STATE OF MICHIGAN
IN THE SUPREME COURT

MELISSA MAYS, MICHAEL ADAM MAYS, JACQUELINE PEMBERTON, KEITH JOHN PEMBERTON, ELNORA CARTHAN, RHONDA KELSO, and ALL OTHERS SIMILARLY SITUATED
Plaintiffs-Appellees,

v

GOVERNOR OF MICHIGAN, STATE OF MICHIGAN, DEPARTMENT OF ENVIRONMENTAL QUALITY, and DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendants-Appellants,

and

DARNELL EARLEY and JERRY AMBROSE,
Defendants-Appellants,

and

CITY OF FLINT,
Not Participating.

Supreme Court Nos.: 157335-7, 157340-2

Court of Appeals Nos.: 335555, 335725, 335726

Court of Claims No.: 16-000017-MM

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PLAINTIFFS-APPELLEES' OMNIBUS RESPONSE TO STATE DEFENDANTS' AND FORMER EMERGENCY MANAGERS EARLEY AND AMBROSE'S BRIEFS ON APPEAL

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellees accept Defendants-Appellants' Statements of Jurisdiction that the Michigan Supreme Court has discretionary jurisdiction to review by appeal a case after decision by the Court of Appeals. MCR 7.303(B)(1).

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

Pursuant to this Court's Order granting Defendants-Appellants' applications for leave to appeal dated May 22, 2019, the parties were instructed to include among the issues to briefed, seven (7) issues which correlate to the questions presented below and are included in the footnotes for the Court's reference. The following questions are presented:

1. Did the Court of Appeals correctly conclude that a damages claim against state defendants under Michigan's due process clause is proper here because plaintiffs have properly pleaded that the state violated plaintiffs' fundamental right to bodily integrity by virtue of custom or policy, and this case is otherwise an appropriate one for which to impose a damage remedy[1]?

   Plaintiffs-Appellees' answer: Yes.

   Trial court's answer: Yes.

   Court of Appeals' answer: Yes.

   Defendants-Appellants' answer: No.

2. Did the Court of Appeals correctly conclude that the Court of Claims had jurisdiction over claims brought against Emergency Managers?

   Plaintiffs-Appellees' answer: Yes.

   Emergency Manager-Appellants' answer: Yes.

   Trial court's answer: Yes.

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[1] **Issue (5):** whether the Court of Appeals erred in recognizing a constitutional tort for violation of bodily integrity under Const 1963, art 1, § 17, and, if not, whether the plaintiffs properly alleged such a violation, and whether a damages remedy is available for such a violation, see *Smith v Dep't of Public Health*, 428 Mich 540 (1987); *Jones v Powell*, 462 Mich 329 (2000).

Court of Appeals' answer: Yes.

State Defendants-Appellants' answer: No.

3. Did the Court of Appeals correctly conclude that Plaintiffs properly pleaded a viable claim for inverse condemnation[2]?

Plaintiffs-Appellees' answer: Yes.

Trial court's answer: Yes.

Court of Appeals' answer: Yes.

Defendants-Appellants' answer: No.

4. Did the Court of Appeals correctly conclude that material fact questions exist with regard to whether Plaintiffs complied with the notice requirements of MCL 600.6431[3]?

Plaintiffs-Appellees' answer: Yes.

Trial court's answer: Yes.

Court of Appeals' answer: Yes.

Defendants-Appellants' answer: No.

5. Did the Court of Appeals correctly conclude that the fraudulent concealment tolling provision found in MCL 600.5855 is applicable and was adequately pleaded[4]?

Plaintiffs-Appellees' answer: Yes.

Trial court's answer: No.

Court of Appeals' answer: Yes.

Defendants-Appellants' answer: No.

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[2] **Issues (6)-(7)**: for purposes of the plaintiffs' inverse condemnation claim, whether the plaintiffs have alleged direct action by defendants against the plaintiffs' property, and a special or unique injury, See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 190 (1994); *Spiek v Dep't of Transp*, 456 Mich 331, 348 (1998); and for purposes of the plaintiffs' inverse condemnation claim, the manner in which the class of similarly situated persons should be defined.

[3] **Issue (1)**: when the plaintiffs' cause of action accrued, See *Henry v Dow Chemical Co*, 501 Mich 965 (2018), and *Frank v Linkner*, 500 Mich 133 (2017).

[4] **Issue (2)**: whether the Court of Appeals erred in holding that the fraudulent concealment exception in MCL 600.5855 applies to the statutory notice period in MCLA 600.6431(3).

6. Did the Court of Appeals correctly conclude that a "harsh and unreasonable" exception to MCLA 600.6431 exists under the circumstances pleaded in this case[5]?

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

[5] **Issues (3)-(4)**: whether the Court of Appeals erred in holding that under the Court of Claims Act, MCLA 600.6401 *et seq*., there is a "harsh and unreasonable consequences" exception to the notice requirement of MCLA 600.6431(3) when a constitutional tort is alleged. Compare *McCahan v Brennan*, 492 Mich 730 (2012) and *Rusha v Dep't of Corrections*, 307 Mich App 300 (2014); and if there is such an exception, whether it is met by the facts alleged in the plaintiffs' amended complaint.

INTRODUCTION

This disturbing case arises from the Flint Water disaster and involves Defendants'[6] deliberately reckless decisions to: 1) provide Flint citizens with dangerous highly corrosive water from the Flint River without the mandatory corrosion control treatments; 2) refuse to switch back to Detroit-sourced Lake Huron water, despite knowing they were poisoning Flint's citizenry; and 3) proclaim, falsely and repeatedly, the river water was safe when they knew it was not. As a result, thousands of fetuses were exposed to intolerable amounts of lead *in utero*, thousands of toddlers and schoolchildren suffered the same exposure in early development, and scores of vulnerable seniors contracted Legionella, with multiple deaths. Indeed, the entire citizenry of Flint was involuntarily damaged in innumerable ways.

Governor Snyder himself described the devastating effects of these decisions in his January 5, 2016 Emergency Proclamation.[7] On January 13, 2016, eight days after his Emergency Proclamation, Snyder and Michigan Department of Health and Human Services ("DHHS") officials belatedly announced a spike in Legionellosis cases in Flint -- 87 cases and 10 deaths between June 2014 and March 2015. These cases directly coincided with Defendants' disastrous decision to switch to Flint River water. (State Def App Vol 2, p403a)

Two days after this admission, on January 15, 2016, Plaintiffs filed this class action lawsuit against Defendants in the Court of Claims, seeking declaratory and injunctive relief, and damages for violations of their rights under the 1963 Michigan Constitution. Plaintiffs' First Amended Class Action

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[6] Defendants are Governor Rick Snyder – in his official capacity – and the State of Michigan, the Michigan Department of Environmental Quality ("MDEQ"), the Michigan Department of Health and Human Services ("MDHHS") (collectively, "State Defendants"); and two Emergency Managers appointed by Governor Snyder for Flint: Darnell Earley and Jerry Ambrose, both acting in their official capacities as officers of the State (collectively, "EM Defendants").

[7] This belated acknowledgment of the crisis and its severity can be found in Governor Snyder's January 5, 2016 *Declaration of Emergency Proclamation*, available at https://www.michigan.gov/documents/snyder/2016-01-05_Flint_Water_Governors_Declaration_Final_509966_7.pdf (last accessed December 5, 2019)(Hereafter "Governor's Declaration"). See also State Def App Vol 2, p279a.

Complaint ("Amended Complaint"), filed on May 25, 2016, asserts two[8] Michigan Constitutional claims currently before this Court: 1) Article 1, §17, a substantive due process claim, asserting that the Defendants' conscience shocking conduct violated Plaintiffs' fundamental rights to bodily integrity; and 2) Article 10, §2, an inverse condemnation claim, asserting that Defendants' actions constituted a *de facto* taking of private property without just compensation.[9]

No discovery has occurred in this case. Indeed, Defendants did not even file an answer, so as to identify the allegations they contest. The matter was presented to Judge Boonstra solely on the pleadings – with the token exception of a handful of exhibits appended to the Defendants' motions. Defendants implicitly acknowledge the inadequacy of the record, as they have inappropriately inserted additional documents into the record for both the Court of Appeals' and this Court's consideration.

Defendants seek to dismiss the Amended Complaint claiming immunity and seeking to overturn longstanding Michigan Supreme Court jurisprudence. They also claim immunity based upon purported noncompliance with MCL 600.6431(3), the notice provision in Michigan's Court of Claims Act ("CCA"). Plaintiffs' claims and Defendants' arguments present two starkly different views of how our Michigan Constitution governs the relationship between state government and Michigan's citizenry.

"[A]ll political power is inherent in the people." Michigan Constitution, Article I, §1. In this phrase we honor Jefferson's notion that, to secure unalienable rights of life, liberty, and the pursuit of happiness; government derives its "just powers from the consent of the governed." In this instance, that ideal is expressed by Michigan's Constitution. Article I, §17 constrains governmental misconduct –"[n]o person shall… be deprived of life, liberty or property, without due process of law." Similarly, the United States Constitution "embrace(s) the right to bodily integrity and to not be subjected to

[8] These claims are Counts II and IV in the Amended Complaint. Two other counts were dismissed.
[9] Both Court of Claims Judge Boonstra and the Court of Appeals found these claims were adequately pled.

government action that 'shocks the conscience and violates the decencies of civilized conduct.'" *Guertin v State of Michigan,* 912 F 3d 907, 918 (CA 6, 2019) (internal citations omitted). This Court has long held that the Michigan Constitution secures such protections as well.

In contrast, Defendants contend that absolute power is vested in the Michigan Legislature and that the Legislature is owed total deference, even when the actions of the State "shocks the conscience." They claim that there is no remedy unless one is granted through the grace of the Legislature. Indeed, in a remarkable demonstration of hubris, Defendants contend not only that they are immune, but that they should not be bothered with the inconvenience of "time-consuming discovery proceedings;" nor of having to explain their conscience shocking behavior. (State Def Br p52) These claims are yet another assault to the citizenry considering the people who have died and those in Flint – namely thousands of children – who will be impacted for the rest of their lives.

In essence, Defendants seek to overturn longstanding Michigan precedent[10] and rewrite Article I, §1 of the Michigan Constitution so that all political power is lodged in the Legislature and the State's bureaucracy– leaving the protections of Article I, §17 and those against property confiscation in Article I, §10, as negligible. Plaintiffs however assert that where conscience shocking acts infringe upon life and liberty, citizens should have the right to conduct discovery, present their proofs, and seek redress in Michigan's courts.

[10] *Smith v Dept of Public Health*, 428 Mich 640, 643-44 (1987), *aff'd sum nom. Will v Michigan Dep't of State Police,* 491 US 58 (1989).

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS[11]

Plaintiffs have set forth detailed allegations in their Amended Complaint regarding Defendants' reckless decisions to supply Flint citizens with dangerous water from the Flint River, and then continue to deceive them, all of which resulted in devastating injuries to people and property. Such decisions were deliberately indifferent to the bodily integrity, physical health, and safety of Flint's citizenry in two respects.

First, the rushed decision to use the Flint River as an interim source of water without adequate preparation and expenditure of funds to upgrade Flint's facilities knowingly endangered Flint's citizens. The decision of State Treasurer Andy Dillon (with the support of Governor Snyder) to switch to the Karegnondi Water Authority ("KWA") without regard to where Flint's citizens would obtain water in the interim forced the decision to impose a clearly dangerous, and ultimately disastrous option, of using the Flint River as an interim source. (State Def App Vol 2, pp266a, 268a) State Defendants attempt to foist accountability for this decision upon local decision-makers. But no one contests the honest concession of former Governor Snyder's Chief of Staff Dennis Muchmore that it

[11] MCR 7.310(A) states that "[a]n appeal is heard on the original papers, which constitute the record on appeal." Yet, State Defendants have submitted multiple documents to either the Court of Appeals or this Court that were never presented to Judge Boonstra in the Court of Claims. Plaintiffs have created a chart to identify these documents. (Pltf App Vol 2, p343b) A party may not expand the record on appeal beyond the original papers filed in the lower court. *People v Gingrich*, 307 Mich App 656, 659 n 1 (2014). If these materials are to be considered, Plaintiffs request an opportunity to similarly supplement the record, either in a remand directed to that purpose or here. Defendants also improperly refer to several original civil complaints, both here and from other cases. But once a pleading is amended, the allegations within it are superceded and the original pleading is "considered abandoned and withdrawn." MCR 2.118(A)(4). *Grzesick v Cepela*, 237 Mich App 554, 562, 603 NW2d 809 (1999). Finally, State Defendants raise new factual issues here that were not raised before Judge Boonstra.. *Cf*, 6/24/16 Brief in Support of State Defendants' 6/24/16 Motion for Summary Disposition under MCR 2.116(C)(4),(C)(7) and (C)(8). (Pltf App Vol 1, pp25b-29b and State Def Br pp3-18) Plaintiffs will make reference to all factual assertions and documents presented to this Court in addressing Defendants' contentions. But the conflagration of factual contentions made for the first time by Defendants in the appellate courts underscores why "a motion for summary disposition is premature if granted before discovery on a disputed issue is complete." *Peterson Novelties, Inc v City of Berkley,* 259 Mich App 1, 24–25, 672 NW2d 351 (2003).

was State Treasurer Dillon who made "the ultimate decision." (State Def App Vol 2, pp266a, 381a)

Second, not long after the switch to Flint River water, it became clear that Flint's citizenry confronted an expanding public health crisis of which multiple officials in MDEQ, MDHHS and the Governor's office were aware. (State Def App Vol 2, pp268-77a nn7, 25) In spite of multiple opportunities to do the right thing and return to Detroit-sourced water, government officials, on multiple occasions, falsely affirmed the safety of Flint Water and obstructed Flint's attempt to return to safe water. (State Def App Vol 2, pp275-8a) Indeed, when the Flint City Council attempted to assert their municipal home rule powers by voting to return from the poisonous Flint River water back to the Detroit Water and Sewerage Department ("DWSD" or "Detroit"), Emergency Manager Ambrose, exercised the authority conferred upon him by the State under MCL 141.1541 *et seq*., and overrode the decision. (State Def App Vol 2, p274a) By doing so Defendants continued to expose Flint's citizenry to unsafe water and exacerbate the risk of bodily injury by falsely claiming that Flint's water was safe when they knew it was not. Defendants made that choice then and again many more times in the months to follow.

Defendants' decisions led to what is known world-wide as the "Flint Water Crisis." These choices caused dire public health consequences and significant impairment of property rights.

A. Flint Had Already Evaluated and Rejected use of the Flint River as its Primary Water Source.

From 1964 to 2014, Flint received its water from Lake Huron via the DWSD. During this 50-year period, Flint water users enjoyed safe, clean, fresh water in their homes, businesses, schools, hospitals, and other places of public service. (State Def App Vol 2, p264a) While Flint did rely on the Flint River for "backup" in those years, when faced with using the Flint River for daily use, the City reviewed and rejected use of river water on multiple occasions.

For example, in 2011 Flint commissioned a study entitled "Analysis of the Flint River as a Permanent Supply for the City of Flint, July 2011" (the "2011 Report"), (State Def App Vol 2, p264a)

which identified a host of issues that would have to be addressed for use of the Flint River "to reliably supply water on a continuous basis."(State Def App Vol 3, p446a) The 2011 Report included the following findings:

- *First*, any governmental official contemplating use of the Flint River would need to assure no sources of surface water pollution or groundwater discharges to surface water polluted the water at the intake point for the Flint Water Treatment Plant ("FWTP"). This had not been done;[12]
- *Second*, the 2011 Report noted the FWTP was obsolete and dangerous. Without $50 million of capital upgrades the antiquated FWTP could not adequately treat river water on a continuous, daily basis.[13] (State Def App Vol 3, p454a); and
- *Third*, it would take over ***four to five years of study and operational lead time to successfully implement upgrades necessary for safe operation of the FWTP.*** This was especially true given the need to perform a source water study to address bacterial issues like cryptosporidium and giardia. (State Def App Vol 3, p533a)

Thus, the City of Flint rejected the lengthy, costly, and ambitious project necessary to use the Flint River as its primary water source for the first time in 2011. (State Def App Vol 2, p264a) The City rejected the option ***again*** the following year on December 20, 2012 and informed the Michigan Department of Treasury officials "**that the City did not want to pursue the option and it is no longer being considered.**" (State Def App Vol 3, p538a) (emphasis added).

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[12] In a section addressing "Source Water Quality" for the Flint River, the 2011 Report noted, "[a] detailed investigation of potential sources of contamination has not been completed." (State Def App Vol 3, p452a)

[13] The Report stated:

> Although the WTP has been maintained and operated as a backup water supply, there have been numerous changes in regulation since the WTP last supplied water on a continuous basis. Although equipment and systems at the WTP have been used sparingly, some existing equipment and systems require replacement from deterioration or obsolescence to provide reliability for continuous operation.

