No. 19-205

In The Supreme Court of the United States

CITY OF FLINT, et al.,

Petitioners,

v.

SHARI GUERTIN, et al.,

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Attorney for City of Flint
WILLIAM Y. KIM*
Assistant City Attorney
CITY OF FLINT DEPT. OF LAW
1101 S. Saginaw, 3rd Floor
Flint, MI 48502
(810) 766-7146
wkim@cityofflint.com

**Counsel of Record*

Attorney for Darnell Earley
TODD PERKINS
PERKINS LAW GROUP
615 W. Griswold, Suite 400
Detroit, MI 48226
(313) 964-1702
tperkins@perkinslawgroup.net

Attorney for Howard Croft
ALEXANDER S. RUSEK
WHITE LAW PLLC
2549 Jolly Rd., Suite 340
Okemos, MI 48664
(517) 316-1195
alexrusek@whitelawpllc.com

Attorneys for City of Flint
FREDERICK A. BERG, JR.
SHELDON H. KLEIN
BUTZEL LONG, P.C.
150 W. Jefferson Ave., Suite 100
Detroit, MI 48226
(313) 225-7000
bergf@butzel.com
klein@butzel.com

Attorney for Gerald Ambrose
BARRY A. WOLF
LAW OFFICE OF BARRY A. WOLF, PLLC
503 S. Saginaw St., Suite 1410
Flint, MI 48502
(810) 762-1084
bwolf718@msn.com

Date: December 26, 2019

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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Introduction

Respondents plausibly allege that they were unknowingly exposed to environmental toxins because various government decision-makers, faced with an insolvent city's need for cost-savings, made a policy decision to switch to a lower cost water source without appropriately weighing the environmental risks or appreciating signs that some of those risks were being realized. If this were a state law negligence claim, Petitioners might have an actionable claim. But this is a substantive due process claim and Respondents point to no case supporting a substantive due process remedy for these alleged wrongs. To the contrary, this Court has rejected using substantive due process as a remedy for the decisions of which Respondents complain:

> [We] presum[e] that the administration of government programs is based on a rational decisionmaking process that takes account of competing social, political, and economic forces. . . . Decisions concerning the allocation of resources . . . involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country.

Collins v. City of Harker Heights, Tex., 503 U.S. 115, 128-29 (1992) (internal citation omitted).

This case can only be understood as seeking a substantive due process remedy for a political environmental policy failure. It is, Petitioners believe, contrary

to *Collins* and its progeny, but at a minimum it extends substantive due process into uncharted areas with no apparent bounds. That should not happen without careful consideration by this Court. Thus *certiorari* should be granted.[1]

Argument

1. This case squarely raises the question of whether there is a substantive due process right to protection from environmental toxins

Respondents assert that this case does not involve a constitutional right to protection from environmental toxins, but instead a right to be free from "government actors knowingly introducing harmful substances into a person's body without their consent." (Response, p. 18). This recasting of the issue fails on multiple levels. First, as the Sixth Circuit majority recognized, there is no allegation that "Defendants intended to harm Flint residents," Pet'r Appx. p. 29. More fundamentally, Respondents' proposed expansion of substantive due process would constitutionalize vast swaths of environmental policy making. No one, of course, consents to being exposed to environmental toxins. And governmental entities routinely make decisions which balance financial constraints with environmental risks. Sometimes they underestimate the risks and over-estimate the benefits and bungle the implementation of the policy. Sometimes they are slow

[1] Petitioners rely on their Petition with respect to the Eleventh Amendment issue.

to recognize that risks are becoming realities and that the original decision was, in hindsight, ill-advised. But the making and implementation of policy is the job of the political branches, and when the political branches fail, it is the job of the electorate to hold them accountable. It is not, cannot and should not be the job of the judiciary, acting under the guise of substantive due process.

