NO. _____

IN THE

Supreme Court of the United States

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

v.

SHARI GUERTIN, ET AL., *Respondents*.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the 14th Amendment's constitutional right to "bodily integrity" extends to encapsulate a right to be protected by state regulators from a foreseeable risk of harm from exposure to contaminants in public drinking water, or to be free from allegedly false statements by an agency spokesperson.

2. If so, whether such a bodily-integrity right was clearly established at the time the defendant officials were fulfilling their official duties.

3. Whether mere alleged mistakes and regulatory inaction by state regulators, or allegedly false statements by an agency spokesperson, are sufficiently "conscience shocking" to strip a government official of qualified immunity.

PARTIES TO THE PROCEEDING

Petitioners are Stephen Busch, Michael Prysby, Liane Shekter Smith, and Bradley Wurfel.

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

Additional Defendants (but not Petitioners here) are the City of Flint, Darnell Earley, Gerald Ambrose, Howard Croft, Veolia North America, LLC, Lockwood Andrews & Newnam, Inc., and the State of Michigan.

DIRECTLY RELATED CASES[1]

1. United States District Court for the Eastern District of Michigan: *Guertin, et al.* v. *State of Michigan, et al.*, No. 16-cv-12421. Opinion and Order entered June 5, 2017.

2. United States Court of Appeals for the Sixth Circuit: (1) *Guertin, et al.* v. *State of Michigan, et al.*, Nos. 17-1698, 17-1699, 17-1745, 17-1752, and 17-1769. Opinion entered January 4, 2019. (2) *Guertin, et al.* v. *State of Michigan, et al.*, Nos. 17-1699 and 17-1745. Order denying rehearing *en banc* entered May 16, 2019.

3. United States Supreme Court. (1) *Busch, et al.* v. *Guertin, et al.*, Application No. 19A111. (2) *City of Flint, et al.* v. *Guertin, et al.*, No. 19-205.

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[1] This case is one of 49 pending in the United States District Court for the Eastern District of Michigan that have been consolidated as *In re Flint Water Litigation*, No. 16-cv-10444. Petitioners do not interpret this Court's Rule 14.1(b)(i) as including the other cases as "related" to the present case.

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The District Court opinion granting in part and denying in part Petitioners' motions to dismiss is reported at *Guertin* v. *State of Michigan*, No. 16-cv-12412, 2017 WL 2418007 (E.D. Mich. June 5, 2017), and is reprinted at App. 106a. The court of appeals opinion affirming that ruling is reported at *Guertin* v. *State of Michigan*, 912 F.3d 907 (6th Cir. 2019), and is reprinted at App. 1a. The Sixth Circuit's deeply divided order denying Petitioners' petition for rehearing *en banc* is reported at *Guertin* v. *Michigan*, 924 F.3d 309 (6th Cir. 2019), and is reprinted at 184a.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 2019. App. 1a. The court of appeals denied Petitioners' timely request for rehearing *en banc* on May 16, 2019. App. 184a. Justice Sotomayor extended the time to file a petition for a writ of certiorari to September 13, 2019. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution states, in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

INTRODUCTION

The so-called "Flint Water Crisis" began in 2013, when an emergency financial manager for the City of Flint, Michigan, decided to switch Flint's public drinking water source to the more affordable Karegnondi Water Authority, and the City of Detroit then unilaterally terminated its longstanding contract for providing drinking water to Flint. Because the Authority was not yet operational, the emergency manager chose an interim measure: to use water from the Flint River, treated at the City's water treatment plant until the Authority could deliver water. That changeover was supervised by a subsequent emergency manager and an outside engineering consultant. This case arises from the alleged improper treatment of Flint River water, which purportedly caused contaminants and lead to leach into the drinking water from the City's water distribution pipes and homeowner service lines.

Petitioners are four current or former employees of the Michigan Department of Environmental Quality, or MDEQ,[1] the state agency responsible for oversight of compliance with state and federal safe drinking-water laws by public water systems, like the City of Flint's. The MDEQ's task included ensuring that Flint complied with the federal Lead and Copper Rule ("LCR"), which generally requires public water systems to monitor lead and copper levels in drinking water and implement corrosion control treatments, as necessary. 40 C.F.R. 141.80 *et seq*.

[1] This Department is now known as the Department of Environment, Great Lakes, and Energy.

Flint did not previously treat the water it received from Detroit with corrosion-control chemicals, and there was therefore no corrosion control to be "maintained" when the water source was changed, as the LCR contemplates. 40 C.F.R. 141.81. MDEQ has historically interpreted the LCR as requiring a public water system to conduct two rounds of lead and copper monitoring to determine what, if any, corrosion-control treatment may be needed for a particular water source *before* implementation of corrosion controls. This interpretation was applied to Flint's water source switch, and Flint began using the Flint River without first implementing corrosion-control treatment chemicals. It is this plausible but allegedly mistaken interpretation of the federal LCR that gives rise to the constitutional claims against Petitioners.

As concerns of lead in Flint's drinking water emerged, the City hired another engineering firm that completed a 160-hour assessment and concluded that Flint's water was in compliance with federal and state water quality regulations and remained safe to drink. Despite increasing complaints, MDEQ continued to believe that Flint's drinking water was safe based on Flint's submitted sampling data, and MDEQ's Communications Director, Petitioner Wurfel, made several public statements to that effect.

By October 2015, Flint's two rounds of lead and copper testing submitted to MDEQ demonstrated a need to implement some form of corrosion control, and Flint was notified that such treatment would be required. As a result of numerous meetings between MDEQ, the EPA, and Flint, Flint reconnected its water supply system to Detroit on October 16, 2015.

The EPA subsequently issued a legal opinion in November 2015 concluding that the LCR was ambiguous when applied to Flint's water source switch, and that MDEQ applied a plausible interpretation of the LCR. The EPA stated that the situation confronted in Flint: "rarely arises and the language of the LCR does not specifically discuss such circumstances. . . . [I]t appears that there are differing possible interpretations of the LCR with respect to how the rule's optimal corrosion-control treatment procedures apply to this situation, which may have led to some uncertainty with respect to the Flint water system."[2]

Plaintiffs filed this lawsuit claiming that Petitioners failed to protect them from a foreseeable risk of harm from contaminants, including lead, following Flint's water-source switch. Their only remaining claim is for violation of their substantive-due-process right to bodily integrity, a right they say protects them from foreseeable harm tangentially arising from decisions made by regulators and agency spokesperson statements to media members. The Sixth Circuit, in a 2-1 decision, allowed that claim to go forward, causing the dissent, penned by Judge McKeague, to observe: "the majority extends the protection 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." App. 61a.

