STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Jansen, P.J., and Fort Hood and Riordan, JJ

MELISSA MAYS, MICHAEL ADAM MAYS, JACQUELINE PEMBERTON, KEITH JOHN PEMBERTON, ELNORA CARTHAN, and RHONDA KELSO,

Plaintiffs-Appellees,

v

GOVERNOR RICK SNYDER, STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, and MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants.
_____/

Supreme Court No. 157335-7

Court of Appeals No. 335555
Consolidated with Docket Nos. 335725 and 335726

Court of Claims No. 16-000017-MM

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

BRIEF ON APPEAL OF APPELLANTS RICK SNYDER, STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Defendants-Appellants Rick Snyder, State of Michigan (State), the Michigan Department of Health and Human Services (DHHS), and the Michigan Department of Environmental Quality (DEQ)[1] (collectively State Defendants) appeal by leave granted the January 25, 2018 opinion of the Michigan Court of Appeals. This Court has jurisdiction under MCL 600.215(3) and MCR 7.303(B)(1).

[1] The Department of Environmental Quality is now the Department of Energy, Great Lakes, and the Environment. To avoid confusion, this brief will still use its previous name, or the DEQ, because that is what it was called during the relevant time period.

STATEMENT OF QUESTIONS PRESENTED

The questions in this case center on the immunity of the state and its agencies to tort claims. Plaintiffs seek to avoid the statutes governing that immunity, the Governmental Torts Liability Act and the Court of Claims Act, by basing their tort claims for personal injuries and property damages on the Michigan Constitution. The following questions are presented:

I.A.1 Did a state custom or policy mandate the alleged violation of Plaintiffs' bodily integrity?

Appellants' answer:	No.
Appellees' answer:	Yes.
Trial court's answer:	Yes.
Court of Appeals' answer:	Yes.

I.A.2 Can the Court unilaterally create a damage remedy against the state agencies in this case without violating the separation of powers?

Appellants' answer:	No.
Appellees' answer:	Yes.
Trial court's answer:	Yes.
Court of Appeals' answer:	Yes.

I.A.3 Are constitutional tort remedies available against individuals?

Appellants' answer:	No.
Appellees' answer:	Yes.
Trial court's answer:	Yes.
Court of Appeals' answer:	Yes.

I.B. Did state agencies take action aimed directly at Plaintiffs' property that harmed Plaintiffs in a way distinct in kind from similarly situated persons giving rise to an inverse condemnation action?

Appellants' answer:	No.
Appellees' answer:	Yes.
Trial court's answer:	Yes.
Court of Appeals' answer:	Yes.

II.A. Did Plaintiffs' claims accrue more than six months before they filed suit?

Appellants' answer:	Yes.
Appellees' answer:	No.
Trial court's answer:	No.
Court of Appeals' answer:	No.

II.B. This Court abrogated the common law discovery rule, but would Plaintiffs' claims be timely even if the Court applied the rule in this case?

Appellants' answer:	No.
Appellees' answer:	Yes.
Trial court's answer:	Yes.
Court of Appeals' answer:	Yes.

II.C. The Legislature did not apply the statutory fraudulent concealment provision to the Court of Claim Act's notice provision, but would Plaintiffs' claims be timely even if it did?

Appellants' answer:	No.
Appellees' answer:	Yes.
Trial court's answer:	Yes.
Court of Appeals' answer:	Yes.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Const 1963, art 1, § 17

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.

Const 1963, art 3, § 2

The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

Const 1963, art 10, § 2

Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law.

MCL 691.1407(1)

Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.

MCL 600.6431

(1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.

(3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

MCR 2.116

(B)(1) A party may move for dismissal of or judgment on all or part of a claim in accordance with this rule.

(C)(7) The motion may be based on one or more of these grounds . . . immunity granted by law.

(G)(5) The affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10).

INTRODUCTION

The people of Flint deserve better than the water crisis. It compounded the stress already burdening the City, which is why the State's legislative and executive branches have devoted substantial resources to the City's recovery and rejuvenation. These Plaintiffs, and others, have also invoked the state and federal judicial branches by filing lawsuits. Unlike Plaintiffs' other lawsuits that pursue well-recognized remedies, this suit seeks to dramatically expand existing remedies against the State, and even create a new one based on Michigan's Constitution. This Court has long recognized the Legislature as the proper branch to authorize damage claims against the State and has deferred to that branch to shape Michigan's immunity law. But Plaintiffs want to transfer policymaking in that area from the Legislature to the Court and multiply the circumstances in which claimants can seek relief. These would be deep structural changes that would reshape Michigan law and should be made by the Legislature, if at all, not this Court. The State Defendants make two overarching points:

First, constitutional torts have only been hypothetical possibilities in Michigan up to this point because the circumstances in which they would be an appropriate use of judicial power are very rare. This case is no exception. Allowing tort claimants like Plaintiffs to rely on a vague constitutional doctrine to seek taxpayer funds—even when they have multiple alternative remedies available, and even when they cannot show that it was the State that caused their alleged injuries—would give Michigan courts an unchecked legislative power. Under the lower courts' reasoning, the Legislature cannot check the Judiciary's self-empowerment because anyone alleging a violation of the non-textual-but-implied substantive due process clause of Michigan's Constitution can bypass the Governmental Tort Liability Act, altogether. This Court should not allow this changing of the guard to take place.

Similarly, Michigan's inverse condemnation jurisprudence ensures that the State's day-to-day regulatory functions do not allow persons to flood the State with property devaluation claims. Persons can only pursue claims if the State directly targets their property and they experience damage that is different in kind, rather than degree, to similarly situated persons. The lower courts reshaped the State's immunity. Persons can now seek taxpayer funds for the State's alleged failure to regulate municipal water treatment if the person's metal pipes corrode—a harm experienced to some degree by all owners of metal pipes, which includes virtually all Michigan residents. There is no apparent limitation on when this new holding would apply, which is alarming considering the age of public infrastructure in Michigan. This Court should reverse the lower courts' unprincipled expansion of inverse condemnation claims.

Second, even if Plaintiffs have pleaded both a constitutional tort and inverse condemnation claim against the State in avoidance of its immunity, their claims are filed too late. Their own pleadings confirm that their claims accrued on April 25, 2014, but they did not file suit until January 21, 2016. The lower courts applied a rule this Court abrogated in 2007 to excuse Plaintiffs' untimeliness. Yet even if this Court resurrected the abrogated common law discovery rule and applied it to the Court of Claims Act's notice provision, Plaintiffs' claims are *still* too late because Plaintiffs objectively should have known of a possible reason to file a notice of intent more than six months before they filed suit.

Importantly, this Court does not stand between Plaintiffs and legal relief. Plaintiffs have ample judicial remedies available to them which they are actively pursuing. This Court can correct the misinterpretation below of Michigan's immunity law and dismiss Plaintiffs' complaint without affecting Plaintiffs' ability to seek remedies in their other lawsuits. It should do so.

STATEMENT OF FACTS AND PROCEEDINGS

While the issues in this case are mostly legal, the facts are complicated, and the lower courts disregarded many of them. This section is lengthy because the Court cannot adjudicate the legal issues without understanding the State's role in regulating lead in water; why Flint chose to temporarily use the Flint River; how local, state, and federal employees responded to problems with Flint's water; and the actions Plaintiffs took during the approximately 18 months before they filed suit.

I. Controlling lead in drinking water is complex and system-specific.

The U.S. Environmental Protection Agency fought to regulate lead in drinking water using a treatment method, rather than simply setting a maximum contaminant level of "zero" for lead. *American Water Works Ass'n v EPA*, 40 F3d 1266 (1994). That is because there is no one-size-fits-all solution for lead in water systems. Lead enters drinking water from the plumbing and pipes that make up water systems. And "the degree to which plumbing materials leach lead varies greatly with such factors as the age of the material, the temperature of the water, the presence of other chemicals in the water, and the length of time the water is in contact with the leaded material." *Id*. at 1269. To make things even more complicated, "chemicals added to the drinking water supply in order to reduce the corrosion of [lead] pipes can *increase* the levels of *other* contaminants" in the water system. *Id*. (emphasis added). So systems must first determine if lead is a problem then conduct a study to design the "optimal corrosion control treatment" that is "tailored specifically" for their system. *American Water Works Ass'n v EPA*, 40 F3d at 1269–1271.

The equivalent of the federal Lead and Copper Rule (LCR), 40 CFR 141.80–141.91, was adopted into Michigan's administrative code, Mich Admin Code, R 325.10101 *et seq*. The LCR

established an "action level" for lead in water that is exceeded if more than 10 percent of the tap water samples taken during a designated six-month testing period contained 15 parts per billion (ppb) or more of lead. 40 CFR 141.80(c)(1). A system with optimized treatment can still exceed the action level, so an exceedance does not mean the system is in violation. Instead, it means the system must take additional steps to decrease the public's exposure to lead, such as public education and the replacement of lead service lines. 40 CFR 141.81, 84–85.

While the DEQ has "primary enforcement responsibility" over local water system operators in Michigan, see 42 USC 300g-2(a), it is *not* a "supplier of water." MCL 325.1002(t). It does not operate any of the many hundreds of local water systems in Michigan. Nor does the Michigan Safe Drinking Water Act (Act 399) authorize the DEQ to unilaterally seize control of a local water system. In this case, Flint was required to certify to the DEQ that the lead samples it took were taken properly and in accordance with law. 40 CFR 141.86. The "power and control" the DEQ has "over public water supplies and suppliers of water" is "[s]ubject to the limitations contained in" in Act 399. MCL 325.1003. If Flint or another local water system operator fails to carry out its obligations under Act 399, the DEQ can issue administrative orders, MCL 325.1015; seek criminal charges, MCL 325.1021; or file a lawsuit, MCL 325.1022. The DEQ is a regulator, not an operator.

II. The City of Flint decided to temporarily use the Flint River.

The City of Flint previously used its water treatment plant to treat the Flint River as its primary water source until 1967, when it stopped using its plant full-time and purchased already

treated water from the Detroit Water and Sewerage Department (DWSD).[2] (App Vol 2, p 414a.)[3] But the DWSD option became very expensive. Flint estimated that purchasing water from DWSD could cost it as much as $23 million per year by 2020. (App Vol 2, p 416a.) As a solution, the Genesee County Drain Commission (GCDC), which also obtained its water from DWSD, proposed that several municipalities form their own water system and construct their own pipeline to Lake Huron. (App Vol 2, pp 264a, 414a–415a.) On April 13, 2010, Genesee County approved the formation of the Karengondi Water Authority (KWA), and the GCDC began recruiting other municipalities to join. (App Vol 2, p 415a.)

Flint did not immediately join the KWA. It had its own treatment plant and still used the Flint River as a backup supply. Flint commissioned a study to determine if it was feasible to fully reactivate its plant and reestablish the Flint River as its full-time source. (App Vol 2, pp 264a, 415a, 443a–533a.) The report concluded that "water from the river can be treated to meet current regulations," and that the treatment plant would need upgrades if it were to treat water long-term on a permanent basis. (App Vol 3, p 452a.) The KWA and Flint River were only some of the options Flint was considering as alternatives to DWSD. (App Vol 2, pp 414a–416a.) While Flint considered its options, it experienced a financial emergency in 2011, and Governor Snyder appointed an emergency manager on December 1, 2011. (App Vol 2, pp 415a–416a.) By November 6, 2012, Flint moved toward joining the KWA. (App Vol 2, p 416a.) Since Flint was under emergency management and joining the KWA would require entering into a contract

[2] The part of the Detroit Water and Sewerage Department that sold water to Flint changed names during the period relevant to this lawsuit. It is now the Great Lakes Water Authority. For the purposes of consistency and to avoid confusion, this brief will still refer to "DWSD."

[3] The timeline cited to in pages 413a–442a of the appendix is a more legible duplicate of the timeline from the Task Force Report Plaintiffs relied extensively on and which they attached to their first amended complaint. (See App Vol 2, pp 377a–406a.)

with KWA in excess of $50,000 without a competitive bidding process, the City sent the proposal to the State Treasurer for review. MCL 141.1552(3).

Internally, DEQ staffers suggested on January 23, 2013 that "the city should have concerns of fully utilizing the Flint River (100%)" because of additional treatment requirements and uncertainty about whether the river could adequately provide for Flint's needs "at 100-year low flow." (App Vol 2, p 417a.) Indeed, the firm the Department of Treasury hired to perform "an analysis of the water supply options being considered by the City of Flint," Tucker, Young, Jackson, Tull (TYJT), did not analyze using the Flint River on a full-time basis to provide 100% of Flint's water. (App Vol 2, pp 265a, 416a; App Vol 3, p 537a.) TYJT completed their report on February 6, 2013. They concluded that after eliminating the options Flint "did not want to pursue," joining the KWA would be less expensive than staying with DWSD. (App Vol 3, pp 538a, 553a.)

DWSD reached out to Flint to try and keep them as a customer, but on March 25, 2013, the Flint City Council voted 7-1 to leave DWSD and join the KWA. (App Vol 2, p 417a.) On March 28, 2013, Treasurer Dillon emailed Governor Snyder "recommending support for Flint's decision to join [the] KWA," noting that the "City's Emergency Manager, Mayor, and City Council all support this decision" and "[DEQ Director] Dan Wyant also concurs." (App Vol 2, pp 266a, 417a.) On April 11, 2013, Treasurer Dillon gave approval for Flint to join the KWA on April 15, 2013 if Flint rejected a forthcoming final offer from DWSD. (App Vol 2, p 417a; App Vol 3, p 583a.) Flint rejected that final offer from DWSD, and on April 16, 2013, Flint formally signed an agreement with KWA. (App Vol 2, p 417a.)

