Attachment 1

Brief Amicus Curiae of Natural Resources Defense Council, American Civil Liberties Union of Michigan, and Great Lakes Environmental Law Center

for Motion of Natural Resources Defense Council, American Civil Liberties Union of Michigan, and Great Lakes Environmental Law Center for Leave to File an Amicus Curiae Brief

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Jansen, P.J., and Fort Hood and Riordan, JJ.

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

v.

GOVERNOR RICK SNYDER, STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, and MICHIGAN 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 No. 335555
Consolidated with Docket Nos.: 335725, 335726

Court of Claims No. 16-000017-MM

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

Amici adopt by reference the counter-statement of questions presented by Plaintiffs-Appellees, Pls' Br at xi-xiii, but this brief only addresses Question 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?" Amici's answer to Question 1 is "Yes."

STATEMENT OF INTERESTS OF AMICI

The Natural Resources Defense Council (NRDC), the American Civil Liberties Union of Michigan (ACLU), and the Great Lakes Environmental Law Center (GLELC)[1] submit this proposed brief as amici curiae in support of Plaintiffs-Appellees (Plaintiffs), residents of Flint, Michigan, who allege that the State of Michigan violated their constitutional rights by intentionally exposing them to poisonous tap water and exacerbating such exposure by lying about the safety of the tap water. Amici submit this brief to assist the Court in understanding why inferring a damages remedy is necessary and appropriate here, where Plaintiffs have alleged an egregious violation of their constitutional right to bodily integrity caused by the State, and where no other remedies are available to vindicate their fundamental right to due process of law and make them whole.

[1] NRDC, ACLU, and GLELC state that no counsel for a party authored this brief in whole or in part, and no such counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the amici, their members, or their counsel made any such contribution. MCR 7.312(H)(4).

The ACLU is the Michigan affiliate of a nationwide, nonpartisan organization with over one million members dedicated to protecting rights guaranteed by the Michigan and United States Constitutions. The ACLU has long been committed to participating in litigation that seeks to protect the constitutional rights of Michigan citizens, including the rights of those who are deprived of due process under the law. The ACLU regularly files amicus curiae briefs on constitutional questions pending before this and other courts. ACLU has particular expertise in issues relating to remedies for constitutional violations and governmental immunity.

NRDC is a nonprofit public health and environmental advocacy organization with hundreds of thousands of members, including more than 9,500 in Michigan. NRDC's mission is to safeguard the earth—its people, its plants and animals, and the natural systems on which all life depends. NRDC engages in policy and legislative advocacy, litigation, and scientific research to protect the health of families and communities threatened by polluted air, contaminated water, and toxic consumer products. One of the organizing principles of NRDC's work is respect for the dignity of all human beings, which includes their right to drink safe water and to be free from unlawful and oppressive government conduct. NRDC works to hold government officials accountable to the law, including federal environmental laws like the Safe Drinking Water Act (SDWA) and Clean Water Act, and constitutional requirements.

The GLELC is a Michigan nonprofit corporation with a mission to protect the world's greatest freshwater resource and the communities that depend on it. GLELC furthers its mission by providing legal counseling and representation to Michigan residents, organizations, and other stakeholders regarding environmental issues that are impacting public health or natural resources. This work has included providing legal counseling and representation to Michigan

residents concerned about lead contamination in public water systems to ensure that the water being provided to them is not harmful to their families' health.

In January 2016, NRDC and ACLU, alongside co-plaintiffs Concerned Pastors for Social Action and Melissa Mays, sued the City of Flint and Michigan state officials under the citizen-suit provision of the SDWA. The lawsuit sought declaratory and prospective injunctive relief to compel the operators of Flint's water system to comply with the SDWA's requirements for minimizing lead in tap water. Compl 54-56, *Concerned Pastors for Social Action v Khouri*, No. 16-10277 (ED Mich January 27, 2016), ECF No. 1.[2] In March 2017, the federal district court approved a settlement agreement resolving the case that requires the City and State to conduct extensive monitoring of Flint's tap water for lead and replace thousands of lead and galvanized steel water pipes, as well as other injunctive relief. See Settlement Agmt, *Concerned Pastors*, No. 16-10277 (ED Mich March 27, 2017), ECF No. 147-1.[3] This relief is designed to protect public health, enforce the SDWA's requirements for reducing lead in drinking water, and prevent future violations of the SDWA.

While the suit achieved some measure of justice for Flint residents, it could not redress the constitutional violations Plaintiffs here allege relating to Flint's water crisis. Federal environmental citizen suits are generally limited to addressing ongoing or recurring violations of environmental laws; they do not provide monetary compensation to individuals for harms to their health from past violations. Indeed, the *Concerned Pastors* plaintiffs did not seek such compensation through their SDWA citizen suit. As organizations committed to advocating for just outcomes and holding the government accountable to the rule of law, Amici have an interest

[2] The complaint is available at <https://on.nrdc.org/2FOuOiN> (accessed January 10, 2020).

[3] The settlement agreement is available at <https://on.nrdc.org/2QEBiXq> (accessed January 10, 2020).

in ensuring that individuals harmed by the kind of constitutional violations alleged here can pursue the full scope of relief to which they are entitled, including damages for health harms. See Principles of Environmental Justice ¶ 9, adopted at the First National People of Color Environmental Leadership Summit (1991), http://www.ejnet.org/ej/principles.pdf (accessed January 7, 2020). Amici also have an interest in promoting enforcement of the constitutional guarantee to due process of law.

SUMMARY OF ARGUMENT

In this case, Plaintiffs ask the Court to affirm the lower courts' holdings that the State can and should be held accountable to fundamental guarantees of the Michigan Constitution protecting individuals against arbitrary and oppressive exercises of State power. The Michigan Constitution's due process clause protects the right to bodily integrity: an individual's fundamental right to exercise control over his or her body. Plaintiffs allege that the State directed Flint's switch to toxic water with knowledge of the lead and bacterial contamination and deliberate indifference to the harm it would cause. The State then refused to switch back to safe water in the face of overwhelming evidence of a public health crisis, and engaged in a concerted effort to cover up the crisis by misleading the public about the safety of the water. This included lying about crucial information that would have enabled Plaintiffs to choose whether to consume the contaminated water.

