Scott Carey

From: Phillip McGraw <phillip.mcgraw@medmail.ch>

Sent: Sunday, October 30, 2022 10:37 PM
To: Scott Carey
Subject: NTRPA November 3rd 2022 G.B. meeting ~ ITEM 2 ~ Public Comment
Attachments: c8618d1b.jpeg; Limiting liability with positioning to minimize negative health effects of cellular phone towers.pdf; In re Flint Water Cases, 2020 WL 6218787 (2020).pdf; In re Flint Water Cases, 969 F.3d 298 (2020).pdf; In re Flint Water Cases, 960 F.3d 820 (2020).pdf; In re Flint Water Cases, 960 F.3d 303 (2020).pdf; In re Flint Water Cases, 384 F.Supp.3d 802 (2019).pdf; Cell Towers—Tahoe Mountain News.pdf; Ex-Governor of Michigan Charged With Neglect in Flint Water Crisis - The New York Times.pdf; Brown v Los Angeles Unified School District, 60 Cal.App.5th 1092 (2021).pdf; Environmental Health Trust v Federal Communications Commission, 2021 WL 3573769 (2021).pdf; City of Portland v United States, 969 F.3d 1020 (2020).pdf; T-Mobile West LLC v City and County of San Francisco, 6 Cal.5th 1107 (2019).pdf

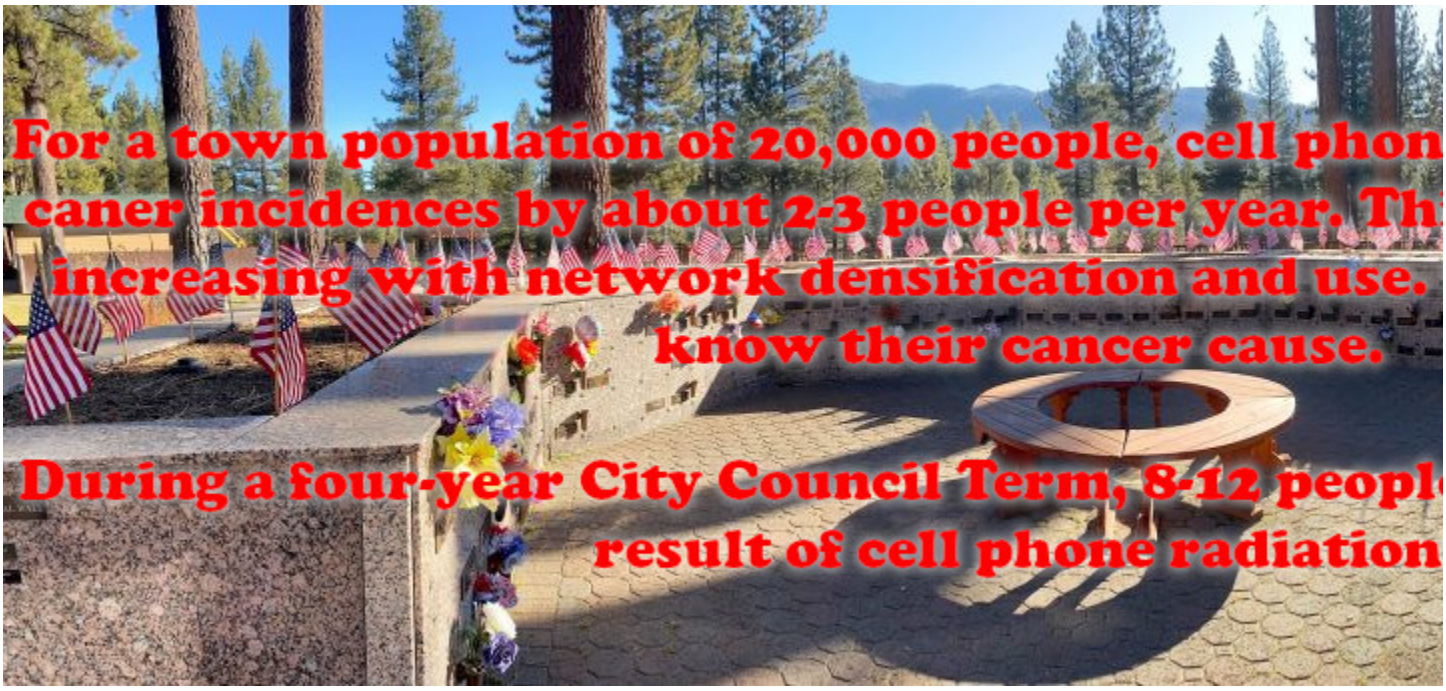
Dear NTRPA Governing Board,

I have grave concern that the **Nevada Tahoe Regional Planning Agency (NTRPA),** its jurisdictional Counties and Cities, are not enacting science-based health and environmental policies. For example County Public Health officer, Dr. Nancy Williams, has caved-into lowly pressures to base our County health policy upon special economic interests (tourism), rather than science-based public policy. The NTRPA/TRPA has done the same on the environmental front. In their leadership vacuum, the Cities have followed suit.

She did the same during the county's salient December 2020 COVID-19 spike which occurred in concert with a **national crescendo** of cases, and dissembled the economic motives in painting the epidemic as a "data aberration" which was patently false. She unconscionably petitioned the state's adjudication process to dangerously keep our county in the lower tiers, despite the numbers having conspicuously crossed the upper lines. The Governor shut her down.

This is part of a continuous pattern of behavior coming out of her office. She spewed out the same economically motivated health "uncertainty" disinformation about hard data proving the somber health costs of radiation from cell towers. Worse-off, she is not qualified as an economist; it is way cheaper to stay out of trouble than to get out of trouble. Treating cancer and lost productivity are expensive.

Therefore, it especially falls upon our City to keep us safe. Your rash decisions are killing us with residential cell tower radiation. Literally. As a recent public comment has pointed out, the interim DNA damage is clear and measurable. Applying the peer-reviewed per capita rate to our City's ~20K population, you get the concrete effects:



During your four-year term, there will be 8-12 new empty seats at dining room tables; that is 8-12 families and their friends heartbroken from the aftermath of cell phone radiation. This is coming from data merely pertaining to 3G & 4G networks, when towers were only on mountain tops and not in neighborhoods. While 3G & 4G are clearly not safe, it is about to get much, much, worse.

If you multiply the per capita rate by our life expectancy, you get a rough approximation of the lifetime risk of getting cancer from cell radiation. The results are horrifying. The number is on par with the rate at which women are already getting breast cancer. And *this* cause is 100% preventable.

You are poising us. You really need to stop and reflect on what you are doing. The ends do not justify the means, and the means apparently are an unconstitutional invasion of our right to bodily integrity. Make no mistake, horrible and impermissible deaths will stem from decisions you have already made pertaining to the location and sitting of Wireless Telecommunication Facilities (WTFs). This may even result in your being charged criminally and/or civilly with willful neglect of duty, and violation of our Constitutional right to bodily integrity "under the color of law" (18 U.S.C. § 242; 42 U.S.C. § 1983).

Governmental body is liable for damages under federal civil rights statute for constitutional violations resulting from official policy or custom; l custom, whether made by its lawmakers or those whose edicts or acts may fairly be said to represent the official policy, inflicts injury, but local nonpolicy-making employees, and thus, may not be held liable on theory of respondeat superior. Flores v. Cameron County, Tex., C.A.5 (Tex.)

You can't kill locals with RFR for the sake of your private tourism special interests. These private interests are liable as well:

Private parties are liable under § 1983 if they have reached agreement with state actor to violate individual's constitutional rights. Copus v. Ci in part 151 F.3d 646. Civil Rights 1326(5)

Really!

Private party involved in conspiracy with state official may, even though not himself official of state, be liable under this section. Adickes v. S.H Civil Rights 1326(5)

Whereas you are allowing an unconstitutional condition to continue and now having actual or constructive knowledge, may liable even if you did not directly participate:

Without direct participation by defendants, plaintiff seeking recovery for violation of civil rights must show that defendants failed to remedy a wr allowed an unconstitutional policy to continue, or acted with gross negligence in managing those who caused the wrong. Smith v. Meachum, 1352(1)

Whereas you have been involved in the retaliatory termination of employment of locals for speaking out about your own neglect, you may also be culpable:

County official's act of calling plaintiff's employer, which was developer active in county, and making false statements regarding plaintiff's spee cause in fact of plaintiff's termination, thus satisfying that aspect of causation element of her First Amendment retaliation claim under § 1983; of opinions about development projects in county, employer specifically cited information relayed in official's call as reason for terminating pla termination suggested that, but for call, employer would not have terminated plaintiff. Paige v. Coyner, C.A.6 2010, 614 F.3d 273, on remand 8 1909; Counties 146

This would hold not just for employment, but even if the local were in custody!

Commissioner of Department of Correctional Services was not protected from liability under § 1983 for knowing about, but not taking any ac against inmate for exercising his constitutional right to petition government for redress of grievances, where there was no evidence regardin inmate. Pacheco v. Comisse, N.D.N.Y.1995, 897 F.Supp. 671. Civil Rights 1358

You are way out of line!

As the instant COVID-19 lesson dictated, **if you procrastinate addressing the problem to the point that we feel real pain, then you are a bad leader**.

Thank you for considering,


For a town population of 20,000 people, cell phone radiation increases caner incidences by about 2-3 people per year. This number is rapidly increasing with network densification and use. Most patients don't know their cancer cause.
During a four-year City Council Term, 8-12 people will get cancer as a result of cell phone radiation.

6 Cal.5th 1107
Supreme Court of California.

T-MOBILE WEST LLC et al., Plaintiffs and Appellants,
v.
CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Respondents.

S238001
|
April 4, 2019

Synopsis

Background: Wireless telephone service providers brought action against city for declaratory and injunctive relief challenging city's wireless facility site permit ordinance. The Superior Court, City and County of San Francisco, No. CGC–11–510703, James McBride, J., granted summary adjudication for city on providers' claims that the ordinance violated a state wireless facility permit statute and California Environmental Quality Act (CEQA), but ruled in providers' favor in part, after bench trial, on claims that the ordinance violated the Public Utilities Code and the Middle Class Tax Relief and Job Creation Act. Providers appealed. The Court of Appeal, 208 Cal.Rptr.3d 248, affirmed. Providers sought review.

Holdings: After grant of review, the Supreme Court, Corrigan, J., held that:

[1] state statute providing that telephone corporations may construct lines and erect equipment along public roads in ways and locations that do not "incommode the public use of the road" did not preempt local regulation allowing city to condition permit approval for telephone line construction on aesthetic considerations, and

[2] statute roads are "accessed" by wireless telephone corporations only applies to temporary access during construction and installation of telephone lines and equipment.

Affirmed.

West Headnotes (22)

[1] **Counties** Governmental powers in general
Municipal Corporations Conformity to constitutional and statutory provisions in general

General laws, for purposes of constitutional provision allowing cities and counties to make and enforce ordinances not in conflict with general laws, are those that apply statewide and deal with matters of statewide concern. Cal. Const. art. 11, § 7.

[2] **Zoning and Planning** Police power

The inherent local police power includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within a local jurisdiction's borders.

[3] **Zoning and Planning** Police power

The local police power generally includes the authority to establish aesthetic conditions for land use.

[4] **Municipal Corporations** Conformity to constitutional and statutory provisions in general

Municipal legislation that conflicts with state law is void.

1 Cases that cite this headnote

[5] **Municipal Corporations** Conformity to constitutional and statutory provisions in general

A conflict exists between local legislation and state law, rendering local legislation void, when the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.

3 Cases that cite this headnote

[6] **Municipal Corporations** Conformity to constitutional and statutory provisions in general

Local legislation duplicates general law, as could render local legislation void, if both enactments are coextensive.

[7] **Municipal Corporations** Conformity to constitutional and statutory provisions in general

Local legislation is contradictory to general law, as could render the local legislation void, when it is inimical to general law.

2 Cases that cite this headnote

[8] **Municipal Corporations** Conformity to constitutional and statutory provisions in general

State law fully occupies a field, as could render local legislation in same field void, when the Legislature expressly manifests its intent to occupy the legal area or when the Legislature impliedly occupies the field.

1 Cases that cite this headnote

[9] **Municipal Corporations** Presumptions and burden of proof

The party claiming preemption of local legislation by state law has the burden of proof.

1 Cases that cite this headnote

[10] **Municipal Corporations** Presumptions and burden of proof

Zoning and Planning Validity of regulations in general

When local government regulates in an area over which it traditionally has exercised control, such as the location of particular land uses, courts will presume the regulation is not preempted by state law unless there is a clear indication of preemptive intent.

1 Cases that cite this headnote

[11] **Municipal Corporations** Proceedings concerning construction and validity of ordinances

Ruling on a facial challenge to a local ordinance, the court considers the text of the measure itself, not its application to any particular circumstances or individual.

2 Cases that cite this headnote

[12] **Appeal and Error** De novo review

Questions of law are subject to de novo review.

4 Cases that cite this headnote

[13] **Municipal Corporations** Concurrent and Conflicting Exercise of Power by State and Municipality

Telecommunications Franchises or licenses and rights of way regulation

State statute providing that telephone corporations could construct lines and erect equipment along public roads in ways and locations that did not "incommode the public use of the road" did not preempt local regulation allowing city to condition permit approval for telephone line construction on aesthetic considerations; city's inherent police power to determine appropriate uses of land included authority to establish aesthetic conditions for land use, to "incommode" could include various impacts disturbing quiet enjoyment, ordinance did not require a company to obtain any local franchise, and statute said nothing about aesthetics or appearance of telephone lines. Cal. Pub. Util. Code § 7901.