Then something unexpected happened. Flint planned to keep purchasing water from DWSD during the interim until the KWA project was completed, but then DWSD abruptly

cancelled its agreement with Flint effective April 17, 2014. (App Vol 2, p 417a.) Flint suddenly had to find a different interim source of water until it could obtain water from KWA, and it chose to use the Flint River during the interim period. (App Vol 2, p 418a.) It promptly hired outside help. Flint hired "the engineering firm Lockwood, Andrews, and Newnam (LAN) to prepare [the] Flint [water treatment plant] for full-time operation." (App Vol 2, p 418a.) And Flint hired "Rowe Professional Services Company" to complete "an engineering proposal for improvements to the Flint [water treatment plant] that would allow continuous operation of the [plant] utilizing the Flint River in lieu of continuing service from DWSD." (App Vol 2, p 418a.)

Nearly a year later, Flint's water treatment plant operator was concerned about meeting DWSD's April 17, 2014 deadline for ending its agreement with Flint. He emailed DEQ staffers on April 16 and 17, 2014, that he was being pressured by "the management above me" to distribute water even though he did not believe the City was ready. (App Vol 2, pp 267a, 419a.) The DEQ staffers had met with and advised the City of Flint and its engineering consultant during the transition and reviewed and issues relevant permits, but they did not try to override the City's decision to use the Flint River. (App Vol 2, pp 418a–419a.) As noted, they were regulators, not operators.

On April 25, 2014, Flint made the switch to the Flint River as its primary water source and marked the occasion with a ceremony. (App Vol 2, pp 268a, 419a.) A DEQ water staffer emailed suggested talking points to Brad Wurfel, DEQ's public information officer, which included the statement that "While [DEQ] is satisfied with the City's ability to treat water from the Flint River, the Department looks forward to the long term solution of continued operation of the City of Flint Water Treatment Plant using water from the KWA as a more consistent and higher quality source water." (App Vol 2, p 419a.)

III. The problems Flint residents experienced with the Flint River were highly publicized and Flint, the DEQ, and the U.S. EPA tried to address them.

Plaintiffs "knew almost immediately after the switch to Flint River water that something was not right about this new water supply." (App Vol 2, pp 226a–227a.) Plaintiffs began complaining to "Defendant State . . . within days" of April 25, 2014 that "the water was cloudy and foul in appearance, taste and odor." (App Vol 2, p 227a.) By May, at least one resident of Flint had also contacted the U.S. EPA, complaining of a skin rash his doctor thought was caused by Flint River water. (App Vol 2, p 419a.) Discussing the complaint internally, EPA staffers reasoned that "Flint River quality is not great, but there is a surface water treatment plan producing water that is currently meeting [Safe Drinking Water Act] standards." (App Vol 2, p 419a.) By June 2014, Flint water treatment plant "operators boost[ed] [the] use of lime to address hardness concerns." (App Vol 2, p 420a.) Also by June 2014, Plaintiffs believed "that the water was making them ill." (App Vol 2, p 268a.) Plaintiffs then spent "the next eight (8) months" expressing "their concerns about water quality" to "Flint and MDEQ officials . . . in multiple ways, including letters, emails and telephone calls." (App Vol 2, p 227a.) Plaintiffs also organized "demonstrations on the streets of Flint" that were "well publicized." (App Vol 2, p 227a.)

As explained above, the LCR requires water systems to determine if lead is a problem, and if it is, perform a study before determining what kind of treatment to use for lead control. 40 CFR 141.81(d). Since the Flint River was a new source, DEQ staffers interpreted the LCR to require Flint to monitor lead levels for two consecutive, six-month periods before determining how to proceed. 40 CFR 141.81(d)(1). On July 1, 2014, Flint began its "first 6-month monitoring period for lead and copper in drinking water." (App Vol 2, p 420a.)

On August 15, 2014, DEQ required Flint to advise Flint residents in some parts of the City that the water was not safe to drink unless boiled because Flint's testing had revealed excessive E. coli. (App Vol 2, pp 227a, 420a.) To address the problem, Flint "increase[d] flushing of water mains" and "boost[ed] chlorine disinfectant use." (App Vol 2, p 420a.) On September 5, 2014 and September 7, 2014, Flint issued new advisories to the residents in some parts of the City that the water needed to be boiled before drinking because of an excess of "coliform bacteria." (App Vol 2, pp 227a, 420a.) To address the problem, Flint again "boost[ed] chlorine use." (App Vol 2, p 420a.) Anticipating that Flint's increased use of chlorine could result in increased total trihalomethanes (TTHM), a byproduct of disinfectant use in water systems, DEQ requested Flint to perform a "preemptive Operational Evaluation for Disinfectant Byproducts." (App Vol 2, p 420a.) Flint hired LAN to perform the evaluation. (App Vol 2, p 420a.)

General Motors, "citing corrosion concerns," announced on October 13, 2014 that it would start using a source different from the Flint River water "for its Flint Engine Operations facility." (App Vol 2, pp 269a, 420a.) DEQ staffers discussing the announcement internally noted that even though Flint's "chloride levels" were "not optimal," they were still "satisfactory" and "'easily within' public health guidelines." (App Vol 2, p 420a.) By October 14, 2014, two of Governor Snyder's aides discussed with Flint's emergency manager, Darnell Earley, why Flint should not switch back to DWSD. He "maintain[ed] [that the] water quality problems [could] be solved and it would be cost-prohibitive to return to DWSD." (App Vol 2, p 420a.)

On December 31, 2014, Flint's first round of lead testing showed lead levels of 6 ppb in the City, lower than the LCR's 15 ppb action level. (App Vol 2, p 421a.) Shortly thereafter, the

University of Michigan-Flint notified Flint that two areas of its campus had "elevated lead levels." (App Vol 2, p 421a.)

On January 2, 2015, Flint—as required by DEQ—notified water users that the City had elevated levels of TTHM. (App Vol 2, p 421a.) That announcement prompted the Department of Technology, Management, and Budget—a state department that manages state properties and is not a party—to install water coolers on January 3, 2015 in the state office building in Flint for "as long as the public water does not meet treatment requirements." (App Vol 2, p 421a.)

On January 21, 2015, the City of Flint hosted a public meeting to discuss the bacteria and TTHM problems the system was having. Some residents who attended the meeting brought containers of water from their taps showing that it was "discolored." (App Vol 2, p 421a.) On January 29, 2015, one DEQ staffer discussing Flint's water problems internally suggested that Flint's discoloration problem could be an indication of "corrosion across the distribution system." (App Vol 2, p 422a.) DWSD made an offer for Flint to return to DWSD water, which Flint rejected. (App Vol 2, pp 271a, 422a.) On January 30, 2015, Brad Wurfel indicated internally that he "didn't want MDEQ Director Wyant 'to say publicly that water in Flint is safe until we get back the results of some county health department traceback work on 42 cases of Legionnaires disease in Genesee County since last May.'" (App Vol 2, p 422a.) Governor Snyder awarded Flint an $8 million grant on February 3, 2015, including $2 million to be spent on improving the City's water system. (App Vol 2, p 422a.) That same month, Flint hired an international engineering firm, Veolia, "to provide additional review and recommendations on [its] water system." (App Vol 2, p 422a.)

Various Flint residents organized to "seek[ ] assistance with the growing major health impacts of the Flint River usage," and reached out to activist Erin Brockovich. (App Vol 1, p

135a.) On February 17, 2015, an engineering firm associated with Ms. Brockovich delivered its recommendations to Flint on how to improve its water quality. (App Vol 1, pp 152a–154a.) On that same day there were "public demonstrations demanding that Flint re-connect with DWSD." (App Vol 1, p 140a.) The U.S. EPA was "inundated" with complaints about Flint's water. (App Vol 2, p 423a.)

On February 25, 2015, the results of water lead testing the City performed at resident LeAnn Walters' home showed that the home had lead levels of 104 ppb, higher than the 15 ppb action level. (App Vol 2, p 422a.) Ms. Walters contacted the U.S. EPA about her water, and U.S. EPA staffers and DEQ staffers discussed the results internally. One DEQ staffer believed that because Flint's city-wide lead testing showed relatively low lead levels of 6 ppb, this house must have been an isolated example. (App Vol 2, pp 271a, 422a.)

Flint attempted to address citizens' complaints without switching back to DWSD. On March 3, 2015, the City convened a Technical Advisory Committee consisting of Veolia professionals and other water treatment and public health professionals from government and academia to inform Flint on how to address the public's water concerns. (App Vol 2, p 423a.) On March 5, 2015, Flint also convened a Citizens Advisory Committee, which had "58 members representing various interests." (App Vol 2, p 423a.) On March 12, 2015 Veolia issued its report on how to address Flint's problems with TTHM, discoloration, and other issues—but did not mention controlling for lead. (App Vol 2, p 423a.)

On March 23, 2015, Flint's City Council voted to return to DWSD, but Flint's emergency manager declined, stating: "It is incomprehensible to me that . . . Flint City Council would want to send more than $12 million a year to the system serving Southeast Michigan, even if Flint rate

payers could afford it. [Lake Huron] water from Detroit is no safer than water from Flint." (App Vol 2, pp 274a, 423a.)

Problems with lead persisted at Ms. Walters' home, with City testing showing water lead levels of 397 ppb. (App Vol 2, p 424a.) U.S. EPA staffers discussed the results with DEQ staffers. Through the course of those discussions, one U.S. EPA staffer, Miguel Del Toral, learned from DEQ that Flint was first conducting lead testing rather than immediately adding corrosion control treatment to its water, which was "very concerning given the likelihood of lead service lines in the city." (App Vol 2, p 424a.) Mr. Del Toral visited Ms. Walters' home on April 27, 2015 and provided her the contact information for Marc Edwards at Virginia Tech. (App Vol 2, p 425a.) Ms. Walters sent water samples to Mr. Edwards, and in May 2015 results showed high lead levels. (App Vol 2, p 425a.) On May 6, 2015, Flint replaced Ms. Walters lead service line under U.S. EPA supervision. (App Vol 2, p 425a.) By the time Flint convened its second Technical Advisory Committee meeting on May 20, 2015, "some attention [had] shifted to lead and copper concerns." (App Vol 2, p 425a.)

On June 5, 2015, Plaintiff Melissa Mays and attorney Trachelle Young, counsel in the instant case, filed the first of many lawsuits they have filed related to Flint's water problems. (App Vol 1, pp 128a–172a.) Plaintiff Mays signed the complaint on behalf of her organization, Water You Fight For, which was part of the Coalition for Clean Water that formed in response to Flint's water problems. (App Vol 1, pp 128a–129a.) Another member of the Coalition was the Flint Water Class Action Group. (App Vol 1, p 146a.) They filed suit against the City of Flint in Genesee County Circuit Court, alleging that the City had "misled the State" about its ability "to have the technical, financial and managerial capacity to provide safe drinking water when they switched from DWSD's lake treated water." (App Vol 1, p 140a.) As a result, they alleged,

members of their organizations had "suffered severe health problems that have been directly connected to the unhealthy, contaminated River water," and City residents "have complained of health issues as a result of lead" in the water. (App Vol 1, pp 134a–135a.)

On June 24, 2015, Mr. Del Toral sent Ms. Walters a memo he had drafted that suggested Flint's problem with lead was not localized, but widespread due to the absence of corrosion control treatment. (App Vol 2, p 426a.) Ms. Walters gave a copy of the memo to a reporter for the American Civil Liberties Union. (App Vol 2, p 426a.) The memo was also disseminated among City, DEQ, and U.S. EPA staff. (App Vol 2, pp 275a, 426a.) U.S. EPA staff communicated to DEQ staff that they were "concerned about the lead situation" in Flint but recognized that they were still awaiting results from Flint's second six-month round of monitoring. (App Vol 2, p 426a.) The U.S EPA's regional administrator assured Flint's mayor that the U.S. EPA would work with DEQ "on issues related to lead in water" but that "'it would be premature to draw any conclusions' based on" Mr. Del Toral's memo. (App Vol 2, p 426a.)

On July 7, 2015, Plaintiff Mays and Attorney Young amended their complaint against the City of Flint to incorporate parts of Mr. Del Toral's memo. (App Vol 1, p 187a.)[4] They indicated that "many of the Plaintiffs and their members live in homes with lead service lines or partial lead service lines," and alleged that by "adding ferric chloride to treat river water" without implementing "corrosion control treatment," the City was accelerating "the deterioration of the aged infrastructure and lead service lines" in the City but had "not been properly testing for high levels of lead and copper in the water." (App Vol 1, p 187a.)