These conscience-shocking policy decisions caused Plaintiffs to consume water contaminated with lead and bacteria, resulting in serious and irreversible bodily harm. The State thus caused a nonconsensual intrusion into Plaintiffs' bodies, violating their right to bodily integrity guaranteed by the Michigan Constitution. Plaintiffs seek, among other relief, a declaration that Defendants' conduct violated the Constitution, and an award of damages to

compensate them for health and property harms. First Am Compl 32; State Def App Vol. 2, p 288a.

Responsibility for these constitutional violations lies with the State. The State cannot use governmental immunity to "avoid constitutional restrictions" on its conduct. *Burdette v Michigan*, 166 Mich App 406, 408-409; 421 NW2d 185 (1988). State policymakers, after considering other options, made affirmative decisions to supply toxic water and lie to the public about its safety. Under settled law, these decisions by State officials with policymaking authority under state law—including the Governor, State Treasurer, State-appointed Emergency Managers, and spokespersons with authority to communicate to the public on behalf of the State—constitute official government policy attributable to the State itself.

Damages are an appropriate and necessary remedy to vindicate the violations alleged here. As this Court's decision in *Smith v Department of Public Health* recognized, a court's ability to order damages for constitutional violations by the State is essential to enforcing the guarantees of the Michigan Constitution, and such remedies are well within the Court's common law judicial authority. 428 Mich 540, 544-45; 410 NW2d 749 (1987). Plaintiffs have no other vehicle to vindicate the fundamental constitutional right at issue here. The SDWA affords only injunctive relief, not monetary compensation for health harms, and therefore no means to achieve a full measure of justice for the violation of Plaintiffs' constitutional rights by the State. The egregious violation of Flint residents' rights "calls out" for a damages remedy to ensure that the State cannot ignore constitutional guarantees with impunity. *Smith*, 428 Mich at 647 (BOYLE, J., concurring in part).

This Court should affirm the well-reasoned opinions of the Court of Claims and Court of Appeals finding that Plaintiffs' bodily integrity claim could move forward to discovery.

ARGUMENT

I. Defendants' alleged conscience-shocking actions violated Plaintiffs' constitutional right to bodily integrity

A. The Michigan Constitution protects Plaintiffs' right to bodily integrity

The Michigan Constitution protects Flint residents from egregious, unjustified, and nonconsensual invasions of their bodily integrity by the government. Like the federal constitution, the Michigan Constitution guarantees that "[n]o person shall . . . be deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17; see US Const, Am XIV. The core purpose of due process is to protect individuals against "the arbitrary exercise of governmental power." *People v Sierb*, 456 Mich 519, 523; 581 NW2d 219 (1998). In this way, the clause prevents the government from employing its authority "as an instrument of oppression." *Guertin v Michigan*, 912 F3d 907, 917 (CA 6, 2018), quoting *Collins v City of Harker Heights*, 503 US 115, 126; 112 S Ct 1061; 117 L Ed 2d 261 (1992). The protections of Michigan's due process clause are coextensive with, and may be even broader than, those of the federal due process clause. *Grimes v Van Hook-Williams*, 302 Mich App 521, 532-33; 839 NW2d 237 (2013); *Sierb*, 456 Mich at 523-24 & n 10.

The right to due process has a substantive component that protects "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Washington v Glucksberg*, 521 US 702, 720-21, 117 S Ct 2258, 138 L Ed 2d 772 (1997) (internal quotation marks and citations omitted). It is well-established that these fundamental rights include the right to self-determination over one's own body, including the right to be free from unwanted physical intrusion. See, e.g., *Glucksberg*, 521 US at 720; *Rochin v California*, 342 US 165, 172, 72 S Ct 205, 96 L Ed 183 (1952); *Lombardi v Whitman*, 485 F3d 73, 78-79 (CA 2, 2007). Indeed, "[n]o right is held more sacred, or is more carefully guarded . . . than the

right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac R Co v Botsford*, 141 US 250, 251; 11 S Ct 1000; 35 L Ed 734 (1891). This right to bodily integrity is among the "historic liberties" protected since the US Constitution's inception, see *Ingraham v Wright*, 430 US 651, 673-74; 97 S Ct 1401; 51 L Ed 2d 711 (1977), "[b]ecause our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination," *Cruzan v Dir, Mo Dep't of Health*, 497 US 261, 287; 110 S Ct 2841; 111 L Ed 2d 224 (1990) (O'CONNOR, J., concurring). Courts have affirmed this fundamental right to bodily integrity again and again. E.g., *Rochin*, 342 US at 172-74; see *Missouri v McNeely*, 133 S Ct 1552; 185 L Ed 2d 696 (2013) ("We have never retreated . . . from our recognition that any compelled intrusion into the human body implicates significant, constitutionally protected . . . interests."); *Planned Parenthood of Southeast Pa v Casey*, 505 US 833, 849; 112 S Ct 2791; 120 L Ed 2d 674 (1992) (explaining that it is "settled" that the Constitution protects an individual's liberty interest in "bodily integrity").

The government violates the right to bodily integrity when it causes an "egregious, nonconsensual" intrusion into the body without a "legitimate governmental objective." *Mays v Snyder*, 323 Mich App 1, 60; 916 NW2d 227 (2018), quoting *Rogers v Little Rock*, 152 F3d 790, 797 (CA 8, 1998); see *Guertin*, 912 F3d at 919. To be constitutionally repugnant, the government conduct must also "shock the conscience," for which, "at a minimum, proof of deliberate indifference is required." *Mays*, 323 Mich App at 60-61. As explained below, Defendants' alleged conduct violated Plaintiffs' right to bodily integrity and shocks the conscience.

B. Defendants' alleged actions caused a nonconsensual, unjustified intrusion of toxic water into Plaintiffs' bodies

Plaintiffs allege that Defendants violated Plaintiffs' right to bodily integrity by knowingly introducing harmful substances into Plaintiffs' bodies, and perpetuating that intrusion, without their consent or a legitimate government purpose. See *infra* pp 12-13. "[T]he central tenet of the Supreme Court's vast bodily integrity jurisprudence is balancing an individual's common law right to informed consent with tenable state interests." *Guertin*, 912 F3d at 919. For an individual to exercise free and voluntary choices over what shall be done to his body, he must be informed, and not be "purposefully misled" about "crucial facts." *In re Cincinnati Radiation Litig*, 874 F Supp 796, 812 (SD Ohio, 1995). The right to informed consent over what enters one's body includes the right to reject even beneficial medication or life-sustaining aid. *Washington*, 494 US at 221-22; *Cruzan*, 497 US at 278-79. It thus necessarily includes the right to reject toxic substances. *Guertin*, 912 F3d at 933-34.