(State Def App Vol 3, pp453-4a) The Report identified nine separate categories of capital upgrades vital to address the Plant's operational obsolescence and deterioration at an estimated cost of $49.9 million. (State Def App Vol 3, pp453-4a)

Implementation of the new $7 million UV Inactivation system was especially crucial to meet US EPA regulations for treatment of river water contaminates such as "giardia, cryptosporidium, viruses, and bacteria…" (State Def App Vol 3, p528a)

Notably, when the Flint City Council reviewed the decision to switch from DWSD water to the KWA-sourced Lake Huron water in March 2013, use of the Flint River for an interim two and a half year duration as a full time source was not anticipated.[14] However, "[a]t the time the Governor authorized his Emergency Manager to contractually bind Flint to the KWA project, the Governor and State officials knew that the Flint River would be used as an interim source." (State Def App Vol 2, p266a) Thus, an era of State led decisions that overrode the home rule powers of Flint's City Council began.

B. Flint's Emergency Managers and Treasurer Dillon Authorize Flint to Switch from Detroit to the KWA and Rush the Decision to Use the Flint River as Flint's Primary Drinking Water Source for a 2.5 year Interim Period without Regard to Cost or Safety.

1. As soon as Emergency Manager Kurtz possessed the state-conferred power to do so, he and Michigan Treasurer Dillon authorized Flint's switch to the KWA and established the rushed interim plans to use the Flint River until the KWA was ready.

On March 29, 2013, the first day after Kurtz was vested with the expanded authority provided by Public Act 436,[15] MCL 141.1541 *et seq*., and in one of his first acts with such expanded authority, Kurtz enacted EM Submission No. 2013 EM041, the Resolution to Purchase Capacity from Karegnondi Water Authority. (Pltf App Vol 1, pp60-1b) *Id.* But, Kurtz's execution of the KWA Resolution couldn't be effective on its own. It required the approval of Treasurer Andy Dillon pursuant to MCL 141.1552. The State of Michigan – Treasurer Andy Dillon, in consultation with

[14] State Defendants note that in April 2013, Detroit unexpectedly canceled its water agreement with Flint effective April 2014. (State Def Br pp6-7; State Def App Vol 2, p417a)

[15] In early 2013, then-Emergency Financial Manager Kurtz had limited powers due to actions taken by Michigan's electorate. The emergency manager statute, 2011 PA 4, had been rescinded by voter referendum in November 2012. In the 2012 lame duck session, however, the Michigan Legislature enacted Public Act 436, MCL 141.1541 *et seq*., the Local Financial Stability and Choice Act of 2012, which, much like the earlier Public Act 4 that had been rejected by voters, included an expansive set of powers for a state-appointed emergency manager. Public Act 436 also included an appropriation provision to render it "referendum-proof." Public Act 436 became effective on March 28, 2013, at which time Kurtz went from being an "Emergency Financial Manager" to being an "Emergency Manager," with far broader powers.

Governor Snyder – made the final decision to authorize Flint's switch from Detroit to KWA. (State Def App Vol 2, p266a)

The switch from Detroit water to KWA water implicated not one emergency manager, but two. While Ed Kurtz operated as Emergency Manager in Flint, Kevin Orr was also appointed by Governor Snyder to operate in Detroit. As Kurtz planned to remove Flint from the Detroit water system and migrate to KWA, Governor Snyder participated in both sides of the negotiations between Detroit (Orr) and Flint (Kurtz). (State Def App Vol 2, p266a) When Snyder and Dillon authorized Kurtz to bind Flint to the KWA project, they already knew Detroit would terminate Flint's contract, and the Flint River would be used as an interim source. (State Def App Vol 2, p266a) Then it happened – Detroit told Flint it would terminate the city as a water customer effective April 17, 2014. (State Def App Vol 2, p381a)

The decisions of Governor Snyder, Treasurer Dillon, and Emergency Manager Kurtz left Flint residents in a pickle: if Detroit cut them off of water in April 2014, where would they get water for two and a half years before the new KWA water was ready? Despite the city's rejection of Flint River water as a primary source in 2011 and 2012, Defendants knew the city would need to draw water from the river until the KWA deal was complete. Despite the 2011 and 2012 rejections of the Flint River and complete lack of improvements to the FWTP, Flint would now be forced by state officials to use Flint River water.

In June 2013, Kurtz exercised his State-granted emergency manager powers again and executed EM Resolution 2013 EM 140. (Pltf App Vol 1, p63b) The resolution authorized the retention of engineering firm Lockwood, Andrews & Newmans ("LAN") to provide consulting services to enable Flint to place its obsolete, deteriorating water treatment plant into service to handle Flint River water. The contract required the approval of Treasurer Dillon pursuant to MCL 141.1552.

LAN was the same engineering firm that had issued the 2011 Report, which found that

preparing the Flint Water Treatment Plant to safely process Flint River water would ***take $50 million in capital upgrades and five years of planning.*** Now state officials and the state-appointed emergency manager were asking the company to rush the project. The Flint WTP had to be up and running to deliver Flint river water on a continuous basis ***in only ten months*** and without the environmental studies or $50 million in capital upgrades necessary to deliver safe water.

2. The Rushed Debut of Flint's Water Treatment Plant in April 2014 Was Predictably Disastrous.

With Detroit's water shutoff deadline of April 2014 looming, the Water Treatment Plant was nowhere near ready to safely deliver Flint River water to Flint's citizenry. (State Def App Vol 2, p267a n4)[16] Michael Glasgow, Flint's WTP laboratory and water quality supervisor informed MDEQ employees Michael Prysby and Stephen Busch on April 16 that the WTP was not ready and that "[i]f water is distributed from this plant in the next couple of weeks, it will be against my direction." (State Def App Vol 2, p267a n4)

Glasgow's warnings were well-founded. Several of the WTP upgrades and requirements for safely using Flint River water identified in the 2011 Report had not been implemented as of April 2014, when the switch to Flint River water was flipped. [17]

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[16] Similarly, Brian Larkin, associate director of the Governor's Office of Urban and Metropolitan Initiatives emailed several members of the Governor's office in March 2014 stating "[t]he expedited timeframe is less than ideal and could lead to some big potential disasters down the road." See, Susan Masten et al, "Flint Water Crisis: What Happened and Why?", Journal of the American Water Works Association, December 2016.

[17] Masten et al, *Id.* Civil and environmental engineering professors Susan Masten, Simon Davies and Shawn McElmurry summarized the state of Flint's WTP capabilities as of April 2014:

> While the [Glasgow's] message sounded the alarm that staffing and monitoring plans were inadequate, it has not been reported how poorly equipped the plant was. It is clear from the MOR [monthly operating report] that the plant was woefully +unprepared for full-time operation on April 25, 2014. The May 2014 MOR reveals that the plant had only four to five days of polymer available to "use as a trial on two different occasions." Supervisory control and data acquisition (SCADA) upgrades were incomplete and out for bid. Filter headloss meters were not operational on the SCADA system. Also, chlorine residual monitoring equipment at the point of entry into the distributional system had not been installed, so chlorine levels would have had

By prematurely forcing the use of the Flint River at the Flint WTP without adequate time (ten months instead of the necessary five years projected in the 2011 Report) or capital improvements ($50 million as projected in the 2011 Report), "the State created a dangerous public health crisis for the users of Flint tap water when it and Kurtz and Earley ordered and set in motion the use of highly corrosive and toxic Flint River water knowing that the WTP was not ready." (State Def App Vol 2, p268a)

C. Defendants' Switch to Flint River Water Quickly Led to a Series of E. Coli, Fecal Coliform and TTHM Events that Exceeded State and Federal Water Quality Standards.

Although the Defendants attempt to characterize the water crisis as only one event, it actually involved a series of events that arose at multiple times, some reported by governmental officials to the community and some concealed by governmental officials all at great risk to the community. Almost immediately after the switch, citizen complaints about contaminated water were rampant. Many Flint water users reported the water was making them ill. (State Def App Vol 2, p268a nn6-7) Thus began a series of events where: 1) problems with Flint's water were reported to the public, 2) advisories were issued to not drink the water, and 3) the advisories were lifted as the problems were reportedly "fixed."

In August 2014, elevated levels of fecal coliform and E. coli bacteria were detected in the water and the MDEQ issued a "boil water advisory" instructing Flint residents not to drink the water and warning that "microbes in these wastes can cause diarrhea, cramps, nausea, headaches, or other

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to been measured by taking grab samples from the clearwell as well as from a tap in the laboratory. It appears that, on the basis of the MORs, chlorination after filtration was not used until May 17, 2014. Fluoridation was not implemented until July 2, 2014. The water utility did not have a corrosion control plan, and it had not installed corrosion control equipment when the water was switched back to DWSD on October 16, 2015. On the basis of the comments in the MORs, the filter headloss meters were never made operational.

symptoms."[18] The notice advised, "We are increasing our chlorine levels and flushing the system. We will inform you when tests show no bacteria and you no longer need to boil your water. We anticipate resolving the problem within a few days." *Id.* A second E. coli exceedance occurred on September 5, 2014 and a second boiled water advisory issued to inform the citizens of Flint. [19]

The City's continued use of chlorine to address these intermittent bacteria exceedances led to a different more serious problem: creation of a known carcinogen byproduct, total trihalomethane ("TTHM"). (State Def App Vol 2, p384a) On January 2, 2015, at MDEQ's instruction, Flint notified its residents that TTHM levels had exceeded for 2014. (State Def App Vol 2, p385a) Flint hired an engineering firm, Veolia, to address the exceedances that had been experienced. On March 12, 2015, Veolia issued a report stating Flint water met state and federal standards for TTHM control. (State Def App Vol 2, p387a)

All told, there were four separate water quality events in 2014 that exceeded state and federal water quality standards which were identified, reported to the public and for which Flint reportedly returned to compliance:

- The August 15, 2014 E. coli and Fecal Coliform bacteria exceedance. Compliance reported August 20;
- The September 5, 2014 E. coli bacteria exceedance. Compliance reported September 9;
- The September 7, 2014 expanded area E. coli bacteria exceedance. Compliance reported September 9; and
- The 2014 TTHM exceedances, reported to the public on January 2, 2015. Compliance reported March 12, 2015.

Throughout this time, some residents continuously complained the water was making them ill. (State Def App Vol 2, pp268a, 272a) In each of these reported events, the public was given notice and informed when the exceedances of state and federal water quality standards had ended.

D. Defendants Failed to Timely Require Corrosion Control to Prevent Lead Contamination.

[18] *See*, boil water advisory on Attorney General's website, *available at* https://www.michigan.gov/documents/ag/Boil_Water_Warning_8.15.14_527087_7.pdf

[19] https://www.michigan.gov/documents/ag/Boil_Water_Warning_9.6.14_527088_7.pdf

in Flint Water, Causing Massive Corrosion Throughout the System, And Then Concealed Elevated Lead Contamination in Water and Blood and Legionella From the Citizens of Flint.

In stark contrast to the public reports issued to Flint's citizenry for exceedances of water quality standards for E. coli, fecal coliform bacteria and TTHM, Defendants caused, were aware of, and *concealed*, elevated lead contamination in the water (and blood of children) from Flint until late September or October 2015.[20] (State Def App Vol 2, pp269a n8, 273-5a n20)

The federal Safe Drinking Water Act ("SDWA") Lead and Copper Rule ("LCR") "requires public water systems to minimize lead and copper levels in drinking water by controlling corrosion in the distribution system, which is achieved by using corrosion control treatment (CCT)."[21] Prior to the switch, MDEQ was required to assure the City was using corrosion control to prevent lead from leaching out of the pipes in Flint. Detroit had treated its water with orthophosphate as a corrosion inhibitor long before the switch, and it was reasonable to assume that the Flint River Water, ***which was more corrosive than the Detroit water***, would similarly require corrosion control.

But MDEQ resisted corrosion control for the more corrosive Flint River water and, instead, simply required two rounds of six month testing – reducing the City of Flint's residents to the status of "guinea pigs" - as the water they were drinking was ***monitored*** instead of being ***treated*** for safety. In its statement of facts, State Defendants state that DEQ staffers interpreted the LCR to require Flint to evaluate new water sources, such as the Flint River, for two consecutive six-month periods before determining how to proceed. (State Def Br p8) The Governor's own Task Force recognized it violated regulatory requirements to merely require monitoring for a year after the water switch. As the Task

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[20] Throughout their presentation of the issues, Defendants conflate the Flint water problems ***that were disclosed*** to the public (like early bacterial boil water advisory notices) with the public health issues ***that were concealed***, like elevated lead exposure and Legionellosis. These were separate events and the disclosure of the former does not immunize the State's culpability for concealment of the latter.

[21] Task Force Final Report. (State Def App Vol 2, p344a)

Force explained, "[a] critical element of that treatment – corrosion control, as required under EPA's Lead and Copper Rule (LCR) – ***was (incorrectly) determined by MDEQ not to be required immediately***; instead, Flint could complete two, six-month monitoring periods and MDEQ would then determine whether corrosion control was necessary." (State Def App Vol 2, p310a)

By early 2015, MDEQ officials were aware of widespread corrosion from the untreated water, leading to increased lead contamination. On January 21, 2015, State officials, recognizing the toxicity of the Flint River water, ordered drinking water coolers installed in all State buildings operating in Flint. (State Def App Vol 2, p270a, n14) By January 29, 2015, State officials recognized (in an internal email) that the public health crisis was caused by the corrosion of the entire infrastructure of the Flint water system. (State Def App Vol 2, p271a) Yet, they fraudulently concealed the information from EPA and the public.

Also, in January 2015, Flint homeowner Ms. LeeAnne Walters informed EPA that she and her family members were becoming physically ill from exposure to Flint water. (State Def App Vol 2, p271a) Subsequent test results on February 25, 2015, revealed that lead levels in Ms. Walters[22] water were 104 parts per billion, nearly seven times over the federal and state limit of 15 parts per billion. [23] (State Def App Vol 2, pp272a n19, 386a) Miguel Del Toral, water safety/LCR expert at EPA employee, suspected that these high lead levels were caused by corrosion in the Flint system and asked MDEQ officials whether Flint was using phosphates as a corrosion control inhibitor. (State Def App

[22] The fact that Ms. Walters' home exhibited elevated levels of lead does not mean that all homes in Flint exhibited such levels certainly was a warning that some – or many – did. Yet, representatives of the state characterized Ms. Walters' elevated lead levels as an "isolated incident" and pointed to system-wide numbers which (fraudulently, as it turns out) demonstrated compliance below the federal 15 ppb threshold.

[23] The mere fact that Ms. Walters' home exhibited elevated levels of lead does not mean that all homes in Flint exhibited such levels. Indeed, representatives of the state characterized Ms. Walters' elevated lead levels as an "isolated incident" and pointed to system-wide numbers which (fraudulently, as it turns out) demonstrated compliance below the federal 15 ppb threshold.

Vol 2, p273a n20) On February 27, 2015, MDEQ's Stephen Busch falsely advised Del Toral that the City was using corrosion control, knowing the statement was false. (State Def App Vol 2, p273a)

On March 5, 2015, the Governor and officials in the Governor's office realized they had a massive public health emergency, which probably included widespread lead poisoning, on their hands. While they began discussing distributing water filters to Flint water users, these public officials took no action to warn or otherwise protect Plaintiffs and the putative class, and continued to conceal the true nature, extent and severity of the public health crisis. (State Def App Vol 2, pp273-4a nn22-3)

On April 23, 2015, Del Toral again communicated with MDEQ, and asked whether Flint was using corrosion control treatment or "CCT". (State Def App Vol 2, p388a) The following day, MDEQ officials finally admitted to Del Toral that ***no corrosion control was in place*** for the Flint system. *Id.* Del Toral shared with colleagues at the EPA it was "very concerning given the likelihood of lead service lines in the City." *Id.*

On June 24, 2015, Del Toral prepared an internal memorandum entitled "High Lead Levels in Flint Michigan-Interim Report." The following day, Del Toral wrote an internal email regarding the elevated lead in Flint water at EPA, stating: "I understand that this is not a comfortable situation, but the State is complicit in this and the public has a right to know what they are doing because it is their children that are being harmed." (State Def App Vol 2, pp274-5a) Del Toral further warned the failure to inform Flint water users of the elevated lead levels was "bordering on criminal neglect." (State Def App Vol 2, p275a) Throughout this time period, as Governor Snyder's Task Force found, the "EPA tried to convince MDEQ by persuasion and forthright referencing to the LCR that Flint needed to add CCT (as DWSD had been doing for decades). However, MDEQ was entrenched in its (incorrect) position that two, six-month monitoring periods are allowed before a decision on CCT is required. (State Def App Vol 2, p275a)

On July 10, 2015, MDEQ official Brad Wurfel, in a continued concealment of the public

health crisis, appeared on public radio stating that Flint River water was safe and it was not causing "any broad problem" with lead leaching into residential waters. Parents, worried about the lead poisoning of their children demanded answers from Wurfel. He told the concerned parents, "[l]et me start here—anyone who is concerned about lead in the drinking water can relax." *Id* . Wurfel, knew his statements were false and he deliberately misled the public about the seriousness of the crisis. (State Def App Vol 2, p275a)

If a large public water system exceeds the 15 ppb federal action level for lead in water, federal regulations require the system to: 1) implement public education requirements to warn the public about methods to reduce exposure to lead; 2) implement all applicable source water treatment requirements; and 3) if the system continues to exceed the 15 ppb threshold after corrosion control and source water treatment requirements, then it must remove all lead service lines. 40 CFR 141.83 and 84.