[2] https://bit.ly/2ktoaaE

What's more, commented Judge McKeague, "the majority unfairly denies defendants protection from suit under the doctrine of qualified immunity," 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." *Ibid.* "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," meaning qualified immunity applies. App. 62a.

The panel majority's decision, Judge McKeague declared, was problematic for two reasons. First, the decision created a deep, jurisprudential conflict: "[I]n case after case around the country, courts have consistently rejected substantive-due-process claims based on the type of conduct alleged here." App. 96a–101a (discussing cases). Second, the opinion "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." App. 105a (quoting *White* v. *Pauly*, 137 S. Ct. 548, 552 (2017)).

The Sixth Circuit denied rehearing *en banc* in a deeply fractured ruling. App. 184a. A five-judge dissent authored by Judge Kethledge concluded that "the majority's decision on the issue of qualified immunity is barely colorable." App. 197a. Substantive due process is "the vaguest of constitutional doctrines," and its "easy malleability makes it a notably poor instrument for prying away an officer's qualified immunity."

Ibid. The decision turns substantive due process into "a font of tort law" by "expanding substantive due process to reach claims based on negligence rather than intent." App. 200a (quoting *Daniels* v. *Williams*, 474 U.S. 327, 332 (1986)).

"No official," said the dissenters, "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." App. 200a. That is why this Court requires that a right be "clearly established" before a plaintiff can overcome qualified immunity. *Ibid.* In stretching substantive due process to cover an entirely new claim against government regulators and an agency spokesperson, then denying qualified immunity, the Sixth Circuit has done "exactly what the Supreme Court has repeatedly told us not to do." *Ibid.* (citations omitted).

Certiorari is warranted.

STATEMENT

A. Plaintiffs

Plaintiffs are Flint residents that for decades received water treated by Detroit's Water and Sewerage Department. ¶¶ 15–16, 19. In 2013, the City's emergency financial manager decided to temporarily switch the City's water source to the Flint River after Detroit terminated its water supply contract with Flint while the Karegnondi Water Authority water pipeline was still being built from Lake Huron to Flint and other communities. *Id.* ¶¶ 20, 28, 93–94. Plaintiffs allege they were harmed when they consumed Flint water after the switch and were exposed to lead. *Id.* ¶ 13.

B. Petitioners

Petitioner Stephen Busch was the District Supervisor assigned to MDEQ's Lansing District Office. Compl. ¶ 33. Petitioner Michael Prysby was an engineer assigned to MDEQ's District 11 (Genesee County). *Id.* ¶ 35. Petitioner Liane Shekter Smith was the Chief of MDEQ's Office of Drinking Water and Municipal Assistance. *Id.* ¶ 31. And Petitioner Bradley Wurfel was MDEQ's Communications Director. *Id.* ¶ 32.

C. Specific allegations against the MDEQ Petitioners

When assessing qualified immunity, there is a world of difference between regulators and spokespersons who purportedly made mistakes and officials who intentionally and forcefully beat, inject, or otherwise infringe on someone's bodily integrity. Yet the panel majority here wrongly analogized the MDEQ Petitioners' conduct to cases involving intentional, forceful conduct while at the same time conceding that "[t]here is no allegation defendants intended to harm Flint residents."[3] App. 27a. The alleged conduct of Petitioners is as follows, with the focus on alleged facts, not alleged conclusions. *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007).

Stephen Busch. Busch was an MDEQ district supervisor. Plaintiffs claimed generically that Busch "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

[3] See also Drs. Gómez and Dietrich, *The Children of Flint Were Not 'Poisoned,'* The New York Times (July 22, 2018), available at https://nyti/ms/2mBqNEs.

systemic denial, lies and attempts to discredit honest outsiders." Compl. ¶ 33.

More specifically, Plaintiffs claimed that Busch "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." Compl. ¶ 33. The record shows that on March 26, 2014, Busch's internal email to Shekter Smith sought a consensus as to what Flint would be required to do to begin using its own water supply on a full-time basis. *Id.* ¶ 98. On April 17, 2014, Busch received an email from Flint's water treatment plant operator who opined that the plant's staff were not ready to distribute water in the short term. *Id.* ¶ 96. On April 23, 2014, Busch told Wurfel that a "talking point" for a forthcoming meeting was that the MDEQ is satisfied with Flint's ability to treat Flint River water and that the Department looked forward to the City's long-term continued operation of its treatment plant using water from the Karegnondi Water Authority, a more consistent water source. *Id.* ¶ 101.

Plaintiffs claim that on February 27, 2015, 10 months *after* Flint switched its water source, Busch told the EPA that the Flint plant had an optimized corrosion-control program even though it did not. Compl. ¶¶ 33, 152. But "Flint *did* have a corrosion-control 'program' in place," one that MDEQ opined complied with the EPA's Lead and Copper Rule. App. 81a–82a. And as Judge McKeague noted, "[e]ven [if] the MDEQ was wrong, that error does not support the allegation that Busch lied." App. 82a.

"In sum," Judge McKeague recognized, "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." App. 82a.

Michael Prysby. Prysby was an MDEQ engineer assigned to the district that included Flint. Plaintiffs generally claim that Prysby ". . . 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." Compl. ¶ 35. Plaintiffs did not provide any allegations specifying the false assurances Prysby made to them.

The key document used to implicate Prysby is an internal, October 2014 email Prysby wrote after General Motors stopped using the Flint River water at its engine plant because of fears that it would cause corrosion due to high levels of chloride. Prysby's email said that despite the elevated chloride levels and the fact that the water was "not optimal," it was "satisfactory." Prysby also stressed to his colleagues the importance of not labeling Flint's water as corrosive merely because it failed to meet a manufacturing facility's criteria. Compl. ¶ 142.