[14] **Municipal Corporations** Concurrent and Conflicting Exercise of Power by State and Municipality

Telecommunications Franchises or licenses and rights of way regulation

Because state law grants telephone corporations a statewide franchise to engage in the telecommunications business, a local government cannot insist that a telephone corporation obtain a local franchise to operate within its jurisdiction. Cal. Pub. Util. Code § 7901.

[15] **Telecommunications** Local Franchise or Regulation; Use of Streets, Roads or Public Places

The right of telephone corporations to construct telephone lines in public rights-of-way is not absolute; instead, it is a limited right to use the highways only to the extent necessary for the furnishing of services to the public.

[16] **Municipal Corporations** Concurrent and Conflicting Exercise of Power by State and Municipality

Municipal Corporations Ordinances permitting acts which state law prohibits

The "contradictory and inimical" form of preemption of an ordinance does not apply unless the ordinance directly requires what the state statute forbids or prohibits what the state enactment demands.

[17] **Municipal Corporations** Concurrent and Conflicting Exercise of Power by State and Municipality

Field preemption generally exists over an ordinance where the Legislature has comprehensively regulated in an area, leaving no room for additional local action.

2 Cases that cite this headnote

[18] **Telecommunications** Regulation in general

The power to regulate the location and manner of telephone line installation is generally a matter left to local regulation.

[19] **Administrative Law and Procedure** Public utilities

Public Utilities Review and determination in general

The Public Utility Commission's (PUC) interpretation of the Public Utility Code should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language. Cal. Pub. Util. Code § 1 et seq.

[20] **Telecommunications** Judicial review or intervention

Default policy of Public Utilities Commission (PUC) is one of deference to municipalities in matters concerning the design and location of wireless facilities. Cal. Const. art. 12, § 8.

[21] **Public Utilities** Nature and status

Role of Public Utilities Commission (PUC) is that of the agency of last resort, intervening only when a utility contends that local actions impede statewide goals. Cal. Const. art. 12, § 8.

[22] **Telecommunications** Local government regulation; proceedings

Statute allowing cities to control time, place, and manner in which roads are "accessed" by wireless telephone corporations only applies to temporary access during construction and installation of telephone lines and equipment. Cal. Pub. Util. Code § 7901.1.

Witkin Library Reference: 8 Witkin, Summary of Cal. Law (11th ed. 2017) Constitutional Law, § 1108 [Test of Valid Regulation]

****241** *****414** First Appellate District, Division Five, A144252, San Francisco City and County Superior Court, CGC-11-510703, James J. McBride, Judge

Attorneys and Law Firms

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Opinion

Opinion of the Court by Corrigan, J.

***1113** By ordinance the City and County of San Francisco (the City) requires wireless telephone service companies to obtain permits to ***1114** install and maintain lines and equipment in public rights-of-way. Some permits will not issue unless the application conforms to the City's established *****415** aesthetic guidelines. Plaintiffs assert a facial challenge urging that (1) the ordinance is preempted by state law and (2) even if not preempted, the ordinance violates a state statute. The trial court and the Court of Appeal rejected both arguments. We do likewise.

I. BACKGROUND

Plaintiffs are telecommunications companies. They install and operate wireless equipment throughout the City, including on utility poles located along public roads and highways.[1] In January 2011, the City adopted ordinance No. 12-11 (the Ordinance),[2] which requires "any Person seeking to construct, install, or maintain a Personal Wireless Service Facility in the Public Rights-of-Way to obtain" a permit. (S.F. Pub. Works Code, art. 25, § 1500, subd. (a).) In adopting the Ordinance, the board of supervisors noted that the City "is widely recognized to be one of the world's most beautiful cities," which is vital to its tourist industry and an important reason that residents and businesses locate there. Due to growing demand, requests from the wireless industry to place equipment on utility poles had increased. The board opined that the City needed to regulate the placement of this equipment to prevent installation in ways or locations "that will diminish the City's beauty." The board acknowledged that telephone corporations have a right, under state law, "to use the public rights-of-way to install and maintain 'telephone lines' and related facilities required to provide telephone service." But it asserted that local governments may "enact laws that limit the intrusive effect of these lines and facilities."

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The Ordinance specifies areas designated for heightened aesthetic review. (See S.F. Pub. Works Code, art. 25, § 1502.) These include historic districts and areas that have " 'good' " or " 'excellent' " views or are adjacent to parks or open spaces. (*Ibid.*) The Ordinance establishes various standards of aesthetic compatibility for wireless equipment. In historic districts, for example, installation may only be approved if the City's planning department ***1115** determines that it would not "significantly degrade the aesthetic attributes that were the basis for the special designation" of the building or district. (S.F. Pub. Works Code, art. 25, § 1502; see also *id.*, §§ 1508, 1509, 1510.) In "view" districts, proposed installation may not "significantly impair" the protected views.[3] (S.F. Pub. Works Code, art. 25, § 1502.)

Plaintiffs sought declaratory and injunctive relief. The operative complaint alleged five causes of action, only one of which is ***416 at issue.[4] It alleges the Ordinance and implementing regulations are preempted by section 7901 and violate section 7901.1. Under section 7901, "telephone corporations may construct ... telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."[5] According to plaintiffs, section 7901 preempted the Ordinance to the extent it allowed the City to condition permit approval on aesthetic considerations.

Section 7901.1 sets out the Legislature's intent, "consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed." (§ 7901.1, subd. (a).) But section 7901.1 also provides that, to be considered reasonable, the control exercised "shall, at a minimum, be applied to all entities in an equivalent manner." (§ 7901.1, subd. (b).) Plaintiffs alleged the Ordinance violated subdivision (b) of section 7901.1 by treating wireless providers differently from other telephone corporations.

The trial court ruled that section 7901 did not preempt the challenged portions of the Ordinance and rejected plaintiffs' claim that it violated section 7901.1. The Court of Appeal affirmed. (*T-Mobile West*, *supra*, 3 Cal.App.5th at pp. 339, 359, 208 Cal.Rptr.3d 248.)

*1116 II. DISCUSSION

A. Section 7901 Does Not Preempt the Ordinance

1. Preemption Principles

[1] **[2]** **[3]** Under the California Constitution, cities and counties "may make and enforce **243 within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7.) General laws are those that apply statewide and deal with matters of statewide concern. (*Eastlick v. City of Los Angeles* (1947) 29 Cal.2d 661, 665, 177 P.2d 558.) The "inherent local police power includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within a local jurisdiction's borders." (*City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal.4th 729, 738, 156 Cal.Rptr.3d 409, 300 P.3d 494 (*City of Riverside*); see also *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151, 45 Cal.Rptr.3d 21, 136 P.3d 821 (*Big Creek Lumber*).) The local police power generally includes the authority to establish aesthetic conditions for land use. (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 886, 50 Cal.Rptr.2d 242, 911 P.2d 429; *Disney v. City of Concord* (2011) 194 Cal.App.4th 1410, 1416, 124 Cal.Rptr.3d 58.)

[4] **[5]** **[6]** **[7]** **[8]** "[L]ocal legislation that conflicts with state law is void." (***417 *City of Riverside*, *supra*, 56 Cal.4th at p. 743, 156 Cal.Rptr.3d 409, 300 P.3d 494, citing *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897, 16 Cal.Rptr.2d 215, 844 P.2d 534.) A conflict exists when the local legislation " ' " 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.' " ' " (*Sherwin-Williams*, at p. 897, 16 Cal.Rptr.2d 215, 844 P.2d 534.) Local legislation duplicates general law if both enactments are coextensive. (*Ibid.*, citing *In re Portnoy* (1942) 21 Cal.2d 237, 240, 131 P.2d 1.) Local legislation is contradictory when it is inimical to general law. (*Sherwin-Williams*, at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534, citing *Ex parte Daniels* (1920) 183 Cal. 636, 641-648, 192 P. 442.) State law fully occupies a field "when the Legislature 'expressly manifest[s]' its intent to occupy the legal area or when the Legislature 'impliedly' occupies the field." (*O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1068, 63 Cal.Rptr.3d 67, 162 P.3d 583 (*O'Connell*), citing *Sherwin-Williams*, at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534.)

[9] **[10]** **[11]** The party claiming preemption has the burden of proof. (*Big Creek Lumber*, *supra*, 38 Cal.4th at p. 1149, 45 Cal.Rptr.3d 21, 136 P.3d 821.) "[W]hen local government regulates in an area over which it traditionally has exercised control, such as the location of particular land uses, California courts will presume" the regulation is not preempted unless there is a clear indication of preemptive intent. (*Ibid.*, citing *1117 *IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 93, 2 Cal.Rptr.2d 513, 820 P.2d 1023.) Ruling on a facial challenge to a local ordinance, the court considers the text of the measure itself, not its

application to any particular circumstances or individual. (*San Francisco Apartment Assn. v. City and County of San Francisco* (2016) 3 Cal.App.5th 463, 487, 207 Cal.Rptr.3d 684, citing *Pieri v. City and County of San Francisco* (2006) 137 Cal.App.4th 886, 894, 40 Cal.Rptr.3d 629, which in turn cites *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084, 40 Cal.Rptr.2d 402, 892 P.2d 1145.)[6]

2. Analysis

[12] **[13]** Section 7901 provides that telephone corporations may construct lines and erect equipment along public roads in ways and locations that do not "incommode the public use of the road." We review the statute's language to determine the scope of the rights it grants to telephone corporations and whether, by granting those rights, the Legislature ****244** intended to preempt local regulation based on aesthetic considerations. These questions of law are subject to de novo review. (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 724, 122 Cal.Rptr.3d 331, 248 P.3d 1185; *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089, fn. 10, 72 Cal.Rptr.3d 112, 175 P.3d 1170.)

[14] The parties agree that section 7901 grants telephone corporations a statewide *****418** franchise to engage in the telecommunications business.[7] (See *Western Union Tel. Co. v. Visalia* (1906) 149 Cal. 744, 750, 87 P. 1023 (*Visalia*).) Thus, a local government cannot insist that a telephone corporation obtain a *local* franchise to operate within its jurisdiction. (See *Visalia*, at p. 751, 87 P. 1023; see also *Pac. Tel. & Tel. Co. v. City & County of S. F.* (1959) 51 Cal.2d 766, 771, 336 P.2d 514 (*Pacific Telephone I*).) The parties also agree that the franchise rights conferred are limited by the prohibition against incommoding the public use of roads, and that local governments have authority to prevent those impacts.

***1118** Plaintiffs argue section 7901 grants them more than the mere right to operate. In their view, section 7901 grants them the right to construct lines and erect equipment along public roads so long as they do not obstruct the path of travel. The necessary corollary to this right is that local governments cannot prevent the construction of lines and equipment unless the installation of the facilities will obstruct the path of travel. Plaintiffs urge that the Legislature enacted section 7901 to promote technological advancement and ensure a functioning, statewide telecommunications system. In light of those objectives, they contend that their right to construct telephone lines must be construed broadly, and local authority limited to preventing roadway obstructions.

Preliminarily, plaintiffs' argument appears to rest on the premise that the City only has the power to regulate telephone line construction based on aesthetic considerations if section 7901's incommode clause can be read to accommodate that power. That premise is flawed. As mentioned, the City has inherent local police power to determine the appropriate uses of land within its jurisdiction. That power includes the authority to establish aesthetic conditions for land use. Under our preemption cases, the question is not whether the incommode clause can be read to permit the City's exercise of power under the Ordinance. Rather, it is whether section 7901 divests the City of that power.

We also disagree with plaintiffs' contention that section 7901's incommode clause limits their right to construct lines only if the installed lines and equipment would obstruct the path of travel. Contrary to plaintiffs' argument, the incommode clause need not be read so narrowly. As the Court of Appeal noted, the word " 'incommode' " means " 'to give inconvenience or distress to: disturb.' " (*T-Mobile West*, *supra*, 3 Cal.App.5th at p. 351, 208 Cal.Rptr.3d 248, citing Merriam-Webster Online Dict. <http://www.merriam-webster.com/dictionary/incommode> [as of April 3, 2019].)[8] The Court of Appeal also quoted the definition of "incommode" from the 1828 version of Webster's Dictionary. Under that definition, "incommode" means " '[t]o give inconvenience to; to give trouble to; to disturb or molest in the quiet enjoyment of something, or in the facility of acquisition.' " (*T-Mobile West*, *supra*, 3 Cal.App.5th at p. 351, 208 Cal.Rptr.3d 248, citing Webster's Dict. 1828—online ed., available at <http://www.webstersdictionary1828.com/Dictionary/incommode> [as of April 3, 2019].) For our purposes, it is sufficient to state that the meaning of incommode has not changed meaningfully since section *****419** 7901's enactment.[9] Obstructing the ***1119** path of ****245** travel is one way that telephone lines could disturb or give inconvenience to public road use. But travel is not the sole use of public roads; other uses may be incommoded beyond the obstruction of travel. (*T-Mobile West*, at pp. 355-356, 208 Cal.Rptr.3d 248.) For example, lines or equipment might generate noise, cause negative health consequences, or create safety concerns. All these impacts could disturb public road use, or disturb its quiet enjoyment.