To be sure, unconstitutional bodily intrusions most often occur in the case law in the context of physical punishment, restraint, or forced entry into the body. E.g., *Rochin*, 342 US at 172 (forcibly pumping a detainee's stomach to gain evidence of criminal activity). But the right to bodily integrity is implicated even when the government does not use physical force to complete the nonconsensual intrusion. See *Guertin*, 912 F3d at 919 (violation does not rely on the "manner in which the government intrudes upon an individual's body"). What matters is whether the individuals knew about and had the ability to consent to the government introducing foreign substances into their bodies, especially when those substances are known to be harmful. See *id.* at 920-21.

For example, in *In re Cincinnati Radiation Litigation*, government officials subjected cancer patients to high levels of radiation to study its effects on combat troops. 874 F Supp at

802-04. The bodily intrusion was not the result of physical force; the patients willingly submitted to the radiation treatment under the guise that it was solely to treat their cancer. *Id.* at 803-04. The radiation exposure caused severe health consequences, including vomiting, burns, shortening of life expectancy, and death. *Id.* at 814. In finding that this human experimentation without informed consent violated the right to bodily integrity, the court explained that "when a person is purposefully misled . . ., he can no longer be said to exercise that degree of free will that is essential to the notion of voluntariness." *Id.* at 812; see also *Heinrich v Sweet*, 62 F Supp 2d 282, 313-15 (D Mass, 1999) (similar).

The same principle applies here. Plaintiffs' lack of consent to exposure to a toxic substance stems from deception, rather than physical coercion. See *In re Cincinnati Radiation Litig*, 874 F Supp at 812 ("Without actually seizing the Plaintiffs and forcing them to submit to these experiments . . . agents of the state[] accomplished the same feat through canard and deception . . . ."); e.g., Am Compl ¶¶ 93, 96, 98, 105-06; State Defs' App Vol 2, pp 275a-278a. Plaintiffs took an action necessary to their survival by drinking water—water that Defendants repeatedly and falsely assured them was safe. Defendants' deception vitiated Plaintiffs' ability to avoid drinking the seriously contaminated water, causing the *nonconsensual* and harmful intrusion of lead and Legionella bacteria into their bodies.

Because of the grievous health harms associated with consuming lead and Legionella bacteria, this violation of Plaintiffs' bodily integrity is "particularly intrusive." *Washington v Harper*, 494 US 210, 237; 110 S Ct 1028; 108 L Ed 2d 178 (1990) (STEVENS, J., concurring in part and dissenting in part). Plaintiffs allege that their consumption of the water "caused serious and in some cases life threatening and irreversible bodily injury." E.g., *id.* ¶ 144; State Defs' App Vol 2, p 274a. Such nonconsensual introduction of "life-threatening substances" into Flint

residents' bodies, "especially when such substances have zero therapeutic benefit," violates residents' right to bodily integrity. *Guertin*, 912 F3d at 921 (internal quotation marks omitted). Moreover, this violation is not outweighed by any countervailing legitimate purpose that could justify such egregious harm. Defendants do not argue, nor could they, that they had any legitimate governmental objective for exposing Plaintiffs to lead and bacteria and lying about it. *Mays*, 323 Mich App at 60.

Contrary to Defendants' assertions, this case is not about a "right to contaminant-free water." State Defs' Br 33. It is about whether the Constitution prohibits the government from knowingly poisoning an entire community and lying to them about it. *Coshow v Escondido*, a California case cited by Defendants rejecting a due-process challenge to drinking-water fluoridation, is inapposite and it involves nothing close to the conscience-shocking conduct at issue here. 132 Cal App 4th 687; 34 Cal Rptr 3d 19 (2005). In *Coshow*, the government added fluoride to the water to benefit public health, over the objections of some citizens. *Id.* at 689. The court found that this type of policy decision, made to benefit public health, did not violate the plaintiff's right to bodily integrity. *Id.* at 710; see *Guertin*, 912 F3d at 921-22. Here, by contrast, there is no contention that the lead or Legionella bacteria in Flint's water had any public health benefit, and thus *Coshow*'s "reasoning is inapplicable." *Mays*, 323 Mich App at 62 n 16. Further, *Coshow* did not involve a nonconsensual bodily intrusion because the plaintiff was fully informed of the City's plan to add fluoride, and thus his "freedom to choose not to ingest [fluoridated water] remain[ed] intact." *Coshow*, 132 Cal App 4th at 710-11. There was no intentional concealment or lying, as in this case. See *infra* pp 12-13.

C. Defendants' alleged actions, undertaken with deliberate indifference, shock the conscience

Defendants' decisions to supply toxic water—with deliberate indifference to the harm it would cause Flint residents—and falsely reassure the public about the water's safety, shock the conscience. The "shocks the conscience" standard focuses on the egregiousness of "abusive executive action." *Sacramento v Lewis*, 523 US 833, 846; 118 S Ct 1708; 140 L Ed 2d 1043 (1998). Conduct shocks the conscience when it "infringes upon the 'decencies of civilized conduct,' is 'so brutal and so offensive to human dignity,' and interferes with rights 'implicit in the concept of ordered liberty.'" See *Guertin*, 912 F3d at 923, quoting *Rochin*, 342 US at 169. "[T]he measure of what is conscience shocking is no calibrated yard stick," and must be evaluated by the totality of facts and circumstances of each case. *Lewis*, 523 US at 847, 850.

Defendants misstate the law when they argue that a government actor's conduct must be "intended to injure" to be conscience-shocking. State Defs' Br 34. To the contrary, "conscience-shocking behavior resides on the continuum of actions." *Range v Douglas*, 763 F3d 573, 590 (CA 6, 2014). Action taken with an intent to inflict harm is on one end of the spectrum and clearly shocks the conscience, while on the other end, "negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Lewis*, 523 US at 849-50, 854. Action taken with deliberate indifference to harm represents the middle ground of culpability and may shock the conscience depending on the circumstances. *Id.* at 849-50. "[T]he entirety of the situation" is relevant to the determination, including "'the type of harm, the level of risk of the harm occurring, and the time available to consider the risk of harm.'" *Guertin*, 912 F3d at 924, quoting *Range*, 763 F3d at 591.