State Defendants' assert that the first six-month round of water sampling results were published on December 31, 2014, and showed a six PPb level for lead, suggesting that lead levels in Flint were below the 15 ppb action level. (State Def Br p8). State Defendants' further assert by July 27, 2015, Flint's second round of lead testing showed lead levels had risen to 11 ppb. (State Def Br p14)

Both of the State Defendants' assertions are false. As the Governor's Task Force clarified:

> The first 6-month monitoring period results showed the 90th percentile to be 6 ppb, and the second 6-month monitoring period results showed the 90th percentile to be 11 ppb. Both of these outcomes fell beneath the lead action level of 15 ppb. ***Unfortunately, because the flawed sampling pool and sampling techniques, the extent of the lead problem was under-reported.***

(emphasis added) (State Def App Vol 2, p345a) However, the lead sampling results presented to the public were not simply "flawed." Flint officials met with MDEQ officials and agreed to "scrub" the results by omitting certain high lead level samples that would have demonstrated higher lead levels in

Flint water. (State Def App Vol 2, p391a)

Even more insidious than MDEQ officials' concealment of elevated levels of lead in water was the concealment by MDHHS of an alarming increase of lead in the blood of Flint's children. By July 2015, Director Lyon knew of the elevated blood lead levels of Flint's children. (State Def App Vol 2, pp276-7a) However, Lyon failed to order any action be taken to warn the public or to remediate the public health crisis created by the actions and inactions of state and Flint employees and officials. His concealment of these dangers exacerbated the public health crisis underway. (State Def App Vol 2, pp276-7a n25)

By August 2015, Professor Marc Edwards of Virginia Tech, determined there was serious lead contamination of the Flint water system and stated the people of Flint faced a major public health emergency. (State Def App Vol 2, p276a) While MDEQ had falsely claimed that Flint's water levels tested at below the federal action limit of 15 ppb, Edwards' more exhaustive sampling demonstrated the actual level of lead in Flint water was at least 25 ppb, and more than 100 samples had lead over 5 ppb. (State Def App Vol 2, p345a) ***One home tested at over 1,000 ppb.*** (State Def App Vol 2, p393a) Also in the summer of 2015, Dr. Mona Hanna-Attisha, using data available to her from Hurley Hospital, observed a similar spike in the percentage of Flint children with elevated blood lead levels. She published a study in an effort to alert the community about the health risks associated with drinking Flint River water. (State Def App Vol 2, p277a)

Rather than conducting public education to minimize lead exposure as required under federal regulations, Wurfel, then Director of Communications for MDEQ, continued to promote the cover-up of the health crisis and attacked both Edwards and Hanna-Atisha, as well as EPA employee Miguel Del Toral. (State Def App Vol 2, pp276-8a)

On October 8, 2015, the Governor recognized he could no longer pretend the water from the Flint River was safe or that water filters could be a long-term solution to the State created emergency.

He finally ordered Flint to re-connect with the Detroit water system. The re-connect took place on or about October 16, 2015. (State Def App Vol 2, p279a) The State and Flint have since implemented a program to remove all public lead service lines that were damaged by the use of corrosive river water.

Just like the concealment of exposure to elevated lead levels, State Defendants were also aware and concealed that the Flint water had caused a deadly outbreak of Legionella in 2014 and 2015. (State Def App Vol 2, pp269-71a, 273a, 276-7a) Governor Snyder first publicly acknowledged the spike in Legionella deaths coincident with the switch to the Flint River on January 13, 2016 – at least ten months after officials in the Governor's office were informed of it. (State Def App Vol 2, p403a)

E. Defendants Exacerbated the Harm to the Public by Knowingly Permitting State Agencies to Conceal the True Threat to Public Health and Delay Implementation of an Effective Remedial Plan.

State Defendants made false and misleading statements to the public about the health crisis and neither the Governor's office nor MDHHS Director Lyon's office nor the MDEQ took any steps to correct the misinformation. Many of the acts of concealment occurred within six months of the filing of the complaint in this case on January 15, 2016. (State Def App Vol 2, pp276-8a)

Flint's citizens, and especially its children, were impacted in multiple ways. "In the areas of Flint that had the highest lead levels in the water, the BLLs (blood lead levels) in children who were tested increased by a factor of 2.5."[24] "[I]n February 2016, information on the increase in the number of cases of Legionellosis that occurred in Flint in the summers of 2014 and 2015 was released. Ninety-one cases and 12 deaths have been confirmed in the Flint area, up from six to 13 cases a year before the switch to Flint River water."[25] In addition to a spike of Legionella deaths and illnesses, other deleterious health effects have unfortunately become well documented in the years following the crisis. Coinciding with the introduction of Flint River water, "fetal death rates in the city increased by 58%,

[24] Susan Masten et al, Journal of the American Water Works Association, December 2016, p24.
[25] *Id.*

fertility rates in Flint decreased by 12% and overall health at birth decreased (from scarring) compared to other Michigan cities."[26]

On January 5, 2016, Governor Snyder declared a State of Emergency in Flint. (State Def App Vol 2, p279a) The Governor's Declaration acknowledges that the emergency in Flint "has either caused or threatened to cause elevated blood lead levels, especially in the population of children and pregnant women…"[27] The Governor's Declaration also acknowledged the Flint emergency caused damage to the homes and business of Flint, noting that "the city's water caused damage to public ***and private infrastructure***…"[28] (emphasis added)

F. Proceedings Below.

Eleven days after Governor Snyder's Emergency Declaration, Plaintiffs commenced this action with the Court of Claims on January 15, 2016,[29] on behalf of themselves and tens of thousands of Flint water users. Plaintiffs amended their Complaint on May 25, 2016. In lieu of an answer, Defendants filed their respective motions for summary disposition under MCR 2.116(C)(4), (C)(7), and (C)(8). No discovery was conducted and the motions were heard without the opportunity to develop an evidentiary record, other than the few exhibits appended to the parties' papers. In contrast to the sixteen page statement of facts presented to this Court, State Defendants presented a mere four and a half pages of facts to Judge Boonstra and presented their arguments entirely on the pleadings.

On October 26, 2016, the Court of Claims issued a 50-page opinion, (State Def App Vol 1,

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[26] See Daniel S. Grossman and David J.G. Slusky, "The Effect of an increase in Lead in the Water System on Fertility and Birth Outcomes: The Case of Flint, Michigan," at 1, WORKING PAPERS SERIES IN THEORECTICAL AND APPLIED ECONOMICS, University of Kansas, Department of Economics, *available at* http://www2.ku.edu/~kuwpaper/2017Papers/201703.pdf.

[27] See Governor's Declaration, link available in footnote 7.

[28] *Id.*

[29] The Court of Appeals' decision makes reference to Plaintiffs filing their initial complaint on January 21, 2016, (State Def App Vol 1, p81) when in fact Plaintiffs filed on January 15, 2016. See timestamp of January 15, 2016 located on page 1 of complaint. (State Def App Vol 2, p211a)

pp25-74a) denying Defendants' motions regarding Plaintiffs' compliance with the notice requirement found in MCL 600.6431(3) and ruled that the substantive-due-process doctrine under the Due Process Clause of the Michigan Constitution gives rise to a tort claim for damages directly under the Michigan Constitution against both the state and individuals in their official capacities in avoidance of governmental immunity. The court also concluded emergency managers are state officials within the jurisdiction of the Court of Claims. Finally, the court ruled Plaintiffs had failed to state either a state-created danger claim or a fair-and-just-treatment-clause claim, but had adequately pleaded both a Michigan constitutional bodily integrity claim and an inverse condemnation claim.

On January 25, 2018, in a decision noted for publication,[30] the Court of Appeals affirmed the Court of Claims. This Court granted applications for appeal filed by the State Defendants and Emergency Manager Defendants on May 22, 2019. requesting the parties to address seven specific issues.

COUNTER-STATEMENT OF STANDARD OF REVIEW

Pursuant to MCR 7.3212(A) and 7.212(D), Plaintiffs submit this Counter-Statement of Standard of Review in opposition to the State-Defendants' position that there was an error committed on the part of the Court of Claims to treat their motion for summary disposition as if it was solely on the pleadings under MCR 2.116(C)(8). (State Def Br p19) However, the State Defendants' Brief before the Court of Appeals did not raise this purported error and as such the State Defendants have forfeited this argument. See *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich. 211, 234 n 23, 507 N.W.2d 422, 432 (1993) (holding that "[t]his Court has repeatedly declined to consider arguments not presented at a lower level, including those relating to constitutional claims"). Plaintiffs otherwise agree that the review of the lower court proceedings is *de novo*.

[30] See *Mays v Snyder,* 323 Mich App 1 (2018).

ARGUMENT

I. Plaintiffs Properly Pled A Damage Claim Against State Defendants Under Michigan's Due Process Clause and Pursuant to *Smith v Department of Public Health.*

Summary of Argument per MCR 7.312(B)(2)

Despite State Defendants' argument to the contrary, Plaintiffs' constitutional claims in this case fall well outside the immunity provision of the Government Tort Liability Act, ("GTLA"), MCL 691.1407(5). It is well-established that, when "the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court action." *Smith v Dep't of Public Health,* 428 Mich at 544. Liability for a violation of the state constitution should be imposed on the state in "those cases in which the state's liability would, but for the Eleventh Amendment, render it liable under the 42 USC § 1983 standard for local governments articulated in *Monell v Dep't of Soc Serv*s, 436 US 658 (1978)." *Smith,* 428 Mich at 642 (Boyle, J., concurring in part, dissenting in part); *see also Bauserman v Unemployment Insurance Agency, (on remand)* __Mich App __, 2019 WL 6622945 (2019) at *7)[31]; *Carlton v Dep't of Corrections,* 215 Mich App 490, 504 (1996), *lv den* 453 Mich 969 (1996).

Thus, just as municipal corporations are directly liable for the customs, policies and practices of their official policymakers under federal law, the State of Michigan is directly liable for a violation of the state constitution in cases where a state policymaker acts in an "official capacity," rendering said action a state "custom or policy." *Carlton,* 215 Mich App at 505; *Reid v State of Michigan,* 239 Mich App 621, 628-29 (2000), *lv den* 463 Mich 954 (2001). Under *Smith,* whether an individual's constitutional rights were violated by custom or policy is established by showing that, were the state a municipality, it would be liable under 42 USC § 1983. *Id.* at 642 (Boyle, J., concurring in part and dissenting in part).

[31] Notably, the Michigan Court of Appeals issued a significant opinion on December 5, 2019, just one day before the filing of this brief, adopting in total the *Mays* constitutional due process analysis from the court of appeals in this case. *See Bauserman, (on remand),* __ Mich App __, 2019 WL 6622945 (2019).

In this case, Plaintiffs have alleged that Defendants through their customs, policies or practices, deliberately breached Plaintiffs' constitutionally protected right to bodily integrity by creating and perpetuating an ongoing exposure to contaminated water; and they did so with deliberate indifference to the known risks of harm which said exposure would, and did, cause to Plaintiffs. Contrary to the arguments set forth by the Defendants, the Court of Appeals correctly found that Plaintiffs properly pleaded such a claim under the due process clause of the Michigan Constitution and that this case is appropriate for a judicially inferred damage remedy. *Mays v Snyder*, 323 Mich App 1, 64, 72 (2018).

A. Plaintiffs have properly asserted a right to bodily integrity under the Michigan Constitution.

The U. S. Supreme Court has definitively established that the Due Process clauses of the Fifth and Fourteenth Amendments of the United States Constitution encompass a right to bodily integrity. See *Washington v Glucksberg*, 521 US 702, 720 (1997); *Albright v Oliver*, 510 US 266, 272 (1994). Moreover, on January 4, 2019, nearly one year after the January 25, 2018 Court of Appeals decision in this case recognized that right under the Michigan Constitution, the United States Court of Appeals for the Sixth Circuit issued a published opinion confirming the Flint residents' right to bodily integrity under the U.S. Constitution, arising from the detrimental invasion of toxic water by the government. See *Guertin v State*, 912 F3d at 921 (2019) *cert pending*. Incredibly, Defendants now ask this Court to simply disregard published precedent directly on point, which clearly holds that the Flint residents, including Plaintiffs, had a fundamental constitutional due process right to bodily integrity arising from the same exact facts as those which underlie Plaintiffs' Michigan constitutional claims here.[32]

[32] It is noteworthy that, although State Defendants acknowledge the *Guertin* ruling in a footnote, (State Def Br p33 n8) they completely disregard the published precedent and, instead, improperly quote from the 3-judge panel ruling – including from the dissenting opinion -- denying the individual State defendants *Petition for Rehearing En Banc* from the Court's substantive decision. 924 F3d 309 (CA 6, 2019). *Id.* Indeed, their only discussion of *Guertin* is their fruitless attempt to distinguish it from this action, relying on two totally frivolous arguments: first, that because *Guertin* was decided "solely on

As the *Guertin* Court held that an individual's right to bodily integrity is violated when government actors "knowingly and intentionally introduce life-threatening substances into individuals without their consent…" *Id.*; and, that in Flint, the state governmental officials violated Plaintiffs' right to bodily integrity by knowingly and deliberately exposing them to water contaminated with lead and legionella bacteria without their consent or knowledge. *Id. Guertin* also reaffirmed the validity of a *Monell* claim (against the City of Flint in that case) for its customs, policies or practices that proximately contributed to the plaintiffs' injuries. *Id.*

In reaching its conclusion the *Guertin* court confirmed the right to bodily integrity, as alleged by the plaintiffs therein, is "an *indispensable right* recognized at common law as the '*right to be free from …unjustified intrusions on personal security'* [citations omitted] . . . This common law right is *first among equals*…" *Guertin*, 912 F3d at 918 (emphasis added). "*No right is held more sacred*…than the right of every individual to the possession and control of his own person…" *Id.* (quoting *Union Pac Ry Co v Botsford,* 141 U.S. 250, 251 (1981)(emphasis added)). The *Guertin* court concluded, '[t]he *right to… bodily integrity bears an impressive constitutional pedigree*.' *Id.,* at 918-19 (quoting *Doe v Clairborne Cty,* 103 F3d 495, 506 (CA 6, 1996) (emphasis added).

As with the facts alleged in *Guertin*, the facts alleged herein against the State of Michigan and its official policy makers – Defendants Governor Snyder, Emergency Managers Ambrose and Earley, all acting in their official capacities – similarly go to the "core of the bodily integrity protection." *Id.* at 921, 925.

Yet, State Defendants continue to misrepresent Plaintiffs' claims and to rely on inapposite

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the pleadings," *id.,* it is somehow not applicable to this case, *which is also based solely on the pleadings*; and second, they seek to have this Court disregard the published U.S. Court of Appeals decision because "…that case will be appealed to the U.S. Supreme Court." *Id.* It is well settled under Michigan Court Rules and published federal case law that a published court of appeals opinion, whether it be a Michigan court of appeals decision or a United States Court of Appeals decision, has precedential effect until and unless it is overturned on appeal. See MCR 7.215(c)(2).

authority, such as *Coshow v Escondido,* 132 Cal App 4th 687 (Cal App, 2005), and *Pinkney v Ohio Environmental Protection Agency*, 375 F Supp 305 (ND Ohio, 1974),[33] in their quixotic attempt to convince this Court that Plaintiffs do not have a Michigan constitutional bodily integrity claim. (State Def Br p33)[34]. Indeed, the *Guertin* Court aptly "joined with" numerous other judicial rulings[35] arising from the Flint water disaster to hold that "plaintiffs have pled a plausible Due Process violation of bodily integrity…" *Id.,* at 916.

It is particularly significant that, while the State Defendants acknowledge that "Michigan courts generally treat the state's due process clause as 'coextensive' with that in the federal constitution," citing *Cummins v Robinson Twp*, 283 Mich App 667, 700-01 (2009), they continue to argue – without any applicable legal authority – that the Plaintiffs' federal constitutional right to bodily integrity under the facts of this case somehow do not apply to their coextensive claims against the State of Michigan under the Michigan Constitution. (State Def Br p32) Defendants argue that "Plaintiffs cannot establish any fundamental right that has been violated," relying heavily on *Coshow,* an irrelevant decision from another state's court.[36] As repeatedly clarified by Plaintiffs and by the lower

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[33] In *Pinkney*, a 45-year old district court case, the court dismissed plaintiffs' claim of a fundamental right to a healthful environment. *Pinkey*, 375 F Supp at 310. Because Plaintiffs in this case have *never* claimed a right to a healthful environment, *Pinkney* has absolutely no bearing on the present matter.

[34] This is the same argument that they made to the Court of Claims and the Court of Appeals below, as well as to the U.S. District Court in *In re Flint Water Cases,* and to the U.S. Court of Appeals in *Guertin,* each of which properly rejected this analysis.

[35] See United States District Court for the Eastern District of Michigan, *In re Flint Water Cases,* 329 F Supp 3d 369 (ED Mich, 2018), *vacated on other grounds* (Nov 9, 2018), and *Guertin v Michigan,* 2017 WL 2418007 (ED Mich, 2017), the Michigan Court of Appeals, *Mays v Snyder,* 323 Mich App 1 (2018), and the Michigan Court of Claims, *Mays v Snyder*, No. 16-000017-MM. (State Def App Vol 1, pp25-74a).