Plaintiffs assert the case law supports their statutory construction. For example, *City of Petaluma v. Pac. Tel. &*

Tel. Co. (1955) 44 Cal.2d 284, 282 P.2d 43 (*Petaluma*) stated that the "franchise tendered by [section 7901] ... [is] superior to and free from any grant made by a subordinate legislative body." (*Id.* at p. 287, 282 P.2d 43; see also *Pacific Telephone I*, *supra*, 51 Cal.2d at p. 770, 336 P.2d 514; *County of Inyo v. Hess* (1921) 53 Cal.App. 415, 425, 200 P. 373 (*County of Inyo*).) Similarly, *Pac. Tel. & Tel. Co. v. City of Los Angeles* (1955) 44 Cal.2d 272, 282 P.2d 36 (*City of Los Angeles*), held that the "authority to grant a franchise to engage in the telephone business resides in the state, and the city is without power to require a telephone company to obtain such a franchise unless the right to do so has been delegated to it by the state." (*Id.* at pp. 279-280, 282 P.2d 36.)

But these cases do not go as far as plaintiffs suggest. Each addressed the question whether a telephone corporation can be required to obtain a local franchise to operate. (See *Pacific Telephone I*, *supra*, 51 Cal.2d at p. 767, 336 P.2d 514; *Petaluma*, *supra*, 44 Cal.2d at p. 285, 282 P.2d 43; *City of Los Angeles*, *supra*, 44 Cal. 2d at p. 276, 282 P.2d 36; *County of Inyo*, *supra*, 53 Cal.App. at p. 425, 200 P. 373.) None considered the distinct question whether a local government can condition permit approval on aesthetic or other considerations that arise under the local police power. A permit is, of course, different from a franchise. The distinction may be best understood by considering the effect of the denial of either. The denial of a franchise would completely bar a telephone corporation from operating within a city. The denial of a permit, on the other hand, would simply prevent construction of lines in the proposed manner at the proposed location.

A few published decisions have tangentially addressed the scope of the inherent local police power to regulate the manner and location of telephone line installations. Those cases cut against plaintiffs' proposed construction.

In *Pacific Tel. & Tel. Co. v. City & County of San Francisco* (1961) 197 Cal.App.2d 133, 17 Cal.Rptr. 687 (*Pacific Telephone II*), the City argued ***1120** it could require a telephone corporation to obtain a local franchise to operate within its jurisdiction because the power to grant franchises fell within its police power. (*Id.* at p. 152, 17 Cal.Rptr. 687.) The court rejected the City's argument, reasoning that the phrase " 'police power' has two meanings, 'a comprehensive one embracing in substance the whole field of state authority and the other a narrower one including only state power to deal with the health, safety and morals of the people.' " (*Ibid.*) "Where a corporation has a state franchise to use a city's *****420** streets, the city derives its rights to regulate the particular location and manner of installation of the franchise holder's facilities from the narrower sense of the police power. Thus, because of the state concern in communications, the state has retained to itself the broader police *power of granting franchises*, leaving to the municipalities the narrower police *power of controlling location and manner of installation*." (*Ibid.*, italics added.)

This court, too, has distinguished the power to grant franchises from the power to regulate the location and manner of installation by permit. In *Visalia*, *supra*, 149 Cal. 744, 87 P. 1023, the city adopted an ordinance that (i) authorized a telephone company to erect telegraph poles and wires on city streets, (ii) approved the location of poles and wires then in use, (iii) prohibited poles and wires from interfering with travel on city streets, and (iv) required all poles to be of a uniform height. (*Id.* at pp. 747-748, 87 P. 1023.) The city asserted its ordinance operated to grant the company a " 'franchise,' " and ****246** then attempted to assess a tax on the franchise. (*Id.* at p. 745, 87 P. 1023.) The company challenged the assessment. It argued that, because the ordinance did not create a franchise, the tax assessment was invalid. (*Id.* at pp. 745-746, 87 P. 1023.) We concluded the ordinance did not create a local franchise. (*Id.* at p. 750, 87 P. 1023.) By virtue of its state franchise, "the appellant had the right, of which the city could not deprive it, to construct and operate its lines along the streets of the city." (*Ibid.*) "[N]evertheless it could not maintain its poles and wires in such a manner as to unreasonably obstruct and interfere with ordinary travel; and the city had the authority, under its police power, to so regulate the manner of plaintiff's placing and maintaining its poles and wires *as to prevent unreasonable obstruction of travel*." (*Id.* at pp. 750-751, 87 P. 1023, italics added.) "[T]he ordinance in question was not intended to be anything more ... than the exercise of this authority to regulate." (*Id.* at p. 751, 87 P. 1023)[10]

[15] Plaintiffs argue the italicized language above shows that local regulatory authority is limited to preventing travel obstructions. But the quoted language is merely descriptive, not prescriptive. *Visalia* involved an ordinance that specifically prohibited interference with travel on city streets, and ***1121** the court was simply describing the ordinance before it, not establishing the bounds of local government regulatory authority. Moreover, the *Visalia* court did not question the propriety of the ordinance's requirement that all poles be a uniform height, nor suggest that requirement was related to preventing obstructions to travel. Thus, *Visalia*

does not support the conclusion that section 7901 was meant to restrict local government power in the manner plaintiffs suggest. The "right of telephone corporations to construct telephone lines in public rights-of-way is not absolute." (*City of Huntington Beach v. Public Utilities Com.* (2013) 214 Cal.App.4th 566, 590, 154 Cal.Rptr.3d 241 (*City of Huntington Beach*).) Instead, it is a " 'limited right to use the highways ... only to the extent necessary for the furnishing of services to the public.' " (*Ibid*., quoting *County of L. A. v. Southern Cal. Tel. Co.* (1948) 32 Cal.2d 378, 387, 196 P.2d 773; see also *Pacific Tel. & Tel. Co. v. Redevelopment Agency* (1977) 75 Cal.App.3d 957, 963, 142 Cal.Rptr. 584.)[11]

*****421** Having delineated the right granted by section 7901, we now turn to its preemptive sweep. Because the location and manner of line installation are areas over which local governments traditionally exercise control (*Visalia*, *supra*, 149 Cal. at pp. 750-751, 87 P. 1023), we presume the ordinance is not preempted absent a clear indication of preemptive intent. (*Big Creek Lumber*, *supra*, 38 Cal.4th at p. 1149, 45 Cal.Rptr.3d 21, 136 P.3d 821.) Plaintiffs put forth a number of preemption theories. They argue the Ordinance is contradictory to section 7901. At oral argument, they asserted the Legislature occupied the field with section 7901, the terms of which indicate that a paramount state concern will not tolerate additional local action. And in their briefs, many of plaintiffs' arguments were focused on what has been labeled, in the federal context, as obstacle preemption.

[16] "The 'contradictory and inimical' form of preemption does not apply unless the ordinance directly requires what the state statute forbids or prohibits what the state enactment demands." (*City of Riverside*, *supra*, 56 Cal.4th at p. 743, 156 Cal.Rptr.3d 409, 300 P.3d 494, citing ****247** *Big Creek Lumber*, *supra*, 38 Cal.4th at p. 1161, 45 Cal.Rptr.3d 21, 136 P.3d 821.) "[N]o inimical conflict will be found where it is reasonably possible to comply with both the state and local laws." (*City of Riverside*, at p. 743, 156 Cal.Rptr.3d 409, 300 P.3d 494.) As noted, section 7901 grants telephone corporations the right to install lines on ***1122** public roads without obtaining a local franchise. The Ordinance does not require plaintiffs to obtain a local franchise to operate within the City. Nor does it allow certain companies to use public roads while excluding others. Any wireless provider may construct telephone lines on the City's public roads so long as it obtains a permit, which may sometimes be conditioned on aesthetic approval. Because section 7901 says nothing about the aesthetics or appearance of telephone lines, the Ordinance is not inimical to the statute.

[17] **[18]** The argument that the Legislature occupied the field by implication likewise fails. Field preemption generally exists where the Legislature has comprehensively regulated in an area, leaving no room for additional local action. (See, e.g., *American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1252-1257, 23 Cal.Rptr.3d 453, 104 P.3d 813; *O'Connell*, *supra*, 41 Cal.4th 1061, 1068-1074, 63 Cal.Rptr.3d 67, 162 P.3d 583.) Unlike the statutory schemes addressed in *American Financial* and *O'Connell*, section 7901 does not comprehensively regulate telephone line installation or provide a general regulatory scheme. On the contrary, section 7901 consists of a single sentence. Moreover, although the granting of telephone franchises has been deemed a matter of statewide concern (*Pacific Telephone I*, *supra*, 51 Cal.2d at p. 774, 336 P.2d 514; *Pacific Telephone II*, *supra*, 197 Cal.App.2d at p. 152, 17 Cal.Rptr. 687), the power to regulate the location and manner of line installation is generally a matter left to local regulation. The City is not *****422** attempting to regulate in an area over which the state has traditionally exercised control. Instead, this is an area of regulation in which there are " 'significant local interest[s] to be served that may differ from one locality to another.' " (*Big Creek Lumber*, *supra*, 38 Cal.4th at p. 1149, 45 Cal.Rptr.3d 21, 136 P.3d 821.)

City of Riverside, *supra*, 56 Cal.4th 729, 156 Cal.Rptr.3d 409, 300 P.3d 494, is instructive. There, the question was whether state statutes designed to enhance patient and caregiver access to medical marijuana preempted a local zoning law banning dispensaries within a city's limits. (*Id*. at pp. 737, 739-740, 156 Cal.Rptr.3d 409, 300 P.3d 494.) An early enactment had declared that physicians could not be punished for recommending medical marijuana and that state statutes prohibiting possession and cultivation of marijuana would not apply to patients or caregivers. (*Id*. at p. 744, 156 Cal.Rptr.3d 409, 300 P.3d 494.) A subsequent enactment established a program for issuing medical marijuana identification cards and provided that a cardholder could not be arrested for possession or cultivation in permitted amounts. (*Id*. at p. 745, 156 Cal.Rptr.3d 409, 300 P.3d 494.) We concluded that the "narrow reach of these statutes" (*ibid*.) showed they did not "expressly or impliedly preempt [the city's] zoning provisions" (*id*. at p. 752, 156 Cal.Rptr.3d 409, 300 P.3d 494).

Preemption was not implied because the Legislature had not tried "to fully occupy the field of medical marijuana regulation as a matter of statewide concern, or to partially occupy this field under circumstances indicating that further

local regulation will not be tolerated." (***1123** *City of Riverside*, *supra*, 56 Cal.4th at p. 755, 156 Cal.Rptr.3d 409, 300 P.3d 494.) While state statutes took "limited steps toward recognizing marijuana as a medicine," they described "no comprehensive scheme or system for authorizing, controlling, or regulating the processing and distribution of marijuana for medical purposes, such that no room remains for local action." (*Ibid.*) Moreover, there were significant local interests that could vary by jurisdiction, giving rise to a presumption against preemption. (*Ibid.*)

Similarly, here, the Legislature has not adopted a comprehensive regulatory scheme. Instead, it has taken the limited step of guaranteeing that telephone corporations need not secure a local franchise to operate in the state or to construct local lines and equipment. Moreover, the statute leaves room for additional local action and there are ****248** significant local interests relating to road use that may vary by jurisdiction.

Finally, plaintiffs' briefing raises arguments that sound in the theory of obstacle preemption. Under that theory, a local law would be displaced if it hinders the accomplishment of the purposes behind a state law. This court has never said explicitly whether state preemption principles are coextensive with the developed federal conception of obstacle preemption. (See, e.g., *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 867-868, 118 Cal.Rptr.2d 746, 44 P.3d 120; cf. *City of Riverside*, *supra*, 56 Cal.4th at pp. 763-765, 156 Cal.Rptr.3d 409, 300 P.3d 494 (conc. opn. of Liu, J.).) But assuming for the sake of argument that the theory applies, we conclude there is no obstacle preemption here.

The gist of plaintiffs' argument is that section 7901's purpose is to encourage technological advancement in the state's telecommunications networks and that, because enforcement of the Ordinance *could* hinder that purpose, the Ordinance is preempted. But no legislation pursues its objectives at all costs. (*Pension Ben. Guar. Corp. v. LTV Corp.* (1990) 496 U.S. 633, 646-647, 110 S.Ct. 2668, 110 L.Ed.2d 579.) *****423** Moreover, the Legislature made clear that the goal of technological advancement is not paramount to all others by including the incommode clause in section 7901, thereby leaving room for local regulation of telephone line installation.

[19] Finally, we think it appropriate to consider the Public Utilities Commission's (PUC) understanding of the statutory scheme. In recognition of its expertise, we have consistently accorded deference to the PUC's views concerning utilities regulation. The PUC's "interpretation of the Public Utility Code 'should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language.' " (*Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 796, 3 Cal.Rptr.3d 703, 74 P.3d 795, quoting *Greyhound Lines, Inc. v. Public Utilities Com.* (1968) 68 Cal.2d 406, 410-411, 67 Cal.Rptr. 97, 438 P.2d 801.) Here, the PUC has made determinations about the scope of permissible regulation that are on point.

***1124** The state Constitution vests principal regulatory authority over utilities with the PUC, but carves out an ongoing area of municipal control. (Cal. Const., art. XII, § 8.) A company seeking to build under section 7901 must approach the PUC and obtain a certificate of public necessity. (§ 1001; see *City of Huntington Beach*, *supra*, 214 Cal.App.4th at p. 585, 154 Cal.Rptr.3d 241.) The certificate is not alone sufficient; a utility will still be subject to local control in carrying out the construction. Municipalities may surrender to the PUC regulation of a utility's relations with its customers (§ 2901), but they are forbidden from yielding to the PUC their police powers to protect the public from the adverse impacts of utilities operations (§ 2902).

