow . . . Eden – please coordinate an answer so Nick can walk into the 1 p.m. (meeting with the governor) prepared on this."

301. As demonstrated in Ms. Lasher's email, the state continued to refuse to take even the simplest measure to protect public health until outsiders forced it to do so.

302. Also on September 29, 2015, Geralyn Lasher e-mailed Defendants Peeler and Wells, Scott, and several others at MDHHS: "Is it possible to get the

same type of data for just children under the age of six? So basically, the city of Flint kids ages six and under with the same type of approach as the attached chart you gave us last week?"

303. Linda Dykema responds to fellow MDHHS employees including Defendant Wells: "[i]t's bad enough to have a data war with outside entities, we absolutely cannot engage in competing data analyses within the Department, or, heaven forbid, in public releases."

304. Defendant Wells's only reply to that email was a single word: "Agree," showing MDHHS continuing efforts to mislead the public, protect itself, and discredit Dr. Hanna-Attisha.

305. The MDHHS and its employees were completely disinterested in the truth or finding out whether it may have made an error.

306. When Dr. Hanna-Attisha directly e-mailed Defendant Wells with updated findings that isolated certain high risk areas of the city and showed that blood lead levels have "more than tripled," Defendant Wells responded that the state was working to replicate Hanna-Attisha's analysis, and inquired about Dr. Hanna-Attisha's plans to take the information public.

307. While discouraging her department to look further into Dr. Hanna-Attisha's findings and misleading Dr. Hanna-Attisha, Defendant Wells remained focused on a single task; saving face at the expense of Flint's residents.

308. Also on September 29, 2015, Genesee County issued its own health advisory about Flint's water. Two days later, the county warned Flint residents not to drink the water.

309. As the lead crisis unfolded, the State also obscured the cause of Flint's Legionnaires' disease outbreak. Because of the common cause, the lack of corrosion control, this effort further hindered outside efforts with respect to the lead problem.

310. The state actively prevented interested federal officials from becoming involved in the Legionnaires' investigation.

311. A Centers for Disease Control and Prevention ("CDC") employee wrote to Genesee County Health officials in April of 2015: "We are very concerned about this Legionnaires' disease outbreak . . . It's very large, one of the largest we know of in the past decade, and community-wide, and in our opinion and experience it needs a comprehensive investigation."

312. That e-mail added "I know you've run into issues getting information you've requested from the city water authority and the MI Dept of Environmental Quality. Again, not knowing the full extent of your investigation it's difficult to make recommendations, and it may be difficult for us to provide the kind of detailed input needed for such an extensive outbreak from afar."

313. On December 5, 2015, an employee of Genesee County Health Department accused state officials

of covering up their mishandling of Flint's Legionnaires' disease outbreak. Tamara Brickey wrote to colleagues that "[t]he state is making clear they are not practicing ethical public health practice." Further, "evidence is clearly pointing to a deliberate cover-up," and "Mil my opinion, if we don't act soon, we are going to become guilty by association."

314. On October 1, 2015, the MDHHS officially confirmed Dr. Hanna-Attisha's results. Department employees developed a "talking points" memorandum that gently admitted that further analysis of their own data supported the doctor's findings, but cited lead paint as a greater concern than the water.

315. Finally, after months of denial, obstruction, and lies, the State began to act on October 12, 2015. Governor Snyder received a proposal to reconnect Flint to DWSD and worked on plans for lead testing and water filters. Still, Governor Snyder's "comprehensive action plan" stated that "[t]he water leaving Flint's drinking water system is safe to drink, but some families with lead plumbing in their homes or service connections could experience higher levels of lead in the water that comes out of their faucets."

316. Subsequent tests have shown that lead levels in Flint's water have been so high that filters could not remove all lead, meaning that the state's recommendation and distribution of filters as a solution continued to inflict harm.

317. On October 16, 2015, Flint reconnected to DWSD. However, the damage had been done and lead has continued to leach from pipes into the water.

318. Two days later Defendant Wyant admitted the colossal failure that his department had made, many months after it was expressly brought to their attention. Wyant informed Governor Snyder that "staff made a mistake while working with the City of Flint. Simply stated, staff employed a federal (corrosion control) treatment protocol they believed was appropriate, and it was not." Also; "simply said, our staff believed they were constrained by two consecutive six-month tests. We followed and defended that protocol. I believe now we made a mistake. For communities with a population above 50,000, optimized corrosion control should have been required from the beginning. Because of what I have learned, I will be announcing a change in leadership in our drinking water program."

319. Defendant Wyant admitted to the Detroit News that MDEQ's "actions reflected inexperience, and our public response to the criticism was the wrong tone early in this conversation."

320. Apparently, by "early in this conversation," Wyant meant "until today." On October 21, 2015, Governor Snyder appointed a five person task force to investigate the Flint water crisis. The task force included Ken Sikkema, senior policy fellow at Public Sector Consultants, Chris Kolb, president of the Michigan Environmental Council, Matthew Davis, a professor of pediatrics and internal medicine at the University

of Michigan, Eric Rothstein, a private water consultant, and Lawrence Reynolds, a Flint pediatrician. The day before the task force's findings were released, Snyder's new chief of staff wrote to him that "[i]f this is the path that the Task Force is on, it is best to make changes at DEQ sooner rather than later. That likely means accepting Dan's resignation. It also means moving up the termination of the 3 DEQ personnel previously planned for Jan 4 to tomorrow."

321. On December 29, 2015, the task force issued a letter detailing its findings.

322. In that letter, the task force stated that "[w]e believe the primary responsibility for what happened in Flint rests with the Michigan Department of Environmental Quality (MDEQ). Although many individuals and entities at state and local levels contributed to creating and prolonging the problem, MDEQ is the government agency that has responsibility to ensure safe drinking water in Michigan. It failed in that responsibility and must be held accountable for that failure."

323. The task force letter continued: "The Safe Drinking Water Act (SDWA) places responsibility for compliance with its requirements on the public water system. In this instance, the City of Flint had the responsibility to operate its water system within SDWA requirements, under the jurisdiction of the MDEQ. The role of the MDEQ is to ensure compliance with the SDWA through its regulatory oversight as the primary

agency having enforcement responsibility for the Flint water system."

324. The letter indicated that the MDEQ had failed to properly interpret and apply the Lead and Copper Rule. The letter pointed to a "minimalist approach to regulatory and oversight authority" at MDEQ's Office of Drinking Water and Municipal Assistance (headed by Defendant Shekter-Smith) which "is unacceptable and simply insufficient to the task of public protection. It led to MDEQ's failure to recognize a number of indications that switching the water source in Flint would-and did- compromise both water safety and water quality."

325. The letter also noted that "[t]hroughout 2015, as the public raised concerns and as independent studies and testing were conducted and brought to the attention of MDEQ, the agency's response was often one of aggressive dismissal, belittlement, and attempts to discredit these efforts and the individuals involved."

326. Further, that "the MDEQ seems to have been more determined to discredit the work of others – who ultimately proved to be right – than to pursue its own oversight responsibility."

327. Regarding other failures of the state, the task force report noted that "we are particularly concerned by recent revelations of MDHHS's apparent early knowledge of, yet silence about, elevated blood lead levels detected among Flint's children."

328. "The City of Flint's water customers—fellow Michigan citizens—were needlessly and tragically exposed to toxic levels of lead through their drinking water supply." The report also notes that the state government should be responsible for remedying the tragedy, "having failed to prevent it."

329. In October 2015, Defendant Shekter-Smith was reassigned so as to have no responsibility for Flint's drinking water.

330. On December 5, 2015, the City of Flint declared a state of emergency. In response to a blog post by Professor Edwards entitled "Michigan Health Department Hid Evidence of Health Harm Due to Lead Contaminated Water. Allowed False Public Assurances by MDEQ and Stonewalled Outside Researchers," the Governor's Communications Director wrote to Governor Snyder and others "Mt wasn't until the Hurley report came out that our epidemiologists took a more in-depth look at the data by zip code, controlling for seasonal variation, and confirmed an increase outside of normal trends. As a result of this process we have determined that the way we analyze data collected needs to be thoroughly reviewed."

331. In other words, MDHHS's failure to properly analyze its own data was a matter of practice, pattern, custom, and/or policy.

332. On December 23, 2015, the Michigan Auditor General provided an investigative report on the crisis, finding that corrosion control should have been

maintained from the beginning and that improper sample sites had been selected by the MDEQ.

333. On December 30, 2015, Defendants Wyant and Wurfel resigned.

334. On January 4, 2016, Genesee County declared its own state of emergency.

335. On January 12, 2016, the Governor called the National Guard into Flint and requested assistance from FEMA.

336. On January 13, 2015, the Governor announced the massive spike in Legionnaires' disease in Genesee county, ten months after the state was made aware that the spike coincided with the switch to Flint River water.

337. On January 16, 2016, President Obama declared a federal state of emergency in his January 19, 2016, State of the State address, Governor Snyder admitted to the people of Flint that "Government failed you at the federal, state and local level."

338. On January 21, 2016, EPA's Susan Hedman resigned over her involvement in the Flint Water crisis. Hedman had acted with deliberate indifference to the MDEQ's failures to follow federal law and guidelines, and helped to silence Del Toral.

339. On January 21, 2016, the EPA issued an Emergency Order, based on its finding that "the City of Flint's and the State of Michigan's responses to the

drinking water crisis in Flint have been inadequate to protect public health and that these failures continue."

340. The Emergency Order included as Respondents the City of Flint, the MDEQ, and the Emergency Order provided for the EPA to conduct its own sampling of lead in Flint's water and undertake other actions as part of a process "to abate the public health emergency in the City of Flint."