As Judge McKeague observed, "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." App. 81a. "Plaintiffs thus do not plausibly allege that Prysby created the Flint Water Crisis and then deceived the public about it." *Ibid.*

Liane Shekter Smith. Plaintiffs claimed generally that Petitioner Shekter Smith, MDEQ's Chief of the Office of Drinking Water and Municipal Assistance, "knowingly participated in, approved of, and caused the decision to transition Flint's water source to a highly corrosive, inadequately studied and treated alternative," and that Shekter Smith "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." Compl. ¶ 31. But Plaintiffs' Complaint did *not* allege that Shekter Smith made or disseminated any specific false statements to the public.

The panel majority focused on two of her emails. In the first, Shekter Smith asked that an EPA official confirm "that the city [was] in compliance with the Lead and Copper Rule," to help the MDEQ "distinguish between [its] goals to address important public health issues separately from the compliance requirements of the actual rule." Compl. ¶ 207. As Judge McKeague said, "all that her email exhibits is an attempt to address" technical compliance and public health separately. App. 82a–83a.

The second email was Shekter Smith's response to a query asking why MDEQ would allow anything less than 100% of Michigan drinking water to meet all health standards. Compl. ¶¶ 199–200. Her honest answer was that such a goal is "impossible," and that the MDEQ did not "'allow' a Flint to occur; circumstances happen." *Ibid.* She wanted goals that could be achieved. "This second email," said Judge McKeague,

"shows nothing more than Shekter-Smith's concern with meeting agency goals." App. 83a. "These two emails, in short, do not demonstrate that Shekter-Smith created the Flint Water Crisis and subsequently attempted to deceive the public." App. 84a.

Bradley Wurfel. Wurfel was MDEQ's Communications Director and the only Petitioner plausibly implicated by Plaintiffs' deceived-the-public theory. Compl. ¶¶ 36–37. Wurfel played no role in regulating Flint's water supply and had no authority to change the source of Flint's water or treatment requirements. Plaintiffs do not allege that they ever directly spoke with Wurfel. The allegations against him concern out-of-context statements made to media members and other government officials.

In mid-July, 2015, Wurfel told a journalist: "let me start here–anyone who was concerned about lead in the drinking water in Flint can relax." Compl. ¶ 204. A few days later, Wurfel emailed his colleagues requesting an update on the January/June testing results, a recap of the December testing numbers, and any additional information they could offer in light of representations of high lead levels in 80 water tests in Flint. *Id.* ¶ 212. The same day, Wurfel emailed a member of the Governor's staff and the former MDEQ Director, stating that Flint had complied with the Lead and Copper Rule but had not yet optimized its water treatment, that Flint's residents should not worry about lead in their water supply, and that the MDEQ's recent sampling information submitted by Flint did not indicate an imminent health threat from lead or copper. *Id.* ¶ 217.

In August 2015, Wurfel responded to an inquiry from the Governor's office regarding reports of high lead levels by researchers and the discrepancy between those figures and the test results submitted to MDEQ by opining that the source of the lead and copper detected in the drinking water was not the Flint River water or the City's transmission lines but was instead the plumbing in residents' homes. Compl. ¶ 221. The email also included statements concerning an "unvetted draft" of the EPA's report to a Flint resident, which "hopped-up and misinformed the residents." *Id.* ¶ 223.

Plaintiffs also claimed that in early September 2015, Wurfel issued statements to reporters discrediting the work of Virginia Tech Professor Marc Edwards and stating that Edwards' results were not supported by lead sampling conducted by the city or blood-lead-level testing the State conducted. *Id.* ¶¶ 225–27, 234. Plaintiffs further claimed that Wurfel discredited persons working to protect the public and provided false assurances to Flint's residents about the water's safety. *Id.* 237. Plaintiffs' allegations conclude with the contention that, on September 28, 2015, Wurfel released a public statement describing a Flint physician's statements about lead in the City of Flint's water as "unfortunate," and stated that Flint's water was safe. *Id.* ¶ 287.

Judge McKeague explained that though Plaintiffs say Wurfel's statements were "knowing lies," their "allegations do not support that conclusion." App. 85a. "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." *Ibid.* Plaintiffs do not allege Wurfel had any contrary information. *Ibid.* "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." *Ibid.*

D. District court proceedings

The district court granted and denied Petitioners' motions to dismiss in part, preserving Plaintiffs' § 1983 claim based on an alleged violation of their substantive-due-process right to bodily integrity. Based on the allegations summarized above, the district court held that Plaintiffs "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." App. 156a. As to Petitioners' qualified-immunity claim, the district court said that "a series of Supreme Court cases over the last seventy-five years makes clear that defendants violated plaintiffs' clearly established rights." *Ibid.*

E. The Sixth Circuit's split decision

The Sixth Circuit panel majority affirmed. To establish the contours of the constitutional right to bodily integrity, the majority began by explaining that bodily-integrity cases "'usually arise in the context of government-imposed punishment or physical restraint.'" App. 12a (quoting *Kallstrom* v. *City of Columbus*, 136 F.3d 1055, 1062 (6th Cir. 1998)). The majority then cited a series of cases involving direct,

forcible, physical invasion of nonconsenting individuals: *Washington* v. *Harper*, 494 U.S. 210, 213–17 (1990) (involuntary administration of antipsychotic medication to an inmate); *Riggins* v. *Nevada*, 504 U.S. 127, 135–38 (1992) (forced administration of drugs); *Cruzan* v. *Director, Missouri Dep't of Health*, 497 U.S. 261, 265–69 (forced hydration and nutrition); *Winston* v. *Lee*, 470 U.S. 753, 759 (1985) (non-consensual surgical intrusion); *United States* v. *Brandon*, 158 F.3d 947, 953 (6th Cir. 1988) (forced medication); *Barrett* v. *United States*, 798 F.2d 565 (2d Cir. 1986) (government experiment on unknowing and unwilling patients); *Lojuk* v. *Quandt*, 706 F.2d 1456 (7th Cir. 1983) (same); *Rogers* v. *Okin*, 634 F.2d 650 (1st Cir. 1980) (same); *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796 (S.D. Ohio 1995) (same). App. 12a–17a.

Next, the majority recognized that to be actionable, government conduct must "shock the conscience." App. 19a–20a (citing *Rochin* v. *California*, 342 U.S. 165, 169, 172–74 (1952)). The majority was forced to concede that there "is no allegation defendants intended to harm Flint residents." App. 27a. Nonetheless, based on the bare-bones factual allegations noted above, the majority accused Petitioners of "creat[ing] the Flint Water environmental disaster and then intentionally attempt[ing] to cover-up their grievous decision. Their actions shock our conscience." App. 32a.