[20] **[21]** Consistent with these statutes, the PUC's default policy is one of deference to municipalities in matters concerning the design and location of wireless facilities. In a 1996 opinion adopting the general order governing wireless facility construction, the PUC states the general order "recognize[s] that primary authority regarding cell siting issues should continue to be deferred to local authorities. ... The [PUC's] role continues to be that of the agency of last resort, intervening only when a utility contends that local actions impede statewide goals ...." (*Re Siting and Environmental Review of Cellular Mobile Radiotelephone Utility Facilities* (1996) 66 Cal.P.U.C.2d 257, 260; see also *Re Competition for Local Exchange Service* (1998) 82 Cal.P.U.C.2d 510, 544.)[12] The order itself "acknowledges that local citizens and local government are often in a better position than the [PUC] to measure local impact and to identify alternative sites. Accordingly, the [PUC] will generally defer to local governments to regulate the location and design ****249** of cell sites ...." (PUC, General order No. 159A (1996) p. 3 (General Order 159A), available at <http://docs.cpuc.ca.gov/PUBLISHED/Graphics/611.PDF> [as of Apr. 3, 2019].)

The exception to this default policy is telling: The PUC reserves the right to preempt local decisions about specific sites "when there is a clear conflict with the [PUC's] goals and/or statewide interests." (General Order 159A, *supra*, at p. 3.) In other words, generally the PUC will not object to municipalities dictating alternate ***424** locations based on local impacts,[13] but it will step in if statewide goals such as "high quality, reliable and widespread cellular services to state residents" are threatened. (General Order 159A, at ***1125** p. 3.) Contrary to plaintiffs' view of the respective spheres of state and local authority, the PUC's approach does not restrict municipalities to judging only whether a requested permit would impede traffic. Instead, the PUC accords local governments the full scope of their ordinary police powers unless the exercise of those powers would undermine state policies.

Plaintiffs argue our construction of section 7901, and a decision upholding the City's authority to enforce the Ordinance, will "hinder the roll-out of advanced services needed to upgrade networks [and] promote universal broadband" and will "stymie the deployment of 5G networks, leaving California unable to meet the growing need for wireless capacity created by the proliferation of ... connected devices." This argument is premised on a hypothetical future harm that is not cognizable in a facial challenge. (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180, 172 Cal.Rptr. 487, 624 P.2d 1215; see also *Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 267, 5 Cal.Rptr.2d 545, 825 P.2d 438.)

In sum, neither the plain language of section 7901 nor the manner in which it has been interpreted by courts and the PUC supports plaintiffs' argument that the Legislature intended to preempt local regulation based on aesthetic considerations. The statute and the ordinance can operate in harmony. Section 7901 ensures that telephone companies are not required to obtain a local franchise, while the Ordinance ensures that lines and equipment will not unreasonably incommode public road use.[14]

B. The Ordinance Does Not Violate Section 7901.1

Plaintiffs next contend that, even if not preempted, the Ordinance violates section 7901.1 by singling out wireless telephone corporations for regulation. Section 7901.1 provides in relevant part that, consistent with section 7901, municipalities may "exercise reasonable control as to the time, place, and manner" in which roads are "*accessed*," and that the control must "*be applied to all entities in an equivalent manner.*" (§ 7901, subds. (a), (b), italics added.)

***1126** Before trial, the parties stipulated to the following facts. First, that the City requires all utility and telephone corporations, both wireless and nonwireless, to ***425** obtain temporary occupancy permits to "access" public rights-of-way during the *initial* construction and installation of equipment facilities. These permits are not subject to aesthetic review. Second, that the City requires only wireless **250** telephone corporations to obtain site-specific permits, conditioned on aesthetic approval, for the *ongoing* occupation and maintenance of equipment facilities in public rights-of-way. The trial court and the Court of Appeal held that section 7901.1 only applies to *temporary* access to public rights-of-way, during initial construction and installation. Because the parties had stipulated that the City treats all companies equally in that respect, the lower courts found no violation of section 7901.1.

Plaintiffs argue the plain language of section 7901.1 does not limit its application to temporary access to public rights-of-way. Rather, the introductory phrase, "consistent with section 7901," demonstrates that section 7901.1 applies to both short-and long-term access. Plaintiffs also suggest that the legislative history of section 7901.1 supports their position, and that the lower courts' interpretation of section 7901.1 "results in an incoherent approach to municipal authority."

Plaintiffs' arguments are unpersuasive. Section 7901.1 allows cities to control the time, place, and manner in which roads are "accessed." (§ 7901.1, subd. (a).) As the competing arguments demonstrate, the "plain meaning of the word 'accessed' is ambiguous." (*T-Mobile West*, *supra*, 3 Cal.App.5th at p. 358, 208 Cal.Rptr.3d 248.) It could refer only to short-term access, during the initial installation and construction of a telephone equipment facility. But it could also refer to the longer term occupation of public rights-of-way with telephone equipment. (*Ibid.*) Though it would be odd for a statute authorizing local control over *permanent* occupations to specifically allow for control over the "time" of such occupations, the statute's plain language does not render plaintiffs' construction totally implausible.

However, the legislative history shows that section 7901.1 only deals with temporary access to public rights-of-way. "This bill is intended to bolster the cities[']abilities with regard to *construction management* ...." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen.

Bill No. 621 (1995–1996 Reg. Sess.) as amended May 3, 1995, p. 3, italics added.) Before section 7901.1's enactment, telephone companies had been taking the "extreme" position, based on their statewide franchises, that "cities [had] absolutely no right to control construction." (Assem. Com. on Utilities & Commerce, Rep. on Sen. Bill No. 621 (1995–1996 Reg. Sess.) as amended July 7, 1995, p. 2.) Section 7901.1 was enacted to "send a message to telephone corporations that cities have authority to manage their construction, without ***1127** jeopardizing the telephone [corporations'] statewide franchise." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 621 (1995–1996 Reg. Sess.) as amended May 3, 1995, p. 3.) Under section 7901.1, cities would be able to "plan maintenance programs, protect public safety, minimize public inconvenience, and ensure adherence to sound construction practices." (Assem. Com. on Utilities and Commerce, Rep. on Sen. Bill No. 621 (1995–1996 Reg. Sess.) as amended July 7, 1995, p. 2.)

[22] To accept plaintiffs' construction of section 7901.1, we would have to ignore this legislative history. (*T-Mobile West*, *supra*, 3 Cal.App.5th at p. 358, 208 Cal.Rptr.3d 248.) Contrary to plaintiffs' argument, construing section 7901.1 in this manner does not render the scheme incoherent. It is eminently reasonable that a local government may: (1) control the time, *****426** place, and manner of temporary access to public roads during construction of equipment facilities; and (2) regulate other, longer term impacts that might incommode public road use under section 7901. Thus, we hold that section 7901.1 only applies to temporary access during construction and installation of telephone lines and equipment. Because the City treats all entities similarly in that regard, there is no section 7901.1 violation.

III. DISPOSITION

The judgment of the Court of Appeal is affirmed.

Cantil-Sakauye, C. J., Chin, J., Liu, J., Cuéllar, J., Kruger, J., and Groban, J., concurred.

All Citations

6 Cal.5th 1107, 438 P.3d 239, 245 Cal.Rptr.3d 412, 19 Cal. Daily Op. Serv. 3067, 2019 Daily Journal D.A.R. 2886

Footnotes

1 The plaintiffs named in the operative complaint were T-Mobile West Corporation, NextG Networks of California, Inc., and ExteNet Systems (California) LLC. T-Mobile West Corporation has also appeared in this litigation as T-Mobile West LLC. NextG Networks of California, Inc. has also appeared as Crown Castle NG West LLC and Crown Castle NG West Inc. (*T-Mobile West LLC v. City and County of San Francisco* (2016) 3 Cal.App.5th 334, 340, fn. 3, 208 Cal.Rptr.3d 248 (*T-Mobile West*).) Not all plaintiffs install and operate the same equipment, but there is no dispute that they are all " 'telephone corporation[s],' " as that term is defined by Public Utilities Code section 234, nor that all of the equipment in question fits within the definition of " 'telephone line' " in Public Utilities Code section 233. All unspecified statutory references are to the Public Utilities Code.

2 The Ordinance was codified as article 25 of the San Francisco Public Works Code.

3 The Court of Appeal discussed other provisions of a previous enactment of the Ordinance that are not in issue here. (*T-Mobile West*, *supra*, 3 Cal.App.5th at pp. 340-341, 208 Cal.Rptr.3d 248.) We review the current version of the Ordinance. (*Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 306, fn. 6, 138 Cal.Rptr. 53, 562 P.2d 1302.)

4 Plaintiffs' first, second, fourth, and fifth causes of action are not before us. The first cause of action was resolved in plaintiffs' favor by summary adjudication. The second was dismissed by plaintiffs before trial. The fourth was resolved in City's favor by summary adjudication. And the fifth was resolved in plaintiffs' favor after trial.

5 This case does not involve the construction or installation of lines or equipment across state waters. Thus, we limit our discussion to lines installed along public roads and highways, which we refer to collectively as public roads.

6 There is some uncertainty regarding the standard for facial constitutional challenges to statutes and local ordinances. (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 218, 159 Cal.Rptr.3d 358, 303 P.3d 1140.) Some cases have held that legislation is invalid if it conflicts in the generality or great majority of cases. (*Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1126, 90 Cal.Rptr.3d 701, 202 P.3d 1089.) Others have articulated a stricter standard, holding that legislation is invalid only if it presents a total and fatal conflict with applicable constitutional prohibitions. (*Ibid.*; see also *Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th at p. 1084, 40 Cal.Rptr.2d 402, 892 P.2d 1145.)

We need not settle on a precise formulation of the applicable standard because, as explained below, we find no inherent conflict between the Ordinance and section 7901. Thus, plaintiffs' claim fails under any articulated standard.

7 In this context, a franchise is a "government-conferred right or privilege to engage in specific business or to exercise corporate powers." (Black's Law Dict. (10th ed. 2014) p. 772, col. 2.)

8 All Internet citations in this opinion are archived by year, docket number, and case name at <http://www.courts.ca.gov/38324.htm>.

9 The predecessor of section 7901, Civil Code section 536, was first enacted in 1872 as part of the original Civil Code. (*Anderson v. Time Warner Telecom of California* (2005) 129 Cal.App.4th 411, 419, 28 Cal.Rptr.3d 289, citing *Sunset Tel. and Tel. Co. v. Pasadena* (1911) 161 Cal. 265, 273, 118 P. 796.) Civil Code section 536 contained the "incommode" language, as did its predecessor, which was adopted as part of the Statutes of California in 1850. (Stats. 1850, ch. 128, § 150, p. 369.)

10 *Visalia* interpreted a predecessor statute, Civil Code section 536, which was repealed in 1951 and reenacted as section 7901. (Stats. 1951, ch. 764, pp. 2025, 2194, 2258 [reenacting Civ. Code, former § 536 as Pub. Util. Code, § 7901].)

11 The Ninth Circuit has addressed this issue twice, coming to a different conclusion each time. In *Sprint PCS Assets v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, the Ninth Circuit found no conflict between section 7901 and a local ordinance conditioning permit approval on aesthetic considerations. (*Palos Verdes Estates*, at pp. 721-723.) In an unpublished decision issued three years earlier, the Ninth Circuit had reached the opposite conclusion. (*Sprint PCS v. La Cañada Flintridge* (9th Cir. 2006) 182 Fed.Appx. 688, 689.) Due to its unpublished status, the *La Cañada Flintridge* decision carries no precedential value. (*T-Mobile West*, *supra*, 3 Cal.App.5th at p. 355, 208 Cal.Rptr.3d 248, citing *Bowen v. Ziasun Technologies, Inc.* (2004) 116 Cal.App.4th 777, 787, fn. 6, 11 Cal.Rptr.3d 522.)

12 In its 1996 opinion adopting general order No. 159-A, the PUC left implicit the portions of the statutory scheme it was applying. In its 1998 opinion, the PUC clarified the respective regulatory spheres in response to arguments based on sections 2902, 7901, 7901.1 and the constitutional provisions allocating authority to cities and the PUC. (See *Re Competition for Local Exchange Service*, *supra*, 82 Cal.P.U.C.2d at pp. 543–544.)

13 Among the PUC's express priorities regarding wireless facility construction is that "the public health, safety, welfare, and zoning concerns of local government are addressed." (General Order 159A, *supra*, at p. 3.)

14 We dispose here only of plaintiffs' facial challenge and express no opinion as to the Ordinance's application. We note, however, that plaintiffs seeking to challenge specific applications have both state and federal remedies. Under state law, a utility could seek an order from the PUC preempting a city's decision. (General Order 159A, *supra*, at p. 6.) Thus, cities are prohibited from using their powers to frustrate the larger intent of section 7901. (*Pacific Telephone II*, *supra*, 197 Cal.App.2d at p. 146, 17 Cal.Rptr. 687.) Under federal law, Congress generally has left in place local authority over "the placement, construction, and modification of personal wireless service facilities" (47 U.S.C. § 332(c)(7)(A)), but it has carved out several exceptions. Among these, a city may not unduly delay decisions (47 U.S.C. § 332(c)(7)(B)(ii)) and may not adopt regulations so onerous as to "prohibit or have the effect of prohibiting the provision of wireless services" (47 U.S.C. § 332(c)(7)(B)(i)(II)). If a city does so, a wireless company may sue. (*Sprint PCS Assets v. City of Palos Verdes Estates*, *supra*, 583 F.3d at p. 725.)