Respondents assert that only two of the cases cited in the Petition were published Court of Appeals decisions. *See* Response, p. 19. They refer to *Concerned Citizens of Nebraska (CCN) v. U.S. Nuclear Regulatory Com'n (NRC)*, 970 F.2d 421, 426 (8th Cir. 1992), and assert that the holding was based on a failure to show deliberate indifference, but that is incorrect. It is clear from the opinion that the government fully understood the risks of low level radiation and knowingly chose to expose the plaintiffs to those risks. In other words, *CCN* illustrates the point in the preceding paragraph. They also cite *Kaucher v. County of Bucks*, 455 F.3d 418, 428-29 (3d Cir. 2006). *Kaucher* is similar to this case in some important respects. There, Plaintiffs alleged that prison officials engaged in conscience shocking behavior by failing to adequately respond to a MRSA outbreak in a prison. The Third Circuit assumed, without deciding, that deliberate indifference was the appropriate standard and that plaintiffs had failed to meet that standard because, *inter alia*, the policies at issue had been approved by the state, prison officials initially only knew of isolated instances of MRSA and when they learned of increasing incidence,

they took ultimately inadequate, remedial measures. *Id.* at 428. As discussed in Section 2, below, all of those factors apply to Flint as well. Thus, *Kaucher* hardly supports Respondents.

Respondents also attempt to distinguish the two unpublished Court of Appeals decisions cited in the Petition – *Hood v. Suffolk City Sch. Bd.*, 469 F. App'x 154, 159 (4th Cir. 2012) and *Greene v. Plano Indep. Sch. Dist.*, 103 F. App'x 542, 544-45 (5th Cir. 2004), because those cases involved mold in schools, not bad water. Response, p. 19. The constitutional difference between exposure to toxic mold and toxic water is left unexplained.

Respondents cite *Washington v. Harper*, 494 U.S. 210, 229 (1990) as supporting their claim. Response, p. 18. *Harper*, like a multitude of other cases, addresses the knowing and intentional intrusion into a person's body for an alleged medical reason. *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"); *Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) (involving "unwanted medical treatment"); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (involving "forced sterilization"); *Winston v. Lee*, 470 U.S. 753, 766-67 (1985) (involving "surgical intrusion" into a suspect's chest); *Riggins v. Nevada*, 504 U.S. 127, 137-38 (1992) (forced administration of antipsychotic medication). *Harper* is far afield from the claim here.

As in the district court and in the Sixth Circuit, Respondents again fail to identify a single case that

has held that substantive due process provides a remedy for a misguided policy decision that resulted in injury from an environmental toxin. That is not a failure on Respondents' part – there is simply no such case. This case should not be the first.

2. The facts which lead to the conclusion that Respondents have not plausibly alleged conscience shocking behavior by the City Defendants are undisputed

Respondents argue that the issues raised in the Petition turn on factual disputes that cannot be resolved at this stage. Response, pp. 23-29. But all of the relevant facts are squarely within the four corners of the Complaint. What Respondents call a factual dispute is instead factual cherry-picking, as time and again they omit from their narrative their own allegations which defeat any reasonable inference that the City Defendants acted in a conscience shocking manner, as required to state a substantive due process claim.

A few examples pertaining to the City Defendants will suffice. Respondents point to the City's decision to switch water sources, Response, p. 6, but not to their allegation that the Michigan Department of Environmental Quality (MDEQ) "approved the use of river as a source[.]" Pet'r App. p. 279. ¶161. They note that orthophosphates were not added to the water for corrosion control, Response at p. 6, but omit their allegations confirming that the MDEQ was behind that decision. Pet'r App. 263-264 and 298-299, ¶74a, 75,

247). The Response, at p. 7 notes that in August and September of 2014 there were two incidents of excessive fecal coliform bacteria in the water, ignoring their allegation that the City promptly gave affected residents notice and rectified the situation. Pet'r App. 275, ¶ 140. Their Response next notes that in January 2015 the City notified residents of a trihalomethane (THM) violation, Response, p. 25, but not that Defendants Veolia, an expert water engineering firm (as well as Defendant Lockwood, Andrews and Newnam, also an expert engineering firm) was retained to redress the problem. Pet'r App. 279-281, ¶ 162-176.[2]