Turning to Petitioners' qualified-immunity defense, the panel majority started with the premise that the plaintiffs had to show a "clearly established" right. App. 40a (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987)). That is, "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." App. 41a (quoting *White* v. *Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam)). But, finding no case with an analogous fact pattern, the majority dispensed with that requirement, holding that the "lack of a comparable government-created public health disaster precedent does not grant defendants a qualified immunity shield. Rather it showcases the grievousness of their alleged conduct." App. 42a. "To be sure," said the majority, "sweeping statements about constitutional rights do not provide officials with the requisite notice." App. 45a. But the majority believed Petitioners' conduct to be akin to "strip[ping] the very essence of personhood" from Plaintiffs. App. 46a.

Judge McKeague dissented. "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." App. 60a. The majority, he said, "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." *Ibid.* And in so doing, "the majority unfairly denies defendants protection from suit under the doctrine of qualified immunity." App. 61a.

Judge McKeague began by analyzing whether Petitioners' conduct was conscience shocking. App. 72a. He painstakingly walked through Plaintiffs' allegations and concluded that they "do not plausibly demonstrate a callous disregard for or intent to injure plaintiffs, let alone any effort to 'systematically

contaminate' the Flint community." App. 85a–86a. "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." App. 86a.

Next, Judge McKeague turned to whether Plaintiffs stated a claim based on a fundamental right to bodily integrity. App. 88a–89a. He concluded that the majority's holding was at odds with decisions of this Court and many others: "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." App. 91a. All "analogous" cases relied on by the majority, Judge McKeague observed, involved a direct, physical intrusion. App. 91a–92a (analyzing *Rochin*, 342 U.S. at 172–174 (forced vomiting); *Missouri* v. *McNeely*, 569 U.S. 141, 148 (2013) (forced blood sample), *Winston* v. *Lee*, 470 U.S. 753, 767 (1985) (anal probe); *Washington* v. *Harper*, 494 U.S. 210, 221, 223 (1990) (unwanted administration of drugs); *Riggins* v. *Nevada*, 504 U.S. 127, 135 (1992) (same)). "These [and other] 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." App. 92a–93a.

Judge McKeague then shifted to the second prong of the qualified-immunity analysis—whether Plaintiffs' alleged constitutional right was "clearly established"—and recognized that this "presents the most fundamental problem for plaintiffs' case." App. 95a. In addition to the clear factual differences between the cases on which the majority relied and Plaintiffs' allegations, "courts have consistently rejected substantive-due-process claims based on the type of conduct alleged here." App. 96a–101a (citing *Branch* v. *Christie*, 2018 WL 337751 (D.N.J. Jan. 8, 2018); *Coshow* v. *City of Escondido*, 132 Cal. App. 4th 687 (Cal. Ct. App. 2005); *Benzman* v. *Whitman*, 523 F.3d 119, 125, 127 (2d Cir. 2008); *Lombardi* v. *Whitman*, 485 F.3d 73 (2d Cir. 2007)). "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," said Judge McKeague, but rather "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." App. 101a–02a. "The number of cases rejecting similar environmentally based claims is significant." App. 103a–04a & n.8 (discussing numerous cases).

F. The divided denial of rehearing *en banc*

The Sixth Circuit denied rehearing *en banc*. In dissent, Judge Kethledge, joined by Judges Thapar, Larsen, Nalbandian, and Murphy, opined that "the majority's decision on the issue of qualified immunity is barely colorable." App. 197a. The dissent began by noting that "the putative constitutional violation concerns the vaguest of constitutional doctrines,

namely substantive due process," and that claim's "easy malleability makes it a notably poor instrument for prying away an officer's qualified immunity." *Ibid.* What's more, "the bodily integrity caselaw fails to provide the high degree of specificity necessary to overcome qualified immunity, at least as to the claim here." App. 198a (cleaned up). "To cite the majority's own examples: the right protects against forcible injection of antipsychotic medication; against forcible stomach-pumping; and, in a district court case, against conducting medical experiments upon cancer patients without their consent." App. 198a–99a (cleaned up). "Nobody forcibly injects or stomach-pumps or conducts medical experiments upon another person by accident," yet "even the majority concedes that there is no allegation defendants intended to harm Flint residents." App. 199a (cleaned up). "Thus, the only manner in which the majority's 'examples illustrate the breadth' of the right to bodily integrity, is to show that the right is inapposite here." *Ibid.* (cleaned up).

The dissent recognized that what the majority did in response to the adverse caselaw was to inappropriately describe the alleged right at a very general level: "a constitutional right to be free of unwanted substances." App. 199a. (cleaned up). "That putative right is violated every day, indeed every time that virtually any of us takes a breath." *Ibid.* And "the majority's formulation elides what the prior cases requires—namely that the officer's injection or intrusion of the 'foreign substance' into the plaintiff's body be intentional. App. 199a–200a.

In sum, said the dissent, the majority's opinion "does exactly what the Supreme Court has repeatedly told us not to do." App. 200a (quoting *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)).

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's opinion conflicts with numerous decisions of this and other courts by expanding the Due Process Clause's coverage into new territory and altering the scope of qualified immunity for government officials. Absent this Court's intervention, nearly 50 similar cases in Michigan—and hundreds more around the country—will be litigated based on a suspect constitutional theory and in derogation of a right to qualified immunity that courts have long endorsed. Given the pervasive conflicts and the tremendous waste of judicial and party resources, the Court should grant the petition, reverse, and direct that judgment be entered for Petitioners.

I. The Sixth Circuit's decision transforms the qualified-immunity defense.

A. Qualified immunity protects government officials from being sued for mistakes.

When resolving a governmental employee's assertion of qualified immunity, courts determine (1) whether the facts the plaintiff has alleged establish the violation of a constitutional right, and (2) whether the right at issue was "clearly established" at the time of the incident. *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009). Courts may examine the two prongs in any order. *Id.* at 236.

An employee invoking qualified immunity does not have to be infallible. It applies even when a government employee is mistaken about the law, facts, or mixed questions of law and fact. *Pearson*, 555 U.S. at 231. "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions [and] protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 743 (2011) (citations omitted).