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Limiting liability with positioning to minimize negative health effects of cellular phone towers

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ABSTRACT

The use of cellular phones is now ubiquitous through most of the adult global population and is increasingly common among even young children in many countries (e.g. Finland, where the market for smart phones is nearly saturated). The basic operation of cellular phone networks demands widespread human exposure to radio-frequency radiation (RFR) with cellular phone base stations providing cellular coverage in most areas. As the data needs of the population increase from the major shift in the source of Internet use from personal computers to smart phones, this coverage is widely predicted to increase. Thus, both the density of base stations and their power output is expected to increase the global human RFR exposure. Although direct causation of negative human health effects from RFR from cellular phone base stations has not been finalized, there is already enough medical and scientific evidence to warrant long-term liability concerns for companies deploying cellular phone towers. In order to protect cell phone tower firms from the ramifications of the failed paths of other industries that have caused unintended human harm (e.g. tobacco) this Current Issue summarizes the peer-reviewed literature on the effects of RFR from cellular phone base stations. Specifically the impacts of siting base stations are closely examined and recommendations are made for companies that deploy them to minimize their potential future liability.

1. Negative human health effects from proximity to cellular phone base stations

There is a large and growing body of evidence that human exposure to RFR from cellular phone base stations causes negative health effects (Siddoo-Atwal, 2018; Singh et al., 2018; Faisal, et al., 2018) including both i) neuropsychiatric complaints such as headache, concentration difficulties, memory changes, dizziness, tremors, depressive symptoms, fatigue and sleep disturbance (Navarro et al., 2003;Hutter et al., 2006; Abdel-Rassoul et al., 2007); and ii) increased incidence of cancer and living in proximity to a cell-phone transmitter station (Wolf and Wolf, 2004; Havas, 2017). The mechanism for causing cancer could be from observed genetic damage using the single cell gel electrophoresis assay assessed in peripheral blood leukocytes of individuals residing in the vicinity of a mobile phone base station and comparing it to that in healthy controls (Gandhi et al., 2014). In epidemiological studies that assessed negative health effects of mobile phone base stations (seven studies explored the association between base station proximity and neurobehavioral effects (Navarro et al., 2003; Hutter et al., 2006; Abdel-Rassoul et al., 2007; Berg-Beckhoff et al., 2009; Blettner et al., 2009; Gadzicka et al., 2006; Santini et al., 2002) and three investigated cancer (Wolf and Wolf, 2004; Havas, 2017;Levitt and Lai, 2010), 80% reported increased prevalence of adverse neurobehavioral symptoms or cancer in populations living at distances < 500 m from base stations (Navarro et al., 2003).

The literature also indicates that these effects may be cumulative based on i) mice exposed to low-intensity RFR became less reproductive and after five generations of exposure the mice were not able to produce offspring indicating intergenerational transfer of effects (Magras and Xenos, 1997); ii) DNA damage in cells after 24 h exposure to low-intensity RFR, which can lead to gene mutation that accumulates over time (Phillips et al., 1998) and iii) increased sensitivity to behavior–disruption experiments in rats (D'Andrea et al., 1986) and monkeys (de Lorge, 1984), iv) an increase in permeability of the blood–brain barrier in mice suggesting that a short-term, high-intensity exposure can produce the same effect as a long-term, low-intensity exposure (Persson et al., 1997). Studies on short-term exposure generally show no effects. For example, early studies saw no effect from

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short-term exposure, however, studies found effects after prolonged, repeated exposure in guinea pigs and rabbits (Takashima et al., 1979).

There are several studies showing the effect intensifies with reduced distance to the cell tower. The first (Santini et al., 2002) found increased symptoms and complaints the closer a person lived to a tower (Santini et al., 2002) and similar results were found in later studies (Navarro et al., 2003; Hutter et al., 2006; Abdel-Rassoul et al., 2007).

2. U.S. law unhelpful for preventing future liability

Current U.S. law has created a somewhat peculiar overriding federal preemption that precludes taking the "environmental effects" of RFR into consideration in cell tower siting (see Section 704 of The Telecommunications Act of 1996). The current, U.S. standards are based solely on thermal effects (which do not appear to be a problem) and thus do not mitigate against non-thermal effects (for which there is a growing litany of concern in the medical/scientific community). Due to the findings of many studies briefly summarized above many researchers argue for the revision of standard guidelines for public exposure to RER from mobile phone base station antennas (Abdel-Rassoul et al., 2007; Hardell and Sage, 2008; Khurana et al., 2010). As Roda and Perry summarize (Roda and Perry, 2014), "… because scientific knowledge is incomplete, a precautionary approach is better suited to State obligations under international human rights law." This is perhaps most forcefully concluded by the *BioInitiative Report* published by the BioInitiative Working Group, which is based on an international research and public policy initiative to give an overview of what is known of biological effects that occur at low-intensity electromagnetic fields exposure. This precautionary approach is gaining favor in Europe, but is less common in the U.S. American companies are therefore ill advised to simply follow "regulatory compliance" on this front, as there appears to be a clear cause for concern in the scientific/medical communities. If causation were to be proven through detailed studies, cellular phone companies would potentially be in position of future legal exposure for causing widespread human health problems and premature death. It is, therefore, in American companies' best interest to act before government and regulation catches up with the science.

3. Current cell tower positioning

Current cell tower locations are chosen based on a "search ring" priority basis of geographic optimum for technical coverage of high concentration of wireless transmissions (e.g. users). This combination of technical parameters (e.g. geography) to enable coverage and dependable service and costs (e.g. positioning on mountaintops on accessibly by helicopter) is then weighed against and local regulations such as local zoning.

To overcome these challenges in urban areas cellphone companies often locate cellphone base stations at schools, because the monthly rental fee (~$1500) is welcome income for economically-challenged school districts that have influence on local zoning. However, some jurisdictions have already prohibited the placement of cell phone towers near schools or hospitals because of the increased sensitivity of these populations, as in India. Other regions such as Europe (Roda and Perry, 2014) could follow a similar approach. Now even in North America, Canada's Standing Committee on Health are considering more precautionary approaches to RFR.

4. Precautionary cell phone base station positioning

A review article of the health effects near base stations concluded that deployment of base stations should be kept as efficient as possible to minimize exposure of the public to RFR and should not be located less than 500 m from the population, and at a height of 50 m (Levitt and Lai, 2010). This potentially presents a serious challenge to cell phone company RF engineers. However, it is possible to obtain necessary coverage while at the same time minimizing human exposure at the highest intensities. There are several first steps a cellular phone company can take to minimize human exposure particularly of the most vulnerable populations.

First, voluntarily restrictions can be made on the placement of cellular phone base stations within 500 m of schools and hospitals. This will synchronize base station deployment strategies between regions. This can be done by utilizing the existing hexagon planning map structure of an area with an overlay using an additional semi-automated process with a geographic information system (GIS) (Al-Sahly et al., 2018) such as the Geographic Resources Analysis Support System (GRASS) to identify any regions within 500 m of existing schools and hospitals. All hexagons with schools or hospitals are marked as unusable for RF engineer planning (e.g. colored red). This restriction only makes planning slightly more difficult, but does present a challenge in regions where schools were specifically targeted as base station locations in (e.g. Verizon deployments in the U.S.). Future work is needed to determine if the increased legal exposure warrants the cost of moving existing stations. However, the increased cost to locate future stations away from schools and hospitals should be minimal.

The second technical hurdle is more challenging. Ideally, all cell phone users would have coverage while minimizing the population density near cellular phone base stations (thus minimizing health impacts). This can be planned using GIS tools, freely-accessible U.S. Census data, parcel data and/or satellite images. The population density can be color coded for straightforward decision making for RF engineers. As a cellphone base station costs $250–350,000 to install in the U.S., using a precautionary approach to potential future regulation can save substantial relocation fees.

The cell phone industry should also consider cell splitting, small cell deployment, beam and null steering antennae as possible technical means for reducing RF exposure. Moreover, more research on cognitive radio should also be conducted, so that the overall RF exposure is reduced. These measures will ultimately benefit the entire telecommunications industry, while potentially significantly reducing global RF pollution.

Finally, exposed companies should consider funding large-scale epidemiological studies with personal dosimeters for strict dose measurement and straight-forward tissue exposure. By quantifying the human medical threat themselves, more appropriate long-term planning can be made to minimize the risk of liability from unintended human harm due to cellular phone base station siting.

Financial disclosure

The author owns stock in the American Tower Corporation.

Declaration of competing interest

The author has no conflict of interest.

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United States District Court, E.D. Michigan, Southern Division.

IN RE FLINT WATER CASES.
This Order Relates to:
Bacon v. Snyder, et al.

Case No. 18-10348
|
Signed 10/22/2020

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OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS PLAINTIFF'S SHORT-FORM COMPLAINT [89, 90, 91, 93]

JUDITH E. LEVY, United States District Judge

***1** This is one of the many cases that are collectively referred to as the Flint Water Cases. Plaintiffs allege that Defendants, a combination of private and public individuals and entities, set in motion a chain of events that led to bacteria and lead leaching into the City of Flint's drinking water. Plaintiffs in the various Flint Water Cases claim that Defendants subsequently concealed, ignored, or downplayed the risks that arose from their conduct, causing them serious harm. These plaintiffs contend that the impact of what has since been called the Flint Water Crisis is still with them and continues to cause them problems.

The Plaintiff in this particular case is Deborah Sapolin, personal representative of the Estate of Margaret A. Bacon.[1] In previous Flint Water decisions, the Court has set forth descriptions of each Defendant in these cases, and adopts those descriptions as if fully set forth here. *See In re Flint Water Cases*, 384 F. Supp. 3d 802, 824–825 (E.D. Mich. 2019).

Before the Court are four motions to dismiss. On June 16, 2020, Defendants Lockwood, Andrews & Newnam, Inc. and Lockwood, Andrews & Newnam, P.C. (together, "LAN") moved to dismiss Plaintiff's complaint. (ECF No. 89.) Defendant Leo A. Daly Company ("LAD") also moved to dismiss on the same day. (ECF No. 90.) On June 17, 2020, the Michigan Department of Environmental Quality ("MDEQ") individual Defendants Stephen Busch, Patrick Cook, and Michael Prysby (collectively, "MDEQ Defendants") moved to dismiss.[2] (ECF No. 91.) And finally, on the same day, Defendants the City of Flint, Darnell Earley, Gerald

Ambrose, Dayne Walling, Howard Croft, Michael Glasgow, and Daugherty Johnson (collectively "City Defendants") moved to dismiss. (ECF No. 93.) For the reasons set forth below, the Court grants in part and denies in part Defendants' motions to dismiss the complaint.

I. Prior Precedent in the Flint Water Cases

This Court has previously adjudicated other motions to dismiss in the Flint Water Cases. First, there was *Guertin v. Michigan*, No. 16-12412, involving individual plaintiffs and many of the same claims and Defendants in the present case. Next, there was *Carthan v. Snyder*, No. 16-10444, a consolidated class action that also involved similar Defendants and claims. Also, there were *Walters v. City of Flint*, No. 17-10164, and *Sirls v. Michigan*, No. 17-10342, which involved individual plaintiffs and the same Master Complaint as the present case.

***2** Most recently, there were *Brown v. Snyder*, No. 18-10726, and *Marble v. Snyder*, No. 17-12942, which not only involved individual plaintiffs and similar claims, facts, Defendants, and the same Master Complaint as the present case, but also involved *legionella* bacteria, which is the focus of this case.

The Flint Water Cases have already produced several Sixth Circuit opinions. These are binding on this Court and include *Carthan v. Earley*, 960 F.3d 303 (6th Cir. 2020); *Walters v. Flint*, No. 17-10164, 2019 WL 3530874 (6th Cir. August 2, 2019); *Guertin v. Michigan*, 912 F.3d 907 (6th Cir. 2019); *Boler v. Earley*, 865 F.3d 391 (6th Cir. 2017); and *Mays v. City of Flint*, 871 F.3d 437 (6th Cir. 2017).

The Court will also adhere to its own prior decisions where appropriate, including *Guertin v. Michigan*, No. 16-12412, 2017 WL 2418007 (E.D. Mich. June 5, 2017); *Carthan v. Snyder*, 329 F. Supp. 3d 369 (E.D. Mich. 2018); *Carthan v. Snyder*, 384 F. Supp. 3d 802 (E.D. Mich. 2019); and *Walters v. City of Flint*, No. 17-10164, 2019 WL 3530874 (E.D. Mich. Aug. 2, 2019). In particular, it will rely on *Marble v. Snyder*, 453 F. Supp. 3d 970 (E.D. Mich. 2020) and *Brown v. Snyder*, No. 18-10726, 2020 WL 1503256 (E.D. Mich. Mar. 27, 2020) to resolve the current motions where appropriate. This opinion will describe Plaintiff's legal claims and then explain why a similar or different result is justified based on the factual allegations pleaded here.

II. Procedural History and Background

A. The Master Complaint

As the number of Flint Water Cases increased over the years, the Court entered case management orders to manage the litigation. For example, in early 2018, it appointed and then directed co-liaison lead counsel for the individual plaintiffs to file a Master Complaint that would apply to all pending and future non-class action cases. (*Carthan*, No. 16-10444, ECF No. 347.) The Master Complaint was filed in *Walters*. (*Walters*, No. 17-10164, ECF no.185-2.) The attorneys in each of the individual cases were also ordered to file a Short Form Complaint, adopting only the pertinent allegations from the Master Complaint as they saw fit. The Short Form Complaints also allowed for an Addendum if any Plaintiff wished to allege a new cause of action or include additional Defendants. This would allow the Court to issue opinions that would apply to multiple individuals, rather than to address each case in turn and cause a delay in the administration of justice. This is the procedure that Plaintiff was required to follow in this case.