[36] In *Coshow*, the California Court of Appeals in 2005 determined that there was no fundamental right to "pure" drinking water that was unfluoridated. 132 Cal App 4th at 709. In reaching this conclusion, the *Coshow* court noted, among other things, that the California legislature's deliberate choice to fluoridate the drinking water indicated that fluoride-free water was not a fundamental right protected by the Constitution. *Id.* That court further noted that courts across the United States had upheld the constitutionality of adding fluoride to the drinking water as a proper exercise of the state's police power in the interest of public health, and that citizens did not have a substantive due process right to drinking water in a form more pure than that mandated by federal and state drinking water standards. *Id.*

courts, the constitutional right to bodily integrity, as alleged here, does not seek to enforce a "right to contaminant-free water;" rather, it seeks to enforce the now-widely accepted "right to be free from...unjustified intrusions on personal security." *Guertin,* 912 F3d at 918. Also, unlike the plaintiffs in *Coshow* – where they were aware beforehand of the intent to fluoridate their water and were able to challenge, albeit unsuccessfully, the state government's plan – the citizens of Flint were never given a choice; rather, here, as in *Guertin,* "government officials engaged in conduct designed to deceive the scope of the bodily invasion." *Guertin*, 912 F3d at 921.

As noted above, every court that has examined the applicability of *Coshow* to the claims arising from the Flint water crisis, including the Court of Appeals below, correctly concluded *Coshow* provides no support for Defendants' position. (State Def App Vol 1, p100a n16) See also *Mays,* 323 Mich App at 62, n 16; see also *Guertin,* 912 F3d at 922 ("*Coshow* did not address whether substantive due-process protections might be implicated in the case of intentional introduction of known contaminants by government officials, and its reasoning is inapplicable." *Id.*)

In rejecting Defendants' reliance on *Coshow*, the *Guertin* Court further noted "[t]he numerous cases involving government experiments on unknowing and unwilling patients provide a strong analogy to the Flint Water Crisis." [37] *Id.* at 920-21. Unlike *Coshow,* those cases arose, as here, from "…forcible intrusions on [individuals'] bodies against their will, absent a compelling state interest." *Id.* at 919 (quoting *Planned Parenthood Sw. Ohio Region v DeWine,* 696 F3d 490, 506 (CA 6, 2012)).

Plaintiffs in this case have thus properly alleged Defendants violated their constitutionally protected right to bodily integrity by: knowingly participating in delivering to them drinking water

[37] The "numerous cases" cited by *Guertin* in a footnote are: *Barrett v United States,* 798 F2d 565 (CA 2, 1986); *Lojuk v Quandt,* 706 F2d 1456 (CA 7, 1983); *Rogers v Okin,* 634 F2d 650 (CA 1, 1980), *overruled on other grounds sub nom, Mills v Rogers,* 457 U.S. 291, 102 S.Ct. 2442, 73 L.Ed.2d 16 (1982); *Bounds v Hanneman,* 2014 WL 1303715 (D Minn, 2014); *Heinrich v Sweet,* 62 F Supp 2d 282 (D Mass, 1999); *Stadt v Univ of Rochester,* 921 F Supp 1023 (WD NY, 1996); *In re Cincinnati Radiation Litigation,* 874 F Supp 796, 802-04, 810-811 (SD Ohio, 1995); *Davis v Hubbard,* 506 F Supp 915 (ND Ohio 1980). *Guertin*, 912 F3d at 920 n 4.

contaminated with Legionella bacteria and dangerous levels of lead without their knowledge, creating a public health emergency; and then exacerbating that emergency by orchestrating a cover-up, which prevented Plaintiffs from being able to help themselves by stemming the damage to their bodies. (State Def App Vol 2, pp259a, 262-3a, 267-73a, 276-9a, 282-4a)

B. Plaintiffs have alleged sufficient facts to show that all of the Defendants herein were enacting "custom or policy" within the meaning of *Monell*.

Municipal liability under 42 USC §1983/*Monell* is predicated on two elements: "(1) a plaintiff's federal constitutional or statutory rights were violated and (2) the violation occurred pursuant to a policy or custom of the municipality." *Johnson v Vanderkooi*, 502 Mich 751, 762 (2018) citing *Monell,* 436 US at 690-91. A municipality may be liable where a course of action is adopted by final official municipal policymaker(s), *Pembaur v City of Cincinnati*, 457 US 469, 480-81, 483 (1986), or where a final policymaker ratifies the decisions and reasoning of an employee. *City of St. Louis v Praprotnik*, 485 US 112, 127 (1988) (plurality op.); *Feliciano v City of Cleveland*, 988 F2d 649, 655 (CA 6, 1993). Municipalities may also be liable where an official authorizes a number of options and employees act in accordance with those options. *Johnson*, 520 Mich at 767.

A final policymaker is one whose "decisions are 'final and unreviewable and are not constrained by the official policies of superior officials.'" *Flagg v City of Detroit*, 715 F3d 165, 175 (CA 6, 2013). State law determines which officials are official policymakers for purposes of *Monell* liability. See *Jackson v City of Detroit*, 449 Mich 420, 434 (1990) citing *Praprotnik*, 845 US at 123. The common thread of these decisions is that a municipality, or in the present case the state, may be liable where a final policymaker affirmatively directs, authorizes, or approves of an employee's actions. Under Michigan case law, once a constitutional right is properly identified, as here, the plaintiff must then identify a policy connected to the governmental entity, the implementation or execution of, caused the alleged constitutional violation. See *Johnson, 502* Mich at 763.

As discussed below and in the Statement of Facts above, in this case, the Court of Appeals

correctly found Plaintiffs alleged sufficient facts[38] to establish that Defendants, each of them, in their respective official capacities, directed, authorized, or otherwise ratified a particular course of action thereby establishing a state policy. (State Def App Vol 1, pp102-3a)

The Defendant State – acting through both the Governor and EMs in their official capacities, as arms of the State, and the other State Defendant agencies all acting by and/or through their official policymakers -- authorized and implemented the transition from the DWSD to the Flint River without taking the necessary steps, of which they were on notice, to utilize necessary anti-corrosive treatment. Defendants were thus deliberately indifferent to the plainly obvious serious risk of harm that Plaintiffs suffered. (State Def App Vol 2, p284a) Defendants then perpetuated and exacerbated the violation of Plaintiffs' constitutional rights to bodily integrity by falsely ensuring them publicly that the water was safe and by suppressing accurate information to the contrary. (State Def App Vol 2, p284a)

1. ***Plaintiffs have pled facts to support finding of "custom policy practice."***

Plaintiffs have properly pleaded that the state, through its relevant policymakers, developed a policy to utilize the Flint River as an interim water source, to wit:

- All the decisions relevant to the use of the Flint River were directed or authorized by official policymakers for the State and its agencies. (State Def App Vol 2, pp257-9a)
- Governor Snyder authorized the use of the Flint River as an interim water source as the state's final policymaker. (*Id.*, p262a, 266a) State Treasurer Andy Dillon made the final decision to transition Flint from the DWSD to the KWA. (*Id.*, p266a)
- State funds were used to request studies on the cost effectiveness of the transition to the KWA and state officials developing the interim plan for using the Flint River. (*Id.*, p265-6a)
- The MDEQ, through policy promulgated by its official policymakers and affected by its officers, and EM Earley directed or authorized Flint to begin providing untreated water to its residents. (*Id.*, pp262a, 267-8a)

Plaintiffs have also properly pleaded a State policy of misleading Flint's residents as to the

[38] It is, of course, axiomatic that on a motion for summary disposition the non-movant's pleadings must be taken as true. *Wade v Dep't of Corrections*, 439 Mich 158, 162–63 (1992).

danger of consuming the contaminated water and of delivering untreated and contaminated water to the residents of Flint. This policy was established by final policymakers and evidenced by the acts taken by state officials pursuant to that policy:

- Defendant Snyder refused to declare a state of emergency or order the City of Flint to reconnect to the DWSD until the public became aware of the extent of the crisis that the state had long been aware of. (*Id.*, pp279-80a)

- MDEQ and MDDHS officials, acting pursuant to official policy, deliberately misled the U.S. Environmental Protection Agency and the public about contaminants in Flint's water throughout 2015 and discredited accurate information given to the public regarding the legionella outbreak attributable to the use of Flint River. (*Id.*, pp273a, 275-6a, 278a)

- Defendant Ambrose refused to go back to using the DWSD as Flint's water supplier even going so far as to override a vote from the Flint City Council. (*Id.,* pp271-2a, 274a)

Plaintiffs' pleadings thus properly allege that state policymakers, acting in their official capacities, made decisions that represent "official policy" within the meaning of *Pembaur*, 475 US at 481, and *Johnson* 502 Mich at 765-67. To ultimately determine whether individual decision makers were delegated relevant policymaking authority requires discovery into Defendant agencies' customs, practices, and policies.

2. *Plaintiffs have pled facts to support a finding of deliberate indifference/conscience shocking behavior.*

In addition to alleging the requisite constitutional right to bodily integrity, and the facts to establish that Defendants acted, or that the requisite custom, policy or practice was enacted, Plaintiffs also sufficiently pled that they acted with deliberate indifference to the constitutional rights of Plaintiffs, such that ". . . the government's discretionary conduct that deprived that [constitutionally protected] interest was constitutionally repugnant . . . We use the 'shocks the conscience' rubric to evaluate intrusions in a person's right to bodily integrity." *Guertin,* 912 F3d at 922.[39]

The U.S. Supreme Court has explained that official conduct that "shocks the conscience" is

[39] See also *Sacramento v Lewis*, 523 US 833, 851-54 (1998); *Am.Express Travel Related Servs Co v Kentucky,* 641 F3d 685, 688 (CA 6, 2011); *Lillard v Shelby Co Bd Of Educ* 76 F3d 716, 725 (CA 6, 1996).

that which is so "'offensive' that it [does] not comport with traditional ideas of fair play and decency," *Whitley v Albers,* 475 US 312, 327 (1986); see also *Rochin v California,* 342 US 165, 169 (1952). The *Guertin* court found that the governmental conduct surrounding the Flint water disaster, as alleged, was indeed constitutionally repugnant, and in so finding, the court pointed to a longstanding U.S. Supreme Court precedent to note, "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another…" *Guertin,* 912 F3d at 923 (quoting *Sacramento v Lewis*, 523 US 833 at 850 (1998).

As they erroneously argued below, Defendants again misrepresent the applicable "deliberate indifference/conscience shocking" standard by contending, "[t]o be 'conscience shocking', a person's conduct generally must be 'intended to injure.'" (State Def Br p34) citing *Range v Douglas*, 763 F3d 573, 590 (CA 6, 2014)). This is just wrong. Defendants' reliance on *Range* is both out of context and dishonest. Whether certain conduct shocks the conscience depends on the facts and circumstances of the particular case. See *Range,* 763 F3d at 590; see also *Guertin,* 912 F3d at 924-27.

While Plaintiffs agree unjustifiable governmental conduct which *is* intended to injure "…most clearly rises to the 'conscience-shocking level,'" *Range*, 763 F3d at 590 quoting *Cty of Sacramento v Lewis*, 523 US 833, 848–49 (1998), it is also true, and as held by *Range,* that deliberate indifference, without the intent to injure, "'may or may not be shocking depending on the context.'" *Id.*, quoting *Hunt v Sycamore Cmty Sch Dist Bd of Educ*, 542 F3d 529, 535 (CA 6, 2006).

Plaintiffs do not dispute that, "[a]t a minimum, the standard requires a showing beyond mere negligence." *Ewolski v City of Brunswick,* 287 F3d 492, 510 (CA 6, 2002) citing *Daniels v Williams,* 474 US 327, 332 (1986); see also *Range,* at 590. Yet, as the Sixth Circuit opined on this issue in *Guertin,* 912 F3d at 923, the range of conduct that could qualify as conscience-shocking falls within a spectrum, at one end of which is "mere negligence," and at the other end of which is conduct that is "'intended to injure in some way unjustifiable by any governmental interest.'" *Id.*, quoting *Sacramento v Lewis*, 523

U.S. at 849. In *Guertin,* arising from the same facts as here, the court was clear: "We deal here not with these extremes but rather in the middle…', something more than negligence but less than intentional conduct, such as recklessness or gross negligence.'" *Id.*, quoting *Lewis,* at 849.

Defendants completely ignore the *Guertin* ruling and glaringly omit from their argument that in *Range,* the court was careful to explain:

> Conduct that is more akin to recklessness or gross recklessness, such as deliberate indifference, is a "matter for closer calls." [*Sacramento v Lewis*], at 849, 118 S Ct 1708. **These middle states of culpability "may or may not be shocking depending on the context."** *Hunt v Sycamore Cnty Sch Dist Bd of Educ*, 542 F3d 529, 535 (CA 6, 2008).

Range, 763 F3d at 590. (emphasis added).

In *Guertin,* 912 F3d at 924-27, the Court analyzed three factors when addressing deliberate indifference: 1) time to deliberate; 2) voluntariness of relationship; and 3) existence of a compelling governmental interest:

> [T]he question is whether defendants acted with '[d]eliberate indifference in the constitutional sense . . . 'which we have equated with subjective recklessness . . . plaintiffs must show the government officials 'knew of facts from which they could infer a substantial risk of serious harm,' that they did infer it, and that they acted with indifference 'toward the individual's rights.'

Guertin, 912 F3d at 926 (internal citations and quotations omitted).

While "intent to injure" might be required when circumstances afforded the official no opportunity to deliberate, it is equally true that the "deliberate indifference" standard is appropriate for situations where, as here, actual deliberation was possible and, in fact, occurred. See *Ewolski,* 287 F3d at 510-11. The critical question is thus "whether the circumstances allowed the state actors time to fully consider the potential consequences of their conduct." *Range,* 763 F3d at 590 (internal quotation marks and citation omitted).

3. *The circumstances of this case satisfy the deliberate indifference/conscience shocking standard.*

In this case Defendants had years to consider the potential consequences of their actions, not

only the act of deciding to switch Plaintiffs' water source, but also of concealing the disastrous effect of the switch on Plaintiffs and the members of their putative class. See *Ewolski,* 287 F3d at 510-11. ("The time for deliberation ...distinguishes this case from those cases in which actual malice and an intent to harm was required.") Given the time Defendants had to deliberate their actions, the kind of risk that they were creating for tens of thousands of people and the lack of an articulable state interest to be served by their conduct, the abuse of power exercised by them in this case was undoubtedly conscience shocking. *Hunt v Sycamore Cmty Sch Dist Bd of Ed,* 542 F3d 529, 540 (CA 6, 2008). Plaintiffs' well-pled allegations against the Defendants in this case thus fall squarely within the realm of "conscience shocking deliberate indifference" as defined by the applicable case law and as properly held by the Court of Appeals:

> We agree with the Court of Claims' conclusion that "[s]uch conduct on the part of the state actors, and especially the allegedly intentional poisoning of the water users of Flint, if true, may be fairly characterized as being so outrageous as to be 'truly conscience shocking.' … At the very least, plaintiffs' allegations are sufficient to support a finding of deliberate indifference on the part of the governmental actors involved here.

(State Def App Vol 1, p100a citing State Def App Vol 1, p52a)

Indeed, Defendants' conduct in Flint has shocked the conscience of millions around the world. If these actions are not conscience-shocking, there are none that are.

C. The State "custom or policy" was the proximate cause of the violation of Plaintiffs' bodily integrity.

Despite Defendants' argument to the contrary, Plaintiffs have not only identified the state customs or "policies" in place during the applicable time periods, but also the ways in which said policies proximately caused Plaintiffs' injuries. That is, Plaintiffs have sufficiently pled facts that Defendants' "customs or policies," as discussed above, were a "moving force" behind the violation of Plaintiffs' constitutional right to bodily integrity. See *Guertin*, 912 F3d at 922.

As an initial matter, factual causation is indisputable. But for the state policy of switching to

the Flint River without having a proper corrosion control regime in place, Plaintiffs would not have been poisoned. (State Def App Vol 2, p271a) As well, but for the state's cover up, Plaintiffs would not have continued to be exposed to contaminants without their knowledge or consent for the length they were. Contrary to Defendants' assertions, Plaintiffs have properly pled that the state policy of providing Plaintiffs with untreated Flint River water and covering up the ensuing health crisis was a proximate cause of the violation of Plaintiffs' right to bodily integrity. (State Def App Vol 2, p285a)

Moreover, also contrary to Defendants' arguments, it is well settled under Michigan law, there may be more than one proximate cause for a plaintiff's injury. *O'Neal v St John Hosp & Med Ctr*, 487 Mich 485, 496-97 (2010) (citing *Brisboy v Fibreboard Corp*, 429 Mich 540, 547-48 (1988)

Applying the deliberate indifference standard, the question is, whether Defendants' official conduct – or customs or policies – amounting to deliberate indifference, was a cause of Plaintiffs' injuries; and, whether those injuries were the "plainly obvious consequences" of Defendants' deliberate indifference. See *Bd of Cnty Commrs Bryan Cnty v Brown,* 520 U.S. 397, 411-12 (1997).