On July 9, 2015, the American Civil Liberties Union published a news story discussing "concerns about lead in Flint's drinking water by detailing [Mr. Del Toral's memo], reporting the

[4] The City of Flint had removed the case to federal court.

high lead levels in LeAnne Walters's water, and exposing the lack of corrosion control in Flint drinking water treatment." (App Vol 2, p 426a.) Relying on the citywide lead testing Flint had performed up to that point, Mr. Wurfel stated in response to the story that "anyone who is concerned about lead in the drinking water in Flint can relax . . . it does not look like there is any broad problem with the water supply freeing up lead as it goes to homes." (App Vol 2, pp 234a, 427a.) On July 21, 2015, in internal discussion, U.S. EPA staffers urged DEQ staffers to require Flint to implement corrosion control treatment immediately, but DEQ staffers stuck to their earlier interpretation of the LCR, which was that implementing treatment without first testing for lead and performing a study would be "premature." (App Vol 2, p 427a.) By July 27, 2015, Flint had submitted the results of its second round of citywide lead testing, which showed that levels in the City had reached 11 ppb.[5] (App Vol 2, p 427a.) Because of the rising lead levels, DEQ staffers reversed their previous position, and drafted a letter requiring Flint to forego a study and implement corrosion control treatment as soon as possible—which was later sent out on August 17, 2015. (App Vol 2, p 427a; App Vol 3, pp 584a–585a.) Also in late July 2015, staffers within DHHS discussed the results of blood lead testing in Flint. One staffer suggested results "were unusually elevated in [the] summer [of] 2014." (App Vol 2, p 427a.) Another suggested that the that "pattern was not terribly different from what we saw in the previous three years." (App Vol 2, p 427a.)

On August 23, 2015, Mr. Edwards notified DEQ and the City of Flint that he planned to perform his own citywide testing of Flint's tap water for lead. (App Vol 2, p 428a.) On August 27, 2015, Mr. Edwards announced that preliminary results of his testing suggested that Flint had

[5] DEQ staffers removed two of Flint's samples from consideration because they did not comply with the LCR. The City's lead levels would have been higher than 11 ppb if those non-compliant samples had been included.

"a serious lead in water problem." (App Vol 2, p 428a.) Mr. Wurfel issued a press release in response, "disputing Edwards/VT's test result and conclusions about corrosion and lead leaching," but stating that "we want to be very clear that the lead levels being detected in Flint drinking water are not coming from the treatment plant or the city's transmission lines . . . the issue is how, or whether, and to what extent the drinking water is interacting with lead plumbing in people's homes." (App Vol 2, p 429a.)

In response to DEQ's August 17, 2015 letter requiring Flint to implement corrosion control as soon as possible, Flint's director of public works emailed DEQ on September 3, 2015 to announce that "Flint is in compliance with the [Safe Drinking Water Act]" and report that Flint had taken "160+ lead samples since [the] switch" to the Flint River and that results showed the City "remaine[ed] within EPA standards." (App Vol 2, p 429a.) He also indicated that Flint would have an "optimization plan" for corrosion control treatment "by 1/1/2016." (App Vol 2, p 429a.)

On September 8, 2015, Mr. Edwards published results of his tests and announced that "Flint has a very serious lead in water problem." (App Vol 2, p 429a.) Mr. Wurfel responded that Mr. Edwards' team had "only just arrived in town and (have) quickly proven the theory they set out to prove . . . offering broad, dire public health advice based on some quick testing could be seen as fanning political flames irresponsibly." (App Vol 2, p 429a.) Also on September 9, 2015, DHHS, "in response to media coverage of Edwards/VT's test results," began "to develop [an] educational program regarding reducing the risk of lead exposure for children." (App Vol 2, p 429a.) On September 15, 2015, Mr. Edwards reported that Flint's official citywide lead testing "cannot be trusted" because of flaws in the ways the tests were performed. (App Vol 2, p 430a.)

Mr. Wurfel responded that lead in water systems "isn't new," it is "just news (now, and) a knee-jerk reaction would be an irresponsible response." (App Vol 2, p 430a.)

On September 21, 2015, Dr. Mona Hanna-Attisha presented research on elevated blood lead levels in Flint children to the Genesee Flint Health Coalition. (App Vol 2, p 430a.) That same day, the coalition met with Flint's mayor and other leaders and requested that the City issue a health advisory. (App Vol 2, p 430a.) Mayor Walling agreed to issue a health advisory "and promote ways to minimize residents' exposure to lead," but he and Flint's administrator insisted "that a return to purchasing water from Detroit would bankrupt the city." (App Vol 2, p 430a.) On September 24, 2015, the Genesee Flint Health Coalition and the Genesee County Medical Society held a press conference with Dr. Hanna-Attisha to announce "elevated blood lead levels in Flint children." (App Vol 2, p 431a.) Mr. Wurfel responded to the findings as "unfortunate." (App Vol 2, p 431a.) On September 25, 2015, the Genesee County Health Department and the City of Flint issued "a lead advisory for residents to be aware of lead levels in drinking water." (App Vol 2, p 431a.) On September 29, 2015, Genesee County also issued a "public health advisory for people using water supplied by [the] Flint system." (App Vol 2, p 432a.)

On October 1, 2015, the State's Chief Medical Executive with DHHS announced that "[a]fter a comprehensive and detailed review down to the zip code level, we have found that the state analysis is consistent with that presented by" Dr. Hanna-Attisha. (App Vol 2, p 433a.) The next day, former Governor Snyder held a press conference in Flint at which he announced a 10-part plan to address Flint's water issues. The plan included expanding water testing in homes and schools, free water filters, accelerating corrosion control in Flint's water system, boosting lead education programs, expanding a technical advisory group to examine and address the issue, and implementing a lead line replacement program. (App Vol 2, p 433a.) By October 7, 2015,

the State Budget Office had located $10.5 million in funds immediately available to implement the Governor's plan. (App Vol 2, p 433a.) On October 14, 2015, the Legislature appropriated an additional $9.35 million to provide water filters, place additional staff in Flint schools, and reconnect Flint to DWSD. 2015 PA 143. On October 16, 2015, Flint reconnected to DWSD. (App Vol 2, p 433a.)

IV. Plaintiffs have filed several lawsuits, not just this one.

On October 18, 2015, DEQ director Dan Wyant announced that "his office was mistaken in how it interpreted federal rules governing corrosion control for water systems the size of Flint." (App Vol 2, p 434a.) But on November 3, 2015, the U.S. EPA issued a memo confirming that DEQ's interpretation of the Lead and Copper Rule was actually one of the possible interpretations of that rule.[6] (App Vol 2, p 434a.) On November 12, 2015, it came to light that even though at the time Flint certified that the lead samples it submitted were in compliance, a Flint official confessed that the water samples he had submitted to DEQ for lead testing after the switch to the Flint River were not actually taken in compliance with the Lead and Copper Rule. (App Vol 2, p 435a.)

On November 13, 2015, Plaintiffs and Attorney Young, joined by additional plaintiffs and attorneys, filed a federal lawsuit against Flint, Flint officials, the State, Brad Wurfel, and other DEQ staffers. (App Vol 3, pp 586a–649a.) The suit is ongoing and is a claim for damages under 42 USC 1983 based on the same constitutional claims at issue in the instant case and for prospective relief to repair property and provide medical monitoring. On January 19, 2016, Plaintiffs and Attorney Young filed another lawsuit, this time in Genesee County Circuit Court.

[6] https://www.epa.gov/sites/production/files/2015-11/documents/occt_req_memo_signed_pg_2015-11-03-155158_508.pdf

(App Vol 3, pp 650a–689a.) The suit is ongoing and is against the City of Flint, city employees, Mr. Wurfel, and several other state employees alleging common law tort claims. On January 27, 2016, Plaintiff Mays joined the Natural Resources Defense Counsel and other plaintiffs to sue several state officials and the City of Flint under the Safe Drinking Water Act. (App Vol 4, pp 690a–747a.) That lawsuit reached a mediated resolution in which the City of Flint agreed to replace lead service lines within the City using state and federal funds. Those replacements are scheduled to be complete by the fall of 2019. On October 14, 2016, Plaintiff Mays and Attorney Young filed a tort claim with the U.S. EPA under the Federal Tort Claims Act, which they followed up with a lawsuit against the U.S. EPA on April 18, 2017. (App Vol 4, pp 748a–784a.)

V. Proceedings in this case.

Plaintiff Mays and Attorney Young, along with additional plaintiffs and attorneys, filed the instant case on January 21, 2016 in the Court of Claims.[7] On April 4, 2016, the State, former Governor Snyder, the Department of Environmental Quality, and the Department of Health and Human Services moved to dismiss the complaint under MCR 2.116(C)(4), (C)(7), and (C)(8). Rather than respond, Plaintiffs filed their first amended complaint on May 25, 2016. State Defendants again filed a motion for summary disposition under MCR 2.116(C)(4), (C)(7), and (C)(8) on June 24, 2016. The Court of Claims granted in part and denied in part State Defendants' motion on October 26, 2016, ultimately allowing virtually all of Plaintiffs' claims to proceed. (App Vol 1, pp 025a–074a.) State Defendants filed a claim of appeal on November 4,

[7] The complaint has contradictory stamps: one shows that the Court of Claims received the complaint on January 15, 2016, but the rest show that the court received it on either January 20 or 21, 2016. The summons indicates that it was issued on January 21, 2016 and the Court of Claims' docket sheet shows that it received the complaint on January 21, 2016, so that is the date used here.

2016 and application for leave to appeal on November 16, 2016. The Court of Appeals consolidated the appeals, along with two corollary appeals by Flint's former emergency managers, on December 21, 2016.

The Court of Appeals heard arguments on January 9, 2018. On January 25, 2018, the Court of Appeals issued a majority opinion authored by Judge Jansen and joined by Judge Fort Hood that largely affirmed the Court of Claims. (App Vol 1, pp 075a–115a.) Judge Riordan issued a dissenting opinion. (App Vol 1, pp 116a–127a.) State Defendants filed a timely application for leave to appeal the Court of Appeals' opinion to this Court on March 8, 2018. This Court granted the application on May 22, 2019.

STANDARD OF REVIEW

An error committed by the Court of Claims and perpetuated by the Court of Appeals was to treat State Defendants' motion as if it was solely on the pleadings under MCR 2.116(C)(8). It was not. It also sought dismissal of Plaintiffs' complaint under MCR 2.116(C)(7) for failure to plead in avoidance of State Defendants' immunity. This Court reviews the Court of Appeals' ruling de novo, and under MCR 2.116(C)(7), it reviews the entire record and accepts as true only well-pleaded allegations that are not contradicted by the record. *Maiden v Rozwood*, 461 Mich 109, 119 (1999); MCR 2.116(G)(5). In this case, many of Plaintiffs' allegations are contradicted by the very documentation they attached to their complaint.

ARGUMENT

I. Plaintiffs failed to plead constitutional claims in avoidance of State Defendants' immunity.

Plaintiffs sued former Governor Snyder, the State of Michigan, the Department of Environmental Quality, and the Department of Health and Human Services for damages. Former

Governor Snyder is immune to tort liability under MCL 691.1407(5). And the state institutions are immune to tort liability under MCL 691.1407(1). This immunity is a "characteristic of government," so Plaintiffs must plead in avoidance of that immunity for their case to proceed. *Mack v City of Detroit*, 467 Mich 186, 198 (2002). Plaintiffs rely on two exceptions to that immunity based on the Michigan Constitution. First, Plaintiffs allege that they can bring a personal injury claim against State Defendants for the violation of their bodily integrity based on the substantive protections of the due process clause in Article 1, Section 17 of the Michigan Constitution. This Court has not recognized this type of claim against individuals, but for state institutions the Court has recognized the possibility of a tort claim arising from the Michigan Constitution under certain circumstances. *Smith v Dep't of Pub Health*, 428 Mich 540, 544 (1987). Those circumstances do not exist here. And second, Plaintiffs allege that they can bring property damage, or inverse condemnation, claims against State Defendants based on the eminent domain clause in Article 10, Section 2 of the Michigan Constitution. This Court has recognized such a claim as an exception to immunity. *Gerzeski v State*, 403 Mich 149, 167 (1978). But Plaintiffs fail to satisfy the elements of an inverse condemnation claim. Because Plaintiffs failed to plead a claim in avoidance of State Defendants' immunity, the Court of Appeals erred by allowing Plaintiffs' suit to continue. This Court should reverse.

A. Plaintiffs cannot proceed with a bodily integrity claim because they cannot demonstrate an unconstitutional act by the state for which a damage remedy is proper.

In *Smith*, this Court indicated that "governmental immunity is not available in a state court action" where "it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution." *Smith*, 428 Mich at 544. Four justices could not agree on any additional guidance for that holding. But Justice Boyle, joined by Justice Cavanagh,

wrote an opinion providing analysis. *Id*. at 637–652. Courts, including this one, have looked to Justice Boyle's opinion for guidance on how to implement the holding in *Smith*. See *Jones v Powell*, 462 Mich 329, 336 (2000); *Marlin v City of Detroit*, 205 Mich App 335, 337 (1994); *Reid v State of Michigan*, 239 Mich App 621, 628 (2000). As Justice Boyle put it, immunity does not shield the State if "the plaintiff proves an unconstitutional act by the state which is otherwise appropriate for a damage remedy." *Smith*, 428 Mich at 640. In this case, Plaintiffs cannot show that it was the *State* that acted rather than state employees, nor can they show that a damage remedy is appropriate in this case.

1. A state custom or policy did not mandate the alleged violation of Plaintiffs' bodily integrity.

Justice Boyle noted the difference between the State's "direct liability from the agency's *own acts*" and "vicarious liability for the acts of its employees." *Smith*, 428 Mich at 642 (emphasis added). She concluded that "statutory immunity would continue to bar suit for cases" where the "liability of the state is based upon respondeat superior," or the acts of state employees. *Id*. at 643. The way to distinguish the government's "own acts" from the "acts of its employees" is to show that "a state 'custom or policy' *mandated* the . . . employee's actions" that allegedly caused the constitutional violation. *Id*. at 642 (emphasis added). The standard articulated in *Monell v Department of Social Services of City of New York*, 436 US 658 (1978), which is used to determine when individuals can sue municipalities under 42 USC 1983, is used to determine when a custom or policy has "mandated" the employee's actions for the purposes of pleading a constitutional tort in avoidance of the State's immunity. *Smith*, 428 Mich at 642–643.