B. Plaintiff's Operative Short-Form Complaint Filed June 1, 2020

Plaintiff's operative Short Form Complaint was filed on June 1, 2020 (the "June 2020 Short Form Complaint"). (ECF No. 86.) In it, she fully adopts the relevant facts alleged in the Master Complaint from *Walters*. (*Walters*, No. 17-cv-10164, ECF No. 185-2.) The Master Complaint's facts, setting forth the background of the Flint Water Crisis, were summarized in this Court's opinion in *Walters* and will not be reproduced here. *Walters v. City of Flint*, No. 17-cv-10164, 2019 WL 3530874, at *4–*11 (E.D. Mich. Aug. 2, 2019). However, as set forth above, unlike *Walters*, Plaintiff does not allege injuries from lead poisoning. Rather, she alleges injuries from Bacon's exposure to *legionella*.

***3** Plaintiff's June 2020 Short Form Complaint involves the following claims against the following Defendants. First, she checked boxes on the short form for the following Defendants.[3]

- Governor Richard D. Snyder[4]
- The City of Flint
- Howard Croft

- Michael Glasgow
- Daugherty Johnson
- Stephen Busch
- Patrick Cook
- Michael Prysby
- Adam Rosenthal
- Andy Dillon
- Lockwood, Andrews & Newnam P.C.
- Lockwood Andres & Newnam, Inc.
- Leo A. Daly Company
- Rowe Professional Services Company and Rowe Engineering (together, "Rowe")

(ECF No. 86.)

Next, she checked the boxes on the short form complaint for the following claims:

- Count I: 42 U.S.C. § 1983–14th Amendment, Substantive Due process-State Created Danger
- Count II: 42 U.S.C. § 1983–14th Amendment. Substantive Due Process-Bodily Integrity
- Count IV: 42 U.S.C. § 1983 – 5th and 14th Amendments, Equal Protection of the Law-Wealth Based
- Count VIII: Punitive damages
- Count IX: Professional Negligence (LAN PC, LAN Inc. and LAD)
- Count X: Professional Negligence (Rowe)[5]
- Count XIII: Survival and Wrongful Death, MCL 600.2922 (All Defendants)

(ECF No. 86, PageID.1189–90.)

C. Plaintiff's Previous Complaints, Claims, and Defendants

Before analyzing Defendants' motions to dismiss, it is helpful to set forth some of the background of Plaintiff's case. Before she died, Bacon initially filed her lawsuit in the State of Michigan, Genesee County Circuit Court. She amended her complaint on April 26, 2016 (the "April 2016 Complaint"). The Defendants in that case removed it to this Court. (*Bacon v. Rowe et al*., No. 16-11579, (E.D. Mich. May 3, 2016) (O'Meara, J.).) The following month, in May 2016, Bacon voluntarily dismissed the individual Defendants in that case. (*Id*. at ECF No. 32.) The remaining parties stipulated to remand the case back to the Genesee County Circuit Court, and they stipulated to permit Bacon to file a second amended complaint. (*Id*. at ECF Nos. 34, 35.)

Now back in the Genesee County Circuit Court, Bacon progressed with her second amendment to the complaint, which was titled the First Amended Short Form Complaint, pursuant to the Master Individual Complaint adopted by the Genesee County Circuit Court. On November 9, 2017, she filed her First Amended Short Form (the "November 2017 Complaint"). *Bacon v. Lockwood, Andrews & Newman, P.C. et al*., No. 17-106692, Consol. Docket No. 17-108646 (Mich. Genesee Cir. Ct. Nov. 9, 2017) (ECF No. 1-1, PageID.47–57; ECF No. 1-3, PageID.59–146.) On January 30, 2018, Defendants jointly removed Bacon's action to this Court. (ECF No. 1.)

***4** As set forth above, on March 26, 2018, after this Court's consolidation and case management orders were entered, Bacon adopted the Master Complaint from *Walters* in full and filed a Short Form Complaint with new allegations and new Defendants (the "March 2018 Short Form Complaint"). (ECF No. 14.)

On April 10, 2018, Bacon unfortunately passed away. (ECF No. 26, 27.) The Court granted a substitution of parties, replacing Bacon with Plaintiff. (ECF No. 31.) Plaintiff and several Defendants then stipulated to dismissal of certain Defendants and certain claims. (ECF Nos. 82, 83.)

On June 1, 2020, Plaintiff filed the operative June 2020 Short Form Complaint.[6] (ECF No. 86.) This complaint differed from her previous complaints in many regards, not only reflecting a new post-death cause of action for wrongful death, but also reflecting several other changes in Defendants and claims.

For example, the June 2020 Short Form Complaint omits some of the claims Bacon previously brought in this case before her death, including: gross negligence, negligent nuisance in fact, public nuisance, intentional nuisance in fact,

intentional infliction of emotional distress, grossly negligent infliction of emotional distress, assault and battery, breach of contract, breach of implied warranty, trespass, unjust enrichment, and a CERCLA violation.

Further, the operative complaint omits Bacon's previous claims against Defendants Daniel Wyant, Laine Shekter Smith, Nick Lyon, State of Michigan, Jeff Wright, Edward Kurtz, Dayne Walling, Veolia LLC, Veolia, Inc., and others. Notably, the June 2020 Short Form Complaint also includes new claims Bacon never brought before: a 41 U.S.C.§ 1983 claim based on wealth, a claim for punitive damages, and a state law claim for survival and wrongful death. Finally, Plaintiff did not check the operative complaint's checkbox for "Property Damage," as Bacon had in past iterations of her complaint. (ECF No. 86 PageID.1189.) Nevertheless, Plaintiff filled out paragraph seven of the short form complaint, which instructs that the paragraph should only be filled out "[i]f alleging property damage." (*Id*., PageID.1188.)

One reason for highlighting this is because Plaintiff requests in her response brief that she be permitted to amend her complaint again if the Court finds her operative complaint fails to state a claim. (ECF No. 105, PageID.1473.)

Although Federal Rule of Civil Procedure 15(a)(2) instructs courts to "freely give leave" to amend, this policy does not include arguments made as an aside in a response brief. A "request for leave to amend almost as an aside, to the district court in a memorandum in opposition to the defendant's motion to dismiss is ... not a motion to amend." *Kuyat v. MioMimetic Theraputics, Inc.*, 747 F.3d 435, 444 (6th Cir. 2014) (citing *La. Sch. Emps.' Ret. Sys. v. Ernst & Young, LLP*, 622 F.3d 471, 486 (6th Cir. 2010)). In *Kuyat*, the Sixth Circuit evaluated language from the plaintiffs in a response brief that stated, "Alternatively, Plaintiffs request leave to amend the Complaint in the event that the Court finds that it falls short of the applicable pleading standards in any respect." (*Id*. at 444.) The plaintiffs in that case did not attach a copy of their proposed amended complaint. Taking these two factors together, the Sixth Circuit found that this type of argument for an amendment, made in a response in opposition to a Rule 12(b)(6) motion is essentially "throwaway language" and that the district court did not abuse its discretion in refusing to allow the plaintiffs to amend. *Id*.

***5** Here, Plaintiff argues that "if arguendo, Plaintiff has not alleged sufficient facts linking her death to her Legionella sickness, the appropriate remedy is to grant Plaintiff leave to further amend." (ECF No.105, PageID.1473.) She argues that "any such deficiencies can be readily cured by granting" leave to amend. (*Id*.) Plaintiff did not include her proposed amendment. Instead, she includes a short paragraph stating that Bacon suffered, "numerous severe infections to her lungs and other parts of her body – which in turn affected her ability to oxygenate and heal from other illnesses that were either pre-existing or contracted after she contracted Legionella sickness."(*Id*. at PageID.1474.) Then, she states that these additional facts "should arguably be sufficient to cure the factual deficiencies." (Id.)

Plaintiff's purported factual-support paragraph is not a proposed amendment. Indeed, all it does is raise more questions. What was the nature of Bacon's severe illness, and what other parts of her body besides her lungs were infected? What were her "other illnesses"? Were they contracted before or after her *legionella* exposure and illness? What were her "pre-existing conditions" that are referenced, and how do they tie into her claims? Her response to factual deficiencies raise more questions than answers. In this way, Plaintiff's request to further amend her complaint is not meaningfully different from that which was rejected in *Kuyat*. Accordingly, her request for leave to amend is denied.

III. Legal Standard

When deciding a motion to dismiss under Federal Rule of Procedure 12(b)(6), the Court must "construe the complaint in the light most favorable to the plaintiff and accept all allegations as true." *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plaintiff's claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. A plausible claim need not contain "detailed factual allegations," but it must contain more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555.

IV. Analysis

A. Incorporation of Prior Complaints

1. The State-Court First Amended Master Long Form Complaint

As an initial matter, Plaintiff did not properly incorporate the items that she references in the June 2020 Short Form Complaint. Federal Rule of Civil Procedure 10(c) governs adoptions by reference, and states, "A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." The Sixth Circuit rule that "[m]atters outside the pleadings are not to be considered by a court in ruling on a 12(b)(6) motion to dismiss" applies. *Weiner v. Klais & Co.*, 108 F.3d 86, 98 (6th Cir. 1997), (overruled on other grounds, *Swierkiwica v. Sorema, N.A.*, 534 U.S. 506, (2002)).

Plaintiff did not attach the First Amended Long Form Complaint to her pleadings, nor is it anywhere else on her docket. In paragraph twelve of the June 2020 Short Form Complaint, Plaintiff states that she "incorporates herein by reference" the factual allegations and conduct of Defendants "set forth in the *First* Amended Master Long Form Complaint and her Short form Complaint filed in the Genesee County Circuit Court on November 9, 2017, prior to being removed to this Honorable Court on or about January 20, 2018." (ECF No. 86, PageID.1190 (emphasis added).)

***6** The state-court *First* Amended Master Long Form Complaint, which she specifically names, is not part of the record in this case. Rather, the state-court *Second* Amended Master Long Form Complaint was the operative state-court long form complaint at the time of removal, and is included on the docket. Plaintiff was clear in her reference to the First Amended Long Form Complaint, and not the Second. Plaintiff does not address this discrepancy or seek to make a correction in her response briefs.[7] Indeed, she does not address this discrepancy at all. Accordingly, she will be taken at her word regarding the item she specifically referenced, and the First Amended Master Long Form Complaint is not incorporated.

2. The November 2017 Complaint

Plaintiff does, however, properly incorporate portions of Bacon's state-court November 2017 Complaint. Unlike the state-court First Amended Master Long Form complaint, the November 2017 Complaint was filed on the docket in this case. (ECF No. 1-2.) However, the November 2017 Complaint is rife with internal inconsistencies, and it involves parties and claims that do not align with the boxes she checked in her June 2020 Short Form Complaint.

For example, in her short form November 2017 Complaint, Bacon sets forth introductory descriptions of individuals identified as governmental defendants, including Dennis Muchmore, Eden Victoria Wells, M.D., Linda Dykema, Nancy Peeler, and Robert Scott. But then, she fails to specifically name them when setting forth her counts. (ECF No. 1-2, PageID.53–56.) Further complicating the puzzle, her November 2017 Complaint incorporates by reference paragraphs of the state-court Second Amended Master Long-Form Complaint. The state-court Second Amended Master Long-Form Complaint does allege counts against these specific individuals. When the two are taken together, it is unclear whether Plaintiff was suing those individuals by incorporation or not since she only partially addressed them in her short form complaint. Yet, it is not the job of this Court to sort this out, particularly since these individuals are not defendants here.

The only relevant paragraphs that the Court can discern in Bacon's November 2017 Complaint are her specific allegations regarding *legionella* exposure. They are set forth below:

> 2. As a direct and proximate result of using Flint River water in her activities of daily living, Plaintiff Margaret A. Bacon contracted Legionella pneumonia on or about September 12, 2014 in her home, resulting in lengthy hospitalizations during which she was intubated and placed on mechanical ventilation and treated with intravenous antibiotics.
>
> 3. As a direct and proximate result of Plaintiff Margaret Bacon's Legionella pneumonia and lengthy hospitalizations, mechanical ventilation, and life threatening infections, she suffered severe and permanent injuries and damages.

(ECF No. 1-2, PageID.48.) These are the only paragraphs where Plaintiff provides any detail regarding her *legionella* exposure and illness. The Court will accept as incorporated only those paragraphs set forth above that describe Plaintiff's *legionella* exposure and subsequent illness.

B. Plaintiff Fails to State a Wrongful Death Claim

***7** MDEQ Defendants, State Defendants, City Defendants, LAN and LAD's and motions to dismiss Plaintiff's wrongful death claim are granted because Plaintiff did not plead any facts to demonstrate that Bacon's death, or injuries resulting in death, were caused by the wrongful act, neglect, or fault of Defendants. Plaintiff alleges wrongful death under Michigan Compiled Laws § 600.2922. The statute provides for the recovery of damages for a wrongfully caused death, and governs the distribution of wrongful death damages. *Id*. Actions under this statute are derivative and must be brought by the personal representative of the estate. Mich. Comp. Laws § 600.2922(2). The statute states, in relevant part,

> Whenever the death of a person, injuries resulting in death, ... *shall be caused by wrongful act, neglect, or fault of another*, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages....

Mich. Comp. Laws § 600.2922(1) (emphasis added). Plaintiff did not plead any facts to demonstrate that Bacon's death, or injuries resulting in death, were caused by the "wrongful act, neglect, or fault" of Defendants.