Defendants' alleged conduct shocks the conscience: Defendants intentionally acted, with time to deliberate, in ways they knew could grievously harm Plaintiffs' health. In other words,

Plaintiffs' allegations, which the Court must assume to be true, *Willet v Waterford Charter Twp of Waterford*, 271 Mich App 38, 45; 718 NW2d 386 (2006), show that Defendants acted with deliberate indifference to the risk of harm to Flint residents. Plaintiffs allege that Defendants "knew of facts from which they could infer a 'substantial risk of serious harm,' that they did infer it, and that they acted with indifference 'toward the individual's rights.'" *Range*, 763 F3d at 591, quoting *Ewolski v Brunswick*, 287 F3d 492, 511-12 (CA 6, 2002). For instance, they allege that Defendants were aware of a Flint-commissioned report cautioning against using the Flint River as the primary source of drinking water, and that Flint's water quality supervisor had warned that the water treatment plant "was not fit to begin operations." Am Compl ¶¶ 40, 53-54, 57-58; State Defs' App Vol 2, pp 264a, 267-68a. Defendants nevertheless decided to supply water from the Flint River without chemical treatment to prevent dangerous corrosion from water pipes. *Id.* ¶¶ 82, 148e; State Defs' App Vol 2, pp 273a, 287a.

Plaintiffs also allege that Defendants refused to switch back to the Detroit water supply, *id.* ¶¶ 74, 86; State Defs' App Vol 2, pp 271a, 274a, despite knowing "that the extreme public health emergency involved lead poisoning, deadly Legionella bacteria and a host of other ailments" indicating a significant risk of harm to residents, *id.* ¶¶ 85, 94; State Defs' App Vol 2, pp 274a, 276a. Defendants knew that there had been an outbreak of Legionnaire's disease in Flint, and that the County Health Department had expressed concerns that the outbreak was related to the water supply. *Id.* ¶¶ 65, 67-69, 76; State Defs' App Vol 2, pp 269-71a. They also knew that lead levels in the water had risen significantly, and that there was evidence of an increase in the incidence of elevated blood lead levels in Flint children. *Id.* ¶¶ 83, 85, 94, 97, 99-100, 102; State Defs' App Vol 2, pp 273-74a, 276-78a. And they knew that General Motors had stopped using Flint's water because it was corroding auto parts. *Id* ¶ 66; ; State Defs' App Vol

2, p 269a.

Plaintiffs allege that during this time and despite the knowledge of the water's danger, Defendants affirmatively misled the public about the health risks of drinking their tap water. They concealed data from the public showing the water was unsafe, *id.* ¶¶ 99-101, 105; State Defs' App Vol 2, pp 276-78a, and made false representations to the EPA, *id.* ¶ 82; State Defs' App Vol 2, p 273a. They publicly discredited independent findings that the water was contaminated, including calling an EPA official raising concerns about lead a "rogue employee" and chastising scientists whose findings indicated systemic lead contamination as needlessly creating "near-hysteria." *Id.* ¶¶ 97-98, 102-07; State Defs' App Vol 2, pp 276a, 278a. Even more shockingly, the official spokesperson for the Michigan Department of Environmental Quality (MDEQ) repeatedly made false assurances to the public that the water was safe to drink. *Id.* ¶¶ 93 ("[A]nyone who is concerned about lead in the drinking water can relax."), 96 (Flint residents "do not need to worry about lead in their water supply"), 98, 104-106; State Defs' App Vol 2, pp 275-278a. These deceptive statements, concealment of accurate information, and false reassurances were made despite actual knowledge of the true risks of drinking Flint's tap water and thus with deliberate indifference to the serious bodily harm it would cause residents. These intentional acts are "offensive to human dignity," *Rochin*, 342 US at 169, and reflect the abuse of governmental power the due process clause prohibits, *Sierb*, 456 Mich at 523.

The type of harm and significant risk of that harm occurring adds to the conscience-shocking nature of the conduct. *Guertin*, 912 F3d at 924. Exposure to water tainted with high levels of lead and Legionella bacteria can cause serious, irreversible health effects and even death. Plaintiffs allege that the water in fact had such effects. E.g., Am Compl ¶ 144; State Defs' App Vol 2, p 285a. The risk of these grievous health harms occurring was high because of

the widespread use of public drinking water, and was further heightened by the Defendants' campaign of lies and misinformation as to its safety.

Defendants' conduct is even "more egregious" because Defendants made these decisions after substantial time to deliberate. See *Williams v Berney*, 519 F3d 1216, 1220-21 (CA 10, 2008), quoting *Whitley v Albers*, 475 US 312, 320; 106 S Ct 1078; 89 L Ed 2d 251 (1986). This is not a case like a prison riot or a high-speed police chase, in which State officials were called to make critical decisions "in haste, under pressure, and frequently without the luxury of a second chance." *Lewis*, 523 US at 852. Rather, Defendants had "time to make unhurried judgments, upon the chance for repeated reflection" over the course of months and years. *Lewis*, 523 US at 853. At each juncture, they chose to continue to expose Plaintiffs to toxic water without their knowledge or consent. In these circumstances, and in the face of repeated opportunities to change course or inform the public of the danger, "their indifference is truly shocking." *Id.*

II. Defendants are not immune from liability because Plaintiffs' injuries were caused by policy decisions attributable to the State itself

Government immunity cannot shield the State and its officials here, because Plaintiffs have adequately alleged a violation of their right to bodily integrity by virtue of State policy. The State's liability for a violation of the Michigan Constitution is determined using the same standard applied to local governments under 42 USC 1983 (section 1983), as articulated in *Monell v Department of Social Services of City of New York*, 436 US 658, 691-92; 98 S Ct 2018; 56 L Ed 2d 611 (1978). See *Reid v Michigan*, 239 Mich App 621, 628-29; 609 NW2d 215 (2000). Liability under this standard requires Plaintiffs to show (1) a State policy decision (2) made by an authorized State policymaker that (3) was the "moving force behind the violation of a constitutional right." See *Groden v Dallas*, 826 F3d 280, 283 (CA 5, 2016); *Johnson v*

Vanderkooi, 502 Mich 751, 761; 908 NW2d 785 (2018) (State is liable for a Michigan constitutional violation "caused by a policy or custom of the [State]"); *Monell*, 436 US at 691-92.