In this case, Plaintiffs have sufficiently alleged Defendants were aware, prior to the switch, of the risk of harm that would flow from supplying Plaintiffs with untreated Flint River water:

- Defendants MDEQ and Governor Snyder knew that the Flint River would be used and that the Flint WTP was not capable of providing the necessary water treatment for the Flint River Water. (State Def App Vol 2, pp264a, 266-7a) The state nonetheless developed a policy to implement the use of the Flint River. (*Id.,* pp265-7a, 268a);

- Defendant MDEQ was aware that the FWTP plant was not prepared for the switch and there were major health risks in switching. (*Id.,* pp267-8a);

- Defendant Earley was aware the FWTP was not prepared. (*Id.,* pp267-8a)

Once Flint residents began receiving contaminated water, Plaintiffs have sufficiently alleged all Defendants knew of *actual* health issues resulting from Plaintiffs' exposure to the untreated Flint River water:

- Defendant Snyder was aware of the harm being caused "as early as May 2014." (*Id.,*

p268a) By March 10, 2015 Defendant Snyder's knowledge was incontrovertible. (*Id.,* pp268-74a) More evidence simply confirms Snyder's knowledge of the public health crisis. (*Id.,* pp275-8a, 280a);

- Defendant Earley was aware of significant health problems related to the provision of untreated water to Flint residents. (*Id.,* pp268-9a);

- Defendant Ambrose was aware of serious health impacts in January, 2015. (*Id.,* pp269-71a) Later evidence confirmed the same. (*Id.,* pp272a, 275-8a, 280a);[40]

- Defendant MDEQ was aware of the health risks, elevated lead levels in water and blood, and legionella from the municipal water system. (*Id.,* pp268-72a, 274-78a);

- Defendant MDDHS was aware of the legionnaires from the water in October 2014. (*Id.,* p270a) The MDDHS was aware of elevated blood lead levels "in late 2014 or early 2015." (*Id.,* pp276-8a) The MDDHS knew these problems were correlated with the switch to the Flint River. (*Id.,* p277a);

- State Defendants' knowledge of the toxic nature of the water being supplied to Flint's residents is made crystal clear by its selective provision of water coolers for only its own employees during the Flint Water Crisis. (*Id.,* p270a)

Thus the State's conduct, acting through its agencies and official policymakers, clearly meets the standard for deliberate indifference and the requisite causal link. Each of the Defendants' actions with respect to the provision of water to Flint residents from 2014–2015 were a proximate cause of the violations of Plaintiffs' bodily integrity. Therefore, no additional inquiry into culpability is necessary. See *Johnson*, 502 Mich at 763.

D. Plaintiffs have properly sued the Governor and Emergency Managers in Their Official Capacities.

This Court has properly recognized, in applying the *Monell* and *Pembaur* municipal liability analysis to claims brought under the Michigan Constitution, that official decisions of those wielding final policymaking authority may incur liability on behalf of the entity they represent. See *Johnson v Vanderkooi*, 502 Mich 751, 765–66 (2018); *Pembaur*, 475 US at 481-83; and *Monell,* 436 U.S. at 694.

[40] While General Motors stopped receiving Flint water because of corrosion concerns prior to EM Ambrose taking office it is utterly implausible that Ambrose was not aware of this.

Contrary to the State Defendants' arguments, the Court of Appeals thus correctly concluded that the Court of Claims has jurisdiction over Plaintiffs' well-pled claims against the Governor and Emergency Mangers in their official capacities.

1. Plaintiffs have properly sued the Governor in his official capacity.

State Defendants rely on *Jones v Powell*, 462 Mich 329 (2000) for their assertion that Plaintiffs' claim against Governor Snyder in his official capacity is improper on the basis of statutory immunity. (State Def Br pp43-4) This argument is misplaced and simply not consistent with this Court's holdings in both *Smith* and *Jones*.

First, with respect to *Jones*, contrary to Defendants' argument otherwise, (State Def Br p43) this Court did *not* hold that official capacity suits against individual policymaking officials were barred by this Court's decision. Rather, in *Jones,* this Court confirmed that where an individual state official is sued in an *official* capacity, that person, like the State itself, is protected by the Eleventh Amendment and therefore subject to suit in the Court of Claims under *Smith*. See *Jones*, 462 Mich at 337.

Furthermore, although State Defendants concede that *Smith* actions are governed by the *Monell* standard, they nonetheless repudiate one of the most critical elements of *Monell* liability—i.e. the liability of the governmental entity for decisions and conduct of an individual policy maker acting in their "official capacity." (State Def Br p21)

State Defendants' argument thus flies in the face of the universal understanding of *Monell* liability. See, e.g., *Kentucky v Graham*, 473 US 159, 165 (1985) quoting *Monell*, 436 US at 690. ("Official-capacity suits . . . 'represent only another way of pleading an action against an entity of which an officer is an agent.'"). See also *Will v Michigan Dep't of State Police,* 491 US 58, 71 (1989) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office."); and *Brandon v Holt,* 469 US 464, 471 (1985). As such, Plaintiffs' claims in this case

against the Governor (and Emergency Managers)[41] in their respective official capacities is no different from a suit against the State itself.[42]

Second, State Defendants' reliance on statutory immunity, MCL 691.1408(1),[43] provides no support for their argument. (State Def Br p44). The claims in this case do not seek "personal judgments" against the Governor or Emergency Managers because it is the State and its agencies which are subject to judgment under *Smith*.

Moreover, State Defendants' reliance on an inapplicable statute and court rule[44] for the proposition that the state must consent to be sued in a claim brought against its official policymakers under *Smith,* (State Def Br p44) is equally incorrect. In addition to this Court's adoption of *Monell* standards in *Smith* and *Jones*, it has been repeatedly affirmed that, "[t]he state's liability for a constitutional tort is not something that the state affirmatively grants in the form of a statute." *Rodwell v Forrest*, unpublished opinion per curiam of the Court of Appeals, May 25, 2010 (Docket No. 289038), 2010 WL 2076933, unpub at 3, (citing *Smith*, 428 Mich at 641, and *Burdette v State*, 166 Mich App 406, 408 (1988)). "Rather, liability for a constitutional tort is simply inherent in the fact that the state is subject to the constitution as the preeminent law of the land." *Id.* See also *Mays*, 323 Mich at 87–88.

Defendants persist in ignoring the distinction between suits brought against the State for violations of statutory or common law– suits in which states are shielded by immunity granted by law– and suits brought for violations of rights guaranteed under the Michigan Constitution, where no

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[41] See discussion *infra* regarding the status of Defendants Emergency Managers Ambrose and Earley as officials of the State.

[42] Indeed, the State Defendants concede that in certain circumstances the acts of government employees are the acts of government. (State Def Br p44) Yet, they attempt to obfuscate the lack of authority supporting their arguments by simply saying those "circumstances . . . do not exist here. (*Id.*, (citations omitted)).

[43] Under the GTLA, MCLA 691.1408(1), the state has the discretionary authority to indemnify employees for *personal* judgments. Any judgments in this case will be against the State, and not *personal* to the respective policymaker Defendants acting in their official capacities.

[44] MCL 600.2051(4); MCR 2.201(C)(5).

immunity applies and the State does not need to consent to be sued. Thus, Plaintiffs' claims against the State, naming Snyder and the EMs in their official capacities, are proper.

2. Plaintiffs have also properly sued the Emergency Managers (EMs) in their official Capacity in the Court of Claims

Defendants also incorrectly assert the decisions made by the EMs cannot support *Monell* liability against the State. (State Def Br pp30-1) Significantly, on this appeal, the EMs themselves do not challenge their status as "state officers" for purposes of Court of Claims jurisdiction over them. (EM Def Br p29) However, the State Defendants wrongly insist, for purposes of the *Monell* claims in this case, the EMs were "city officials" and thus not properly sued in the Court of Claims. (State Def Br pp30-1) And the EMs argue simply Plaintiffs failed to allege sufficient facts to establish their liability for the violation of Plaintiffs' right to bodily integrity, relying only an incomplete listing of Plaintiffs' allegations. (EM Def Br pp25-9) All Defendants are wrong for the reasons set forth below.

a. **The EMs Were At All Times, Agents of the State, Even while they ran the City of Flint as Receivers.**

This case undoubtedly presents a unique set of circumstances, both factually and legally. On the one hand, pursuant to Michigan's Home Rule City Act, MCLA 117.1 and the Michigan Constitution, Mich. Const. Art 7 §22(1963), it has been consistently determined that the imposition of an emergency manager to assume state receivership power over the financially strapped City of Flint did not transform Flint into an arm of the State. See *Guertin,* 912 F3d at 937-39 (citing *Ass'd Builders & Contractors v Lansing,* 499 Mich 177, 186 (2016); *AFSCME v City of Detroit,* 468 Mich. 388, 410 (2003); *Bivens v Grand Rapids,* 443 Mich 391, 400 (1993); *Boler v Governor,* 324 Mich App 614 (2018); *Collins v City of Flint,* 2016 WL 8739164, at *4 (Mich, 2016).

On the other hand, as the Court of Appeals rightly held, the Court of Claims had jurisdiction over Defendants EMs themselves, as "state officers," as expressly defined by the Court of Claims Act ("CCA"), MCLA 600.6419(7). Also, as clearly provided by the Emergency Manager Act, MCLA

141.1541 *et seq*., ("P.A. 436"), when the Governor appointed the EMs to assume governance control as state receivers over the City of Flint, they stepped in as agents and officers of the State.[45]

While the Michigan Constitution grants municipal governments the authority to provide public services including "supplying water," Const. 1963 art VII, § 24, the Emergency Manager Act, P.A. 436, takes *all* of the authority held by municipal governments and places it in the hands of the State. MCL 141.1459(2) (granting the EM exclusive use of municipal authority); see also *Phillips v Snyder*, 836 F3d 707, 710 (CA 6, 2016) ("An emergency manager's powers…are extensive and arguably displace all those of the local officials.").

b. The State EM's are Properly Sued in the Court of Claims under *Smith* and *Monell*.

The State Defendants' argument regarding the EMs is simple: because supplying water is a municipal function the EMs were making municipal policy and therefore, the decisions made by the EMs cannot support *Monell* liability against the state. (State Def Br p30). They cite *McMillan v Monroe Co, Ala*, 520 US 781 (1997), and an unpublished order from the U.S. District Court for Eastern Michigan, *In re Flint Water Cases*, No 16-cv-10444 (ED Mich Oct 31, 2018) (order),[46] in support of their argument here. The simplicity of Defendants' argument however ignores the exceptionally unique nature of this case.

Whether the EMs are state policymakers turns whether they represented the state or

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[45] See, e.g., MCLA 141.1546(1)(b) and 1549(1) [emergency manager [EM] is appointed by the governor]; MCLA 141.1549(3)(D) [EM serves at pleasure of governor]; MCLA 141.1549(4) and (5) [all EM powers are conferred by the Legislature]; MCLA 141.1552(1)(f), (x), (z) and (3) and MCLA 141.1555(1) [EM powers conditioned upon approval of governor and/or state treasurer]; MCLA 141.1549(9) [EMs are subject to the same codes of conduct applicable only to state officers]; MCLA 141.1557 [EM to submit reports every 3 months to governor, state treasurer, state legislators, among others]; MCLA 141.1562(1) [governor has final say over EM's determination of whether the local emergency has been rectified].

[46] This order also takes the same all or nothing approach adopted by Defendants looking solely at the fact that the Emergency Managers made decisions regarding municipal water services. (State Def App Vol 4, pp796-9a)

municipality when making their decisions. *McMillan*, 520 US at 792.[47] The state's allegation that "an official's actions 'in a particular area' can only be attributed to either the state or a municipality—not both," (State Defs' Br p30 (quoting *McMillan*, 520 US at 785)) is not accurate. The Supreme Court never explicitly stated that an individual cannot exercise policymaking authority for both a state and municipal government. Indeed, in *McMillan,* the Court acknowledged that in some cases "[i]t may not be possible to draw an elegant line that will resolve this conundrum." *McMillan*, 520 US at 763 (citation and quotation omitted). Instead of conducting a proper *McMillan* analysis to determine the relationship between EMs and the State, Defendants rely almost exclusively on an unpublished decision and ignore the clear fact that the EMs are "creature[s] of the Legislature with only power and authority granted by statute." *Kincaid v City of Flint*, 311 Mich App 76, 86 (2015).

E. The special factors analysis weighs in favor of recognizing a judicially inferred remedy against the state/recognizing a damage remedy does not violate separation of powers.

Once a plaintiff establishes a constitutional violation pursuant to state custom or policy, *Smith* requires an analysis of "special factors" to determine whether it is appropriate to infer a damage remedy against the State. *Smith*, 428 Mich 502, 648–652 (1987). Plaintiffs' allegations have established a clear violation of their constitutional right to bodily integrity pursuant to the requisite custom or policy. As discussed below, the Court of Appeals properly applied the *Smith* "special factors" analysis in finding that it is appropriate to infer a damage remedy in this case. *Mays,* 323 Mich App at 65-72.

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[47] The EMs were exercising authority that municipalities may exercise. *Compare*, *McMillan*, 520 US at 788 *with* Const. 1963 art VII, § 24 (allowing municipalities to provide public services to their residents). However, the remainder of the factors clearly demonstrate the link between the EM and the State, not the municipality. Like the Sheriff in *McMillian* who was deemed to be a state policymaker: the EMs are subject to removal by impeachment plus the additional possibility of removal by the Governor (*compare*, *McMillian*, 520 US at 788–89 *with* MCL 141.1549(3)(d)); the municipality does not have the ability to direct the EM's actions (*compare McMillian*, 520 US at 790 *with* MCL 141.1549(2)); and EMs must report to the state treasurer (*compare McMillian*, 520 US at 790 *with* MCL 141.1549(5)). Furthermore, the EMs are paid by the state, subject to the regulations of state civil servants, can be placed under the supervision of the State Treasurer, and appointed by the Governor. See MCL 141.1459(1), (3), (8), (9). All of these factors point explicitly to the EMs exercising policymaking authority for the state. (See also State Def App Vol 1, pp94-6a)

In assessing whether a damage remedy is properly inferred, the factors this Court considers are: 1) the "text, history, and previous interpretations of the specific provision"; 2) whether the state has a special authority over the matter at issue; 3) specificity of the constitutional protection; 4) "the clarity of the constitutional protection and violation . . ."; and the availability of other remedies. *Id.* at 651 (see also State Def App Vol 1, pp102-3a); (using largely the same factors plus "'various other factors' militating for or against a judicially inferred remedy").

1. There is No Alternative Remedy Available to Hold the State Accountable for the Harm Done to Plaintiffs and the Violation of Their Constitutional Rights

At the outset, one of State Defendants' central arguments throughout this case has been that there can be no damages remedy directly against the State under the Michigan Constitution because Plaintiffs purportedly "can pursue damages and other relief for the injuries they allege." (State Def Br p35) This argument has no merit, as was properly held by both the Court of Claims and the Court of Appeals.

First, they take *Jones v Powell* out of context and entirely misconstrue the case, by asserting that under *Jones* a damage remedy against the State can "only" be recognized if no other remedy is available in any other forum against any other parties under any other theory of liability. (State Def Br p35) As was expressly, and properly, held by the Court of Appeals, and fully this is an incorrect reading of *Jones*. In *Jones,* the plaintiff asserted Michigan constitutional claims against a municipality and individual municipal employees in their individual capacities. This Court held that because the *Jones* plaintiff had an effective alternative cause of action *against those particular defendants* under 42 USC § 1983, and were not barred by the Eleventh Amendment, they did not have a viable claim directly under the Michigan Constitution, thus expressly contrasting claims against *the state and state officials* with claims against municipalities and individual municipal employees. See *Id. See also Bauserman, (on remand)*, 2019 WL 6622945 at *11, ("[I]n *Jones* our Supreme Court observed that the plaintiff did have an alternate remedy available because she could pursue an action in federal or state court under 42 USC § 1983 against a

municipality or an individual defendant without implicating immunity under the Eleventh Amendment." *Id.*)[48]

Thus the Court of Appeals correctly found in this case that the *Jones* holding was limited to "…cases involving a municipality or an individual defendant," *Mays*, 323 Mich App at 71. Thus, both the Court of Claims and the Court of Appeals correctly concluded, "the question posed is whether plaintiffs have any *available* alternative remedies against these specific defendants. See *Jones,* 462 Mich at 335-37." *Id.*, at 67. (emphasis incl.)

Similarly, common law tort claims against state employees in their individual capacities, or against the EPA under the FTCA, do not provide a remedy for the State's customs, policies or practices that caused the violation of constitutional rights. *See Monell v Dep't of Social Servs of City of New York*, 436 US 658 (1978); *Smith v Dep't of Pub Health*, 428 Mich 540 (1987).[49] The appropriate inquiry in this case is thus whether there are alternative remedies against *the State*; *not,* as Defendants insist, whether there are other remedies available under other causes of action against other responsible parties *not the State*. Defendants' allegation that the SDWA or Michigan SDWA provide alternative remedies is laughable because neither will remedy or compensate for the harm caused by the State for the violation of Plaintiffs' constitutional injuries. See *Mays*, 323 Mich App at 69 ("Contrary to defendants' assertion, the SDWA and its Michigan counterpart do not provide a legislative scheme for vindication of the alleged constitutional violations…"). See also *Boler/Mays v Earley, et al.*, 865 F3d 391 (CA 6, 2017), wherein the Sixth Circuit addressed head on this precise question. *Boler* ruled

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[48] The *Bauserman* court also adopted the lower appellate court's analysis in this case in finding that, despite the availability of an administrative remedy to the plaintiffs in that case, such a purported "remedy" did not "…provide an avenue for plaintiffs to seek redress in the form of monetary relief for the alleged violation of their due process rights protected by the state constitution. *See Mays,* 323 Mich App at 67." *Bauserman*, (*on remand*), 2019 WL 6622945 at *11.