341. The Emergency Order notes that "[t]he presence of lead in the City water supply is principally due to the lack of corrosion control treatment after the City's switch to the Flint River as a source in April 2014. The river's water was corrosive and removed protective coatings in the system. This allowed lead to leach into the drinking water, which can continue until the system's treatment is optimized."

342. The Emergency Order indicates that "water provided by the City to residents poses an imminent and substantial endangerment to the health of those persons. Those persons' health is substantially endangered by their ingestion of lead in waters that persons legitimately assume are safe for human consumption."

343. Further, the EPA states that "The City, MDEQ and the State have failed to take adequate measures to protect public health."

344. According to the Emergency Order: "Based upon the information and evidence, EPA determines that Respondents' actions that resulted in the introduction of contaminants, which entered a public water

system and have been consumed and may continue to be consumed by those served by the public water system, present an imminent and substantial endangerment to the health of persons."

345. In a public statement, EPA Administrator Gina McCarthy declared: "Let's be really clear about why we are here today . . . We are here today because a state-appointed emergency manager made the decision that the City of Flint would stop purchasing treated water that had well served them for 50 years and instead purchase untreated—and not treat that water and by law the state of Michigan approved that switch and did not require corrosion control. All to save money. Now that state decision resulted in lead leaching out of lead service pipes and plumbing, exposing kids to excess amounts of lead. That's why we're here."

346. On January 22, Defendants Shekter-Smith and Busch were suspended without pay. Defendant Shekter-Smith's firing was announced on February 5, 2016.

347. At one of several congressional hearings on the subject, EPA Deputy Assistant Administrator Joel Beauvais testified "MDEQ incorrectly advised the City of Flint that corrosion-control treatment was not necessary, resulting in leaching of lead into the city's drinking water . . . EPA regional staff urged MDEQ to address the lack of corrosion control, but was met with resistance. The delays in implementing the actions needed to treat the drinking water and in informing

the public of ongoing health risks raise very serious concerns."

COUNT I:
42 U.S.C. § 1983 – SUBSTANTIVE DUE PROCESS – DEPRIVATION OF CONTRACTUALLY CREATED PROPERTY RIGHT
(Against Defendants City of Flint, Croft, Glasgow, State of Michigan, Snyder, Earley, Ambrose, MDEQ, Shekter-Smith, Wyant, Busch, Cook, Prysby, and Wurfel)

348. Plaintiffs hereby incorporate the allegations in paragraphs 1 through 347 of this complaint, as though fully restated herein.

349. Plaintiffs possessed and were deprived of a state contract law created property right to purchase and receive safe, potable drinking water.

350. Plaintiffs' right was created by the actions of the parties as well as under Section § 46-16 et. seq. of the Flint City Ordinance.

351. Plaintiffs' right is so rooted in the traditions and conscience of the American people as to be ranked as fundamental and protected by the Constitution.

352. Defendants violated Plaintiffs' property right when, ceasing to provide Plaintiffs with safe, potable water, they provided Plaintiffs with poisonous, contaminated water.

353. The violation of Plaintiffs' property right is not adequately redressed in a state breach of contract action.

354. The violation of Plaintiffs' property right involved Defendants' failure to adequately train, supervise, and/or hire employees.

355. It was Defendants' practice to inadequately train, supervise, and/or hire employees.

356. Defendants' outrageous, deliberate acts and/or inaction in violating Plaintiffs' protected property right caused Plaintiffs to suffer injuries.

357. Defendants' actions and/or omissions were the proximate cause of the Plaintiffs' injuries.

358. As a direct and proximate result of all of the above Defendants' conduct and/or failures to act, Plaintiffs have suffered past, present and future personal injuries, including but not limited to: various health problems (including without limitation hair, skin, digestive and other organ problems), physical pain and suffering, mental anguish, fright and shock, disability, denial of social pleasures and enjoyments, embarrassment, humiliation, and mortification, medical expenses, wage loss, brain and/or developmental injuries including (without limitation) cognitive deficits, lost earning capacity, aggravation of pre-existing conditions, contract damages and property damages (including but not limited to damaged plumbing and lost real property value), and punitive damages.

COUNT II:
42 U.S.C. § 1983 – PROCEDURAL DUE PROCESS – DEPRIVATION OF CONTRACTUALLY CREATED PROPERTY RIGHT
(Against Defendants City of Flint, Croft, Glasgow, State of Michigan, Snyder, Earley, Ambrose, MDEQ, Shekter-Smith, Wyant, Busch, Cook, Prysby, and Wurfel)

359. Plaintiffs hereby incorporate the allegations in paragraphs 1 through 358 of this complaint as though fully restated herein.

360. Defendants deprived Plaintiffs of their contractually based property right to purchase and receive safe, potable drinking water without notice or hearing.

361. Defendants have not provided Plaintiffs with just compensation for their taking of Plaintiffs' property interests.

362. Defendants' actions and/or omissions were the proximate cause of the Plaintiffs' injuries.

363. As a direct and proximate result of all of the above Defendants' conduct and/or failures to act, Plaintiffs have suffered past, present and future personal injuries, including but not limited to: various health problems (including without limitation hair, skin, digestive and other organ problems), physical pain and suffering, mental anguish, fright and shock, disability, denial of social pleasures and enjoyments, embarrassment, humiliation, and mortification, medical expenses, wage loss, brain and/or developmental injuries including (without limitation) cognitive deficits,

lost earning capacity, aggravation of pre existing conditions, contract damages and property damages (including but not limited to damaged plumbing and lost real property value), as well as punitive damages.

COUNT III:
42 U.S.C. § 1983 – SUBSTANTIVE DUE PROCESS – STATE CREATED DANGER
(Against Defendants City of Flint, Croft, Glasgow, State of Michigan, Snyder, Earley, Ambrose, MDEQ, MDHHS, Shekter Smith, Wyant, Busch, Cook, Prysby, Wurfel, Wells, Peeler, Lyon, and Scott)

364. Plaintiffs hereby incorporate the allegations in paragraphs 1 through 363 of this complaint as though fully restated herein.

365. Plaintiffs in this action are citizens of the United States and all of the Defendants are persons for purposes of 42 U.S.C. § 1983.

366. Defendants in this Count III, at all times relevant hereto, were acting under the color of law in their individual and official capacity as State and City officials, and their acts and/or omissions were conducted within the scope of their official duties and employment.

367. Plaintiffs herein, at all times relevant hereto, have a clearly established Constitutional right under the Fourteenth Amendment, such that the state may not deprive a person of life, liberty or property without due process of law.

368. Defendants each acted to expose Plaintiffs to toxic, lead-contaminated water.

369. Defendants made, caused to be made, and/or were responsible for continued representations that the water was safe to drink.

370. Defendants' actions and omissions with regard to the switch to the Flint River, as described herein, were objectively unreasonable in light of the facts and circumstances confronting them, and therefore violated the Fourteenth Amendment rights of Plaintiffs.

371. Defendants' actions and omissions with regard to the switch to the Flint River, as described herein, were also malicious and/or involved reckless, callous, and deliberate indifference to Plaintiffs' federally protected rights. These actions and omissions shock the conscience and violated the Fourteenth Amendment rights of Plaintiffs.

372. Defendants obscured and hid information that was known to them to demonstrate the danger that faced Plaintiffs.

373. Defendants acted with a deliberate indifference to a known and/or obvious danger.

374. Defendants created and/or increased the danger facing Plaintiffs.

375. Defendants' actions constituted gross negligence, because they were so reckless as to demonstrate

a substantial lack of concern for whether an injury would result.

376. As a result of the actions of the Defendants, Plaintiffs suffered injuries, including but not limited to personal injuries, illnesses, exposure to toxic substances, and property damage.

377. Defendants' actions and/or omissions were the proximate cause of the Plaintiffs' injuries.

378. As a direct and proximate result of all of the above Defendants' conduct and/or failures to act, Plaintiffs have suffered past, present and future personal injuries,including but not limited to: various health problems (including without limitation hair, skin, digestive and other organ problems), physical pain and suffering, mental anguish, fright and shock, disability, denial of social pleasures and enjoyments, embarrassment, humiliation, and mortification, medical expenses, wage loss, brain and/or developmental injuries including (without limitation) cognitive deficits, lost earning capacity, aggravation of pre existing conditions, contract damages and property damages (including but not limited to damaged plumbing and lost real property value), and punitive damages

COUNT IV:
42 U.S.C. § 1983 – SUBSTANTIVE DUE PROCESS – BODILY INTEGRITY
(Against Defendants City of Flint, Croft, Glasgow, State of Michigan, Snyder, Earley, Ambrose, MDEQ, MDHHS, Shekter Smith, Wyant, Busch, Cook, Prysby, Wurfel, Wells, Peeler, Lyon, and Scott)

379. Plaintiffs hereby incorporate the allegations in paragraphs 1 through 378 of this complaint as though fully restated herein.

380. Plaintiffs in this action are citizens of the United States and all of the Defendants are persons for purposes of 42 U.S.C. § 1983.

381. All Defendants, at all times relevant hereto, were acting under the color of law in their individual and official capacity as State and City officials, and their acts and/or omissions were conducted within the scope of their official duties and employment.

382. Plaintiffs have a clearly established right to bodily integrity under the Fourteenth Amendment.

383. At all times relevant hereto, that right is and has been well established.

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.

385. As a result of Defendants' actions and/or omissions, Plaintiffs suffered bodily harm and their rights to bodily integrity were violated.