To overcome a qualified-immunity defense, a plaintiff must show that the constitutional right allegedly violated is clearly established in a particularized sense so that a reasonable official in the defendant's position knows that his or her actions violate that right. *Saucier* v. *Katz,* 533 U.S. 194, 202 (2001). 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) (quoting *Reichle* v. *Howards*, 566 U.S. 658, 664 (2012)).

Because the "dispositive question is whether the violative nature of *particular* conduct is clearly established," courts look to how existing precedent applies to each defendant's actions in the 'specific context of the case" before it. *Id.* (cleaned up). A plaintiff must be able to identify a case with a similar fact pattern, one that would have given "fair and clear warning to officers" about what the law requires. *White* v. *Pauly*, 137 S. Ct. 548, 552 (2017). Whether a law is clearly established may not be defined at a high level of generality. *al-Kidd*, 563 U.S. at 742.

B. The Sixth Circuit changed what it means for a constitutional right to be "clearly established."

"As the majority acknowledge[d], plaintiffs point to no factually similar controlling case in which a court found that such conduct violated a right to bodily integrity." App. 96a (McKeague, J., dissenting). "This alone should have been an important indication to the majority that the defendants' conduct did not violate plaintiffs' 'clearly established rights.'" *Ibid.* (quoting *White*, 137 S. Ct. at 552 (cleaned up)).

Indeed, "in case after case around the country, courts have consistently rejected substantive-due-process claims based on the type of conduct alleged here." App. 96a (McKeague, J., dissenting). Courts have refused to extend due-process protection to include a right to a contaminant-free environment, contaminant-free water, the right to receive clean water, or the right to accurate information from a government spokesperson about water. These cases include but are not limited to:

- *Branch* v. *Christie*, where the court rejected claims against state officials who were alleged to have "knowingly exposed [school] children . . . to water that was contaminated with unsafe levels of lead," and "concoct[ing] a scheme to cover up the health hazard." 2018 WL 337751, at *1 (D.N.J. Jan. 8, 2018). While the right to bodily integrity guarantees the "right generally to resist enforced medication," and to be "free from medical invasion," the right does not guarantee "a right to minimum levels of safety" or protection from contaminated water. *Id.* at *7.
- *Coshow* v. *City of Escondido*, where the court rejected the plaintiffs' bodily-integrity claims against city officials who knowingly added fluoride to public drinking water even though the fluoride might have contained "trace levels of lead and arsenic." 132 Cal. App. 4th 687, 700 (Cal. Ct. App. 2005). And unlike the officials in *Coshow*, none of the MDEQ Petitioners here "made a conscious decision to introduce lead into Flint's water." App. 99a (McKeague, J., dissenting).
- *Foli* v. *Metro. Water Dist. of S. Cal.*, where the Ninth Circuit adopted the *Coshow* court's "well-reasoned conclusion" denying a bodily-integrity claim based on additives in public drinking water. It agreed that fluoridating public drinking water "is not forced medication because the public is not forced to use the water and fluoridation is not the type of invasive medical procedure that implicates" a constitutional bodily-integrity right. 592 Fed. App'x 634, 635 (9th Cir. 2015).

- *Hood* v. *Suffolk City Sch. Bd.*, where the Fourth Circuit rejected a plaintiff's claim for exposure to mold and contaminants as a bodily-integrity violation because a liberty interest in bodily integrity is only recognized in very limited circumstances. There is no right to be free from unreasonable risks of bodily harm. 469 Fed. App'x 154, 159 (4th Cir. 2012)
- *Greene* v. *Plano Indep. Sch. Dist.*, where the Fifth Circuit affirmed the grant of defendants' motion to dismiss because the plaintiff's allegations that the school knew of dangerous mold but failed to remedy or warn her of the risk of harm did not rise to the level of a substantive-due-process violation. 103 Fed. App'x 542, 544–45 (5th Cir. 2004).
- *Benzman* v. *Whitman*, which involved the Second Circuit's rejection of substantive-due-process claims against EPA officials for making "false and misleading" statements regarding air quality after the September 11 terrorist attacks. 523 F.3d 119, 123–27 (2d Cir. 2008) ("no court has ever held a government official liable for denying substantive due process by issuing press releases or making public statements"); *Lombardi* v. *Whitman*, 485 F.3d 73, 74 (2d Cir. 2007) (same).
- *Kaucher* v. *County of Bucks*, where the Third Circuit rejected a substantive-due-process claim by corrections employees who became ill due to a jail's unsanitary conditions and officials' false and misleading statements about the scope of the problem. 455 F.3d 418, 420, 428–30 (3d Cir. 2006).

- *Walker* v. *City of East Chicago*, where the federal court rejected a claim based on officials allowing a housing authority to "build and operate public housing in an area with contaminated soil." 2017 WL 4340259, at *6 (N.D. Ind. Sept. 29, 2017).
- *Allen* v. *N.Y.C. Hous. Auth.*, denying a substantive-due-process claim based on the housing authority knowing of mold in plaintiff's apartment but failing to effectively remediate the condition because a government actor's failure to protect an individual from a known danger to bodily harm did not amount to a constitutional violation. 2012 U.S. Dist. LEXIS 130307, at *20–28 (S.D.N.Y. July 16, 2012).
- *Paige* v. *N.Y.C. Hous. Auth.*, granting defendants' motion to dismiss a substantive-due-process claim based on a failure to remove or address lead paint in residences because allegations of failing to provide a safe environment are insufficient to state a substantive-due-process claim. 2018 U.S. Dist. LEXIS 137238, at *32–35 (S.D.N.Y. Aug. 14, 2018).
- *In re Camp Lejeune N. Carolina Water Contamination Litigation*, which rejected a claim by service members who alleged that officials failed to monitor water quality and notify them of toxic substances. 263 F. Supp. 3d 1318, 1325, 1359 (N.D. Ga. 2016).

- *Naperville Smart Meter Awareness* v. *City of Naperville*, where a court rejected a claim that radio waves from devices officials installed in homes posed health risks. 69 F. Supp. 3d 830, 839 (N.D. Ill. 2014).
- *Lopresti* v. *Norwalk Pub. Sch.*, 2014 U.S. Dist. LEXIS 139361 (D. Conn. 2014), rejecting a claim that the defendant had "intentionally and maliciously" exposed individuals to a highly dangerous environment related to mold and concealed it because failure to warn or remedy dangerous environmental conditions did not constitute a constitutional violation.
- *Roudat* v. *Georgia Dep't of Cmty. Affairs*, 2017 US Dist. LEXIS 25192 (N.D. Ga. 2017), rejecting a due-process claim based on failing to remedy or prevent exposure to mold and contaminants.
- And *J.S. ex rel. Simpson* v. *Thorsen*, which rejected a claim by a student that school officials knowingly concealed a mold problem that affected the student's health. 766 F. Supp. 2d 695, 712 (E.D. Va. 2011). *See also Hood* v. *Suffolk City School Board*, 469 Fed. App'x 154 (4th Cir. 2012) (similar).