[49] See also *Baldwin v City of Estherville*, 929 NW2d 691, 704 (Iowa 2019) (Appel, J., concurring in part) ("Any analogy between common law and constitutional claims, however, is at best inexact. A constitutional tort is designed not only to provide compensation for injuries but also to vindicate constitutional rights.") (citation omitted).

unequivocally that: 1) plaintiffs' §1983 substantive due process/bodily integrity claims against the individual defendants acting in their individual capacities while under color of state law, are not alleging a "constitutional right to safe drinking water…," *id.* at 405-6; and 2) that "…a state actor's deliberately indifferent action concerning contaminants in public water systems, which created a special danger to a plaintiff that the state knew or should have known, could violate the Due Process Clause without also violating the SDWA…" *Id.*at 408**.**

Even if this Court were to consider individual-capacity bodily integrity claims against individual defendants as an "alternative remedy," that alone does not render it inappropriate for courts to infer a damage remedy against the State for its direct role in causing the violations of Plaintiffs' constitutional rights and the injuries caused therefrom. See *Smith*, 428 Mich at 647. First, in the related §1983 cases the individual defendants are being held responsible only in their respective individual capacities, with no reference to the entirely independent basis of liability against the State for its own customs, policies or practices that led to Plaintiffs' injuries. Second, the individual defendants have available to them a qualified immunity defense, unrelated to the State's conduct, so that it is not clear whether a remedy is *actually even available* in those cases.[50]

Third, considering the number of injured Plaintiffs and scope of those injuries it is likely that defendants in their individual capacities will be judgment-proof, and therefore, Plaintiffs will be left without an adequate remedy.[51]

2. Other "special factors" weigh in favor of inferring a damage remedy that does not violate the separation-of-powers

The Court of Appeals conducted a special factors analysis and properly concluded the

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[50] In *Guertin,* for example, although binding precedent as a published opinion, as State Defendants inaptly point out, they are still seeking to have the U.S. Supreme Court grant *certiorari* to take on this question of the individual defendants' claim of qualified immunity. See *Guertin,* 912 F3d at 907 (*rehrg den* 924 F3d 309 (2019), *cert pet. pending.*

[51] See, e.g., *Lakeview Technology, Inc v Robinson*, 446 F3d 655, 657 (CA 7, 2006) ("Ability to *calculate* damages does not make that remedy adequate, however, if the plaintiff cannot *collect* the award.")

circumstances of this case, warrants recognizing a damage remedy against the state under *Smith*. *Mays*, 323 Mich App at 65-72. Defendants fail to provide any cogent reasons how the Court of Appeals erred in its analysis. Rather, they persist in their confusion that Plaintiffs' claim is merely a garden variety tort and that a judicially inferred remedy here violates the separation of powers, citing Const. 1963 art 3, § 2. (State Def Br pp37–38[52]). Yet, notably, in *Bauserman,* 2019 WL 6622945*,* the Court of Appeals, on remand from this Court, held that a judicially inferred damage remedy arising from the substantive due process clause of the Michigan Constitution is appropriate because, unlike the equal protection clause, art 1, § 2, "…the plain language of [the due process clause] Const 1963, art 1, § 17 does not leave the implementation of a private cause of action to the Legislature." *Id.,* 2019 WL 6622945 at *9.

The state erroneously relies on *FDIC v Meyers*, 510 US 471 (1994), in an effort to bolster its argument that the judiciary should not infer a damage remedy here. (State Def Br p39) *Meyers* is entirely irrelevant to a *Smith* analysis. As the *Meyers* Court notes, "we implied a cause of action against federal officials in *Bivens* in part *because* a direct action against the Government was not available." 510 US at 48 (emphasis incl.).[53] Similarly, but on the flip side, in *Smith*, this Court has implied a cause of action against the State where no alternative remedy against the State is available. *Jones*, 462 Mich at 427. Returning to the relevant caselaw for this issue, as the U.S. Supreme Court did in *Meyers*, 510 US at 485, *Smith* resolves the matter in Plaintiffs' favor. *Smith*, 428 Mich at 544 ("A claim for damages against

[52] EM Defendants' further reliance on *Chappel v Wallace*, 462 US 296 (1983) and *Bush v Lucas*, 462 US 367 (1983) as support for denying Plaintiffs a damage remedy against the State, (EM Defs' Br pp33-37) is equally unavailing. The Court in *Bush* declined to infer a damage remedy for defamation and demotion of a federal employee because of the existence of a "comprehensive scheme that was specifically designed to *provide full compensation* to civil service employees who are discharged or disciplined in violation of their First Amendment rights." *Bush*, 462 US at 390 (Marhsall, J. and Blackmun, J., concurring). (emphasis added) As discussed above, the Michigan and Federal SDWAs do not provide a comprehensive remedial scheme – including any compensation -- for the violation of Plaintiffs' constitutional rights.

[53] Notably, at no point does *Meyers* discuss the separation of powers.

the *state* arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases.") (emphasis incl.)

While the judiciary may not exercise the powers of the Legislature, Const. 1963 art III, § 2, it is equally true that the State does not get to decide when it wants to comply with the Michigan Constitution. See *LM v State*, 307 Mich App 685, 695 (2014) *lv den sub nom SS v State*, 498 Mich 880 (2015) quoting *Burdette v Michigan*, 166 Mich App 406, 409 (1988) ("Constitutional rights serve to restrict government conduct. These rights would never serve this purpose if the state could use governmental immunity to avoid constitutional restrictions."). This Court has long held that in deciding "…whether the action of [another branch of government] exceeds whatever authority it has been committed . . . *is a responsibility of this Court as ultimate interpreter of the Constitution*." *House Speaker v Governor*, 443 Mich 560, 575 (1993) (citation and internal quotation omitted). (emphasis added) Moreover, as noted in *Bauserman,* there is nothing in the text of the due process clause of the Constitution that precludes this Court from inferring a damage remedy for substantive due process violations committed by the State. *See Bauserman, (on remand)*, 2019 WL 6622945 at *9. Thus, this Court does not violate the separation of powers by performing its constitutional duty.[54]

Defendants claim a damage remedy in this case will "impair its ability" to function by opening the State's "coffers to tort claimants." (State Def Br p38) Because *Smith* only allows the judiciary to infer damage remedies for constitutional violations pursuant to state custom or policy, *Smith*, 428 Mich

[54] The separation-of-powers does not mean that the coordinate branches of government "operate with absolute independence." *Makowski v Governor*, 495 Mich 465, 482 (2014) (citation and internal quotation omitted). Rather, "[t]he true meaning . . . is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution." *Id.* (citation and internal quotations omitted). Inferring a damage remedy does not violate the separation of powers doctrine because the judiciary will not be exercising the whole of the Legislature and Executive's shared power to provide remedies, a factor that *Smith* accounted for by requiring consideration of the availability of alternative remedies. See *Smith*, 428 Mich at 651. Applying *Smith* does not subvert the Constitution; rather it bolsters and affirms the State's commitment to its founding document.

at 544, the only activities that will be chilled are the promulgation of unconstitutional customs and policies.[55] Furthermore, as Justice Boyle aptly noted, the *Monell* "standard avoids the specter of multitudinous lawsuits against the state for the unauthorized tortious acts of its employees." *Smith*, 428 Mich at 643. The passage of three decades since *Smith* was decided has confirmed Justice Boyle's conclusion, insofar as the government has not been overwhelmed by "multitudinous lawsuits." In a similar vein, the EM Defendants argue the absence of qualified immunity for the state weighs against inferring a damage remedy because it is difficult for the state "to defend against frivolous claims." (EM Def Br p36) This argument fails for the same reason the State Defendants' does. EM Defendants' reference to a lack of punitive damages and jury trial, (*Id.,* at p35), is even less relevant. For Plaintiffs, it is either a remedy under *Smith* or nothing. The lack of better remedies is not an argument against inferring a damage remedy in this case.

Defendants also argue that the amount of the potential liability should be a factor weighing against inferring a damage remedy against the state. (State Def Br p39)[56] Any liability is only commensurate with the egregiousness of Defendants' conduct; they deliberately exposed an entire city to toxic water and then lied to the residents by telling them it was safe to drink**.** See *Mays*, 323 Mich App at 72. Furthermore, implicit in the state's argument is the proposition that the graver the constitutional violation, the less appropriate it is to infer a damage remedy. This is nonsensical. Indeed, as held by the Court of Appeals in *Bauserman,* on this precise question, "we afford 'significant weight' to the 'outrageousness' of the misconduct by the [State] that plaintiffs allege in this case, and we conclude that it weighs in favor of a judicially inferred damage remedy. *Mays,* 323 Mich App at 72." *Id.,* 2019 WL 6622945 at *12.

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[55] Of the states where the judiciary may infer a damage remedy under the constitution, Michigan has one of the most stringent standards for plaintiffs to meet. *Baldwin v City of Estherville*, 915 N.W2d 259, 271 (Iowa, 2018).

[56] Notably, Defendants accusation that "the lion's share" of any recovery would be going to Plaintiffs' attorneys is both offensive and untrue.

Defendants have articulated no valid reasons why the Court of Appeals erred in its special factors analysis. Instead, they continue to attempt to conflate constitutional and garden variety torts, drum up fear of the effects of constitutional compliance, and argue only the legislature may choose to remedy violations of the constitution. Precedent and the basic concept of constitutional democracy foreclose these arguments.

F. This Court should reaffirm *Smith*

"[T]he judicial power of the state is vested exclusively in one court of justice…" Const. 1963 art. VI, § 1. The basic premise of *Smith* is that "[c]onstituional rights serve to restrict government conduct. These rights would never serve this purpose if the state could use governmental immunity to avoid constitutional restrictions." *Burdette v State*, 166 Mich App 406, 408-09 (1988). See also *Jones v Powell*, 462 Mich at 336 (2000); *LM v State*, 307 Mich App 685, 694 (2014) *lv den sub nom SS v State*, 498 Mich 880 (2015); *Hinojosa v Dep't Nat Res*, 263 Mich App 537, 546 (2004) *lv den* 472 Mich 943 (2005), *cert den* 546 US 1034 (2005) ("[A]n action that establishes an unconstitutional taking may not be limited except as provided by the Constitution because of the preeminence of the Constitution.").

This Court's decision will determine "the fullness of the state's commitment to limits on its power to invade the fundamental freedoms of its citizenry enshrined in the state constitution." Gary S. Gildin, Symposium, *State Constitutionalism in the 21st Century*, 115 Penn. L. Rev. 877, 921 (2011).

The State Defendants argue *Smith* should be overturned, relying largely on the U.S. Supreme Court's recent decisions interpreting *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388 (1971), culminating in *Ziglar v Abbasi*, 137 S. Ct. 1843 (2018). Despite Defendants' reliance on *Ziglar*, the U.S. Supreme Court's treatment of *Bivens* claims against individuals, is irrelevant to the constitutional claims asserted against the State itself under Michigan's Constitution. See *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 96 (2007) (Kelly, J., dissenting) ("State constitutions, too, are a font of individual liberties, their protections often extending beyond

those required by the [U.S.] Supreme Court's interpretation of federal law.") (alteration original) (citation and internal quotation omitted).[57]

Also, state judiciaries have broader authority than their federal counterpart. *Lansing Schools Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 362-363 (2010).[58] While *Smith* and *Bivens* partially share a common rationale, the importance of providing a remedy for constitutional violations where none otherwise exists, this idea originated long before *Bivens*. See, e.g., *Marbury v Madison*, 5 US (1 Cranch) 137, 163 (1803), quoted by *Smith*, 428 Mich at 644, and by *Bivens*, 403 US at 397. Furthermore, several factors make the *Smith* and *Bivens* lines of cases fundamentally different.

According to the State Defendants, because the purpose of *Bivens* is to deter the misconduct of individuals, the same must be true of *Smith*. (State Def Br pp41-2) This is incorrect. First, *Smith* only allows for *Monell* liability of the *State* for its customs, policies or practices that result in violations of constitutional rights. *Jones*, 462 Mich at 336–337.[59] When *Smith* was decided, this Court recognized only the State would be liable. *Smith*, 428 Mich at 544. Second, *Smith* also recognizes the importance

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[57] Because of the differences between the state and federal constitutions and purposes of *Bivens* and *Smith* this Court should reject the arguments Defendants draw from *Ziglar*. *See Sharp v City of Lansing*, 464 Mich 792, 802-803 (2001) ("[F]ederal case law can only be persuasive authority, not binding precedent…"). Nonetheless, even in *Ziglar,* as noted by the Court of Appeals on December 5, 2019, in *Bauserman,* "…while the United States Supreme Court, in its most recent pronouncement on the validity of the *Bivens* remedy, has reiterated that caution must be employed before extending the *Bivens* remedy into new contexts, **it also acknowledged that the United States Supreme Court had permitted a *Bivens* action in the context of the Fifth Amendment Due Process Clause in a case alleging gender discrimination.** *Ziglar v Abbasi*, ___ US ___, ___; 137 S Ct 1843, 1854,1857; 198 L Ed 2d 290 (2017), citing *Davis v Passman*, 442 US 228; 99 S Ct 2264; 60 L Ed 2d846 (1979).7 **Accordingly, we likewise conclude that the third factor weighs in favor of a judicially inferred remedy for damages**." *Bauserman,(on remand),* 2019 WL 6622945 at *10. (Emphasis added).

[58] Other states have various rationales for inferring damage remedies for constitutional violations, "(1) the reasoning of the Restatement (Second) section 874A, (2) by analogy to *Bivens*, (3) common law predecessors of the constitutional provision at issue, or a combination of the previous three." *Godfrey v State*, 898 NW2d 844, 859 (Iowa, 2017) (citation omitted).

[59] Moreover, concerns of judicial overreach are tempered by the requirement that plaintiffs establish *Monell* liability and the numerous factors the Court considers when determining whether to infer a damage remedy. *See Smith*, 428 Mich at 643. *See also Baldwin v City of Estherville*, 915 NW2d 259, 271 (Iowa 2018) (noting that Michigan has a higher burden for constitutional torts against than most other states).

of *compensating* individuals whose rights were violated pursuant to state custom or policy. *Id.* at 643. Finally, and most critically, the core of *Smith* is that the primacy of the Michigan Constitution compels a remedy for violations of that Constitution, whether created by the legislature or inferred by the courts. See *id.,* at p640-4.

Also, State Defendants fail to consider the significant textual distinctions between the Michigan and Federal Constitutions. Most fundamentally, "[t]he United States Constitution *grants* limited authority to the federal government. State constitutions, by contrast, serve as a *limitation* on the otherwise plenary powers of state governments." *Woodland v Michigan Citizens Lobby*, 423 Mich 188, 210 (1985). Other substantial textual differences in the Constitutions include, e.g.: the members of this Court are chosen by the people at regular elections; and, the Michigan Constitution explicitly provides for advisory opinions of enacted legislation, Const. 1963, art III, §8. These differences, and others,[60] demonstrate the broader scope of authority and independence the Michigan judiciary possesses compared to its federal counterpart. Furthermore, it is "well settled [in Michigan] that under our form of government the Constitution confers on the judicial department all the authority necessary to exercise its powers as a co-ordinate branch of the government." *Judicial Attorneys Ass'n v State*, 459 Mich 291, 299–300 (1998).

State Defendants' argue, because this Court has become more hesitant to infer causes of action under statutes, it should also refuse to give effect to the Constitution[61]. While Plaintiffs agree that courts are not, and should not be, concerned with "[w]hether or not *a statute* is productive of injustice, inconvenience, is unnecessary, or otherwise," *Johnson v Recca*, 492 Mich 169, 187 (2012) (citation and internal quotations omitted) (emphasis added), this is not what is going on here. First, in *Smith*, a claim

[60] See, e.g., Const. 1963 art VII, § 5 (providing that the Michigan Supreme Court establishes court rules); *Id.* at § 30 (providing that the Michigan Supreme Court may "suspend . . . retire or remove" judges upon the recommendation of the judicial tenure commission.).
[61] See State Def Br p41 citing *Myers v City of Portage*, 304 Mich App 637, 643 n 12 (2014) and *Lash v City of Traverse City*, 479 Mich 180, 193-94 (2005).

arising directly under the Constitution, not a statute, legislative intent is irrelevant. Second, Justice Boyle's opinion in *Smith*[62] does not rely on, or analogize to, any examples of inferring causes of action under a statute. Rather, as discussed above, her opinion is based on the primacy of the Constitution. See *Smith*, 428 Mich 643–644 (Boyle, J., concurring in part and dissenting in part).[63]

Despite Defendants' assertion "[t]here is no longer a defensible basis for *Smith* claims", (State Def Br p43) the primacy of the Michigan Constitution has not changed in the decades since *Smith*. This Court must reject State Defendants' attempt to undermine the supremacy of the Michigan Constitution, reaffirm *Smith* and affirm the Court of Appeals in this case.