In paragraph ten of her June 2020 Short Form Complaint, Plaintiff sets forth her claims. Her claim for survival and wrongful death against all Defendants, is identified as an "additional claim" that is not identified in the Master Complaint from *Walters*. Accordingly, to sustain her additional claim, Plaintiff was required to provide factual support in paragraph twelve.

Paragraph twelve of Plaintiff's June 2020 Short Form Complaint states:

> 12. If additional claims against the Defendants identified in the Master Long Form Complaint are alleged in paragraph 10, the facts supporting these allegations must be pleaded. Plaintiff asserts the following factual allegations against the Defendants identified in the Master Long Form Complaint:
>
> A. Plaintiff, Deborah Sapolin, as the Personal Representative of the Estate of Margaret A. Bacon, incorporates herein by reference all preceding factual allegations set forth in the First Amended Master Long Form Complaint and her Short Form Complaint filed in the Genesee County Circuit Court on November 9, 2017, prior to being removed to this Honorable Court on or about January 30, 2018.
>
> B. The conduct of Defendants, as described in the First Amended Master Long Form Complaint and Plaintiff's Short Form Complaint filed in the Genesee County Circuit Court on November 9, 2017, was the proximate cause of Margaret A. Bacon's death.
>
> C. Plaintiff, as Personal Representative of the Estate of Margaret A. Bacon, Deceased, is entitled to the following damages as a result of Defendants' conduct:
>
> i. All damages recoverable pursuant to Michigan's wrongful death statute, MCL 600.2922;
>
> ii. Damages for pain and suffering sustained by decedent Margaret A. Bacon before her death on April 10, 2018;
>
> iii. Loss of past and future earnings;
>
> iv. Funeral and burial expenses;
>
> v. Medical and hospital expenses;
>
> vi. Damages for the loss of society and companionship suffered by Margaret A. Bacon's family members.

(ECF No. 86, PageID.1190–91.)

As set forth above, Plaintiff failed to properly incorporate her state-court complaints except for paragraphs 2–3, which specifically relate to Bacon's *legionella* exposure and illness. However, even the incorporated paragraphs do not provide any facts related to the cause of Bacon's death because they were written before April 2018 when she died.

Therefore, the June 2020 Short Form Complaint was the place to set forth allegations regarding Bacon's cause of death. Yet, the only allegation regarding Bacon's death in the June 2020 Short Form Complaint is Plaintiff's conclusory allegation that Defendants were "the proximate cause of Margaret A. Bacon's death." (PageID.1190–91.) This bare allegation provides no facts regarding how her 2014 illness, while very serious, contributed to or caused her 2018 death.

***8** Plaintiff argues in her response briefs that Bacon died "as a result of complications associated with her Legionella sickness." (ECF No. 101, PageID.1395; ECF No. 102, PageID.1414.) She states that she "advised the court of this" and was given a "green light" to add wrongful death and

survival claims to her short form complaint. (*Id*.) She also defends the brevity of her pleadings, stating that the format of long-and-short-form complaints adopted in this case:

> allow each individual Plaintiff to simply check boxes for Defendants and claims, and they are set up in a way that minimizes the amount of additional factual information that each individual Plaintiff must allege in addition to what is already alleged in the Master Complaint. These special pleading requirements clearly supersede any conflicting procedural requirements contained elsewhere.

(ECF No. 105, PageID.1471.) She argues that these forms create a "relaxed specificity standard." (*Id*. at 1472.)

Finally, Plaintiff argues that, even without the "relaxed" standard, her facts were sufficient to support a wrongful death claim:

> Her [June 2020] Short Form Complaint clearly identifies that she contracted legionella sickness as a result of being exposed to the contaminated Flint water supply, and that she became violently ill immediately thereafter as a result. Her Complaint further confirms that she subsequently underwent extensive medical treatment *and died with a reasonable short amount of time after contracting Legionella sickness* and undergoing extensive medical treatment for all of the harms that it brought upon her. Given the nature and severity of her legionella sickness and the timing of her death, it is clearly reasonable to infer circumstantially that Plaintiff's ultimate death was brought on by her legionella sickness.

(ECF No. 105, PageID.1472 (emphasis added).)

This is not an accurate account of the contents of the June 2020 Short Form Complaint. As set forth above, Plaintiff alleges Bacon was exposed to *legionella* in September 2014, and died over three-and-a-half years later in April 2018. Three-and-a-half years is not a "reasonable short amount of time," particularly when Plaintiff has not provided any additional detail regarding the length of Bacon's illness, or what harms it brought about that could reasonably lead the Court to conclude that *legionella* exposure, and therefore Defendants, caused her death.

Nor are Plaintiff's arguments that the streamlined process for long- and-short-form complaints creates a "relaxed" specificity standard persuasive. The short form complaint itself states, "factual support for these allegations must be pleaded." (ECF No. 86, PageID.1190.) The Master Complaint from *Walters* specifically states that, "[a]ny separate facts and additional claims of individual Plaintiffs may be set forth as necessary in the actions filed by the respective Plaintiffs." (*Walters*, No. 17-0164, ECF No.185-2, PageID.5044.) Factual support for a complaint is a basic pleading requirement under Federal Rule of Civil Procedure 8, which is unchanged by the streamlined process in the Flint Water cases.

Accordingly, Defendants' motions to dismiss Plaintiff's wrongful death claim are granted. Rowe answered the complaint and did not move to dismiss this claim. However, in light of this decision, Rowe may file a motion under Rule 12(c) within sixty days, which is Monday December 21, 2020.

C. Plaintiff's Remaining Long-Form Counts

All of Plaintiff's remaining claims rely in their entirety on the Master Complaint from *Walters*. (*Walters*, No. 17-10164, ECF No. 86, PageID.1186.) The Court will address each claim in turn as set forth below.

1. State-Created Danger Claim

***9** Plaintiff alleges that MDEQ Defendants, State Defendants, and City Defendants violated Bacon's right to be free from a state-created danger. (ECF No. 86, PageID.1189.) The Defendants moved to dismiss. (ECF No. 91, PageID.1307–08); (ECF No. 93, PageID.1327.)

Plaintiff concedes in her response that, "the Court dismissed identical State Created Danger claims" in *Marble* and *Brown*. (ECF No. 104, PageID.1459.) She acknowledges that the Court's ruling in those cases govern this issue but notes that she disagrees with those rulings. (*Id*.)

For the reasons set forth in *Marble* and *Brown*, Plaintiff's state-created danger claims are dismissed. *Brown*, 2020 WL 1503256, at * 16; *Marble*, 453 F. Supp. 3d at 988–91.

2. Bodily Integrity Claim

Plaintiff alleges that MDEQ Defendants, State Defendants, and City Defendants violated her right to bodily integrity. (ECF No. 86, PageID.1189.) The Defendants moved to dismiss. (ECF No. 91, PageID. 1296–1306); (ECF No. 93, PageID.1333–1337.)

As in *Marble*, the Court adopts the governing legal standard for a bodily integrity claim set forth previously in *Walters* and *Carthan*:

> The right to bodily integrity is a fundamental interest protected by the Due Process Clause of the Fourteenth Amendment. *Guertin*, 912 F.3d at 918–19; *Guertin*, 2017 U.S. Dist. LEXIS 85544, at *63 (citing *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). And although violations of the right to bodily integrity usually arise in the context of physical punishment, the scope of the right is not limited to that context. *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1062–63 (6th Cir. 1998). For instance, the "forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." *Guertin*, 912 F.3d at 919 (citing *Washington v. Harper*, 494 U.S. 210, 229 (1990)). And "compulsory treatment with anti-psychotic drugs may [also] invade a patient's interest in bodily integrity." *Guertin*, 2017 U.S. Dist. LEXIS 85544, at *66 (citing *Lojuk v. Quandt*, 706 F.2d 1456, 1465–66 (7th Cir. 1983)). The key is whether the intrusion is consensual. *See Guertin*, 912 F.3d at 920. There is no difference between the forced invasion of a person's body and misleading that person into consuming a substance involuntarily. *Guertin*, 2017 U.S. Dist. LEXIS 85544, at *71 (citing *Heinrich v. Sweet*, 62 F. Supp. 2d 282, 313–14 (D. Mass. 1999)). As such, officials can violate an individual's bodily integrity by introducing life-threatening substances into that person's body without their consent. *Guertin*, 2017 U.S. Dist. LEXIS 85544, at *65 (citing *Washington*, 494 U.S. at 229).
>
> However, to state a claim, plaintiffs must do more than point to the violation of a protected interest; they must also demonstrate that it was infringed arbitrarily. *Guertin*, 912 F.3d at 922. *But see Range v. Douglas*, 763 F.3d 573, 589 (6th Cir. 2014) (observing that in some contexts government action may violate substantive due process without a liberty interest at stake). And with executive action, as here, only the most egregious conduct can be classified as unconstitutionally arbitrary. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). In legal terms, the conduct must "shock[ ] the conscience." *Guertin*, 2017 U.S. Dist. LEXIS 85544, at *63 (quoting Lewis, 523 U.S. at 846).
>
> ***10** Whether government action shocks the conscience depends on the situation. *Ewolski v. City of Brunswick*, 287 F.3d 492, 510 (6th Cir. 2002). Where unforeseen circumstances demand the immediate judgment of an executive official, liability turns on whether decisions were made "maliciously and sadistically for the very purpose of causing harm." *Lewis*, 523 U.S. at 852–53 (quoting *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986)). But where an executive official has time for deliberation before acting, conduct taken with "deliberate indifference" to the rights of others "shocks the conscience." *See Claybrook v. Birchwell*, 199 F.3d 350, 359 (6th Cir. 2000). This case involves the latter of these two situations. And as a result, plaintiffs must demonstrate that (1) officials knew of facts from which they could infer a "substantial risk of serious harm," (2) that they did infer it, and (3) that they nonetheless acted with indifference, *Range*, 763 F.3d at 591 (citing *Ewolski*, 287 F.3d at 513), demonstrating a callous disregard towards the rights of those affected, *Guertin*, 912 F.3d at 924 (quoting *Schroder v. City of Fort Thomas*, 412 F.3d 724, 730 (6th Cir. 2005)).

Marble, 453 F. Supp. 3d at 991–92 (citing *Walters*, 2019 WL 3530874, at *14–*15; *Carthan*, 384 F. Supp. 3d at 839–40).

As set forth, the Court's inquiry is whether each Defendant had knowledge of the facts from which they could infer a substantial risk of serious harm to Bacon, did infer it, and nonetheless acted with indifference demonstrating a callous disregard towards Bacon's rights. Accordingly, the pertinent time frame for this knowledge-based analysis is the time before Bacon became ill on September 12, 2014. In analyzing the bodily integrity claims in *Walters*, the Court relied upon many facts that occurred after Bacon became ill. Those facts are not applicable to the bodily integrity claim here, which is limited to whether Defendants can be held liable for the conditions that resulted in Bacon contracting *legionella*. For this reason, only conduct undertaken by Defendants before Plaintiff fell ill with *legionella* on September 12, 2014 can be considered in this analysis.

a) Legionella Exposure

As an initial matter, in both *Marble* and *Brown*, the Court determined that bodily integrity claims based on *legionella* exposure could proceed on the same bases as claims based on lead exposure. *Marble*, 453 F. Supp. 3d at 992–93; *Brown*, 2020 WL 1503256 at *5–*8. It also held that the Defendants' actions that allegedly hid the Flint water's lead and *legionella* content implicated the plaintiffs' right to bodily integrity. *Id*. The Court fully adopts those conclusions in this case.

MDEQ Defendants and State Defendants urge the Court to decide this issue differently here because, they argue, state-level *legionella* exposure regulations do not rest with MDEQ as the state regulator. (ECF No. 91, PageID.1300.) Plaintiff does not address this argument in her response. (ECF No. 104.)

In *Brown*, MDEQ Defendants and State Defendants also argued that *legionella*-related cases should be decided differently from lead injury cases. (Brown, ECF No. 83, PageID.442, 444); (ECF No. 91, PageID.1310–1312.) The Court rejected that argument in *Brown*, explaining:

> "[T]his is not a case about the right to a contaminant-free environment or clean water. Rather, this case implicates the consumption of life-threatening substances. Indeed, neither side disagrees that lead and *legionella* are life threatening, nor that plaintiffs ingested these contaminants and others through the water supply." [*Carthan*,] 384 F. Supp. 3d at 840 (internal citations removed). Similarly, as the Sixth Circuit held in *Guertin*, a related Flint Water Case: "Involuntarily subjecting nonconsenting individuals to foreign substances with no known therapeutic value—often under false pretenses and with deceptive practices hiding the nature of the interference—is a classic example of invading the core of the bodily integrity protection." *Guertin v. State*, 912 F.3d 907, 920–21 (6th Cir. 2019).

***11** *Brown*, 2020 WL 1503256, at * 7. The presence of legionella bacteria was a foreseeable consequence of the April 2014 switch to the Flint River. As such,

> Plaintiff plausibly alleges that the presence of *legionella* bacteria in Flint was a foreseeable result of the April 2014 switch to Flint River water. Because Defendants allegedly hid the fact that Flint's water contained life-threatening substances like lead and *legionella*, and because under state and municipal law, Plaintiff was not permitted to receive water in any other way, Flint Code of Ord. §§ 46-25, 46-26, 46-50(b), Plaintiff's claim implicates the right to bodily integrity. *See Walters*, 2019 WL 3530874, at *15.