The Court of Appeals has adopted and applied this portion of Justice Boyle's opinion into Michigan's caselaw. *Marlin v City of Detroit*, 205 Mich App 335, 337 (1994); *Johnson v Wayne*

Co, 213 Mich App 143, 156 (1995); *Carlton v Dep't of Corrections*, 215 Mich App 490, 504–505 (1996); *Reid v State of Michigan*, 239 Mich App 621, 628 (2000). The law binding both the Court of Claims and the Court of Appeals below was that "the state will be liable for a violation of the state constitution *only* in cases where a state custom or policy *mandated* the official's or employee's actions,"—which is determined using the *Monell* standard. *Reid*, 239 Mich App at 628–629 (J. Jansen) (emphasis added). The Court of Appeals below did not follow the *Monell* standard.

The heart of the *Monell* analysis requires a person to "show that the [institutional] action was *taken with the requisite degree of culpability* and must demonstrate *a direct causal link* between the [institutional] action and the deprivation of federal rights." *Bd of Co Comm'rs of Bryan Co, Ok v Brown*, 520 US 397, 404 (1997) (emphasis added). But there is a preliminary step in cases, like this one, where a person wishes to designate the decision of an official policymaker, as opposed to a formally adopted rule, as the state "custom or policy" that caused their alleged injuries. The person must identify the policymaker's choice and show that the choice was "a deliberate choice to follow a course of action" that was "made from among various alternatives by the official . . . responsible for establishing final policy with respect to the subject matter in question." *Pembaur v City of Cincinnati*, 475 US 469 (1986). Determining whether the official had policymaking authority in the relevant area "is a question of state law." *City of St Louis v Praprotnik*, 485 US 112, 124 (1988).

When the Court of Appeals below concluded—incorrectly—that Plaintiffs had satisfied *Pembaur*, it ended its analysis. (App Vol 1, pp 101a–102a.) That was clear error. Because even if persons satisfy their burden under *Pembaur*, they *still* must plead facts showing both that the institution is at "fault" for the policy or custom, and the policy or custom "caus[ed]" their

constitutional injury. See *Johnson v Vanderkooi*, 502 Mich 751, 780 (2018), citing *Brown*, 520 US at 404–405. If a plaintiff cannot establish both, then it does not matter if they satisfy *Pembaur*, they cannot meet their *Monell* burden.

a. Plaintiffs do not meet the requirements of *Pembaur*.

The Court of Appeals relied entirely, and incorrectly, on *Pembaur* to determine if Plaintiffs had satisfied their *Monell* burden. (App Vol 1, pp 101a–102a.) In *Pembaur*, under state law, the county prosecutor was the final decisionmaker responsible for establishing the county's policies for how deputy sheriffs served capiases. *Pembaur*, 475 US at 484. When a business refused to let deputies enter to serve capiases, the deputies contacted the prosecutor's office, and the prosecutor directed the deputies to violate the persons' Fourth Amendment rights by forcing their way into the business. *Id*. Since the person who ordered the violation of rights was the final policy maker in the relevant area, the Court considered the policy maker's decision an act of the government. *Id*. at 485.

Here, the Court of Appeals concluded that "Plaintiffs allege that various aspects of Flint's participation in the KWA project and the interim plan to provide Flint residents with Flint River water during the transition were approved and implemented by the Governor, the State Treasurer, the emergency managers, and other state officials, including officials employed by the DEQ." (App Vol 1, p 102a.) (emphasis added). That statement is not accurate and would not satisfy *Pembaur* even if it were. The constitutional tort Plaintiffs allege is the "expos[ure] . . . to toxic water," not Flint's participation in the KWA. (App Vol 2, pp 284a–285a.) The Court of Appeals identified no state law making former Governor Snyder, the State, or the Department of Health and Human Services the final policymaker for how Flint treated its water. Instead, the "the official or officials responsible under state law for making policy" for municipal water

treatment, *Praprotnik*, 485 US at 123–124, were the managers of Flint's water system and the director of the DEQ. MCL 325.1001 *et seq*. But Plaintiffs do not plead facts showing that former Director Wyant ordered Flint to expose Plaintiffs to toxic water, such as the county prosecutor in *Pembaur* who ordered the deputies to force their way into a business. Since Plaintiffs seek to rely on the discrete decisions of policymakers to satisfy their *Monell* burden, and they do not satisfy the *Pembaur* requirements for doing so, the Court of Appeals should have dismissed their constitutional tort claims.

b. Plaintiffs fail to satisfy the fault and causation components of their *Monell* burden.

As noted above, even if Plaintiffs could satisfy *Pembaur*, they still "must show that the [institutional] action was *taken with the requisite degree of culpability* and must demonstrate *a direct causal link* between the [institutional] action and the deprivation of federal rights." *Brown*, 520 US at 404 (emphasis added). It is not enough that a custom or policy "played a role" as the Court of Appeals erroneously concluded. (App Vol 1, p 102a.) "Obviously, if one retreats far enough from a constitutional violation some [institutional] 'policy' can be identified behind almost any . . . harm inflicted by [an institution's] official." *City of Canton, Ohio v Harris*, 489 US 378, 390, n 9 (1989) (citation omitted). That is why *Monell* is "only" satisfied "where [an institution's] policies are the moving force behind the constitutional violation." *York v City of Detroit*, 438 Mich 744, 755 (1991) (citation omitted). Plaintiffs cannot satisfy the fault and causation components of their *Monell* burden.

i. Neither the State, the DEQ, nor the DHHS directed the alleged invasion of Plaintiffs' bodily integrity.

When a policy directs the violation of rights, resolving "issues of fault and causation is straightforward." *Brown*, 520 US at 404. For example, the policy at issue in *Monell* was a rule that pregnant city employees were required to take an unpaid leave of absence once they reached five months of pregnancy, whether the leave was medically necessary or not. *Monell*, 436 US at 661. The institution's rule *directed* managers to discriminate against their pregnant employees. Similarly, in *Pembaur*, the county prosecutor *directed* the deputies to force their way into the business. *Id.* at 475 US at 484. That is why both "fault" and "causation" were plainly established in *Pembaur*. *Brown*, 520 US at 406. This Court also recently held that where an institution's policy or custom expressly authorizes its employees to violate the constitution, the policy can satisfy the fault and causation prongs of the *Monell* burden. *Johnson*, 502 Mich at 769.

Plaintiffs' claims do not fall into this category. Plaintiffs allege that the way the State, the DEQ, and the DHHS "breached [their] constitutionally protected bodily integrity" was by "deliberately and knowingly . . . creating and perpetuating the ongoing exposure to contaminated water," or "exposing" them "to toxic water." (App Vol 2, pp 284a–285a.) But Plaintiffs do not identify a "custom or policy" that "mandated" that Plaintiffs be exposed to toxic water. There is no written policy or official directive from the State, DHHS, or DEQ directing the City of Flint to deliver toxic water to its residents, such as the rule in *Monell* mandating discrimination, or the mandate in *Pembaur* ordering the constitutional violation.

The most Plaintiffs allege is a conclusory statement that "officials" within those institutions acted "pursuant to customs, policies and/or practices." (App Vol 2, pp 257a–258a, 282a–283a.) But the Supreme Court has held that a "bald allegation" that they were injured by

an official who was "acting pursuant" to a custom or policy falls far short of satisfying the *Monell* standard. *Polk Co v Dodson*, 454 US 312, 326 (1981). Indeed, Plaintiffs' bald allegations fall short even of Michigan's lenient pleading standards because "conclusory statements that are unsupported by allegations of fact on which they may be based will not suffice to state a cause of action." *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 63 (2014). This is particularly true when a plaintiff, like these Plaintiffs, has the burden of pleading "*facts* in avoidance of immunity." *Mack*, 467 Mich at 199 (citation omitted, emphasis added). The State, the DEQ, and the DHHS thus retain their immunity because Plaintiffs do not plead *facts* showing that the *agencies*, as opposed to state employees, "mandated" that Plaintiffs be exposed to toxic water. *Smith*, 428 Mich at 642.

ii. There is no pattern showing that the State, the DEQ, or the DHHS were "deliberately" indifferent to the alleged invasion of Plaintiffs' bodily integrity.

Where an institution does not direct the violation of rights, a plaintiff can still satisfy their *Monell* burden by showing that the institution's "deliberate" indifference violated their rights. *Brown*, 520 US at 406–407, discussing *City of Canton, Ohio v Harris*, 489 US 378, 390 (1989). The connection between a violation of rights and an institution's responsibility for that violation is "at its most tenuous" in this context. *Connick v Thompson*, 563 US 51, 61 (2011). Which is why this approach "present[s] much more difficult problems of proof." *Brown*, 520 US at 406. A plaintiff still must establish the "fault and causation" required by *Monell*—which is a "stringent" standard. *Id*. at 407–414. Courts must take care to "to adhere to rigorous requirements of culpability and causation" in this context to ensure that institutional liability does not "collapse[ ] into *respondeat superior* liability." *Id*. at 415.

To satisfy the fault and causation elements required by *Monell*, plaintiffs "ordinarily" must demonstrate a "pattern of similar constitutional violations." *Connick*, 563 US at 62, citing *Brown*, 520 US at 406. But the "custom or policy" under *Monell* still must "be so permanent and well settled as to constitute a custom or usage with the force of law." *Monell*, 426 US at 691. For example, if an institution knows that a training program that applies "over time to multiple employees" has repeatedly failed to "prevent constitutional violations" by employees, then the institution's choice not to improve the program could be considered a deliberate choice to allow the violation of rights, and thus a custom or policy under *Monell*. *Brown*, 520 US at 407–408. In other words, because the institution knew that the training program was deficient, it was *culpable*; and its decision not to improve the program despite its knowledge that its employees would continue violating rights, means that the institution *caused* the violations. See *id*. "'Deliberate indifference' in this context does not mean a collection of sloppy, or even reckless, oversights; it means evidence showing an *obvious, deliberate* indifference" to the invasion of rights. *Doe v Claiborne Co, Tenn By & Through Claiborne Co Bd of Ed*, 103 F3d 495, 508 (CA 6, 1996) (emphasis added).

Neither the Court of Claims nor the Court of Appeals below found any pattern of similar constitutional violations where persons had repeatedly been exposed to toxic water because state regulators had received poor training, such that the need for the State, the DEQ, or the DHHS to change its training or other policies was "plainly obvious." *City of Canton, Ohio v Harris*, 489 US 378, 390, n 10 (1989). Plaintiffs in this case do not allege any such pattern.

iii. Plaintiffs do not satisfy the exception to the pattern requirement.

There is an exception to the pattern requirement, but it does not apply here. In *City of Canton*, the Supreme Court left open "the possibility that evidence of a single violation of federal rights, accompanied by a showing that [an institution] has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger [institutional] liability" under *Monell*. *Brown*, 520 US at 409, discussing *City of Canton*, 489 US at 390, n 10. In other words, if there is "moral certainty" that an employee will violate the constitution in a particular situation without proper training, then a pattern is not necessary. *City of Canton*, 489 US at 390, n 10. For example, if a government gives a police officer a gun without training her when it would be constitutionally permissible to use it, the government could be "deliberate[ly]" indifferent to the violation of rights. *Id*. Plaintiffs do not satisfy this exception to the pattern requirement.

As noted above, Plaintiffs do not allege that the State, DEQ, or DHHS failed to train its employees. Instead, it appears Plaintiffs wish to apply the "failure-to-train" precedent in a new context. They apparently argue that the State, DEQ, and DHHS are directly liable for the acts of state employees because the institutions did not *override* the decisions of those state employees. To apply the *Monell* no-pattern exception in a new context, Plaintiffs must show that their *specific* injuries—not just the violation of rights in general—were the "plainly obvious" result—not just a possible result—of the institution's decision not to override its employees. *Brown*, 520 US at 411–412 (discussing the potential application of the no-pattern exception to a new context). That is, Plaintiffs must show that the State, DEQ, or DHHS knew to a "moral certainty" that the institutions' decision not to override their employees would directly cause

Plaintiffs' specific alleged injuries. See *City of Canton*, 489 US at 390, n 10. They cannot do that.

As noted above, water treatment is complex and changes depending on the characteristics of each system. (See above, pp 3–4). In this case, DEQ employees interpreted the Lead and Copper Rule in a textually permissible manner, even if it was not ideal, and there were conflicting professional opinions on the best way for Flint to address its water problems. (See above, pp 8–17.) As for the State, the briefs sent to former Governor Snyder on Flint's water problems did not initially mention lead issues, (App Vol 2, p 420a), and later indicated that Flint was "complying with [the] LCR" by testing for lead and that "elevated blood lead levels" in Flint were "seasonal." (App Vol 2, p 426a.) Flint assured the Governor's staff that Flint's water problems could be fixed. (App Vol 2, p 420a.) As for DHHS, the Chief Medical Officer for DHHS *agreed* on October 1, 2015 with the Hurley Medical Center's September 24, 2015 analysis of the rise of blood lead levels in Flint. (See above, p 16.)