The purpose of this policy-or-custom requirement is to distinguish acts that can be fairly attributed to the State from acts of individual tortfeasors employed by the State. *Pembaur v Cincinnati*, 475 US 469, 478-79; 106 S Ct 1292; 89 L Ed 2d 452 (1986) ("*Monell* is a case about responsibility[.]"); *Johnson*, 502 Mich at 784 (WILDER, J., concurring). Here, as described below, responsibility for the challenged actions lies squarely with the State—not some rogue employee. According to Plaintiffs, State officials, acting in their official capacities and pursuant to their authority under state law, made several disastrous and deliberately indifferent choices to switch Flint's water source to improperly treated Flint River water, and to intentionally deceive Flint residents about the dangers of drinking it. Those State policies caused Flint residents to consume toxic water, without their consent, invading their physical security and causing them great harm.

A. The decisions at issue were tailored to the situation and made by State policymakers

It is blackletter law that a single choice by a final state decisionmaker "tailored to a particular situation" constitutes official "policy" for purposes of governmental liability under *Monell*. *Pembaur*, 475 US at 480-81; see also *Mays*, 323 Mich App at 63-64. This is because "[o]fficial [state] policy includes the . . . acts of its policymaking officials." *Connick v Thompson*, 563 US 51, 61; 131 S Ct 1350; 179 L Ed 2d 417 (2011). The policy or custom need not be written down to incur liability, *Johnson*, 502 Mich at 763-64 & n 6, and may include a choice to approve a subordinate's decision, *St Louis v Praprotnik*, 485 US 112, 127; 108 S Ct 915; 99 L Ed 2d 107 (1988). "[T]he power to establish policy" is not exclusive to the

legislature, and *Monell* "expressly envisioned other officials 'whose acts or edicts may fairly be said to represent official policy.'" *Pembaur*, 475 US at 480, quoting *Monell*, 436 US at 694.

State law determines who is an official policymaker for purposes of *Monell* liability. *Jackson v Detroit*, 449 Mich 420, 434; 537 NW2d 151 (1995), citing *Praprotnik*, 485 US at 123 (plurality opinion). "[W]ho, or what, this decisionmaker is, is a question of law to be decided in the first instance by the trial court. . . . [I]t is enough for [the reviewing Court's] purposes that plaintiffs allege that" the violation was perpetrated by a facially plausible final decisionmaker. *Jackson*, 449 Mich at 435 & n 15. Several officials may be official policymakers within a governmental entity, as such entities "often spread policymaking authority among various officers and official bodies." *Pembaur*, 475 US at 483.

Plaintiffs properly allege that State officials acting on behalf of the State, including Governor Snyder, State Treasurer Dillon, and Emergency Managers Ambrose and Earley, made decisions that amounted to state policy. First, Plaintiffs allege that State officials and entities made decisions tailored to the circumstances that caused the continuing supply of toxic water to Plaintiffs, including:

- Governor Snyder and State Treasurer Andy Dillon authorized the use of the Flint River instead of pre-treated water from Detroit, despite knowing that use of the River as a primary drinking water source would be "dangerous and unsafe." Am Compl ¶¶ 48-54; State Defs' App Vol 2, pp 266-67a.

- MDEQ and Emergency Manager (EM) Earley, appointed by Governor Snyder and acting on behalf of the State, directed Flint to begin providing untreated water to its residents. Am Compl ¶ 58; State Defs' App Vol 2, p 268a.

- EM Ambrose, appointed by Governor Snyder and acting on behalf of the State, continued the supply of toxic water to Plaintiffs by affirmatively refusing to switch back to Detroit water at multiple junctures, including overriding the vote of the Flint City Council to switch back. Am Compl ¶¶ 74, 86; State Defs' App Vol 2, pp 271a, 274a.

Second, Plaintiffs allege that Defendants had a policy of deliberately misleading Flint residents as to the danger of the water. MDEQ and Michigan Department of Health and Human Services (MDHHS) officials decided what to communicate on behalf of the State to Flint residents about their water, and chose to repeatedly lie and discredit independent findings about the water and its effects on Flint children, in an effort to conceal the public health crisis. See *supra* pp 12-13. Contrary to Defendants' assertions, these specific decisions, detailed above, are far from "bald allegation[s]" or "conclusory statements that are unsupported by allegations of fact." State Defs' Br at 25-26.

The Defendants had policymaking authority under state law to make the decisions Plaintiffs allege caused the constitutional violations at issue. See, e.g., Am Compl ¶¶ 24-28; State Defs' App Vol 2, pp 262-63a (describing responsibilities of Governor Snyder, MDEQ, and MDHHS). Indeed, Plaintiffs' complaint is replete with allegations that State officials with final authority to decide what water to deliver to Flint residents, and what to tell residents about the quality of their water, considered various alternatives and then made final policy decisions. E.g., Am Compl ¶¶ 48-53, 58, 74, 86, 93, 96, 98-99, 104-07. And because the City was under emergency management, State officials, including the Emergency Managers, had broad policymaking authority over Flint's water system. See, e.g., MCL 141.1549(2) (giving Emergency Managers "broad powers" to "act for and in the place" of the local government, including to provide "necessary governmental services essential to the public health, safety and welfare"); MCL 141.1550(1); *Concerned Pastors for Social Action v Khouri*, 217 F Supp 3d 960, 968-69 (ED Mich 2016) (describing control of State officials over Flint's water system). Indeed, the decisions to change the City's water supply and use the Flint River, which involved large financial commitments, could be made *only* by or with final approval by State officials,

including the Emergency Managers[4] and State Treasurer. See, e.g., MCL 141.1552(1)(g), (2), (3) (giving Emergency Manager and State Treasurer approval authority over contracts worth more than $50,000); MCL 141.1551(2); Emergency Financial Manager City of Flint, Order No. 1, at 2 (August 21, 2012), *available at* <https://www.cityofflint.com/wp-content/uploads/CityPDF/EFM001.pdf> (accessed January 9, 2020) (requiring Emergency Manager approval for all purchases over $10,000); *Concerned Pastors*, 217 F Supp 3d at 968-69. Nor do Defendants contend that any of the Michigan officials whose decisions are challenged here were acting as rogue employees outside the scope of their responsibilities under state law.