These undisputed facts undermine any plausible allegation of "conscience-shocking," "deliberately indifferent" behavior. Respondents assert that "[w]here government actors have 'time to make unhurried judgments' and 'the chance for repeated reflection,' actions taken with deliberate indifference necessarily shock the conscience," *quoting County of Sacramento v. Lewis*, 523 U.S. 833, 853 (1998). But, as with their summary of the complaint, Petitioners distillation of *County of Sacramento* is misleadingly incomplete. The actual holding of *County of Sacramento* was that "deliberate indifference" applies when the state actors "hav[e] time to make unhurried judgments, upon the chance for

[2] Respondents also create false conflicts by referring to "Petitioners" collectively, ignoring that there are two distinct groups of Petitioners with the City and MDEQ Defendants. For example, a full three pages of the Response (Section 3, beginning at the bottom of page 8) are focused on a series of alleged false statements and disparagements by "Petitioners," when the underlying allegations relate only to the MDEQ Defendants, not the City Defendants.

repeated reflection, *largely uncomplicated by the pulls of competing obligations*." *Id.*, emphasis added. As explained above, the Complaint's repeated acknowledgement that at every turn the City Defendants looked to state regulators and expert advisors does not fit the *County of Sacramento* paradigm. More importantly, there is no plausible understanding of the facts under which the City Defendants were free of competing obligations, the most obvious of which was finding a way for an insolvent City to find relief from crushing financial obligations. In sum, Respondents cannot fit their own facts into the mold on which their claim depends.

3. This Case is an excellent vehicle for review

Finally, Respondents assert that this case "is a poor vehicle for review." Response, p. 35. Their argument is largely premised on the assertions that are rebutted above. If this case turned on the simple application of a "settled rule of law," or on "the resolution of disputed factual issues," then certiorari would indeed be inappropriate, but neither premise is true.

They also argue that this Court should defer addressing the issues presented until resolution of other cases arising out of the Flint Water crisis. But there are compelling reasons not to delay addressing these issues. The underlying events occurred in 2014 and 2015. Litigation has been pending since 2015 and this particular case since 2016. As noted in the Petition, there are tens of thousands of claimants whose claims are before the district court. Resolution of those claims will necessarily take years. It is in everyone's interest,

including the interest of claimants, to know sooner rather than later whether they have a viable Section 1983 claim against the City Defendants. This Petition provides the Court with an ideal opportunity to answer the important questions presented.

Conclusion

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

Respectfully submitted,

Attorney for City of Flint

WILLIAM Y. KIM (Bar #303932)
Assistant City Attorney
CITY OF FLINT DEPT. OF LAW
1101 S. Saginaw, 3rd Floor
Flint, MI 48502
(810) 766-7146
wkim@cityofflint.com

Attorneys for City of Flint

FREDERICK A. BERG, JR.
SHELDON H. KLEIN
BUTZEL LONG, P.C.
150 W. Jefferson Ave., Suite 100
Detroit, MI 48226
(313) 225-7000
bergf@butzel.com
klein@butzel.com

Attorney for Gerald Ambrose

Barry A. Wolf
Law Office of Barry A. Wolf, PLLC
503 S. Saginaw St., Suite 1410
Flint, MI 48502
(810) 762-1084
bwolf718@msn.com

Attorney for Darnell Earley

TODD PERKINS
PERKINS LAW GROUP
615 W. Griswold, Suite 400
Detroit, MI 48226
(313) 964-1702
tperkins@perkinslawgroup.net

Attorney for Howard Croft

ALEXANDER S. RUSEK
WHITE LAW PLLC
2549 Jolly Rd., Suite 340
Okemos, MI 48664
(517) 316-1195
alexrusek@whitelawpllc.com