If anything, the prevailing theme of this record is *uncertainty*, not the "moral certainty" required for this type of *Monell* claim. See *City of Canton*, 489 US at 390, n 10. When exploring the outer perimeter of *Monell* liability, Courts must take care to "to adhere to rigorous requirements of culpability and causation" to ensure that institutional liability does not "collapse[ ] into *respondeat superior* liability." *Brown*, 520 US at 415. Here, Plaintiffs fail to demonstrate that their specific alleged injuries were the plainly obvious and direct result of the State, DEQ, or DHHS' decision not to override state employees. *Brown*, 520 US at 411–412. Nor do they explain what an "override" would entail or how it would have prevented their alleged injuries. Since Plaintiffs fail to satisfy their *Monell* burden, "statutory immunity . . . continue[s] to bar" their suit. *Smith*, 428 Mich at 642–643.

c. Under *Monell*, the decisions of Flint's emergency managers would be attributable to the City of Flint, not to the State.

The discussion above focuses on decisions of former Governor Snyder and DEQ and DHHS employees. But Plaintiffs also allege that the actions of Flint's emergency managers should be attributed to the State for *Monell* purposes. (See, e.g., App Vol 2, p 282a.) They are wrong. It is not clear the extent to which either the Court of Claims or the Court of Appeals below relied on decisions by emergency managers to support their rulings recognizing a *Monell*-type claim against the State, because both courts repeatedly refer only to "defendants" with virtually no citations to the record. But the courts below erred to the extent they relied on the emergency managers to support their rulings against the State.

Under *Monell*, an official's actions "in a particular area" can only be attributed to either the state or a municipality—not both. *McMillian v Monroe Co, Ala*, 520 US 781, 785 (1997). Importantly, "simply labeling [the official] as a state official" does not resolve the issue. *Id*. at 786. It does not matter that the Court of Appeals below determined that the emergency managers were state officials for the purposes of the Court of Claims' jurisdiction. (App Vol 1, pp 092a–097a.) The *Monell* analysis is different. It requires looking beyond labels to examine "the official's functions under relevant state law" to determine if the official is setting local policy in the relevant area even if labeled a state official. *McMillian,* 520 US at 786.

In one of the federal courts handling cases related to Flint's water problems, the City of Flint moved to dismiss the *Monell* claims against it by arguing that its emergency managers were making state policy, not city policy. In a thorough analysis, the court rejected that theory. (App Vol 4, pp 792a–802a.) It analyzed the Local Financial Stability and Choice Act, MCL 141.1451 *et seq*., which outlines the duties of emergency managers, and examined the provisions explicitly stating that emergency managers "act for and in the place and stead of the governing body and

the office of chief administrative officer of the local government." (App Vol 4, pp 796a–797a.) Accordingly, the decisions of the emergency managers could give rise to a *Monell* claim against the City of Flint. (App Vol 4, p 797a.) That means those decisions could *not* give rise to a *Monell* claim against the State. *McMillian*, 520 US at 785. The court observed that it was "not a difficult question." (App Vol 4, p 797a.)

2. The Court cannot unilaterally create a remedy against State Defendants in this case without violating the separation of powers.

Even if Plaintiffs meet their *Monell* burden, State Defendants retain their immunity because it is not appropriate for the Court to unilaterally create a potentially multi-billion dollar remedy in this case. See *Smith*, 428 Mich at 640 (Boyle, J, concurring). The robust body of *Bivens* caselaw, along with the guidance provided by Justice Boyle, outlines the analysis of a damage remedy. *Smith*, 428 Mich at 644–648, discussing *Bivens v Six Unknown Named Agents of Fed Bureau of Narcotics*, 403 US 388 (1971). This Court should not unilaterally create a damage remedy because the substantive due process clause is vague and Plaintiffs have not satisfied it; Plaintiffs already have many existing remedies; and creating a remedy here would violate the separation of powers doctrine.

a. Substantive due process is a notoriously vague doctrine and Plaintiffs have not satisfied its requirements.

Plaintiffs allege a violation of a substantive due process right to bodily integrity under Article 1, Section 17 of the Michigan Constitution. (App Vol 2, pp 284a–285a.) Justice Boyle noted that the "degree of specificity of the constitutional protection" is a key factor to consider when weighing the unilateral creation of a damages remedy against the State. *Smith*, 428 Mich at 651. Here, the substantive due process clause is exceptionally vague. Indeed, Justice Boyle

observed that the "substantive guarantees of due process and equal protection are troubling in their indeterminate character," and "courts have struggled with the question [of] what constitutes a violation of due process." *Id.* at 651, 649 (J. Boyle) (emphasis added) (citations omitted). Because of that, Justice Brickley concluded that "we should defer to the Legislature the question whether to create a damages remedy for violations of a plaintiff's rights to due process . . . ." *Smith*, 428 Mich at 632 (Brickley, J.). See also *Guertin v Michigan*, 924 F3d 309, 312 (CA 6, 2019) ("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.") (Sutton, concurring); *Guertin*, 924 F3d 309, 315–316 (substantive due process is "the vaguest of constitutional doctrines," such that "its 'contours' are shapeless rather than crisp, subjective rather than objective, unknowable until judicially announced") (Kethledge, dissenting).

As the Court of Appeals observed below, there is no "Michigan appellate decision expressly recognizing . . . a stand-alone constitutional tort for violation of the right to bodily integrity." (App Vol 1, p 103a.) Michigan courts generally treat the state's due process clause as "coextensive" with that in the federal constitution. See *Cummins v Robinson Twp*, 283 Mich App 667, 700–701 (2009). Yet even under federal law, the due process clause "does not transform every tort committed by a state actor into a constitutional violation." *DeShaney v Winnebago Co Dep't of Social Servs*, 489 US 189, 202 (1989). The clause does not "supplant traditional tort law," nor is it intended to be a "font of tort law . . . superimposed upon whatever systems may already be administered by the States." *Co of Sacramento v Lewis*, 523 US 833, 848 (1998) (citations omitted). Instead, Plaintiffs must establish that the actions of which they complain violate either a "constitutionally protected" or "fundamental" right. *Range v Douglas*,

763 F3d 573, 591–92 (CA 6, 2014). Plaintiffs cannot establish any fundamental right that has been violated.

Federal courts recognize a substantive due process right to bodily integrity, *Albright v Oliver*, 510 US 266, 272 (1994), but they have not recognized any right to contaminant-free water. The few courts that have considered that or similar claims—none of which are in Michigan—have rejected the argument. *Coshow v City of Escondido*, 132 Cal App 4th 687, 709 (2005) (no constitutional right to pure drinking water); *Pinkney v Ohio Environmental Protection Agency*, 375 F Supp 305, 310 (ND Ohio, 1974) (no constitutional right to a healthful environment). As the court in *Coshow* explained, relying on federal authority, "the right to bodily integrity is not coextensive with the right to be free from the introduction of an allegedly contaminated substance in the public drinking water." *Coshow*, 132 Cal App 4th at 709.[8]

The Court of Appeals improperly distinguished *Coshow* from this case based on the type of "contaminant," because fluoride was at issue in *Coshow*. (App Vol 1, pp 100a–101a.) But the plaintiff in *Coshow* alleged that fluoride contained "lead[9] and arsenic" and could cause "permanent dental scarring, genetic damage, [and] cancer." *Coshow*, 132 Cal App 4th at 699–700. The court observed that the "mere novelty of claiming a fundamental right to public drinking water free of fluoride is sufficient to create a doubt whether such a right is protected by substantive due process because it is not 'so rooted in the traditions and conscience of our people

[8] The U.S. Court of Appeals for the Sixth Circuit has recognized a bodily integrity claim based on substantive due process in a Flint water case, but that case was based solely on the pleadings rather than the more robust record available in this case. Even then, the high-level state officials were dismissed. Also, that case will be appealed to the U.S. Supreme Court. *Guertin v State*, 912 F3d 907 (CA 6, 2019).

[9] Indeed, the city of Sandy, Utah recently added too much fluoride to its water system, sending the city's lead levels to 394 ppb—which is 15 times higher than Flint's lead levels at any time during the water emergency. https://www.deseretnews.com/article/900056140/utah-city-delayed-notifying-state-public-of-contamination-water.html (last accessed July 23, 2019).

as to be ranked as fundamental.'" *Id*. at 709, quoting *United States v Salerno*, 481 US 739, 751 (1987). Though it is not a Michigan case, *Coshow* is instructive because it addressed the type of right Plaintiffs claim here and rejected it.

Nor can Plaintiffs satisfy a substantive due process violation based on the "shocks the conscience" test. Substantive due process does *not* "offer recourse for every wrongful action taken by the government." *Range*, 763 F3d at 589. Rather, the "'shocks the conscience' standard sets a high bar: '[s]ubstantive due process affords only those protections so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id*. To be "conscience shocking," a person's conduct generally must be "'intended to injure.'" *Id*. at 590. Here, Plaintiffs do not allege any action by the State that was "intended to injure." Instead, Plaintiffs assert that DEQ employees inadequately reviewed Flint's decision to use the Flint River as a source of drinking water and did not more aggressively regulate the City of Flint. But such conduct does not meet the *Range* standard.

In short, Plaintiffs' claims may sound in tort, but they have failed to show that Michigan courts should constitutionalize their alleged "violation of bodily integrity." This Court, for good reason, is as reluctant as the U.S. Supreme Court to expand the concept of substantive due process "because guideposts for responsible decision-making in this unchartered area are scarce and open-ended." *Collins v City of Harker Hts, Tex*, 503 US 115, 125 (1992); *People v Sierb*, 456 Mich 519, 523 (1998). This Court should reverse the Court of Appeals' unfounded conclusion that Plaintiffs can establish a constitutional violation in this case.

b. There are multiple remedies available to meaningfully redress the injuries Plaintiffs allege.

This Court has confirmed that a constitutional tort can "only" be pursued "on the basis of the *unavailability of any other remedy*." *Jones*, 462 Mich at 337 (emphasis added). In other words, before courts unilaterally create a remedy, a person should need to show, among other things, that they face the "stark picture" of getting "damages or nothing." *Smith*, 428 Mich at 647 (Boyle, J.), quoting *Bivens*, 403 US at 410 (Harlan, J., concurring). This factor should have ended Plaintiffs' constitutional tort claim.

There are multiple, well-worn methods by which Plaintiffs can pursue damages and other relief for the injuries they allege. They can pursue common-law tort claims against the state employees they allege caused their injuries, seek damages from the U.S. EPA under the Federal Tort Claims Act, seek injunctive relief under the federal Safe Drinking Water Act, seek prospective injunctive relief against sitting state officials, and seek damages from the state employees they allege violated the very constitutional rights they allege were violated in this case. Plaintiffs have done all those things. (App Vol 1, pp 128a–206a; App Vol 3, pp 586a–689a; App Vol 4, pp 690a–784a.) Plaintiffs *do not* find themselves without a remedy.

That should have ended the analysis, but the Court of Appeals avoided dismissal by asking whether Plaintiffs could seek damages "against these specific defendants" in another court, and whether Plaintiffs will prevail in their various other suits. (App Vol 1, p 103a.) Since the State and its agencies are generally immune to tort claims in both state and federal court and it is not clear whether Plaintiffs will prevail in their other suits, the Court of Appeals decided that the availability of other remedies was no reason not to unilaterally create a potentially multi-billion-dollar damages claim against the State and its agencies. (App Vol 1, pp 103a–106a.) That is the wrong analysis.

The State will almost always be immune in state and federal court, and it will rarely be certain that a person will prevail in an ongoing lawsuit, so the factors created by the Court of Appeals do not serve a limiting function, and certainly do nothing to ensure that a *Smith* action remains "a narrow remedy against the state," as this Court anticipated in *Jones*. *Jones*, 462 Mich at 337. The correct alternative-remedy analysis focuses on the "interest" the plaintiff seeks to vindicate and whether there is already an "existing process for protecting the interest." *Wilkie v Robbins*, 551 US 537, 550 (2007).

The U.S. Supreme Court has declined to create a remedy in every *Bivens* case it has considered since 1983. Of those nine cases, it declined to create a remedy in six of them because there was already a system in place to meaningfully redress the person's alleged injury. *Bush v Lucas*, 462 US 367, 386 (1983) (even though it did not "provide complete relief," civil service system already provided "meaningful remedies," including back pay, so there was no need to also create a cause of action for federal employee to sue supervisor for First Amendment violation); *Chappell v Wallace*, 462 US 296, 303 (1983) (Navy had administrative procedures to address mistreatment by superior officers, including retroactive pay and promotion, so no need to create a cause of action for sailors to directly sue superior officers for Equal Protection violations); *Schweiker v Chilicky*, 487 US 412, 425 (1988) (even though the Social Security system did not "provide complete relief" and some constitutional injuries would go "unredressed," the system still provided "meaningful . . . remedies" such that it was unnecessary to create a cause of action to sue officials for Fifth Amendment violations); *Correctional Servs Corp v Malesko*, 534 US 61, 72–73 (2001) (plaintiff could file state tort claim, seek federal injunctive relief, and file administrative grievance, so no need to create a cause of action to sue private prison operator for Eighth Amendment violation); *Minneci v Pollard*, 565 US 118, 125–

126 (2012) (state tort law "provides an alternative, existing process" to protect the interests at stake, so no need to create a cause of action to sue employee of private prison operator for Eighth Amendment violation) (citation omitted); *Ziglar v Abbasi*, 137 S Ct 1843, 1863 (2017) (habeas petition and injunctive relief adequately redress the "conditions of confinement" interest, so no need to create causes of action under Fourth or Fifth Amendments).