The majority ignored these and similar cases because it believed that Petitioners' conduct was comparable to intentionally and systemically poisoning an entire community. But 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." App. 101a–02a (McKeague, J., dissenting). "It is 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." App. 102a. The "clearly established" law the majority cited put the MDEQ Petitioners on notice of completely different prohibited conduct: it is unlawful for government officials to forcibly induce vomiting, administer anti-psychotic drugs to pretrial detainees, or to cut off life support in some circumstances.

The Sixth Circuit majority's willingness to let inapposite case law "clearly establish" Plaintiffs' rights has mammoth repercussions. Without the traditional limits on the malleable substantive-due-process guarantees of the Constitution, public officials are exposed to unqualified liability based on allegations of abstract rights. Here, that allowed the majority to deny qualified immunity to the MDEQ Petitioners despite no court having ever recognized a right to have government regulators act a certain way if there is a possible water contamination problem or a right to accurate press statements from agency spokespersons. The opinion welcomes lawsuits against food inspectors, regulators who approve medicines and medical devices, FAA regulators who oversee aircraft manufacturers, environmental regulators issuing permits, and even agency spokespersons who play no part in the regulatory process, making it nearly impossible to find anyone willing to accept these important government positions.

C. The Sixth Circuit has changed the meaning of "conscience-shocking" behavior.

"[A] policymaker's or regulator's unwise decisions and statements or failures to protect the public are typically not considered conscience-shocking conduct." App. 72a (McKeague, J., dissenting). "[N]egligence—even gross negligence—does not implicate the Due Process Clause's protections." *Ibid.* (citing *Daniels* v. *Williams*, 474 U.S. 327, 331–33 (1986)). That is because the Due Process Clause is not supposed to be a substitute for common-law tort liability. *Collins* v. *Harker Heights*, 503 U.S. 115, 128 (1992). Instead, it limits government officials from using their power as an "instrument of oppression." *DeShaney* v. *Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989).

Significantly, "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." App. 79a (McKeague, J., dissenting). Plaintiffs say the decision was made by Flint's Emergency Manager. App. 79a–80a. And "plaintiffs fail to allege that any of these MDEQ employees knew that the Flint water treatment plant was incapable of treating Flint River water." App. 80a. "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." *Ibid.* In sum, Plaintiffs' allegations "do not plausibly demonstrate a callous disregard for or intent to injure plaintiffs, let alone any effort to 'systematically contaminate' the Flint community." App. 85a–86a.

Regarding the claims against Prysby, Shekter Smith, and Busch, "[e]ven if the MDEQ employees made mistakes in interpreting the [Lead and Copper] Rule, those mistakes are not conscience-shocking." App. 86a (McKeague, J., dissenting). The EPA has said that the unique situation here "rarely arises and the language of the [Lead and Copper Rule] does not specifically discuss such circumstances. . . . [I]t appears that there are differing possible interpretations of the LCR with respect to how the rule's optimal corrosion control treatment procedures apply to this situation, which may have led to some uncertainty with respect to the Flint water system." 11/3/15 EPA Memorandum, *Mays* v. *City of Flint*, E.D. Mich. No. 16-cv-11519 (RE 29-11, PgID 1135–37), Sixth Circuit No. 16-2484. Given that MDEQ officials could be confused by this uncertainty and apply a plausible interpretation different from that which the EPA now, in hindsight, has opined should be applied in these unique circumstances, it is impossible to say that the MDEQ Petitioners' conduct rose to the level of egregiousness required to strip them of qualified immunity.

Similarly, regarding the claims against Wurfel, even if his statements were erroneous, the factual allegations against him do not support a conclusion that these statements were intentional lies or that they shock the conscience. Instead, as Judge McKeague noted, "[a]t most, they show a mistake of law or fact, made at least in partial reliance on the representations of other State employees." App. 85a (McKeague, J., dissenting).

Again, the majority has rendered a significant rift in qualified-immunity jurisprudence. To begin, in opening the door to amorphous constitutional claims based on alleged failures to act, the Sixth Circuit allowed allegations to go forward that this Court has said are not actionable. *E.g.*, *DeShaney*, 489 U.S. at 195 ("It is not enough to allege that a government actor failed to protect an individual from a known danger of bodily harm or failed to warn the individual of that danger.").

The Sixth Circuit itself has previously declined to recognize a substantive-due-process right to be protected from exposure to contaminants, even when the government actors allegedly created the exposure, because such conduct did not "shock the conscience." In *Upsher* v. *Grosse Point Pub Sch. Sys.*, 285 F.3d 448, 450 (6th Cir. 2002), the court rejected Section 1983 substantive-due-process claims premised on the defendant forcing plaintiffs to remove carpet knowing that the process would expose them to asbestos. A contractor had refused to perform the work due to asbestos-exposure concerns, yet defendant required plaintiffs to perform the work without appropriate safety equipment. *Id.* The Sixth Circuit turned to how the plaintiffs described the constitutional right in their complaint, and found that plaintiffs' claim that defendants had willfully, maliciously, and recklessly disregarded their health and safety was not substantiated because there was no evidence that the defendants either intentionally injured the plaintiffs or engaged in arbitrary conduct "intentionally designed to punish someone." *Id.* at 452–53; accord *Lewellen* v. *Metropolitan Gov't*, 34 F.3d 345, 348 (6th Cir. 1994) (denying substantive-due-process claim based on government's decision to build a school in the immediate vicinity of a high-voltage conductor line in

violation of applicable safety codes and standards because the defendants "obviously did not make a deliberate decision to inflict pain and bodily injury.").