Defendants misguidedly argue that under the Michigan Safe Drinking Water Act, MCL 325.1001 *et seq.*, the sole officials responsible for decisionmaking about Flint's water supply were MDEQ Director Dan Wyant and "the managers of Flint's water system." State Defs' Br 23-24. That statute grants MDEQ some regulatory authority over public water supplies in the state, but it does not designate the director of DEQ as the sole decisionmaker with respect to the decisions about what water source to use in Flint or what to tell Flint residents about their water. Indeed, although Defendants do not specify who they believe the "managers of Flint's water system" are, it is clear that those managers *included* the State officials whose decisions are at issue here. Plaintiffs' allegations challenge specific decisions of State officials demonstrating that they had control over, managed, and "direct[ed] the workings of" Flint's water system. *Concerned Pastors*, 217 F Supp 3d at 968-69, quoting *United States v Bestfoods*, 524 US 51, 66; 118 S Ct 1876; 141 L Ed 2d 43 (1998); e.g., *supra* p 16. The fact that an MDEQ official or

[4] Plaintiffs' brief at pages 35-37 correctly explains that Emergency Managers can be State policymakers for purposes of *Monell* liability.

others may have *some* regulatory authority with respect to public water supplies does not mean that Defendants were not the final policymakers with respect to the particular decisions at issue here.

B. Causation is clear because Defendants allegedly directed the violation of Plaintiffs' rights

Defendants' policy decisions directly caused Plaintiffs' nonconsensual exposure to toxic water, and were thus the "moving force" behind the constitutional violation. *Johnson*, 502 Mich at 763, quoting *Monell*, 436 US at 694; see *id.* at 777-80. When, as here, State policymakers "specifically direct[] the action resulting in the deprivation" of constitutional rights, no difficult questions of fault or causation arise. *Bd of Co Comm'rs of Bryan Co v Brown*, 520 US 397, 406; 117 S Ct 1382; 137 L Ed 2d 626 (1997). Plaintiffs' allegations show both cause-in-fact—that their injuries would not have occurred "'but for' the defendant's actions," and proximate cause—that the consequences of the actions were foreseeable such that a "defendant should be held legally responsible." *Johnson*, 502 Mich at 794-95, quoting *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994).

As Plaintiffs explain in their brief, "but for" Defendants' policy directing that toxic water be delivered to residents' homes, and their repeated refusal to switch back, Plaintiffs would not have suffered the nonconsensual entry of lead- and bacteria-laden water into their bodies. Am Compl ¶¶ 48-53; 74, 86; State Defs' App Vol 2, pp 266-67a, 271a, 274a; see Pls' Br 30-32. It was also foreseeable that this harm would occur, because Plaintiffs allege that Defendants were aware that using the water was dangerous and the water treatment plant "was not fit to begin operations." Am Compl ¶¶ 40, 53-54, 57-60; State Defs' App Vol 2, pp 264a, 267-68a. Indeed, the State officials acted despite actual knowledge that using Flint River water would be "dangerous and unsafe." *Id.* ¶¶ 53; State Defs' App Vol 2, p 268a. Likewise, "but for"

Defendants' policy of lying to Plaintiffs about the safety of the water, Plaintiffs' right to refuse such an intrusion would not have been violated. And it is reasonably foreseeable that lying about the safety of toxic water would cause Flint residents to continue unwittingly to consume it. In short, because the decisions of the State (through its policymakers) "specifically directed the action" resulting in the constitutional violation, those decisions are the moving force behind the violation. *Brown*, 520 US at 406.

Defendants' arguments betray a fundamental misunderstanding about the causation requirement. See State Defs' Br 25-26. First, Defendants incorrectly suggest that a policymaker's written policy must have mandated or directed *another* employee to violate constitutional rights, as in *Monell* and *Pembaur*, in order for Plaintiffs to satisfy causation. State Defs' Br 25. Here, the connection between the State action and the violation is even more direct than in *Monell* and *Pembaur*: the State policymakers *themselves* directed the government intrusion into Plaintiffs' bodies, without a middleman implementing the policy. And contrary to Defendants' suggestion, a policy need not be in writing to constitute a policy decision of the State. See *Johnson*, 502 Mich at 762-63 & n 56.

Second, Defendants incorrectly argue that Plaintiffs needed to show deliberate indifference in order to prove causation. State Defs' Br 26-29. As explained below, Plaintiffs have amply demonstrated deliberate indifference—but such a showing is not required in this context. Defendants' brief cites cases involving *inaction* or omission by State officials leading to a subordinate employee committing a violation. See State Defs' Br at 26-29. In such cases a showing of deliberate indifference by the non-acting official is required. E.g., *Johnson*, 502 Mich at 777; *Jackson v Barnes*, 749 F3d 755, 763 (CA 9, 2014). The question is whether the policymakers "are on actual or constructive notice that a particular omission" causes other

employees to "violate citizens' constitutional rights." *Connick*, 563 US at 61. Here, by contrast, Plaintiffs allege a state policy of *action* that "itself directed or authorized the violation of a federally protected right," i.e., the nonconsensual and concealed delivery of toxic tap water. *Johnson*, 502 Mich at 777. In such circumstances, no showing of deliberate indifference is required. *Id.*; see also *Jackson*, 749 F3d at 763; *Williams v Kaufman Co*, 352 F3d 994, 1014 n 66 (CA 5, 2003).

In any event, Plaintiffs do allege that Defendants acted with deliberate indifference. Defendants took intentional, affirmative acts that foreseeably caused harm. State officials "disregarded a known or obvious consequence" of their decisions to switch Flint's water source to the Flint River. *Connick*, 563 US at 61, quoting *Bryan Co*, 520 US at 410. Plaintiffs allege that the State policymakers were "on notice" that their actions would cause harm because of their knowledge that using the Flint River water would be unsafe, and the mounting evidence of contamination after the switch. See *supra* pp 12-13. Their actions were thus taken with deliberate indifference to the harm it would foreseeably cause Plaintiffs, which shocks the conscience and meets any culpability requirement here.

III. Damages are an appropriate and necessary remedy to vindicate the Michigan Constitution's protection against egregious bodily intrusion at the hands of the State

Recognizing a claim for damages against the State in this case is both appropriate and necessary to vindicate fundamental rights under the Michigan Constitution. This Court held in *Smith* that a "claim for damages against the state arising from a violation by the state of the Michigan Constitution may be recognized in appropriate cases." *Smith*, 428 Mich at 544 (memorandum opinion). In determining the appropriateness of inferring a damages remedy, Michigan courts weigh the factors described in Justice Boyle's concurrence in *Smith*. See e.g.,

Mays, 323 Mich App at 65-67; *Bauserman v Unemployment Ins Agency*, No. 333181, 2019 WL 6622945, at *9-12 (Mich Ct App, December 5, 2019); *Reid v Michigan*, 239 Mich App 621, 628; 609 NW2d 215 (2000). One important factor is the availability of another remedy. *Smith*, 428 Mich at 648-52 (BOYLE, J., concurring in part).