In this case, there are several existing ways Plaintiffs can seek redress for their alleged injuries. There is no gap to fill in this case, such as there was in *Bivens*. See *Bivens*, 403 US at 410. The Court of Appeals should have dismissed Plaintiffs' constitutional tort claim.

c. Creating a remedy in this case would violate the separation of powers doctrine.

In Michigan, the separation of powers doctrine is that the "powers of government are divided into three branches," and no "person exercising powers of one branch shall exercise powers properly belonging to another branch." Const 1963, art 3, § 2. The *Bivens* case is the basis for a *Smith* claim. *Smith*, 428 Mich at 644–648. For a *Bivens* case, the key question regarding whether the judicial branch risks infringing on the legislative branch is whether there are "sound reasons to think [the Legislature] might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong." *Ziglar*, 137 S Ct at 1858. If so, then "courts *must refrain* from creating the remedy in order to respect the role of [the Legislature]." *Id*. (emphasis added). There are at least three sound reasons to think that the Legislature would doubt the appropriateness of this Court unilaterally creating a damage remedy in this case.

First, as noted above, what Plaintiffs frame as a violation of their substantive due process rights is really a personal injury claim. (See above, pp 31–34.) Indeed, Plaintiffs frame their

identical alleged injuries as tort claims, not constitutional claims, against both the U.S. EPA and state employees. (App Vol 3, pp 650a–689a; App Vol 4, pp 748a–784a.) For personal injury claims, the Legislature already created the Government Tort Liability Act, which is an attempt "to make uniform the liability of . . . the state, its agencies and departments, officers, employees, and volunteers thereof . . . for injuries to property and persons" and to "define and limit this liability." Title to 1964 PA 170. Determining if, when, and how to open the public coffers to tort claimants present "problems . . . of immense difficulty." *Ross v Consumers Power Co*, 420 Mich 567, 618 (1984) (citation omitted). On the one hand, unlike private businesses that can leave a risky business venture, the government cannot simply abandon the obligation to govern. The government must make the laws and rules that govern society; issue and revoke professional licenses; quarantine sick persons; commit the mentally ill to involuntary confinement; arrest, prosecute, sentence, and house prisoners; construct roads and bridges; and provide all types of recreational, enforcement, and emergency services. See *Ross*, 420 Mich at 618. These are risky ventures. Not providing the government any tort immunity would impair its ability to provide services to the public and siphon taxpayer funds from other priorities. But on the other hand, granting it full immunity would also harm the public because it would make the people's government much less accountable to the people. The Governmental Tort Liability Act is the Legislature's attempt to balance various competing concerns. It is very likely the Legislature would "doubt" the propriety of the Court unilaterally creating an exception to the Act, *Ziglar*, 137 S Ct at 1858, especially a major exception based on the one of the vaguest doctrines of constitutional law for whenever persons characterize their personal injuries as "invasions of their bodily integrity."

Second, the sheer size of the remedy Plaintiffs seek is alone a reason to believe the Legislature would doubt the propriety of this Court taking unilateral action. Plaintiffs and their children are ten of the 2,627 people seeking damages in Plaintiffs' suit against the U.S. EPA. (App Vol 4, pp 748a–784a). They have demanded $421,507 per person, or $1,107,300,000. (App Vol 4, p 782a.) In this case, Plaintiffs seek to certify a class that, based on Plaintiffs' allegations, would potentially include more than the entire population of the City of Flint, which is nearly 100,000 people. (App Vol 2, pp 281a–282a.) That means if this Court allows their claim to proceed, Plaintiffs appear ready to demand up to $42,150,700,000 from Michigan's taxpayers, with the lion's share going to Plaintiffs' attorneys. That is more than $40 billion. The State's entire 2017–2018 budget was $54.9 billion.[10] When a person asked the U.S. Supreme Court to approve a *Bivens* action against a federal agency, the Court declined, noting that if "we were to recognize a direct action for damages against federal agencies, we would be creating a potentially enormous financial burden for the Federal Government." *FDIC v Meyer*, 510 US 471, 486 (1994). The Court noted that "decisions involving federal fiscal policy are not ours to make," and concluded that it would "leave it to Congress to weigh the implications of such a significant expansion of Government liability." *Id.* This reasoning applies even more forcefully to this case because the "enormous financial burden" is not hypothetical. We know how much money Plaintiffs want from the taxpayers. Whether they can have it should be a legislative decision, not a judicial one.

Finally, the Legislature is likely to doubt the propriety of this Court unilaterally granting Plaintiffs access to potentially billions more in taxpayer funds because the Legislature has already appropriated an enormous sum of money to address Flint's water emergency. As of

[10] http://www.michigan.gov/documents/budget/FY17_Exec_Budget_513960_7.pdf.

March 31, 2019, the Legislature has appropriated $329,999,000 for Flint.[11] (App Vol 4, p 805a.) Of that amount, $234,956,449 has been spent, and an additional $107,474,036 has been spent from non-Flint-specific appropriations. (App Vol 4, p 805a.) That is a total of $392,081,276 in taxpayer funds: $143,927,217 towards "safe drinking water"; $26,362,929 towards "food and nutrition"; $68,213,540 towards "social development and well-being"; $41,111,980 towards "physical well-being"; $41,737,844 towards "water bill credits"; and $70,727,766 towards "economic development." (App Vol 4, p 805a.) Those amounts do not include significant funds Congress has appropriated for Flint, most recently in the form a $100 million grant for Flint to improve its water infrastructure. (App Vol 4, pp 806a–807a.) The Legislature is well-aware of Flint's water emergency and has taken major action to address it. That action does not include appropriating cash payments directly to Plaintiffs, their purported class, and their attorneys. Just as in *Ziglar*, the Legislature's "silence is telling" in this high-profile context, making it "much more difficult to believe that [legislative] inaction was inadvertent." *Ziglar*, 137 S Ct at 1862 (citation omitted).

Plaintiffs' constitutional claim is really a personal injury claim; Plaintiffs have ample remedies already available to redress their alleged injuries; and the Legislature has chosen to spend hundreds of millions towards Flint's water emergency, but not in the way Plaintiffs prefer. It is not clear how the Court could authorize a multi-billion-dollar remedy in these circumstances without violating the separations of powers doctrine. It should reverse the Court of Appeals and dismiss Plaintiffs' constitutional tort claim.

[11] Expenditures for Flint water are tracked at https://www.michigan.gov/flintwater.

d. The Court should revisit whether current jurisprudence supports the types of claims against the State envisioned in *Smith*.

Bivens actions are the equivalent of section 1983 actions against state and local officials, but against federal officials. *Ziglar*, 137 S Ct at 1854–1855. Since *Bivens* actions can proceed only against individuals, they are an awkward vehicle on which to base an inferred action against *state agencies*, as this Court did in *Smith*. *Smith*, 428 Mich at 647 (J. Boyle, concurring). Indeed, federal law has changed so much that the outcome in *Bivens* "might have been different if [it] were decided today." *Ziglar*, 137 S Ct at 1856. Because of a similar evolution in Michigan law, the same can also be said for *Smith*.

During the time *Smith* was decided, this Court took a "freewheeling approach" that vaguely allowed courts to "imply" rights of action from statutes where the existing remedy was "plainly inadequate." *Myers v City of Portage*, 304 Mich App 637, 643 n 12 (2014), discussing *Pompey v Gen Motors Corp*, 385 Mich 537, 553 (1971), and *Gardner v Wood*, 429 Mich 290, 302 (1987). Now this Court focuses exclusively on legislative intent. *Lash v City of Traverse City*, 479 Mich 180, 193 (2007); see also *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 499 (2005), discussing *Alexander v Sandoval*, 532 US 275 (2001). And when it comes to authorizing statutory rights of action against the *government*, this Court flatly refuses to do so "without express legislative authorization." *Lash*, 479 Mich at 194. In addition to these changes in Michigan law, there are several reasons why *Bivens* no longer provides a sound basis for *Smith*.

First, the main purpose of an action against individuals is to deter future misconduct. *Carlson v Green*, 446 US 14, 21 (1980) ("Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States. It is almost axiomatic that the threat of damages has a deterrent effect . . . surely particularly so when

the individual official faces personal financial liability."); *Meyer*, 510 US at 485 ("It must be remembered that the purpose of *Bivens* is to deter *the officer* . . . If we were to imply a damages action directly against federal agencies . . . the deterrent effects of the *Bivens* remedy would be lost.") Relying on *Bivens* to infer a remedy against the *State* as this Court envisioned defeats the deterrence *Bivens* sought to achieve.

Additionally, the U.S. Supreme Court has "have never considered [a *Bivens* action] a proper vehicle for altering an entity's policy." *Correctional Servs Corp v Malesko*, 534 US 61, 74 (2001). That is why *Bivens* actions are generally not available against high-ranking officials, let alone the agency itself. *Ziglar*, 137 S Ct at 1854–1855. This Court has similarly recognized the separation of powers problems implicated by tort suits against agencies. *Ross*, 420 Mich at 619 ("[I]n our system of government, decision-making has been allocated among three branches of government . . . and in many cases decisions made by the legislative and executive branches should not be subject to review in tort suits for damages, for this would take the ultimate decision-making authority away from those who are responsible politically for making the decisions.") (citation omitted). Relying on *Bivens* to infer a damage claim against an agency, as this Court envisioned in *Smith*, creates an agency-review procedure *Bivens* actions are meant to avoid.

Finally, the Supreme Court has long refused to infer damage remedies either for or against the federal government, considering them matters of "federal fiscal policy." *Bivens*, 403 US at 396, citing *United States v Standard Oil Co of Cal*, 332 US 301, 314 (1947) ("[T]he issue comes down in final consequence to a question of federal fiscal policy."). As noted above, the Supreme Court has flatly refused to infer a *Bivens* action against federal agencies because doing so "would be creating a potentially enormous financial burden for the Federal Government."

Meyer, 510 US at 486. The Court noted that it would "leave it to Congress to weigh the implications of such a significant expansion of Government liability" because "decisions involving federal fiscal policy are not ours to make." *Id.* So inferring an action against the State based on *Bivens*, as this Court envisioned in *Smith*, is fundamentally contrary to *Bivens*.

There is no longer a defensible basis for *Smith* claims. This Court's changes to Michigan law, the U.S. Supreme Court's multi-decade retreat from *Bivens*, and the fact that creating a *Bivens*-type remedy against the State undermines the foundation on which *Bivens* is built should cause this Court to reconsider whether the hypothetical claims against the State envisioned in *Smith* should even remain a possibility.

3. Constitutional torts are not available against individuals.

Plaintiffs' bodily integrity claim against former Governor Snyder must be dismissed. Since "a plaintiff may bring an action against an individual defendant under § 1983 and common-law tort theories," this Court held that a *Smith* action is not available against individuals. *Jones*, 462 Mich at 337. The concurring opinion in *Jones* confirmed that the majority opinion "bar[red] recovery against individuals" based on *Smith* claims. *Id.* at 338.

Despite this straightforward holding, the Court of Appeals declined to dismiss Plaintiffs' constitutional tort claims against former Governor Snyder. It recognized that the holding in *Jones* applied to "cases involving . . . an individual defendant", (App Vol 1, p 112a), but confusingly, the Court of Appeals concluded that the "*Jones* Court's conclusions do not preclude a constitutional tort claim against individuals." (App Vol 1, p 113a.) The Court of Appeals reasoned that because claims against individuals in their "official capacity" in *federal court* are the same as a claim against the State in *federal court*, the same must be true in *state court*. (App Vol 1, p 114a.) That is incorrect.

Under Michigan law, officials can stand in for suits against a state agency only when "authorized to sue or be sued in its behalf." MCL 600.2051(4); MCR 2.201(C)(5). For example, the prison warden in *McDowell v Fuller*, 169 Mich 32 (1912) had been authorized by statute to be "sued in all matters concerning the said prison, by his name of office." *Id*. at 334. There is no such authorization here. No statute authorizes the governor to be sued for tort claims—constitutional or otherwise—on behalf of the State. In fact, the opposite is true. If a judgement for damages issues against "an officer . . . of a governmental agency as a result of a civil action for personal injuries or property damage caused by the officer . . . while acting within the scope of his or her authority" then the agency "*may*" pay the judgment, but is not required to do so. MCL 691.1408(1). The agency is only required to pay a judgement if the judgement is against *the agency*, not one of its officers. MCL 600.6458; MCL 600.6096. A plaintiff cannot compel an agency to pay a judgment against an officer simply by using the phrase "official capacity" in their complaint—that phrase has no legal meaning in a damages suit in Michigan unless a statute authorizes the officer to be sued for damages on behalf of the agency.

The Court of Appeals' disregard of this straightforward arrangement illustrates how confused its *Monell* analysis was. It concluded that any judgement issued against "the Governor . . . cannot result in individual liability" because "the state alone is accountable for any damage award" in this case. (App Vol 1, p 114a.) (citation omitted.) That not only contradicts the statutes discussed above, it is the opposite of the principle *Monell* stands for: the alleged tortious acts of government employees *are not* the acts of the government except in narrow circumstances which do not exist here. *Smith*, 428 Mich at 642–643, discussing *Monell*, 436 US 658. The constitutional tort claim against former Governor Snyder in this case should have been dismissed.

B. State Defendants did not take action aimed directly at Plaintiffs' property that harmed Plaintiffs in a way distinct in kind from similarly situated persons and thus no inverse condemnation action lies here.

Plaintiffs' also fail to demonstrate that their property damage claims avoid State Defendants' immunity. Neither the DEQ, the State, nor the DHHS took action directly aimed at Plaintiffs property. Nor do Plaintiffs allege property injuries different in type, rather than degree, than similarly situated persons.