II. THE LOWER COURTS CORRECTLY FOUND PLAINTIFFS PROPERLY PLED ALL ELEMENTS OF AN ACTION FOR INVERSE CONDEMNATION.

Plaintiffs asserted a claim for inverse condemnation as a result of the damage to their property and diminution in value caused by the Defendants' actions to switch the source of Flint's water. (State Def App Vol 2, p287a) Applying settled Michigan law, the trial court found Plaintiffs' allegations were sufficient to plead an inverse condemnation claim. (State Def App Vol 1, p73a) The Court of Appeals affirmed, finding that Plaintiffs "*alleged injuries unique among similarly situated individuals, i.e. municipal water users, caused directly by governmental actions that resulted in exposure of their property to specific harm*." (emphasis added) (State Def App Vol 1, p112a) Notably, Governor Snyder's Emergency Proclamation concedes damage to private plumbing infrastructure.[64] Nonetheless, the Defendants challenged that holding.

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[62] As the most comprehensive discussion of the state liability holding in *Smith*, courts look to Justice Boyles' opinion for guidance. See, e.g., *Jones*, 462 Mich 329, 336 (2000).

[63] Finally, Defendants argue that because the US Supreme Court sees granting damage remedies against federal agencies or government as "a vehicle for altering an entity's policy", State Defendants' Br, 42 (citation and internal quotation omitted), this Court should see *Smith* in the same light. Only if Defendants assert that violating the constitutional rights of those within its jurisdiction falls within the state's authority may it be said that *Smith* seeks to alter state policy. However, if Defendants do not make that contention—which they may not—providing a remedy for state action that is *ultra vires* of the Michigan Constitution does not make *Smith* a vehicle for altering the *legitimate* policy determinations of the state.

[64] *Supra* fn 7.

A. Defendants took affirmative, overt actions which limited the value and use of Plaintiffs' property.

Generally, a plaintiff alleging inverse condemnation[65] must establish that the government's actions were a substantial cause of the decline of the property's value, and that the government abused its powers in affirmative actions directly aimed at the property. *Hinojosa v Dept of Nat Resources*, 263 Mich App 537, 548 (2004). Plaintiffs also properly pled the requisite causal connection between the government's actions and the alleged damages. See *Id;* see also *Dorman v Clinton Twp*, 269 Mich App 638, 645; 714 NW2d 350 (2006). (COA Opinion, p. 35) (State Def App Vol 1, p110a)

Plaintiffs alleged: that Defendants made the decision to switch to the Flint River despite knowledge of the dangers posed by the water. (State Def App Vol 2, pp264a, 267-8a) Plaintiffs also alleged Defendants concealed data and made false statements to downplay the dangers caused by the toxic water from the Flint River. (State Def App Vol 2, pp270-2a, 275a) Plaintiffs further alleged the toxic water which flowed directly from the Flint River through the service lines and plumbing to the taps of the individual users damaged the plumbing, water heaters, and service lines leaving the infrastructure unsafe to use even after Flint was reconnected to the DWSD. (State Def App Vol 2, pp279a, 287a) Finally, Plaintiffs alleged a reduction in property value caused by the damage to plumbing, service lines and water heaters. *Id.*

In *Peterman*, this Court discussed the type of actions which support an inverse condemnation claim, opining that:

> …because "'[t]he constitutional provision is adopted for the protection of and security to the rights of the individual as against the government,' ... the term 'taking' should

[65] Eminent domain or condemnation is the power of a government to take private property for public use. *Silver Creek Drain District v Extrusions Division, Inc*, 468 Mich 367, 373-4; 663 NW2d 436 (2003). The Michigan Constitution requires that "private property shall not be taken for public use without just compensation." Const 1963, Art 10, §2. An inverse condemnation action is appropriate when private property has been damaged rather than formally taken for public use by government actions. *In the matter of Acquisition of Land – Virginia Park*, 121 Mich App 153, 158; 328 NW2d 602 (1982). Even a partial or fractional loss of the value or use of property by an act of government, which directly affects it, constitutes an appropriation. *Peterman v State Dep of Nat Resources*, 446 Mich 177, 190 (1994).

> not be used in an unreasonable or narrow sense." *Pearsall v Eaton Co Bd of Supervisors,* 74 Mich 558, 561, 42 NW 77 (1889). Hence, this Court has long held that "[t]he right of exclusion or the right of complete possession and enjoyment is one of the essential elements of property in land." *Vanderlip, supra* 73 Mich. at 533, 41 N.W. 677.[16] Thus, a physical intrusion on the property itself is not required for a "taking" to have occurred. See, e.g., *Thom v State Hwy Comm'r,* 376 Mich 608, 138 NW2d 322 (1965); *Bott v Natural Resources Comm.,* 415 Mich. 45, 81, n 43, 327 NW2d 838 (1982). As Justice Campbell explained for the Court, to deprive a property owner of enjoyment of property "'is to deprive him of the property itself, wholly or to the extent of the mischief.' " *Vanderlip, supra* 73 Mich at 537, 41 NW 677, quoting *Koopman v Blodgett,* 70 Mich 610, 619, 38 NW 649 (1888). See also *Electro–Tech v H.F. Campbell Co,* 433 Mich 57, 88-89, 445 NW2d 61 (1989).

Peterman, supra at 188-9

Thus the *Peterman* court concluded, "any injury to the property of an individual which deprives the owner of the ordinary use of it is equivalent to a taking, and entitles him to compensation. *Id.* at 190. In *Peterman*, *supra*, the court concluded the defendant's construction of a boat launch and jetties, which altered the current and thereby deprived plaintiffs' property of the sand that had previously nourished and replenished it, constituted a taking. Likewise the actions of Defendants as alleged are1` sufficient to support this claim as Plaintiffs have alleged the damage to the Plaintiffs' pipes and water infrastructure in their homes and service lines was the "natural and direct result" of the Defendants' decision to switch to the untreated corrosive and toxic Flint river water.

The State Defendants claim they cannot be held responsible for any inverse condemnation because Plaintiffs did not allege they engaged in any affirmative state actions, claiming that it was the decision of Flint *not* the State to switch water sources. (State Def Brf, pp48-9) The State Defendants claim their actions were simply "regulatory" not direct action and therefore do not support an inverse condemnation action. This is patently false. Plaintiffs allege state officials, including Dillon and Kurtz, developed the plan to use the Flint River water until KWA became operational. (State Def App Vol 2, p266a) Plaintiffs further alleged the Governor authorized the use of the Flint River despite knowledge that it had been rejected as dangerous and unsafe. (State Def App Vol 2, p267a) Thus, Plaintiffs clearly pled affirmative actions by state actors.

The State Defendants further argue *Peterman* is not applicable to this case because the state did not send the water into the homes and did not operate the Flint water system. (State Def Br p47) However, they actively participated in and approved the decision to switch Flint water users from the properly treated and safe water provided by DWSD to the corrosive, toxic water of the Flint River. Their participation in this decision is sufficient whether or not State Defendants personally turned on the spigot to the water which ruined the water service lines of the Plaintiffs.

The State Defendants also assert the allegations against the MDEQ and MDHHS fail to support a claim.[66] However, Plaintiffs alleged a series of overt actions taken by these Defendants, sufficient to form the basis of an inverse condemnation claim. Plaintiffs alleged that "under the direction" of MDEQ officials, Flint water users began receiving the corrosive and toxic water from the Flint River (State Def App Vol 2, p268a) MDEQ also acted overtly and affirmatively its officials assured Flint residents that the water was safe, (*Id.*, p269a). In addition, state officials from both MDEQ and MDHHS recognized the entire infrastructure of the Flint water system had been corroded by the switch to the Flint River as a water source and affirmatively decided not to notify the public. (*Id.,* pp270-1a) MDEQ officials, including Defendant Wurful, also affirmatively lied to Plaintiffs and other class member telling them the water was safe in July 2015. Plaintiffs also alleged an overt and affirmative decision by State Defendants to conceal the fact that the elevated blood levels in Flint children correlated to the switch to the corrosive Flint water and not warn the public of the danger caused by continuing use of the corrosive and toxic water from the Flint river (State Def App Vol 2,

[66] In making this argument, the State Defendants mischaracterize the holding of *Hinojosa, supra.* Contrary to Defendants' argument, the Court of Appeals did not conclude that "a failure to act" cannot support an inverse condemnation claim. Rather, the Court found that settled law requires an "overt action" by the state. The claim in *Hinojosa* failed because at most the defendant failed to abate a nuisance, but took no overt actions. Here Plaintiffs have alleged overt actions by all Defendants.

p279a) These actions were all affirmative and overt, supporting the claim against all Defendants for inverse condemnation.[67]

Plaintiffs' Amended Complaint is replete with allegations that the damage to the plumbing infrastructure including pipes, water heaters, and service lines were a direct result of the state actors' decisions to require Flint water users to obtain their water from the Flint River until the KWA pipeline was completed.[68] It was this Interim Plan which resulted in the damage to their property and diminution in property values. Thus, Defendants did not need to actually physically pump the water into the homes to be the substantial cause of the injury. They made the decision that toxic Flint River water would be pumped into Plaintiffs' homes and thwarted the Flint City Council's attempt to switch back.

B. Plaintiffs alleged a unique injury, not suffered by similarly situated municipal water users.

Next Defendants argue the Court of Appeals erred in finding the actions were directed specifically at Flint water users, not the general public. In *Spiek v DOT*, 456 Mich 331; 572 NW 2d 201 (1998), the Michigan Supreme Court found an inverse condemnation suit exists only where the plaintiff can allege "a unique or special injury, that is, an injury different in kind, not simply degree, from the harm suffered by all persons similarly situated." *Id* at 348. In *Spiek*, the plaintiffs alleged they were entitled to compensation for damage to their property as a result of dust, vibration and fumes caused by the proximity of their property to an interstate freeway. However, the impact on the Spiek

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[67] The state defendants' position that they could only be liable for inverse condemnation if the owned and operated the water system is misguided and not supported by any legal authority (State Defs' Br p49)

[68] As aptly put by the Court of Appeals: "this is not a situation where plaintiffs have alleged an incidental reduction in property value resulting from some unrelated administrative action by the government. Here, plaintiffs allege deliberate actions taken by defendants that directly led to toxic water being delivered through Flint's own water delivery system *directly into* plaintiffs' water heaters, bathtubs, sinks, and drinking glasses, causing actual, physical damage to plaintiffs' property and affecting plaintiffs' property rights" (emphasis incl.) (State Def App Vol 1, p111a)

property was no different than for those living close to any public highway anywhere in Michigan. This court thus concluded summary disposition was appropriate in *Spiek* because "plaintiffs' complaint alleges the same type of incidental and consequential harm as is experienced by all persons similarly situated to plaintiffs in that they reside near a public highway." *Id.* at 332, 350.

In deciding *Spiek*, this Court relied upon and analyzed the U.S. Supreme Court's holding in *Richards v Washington Terminal Co,* 233 US 546 (1914). There the court distinguished between damage from vibration causing cracks, for which the plaintiff could not recover because all those living near railroad tracks suffer in common, and those who lived near a railroad tunnel which caused smoke, cinders and gasses to be expelled onto the property, for which the plaintiffs could recover damages because it was a unique harm. This case is more akin to the facts in *Richards* than *Spiek*.

Contrary to Defendants' assertions, the Court of Appeals properly applied the *Spiek* holding here. The Court of Appeals found that the damages suffered by Plaintiffs were different in kind than others similarly situated, i.e. other municipal water users who were not required to receive toxic, contaminated, corrosive and inadequately treated water from the Flint River. (State Def App Vol 1, pp111-2a) Unlike *Spiek* and like *Richards*, Plaintiffs here suffered a unique and special injury not endured by all municipal water users.[69]

Although Defendants claim the Court of Appeals erred by comparing Flint water users to non-Flint water users, they cite no authority for their position. In fact, Flint water users are similarly situated to non-Flint water users, just as in *Spiek*, the plaintiffs were similarly situated to all property owners living near any freeway, not just the freeway at issue in that case. The claim in *Spiek* failed

[69] Plaintiffs could also be compared to those water users whose communities signed on to the KWA. All those individuals required an interim plan for water until the pipeline was completed. Those outside Flint continued to receive water from DWSD so suffered no injury as a result of State action unlike Flint water users who experienced a loss in property and property values because of the harm caused by the toxic Flint River water. Thus, Plaintiffs have identified a unique injury, not suffered by those similarly situated.

because the damages suffered by the plaintiffs was common to all similarly situated, not just the property owners living near the roadway. Here the damage to Plaintiffs' property was not common to all similarly situated water users. Defendants' decision to force Flint water users to obtain their water from that source uniquely caused Plaintiffs' damages. Thus, *Spiek* was correctly applied here.

Defendants also assert, without any legal authority, that Plaintiffs claim an injury which is only different in degree, not kind, from other similarly situated water users because anyone with metal pipes will suffer some corrosion from water. (State Def Br p50). However, other similarly situated water users did not receive improperly treated toxic and corrosive water from the Flint River which ruined their service lines and water infrastructure throughout their homes. Here, the injury suffered by Plaintiffs was not simply different in degree from other municipal water users. Only Plaintiffs, the Flint water users -- and *not* other municipal water users -- suffered damages to their plumbing infrastructure due to the Defendants' actions. Plaintiffs have thus satisfied the requirement of alleging damages different in kind and degree than others similarly situated.

Lastly, Plaintiffs' inverse condemnation claim is brought ***by*** "Plaintiff property owners and/or users" for damage done to their property and diminution in value caused by the Defendants' actions to switch the source of Flint's water to the inadequately treated toxic water drawn from the Flint River. (State Def App Vol 2, p287a). Applying settled Michigan law, the Court of Appeals affirmed the trial court, finding that Plaintiffs "*alleged injuries unique among similarly situated individuals, i.e. municipal water users, caused directly by governmental actions that resulted in exposure of their property to specific harm.*" (emphasis added) (State Def App Vol 1, p112a)

Among the issues that this Court has instructed the parties to address with respect to Plaintiffs' inverse condemnation claim, is the manner in which the class of similarly situated persons should be defined. At this point, no class related discovery has taken place that will inform an evaluation of the contours of the class. At this stage, Plaintiffs respectfully suggest that their current definition is

sufficient. See, e.g., *Communities for Equity v Michigan High Sch Athletic Ass'n*, 192 FRD. 568, 575 n 6 (WD Mich, 1999) (reminding the parties that class definitions may change as the litigation progress); *Schorsch v Hewlett-Packard Co*, 417 F.3d 748, 750 (CA 7, 2005) ("Litigants . . . regularly modify class definitions.").[70]

Plaintiffs' allegations satisfy each element necessary to establish a claim for inverse condemnation. Accordingly, this Court should affirm the Court of Appeals' decision finding that Plaintiffs properly pled an inverse condemnation claim.

III. PLAINTIFFS HAVE COMPLIED WITH THE NOTICE PROVISION CONTAINED IN MCL 600.6431(3) OR, ALTERNATIVELY, HAVE BEEN EXCUSED FROM COMPLIANCE WITH THE NOTICE PROVISION BY VIRTUE OF BOTH 1) FRAUDULENT CONCEALMENT ENGAGED IN BY DEFENDANTS; AND 2) THE "HARSH AND UNREASONABLE CONSEQUENCES"

MCL 600.6431(3) requires that a claimant in the Court of Claims "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." Plaintiffs alleged that their constitutional tort claims accrued, for purposes of providing notice pursuant to MCL 600.6431(3), on October 16, 2015.[71] (State Def App Vol 2, p263a)

A. Genuine issues of material fact exist as to when the putative class' causes of action accrued.

1. Plaintiffs have pled multiple allegations of actionable tortious conduct that occurred within six months of Plaintiffs' filing of their complaint.

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[70] Michigan Courts look to federal authorities for guidance on class action questions. See, e.g., *Brenner v Marathon Oil Co*, 222 Mich App 128, 133, 565 NW2d 1 (1997) ("MCR 3.501(E) has not been the subject of apposite analysis by Michigan courts and, in the absence of available Michigan precedents, we turn to federal cases construing the similar federal rule [] for guidance.") (citing *McCalla v Ellis*, 180 Mich App 372, 377-378, 446 NW2d 904 (1989)).

[71] The date cited in the Complaint, October 16, "2016," is a typographical error. The date referred to is when Flint reconnected to Detroit water, which was October 16, **2015**.

Plaintiffs filed their initial complaint in this matter on January 15, 2016, which means that as a matter of simple math, any actionable tortious conduct in which Defendants engaged within six months of the filing of plaintiffs' complaint (after July 15, 2016) cannot be barred by the six-month notice provision in MCL 600.6431(3). As set forth in their papers submitted to the Court of Claims,[72] at least three areas of tortious conduct that fall into this category:

1. the failure to switch Flint's water source between July 15, 2015 and October 8, 2015 to stem the poisonous exposure;
2. the belligerent discrediting of independent reports that began to disclose the truth about the health threats to which Flint's citizenry was exposed (State Def App Vol2, pp276a-78a); and
3. the "scrubbing" of lead levels averaging 11 parts per billion in water (below the EPA trigger of 15 parts per billion) by omitting certain high lead level samples from the average and otherwise understating the real lead levels in water. (State Def App Vol2, p 392a).[73]

These tortious acts were independently actionable and fell within six months of this lawsuit. The Court of Appeals held that there are multiple events giving rise to plaintiffs' causes of action." And that "[t]he Court of Claims did not err by recognizing that plaintiffs' complaint alleges multiple harms resulting from distinct tortious acts rather than a continuing harm resulting from the single tortious act of switching the water source." (State Def App Vol 1, p083a)[74]

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[72] See Plaintiffs' Response to 6/24/2016 State Defendants' Motion for Summary Disposition Under MCR 2.116(C)(4, (C)(7), and (C)(8) filed in the Michigan Court of Claims (Pltf App Vol 2, pp261-62b) Plaintiffs had pled multiple tortious acts, not just one, Plaintiffs argued that ***each*** new act enabled the timely filing of a complaint in the Court of Claims. Cf. *Bauserman v Unemployment Ins Agency,* 503 Mich 169, n 19. In *Bauserman,* one of the Plaintiffs (Williams) pled that his first garnishment of wages was more than six months prior to the time he filed suit and the Court accordingly found his filing untimely. The Court qualified the ruling in footnote 19 by stating "Moreover, Williams has not argued that each garnishment of his wages 'g[ave] rise to' a new cause of action." As distinct from the treatment of Plaintiff Williams in the *Bauserman* opinion, Plaintiffs in this case ***did plead*** multiple tortious acts within six months of the filing of their suit.