In assessing whether other remedies are "available," the relevant question is whether Plaintiffs have another avenue to "seek redress in the form of monetary relief for the alleged violation of their due process rights protected by the state constitution." *Bauserman*, 2019 WL 6622945, at *11; see also *Mays*, 323 Mich App at 67; see *Wilkie v Robbins*, 551 US 537, 550; 127 S Ct 2588; 168 L Ed 2d 389 (2007) (asking whether there is "any alternative, existing process for protecting" a constitutionally recognized interest). That Plaintiffs may be able to sue other defendants, or sue for injunctive relief, or sue for different violations of law relating to the Flint water crisis, does not militate against the Court inferring a damages remedy for constitutional violations by the State. See *Carlson v Green*, 446 US 14, 18-19; 100 S Ct 146; 864 L Ed 2d 15 (1980); *Bauserman*, 2019 WL 6622945, at *11. Contra State Defs' Br 35. Holding the State accountable for its own unlawful conduct "serve[s] as a deterrent against future constitutional deprivations." *Owen v Independence*, 445 US 622, 651; 100 S Ct 1398; 63 L Ed 2d 673 (1980). And injunctive relief alone cannot make Plaintiffs whole for the health harms they have suffered as a result of Defendants' unjustified intrusions into Plaintiffs' bodies. Here, as explained below, Plaintiffs have no other means to vindicate their constitutional due process rights against egregious violations by the State.

A. The Safe Drinking Water Act does not enable Plaintiffs to seek redress for constitutional violations

Contrary to Defendants' contentions, Former Emergency Mgr Br 30-33, State Defs' Br 35, the Safe Drinking Water Act and its Michigan counterpart do not provide a remedy for the

constitutional violations at issue here. As a threshold matter, because Defendants did not raise this argument before the trial court, see *Mays*, 323 Mich App at 69, this Court need not consider it. See *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). In any event, the argument is meritless, because the SDWA does not vindicate or displace constitutional rights, and only provides for injunctive relief, not damages.

The SDWA is a federal law that regulates public water systems to ensure that drinking water "meet[s] minimum national standards for protection of public health." HR Rep No 93-1185, at 1 (1974), *as reprinted in* 1974 USCCAN 6454, 6454. The law requires water system owners and operators to disinfect and filter water to kill bacteria; ensure that levels of certain harmful contaminants do not exceed specified standards; treat water with chemicals to prevent corrosion of lead pipes; and monitor drinking water for certain contaminants. See generally 42 USC 300g-1; 40 CFR pt 141. Michigan's SDWA generally mirrors the federal requirements. See MCL 325.1001 *et seq.* Congress created a "citizen suit" provision in the SDWA to allow private individuals to sue to enforce the statutory rights created by the SDWA. See 42 USC 300j-8(a)(1) (authorizing suits against "any person" who is "alleged to be in violation of any requirement" of the statute or its implementing regulations); cf. *Chesapeake Bay Found, Inc v Gwaltney*, 844 F2d 170, 171-72 (CA 4, 1988) (discussing citizen-suit liability under the Clean Water Act).

1. The Safe Drinking Water Act does not vindicate constitutional rights

The SDWA does not provide a remedy for constitutional violations. Plaintiffs cannot bring constitutional claims through the SDWA's citizen-suit provision, which allows for suits to enforce "requirement[s] prescribed by or under" the statute, because the SDWA does not

proscribe constitutional violations. 42 USC 300j-8(a)(1).[5] The SDWA simply does not address the conduct at issue here, including the "knowing and intentional perpetuation of exposure to contaminated water as well as fraudulent concealment of the hazardous consequences faced by individuals who used or consumed the water." See *Mays*, 323 Mich App at 69-70. As the Sixth Circuit has explained, the "SDWA does not use language related to constitutional rights, or codify legal standards that appeared in prior cases to enforce rights guaranteed by the Constitution." *Boler v Earley*, 865 F3d 391, 405 (CA 6, 2017) (holding that the SDWA does not foreclose federal section 1983 claims seeking to enforce constitutional rights).

Rather, Congress included citizen-suit provisions in federal environmental statutes to create a mechanism for "supplemental and effective assurance that the [environmental laws] would be implemented and enforced." *NRDC, Inc v Train*, 510 F2d 692, 700 (DC Cir, 1974) (discussing the Clean Air Act). The "central purpose" of such citizen suits is to allow "citizens to abate pollution when the government cannot or will not command compliance," *Gwaltney of Smithfield, Ltd*, 484 US at 62, *not* to restrict the availability of other remedies. Indeed, Congress was explicit in the SDWA's citizen-suit provision that it did not intend the availability of citizen suits to displace constitutional rights: "Nothing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any requirement prescribed by [the SDWA] *or to seek any other relief*." 42 USC 300j-8(e) (emphasis added). Because the SDWA does not allow plaintiffs to seek redress for constitutional violations, it is not another available remedy for *Smith* purposes. See *Bauserman*, 2019 WL 6622945, at *11.

[5] Michigan's SDWA does not have a citizen-suit provision at all, and thus offers Plaintiffs no avenue for relief. See *Mays*, 323 Mich App at 69. Contra Former Emergency Mgr Br 30-32.

This case is unlike those Defendants cite, where the Supreme Court declined to infer a damages remedy under *Bivens* due to a comprehensive remedial statutory or administrative scheme that addressed the specific constitutional rights at issue. *Bush v Lucas*, for example, concerned First Amendment claims by a federal civil service employee. 462 US 368-69, 369; 103 S Ct 2404; 76 L Ed 2d 648 (1983). The Court determined that civil servants are "protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors" and allows employees to raise First Amendment challenges. *Id.* at 385-86. Likewise, *Schweiker v Chilicky* involved a comprehensive remedial scheme that permitted "review of constitutional claims" related to the denial of social security benefits. 487 US 412, 424; 108 S Ct 2460; 101 L Ed 2d 370 (1988). In contrast, Plaintiffs cannot obtain judicial review of their constitutional claims under the SDWA. This is not a case where "the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." *Schweiker*, 487 US at 423.[6]

2. The Safe Drinking Water Act does not provide damages

Nor does the SDWA provide for the *type* of relief sought by Plaintiffs. Money damages for health and property harms are not available through the SDWA or its state counterpart. See *Boler*, 865 F3d at 406; *Mays*, 323 Mich App at 69 (noting that Michigan's SDWA does not