386. Defendants' actions were malicious, reckless, and/or were made with deliberate indifference to Plaintiffs' constitutional rights. Defendants engaged in these acts willfully, maliciously, in bad faith, and/or in reckless disregard for Plaintiffs' constitutional rights.

387. Defendants' actions shock the conscience of Plaintiffs and of any reasonable person.

388. As a direct and proximate result of Defendants' unlawful conduct, Plaintiffs have suffered injuries and seek relief as described in this complaint.

389. Defendants' actions and/or omissions were the proximate cause of the Plaintiffs' injuries.

390. As a direct and proximate result of all of the above Defendants' conduct and/or failures to act, Plaintiffs have suffered past, present and future personal injuries, including but not limited to: various health problems (including without limitation hair, skin, digestive and other organ problems), physical pain and suffering, mental anguish, fright and shock, disability, denial of social pleasures and enjoyments, embarrassment, humiliation, and mortification, medical expenses, wage loss, brain and/or developmental injuries including (without limitation) cognitive deficits, lost earning capacity, aggravation of pre existing conditions, contract damages and property damages

(including but not limited to damaged plumbing and lost real property value), and punitive damages.

COUNT V:
BREACH OF CONTRACT
PLAINTIFF GUERTIN
(Against Defendants City of Flint and the State of Michigan)

391. Plaintiffs hereby incorporate the allegations in paragraphs 1 through 390 of this complaint as though fully restated herein.

392. Defendant City of Flint, by its statutes and by offering services to its residents, offers to sell potable, safe drinking water to its residents.

393. Plaintiffs, Guertin, accepted the offer by utilizing Flint's water, agreeing to pay for the water, and tendering payment for the water.

394. Plaintiffs, Guertin, and Defendant City of Flint entered into a contract for the purchase and sale of potable, safe drinking water.

395. Defendant State of Michigan overtook the local government of Flint and assumed and/or shared its duties under the contract to sell potable, safe drinking water to Plaintiffs.

396. Defendants materially and irreparably breached the contract with Plaintiffs by failing to provide potable, safe drinking water, and instead

providing harmful, foul, contaminated water unfit for human consumption.

397. As a result of Defendants' breach, Plaintiffs suffered damages in the amount of all debts and obligations for Flint water, whether tendered or untendered, and as stated throughout this complaint.

398. Defendants' actions and/or omissions were the proximate cause of the Plaintiffs' injuries.

399. As a direct and proximate result of the above Defendants' conduct and/or failures to act, Plaintiffs have suffered past, present and future personal injuries, including but not limited to: various health problems (including without limitation hair, skin, digestive and other organ problems), physical pain and suffering, mental anguish, fright and shock, disability, denial of social pleasures and enjoyments, embarrassment, humiliation, and mortification, medical expenses, wage loss, brain and/or developmental injuries including (without limitation) cognitive deficits, lost earning capacity, aggravation of pre existing conditions, contract damages and property damages (including but not limited to damaged plumbing and lost real property value), and exemplary damages.

COUNT VI:
BREACH OF IMPLIED WARRANTY
(Against Defendants City of Flint and the State of Michigan)

400. Plaintiffs hereby incorporate the allegations in paragraphs 1 through 399 of this complaint as though fully restated herein.

401. The State of Michigan and the City of Flint directly promised to provide water that was fit for human consumption and/or impliedly promised that the water was fit for human consumption.

402. The State of Michigan and the City of Flint have both admitted that the water it supplied was contamination, including being poisoned with lead, and therefore clearly not fit for its intended use of human consumption.

403. The provision of water unfit for its intended purpose and/or the admission that the water was not fit for its intended purpose constitute material breaches of an implied warranty and/or contract.

404. Defendants are liable to Plaintiffs for all amounts billed and/or charged and/or collected, whether paid or unpaid, for water that was unfit for human consumption.

405. Defendants' actions and/or omissions were the proximate cause of the Plaintiffs' injuries.

406. As a direct and proximate result of the individual Defendants' conduct and/or failures to act,

Plaintiffs have suffered past, present and future personal injuries, including but not limited to: various health problems (including without limitation hair, skin, digestive and other organ problems), physical pain and suffering, mental anguish, fright and shock, disability, denial of social pleasures and enjoyments, embarrassment, humiliation, and mortification, medical expenses, wage loss, brain and/or developmental injuries including (without limitation) cognitive deficits, lost earning capacity, aggravation of pre existing conditions, contract damages and property damages (including but not limited to damaged plumbing and lost real property value), and exemplary damages.

COUNT VII:
NUISANCE
(Against All Defendants)

407. Plaintiffs hereby incorporate the allegations in paragraphs 1 through 406 of this complaint as though fully restated herein.

408. Defendants' actions in causing foul, poisonous, lead contaminated water to be delivered to the homes of Plaintiffs resulted in the presence of contaminants in Plaintiffs' properties and/or persons.

409. Defendants' actions substantially and unreasonably interfered with Plaintiffs' comfortable living and ability to use and enjoy their homes, constituting a nuisance.

410. Plaintiffs did not consent for foul, poisonous, lead contaminated water to physically invade their persons or property.

411. Plaintiffs suffered injuries and damage to their persons and/or properties as a direct and proximate result of Defendants' actions in causing lead contaminated water to be delivered to their homes.

412. Defendants' actions in causing a substantial and unreasonable interference with Plaintiffs' ability to use and enjoy their properties constitutes a nuisance and Defendants are liable for all damages arising from such nuisance, including compensatory and exemplary relief.

413. Defendants' actions and/or omissions were the proximate cause of the Plaintiffs' injuries.

414. As a direct and proximate result of the Defendants' conduct and/or failures to act, Plaintiffs have suffered past, present and future personal injuries, including but not limited to: various health problems (including without limitation hair, skin, digestive and other organ problems), physical pain and suffering, mental anguish, fright and shock, disability, denial of social pleasures and enjoyments, embarrassment, humiliation, and mortification, medical expenses, wage loss, brain and/or developmental injuries including (without limitation) cognitive deficits, lost earning capacity, aggravation of pre existing conditions, contract damages and property damages (including but not limited to damaged plumbing and lost real property value), as well as exemplary damages.

COUNT VIII:
TRESPASS
(Against All Defendants)

415. Plaintiffs incorporate every allegation in this complaint as if fully restated herein. Plaintiffs hereby incorporate the allegations in paragraphs 1 through 414 of this complaint as though fully restated herein.

416. Defendants' negligent, grossly negligent, willful, and/or wanton conduct and/or failures to act caused contaminants to enter upon Plaintiffs' property and into Plaintiffs' persons.

417. Upon information and belief, Defendants had exclusive control over the facilities providing Plaintiffs' water at all relevant times.

418. Defendants, knowingly or in circumstances under which they should have known, engaged in deliberate actions that released contaminants which were substantially certain to invade the properties of Plaintiffs.

419. Defendants knew or should have known of the likelihood that corrosive water would cause lead to drink into Plaintiffs' drinking water.

420. Defendants' actions resulted in contaminants entering into Plaintiffs' persons and properties, causing injury and damage to person and property.

421. Defendants' actions were done with actual malice or wanton, reckless or willful disregard for Plaintiffs' safety, rights, and/or property.

422. Defendants' actions and/or omissions were the proximate cause of the Plaintiffs' injuries.

423. As a direct and proximate result of the Defendants' conduct and/or failures to act, Plaintiffs have suffered past, present and future personal injuries, including but not limited to: various health problems (including without limitation hair, skin, digestive and other organ problems), physical pain and suffering, mental anguish, fright and shock, disability, denial of social pleasures and enjoyments, embarrassment, humiliation, and mortification, medical expenses, wage loss, brain and/or developmental injuries including (without limitation) cognitive deficits, lost earning capacity, aggravation of pre existing conditions, contract damages and property damages (including but not limited to damaged plumbing and lost real property value), and exemplary damages.

COUNT IX:
UNJUST ENRICHMENT
(Against Defendants City of Flint and State of Michigan)

424. Plaintiffs hereby incorporate the allegations in paragraphs 1 through 423 of this complaint as though fully restated herein.

425. Defendants have received the benefits of the funds paid by Plaintiffs for contaminated water that was and is unfit for human consumption.

426. Defendants have utilized these funds for the operation of the government(s) of Flint and/or Michigan.

427. The retention of the benefit of the funds paid by Plaintiffs constitutes unjust enrichment in the amount of all funds paid for water that was unfit for human consumption.

428. It would be unjust to allow Defendants to retain the benefit they obtained from Plaintiffs.

COUNT X:
NEGLIGENCE/PROFESSIONAL NEGLIGENCE/GROSS NEGLIGENCE
(Against Defendant Veolia)

429. Plaintiffs hereby incorporate the allegations in paragraphs 1 through 428 of this complaint as though fully restated herein.

430. Veolia undertook, for consideration, to render services for the City of Flint which it should have recognized as necessary for the protection of Plaintiffs and/or their property.

431. Veolia undertook to perform a duty owed to Plaintiffs by the City of Flint and/or the State of Michigan.

432. Based on its undertaking, Veolia had a duty to Plaintiffs to exercise reasonable care to protect that undertaking.

433. Plaintiffs relied on the City, State, and/or Veolia to perform its duties with respect to the City's public drinking water system.

434. Veolia carelessly and negligently failed to undertake its duties with respect to the City's public drinking water system with reasonable care and conduct as a professional engineering firm.

435. Veolia carelessly and negligently failed to exercise reasonable care in inspecting the City's water system and issuing its interim and final reports.

436. Veolia carelessly and negligently failed to exercise reasonable care when it declared that Flint's drinking water met federal and/or state and/or all applicable requirements.