1. Neither the State nor the DEQ directed the alleged destruction of Plaintiffs' property.

State agencies do a great deal of work that effects property. The DEQ, in particular, authorizes thousands of persons each year, both individuals and entities, to carry out projects that impact our air, rivers, lakes, and wetlands. See, e.g., MCL 324.3101 *et seq.*; MCL 324.20101 *et seq.*; MCL 324.30101 *et seq.*; MCL 324.30301 *et seq*. Regulation very often follows the pattern of "authorize and monitor." That is, an individual, private entity, or political subdivision seeks to emit air pollution, tear down a building, build a road, or perform some other regulated action. The state agency then authorizes the person to perform the action and monitors the person to ensure it complies with the conditions of authorization. Michigan's inverse condemnation doctrine is designed in significant part to ensure that the State's vast, day-to-day regulatory functions cannot form the basis of an inverse condemnation claim. For decades, it has been Michigan law that an alleged regulatory failure, such as the failure to license, failure to supervise, or failure to regulate cannot be the basis of a takings claim. *Attorney General v Ankersen*, 148 Mich App 524, 561–62 (1986); see also *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 549–50 (2004) (discussing *Ankerson* and holding as a "settled principle[ ]" that a failure to act cannot form the basis of an inverse-condemnation claim). Instead, the State

must take an "affirmative act[ ]" that is "directly aimed at [the person's] property" and "substantially caus[ed]" the alleged damage. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 295 (2009).

The state agencies most likely to perform actions that could potentially be "directly aimed" at a person's property are the Department of Transportation and the Department of Natural Resources. That is because those are the agencies most likely to directly perform projects, as opposed to simply regulate them. This reality is reflected in the fact that most inverse condemnation cases involving a state agency, rather than a political subdivision, involve one of those two agencies. For example, in *Peterman v State Department of Natural Resources*, 446 Mich 177, 180 (1994), the DNR built jetties immediately to the north of plaintiff's home on Grand Traverse Bay. Sand in the bay naturally drifts from north to south and replenishes beaches from that direction. *Id*. at 181–182. The jetties were intended to protect a boat launch.[12] The DNR did not construct the jetties in accordance with published guidance from the U.S. Army Corps of Engineers and removed the sand that accumulated on the jetties. *Id*. at note 6. The DNR was warned beforehand "that the construction of the jetties could very well result in the washing away of plaintiffs' property." *Id*. at 191. And that is what happened. The jetties captured so much of the sand that ordinarily replenished the plaintiff's beach directly south of the jetties, that not only the beach but a significant portion of the plaintiff's fast land was washed away. This Court noted that "an act of government" must "directly and not merely incidentally" affect the plaintiff's land for an inverse condemnation claim to lie. *Peterman*, 446 Mich at 190, citing *Vanderlip v City of Grand Rapids*, 73 Mich 522, 534 (1889). The Court concluded under the facts in *Peterman* that the destruction of the plaintiff's property "was the natural and direct

[12] The launch is still there and is called the East Grand Traverse Bay Boat Launch.

result" of the construction of the jetties such that the construction was the equivalent of "bulldozing the property into the bay." *Peterman*, 446 Mich at 191 (citation omitted).

This case does not fit the fact pattern of *Peterman*. Plaintiffs allege that the "introduc[tion of] corrosive Flint River water into property water system . . . damaged property plumbing, water heaters and water service lines." (App Vol 2, p 287a.) But neither the State nor the DEQ sent Flint River water into Plaintiffs' homes. Neither the State nor the DEQ operates the municipal water system that serves Plaintiffs, any more than it operates the hundreds of other water systems it regulates. Instead, the City of Flint chose its own interim water source as a response to the decision by DWSD to sever ties with Flint. The Emergency Manager Defendants acknowledged this fact at oral argument in response to the Court of Appeals' questioning. (App Vol 4, pp 832a–833a.) In June 2013, Flint "notifie[d] MDEQ of [its] intent to operate [the] Flint Water Treatment Plant full time using Flint River for drinking water," hired LAN to help it make the transition, requested "DEQ approval for full-time use of the Flint [water treatment plant] with [the] Flint River water as source," and after meeting with LAN and DEQ, the "Flint [Department of Public Works] and Finance Department recommend[ed] using the Flint River as a temporary water source." (App Vol 2, p 418a.) DEQ employees did not try to *stop* Flint from using the Flint River once Flint decided to do so. Commenting internally, one employee noted that "when Flint decided to leave Detroit and operate using the River, our role wasn't to tell them our opinion; only what steps would be necessary to make the switch." (App Vol 2, p 421a.) Plaintiffs acknowledge that DEQ employees served only an oversight function. (App Vol 2, p 268a.) Indeed, the record in this case confirms that the DEQ's employees served regulatory and advisory functions for the City of Flint, just as they would have for any of the other hundreds of water systems in Michigan had the systems been changing water sources.

Similarly for Governor Snyder, Plaintiffs allege only that he "knew" about Flint's decision to use the Flint River as an interim source, and that he "authorized" the decision. (App Vol 2, p 267a.) The allegation that he "authorized" the interim switch is contradicted by the substantial documentation Plaintiffs attached to their complaint, as explained above. But even if his actions *could* be attributed to the State in these circumstances and the Governor *did* authorize the switch, that still only confirms that Governor Snyder served an after-the-fact function of allowing Flint to carry out its plan. That is, he did not *stop* Flint from carrying out its plan.

As for DHHS, there is nothing in the record even suggesting that DHHS had anything to do with Flint's choice to use the Flint River or how the City treated the water. DHHS does not have any regulatory role over water systems. The Court of Appeals should have dismissed Plaintiffs' inverse condemnation claim against DHHS.

Plaintiffs' allegation that "Defendants took affirmative actions that directly targeted those properties with water service lines and plumbing susceptible to damage caused by corrosive water", (App Vol 2, p 287a), is a conclusory recitation of the element of a cause of action, and is not supported by factual allegations against the State, the DEQ, or the DHHS. See *CVS Caremark Corp*, 496 Mich at 63. Instead, the DEQ's involvement with the City of Flint's water system was precisely the sort of day-to-day, "authorize and monitor" regulatory function that cannot form the basis of an inverse condemnation claim. Otherwise, the thousands of authorizations state agencies issue each year that have a relationship to property use or value would become eligible for takings claims. That has never been the law, and this Court should not make it so.

2. Plaintiffs do not allege a harm distinct in kind from other persons with metal service lines or plumbing.

Even if the State, the DEQ, or the DHHS was the water provider that owned and operated Plaintiffs' water system and selected Plaintiffs' water source instead of the City of Flint, Plaintiffs claims would still fail. That is because they must plead facts showing "a unique or special injury." *Spiek v Michigan Dep't of Transp*, 456 Mich 331, 348 (1998). In other words, they must demonstrate "an injury that is different in kind, not simply in degree, from the harm suffered by all persons similarly situated." *Id*. In *Spiek*, the plaintiffs lived adjacent to a road that ultimately became the service drive for I-696. *Spiek*, 456 Mich at 333. They alleged that by constructing I-696, the Department of Transportation had increased "dramatically the levels of noise, vibrations, pollution and dirt in the once-residential area, thus destroying the desirability of the property as an area for living and destroying the acceptability of the property for residential purposes." *Id*. at 334–335. The Court of Appeals compared the plaintiffs' situation to that of the "citizenry at large" and decided the plaintiffs' claims could proceed because they were "affected to a different degree than the public at large." *Id*. at 341, 349. This Court reversed. The proper comparison is not to the general public, but to persons "similarly situated," and a person must demonstrate an injury "different in kind, not simply degree," from similarly situated persons. *Spiek*, 456 Mich at 348. In *Spiek*, persons similarly situated to the plaintiffs were those "living in similar proximity to a highway." *Id*. at 350. And the "noise, vibrations, pollution and dirt" that affected them were "the same type of incidental and consequential harm as is experienced by all persons . . . [who] reside near a public highway," so their case should have been dismissed. *Id*.

Here, the sole allegation Plaintiffs offer to satisfy *Spiek* that the "injury to Plaintiff property owners is unique or special because this group of Plaintiffs had water service lines and

plumbing susceptible to damage by corrosive water . . . ." (App Vol 2, p 288a.) But *any* water service lines and plumbing made of metal are susceptible to corrosion by water. Based on Plaintiffs' allegations, persons "similarly situated" to Plaintiffs are any property owners with service lines or plumbing made of metal. That means all persons similarly situated to Plaintiffs (persons with metal service lines, plumbing, or both) will experience some degree of corrosion, just as all persons similarly situated to the persons in *Spiek* (persons living near a public highway) will experience some degree of "noise, vibrations, pollution and dirt" *Spiek*, 456 Mich at 334. Plaintiffs have alleged an injury that is only different "in degree" from others with metal pipes, not an injury different "in kind." *Id.* at 345.

Allowing Plaintiffs' claim to proceed would harm Michigan's inverse condemnation jurisprudence in at least two ways. First, courts would be confronted with the problem of determining what *degree* of corrosion would suffice to support an inverse condemnation claim. That would be "unworkable" for the same reason a "traffic flow" measurement would have been in *Spiek*. *Spiek*, 456 Mich at 348. Like traffic flow, water chemistry often changes "over time because of factors unrelated to and out of the control of the state." *Id*. Allowing an inverse condemnation claim to proceed whenever a person "feels aggrieved" by the chemistry of their water, especially an action against the state regulator rather than the water system operator, would "wreak havoc" and do more harm than good. *Id*. Second, allowing persons with metal service lines or plumbing to make inverse condemnation claims if water corrodes their pipes or plumbing would expose municipalities that operate water systems to a very high number of claims. Like the requirement that a person demonstrate that government action directly targeted their property, the requirement that a person demonstrate an injury distinct from that experienced by similarly situated persons is meant to keep a "harm . . . shared in common by many members

of the public" out of "the judicial realm." *Spiek*, 456 Mich at 349. That is because "the appropriate remedy [in that situation] lies with the legislative branch and the regulatory bodies . . . ." *Id*. The Court of Appeals should have dismissed Plaintiffs' overly broad inverse condemnation claim.

II. The notice provision in the Court of Claims Act also requires the dismissal of Plaintiffs' suit.

As explained above, this Court should dismiss Plaintiffs' lawsuit because of their failure to satisfy their threshold burden to avoid the State's immunity. This Court should also dismiss because Plaintiffs did not meet their parallel threshold burden to comply with the notice provision in the Court of Claims Act. MCL 600.6431.

A. Plaintiffs' claims accrued more than six months before they filed suit.

Because Plaintiffs' action is one "for property damage or personal injuries," they were required to file their claim or a notice of potential claim within "6 months following the happening of the event giving rise to the cause of action." MCL 600.6431(3). If they did not file their claim, or notice of intent to file a claim, within six months of the claims' accrual, the Court must dismiss the claims. *McCahan v Brennan*, 492 Mich 730, 742 (2012).

Determining the date Plaintiffs' claims accrued is relatively straightforward. Since Plaintiffs seek "monetary damages," their claim accrued under MCL 600.6431(3) when they experienced "the actionable harms alleged in [their] cause[s] of action." *Bauserman v Unemployment Ins Agency*, 503 Mich 169, at *7 (2019), citing *Frank v Linkner*, 500 Mich 133, 150 (2017). That date is determined by identifying "the date on which plaintiffs first incurred the harms they assert." See *Frank*, 500 Mich at 150. According to Plaintiffs' complaint, that date was April 25, 2014—the date Flint began using the Flint River as its water source.

Plaintiffs allege that the "exposure" of their persons and property to "corrosive" and "toxic Flint River water" is the basis of their personal and property damage claims. (App Vol 2, pp 257a–260a, 282a–286a.) Plaintiffs allege that "since April 25, 2014," they "were . . . injured in person and property because they were exposed to highly dangerous conditions created . . . by Defendants' conduct . . . ." (App Vol 2, pp 259a–260a.) That is why Plaintiffs wish to use April 25, 2014 as the date to define the alleged class of people they represent "who sustained personal and/or property injury . . . because of their exposure to toxic Flint River water . . . ." (*Id.*)

Therefore, according to Plaintiffs' complaint, the date they first incurred the harms they assert was April 25, 2014. See also *Henry v Dow Chem Co*, 501 Mich 965 (2018) (a claim accrues when a person is harmed, not when the harm is discovered). Since Plaintiffs' claim accrued on April 25, 2014 and they filed neither a notice of intent to file a claim or the claim itself until January 21, 2016—more than six months later—then MCL 600.6431 requires the dismissal of their complaint as untimely. *McCahan*, 492 Mich at 742.

The Court of Appeals below disregarded the allegations in Plaintiffs' complaint and determined, instead, that the accrual of Plaintiffs' claims was a factual question, so Plaintiffs "should be permitted to conduct discovery" on when they were injured. (App Vol 1, p 083a.) That holding does not make sense considering Plaintiffs' own allegations, and it is not clear how seeking discovery from State Defendants would enable Plaintiffs to determine the date they were harmed. Furthermore, that holding is contrary to law. This Court has made clear that compliance with MCL 600.6431 is a threshold legal issue. See, e.g., *Fairley v Dep't of Corrections*, 497 Mich 290, 292–293 (2015). This accords with the settled law that the State is immune not only to liability but also to suit—including expensive and time-consuming discovery proceedings. See *Ballard v Ypsilanti Twp*, 457 Mich 564, 567 (1998). Plaintiffs were required

to identify, as a threshold legal matter, "the time when . . . [their] claim arose" in their complaint. MCL 600.6431(1). As noted above, they did so. The Court of Appeals should have dismissed their complaint.