[6] The other cases Defendants cite where the Supreme Court has declined to infer a damages remedy, State Defs' Br 36-37, are likewise distinguishable. This case does not involve claims against non-governmental defendants, as in *Correctional Servs Corp v Malesko*, 534 US 61; 122 S Ct 515; 151 L Ed 2d 456 (2001), and *Minneci v Pollard*, 565 US 118; 132 S Ct 617; 181 L Ed 2d 606 (2012). Nor does it involve "the unique relationship between the government and military personnel," *Chappell v Wallace*, 462 US 296, 299, 302; 103 S Ct 2362; 76 L Ed 2d 586 (1983), or "sensitive issues of national security," *Ziglar v Abbasi*, 137 S Ct 1843, 1861; 198 L Ed 2d 290 (2017).

contain a citizen-suit provision). Such damages are essential to making Plaintiffs whole, where, as here, their injuries include health harms that cannot be undone through injunctive relief. See Restatement (Second) of Torts § 903, cmt a (1979) (explaining that when a "tort causes bodily harm or emotional distress, the law cannot restore the injured person to his previous position," but damages "give to the injured person some pecuniary return for what he has suffered or is likely to suffer").

Under the SDWA, plaintiffs may seek injunctive relief against water system owners and operators to enforce the SDWA's requirements and mitigate ongoing harm from the violation of those requirements. 42 USC 300j-8(a). Such relief might include an order compelling a water system operator to conduct required tap water monitoring, comply with applicable treatment requirements, or replace lead-containing pipes in the water system. See *Concerned Pastors for Social Action v Khouri*, 194 F Supp 3d 589, 602-03 (ED Mich 2016). While such injunctive relief is essential to ensure that tap water delivered to Flint's residents meets the SDWA's requirements for controlling lead going forward, it categorically does not provide financial compensation for Plaintiffs' past health harms. The unavailability of damages under the SDWA further distinguishes this case from both *Bush* and *Schweiker*, where the applicable administrative and statutory processes permitted the claimant to receive monetary relief in the form of back pay or recovery of denied disability benefits. 462 US at 388; 487 US at 424.

In sum, this is not a case where Congress, through the SDWA, "has provided an alternative remedy *which it explicitly declared to be a substitute* for recovery directly under the Constitution and viewed as equally effective." *Carlson*, 446 US at 18-19; see *Bauserman*, 2019 WL 6622945, at *11.

B. No other law provides Plaintiffs a remedy against the State to vindicate their constitutional rights

Defendants' handwaving at other statutes also fails to demonstrate that Plaintiffs have other available damage remedies to hold the State to account for its unconstitutional policies. The statutes Defendants cite are either plainly unavailable here, or any relevant claims would address other officials or for different (non-constitutional) violations of law.

First, the State and its officials acting in their official capacities cannot be sued in federal or state court for damages under section 1983. *See Will v Mich Dep't of State Police*, 491 US 58, 71 (1989); *Bay Mills Indian Cmty v Michigan*, 244 Mich App 739, 749 (2001). And potential claims under section 1983 against government employees in their individual capacities—not the State—do not weigh against finding a remedy here. That is because Plaintiffs here seek to hold the *State itself* accountable for "its direct violations of the constitution." *Smith*, 428 Mich at 642 (BOYLE, J., concurring in part). Indeed, a core purpose of a *Smith* remedy is to affirm the "primacy of the state constitution" as a restriction on conduct of the State itself—not individual employees—that overrides any general claim to sovereign immunity the State may otherwise have. *Id*. at 641.

This Court's holding in *Jones v Powell* is not to the contrary. 462 Mich 329 (2000). *Contra* State Defs' Br 35. The *Jones* Court declined to infer a *Smith* damages remedy when a "municipality or individual government employee" is the defendant, rather than the State. 462 Mich at 335. Such non-State defendants do not enjoy Eleventh Amendment immunity, and thus are subject to damages suits for constitutional violations under section 1983. The Court concluded that a *Smith* damages remedy did not extend to defendants against whom section 1983 damages claims for constitutional violations may lie. Contrary to Defendants' argument, State Defs' Br 35, *Jones* did not broadly hold that the existence of *any other remedy* relating to the

circumstances giving rise to the lawsuit would defeat a damages claim.

In addition, potential tort claims against federal EPA officials do nothing to vindicate Plaintiffs' constitutional right to be free from unjustified invasions of their bodily integrity at the hands of the State. *Contra* State Defs' Br 35. And for the reasons explained by the Court of Appeals, state law immunizes the State, its agencies, and officials from tort liability, absent an exception to governmental immunity under Michigan's Government Tort Liability Act. See *Mays*, 323 Mich App. at 67-68. Even if tort claims were available, any potential remedy would not vindicate the constitutional rights at issue here or deter violations of the Constitution. Cf. *City of Riverside v Rivera*, 477 US 561, 574; 106 S Ct 2686; 91 L Ed 2d 466 (1986) (plurality op.).

* * *

This is a case in which "a constitutional right can only be vindicated by a damages remedy." *Smith*, 428 Mich at 647. Plaintiffs allege egregious abuses of power by the State that caused them irreversible health harms. The "outrageousness" of these abuses should be afforded "significant weight . . . in favor of a judicially inferred damage remedy." *Bauserman*, 2019 WL 6622945, at *12. Moreover, without the availability of damages against the State for its unconstitutional conduct, Plaintiffs will have no other path to vindicate their constitutional right to bodily integrity or obtain compensation for the health harms they have suffered at the hands of the State. See *Davis v Passman*, 442 US 228, 242; 99 S Ct 2264; 60 L Ed 2d 846 (1979) (unless constitutional rights "are to become merely precatory," individuals "must be able to invoke the existing jurisdiction of the court for the protection" of their constitutional rights when they "have no effective means other than the judiciary to enforce these rights"). As a result, to deny them a remedy here would render the constitutional right meaningless. See *Marbury v*

Madison, 5 US (1 Cranch) 137, 163; 2 L Ed 60 (1803). As the U.S. Supreme Court has recognized, the availability of damages and other retrospective relief is a "vital component of any scheme for vindicating cherished constitutional guarantees," and "serve[s] as a deterrent against future constitutional deprivations." *Owen*, 445 US at 651. The violation of Flint residents' rights "calls out for such a [damages] remedy" to ensure that the State cannot ignore constitutional guarantees with impunity. *Smith*, 428 Mich at 647 (BOYLE, J., concurring in part).

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Appeals on Plaintiffs' claim for violations of their right to bodily integrity.

Respectfully submitted,

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