437. Veolia carelessly and negligently failed to exercise reasonable care when it represented that Flint's drinking water was safe.

438. Veolia carelessly and negligently failed to exercise reasonable care when it discounted the possibility that problems unique to Flint's water supply were causing medical harms.

439. Veolia carelessly and negligently failed to exercise reasonable care when it failed to warn about the dangers of lead leaching into Flint's water system.

440. Veolia carelessly and negligently failed to exercise reasonable care when it did not forcefully recommend the immediate implementation of corrosion control for purposes of preventing lead contamination in Flint's water supply.

441. Plaintiffs suffered harm resulting from Veolia's failures to exercise reasonable care to protect its undertaking.

442. Veolia's failures to exercise reasonable care in performing its undertaking proximately caused the Plaintiffs' injuries and were entirely foreseeable.

443. Veolia is liable to Plaintiffs for all harms resulting to themselves and their property from Veolia's failures to exercise reasonable care.

444. Veolia's liability includes without limitation personal injuries, illnesses, exposure to toxic substances, and property damage suffered by Plaintiffs as a result of Veolia's failures to exercise reasonable care.

445. Veolia's conduct and/or failure(s) to act constitute gross negligence because it was so reckless that it demonstrates a substantial lack of concern for whether an injury would result.

446. Veolia's actions and/or omissions were a and/or the proximate cause of the Plaintiffs' injuries.

447. As a direct and proximate result of Veolia's actions and/or omissions, Plaintiffs have suffered past, present and future personal injuries, including but not limited to: various health problems (including without

limitation hair, skin, digestive and other organ problems), physical pain and suffering, mental anguish, fright and shock, disability, denial of social pleasures and enjoyments, embarrassment, humiliation, and mortification, medical expenses, wage loss, brain and/or developmental injuries including (without limitation) cognitive deficits, lost earning capacity, aggravation of pre existing conditions, contract damages and property damages (including but not limited to damaged plumbing and lost real property value), as well as punitive and/or exemplary damages.

COUNT XI:
NEGLIGENCE/PROFESSIONAL NEGLIGENCE/GROSS NEGLIGENCE
(Against Defendant LAN)

448. Plaintiffs hereby incorporate the allegations in paragraphs 1 through 447 of this complaint as though fully restated herein.

449. LAN undertook, for consideration, to render services for the City of Flint which it should have recognized as necessary for the protection of Plaintiffs and/or their property.

450. LAN undertook to perform a duty owed to Plaintiffs by the City of Flint and/or the State of Michigan.

451. Based on its undertaking, LAN had a duty to Plaintiffs to exercise reasonable care to protect that undertaking.

452. Plaintiffs relied on the City, State, and/or LAN to perform the duty to ensure the proper treatment of the new water source(s).

453. LAN failed to exercise reasonable care in preparing for and executing the transition from treated DWSD water to untreated Flint River water.

454. LAN failed to undertake reasonable care and conduct as a professional engineering firm.

455. LAN failed to exercise reasonable care when it did not implement corrosion control in a system containing lead pipes that was being transitioned onto a highly corrosive water source.

456. Plaintiffs suffered harm resulting from LAN's failures to exercise reasonable care to protect its undertaking.

457. LAN's failures to exercise reasonable care to protect its undertaking proximately caused the Plaintiffs' injuries and were entirely foreseeable.

458. LAN is liable to Plaintiffs for all harms resulting to themselves and their property from Veolia's failures to exercise reasonable care.

459. LAN liability includes without limitation personal injuries, illnesses, exposure to toxic substances, and property damage suffered by Plaintiffs as a result of LAN's failures to exercise reasonable care.

460. LAN's conduct and/or failure(s) to act constitute gross negligence because it was so reckless that

it demonstrates a substantial lack of concern for whether an injury would result.

461. LAN's actions and/or omissions were a and/or the proximate cause of the Plaintiffs' injuries.

462. As a direct and proximate result of LAN's actions and/or omissions, Plaintiffs have suffered past, present and future personal injuries, including but not limited to: various health problems (including without limitation hair, skin, digestive and other organ problems), physical pain and suffering, mental anguish, fright and shock, disability, denial of social pleasures and enjoyments, embarrassment, humiliation, and mortification, medical expenses, wage loss, brain and/or developmental injuries including (without limitation) cognitive deficits, lost earning capacity, aggravation of pre existing conditions, contract damages and property damages (including but not limited to damaged plumbing and lost real property value), as well as punitive and/or exemplary damages.

COUNT XII:
GROSS NEGLIGENCE
(Against Defendants Snyder, Croft, Glasgow, Earley, Ambrose, Shekter-Smith, Wyant, Busch, Cook, Prysby, Wurfel, Wells, Peeler and Scott)

463. Plaintiffs hereby incorporate the allegations in paragraphs 1 through 462 of this complaint as though fully restated herein.

464. Defendants independently owed Plaintiffs a duty to exercise reasonable care.

465. Defendants undertook, for consideration, to perform a duty owed to Plaintiffs and by the City of Flint and/or the State of Michigan.

466. Based on their undertakings, Defendants had a duty to Plaintiffs to exercise reasonable care to protect that undertaking.

467. Plaintiffs relied on the City, State, and/or Defendants to perform the duty to ensure the proper treatment of Flint River Water.

468. Plaintiffs relied on the City, State, and/or Defendants to perform the duty to disclose known hazards in their drinking water.

469. Defendants failed to exercise reasonable care.

470. Defendants breached their duties to Plaintiffs in ways including but not limited to the following:

a. Failing to require corrosion control treatment of Flint River water;

b. Failing to conduct proper testing of Flint's water;

c. Failing to require proper testing of Flint's water;

d. Failing to respond to evidence that Flint's water was improperly treated;

e. Misrepresenting that corrosion control treatment had been implemented;

f. Publically declaring unsafe water to be safe to drink;

g. Ignoring evidence that Flint's water was unsafe to drink;

h. Withholding information that showed that Flint's water was unsafe to drink;

i. Publicly discrediting those who claimed that Flint's water may not be safe to drink;

j. Failing to warn Plaintiffs the public that Flint's water was not safe to drink.

471. Plaintiffs suffered harm resulting from Defendants' failures to exercise reasonable care.

472. Plaintiffs suffered harm resulting from Defendants' failures to exercise reasonable care to protect their undertakings.

473. Defendants' failures to exercise reasonable care to protect their undertakings proximately caused the Plaintiffs' injuries and were entirely foreseeable.

474. Defendants are liable to Plaintiffs for all harms resulting to themselves and their property from Defendants' failures to exercise reasonable care.

475. Defendants' liability includes without limitation personal injuries, illnesses, exposure to toxic substances, and property damage suffered by Plaintiffs as a result of Defendants' failures to exercise reasonable care.

476. Defendants' actions and/or omissions were the proximate cause of the Plaintiffs' injuries.

477. All of the above individual Defendants' conduct and/or failure to act constitute gross negligence because it was so reckless that it demonstrates a substantial lack of concern for whether injury would result.

478. The performance of governmental functions constituting gross negligence falls within the exceptions of governmental immunity pursuant to MCL 691.1407.

479. As a direct and proximate result of the above individual Defendants' conduct and/or failures to act, Plaintiffs have suffered past, present and future personal injuries, including but not limited to: various health problems (including without limitation hair, skin, digestive and other organ problems), physical pain and suffering, mental anguish, fright and shock, disability, denial of social pleasures and enjoyments, embarrassment, humiliation, and mortification, medical expenses, wage loss, brain and/or developmental injuries including (without limitation) cognitive deficits, lost earning capacity, aggravation of pre existing conditions, contract damages and property damages (including but not limited to damaged plumbing and lost real property value), as well as punitive and/or exemplary damages.

COUNT XIII:
INTENTIONAL INFLICTION
OF EMOTIONAL DISTRESS
(Against Defendants Snyder, Croft, Glasgow, Earley, Ambrose, Shekter-Smith, Wyant, Busch, Cook, Prysby, Wurfel, Wells, Peeler and Scott)

480. Plaintiffs hereby incorporate the allegations in paragraphs 1 through 479 of this complaint as though fully restated herein.

481. Defendants' outrageous conduct in causing, prolonging, and obscuring Plaintiffs' exposure to toxic, lead contaminated water exceeds all bounds of decency in a civilized society.

482. Defendants' outrageous conduct was intentional and/or reckless and made with a conscious disregard for the rights and safety of Plaintiffs.

483. Defendants' outrageous conduct caused severe distress to Plaintiffs..

484. Defendants' outrageous conduct was the proximate cause of Plaintiffs' injuries.

485. As a direct and proximate result of the above individual Defendants' conduct and/or failures to act, Plaintiffs have suffered past, present and future personal injuries, including but not limited to: various health problems (including without limitation hair, skin, digestive and other organ problems), physical pain and suffering, mental anguish, fright and shock, disability, denial of social pleasures and enjoyments,

embarrassment, humiliation, and mortification, medical expenses, wage loss, brain and/or developmental injuries including (without limitation) cognitive deficits, lost earning capacity, aggravation of pre existing conditions, contract damages and property damages (including but not limited to damaged plumbing and lost real property value), as well as punitive and/or exemplary damages.

COUNT XIV:
NEGLIGENT INFLICTION
OF EMOTIONAL DISTRESS
(Against Defendants Snyder, Croft, Glasgow, Earley, Ambrose, Shekter Smith, Wyant, Busch, Cook, Prysby, Wurfel, Wells, Peeler and Scott)

486. Plaintiffs hereby incorporate the allegations in paragraphs 1 through 485 of this complaint as though fully restated herein.