Highlighting the inherent contradiction between the majority's opinion and existing, clearly established substantive-due-process case law of what constitutes "conscience shocking behavior," the Sixth Circuit came to the opposite conclusion in a substantially similar bodily-integrity case just a few months ago. The court recently affirmed dismissal of a bodily-integrity claim premised on forced consumption of lead-contaminated water because it was in a non-custodial setting and the plaintiff had not proven either intentional injury or arbitrary conduct intentionally designed to punish the plaintiff that "shocks the conscience." *Brown* v. *Detroit Pub. Sch. Cmty. Dist.*, 763 Fed. App'x 497, 503–04 (6th Cir. 2019). The allegations in *Brown* closely track those here. While the plaintiff in *Brown* argued that defendants violated her constitutional rights by forcing her to use toxic water for weeks due to the school's "shocking misrepresentations," the Sixth Circuit upheld dismissal of plaintiff's bodily-integrity claim because allegations of providing plaintiff with contaminated water and causing her to consume the water, thereby exposing her to a foreseeable risk of harm, "suggest negligence, rather than a deliberate imposition of bodily harm." *Id.* at 503.

In addition, the Sixth Circuit's new conscience-shocking standard conflicts with numerous decisions holding that a mere mistake of law—like most of Petitioners' differing interpretation of the Lead and Copper Rule—is insufficient to defeat a qualified-immunity defense. *E.g.*, *Pearson*, 555 U.S. at 231

("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.'"); *Singh* v. *Cordle*, __ F.3d __, 2019 WL 4050272, at *5 (10th Cir. Aug. 28, 2019) (qualified immunity "applies regardless of whether the government official's error is a mistake of law"); *Naumovski* v. *Norris*, 934 F.3d 200 (2d Cir. 2019) ("Government officials are thus shielded from liability whenever their actions are based on reasonable mistakes of law"); *Eves* v. *LePage*, 927 F.3d 575, 588 (1st Cir. 2019) ("A reasonable mistake of law does not defeat qualified immunity."). The standard also conflicts with the Second Circuit's opinions in *Benzman* and *Lombardi*, which rejected bodily-integrity claims indistinguishable from the current claim against Wurfel based on allegedly false statements to the press.

Petitioners' alleged conduct here consists of internal emails, intra-governmental communications, communications with the EPA, and press statements to media members in a quickly changing and difficult regulatory situation. None of this conduct satisfies the "shocks the conscience" standard, and the Sixth Circuit's contrary holding warrants this Court's grant of this petition.

II. No previous court has recognized a constitutional right to bodily integrity to be protected by state regulators from exposure to contaminants in drinking water or from allegedly false statements made by an agency spokesperson to the media.

As Judge McKeague explained in his panel dissent, this Court and other federal circuits have consistently interpreted the bodily-integrity right as one that prohibits "forcible physical intrusion of the body by the government." App. 91a–94a (citations omitted). The Sixth Circuit's contrary decision creates a substantial rift in the law of substantive due process, one that will expose government regulators to constitutional liability in a broad variety of contexts.

The same cases that make it impossible for Plaintiffs to show that they have a "clearly established" constitutional right to safe drinking water, see *supra* § I.B., make clear that Plaintiffs have no substantive-due-process claim at all. Plaintiffs' cited cases, and those on which the Sixth Circuit majority relied, consistently involve a direct physical invasion. This Court's precedents are of the same ilk. *E.g., Rochin*, 342 U.S. at 172–74 (state secured evidence for a criminal prosecution by using a vomit-inducing solution to forcibly extract evidence from the suspect's stomach); *McNeely*, 569 U.S. at 148 ("compelled physical intrusion beneath [a suspect's] skin and into [the] veins to obtain a" blood sample); *Winston*, 470 U.S. at 767 (nonconsensual surgery to retrieve a bullet from a suspect's chest); *Harper*, 494 U.S. at 223 (unwanted administration of antipsychotic drugs to an inmate); *Riggins*, 540 U.S. at 135 (unwanted administration of drugs for pretrial detainees). So are decisions from other circuits. *E.g.*, *Barrett* (state

psychiatric hospital administered injections of a compound the United States furnished as part of a program to test the suitability of the injected substance as a warfare agent); *Lojuk* (administering of electroconvulsive therapy without patient consent); *Rogers* (state administration of antipsychotic drugs to involuntary patients at state mental health facilities).

Contrast all these cases with the one that the Sixth Circuit majority found "especially analogous," *In re Cincinnati Radiation Litigation*, 874 F. Supp. 796 (S.D. Ohio 1995), a nonbinding district-court case. That litigation involved government officials who subjected unwitting cancer patients to high levels of radiation on the pretense of performing cancer treatment. Government officials intentionally and deliberately injected the patients with radiation. That situation is a far cry from saying that substantive due process "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," the claim that Plaintiffs allegedly presented and the majority accepted. App. 93a–94a n.4 (McKeague, J., dissenting).

Deliberately injecting specific citizens with radiation is not comparable to what happened here. The MDEQ Petitioners did not intentionally or purposefully inject Plaintiffs with lead or force them to ingest anything. They were doing the best they could in difficult circumstances with limited information certified by Flint as accurate and in compliance with Lead and Copper Rule mandates. What the cases cited in section I.A. show are that substantive-due-process claims are regularly dismissed even where governmental defendants exercise a much greater degree of

control over the complained of environment or contaminant because there is no constitutional right to be protected by public officials from exposure to contaminants under the Fourteenth Amendment. These cases also demonstrate that the provision of public housing or public water is not akin to forcible injections or intrusions.

These differing circumstances are why the majority conceded that Plaintiffs have not alleged that any MDEQ Petitioners intentionally tried to harm anyone. Yet the majority's substantial departure from the Sixth Circuit's precedents and those of other courts blows wide open the doors to governmental liability in a context where constitutional claims are easy to assert and difficult to defend.

Regarding Wurfel's alleged media statements, no court anywhere has ever held that statements made to media members were a violation of a right to bodily integrity. Indeed, the Second Circuit recognized this in dismissing analogous claims in *Benzman* and *Lombardi*. The panel majority here suggested that *Benzman* and *Lombardi* were distinguishable because those cases "involved the balancing of competing government interests . . . during a time-sensitive environmental emergency." App. 33a. But the *Benzman* plaintiffs resided, attended school, or worked in lower Manhattan or Brooklyn, and there was no immediate emergency (as in *Lombardi*) that would have required the EPA to make public statements reassuring the public that they could return to their homes, jobs, or schools. *Benzman*, 523 F.3d at 123. Though the *Benzman* plaintiffs emphasized this point, *id.* at 128, the court nonetheless dismissed their claims.