1. The "harsh and unreasonable" exception to statutes of limitation this Court once recognized is indistinguishable from the common law discovery rule and no longer exists.

The "harsh and unreasonable" exception to the notice provision the Court of Appeals relied on below, (App Vol 1, pp 083a–088a), does not exist in Michigan law because this Court abrogated it in *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378 (2007). The exception came from the case *Forest v Parmalee*, 402 Mich 348 (1978), and was applied to statutes of limitation, not the notice provision. In *Forest*, the issue was whether it was constitutional that plaintiffs with tort claims (not constitutional claims) against a governmental entity had a shorter statute of limitations than plaintiffs with tort claims against a private entity. *Id.* at 354. The Court noted that statutes of limitations are "procedural requirements." *Id*. at 359. The Court then made the following statement without citation: "We submit that as procedural requirements these statutes of limitation are to be upheld by courts unless it can be demonstrated that they are so harsh and unreasonable in their consequences that they effectively divest plaintiffs of the access to the courts intended by the grant of the substantive right." *Id*. The Court allowed the shorter statute of limitation to stand because it was "reasonable." *Id*. at 362.

The "harsh and unreasonable" rule this Court declared in *Forest* was a judicial creation—a constraint on the Legislature to "place [only] reasonable restrictions" on a person's ability to file suit. *Forest*, 402 Mich at 360–362. The common law discovery rule was an iteration of this rule. *Stephens v Dixon*, 449 Mich 531, 535 (1995) ("[T]he common law has developed equitable rules to mitigate the harsh effects of the statute of limitation. One such exception is the

discovery rule."). This Court abrogated all common law restraints on statutes of limitation from Michigan jurisprudence in *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378 (2007). This abrogation included the *Forest* rule, as further demonstrated by the fact that the dissenting justices invoked the *Forest* rule in their opinions. *Id*. at 429 (Weaver, J. dissenting) and 446 (Kelly, J. dissenting).

In *Trentadue*, the plaintiffs had argued for an equitable exception to the statute of limitations to avoid the "harsh result" of applying the statute as written. *Id*. at 388. This Court rejected that argument, explaining that the "statutory scheme" the Legislature created in the Revised Judicature Act "is comprehensive," and therefore "exclusive." *Id*. at 389–392. The Legislature had already "undertaken the necessary task of balancing plaintiffs' and defendants' interests and has allowed for tolling only where it sees fit." *Id*. at 392. Since the Legislature can "abrogate the common law," *id*. at 389, "the statutory scheme"—rather than the common law—"controls limitations periods, accrual, and tolling," *id*. at 406.

2. The Court of Appeals misconstrued the law on this point.

When the Court of Appeals cited the *Forest* rule in 2014, it cited a rule this Court had abrogated. *Rusha v Dep't of Corrections*, 307 Mich App 300, 311 (2014), citing *Curtin v Dep't of State Hwys*, 127 Mich App 160, 163 (1983), citing *Forest*, 402 Mich at 359. The Court of Appeals in *Rusha* did not somehow resurrect the *Forest* rule simply by citing it in a published opinion. See *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 192–193 (2016) (lower courts are limited by this Court's authority to modify precedent). The author of the *Rusha* opinion, Judge Murray, later acknowledged that the *Forest* rule cited in *Rusha* "is no longer a valid statement of the law." (App Vol 4, p 829a.) The Court of Appeals compounded its mistake when it suggested that the *Forest* rule, an abrogated common law rule that had only

ever applied to statutes of limitation, could *also* apply to the notice provision in MCL 600.6431. *Rusha*, 307 Mich App at 311. That suggestion directly contradicted this Court's existing holding that "no judicially created saving construction is permitted to avoid [the] clear statutory mandate" in MCL 600.6431. *McCahan*, 492 Mich at 733.

Contrary to the Court of Appeals' conclusion below, its application of the *Forest* rule was not simply the proper recognition of a "longstanding principle." (App Vol 1, p 084a.) Both below and in *Rusha*, the Court of Appeals relied on an abrogated rule and applied it in violation of this Court's precedent. Whether the claims asserted in a lawsuit are constitutional or not, it is this Court's exclusive prerogative to alter existing Michigan Supreme Court precedent. *Associated Builders & Contractors*, 499 Mich at 192–193. The Court of Appeals' attempt to take upon itself the authority to do so was error.

B. Plaintiffs' claims would still be untimely if this Court were to resurrect the common law discovery rule and apply it to the notice provision.

As demonstrated above in Section I, Plaintiffs do not have viable constitutional claims, so there is no reason, as at least one Justice has suggested, for the Court in this case to revisit *Trentandue* or *McCahan* in the context of constitutional claims. *Bauserman*, 503 Mich 169, at *12–14 (McCormack, J. concurring). But even if this Court were to revisit *Trentandue* and *McCahan*, Plaintiffs' complaint would still be untimely. That is because the discovery rule did not change the length of statutes of limitation, it only tolled the running of the time limit until "on the basis of objective facts, the plaintiff should have known of an injury, even if a subjective belief regarding the injury occurs at a later date." *Moll v Abbott Laboratories*, 444 Mich 1, 18 (1993). Additionally, the tolling only continued until objective factors revealed a "possible" case of action rather than a "likely" one. *Id.* at 21–25. Once a person objectively should have known

of a possible cause of action, the clock started on the person's time limit, and the person still only had the designated amount of time to file suit from that point. *Id.* In this case, the notice provision at issue anticipates only *a notice*, not a *legal pleading*. MCL 600.6431. So the question would be when Plaintiffs objectively should have known they had a possible reason not to file a lawsuit, but a possible reason to file *a notice of intent* to do so. Even if that were the standard this Court applied, Plaintiffs' six-month window closed before they filed suit on January 21, 2016.

As Judge Riordan determined in his dissenting opinion below, "it is clear that plaintiffs had reason to know that they had suffered harm due to defendants' [alleged] actions . . . well before July 21, 2015." (App Vol 1, p 122a.) That is, even if Plaintiffs' six-month window opened later than April 25, 2014, it still had opened and closed before they filed suit. According to Plaintiffs' original complaint, they "knew almost immediately after the switch to Flint River water that something was not right about this new water supply." (App Vol 2, pp 226a–227a.) Plaintiffs began complaining to "Defendant State . . . within days" of April 25, 2014 that "the water was cloudy and foul in appearance, taste and odor." (App Vol 2, p 227a.) By May 2014, at least one resident of Flint had also contacted the U.S. EPA, complaining of a skin rash his doctor thought was caused by Flint River water. (App Vol 2, p 419a.) Also by "May 2014," there had been "numerous press stories about water quality problems" and "citizen complaints" had been submitted to the "Governor's office." (App Vol 2, p 268a.) By June 2014, Plaintiffs believed "that the water was making them ill." (App Vol 2, p 268a.) Plaintiffs then spent "the next eight (8) months" expressing "their concerns about water quality" to "Flint and MDEQ officials . . . in multiple ways, including letters, emails and telephone calls." (App Vol 2, p

227a.) Plaintiffs also organized "demonstrations on the streets of Flint" that were "well publicized." (App Vol 2, p 227a.)

On August 15, 2014, September 5, 2014, and September 7, 2014, DEQ required Flint to advise Flint residents in parts of the City that the water was not safe to drink unless boiled because Flint's testing had revealed excessive E. coli or coliform bacteria. (App Vol 2, pp 227a, 420a.) General Motors announced on October 13, 2014 that it would start using a source different from the Flint River water "for its Flint Engine Operations facility . . . citing corrosion concerns." (App Vol 2, pp 228a, 420a.) According to Plaintiffs, this was "clear evidence of serious and significant danger." (App Vol 2, p 228a.) On January 2, 2015, Flint—as required by DEQ—notified water users that samples confirmed that the City had elevated levels of TTHM. (App Vol 2, p 421a.) On January 21, 2015, the City of Flint hosted a public meeting to discuss the bacteria and TTHM problems the system was having, and some residents brought "discolored" water. (App Vol 2, p 421a.) On February 17, 2015, there were "public demonstrations demanding that Flint re-connect with DWSD." (App Vol 2, p 231a.) Also by that date, various Flint residents organized to "seek[ ] assistance with the growing major health impacts of the Flint River usage," and reached out to activist Erin Brockovich. (App Vol 1, p 135a.) On March 3, 2015, the City publicly convened both a Technical Advisory Committee consisting of various academics and professionals, and a Citizens Advisory Committee, which had "58 members representing various interests." (App Vol 2, p 423a.) On March 10, 2015, U.S. EPA staffers indicated that it had been "inundated" with complaints about Flint's water. (App Vol 2, p 423a.) On March 25, 2015, Flint's City Council voted to return to DWSD. (App Vol 2, p 274a.)

On June 5, 2015, Plaintiff Melissa Mays and her counsel, Trachelle Young, who is still her counsel in the instant case, filed a lawsuit against Flint alleging that as a result of using the Flint River, several individuals had "suffered severe health problems that have been directly connected to the unhealthy, contaminated River water," and City residents "have complained of health issues as a result of lead" in the water. (App Vol 1, pp 134a–135a.) On July 7, 2015, Plaintiff Mays and Attorney Young amended their complaint, further alleging exposure to lead in their water. (App Vol 1, p 187a.) On July 9, 2015, the American Civil Liberties Union published a news story discussing "concerns about lead in Flint's drinking water by detailing [a U.S. EPA employee's memo], reporting the high lead levels in LeAnne Walters's water, and exposing the lack of corrosion control in Flint drinking water treatment." (App Vol 2, p 426a.)

The record in the case indicates that Plaintiffs objectively "should have known" of a "possible" reason to file a notice of intent under MCL 600.6431 more than six months before January 21, 2016. See *Moll*, 444 Mich at 17–18, 21–25. A few statements from DEQ's spokesperson in late summer 2015, (see above, pp 14–16), did not somehow invalidate what Plaintiffs themselves alleged to have witnessed, protested about, and experienced for more than 18 months before they finally filed suit in the Court of Claims. As Judge Riordan observed, a notice would not have had to satisfy MCR 2.111(B) and would not have been subject to a dispositive motion under MCR 2.116(C)(8) for failing to state a claim. (App Vol 1, p 125a.) Indeed, even for legal pleadings, the common law discovery rule did not require a person to "know the details of the evidence by which to establish his cause of action" before the clock started clicking on a statute of limitation. *Moll*, 444 Mich at 24, citing *Kroll v Vanden Berg*, 336 Mich 306, 311 (1953). As a result, Plaintiffs' January 21, 2016 complaint is untimely even under a common law discovery rule, so the Court of Appeals should have dismissed it.

C. The Legislature did not apply the fraudulent concealment provision to the Court of Claims Act's notice provision, and even if it did, Plaintiffs' suit would still be untimely.

The Court of Appeals' conclusion that the Legislature intended to extend the notice period under MCL 600.6431(3) from six months to two years if there was "fraudulent concealment" of a claim is wrong. (App Vol 1, pp 088a–091a.) The majority conceded that the Legislature's intent was "not explicit[ ]," but determined that the interplay between the fraudulent concealment provision of the Revised Judicature Act, MCL 600.5855, the Court of Claims Act's statute of limitations, MCL 600.6452, and the Court of Claims Act's notice provision, MCL 600.6431, was ambiguous enough to justify "judicial construction" of the statute. (App Vol 1, p 089a.) The majority acknowledged that the Legislature expressly applied the fraudulent-concealment provision only to the statute of limitations in the Court of Claims Act. But it reasoned that the fraudulent-concealment provision could not be "practically applied" in the Court of Claims if it applied only to the statute of limitations, so the Legislature must have also intended to apply it to the notice provision notwithstanding the absence of language indicating that intention. (App Vol 1, p 090a.)

The majority's reasoning is contradicted by the plain language of MCL 600.6452(2), which imports the fraudulent-concealment provision only to "this section"—that is, only to § 6452, which is the Court of Claims Act's statute of limitations—and not to § 6431, which is its notice provision. That is why the Court of Claims below, (App Vol 1, p 035a), the dissent below, (App Vol 1, p 120a), and the previous three panels of the Court of Appeals to consider the question all concluded that the Legislature did not apply the fraudulent-concealment provision to the notice provision. See *Brewer v Central Michigan Univ Bd of Trustees*, unpublished opinion per curium of the Court of Appeals, issued November 21, 2013 (Docket No. 312374), p 2; *Zelek v State of Michigan*, unpublished opinion per curium of the Court of

Appeals, issued October 16, 2012 (Docket No. 305191), p 2; *Super v Dep't of Transp*, unpublished opinion per curium of the Court of Appeals, issued July 14, 2009 (Docket No. 282636), p 2.

Even if the Legislature *did* intend to apply the fraudulent-concealment provision to the notice provision, it would not change the outcome of this case because the provision does not apply if a plaintiff knows, or should know, that he or she has a "possible" cause of action. *Doe v Roman Catholic Archbishop of Archdiocese of Detroit*, 264 Mich App 632, 643–647 (2004). As detailed above, Plaintiffs' own allegations demonstrate that they had reason to believe they had a possible cause of action more than six months before they filed suit.

CONCLUSION AND RELIEF REQUESTED

State Defendants request that the Court reverse the Court of Appeals and dismiss Plaintiffs' complaint in its entirety.

Respectfully submitted,

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