487. Defendants were in a special relationship to Plaintiffs, being persons entrusted with the protection of their most basic needs – water, health, and safety.

488. The distress caused to Plaintiffs by Defendants was highly foreseeable.

489. Defendants placed Plaintiffs in a zone of physical danger, causing them severe emotional distress.

490. Plaintiffs have contemporaneously perceived the exposure of their immediate family members to lead contaminated water.

491. Defendants' negligent acts were the proximate cause of Plaintiffs' contemporaneous perception of their loved ones exposure to lead contaminated water.

492. Defendants' negligent acts were the proximate cause of Plaintiffs being placed into a zone of physical danger and resulting severe emotional distress.

493. Defendants' negligent acts were the proximate cause any and all severe emotional distress related to their own exposure and their families' exposure to lead contaminated water.

494. As a direct and proximate result of the above individual Defendants' conduct and/or failures to act, Plaintiffs have suffered past, present and future personal injuries, including but not limited to: various health problems (including without limitation hair, skin, digestive and other organ problems), physical pain and suffering, mental anguish, fright and shock, disability, denial of social pleasures and enjoyments, embarrassment, humiliation, and mortification, medical expenses, wage loss, brain and/or developmental injuries including (without limitation) cognitive deficits, lost earning capacity, aggravation of pre existing conditions, contract damages and property damages (including but not limited to damaged plumbing and lost real property value), as well as punitive and/or exemplary damages.

495. At critical times including during gestation and her developmental years, the minor plaintiff has

been exposed to damaging levels of lead and other toxic substances. Plaintiffs' damages and losses include, but are not limited to, physical and psychological injuries, learning and other permanent disabilities, weight loss, stunted growth, anemia, headaches, abdominal and other pain, mental anguish, emotional distress, the cost of medical, educational, and rehabilitation expenses, and other expenses of training and assistance, and loss of income and earning capacity

496. Plaintiffs, at the time of sustaining the injuries complained of herein, have been the owners, lessees and/or occupants of certain real property located in Flint, Michigan, that received highly corrosive and contaminated water pumped from the Flint River.

497. Upon information and belief, Defendants, who were acting under the color of law, deprived Plaintiffs of their rights under the 14th Amendment to the United States Constitution. Specifically, Defendants deprived Plaintiffs of life, liberty and property without due process of law when the decision to switch to the Flint River was made, thus providing Plaintiffs with toxic and unsafe water.

COUNT XV:
PROPRIETARY FUNCTION
(Against Defendants Snyder, Croft, Glasgow, Earley, Ambrose, Shekter Smith, Wyant, Busch, Cook, Prysby, Wurfel, Wells, Peeler and Scott)

498. Plaintiffs hereby incorporate the allegations in paragraphs 1 through 497 of this complaint as though fully restated herein.

499. At relevant times, Defendants engaged in proprietary functions, specifically, the sale of potable water to Plaintiffs.

500. Defendants' primary purpose in the aforementioned facts was to produce a pecuniary profit for the governmental agencies.

501. The relevant activities are not normally supported by taxes and fees.

502. The conduct of Defendants constituted "proprietary function" in avoidance of governmental immunity.

503. The performance of governmental functions constituting proprietary function falls within the exceptions of governmental immunity pursuant to MCL 691.1413.

504. Defendants independently owed Plaintiffs a duty to exercise reasonable care.

505. Based on their undertakings, Defendants had a duty to Plaintiffs to exercise reasonable care to protect that undertaking.

506. Plaintiffs relied on Defendants to perform the duty to ensure the proper treatment of Flint River Water.

507. Plaintiffs relied on Defendants to perform the duty to disclose known hazards in their drinking water.

508. Defendants failed to exercise reasonable care.

509. Defendants breached their duties to Plaintiffs in ways including but not limited to the following:

a. Failing to require corrosion control treatment of Flint River water;

b. Failing to conduct proper testing of Flint's water;

c. Failing to require proper testing of Flint's water;

d. Failing to respond to evidence that Flint's water was improperly treated;

e. Misrepresenting that corrosion control treatment had been implemented;

f. Publically declaring unsafe water to be safe to drink;

g. Ignoring evidence that Flint's water was unsafe to drink;

h. Withholding information that showed that Flint's water was unsafe to drink;

i. Publicly discrediting those who claimed that Flint's water may not be safe to drink;

j. Failing to warn Plaintiffs the public that Flint's water was not safe to drink.

510. Plaintiffs suffered harm resulting from Defendants' failures to exercise reasonable care.

511. Defendants are liable to Plaintiffs for all harms resulting to themselves and their property from Defendants' failures to exercise reasonable care.

512. Defendants' liability includes without limitation personal injuries, illnesses, exposure to toxic substances, and property damage suffered by Plaintiffs as a result of Defendants' failures to exercise reasonable care.

513. Defendants' actions and/or omissions were the proximate cause of the Plaintiffs' injuries.

514. As a direct and proximate result of the above individual Defendants' conduct and/or failures to act, Plaintiffs have suffered past, present and future personal injuries, including but not limited to: various health problems (including without limitation hair, skin, digestive and other organ problems), physical pain and suffering, mental anguish, fright and shock, disability, denial of social pleasures and enjoyments, embarrassment, humiliation, and mortification, medical expenses, wage loss, brain and/or developmental injuries including (without limitation) cognitive deficits, lost earning capacity, aggravation of pre existing conditions, contract damages and property damages

(including but not limited to damaged plumbing and lost real property value), as well as punitive and/or exemplary damages.

PUNITIVE DAMAGES

515. Plaintiffs hereby incorporate the allegations in paragraphs 1 through 344 of this complaint as though fully restated herein.

516. Upon information and belief, Defendants engaged in willful, wanton, malicious, and or/reckless conduct that caused the foregoing property damage, nuisances, and trespasses upon Plaintiffs' persons and properties, disregarding the rights of Plaintiffs.

517. Defendants' willful, wanton, malicious, and/or reckless conduct includes but is not limited to:

a. failure to provide safe drinking water to the residents of Flint;

b. failure to implement adequate corrosion controls for Flint River water; and

c. underestimating the seriousness of the lead contamination in Flint's water system.

518. Defendants have caused great harm to Plaintiffs' property and water supplies and demonstrated an outrageous conscious disregard for Plaintiffs' safety with implied malice, warranting the imposition of punitive damages.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a jury trial pursuant to Federal Rule of Civil Procedure 3 8(b) on all issues so triable in this action.

RELIEF REQUESTED

WHEREFORE, this Complaint is being plead in avoidance of governmental immunity and the Defendants' defense of governmental immunity is voidable due to the proprietary function and gross negligence exceptions as well as all other relevant exceptions and Plaintiffs demand judgment against Defendants, and each of them, jointly and severally, and request the following relief from the Court:

A. An order declaring the conduct of defendants unconstitutional;

B. An order of equitable relief to remediate the harm caused by defendants of unconstitutional conduct including repairs or property, establishment of a medical monitoring fund, and appointing a monitor to oversee the water operations of Flint for a period of time deemed appropriate by the court;

C. An order for an award for general damages;

D. An order for an award of compensatory damages;

E. An order for an award of punitive damages;

F. An order for an award of actual reasonable attorney fees and litigation expenses;

G. An order for all such other relief the court deems equitable.

Respectfully submitted,

/s/ David E. Hart

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Dated: July 27, 2016

Act No.
436 Public Acts of 2012
Approved by the Governor
December 26, 2012

Filed with the Secretary of State
December 27, 2012

EFFECTIVE DATE: March 28, 2013

The People of the State of Michigan enact:

* * *

Sec. 1. This act shall be known and may be cited as the "local financial stability and choice act".

Sec. 2. As used in this act:

(a) "Chapter 9" means chapter 9 of title 11 of the United States Code, 11 USC 901 to 946.

(b) "Chief administrative officer" means any of the following:

* * *

(*ii*) The city manager of a city or, if a city does not employ a city manager, the mayor of the city.

* * *

(e) "Emergency manager" means an emergency manager appointed under section 9. An emergency manager includes an emergency financial manager appointed under former 1988 PA 101 or former 1990 PA 72 who was acting in that capacity on the effective date of this act.

* * *

(g) "Financial and operating plan" means a written financial and operating plan for a local government under section 11, including an educational plan for a school district.

* * *

(k) "Local government" means a municipal government or a school district.

(*l*) "Local government representative" means the person or persons designated by the governing body of the local government with authority to make recommendations and to attend the neutral evaluation process on behalf of the governing body of the local government.

* * *

(n) "Municipal government" means a city, a village, a township, a charter township, a county, a department of county government if the county has an elected county executive under 1966 PA 293, MCL 45.501 to 45.521, an authority established by law, or a public utility owned by a city, village, township, or county.

* * *

(q) "Receivership" means the process under this act by which a financial emergency is addressed through the appointment of an emergency manager. Receivership does not include chapter 9 or any provision under federal bankruptcy law.

* * *

(u) "State financial authority" means the following:

(*i*) For a municipal government, the state treasurer.

* * *

(v) "Strong mayor" means a mayor who has been granted veto power for any purpose under the charter of that local government.

(w) "Strong mayor approval" means approval of a resolution under 1 of the following conditions:

(*i*) The strong mayor approves the resolution.

(*ii*) The resolution is approved by the governing body with sufficient votes to override a veto by the strong mayor.

(*iii*) The strong mayor vetoes the resolution and the governing body overrides the veto.