Additionally, the "competing government interests" at issue in *Benzman* were the EPA Administrator's choice between accepting guidance from the White House Council on Environmental Quality ("CEQ") or disregarding the CEQ's views when communicating with the public. *Id*. at 128. Here, Wurfel faced similar competing government interests. Just as the EPA Administrator faced a choice over whether to accept guidance from the CEQ, Wurfel similarly faced a choice between accepting guidance from the State's technical experts regulating Flint's operation of its water treatment plant or disregarding these views in communicating with the press. The Sixth Circuit's reliance on the emergency-nature dichotomy was misguided, and its holding a significant, unwarranted expansion of substantive-due-process liability.

III. This case is an ideal vehicle to clear up the substantial confusion caused by the Sixth Circuit's published decision.

The Sixth Circuit's unprecedented holding requires this Court's immediate intervention, and this case is an ideal vehicle for this Court to address the important questions presented.

First, the legal questions presented are unencumbered by factual issues. For purposes of this proceeding, Petitioners accept the truth of all the allegations pled in the Complaint. Notably, this Court regularly reviews qualified-immunity issues.

Second, the issues are monumentally important. Claims based on the constitutional right to bodily integrity are a growing cottage industry for plaintiffs' lawyers. And given the legacy of lead-pipe systems in nearly all major American cities, such claims will only continue to grow. Moreover, regulators and agency

spokespersons in innumerable other contexts may face previously unimagined lawsuits in reliance on the Sixth Circuit's reasoning.

Third, the Sixth Circuit's holding is undeniably out of step with decisions of this Court and other circuits, both in the context of bodily-integrity claims and qualified immunity.

Fourth, this case is one of 49 similar cases currently pending before the United States District Court for the Eastern District of Michigan. Absent this Court's intervention, tremendous judicial and party time and resources will be needlessly expended.

Fifth, lawsuits targeting alleged lead contamination of public drinking water are not limited to Flint. Additional cases are pending across the nation, including in Chicago, Fresno, and Newark, among others. These cases, and the governmental regulators in those states, will similarly be affected by the decision here, absent this Court's action. The majority's opinion is already being relied on outside the context of "Flint Water Crisis" cases by numerous courts to expand the substantive-due-process guarantees of bodily integrity and contract the protection of qualified immunity. *E.g.*, *Davis* v. *New York City Hous. Auth.*, 379 F. Supp. 3d 237, 255 (S.D.N.Y. 2019) (relying on *Guertin* in denying qualified immunity to government officials from tenant's claim that her right to bodily integrity was violated by exposure to extreme cold in her public housing apartment that lacked heat); *Hootstein* v. *Amherst-Pelham Reg'l Sch. Comm.*, 361 F. Supp. 3d 94, 112–13 (D. Mass. 2019) (relying on *Guertin* to deny qualified immunity from a bodily-integrity claim based on alleged exposure to lead contaminated water provided to students and parents despite school allegedly knowing of high lead

levels); and *Schulkers* v. *Kammer,* 367 F. Supp. 3d 626 (E.D. Ky. 2019) ("the Sixth Circuit has recently emphasized that we 'do not require a prior, precise situation' or 'a finding that the very action in question has previously been held unlawful' to conclude that officials had 'fair warning' that their conduct was unconstitutional").

And finally, there is no need for further percolation. The conflicts are clear and, having denied *en banc* rehearing, the Sixth Circuit is unlikely to revisit its unprecedented decision. This Court should not delay but should instead grant the petition now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 2019

PETITION APPENDIX TABLE OF CONTENTS

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); NANCY PEELER (17-1752); ROBERT SCOTT (17-1769); EDEN WELLS and NICK LYON (17-1698), *Defendants-Appellees.* [sic]	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

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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 moth-balled 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

[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.

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.

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

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

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 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

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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).

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]

"[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,"

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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 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 688–89 (citation omitted). This is consistent with *Lewis.* 523 U.S. at 847 n.8.

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 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. *See, e.g., Lewellen,*

[Footnote continued on next page]

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

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[Footnote continued from previous page]

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

argued below, "residents 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 governmental actor's choice

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[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).

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.
- 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

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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.

> 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:

- 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 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

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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.").

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]

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[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.*

[Footnote continued on next page]

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 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

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[Footnote continued from previous page]

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.

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]

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

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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 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.

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. 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*

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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).

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).

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]

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

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13 Citing *Cash v. Granville County Board of Education,* 242 F.3d 219 (4th Cir. 2006), 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 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.

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 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 (Mich. Ct. App. 2018) (per curiam).[14] The import of Michigan's

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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.

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 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 statewide 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 outweigh" 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. 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

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[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.

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. 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,

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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.

Nancy Peeler, and Robert Scott) and the MDEQ Director (Daniel Wyant) must be dismissed.

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 [sic] 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 determining whether and when the treatment plant would use corrosion control. The

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[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.

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.

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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 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

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[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.

[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, Miss 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*

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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 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

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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).

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 clean-up 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

[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

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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.

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

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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.

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

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[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

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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 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

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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).

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 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]

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 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).

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[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.)

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

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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.

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 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

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[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;

[Footnote continued on next page]

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 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

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[Footnote continued from previous page]

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.

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-conftaminated [sic] 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 pre-empt § 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]

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[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 [sic] 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]

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[5] Plaintiffs also bring this claim against the State of Michigan, MDEQ, and the individual state defendants in their official

[Footnote continued on next page]

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 (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

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[Footnote continued from previous page]

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.

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 pre-deprivation 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

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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

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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 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).

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.

"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*

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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

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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 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).

on constitutional grounds, would be found wanting." *Id.* (quoting *Seiter,* 858 F.2d at 1177).

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

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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)).

suffer from severe medical problems with their hair, skin, digestive system, and organs, as well as 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]

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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*

[Footnote continued on next page]

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.

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

[Footnote continued from previous page]

proximate cause of plaintiffs' injuries. The state tort claims as to defendant Scott are thus dismissed.

(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 [sic] 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 noncontractual 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

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail

addresses disclosed on the Notice of Electronic Filing on June 5, 2017.

s/Felicia M. Moses
FELICIA M. MOSES

Case Manager

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

File Name: 19a0093p.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 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

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

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, evenhandedly 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

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Deborah S. Hunt, Clerk