[73] As argued to the Court of Claims, the "scrubbing" of lead reports had been the subject of criminal charges filed by then-Attorney General Bill Schuette. Although those charges have since been voluntarily dismissed without prejudice, the factual issue as to whether the manipulation of lead results by Defendants is actionable remains a contested issue.

[74] In the lower courts, Defendants attempted to recharacterize the acts in which they engaged within six months of the filing of the complaint as mere "continuing violations" rather than multiple acts giving rise to plaintiffs' causes of action. The Court of Appeals rejected this argument noting that "[T]he fact that some of a plaintiff's claims accrued outside the applicable limitations period does not

2. Even for tortious conduct that occurred more than six months before the filing of Plaintiffs' Complaint, questions of fact preclude a finding as a matter of law that Plaintiffs' claims accrued more than six months prior to the filing of the complaint.

In *Bauserman v Unemployment Ins Agency,* 503 Mich 169 (2019), this Court found "no meaningful distinction" between the time for determining an event giving rise to the cause of action under MCL 600.6431(3) and the time when a claim accrues under MCL 600.5827.[75] The *Bauserman* Court pointed to its previous decision in *Frank v Linkner,* 500 Mich 133, 147(2017) and further explained that the "actionable harm" we discussed in *Frank* is the "event giving rise to [a] cause of action" seeking monetary relief under MCL 600.6431(3)."

Under *Bauserman* and *Frank,* there are genuine issues of fact as to when the claims accrued. As to the inverse condemnation claim, Plaintiffs lost the ordinary use and enjoyment of their properties after public health advisories issued in the Fall of 2015 that the water had dangerously high levels of lead. (State Def App Vol 2, p288a)[76] Also, Plaintiffs sustained damage to their properties because they had water service lines and plumbing susceptible to damage by corrosive water which were rendered unsafe – even after the corrosive water was discontinued. *Id.* Governor Snyder conceded in his

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time-bar all the plaintiff's claims." (State Def App Vol 1, p083a and n 5) (citing *Dep't of Environmental Quality v Gomez,* 318 Mich App 1, 28(2016))

[75] Plaintiffs had argued below that one could borrow from the definition of accrual in MCL 600.5827 for purposes of determining when the notice obligation is triggered under MCL 600.6431(3). See Plaintiffs' Response to 6/24/2016 State Defendants' Motion for Summary Disposition Under MCR 2.116(C)(4, (C)(7), and (C)(8) filed in the Michigan Court of Claims, (Pltf App Vol 2, p257b) State Defendants opposed this argument, arguing that MCL 600.6431(3) does not use the word "accrue." 8/26/2016 State Defendants Reply to 8/15/2016 State Defendants' Motion for Summary under MCR 2.116(C)(4), (C)(7), and (C)(8). (Pltf App Vol 2, pp316b-318b)

[76] See *Gulla v State,* unpublished opinion per curiam of the Court of Appeals issued January 24, 2019, p.8 citing a lead advisory warning issued to plaintiffs in September 2015 and stating "at the latest, then, their use and enjoyment of their homes was affected in September 2015…" Although the *Gulla* plaintiffs filed their claims more than six months after September 2015, the *Mays* plaintiffs filed within that six month window. Defendants argue that the claims had accrued earlier when boiled water advisories issued in 2014 for E coli, and TTHM, but this ignores the fact that *those advisories were lifted* and the public was informed that it could drink the water again. See *infra* at section C of the Statement of Facts. Those advisories have no bearing on the separate claims associated with the Fall 2015 advisories associated with elevated lead.

January 5, 2016 Emergency Declaration that private water infrastructure was damaged.

In *Henry v Dow Chemical Co,* 501 Mich 965 (2018), this Court reviewed accrual issues in the context of environmental nuisance and negligence claims. This Court revived Judge Gadola's dissenting Court of Appeals opinion and stated that the actionable harm occurred (and accrual of plaintiffs causes of action began) when dioxin became present in the soils of plaintiffs' properties. Extending *Henry v Dow* to the present circumstances, the factual question is when did lead become present in elevated levels in Plaintiffs' properties? Defendants state that lead levels in Flint water were ***below*** the 15 parts per billion (ppb) action level at the 90th percentile ---the target action level set forth in the Safe Drinking Water Act as reported on December 31, 2014 (State Def Br p9) (State Def App Vol 2, p421a) and on July 27, 2015. (State Defs' Br p14) With the exception of a single house[77] identified in the briefs, the record presented below does not contain reference to lead levels at any specific properties. Marc Edwards of Virginia Tech performed water sampling which demonstrated that Flint water measured at 25 parts per billion at the 90th percentile, with several samples over 100 ppb and one over 1,000 ppb in the Fall of 2015. (State Def App Vol 2, p315a) These published results mark the first time that documentary evidence identified homes in Flint with elevated levels of lead in water on a widespread basis and is an appropriate line of demarcation for purposes of determining accrual of the notice provision under MCL 600.6431(3) under *Henry v Dow.* [78]

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[77] Defendants have repeatedly argued, mostly by referencing pleadings from other cases, that some Plaintiffs expressed concern that river water would corrode plumbing and lead to elevated levels of lead more than six months before this suit was filed. But none of those pleadings demonstrate that any specific home reached such elevated lead levels more than six months before the filing of the complaint, with the exception of the home of Ms. Lee Ann Walters. (State Def Br p12) It is an extraordinary stretch to use ***one*** home in Flint as a basis to suggest that ***all*** homes in Flint should have filed a notice of intent under MCL 600.6431(3). And it is especially ironic that, after dismissing Ms. Walters' home as an "anomaly" that was not reflective of conditions in the broader community, Defendants would now seize upon the exact same house to argue that it was reflective of the broader community.

[78] It remains possible (probable in Plaintiffs' view) that Defendants "cooked" the reported levels of lead in water to understate the lead levels prior to August 2015, as Plaintiffs have alleged. Defendants apparently assert that their manipulation of the lead levels in public reports forms the basis for their

This case, however, pleads an inverse condemnation property claim – not the nuisance or negligence claims at issue in *Henry v Dow*. For inverse condemnation claims, Michigan courts have looked to the "stabilization doctrine" first articulated in *United States v Dickinson,* 67 S Ct 1382 (1947) as a basis for evaluating when statutes of limitations run.[79] *Dickinson* involved a claim for inverse condemnation of land associated with the federal government's establishment of a dam that permanently flooded a landowner's property. Justice Frankfurter began by noting that the government could have instituted condemnation proceedings that would have fixed a date certain as to when the "taking" had occurred, but elected not to do so. Instead, "[i]t left the taking to physical events, thereby putting on the owner the onus of determining the decisive moment in the process of acquisition…when the fact of taking could no longer be in controversy." The Court explained the point at which an inverse condemnation claim "stabilizes" as follows:

> The source of the entire claim -the overflow due to rises in the level of the river- is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a person by postponing suit until the situation becomes stabilized.

Plaintiffs' Amended Complaint proposes an accrual date of October 16, 2015, when Defendants re-connected the Flint water system to water supplied by the Detroit Water and Sewerage Department ("DWSD"). (State Def App Vol 2, p263a) Whatever damage to Plaintiffs' property had been inflicted by Defendants had stabilized by that date. Plaintiffs were unable to use or drink their water because their internal plumbing was "rendered unsafe even after the corrosive water was discontinued." (State

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argument that Plaintiffs should have filed sooner. In other words, the lynchpin of Defendants' notice argument is that they disseminated false data and their notice argument only survives if the data's falsity is established. As the Court of Appeals noted, "It would be unreasonable to divest plaintiffs of the opportunity to vindicate their substantive constitutional rights simply because defendants successfully manipulated the public long enough to outlast the statutory notice period." (State Def App Vol 1, p87a)

[79] *Hart v City of Detroit,* 416 Mich 488 (1982); *Silverstein v City of Detroit,* 335 F Supp 1306(ED Mich 1971); *Woodland Estates,* 2016 WL 7333416 (Mich App 2016); *Schultz v MDEQ,* 2007 WL 517393 (Mich App 2007).

Def App Vol 2, p288a) Moreover, at this point in time, the value and marketability of property within the City of Flint was immediately and significantly impaired. Lenders became hesitant to authorize loans for purchase of realty within the City and property values plummeted." (State Def App Vol 2, p280a)

As to Plaintiffs' bodily integrity claim, there is no one date of accrual when the victims of Flint's water crisis established injury attributable to the crisis. Victims hair did not fall out at a uniform time, skin rashes did not occur all at once, and the results of lead poisoning of infants is only now becoming manifest through the emergence of cognitive and neurological impairment. Plaintiffs acknowledged as much in the Court of Claims, stating it would have been speculative for Plaintiffs to assert that anyone was physically injured on the first day of exposure. Both the Court of Claims and the Court of Appeals agreed. The Court of Appeals held "it is not clear on what date plaintiffs suffered actionable personal injuries as a result of their use and consumption of the contaminated water. Plaintiffs should be permitted to conduct discovery and should be given the opportunity to prove the dates on which their distinct harms first arose before summary disposition may be appropriate." (State Def App Vol 1, p83a)

B. The Court of Appeals did not err by applying fraudulent concealment to the Court of Claims notice provision in MCL 600.6431(3).

Some personal injuries definitively occurred more than six months before the Plaintiffs' Complaint was filed in this action. Legionnaire's Disease victims and fetal deaths, when they occurred more than six months before this complaint was filed, are two examples. For these types of claims, Plaintiffs allege that Defendants fraudulently concealed the dangers of Flint water (particularly the information associated with Legionella and lead exposure) while publicly proclaiming that the water was safe. (State Def App Vol 2, pp271-3a, 275-8a, 280-1a) Governor Snyder didn't publicly acknowledge the link between Flint water and Legionella, for example, until January 13, 2016. (State Def App Vol 2, p439a)

Defendants contest application of fraudulent concealment to the notice provision based upon two flawed premises: 1) that the Legislature didn't authorize it; and 2) that the Plaintiffs haven't generated a material fact as to whether their claims were fraudulently concealed.

The Michigan Legislature expressly imported the fraudulent concealment provision in MCL 600.5855 into the CCA. The Court of Appeals identified the inherent conflict involved when the Legislature expressly imported fraudulent concealment tolling for limitations purposes – but not CCA notice purposes. (State Def App Vol 1, pp88a-91a) As a matter of pure logic, ***it is impossible to apply fraudulent concealment tolling – as the Legislature has expressly instructed –*** for statute of limitations purposes unless one ***also applies it*** to the notice provision.

Defendants argue that the court should nullify the Legislature's directive to apply fraudulent concealment tolling to the Court of Claims statute of limitation provision (MCL 600.6452) because the Legislature failed to also direct that the court should apply fraudulent concealment to the Court of Claims notice provision found in MCL 600.6431. But under Defendants' proposed interpretation of the interplay between MCL 600.6431, MCL 600.5822 and MCL 600.6452(2), the lack of availability of fraudulent concealment tolling for the notice statute will "trump" or nullify the availability of fraudulent concealment as authorized by the other two statutory provisions. This Court has directed that "[i]n such a case of tension, or even conflict, between sections of a statute, it is our duty to, if reasonably possible, construe them both so as to give meaning to each; that is, to harmonize them." *Nowell v Titan Ins Co*, 466 Mich 478, 484 (2002). In honoring the Legislature's instruction that fraudulent concealment tolling is to apply to the statute of limitations in the Court of Claims as authorized under MCL 600.6452(2), and in keeping with the Supreme Court's instruction in *Nowell* that potentially conflicting statutory sections should be read in harmony, the only way to rectify the conflict between application of the fraudulent

concealment tolling provision to the Court of Claims statute of limitation is to also allow fraudulent concealment tolling of the notice provision contained in MCL 600.6431(3). [80]

Moreover, as to whether fraudulent concealment occurred in this case as it concerns lead and Legionella exposure is a question of fact. Defendants point to selective allegations related to public advisories concerning E. coli, fecal coliform and TTHM exceedances. At best, they demonstrate that Plaintiffs knew about these discrete issues. Given the public notices on these topics, this is hardly controversial. But Plaintiffs allegations concerning fraudulent concealment (detailed in the Statement of Facts) concern elevated lead and Legionella poisoning. These are separate events and separate issues.

C. The Court of Appeals Correctly Followed *Rusha* in finding that the "Harsh and Unreasonable" Exception Applies.

In *McCahan v Brennan,* 492 Mich 730, 750 (2012),[81] this Court held that "because the government may voluntarily subject itself to liability, it may also place conditions or limitations on the liability imposed. One such condition on the right to sue the state is the notice provision of the Court of Claims Act…" But as noted in the concurring opinion of Justice McCormack in *Bauserman,* in some instances, it is the Constitution that serves as the source of protection from property

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[80] In *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378 (2007), one of the reasons that this Court provided for abrogating the common law discovery rule was that a plaintiff could rely, instead, upon statutory fraudulent concealment tolling. "Finally, MCL 600.5855 is a good indication that the Legislature intended the scheme to be comprehensive and exclusive. MCL 600.5855 provides for essentially unlimited tolling based on discovery when a claim is fraudulently concealed." *Id.* at 391. Yet, Defendants argue that fraudulent concealment does not apply to the notice provision in direct contradiction to one of the reasons the *Trentadue* Court provided as to why the abrogation of the discovery rule was not overly harsh. In that regard, harmonization of MCL 600.5855 and 600.6431(3) would be consistent with *Trentadue's* rationale for abrogating the discovery rule in the first place.

[81] *McCahan* arose from an automobile collision claim that could be maintained against the state only through the enactment of MCL 691.1405. Relying on *Rowland*, the Michigan Supreme Court held that the notice requirement of MCL 600.6431(3) was to be strictly construed and applied. As the Court of Appeals recognized, this suit was unique and unlike *McCahan* where "the event giving rise to the cause of action" was unambiguous – the accident itself. (State Def App Vol 1, p86a)

confiscation or invasions of bodily integrity without due process, not the "voluntary" provision of liability exposure recognized in *McCahan*. *Bauserman, Id.* at 553 ("the fundamental principle that animated our decisions in *Rowland* and *McCahan* isn't implicated here." [citations omitted]).

Under some circumstances, a short six month notice provision would effectively divest citizens of their ability to assert the constitutional protections. Victims who died or fell ill from the Flint water crisis more than six months prior to the filing of Plaintiffs complaint, and who had no knowledge of concealed Legionella exposure or heightened risk of fetal death, for example, are two such circumstances. In such circumstances, "victims will frequently fail to recognize within the 4-month statutory period that they have been wronged at all." *Felder v Casey,* 487 U.S. 131,146 n.3(1988)(referencing a 4 month notice provision rather than the 6 month provision in the CCA).

In order to address these circumstances, this Court should affirm application of the "harsh and unreasonable" exception noted in *Rusha v Dep't of Corrections*, 307 Mich App 300, 312 (2014), *lv den* 498 Mich 860 (2015). Both the Court of Claims and the Court of Appeals have held that Plaintiffs have adequately pleaded a circumstance where application of the notice provision meets the "harsh and unreasonable" exception.[82]. As the *Rusha court* recognized, it would be harsh and unreasonable to divest Plaintiffs "of the access to the courts intended by the grant of the substantive right." *Rusha*, 307 Mich App at 311 (emphasis added). Plaintiffs respectfully submit that this Court should affirm application of this principle.

CONCLUSION

The Court of Appeals correctly found that Plaintiffs may seek damages against the State and

[82] Relying upon *Rusha*, the Court of Claims also recognized that the present litigation was unlike any other suits cited by Defendants and that Defendants' proposed accrual dates could potentially divest plaintiffs of the ability to vindicate constitutional violations despite factual allegations that the cause of action was not readily apparent to Plaintiffs and concealed by Defendants' conduct. (State Def App Vol 1, pp34-5a) As noted above, this was not the only basis for which the court denied summary disposition. The court also held that *if* strict compliance with the notice requirements were required, summary disposition would still be premature. (State Def App Vol 1, p37a)

its officials, including the Emergency Managers, for violations of the Michigan Constitution. Therefore, for all the reasons cited herein, Plaintiffs-Appellees respectfully request that this Court deny Defendants' request to reverse the Court of Appeals.

Dated: December 6, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on December 6, 2019 she served a copy of **Plaintiffs-Appellees' Omnibus Response To State Defendants' And Former Emergency Managers Earley And Ambrose's Briefs On Appeal upon all counsel of record utilizing the Courts Mfiling system.**

/s/ Julie H. Hurwitz