Sec. 3. The legislature finds and declares all of the following:

(a) That the health, safety, and welfare of the citizens of this state would be materially and adversely affected by the insolvency of local governments and that the fiscal accountability of local governments is vitally necessary to the interests of the citizens of this state to assure the provision of necessary governmental services essential to public health, safety, and welfare.

(b) That it is vitally necessary to protect the credit of this state and its political subdivisions and that it is necessary for the public good and it is a valid public purpose for this state to take action and to assist a local government in a financial emergency so as to remedy the financial emergency by requiring prudent fiscal management and efficient provision of services, permitting the restructuring of contractual obligations, and prescribing the powers and duties of state and local government officials and emergency managers.

(c) That the fiscal stability of local governments is necessary to the health, safety, and welfare of the citizens of this state and it is a valid public purpose for this state to assist a local government in a condition of financial emergency by providing for procedures of alternative dispute resolution between a local government and its creditors to resolve disputes, to determine criteria for establishing the existence of a financial emergency, and to set forth the conditions for a local government to exercise powers under federal bankruptcy law.

(d) That the authority and powers conferred by this act constitute a necessary program and serve a valid public purpose.

* * *

(3) If a finding of probable financial stress is made for a municipal government by the local emergency financial assistance loan board under subsection (2), the governor shall appoint a review team for that

municipal government consisting of the state treasurer or his or her designee, the director of the department of technology, management, and budget or his or her designee, a nominee of the senate majority leader, and a nominee of the speaker of the house of representatives. The governor may appoint other state officials or other persons with relevant professional experience to serve on a review team to undertake a municipal financial management review.

* * *

(5) The department of treasury shall provide staff support to each review team appointed under this section.

* * *

Sec. 5. (1) In conducting its review, the review team may do either or both of the following:

* * *

(4) The review team shall include 1 of the following conclusions in its report:

(a) A financial emergency does not exist within the local government.

(b) A financial emergency exists within the local government.

* * *

Sec. 6. (1) Within 10 days after receipt of the report under section 5, the governor shall make 1 of the following determinations:

(a) A financial emergency does not exist within the local government.

(b) A financial emergency exists within the local government.

* * *

(3) A local government for which a financial emergency determination under this section has been confirmed to exist may, by resolution adopted by a vote of 2/3 of the members of its governing body elected and serving, appeal this determination within 10 business days to the Michigan court of claims. A local government may, by resolution adopted by a vote of 2/3 of the members of its governing body elected and serving, waive its right to appeal as provided in this subsection. The court shall not set aside a determination of financial emergency by the governor unless it finds that the determination is either of the following:

(a) Not supported by competent, material, and substantial evidence on the whole record.

(b) Arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion.

Sec. 7. (1) Notwithstanding section 6(3), upon the confirmation of a finding of a financial emergency under section 6, the governing body of the local government shall, by resolution within 7 days after the confirmation of a finding of a financial emergency, select 1 of the following local government options to address the financial emergency:

(a) The consent agreement option pursuant to section 8.

(b) The emergency manager option pursuant to section 9.

(c) The neutral evaluation process option pursuant to section 25.

(d) The chapter 9 bankruptcy option pursuant to section 26.

* * *

(2) Subject to subsection (3), if the local government has a strong mayor, the resolution under subsection (1) requires strong mayor approval. If the local government is a school district, the resolution shall be approved by the school board. The resolution shall be filed with the state treasurer, with a copy to the superintendent of public instruction if the local government is a school district.

* * *

Sec. 8. (1) The chief administrative officer of a local government may negotiate and sign a consent agreement with the state treasurer as provided for in this act. If the local government is a school district and the consent agreement contains an educational plan, the consent agreement shall also be signed by the superintendent of public instruction. The consent agreement shall provide for remedial measures considered necessary to address the financial emergency within the local government and provide for the financial

stability of the local government. The consent agreement may utilize state financial management and technical assistance as necessary in order to alleviate the financial emergency. The consent agreement shall also provide for periodic financial status reports to the state treasurer, with a copy of each report to each state senator and state representative who represents that local government. The consent agreement may provide for a board appointed by the governor to monitor the local government's compliance with the consent agreement. In order for the consent agreement to go into effect, it shall be approved, by resolution, by the governing body of the local government and shall be approved and executed by the state treasurer. Nothing in the consent agreement shall limit the ability of the state treasurer in his or her sole discretion to declare a material breach of the consent agreement. A consent agreement shall provide that in the event of a material uncured breach of the consent agreement, the governor may place the local government in receivership or in the neutral evaluation process. If within 30 days after a local government selects the consent agreement option under section 7(1)(a) or sooner in the discretion of the state treasurer, a consent agreement cannot be agreed upon, the state treasurer shall require the local government to proceed under 1 of the other local options provided for in section 7.

* * *

Sec. 9. (1) The governor may appoint an emergency manager to address a financial emergency within that local government as provided for in this act.

(2) Upon appointment, an 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 and to assure the fiscal accountability of the local government and the local government's capacity to provide or cause to be provided necessary governmental services essential to the public health, safety, and welfare. 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 or as otherwise provided by this act and are subject to any conditions required by the emergency manager.

(3) All of the following apply to an emergency manager:

(a) The emergency manager shall have a minimum of 5 years' experience and demonstrable expertise in business, financial, or local or state budgetary matters.

(b) The emergency manager may, but need not, be a resident of the local government.

(c) The emergency manager shall be an individual.

(d) Except as otherwise provided in this subdivision, the 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 under section 7 of article XI of the state constitution of 1963. A vacancy in the office of emergency manager shall be filled in the same manner as the original appointment.

(e) The emergency manager's compensation shall be paid by this state and shall be set forth in a contract approved by the state treasurer. The contract shall be posted on the department of treasury's website within 7 days after the contract is approved by the state treasurer.

(f) In addition to the salary provided to an emergency manager in a contract approved by the state treasurer under subdivision (e), this state may receive and distribute private funds to an emergency manager. As used in this subdivision, "private funds" means any money the state receives for the purpose of allocating additional salary to an emergency manager. Private funds distributed under this subdivision are subject to section 1 of 1901 PA 145, MCL 21.161, and section 17 of article IX of the state constitution of 1963.

(4) In addition to staff otherwise authorized by law, an emergency manager shall appoint additional staff and secure professional assistance as the emergency manager considers necessary to fulfill his or her appointment.

(5) The emergency manager shall submit quarterly reports to the state treasurer with respect to the financial condition of the local government in

receivership, with a copy to the superintendent of public instruction if the local government is a school district and a copy to each state senator and state representative who represents that local government. In addition, each quarterly report shall be posted on the local government's website within 7 days after the report is submitted to the state treasurer.

(6) The emergency manager shall continue in the capacity of an emergency manager as follows:

(a) Until removed by the governor or the legislature as provided in subsection (3)(d). If an emergency manager is removed, the governor shall within 30 days of the removal appoint a new emergency manager.

(b) Until the financial emergency is rectified.

(c) If the emergency manager has served for at least 18 months after his or her appointment under this act, the emergency manager may, by resolution, be removed by a 2/3 vote of the governing body of the local government. If the local government has a strong mayor, the resolution requires strong mayor approval before the emergency manager may be removed. Notwithstanding section 7(4), if the emergency manager is removed under this subsection and the local government has not previously breached a consent agreement under this act, the local government may within 10 days negotiate a consent agreement with the state treasurer. If a consent agreement is not agreed upon within 10 days, the local government shall proceed with the neutral evaluation process pursuant to section 25.

(7) A local government shall be removed from receivership when the financial conditions are corrected in a sustainable fashion as provided in this act. In addition, the local government may be removed from receivership if an emergency manager is removed under subsection (6)(c) and the governing body of the local government by 2/3 vote approves a resolution for the local government to be removed from receivership. If the local government has a strong mayor, the resolution requires strong mayor approval before the local government is removed from receivership. A local government that is removed from receivership while a financial emergency continues to exist as determined by the governor shall proceed under the neutral evaluation process pursuant to section 25.

(8) The governor may delegate his or her duties under this section to the state treasurer.

(9) Notwithstanding section 3(1) of 1968 PA 317, MCL 15.323, an emergency manager is subject to all of the following:

(a) 1968 PA 317, MCL 15.321 to 15.330, as a public servant.

(b) 1973 PA 196, MCL 15.341 to 15.348, as a public officer.

(c) 1968 PA 318, MCL 15.301 to 15.310, as if he or she were a state officer.

* * *

(11) Notwithstanding section 7(4) and subject to the requirements of this section, if an emergency manager has served for less than 18 months after his or her appointment under this act, the governing body of the local government may pass a resolution petitioning the governor to remove the emergency manager as provided in this section and allow the local government to proceed under the neutral evaluation process as provided in section 25. If the local government has a strong mayor, the resolution requires strong mayor approval. If the governor accepts the resolution, notwithstanding section 7(4), the local government shall proceed under the neutral evaluation process as provided in section 25.

Sec. 10. (1) An emergency manager shall issue to the appropriate local elected and appointed officials and employees, agents, and contractors of the local government the orders the emergency manager considers necessary to accomplish the purposes of this act, including, but not limited to, orders for the timely and satisfactory implementation of a financial and operating plan, including an educational plan for a school district, or to take actions, or refrain from taking actions, to enable the orderly accomplishment of the financial and operating plan. An order issued under this section is binding on the local elected and appointed officials and employees, agents, and contractors of the local government to whom it is issued. Local elected and appointed officials and employees, agents, and contractors of the local government shall take and direct

those actions that are necessary and advisable to maintain compliance with the financial and operating plan.

(2) If an order of the emergency manager under subsection (1) is not carried out and the failure to carry out an order is disrupting the emergency manager's ability to manage the local government, the emergency manager, in addition to other remedies provided in this act, may prohibit the local elected or appointed official or employee, agent, or contractor of the local government from access to the local government's office facilities, electronic mail, and internal information systems.

Sec. 11. (1) An emergency manager shall develop and may amend a written financial and operating plan for the local government. The plan shall have the objectives of assuring that the local government is able to provide or cause to be provided governmental services essential to the public health, safety, and welfare and assuring the fiscal accountability of the local government. The financial and operating plan shall provide for all of the following:

(a) Conducting all aspects of the operations of the local government within the resources available according to the emergency manager's revenue estimate.

(b) The payment in full of the scheduled debt service requirements on all bonds, notes, and municipal securities of the local government, contract obligations in anticipation of which bonds, notes, and municipal

securities are issued, and all other uncontested legal obligations.

(c) The modification, rejection, termination, and renegotiation of contracts pursuant to section 12.

(d) The timely deposit of required payments to the pension fund for the local government or in which the local government participates.

(e) For school districts, an educational plan.

(f) Any other actions considered necessary by the emergency manager in the emergency manager's discretion to achieve the objectives of the financial and operating plan, alleviate the financial emergency, and remove the local government from receivership.

(2) Within 45 days after the emergency manager's appointment, the emergency manager shall submit the financial and operating plan, and an educational plan if the local government is a school district, to the state treasurer, with a copy to the superintendent of public instruction if the local government is a school district, and to the chief administrative officer and governing body of the local government. The plan shall be regularly reexamined by the emergency manager and the state treasurer and may be modified from time to time by the emergency manager with notice to the state treasurer. If the emergency manager reduces his or her revenue estimates, the emergency manager shall modify the plan to conform to the revised revenue estimates.

(3) The financial and operating plan shall be in a form as provided by the state treasurer and shall contain that information for each year during which year the plan is in effect that the emergency manager, in consultation with the state financial authority, specifies. The financial and operating plan may serve as a deficit elimination plan otherwise required by law if so approved by the state financial authority.

(4) The emergency manager, within 30 days of submitting the financial and operating plan to the state financial authority, shall conduct a public informational meeting on the plan and any modifications to the plan. This subsection does not mean that the emergency manager must receive public approval before he or she implements the plan or any modification of the plan.

(5) For a local government in receivership immediately prior to the effective date of this act, a financial and operating plan for that local government adopted under former 2011 PA 4 or a financial plan for that local government adopted under former 1990 PA 72 shall be effective and enforceable as a financial and operating plan for the local government under this act until modified or rescinded under this act.

Sec. 12. (1) An emergency manager may take 1 or more of the following additional actions with respect to a local government that is in receivership, notwithstanding any charter provision to the contrary:

(a) Analyze factors and circumstances contributing to the financial emergency of the local government and initiate steps to correct the condition.

(b) Amend, revise, approve, or disapprove the budget of the local government, and limit the total amount appropriated or expended.

(c) Receive and disburse on behalf of the local government all federal, state, and local funds earmarked for the local government. These funds may include, but are not limited to, funds for specific programs and the retirement of debt.

(d) Require and approve or disapprove, or amend or revise, a plan for paying all outstanding obligations of the local government.

(e) Require and prescribe the form of special reports to be made by the finance officer of the local government to its governing body, the creditors of the local government, the emergency manager, or the public.

(f) Examine all records and books of account, and require under the procedures of the uniform budgeting and accounting act, 1968 PA 2, MCL 141.421 to 141.440a, or 1919 PA 71, MCL 21.41 to 21.55, or both, the attendance of witnesses and the production of books, papers, contracts, and other documents relevant to an analysis of the financial condition of the local government.

(g) Make, approve, or disapprove any appropriation, contract, expenditure, or loan, the creation of any

new position, or the filling of any vacancy in a position by any appointing authority.

(h) Review payrolls or other claims against the local government before payment.

(i) Notwithstanding any minimum staffing level requirement established by charter or contract, establish and implement staffing levels for the local government.

(j) Reject, modify, or terminate 1 or more terms and conditions of an existing contract.

* * *

(n) Consolidate or eliminate departments of the local government or transfer functions from 1 department to another and appoint, supervise, and, at his or her discretion, remove administrators, including heads of departments other than elected officials.

(o) Employ or contract for, at the expense of the local government and with the approval of the state financial authority, auditors and other technical personnel considered necessary to implement this act.

(p) Retain 1 or more persons or firms, which may be an individual or firm selected from a list approved by the state treasurer, to perform the duties of a local inspector or a local auditor as described in this subdivision. The duties of a local inspector are to assure integrity, economy, efficiency, and effectiveness in the operations of the local government by conducting meaningful and accurate investigations and forensic audits,

and to detect and deter waste, fraud, and abuse. At least annually, a report of the local inspector shall be submitted to the emergency manager, the state treasurer, the superintendent of public instruction if the local government is a school district, and each state senator and state representative who represents that local government. The annual report of the local inspector shall be posted on the local government's website within 7 days after the report is submitted. The duties of a local auditor are to assure that internal controls over local government operations are designed and operating effectively to mitigate risks that hamper the achievement of the emergency manager's financial plan, assure that local government operations are effective and efficient, assure that financial information is accurate, reliable, and timely, comply with policies, regulations, and applicable laws, and assure assets are properly managed. At least annually, a report of the local auditor shall be submitted to the emergency manager, the state treasurer, the superintendent of public instruction if the local government is a school district, and each state senator and state representative who represents that local government. The annual report of the local auditor shall be posted on the local government's website within 7 days after the report is submitted.

(q) An emergency manager may initiate court proceedings in the Michigan court of claims or in the circuit court of the county in which the local government is located in the name of the local government to enforce compliance with any of his or her orders or any

constitutional or legislative mandates, or to restrain violations of any constitutional or legislative power or his or her orders.

(r) Subject to section 19, if provided in the financial and operating plan, or otherwise with the prior written approval of the governor or his or her designee, sell, lease, convey, assign, or otherwise use or transfer the assets, liabilities, functions, or responsibilities of the local government, provided the use or transfer of assets, liabilities, functions, or responsibilities for this purpose does not endanger the health, safety, or welfare of residents of the local government or unconstitutionally impair a bond, note, security, or uncontested legal obligation of the local government.

(s) Apply for a loan from the state on behalf of the local government, subject to the conditions of the emergency municipal loan act, 1980 PA 243, MCL 141.931 to 141.942.

(t) Order, as necessary, 1 or more millage elections for the local government consistent with the Michigan election law, 1954 PA 116, MCL 168.1 to 168.992, sections 6 and 25 through 34 of article IX of the state constitution of 1963, and any other applicable state law.

(u) Subject to section 19, authorize the borrowing of money by the local government as provided by law.

(v) Approve or disapprove of the issuance of obligations of the local government on behalf of the local

government under this subdivision. An election to approve or disapprove of the issuance of obligations of the local government pursuant to this subdivision shall only be held at the general November election.

(w) Enter into agreements with creditors or other persons or entities for the payment of existing debts, including the settlement of claims by the creditors.

(x) Enter into agreements with creditors or other persons or entities to restructure debt on terms, at rates of interest, and with security as shall be agreed among the parties, subject to approval by the state treasurer.

(y) Enter into agreements with other local governments, public bodies, or entities for the provision of services, the joint exercise of powers, or the transfer of functions and responsibilities.

(z) For municipal governments, enter into agreements with other units of municipal government to transfer property of the municipal government under 1984 PA 425, MCL 124.21 to 124.30, or as otherwise provided by law, subject to approval by the state treasurer.

(aa) Enter into agreements with 1 or more other local governments or public bodies for the consolidation of services.

(bb) For a city, village, or township, the emergency manager may recommend to the state boundary commission that the municipal government consolidate with 1 or more other municipal governments, if

the emergency manager determines that consolidation would materially alleviate the financial emergency of the municipal government and would not materially and adversely affect the financial situation of the government or governments with which the municipal government in receivership is consolidated. Consolidation under this subdivision shall proceed as provided by law.

(cc) For municipal governments, with approval of the governor, disincorporate or dissolve the municipal government and assign its assets, debts, and liabilities as provided by law. The disincorporation or dissolution of the local government is subject to a vote of the electors of that local government if required by law.

(dd) Exercise solely, for and on behalf of the local government, all other authority and responsibilities of the chief administrative officer and governing body concerning the adoption, amendment, and enforcement of ordinances or resolutions of the local government as provided in the following acts:

(*i*) The home rule city act, 1909 PA 279, MCL 117.1 to 117.38.

(*ii*) The fourth class city act, 1895 PA 215, MCL 81.1 to 113.20.

(*iii*) The charter township act, 1947 PA 359, MCL 42.1 to 42.34.

(*iv*) 1851 PA 156, MCL 46.1 to 46.32.

(*v*) 1966 PA 293, MCL 45.501 to 45.521.

(*vi*) The general law village act, 1895 PA 3, MCL 61.1 to 74.25.

(*vii*) The home rule village act, 1909 PA 278, MCL 78.1 to 78.28.

(viii) The revised school code, 1976 PA 451, MCL 380.1 to 380.1852.

(*ix*) The state school aid act of 1979, 1979 PA 94, MCL 388.1601 to 388.1896.

(ee) Take any other action or exercise any power or authority of any officer, employee, department, board, commission, or other similar entity of the local government, whether elected or appointed, relating to the operation of the local government. The power of the emergency manager shall be superior to and supersede the power of any of the foregoing officers or entities.

(ff) Remove, replace, appoint, or confirm the appointments to any office, board, commission, authority, or other entity which is within or is a component unit of the local government.

(2) Except as otherwise provided in this act, during the pendency of the receivership, the authority of the chief administrative officer and governing body to exercise power for and on behalf of the local government under law, charter, and ordinance shall be suspended and vested in the emergency manager.

(3) Except as otherwise provided in this subsection, any contract involving a cumulative value of $50,000.00 or more is subject to competitive bidding by

an emergency manager. However, if a potential contract involves a cumulative value of $50,000.00 or more, the emergency manager may submit the potential contract to the state treasurer for review and the state treasurer may authorize that the potential contract is not subject to competitive bidding.

(4) An emergency manager appointed for a city or village shall not sell or transfer a public utility furnishing light, heat, or power without the approval of a majority of the electors of the city or village voting thereon, or a greater number if the city or village charter provides, as required by section 25 of article VII of the state constitution of 1963. In addition, an emergency manager appointed for a city or village shall not utilize the assets of a public utility furnishing heat, light, or power, the finances of which are separately maintained and accounted for by the city or village, to satisfy the general obligations of the city or village.

Sec. 13. Upon appointment of an emergency manager and during the pendency of the receivership, the salary, wages, or other compensation, including the accrual of postemployment benefits, and other benefits of the chief administrative officer and members of the governing body of the local government shall be eliminated. This section does not authorize the impairment of vested pension benefits. If an emergency manager has reduced, suspended, or eliminated the salary, wages, or other compensation of the chief administrative officer and members of the governing body of a local government before the effective date of this act, the reduction, suspension, or elimination is valid to the

same extent had it occurred after the effective date of this act. The emergency manager may restore, in whole or in part, any of the salary, wages, other compensation, or benefits 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, to the extent that the emergency manager finds that the restoration of salary, wages, compensation, or benefits is consistent with the financial and operating plan.

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Sec. 17. Beginning 6 months after an emergency manager's appointment, and every 3 months thereafter, an emergency manager shall submit to the governor, the state treasurer, the senate majority leader, the speaker of the house of representatives, each state senator and state representative who represents the local government that is in receivership, and the clerk of the local government that is in receivership, and shall post on the internet on the website of the local government, a

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(3) With respect to any aspect of a receivership under this act, the costs incurred by the attorney general in carrying out the responsibilities of subsection (2) for attorneys, experts, court filing fees, and other reasonable and necessary expenses shall be at the expense of the local government that is subject to that receivership and shall be reimbursed to the attorney

general by the local government. The failure of a municipal government that is or was in receivership to remit to the attorney general the costs incurred by the attorney general within 30 days after written notice to the municipal government from the attorney general of the costs is a debt owed to this state and shall be recovered by the state treasurer as provided in section 17a(5) of the Glenn Steil state revenue sharing act of 1971, 1971 PA 140, MCL 141.917a. The failure of a school district that is or was in receivership to remit to the attorney general the costs incurred by the attorney general within 30 days after written notice to the school district from the attorney general of the costs is a debt owed to this state and shall be recovered by the state treasurer as provided in the state school aid act of 1979, 1979 PA 94, MCL 388.1601 to 388.1896.

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(5) If, after the date that the service of an emergency manager is concluded, the emergency manager or any employee, agent, appointee, or contractor of the emergency manager is subject to a claim, demand, or lawsuit arising from an action taken during the service of that emergency manager, and not covered by a procured worker's compensation, general liability, professional liability, or motor vehicle insurance, litigation expenses of the emergency manager or any employee, agent, appointee, or contractor of the emergency manager, including attorney fees for civil and criminal proceedings and preparation for reasonably anticipated proceedings, and payments made in settlement of civil

proceedings both filed and anticipated, shall be paid out of the funds of the local government that is or was subject to the receivership administered by that emergency manager, provided that the litigation expenses are approved by the state treasurer and that the state treasurer determines that the conduct resulting in actual or threatened legal proceedings that is the basis for the payment is based upon both of the following:

(a) The scope of authority of the person or entity seeking the payment.

(b) The conduct occurred on behalf of a local government while it was in receivership under this act.

(6) The failure of a municipal government to honor and remit the legal expenses of a former emergency manager or any employee, agent, appointee, or contractor of the emergency manager as required by this section is a debt owed to this state and shall be recovered by the state treasurer as provided in section 17a(5) of the Glenn Steil state revenue sharing act of 1971, 1971 PA 140, MCL 141.917a. The failure of a school district to honor and remit the legal expenses of a former emergency manager or any employee, agent, appointee, or contractor of the emergency manager as required by this section is a debt owed to this state and shall be recovered by the state treasurer as provided in the state school aid act of 1979, 1979 PA 94, MCL 388.1601 to 388.1896.

Sec. 21. (1) Before the termination of receivership and the completion of the emergency manager's term, or if a transition advisory board is appointed under section 23, then before the transition advisory board is appointed, the emergency manager shall adopt and implement a 2-year budget, including all contractual and employment agreements, for the local government commencing with the termination of receivership.

(2) After the completion of the emergency manager's term and the termination of receivership, the governing body of the local government shall not amend the 2-year budget adopted under subsection (1) without the approval of the state treasurer, and shall not revise any order or ordinance implemented by the emergency manager during his or her term prior to 1 year after the termination of receivership.

Sec. 22. (1) If an emergency manager determines that the financial emergency that he or she was appointed to manage has been rectified, the emergency manager shall inform the governor and the state treasurer.

(2) If the governor disagrees with the emergency manager's determination that the financial emergency has been rectified, the governor shall inform the emergency manager and the term of the emergency manager shall continue or the governor shall appoint a new emergency manager.

(3) Subject to subsection (4), if the governor agrees that the financial emergency has been rectified, the emergency manager has adopted a 2-year budget

as required under section 21, and the financial conditions of the local government have been corrected in a sustainable fashion as required under section 9(7), the governor may do either of the following:

(a) Remove the local government from receivership.

(b) Appoint a receivership transition advisory board as provided in section 23.

(4) Before removing a local government from receivership, the governor may impose 1 or more of the following conditions on the local government:

(a) The implementation of financial best practices within the local government.

(b) The adoption of a model charter or model charter provisions.

(c) Pursue financial or managerial training to ensure that official responsibilities are properly discharged.

Sec. 23. (1) Before removing a local government from receivership, the governor may appoint a receivership transition advisory board to monitor the affairs of the local government until the receivership is terminated.

(2) A receivership transition advisory board shall consist of the state treasurer or his or her designee, the director of the department of technology, management, and budget or his or her designee, and, if the local government is a school district, the superintendent

of public instruction or his or her designee. The governor also may appoint to a receivership transition advisory board 1 or more other individuals with relevant professional experience, including 1 or more residents of the local government.

(3) A receivership transition advisory board serves at the pleasure of the governor.

(4) At its first meeting, a receivership transition advisory board shall adopt rules of procedure to govern its conduct, meetings, and periodic reporting to the governor. Procedural rules required by this section are not subject to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328.

(5) A receivership transition advisory board may do all of the following:

(a) Require the local government to annually convene a consensus revenue estimating conference for the purpose of arriving at a consensus estimate of revenues to be available for the ensuing fiscal year of the local government.

(b) Require the local government to provide monthly cash flow projections and a comparison of budgeted revenues and expenditures to actual revenues and expenditures.

(c) Review proposed and amended budgets of the local government. A proposed budget or budget amendment shall not take effect unless approved by the receivership transition advisory board.

(d) Review requests by the local government to issue debt under the revised municipal finance act, 2001 PA 34, MCL 141.2101 to 141.2821, or any other law governing the issuance of bonds or notes.

(e) Review proposed collective bargaining agreements negotiated under section 15(1) of 1947 PA 336, MCL 423.215. A proposed collective bargaining agreement shall not take effect unless approved by the receivership transition advisory board.

(f) Review compliance by the local government with a deficit elimination plan submitted under section 21 of the Glenn Steil state revenue sharing act of 1971, 1971 PA 140, MCL 141.921.

(g) Review proposed judgment levies before submission to a court under section 6093 or 6094 of the revised judicature act of 1961, 1961 PA 236, MCL 600.6093 and 600.6094.

(h) Perform any other duties assigned by the governor at the time the receivership transition advisory board is appointed.

(6) A receivership transition advisory board is a public body as that term is defined in section 2 of the open meetings act, 1976 PA 267, MCL 15.262, and meetings of a receivership transition advisory board are subject to the open meetings act, 1976 PA 267, MCL 15.261 to 15.275. A receivership transition advisory board is also a public body as that term is defined in section 2 of the freedom of information act, 1976 PA 442, MCL 15.232, and a public record in the possession

of a receivership transition advisory board is subject to the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

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Sec. 27. (1) The local elected and appointed officials and employees, agents, and contractors of a local government

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Sec. 32. This act does not impose any liability or responsibility in law or equity upon this state, any department, agency, or other entity of this state, or any officer or employee of this state, or any member of a receivership transition advisory board, for any action taken by any local government under this act, for any violation of the provisions of this act by any local government, or for any failure to comply with the provisions of this act by any local government. A cause of action against this state or any department, agency, or entity of this state, or any officer or employee of this state acting in his or her official capacity, or any membership of a receivership transition advisory board acting in his or her official capacity, may not be maintained for any activity authorized by this act, or for the act of a local government filing under chapter 9, including any proceeding following a local government's filing.

Sec. 33. If any portion of this act or the application of this act to any person or circumstances is found to be invalid by

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/s/ Carol Morey Viventi
Secretary of the Senate

/s/ Jerry [Illegible] Randall
Clerk of the
House of Representatives

Approved _____

_____
Governor