Brown, 2020 WL 1503256, at * 7. Moreover, the Court's reasoning regarding exposure in *Brown* applies with the same force here:

> The right to bodily integrity is not dependent upon which particular dangerous or even lethal substance came from Flint's pipes. Defendants made a choice to utilize the long dormant Flint Water Treatment Plant ("FWTP"), knowing that the plant required millions of dollars in upgrades before it could process the raw water from the Flint River, and that those upgrades would not be implemented.

Id. at *8.

As such, this issue has already been fully litigated in *Marble* and *Brown*. MDEQ Defendants and State Defendants advance no compelling arguments to justify treating *legionella*-related cases differently from lead injury cases. Accordingly, the Court will adhere to its prior decisions in *Marble* and *Brown*.

b) Defendants Cook and Dillon

In *Brown*, the Court dismissed the bodily integrity claims against Cook and Dillon because the Master Complaint contained insufficient factual allegations against them that preceded Odie Brown's death in January 2015. *Brown*, 2020 WL 1503256, at *9, *12. If the pre-January 2015 allegations in *Brown* were insufficient, then Plaintiff's pre-September 2014 allegations here must also fail. For the reasons stated in *Brown*, Plaintiff's bodily integrity claims against Cook and Dillon are dismissed.[8] *See Brown*, 2020 WL 1503256, at *9, *12.

c) Defendant Governor Snyder

In contrast to Cook and Dillon, the allegations set forth in *Brown* indicated that Governor Snyder knew of and inferred a substantial risk of serious harm to Flint water users prior to September 2014.

> [Governor Snyder] knew that the use of "Flint River water as a primary drinking source had been professionally evaluated and rejected as dangerous and unsafe" in 2011. (*Id*. at PageID.5077.) He also knew that under the plan to create the Karegnondi Water Authority, Flint River water would be used as an interim source of water for the City of Flint. (*Id*.) Plaintiff also alleges that shortly after the switch to Flint River water, the Governor's office began receiving complaints about the water. (*Id*. at PageID.5085.) There were also numerous press stories about water quality problems in Flint as early as May 2014. (*Id*.) By June of 2014, "[m]any Flint water users reported that the water was making them ill[.]"

***12** *Id*. (citing *Walters*, No. 17-10164, ECF No. 185-2). As in *Brown*, it is reasonable to infer that because Governor Snyder knew of the significant risks and seriously compromised water quality issues well before then, he knew

of and did infer a substantial risk. *Brown*, 2020 WL 1503256, at *8. Accordingly, the first two elements of a bodily integrity claim have been adequately plead.

As for the third element of a bodily integrity claim, callous disregard, the Court in *Marble* determined that the plaintiff's claim that Governor Snyder "authorized the switch to the Flint River, knowing that 'there was no agreed upon plan in place to implement the necessary remediation at the FWTP in order to use Flint River water as Flint's sole source of water.' " *Marble*, 453 F. Supp. 3d at 994 (citing Master Complaint from *Walters*, No. 17-10164, ECF No. 185-2, PageID.5077.) The Court in *Marble* also reasoned that "the Governor's continued inaction following the switch reinforces his deliberate indifference." *Id*. Even without the allegations of a cover-up beginning in January 2015, approximately four months after Bacon contracted *legionella*-related illness, Governor Snyder's failure to act for months despite notice of harm shows a callous disregard. The Court came to a similar conclusion in *Brown*, where it also disregarded allegations that took place after January 2015. *Brown*, 2020 WL 1503256, at * 9. Accordingly, Governor Snyder's motion to dismiss is denied and Plaintiff's bodily integrity claim against him may continue.

d) Defendants Croft, Glasgow, and Johnson

In *Carthan*, the Court summarized Croft, Glasgow, and Johnson's alleged actions. The following occurred before September 12, 2014, when Bacon contracted illness:

> As the transition to the Flint River loomed, [in spring of 2014] all three knew that the FWTP was not ready to process the raw water. And Croft, in particular, was aware of the lead and Legionnaires' disease issues that followed the transition. Glasgow tested for and found high concentrations of lead in the water. He also recognized that Flint was not using corrosion control treatment and had no legitimate lead and copper testing in place.... Despite knowing that the FWTP was not ready to process the Flint River water, Croft and Johnson pressured Glasgow to give the green light to the transition [in April 2014].

Carthan, 384 F. Supp. 3d at 860. Accordingly, it is reasonable to conclude that these Defendants were aware of the substantial risk of harm facing Bacon, that they did infer it, and that they acted with callous disregard toward her.

In *Walters*, the Court found that the plaintiffs' bodily integrity claims in the Master Complaint contained essentially the same allegations as the *Carthan* complaint with respect to Croft, Johnson, and Glasgow. *Walters*, 2019 WL 3530874, at *18. Accordingly, for the same reasons set forth in *Carthan* and *Walters*, Croft, Glasgow, and Johnson were aware of the substantial risk of harm facing Bacon.

Analyzing the callous disregard element with respect to these three Defendants again in *Marble*, the Court stated,

> [A]ll three Defendants participated in making the switch to the Flint River in April 2014, knowing that the FWTP was not ready to process water. This fact alone is enough to show callous disregard for Bertie Marble's bodily integrity.

453 F. Supp. 3d at 1000. Here, this fact alone is also enough to show Croft, Glasgow, and Johnson's callous disregard for Bacon's bodily integrity. Because these individuals were involved in the switch to the Flint River, knowing full well of the dangers, and the relevant conduct took place prior to September 14, 2014, Plaintiff has stated a bodily integrity claim against Croft, Glasgow, and Johnson.

e) Defendants Busch and Prysby

***13** With respect to Busch and Prysby, the relevant pre-September 2014 facts were also set forth in *Marble*.

> Plaintiffs allege that Busch was involved in resolving the regulatory hurdles to using Flint River water. (*Id*. at PageID.5173–5176.) For example, he helped obtain an Administrative Consent Order ("ACO") that was critical to allowing the City of Flint to begin using the FWTP, although the plant was "nowhere near ready to begin distributing water." (*Id*. at PageID.5176.) Plaintiffs allege that Prysby reviewed and approved the permit "that was the last approval necessary for the use of the Flint Water Treatment Plant." (*Id*. at PageID.5081, 5179.)
>
> Moreover, shortly before the switch, the FWTP's water quality supervisor wrote to Prysby and Busch that he had inadequate staff and resources to properly monitor the water. (*Id*. at PageID.5080.) As a result, he informed Prysby and Busch, "I do not anticipate giving the OK to begin sending water out anytime soon. If water is distributed from this plant in the next couple of weeks, it will be against my direction." (*Id*.) But Prysby and Busch did not act on this warning.

Id. at 997 (citing Master Complaint from *Walters*, No. 17-10164, ECF No. 185-2.) The Court found that, based on these facts, Busch and Prysby knew of and did infer a substantial risk of serious harm to Flint water users, and showed a callous disregard for Marble's right to bodily integrity. These facts apply with equal force to Bacon. Busch and Prysby argue that "[t]he first allegation that Busch or Prysby had knowledge of a *legionella* issue in Flint is alleged to be March 10, 2015, six months after Plaintiff's alleged contraction." (ECF No. 91, PageID.1301.) However, the Court has already rejected this contention in *Brown* and *Marble*.

> [T]he risks of using Flint River water channeled through the FWTP were substantial. The complaint alleges that many of these MDEQ Defendants knew as early as May 2014 that Flint's water was contaminated in ways that could be life threatening. (*Id*. at PageID.5130–5131, 5140–5141.) Even if the MDEQ Defendants were not aware of *legionella* bacteria in particular by the time of Odie Brown's death, the facts alleged plausibly show that Busch, ... and Prysby were aware of the dangerous condition of the City's water supply before she died.

Brown, 2020 WL 1503256, at * 10 (citing *Walters*, No. 17-10164, ECF No. 185-2); *see also Marble*, 453 F. Supp. 3d at 996–997. Accordingly, Busch and Prysby's motion to dismiss Plaintiff's bodily integrity claim is denied. Plaintiff's bodily integrity claim against Busch and Prysby may continue.

f) Defendant Rosenthal

With respect to Rosenthal, the *Walters* Master Complaint—adopted in full by Plaintiff here—contains essentially the same allegations related to the plaintiffs' bodily integrity claims in *Carthan*. *Walters*, 2019 WL 3530874, at *18. On appeal, the Sixth Circuit summarized Rosenthal's alleged pre-September 2014 conduct that applies equally to Bacon in this case.

On April 16, 2014, the week before the switch to the Flint River, Rosenthal received an email from Michael Glasgow, stating, "[I]t looks as if we will be starting the plant up tomorrow and are being pushed to start distributing water as soon as possible.... I would like to make sure we are monitoring, reporting and meeting requirements before I give the OK to start distributing water." *Carthan*, 960 F.3d at 314. (citing Amended Complaint in *Carthan*, No. 16-10444, ECF No. 349, PageID.11804.) And the very next day, Glasgow informed the MDEQ that "the FWTP was not fit to begin operations and that 'management' was not listening to him." *Id*. The Sixth Circuit also noted that, "[b]ack in May 2014, MDEQ officials—including Busch, Prysby, and Rosenthal—knew that [total trihalomethane] levels were above the EPA's maximum contaminant level but did nothing, even as residents raised concerns about the water." *Id*. at 315 (citing Master Complaint in *Carthan*, No. 16-10444, ECF No. 349, PageID.11813–14.). Moreover, in the summer of 2014, the Michigan Department of Health and Human Services ("MDHHS") reported an outbreak of Legionnaires' disease, which occurs when water droplets contaminated with *legionella* bacteria are inhaled. (*Id*.) These events all took place before Bacon became ill.

***14** The relevant allegations that the Sixth Circuit in *Carthan* found sufficient to state a claim against Rosenthal for bodily integrity are that Rosenthal was the MDEQ Water Quality Analyst who "did not stop the switch to the Flint River in spite of Glasgow's warning that the FWTP was not ready." *Id*. at 327. That Rosenthal "knew as early as May 2014 that the water contained high TTHM levels that were above regulation ... and did nothing." *Id*. These same facts pleaded in the *Walters* Master Complaint are sufficient to show that Rosenthal knew of and did infer a substantial risk of serious harm to Flint water users, including Bacon.[9] Further, these allegations are adequate to show that Rosenthal callously disregarded Bacon's right to bodily integrity. Rosenthal's motion to dismiss is denied, and Plaintiff's claim against him may continue.

g) Defendant City of Flint

Plaintiff alleges the City of Flint is liable under 42 U.S.C. § 1983 as a result of the unconstitutional actions taken by Earley and Ambrose. (*Walters*, No. 17-10164, ECF No. 185-2, PageID.5051–52, 5055–56.) Under *Monell v. Dep't of Soc. Servs. of the City of New York*, a plaintiff may bring a § 1983 claim against a city for the unconstitutional conduct of its employees only if the employees' conduct implemented a policy "officially adopted and promulgated by that body's officers." 436 U.S. 658, 690 (1978). However, a municipality "cannot be held liable solely because it employs a tortfeasor." *Id*. at 691. Liability will only attach where the policy or custom was the "moving force" behind the constitutional violation. *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 607 (6th Cir. 2007).

In *Carthan*, the Court held that Earley and Ambrose "were final decisionmakers for Flint with respect to the decision to provide residents with contaminated water." 384 F. Supp. 3d at 865 (citing *Carthan*, 329 F. Supp. 3d at 421–22). As such, "their actions represented official policy and Flint could be held liable for their conduct insofar as it violated plaintiffs' rights." *Carthan*, 329 F. Supp. 3d at 422.

Here, even though Plaintiff has conceded to dismissal of Earley and Ambrose (ECF No. 105, PageID. 1476), she states a claim for *Monell*-based bodily integrity against the City of Flint for the same reasons set forth in *Carthan* and *Brown*. *Carthan*, 329 F. Supp. 3d at 422; *Brown*, 2020 WL 1503256, at * 14.

3. Wealth-Based Equal Protection Claim

Plaintiff alleges that MDEQ Defendants, State Defendants, and City Defendants violated her right to be free from wealth-based discrimination. (ECF No. 86, PageID.1189.) Plaintiff's wealth-based equal protection allegations are based solely on the allegations set forth in the Master Complaint from *Walters*. In *Walters*, the Court analyzed and dismissed the plaintiffs' wealth-based discrimination claims because the plaintiffs failed to identify how their treatment differed from a similarly situated class of persons. *Walters*, 2019 WL3530874, at *20. The Court adopts these conclusions from *Walters*, and Plaintiff's wealth-based equal protection claim is dismissed.

4. Professional Negligence Claim

Plaintiff also alleges a professional negligence claim against Defendants LAN, LAD, and Rowe. (ECF No. 86, PageID.1189.) Only LAN and LAD moved to dismiss. However, neither LAN nor LAD have presented any arguments that differ from the arguments presented and rejected in *Walters*. 2019 WL 3530874, at *40. For the reasons set forth in *Walters*, LAN's motion to dismiss is denied. Plaintiff's claims for professional negligence against LAN and LAD may go forward.

5. Punitive Damages Claim

***15** Plaintiff also incorporates the Punitive Damages claim from the Master Complaint in *Walters* against all Defendants. (ECF No. 86, PageID.1189 (*Walters*, No. 17-10164, ECF No. 185-2, PageID. 5234).) MDEQ Defendants, State Defendants, and LAN move to dismiss. (ECF No. 89, 91.) City Defendants and LAD incorporate their motions to dismiss this claim in other cases. (ECF No. 93, PageID.1327; ECF No. 90, PageID.1206.)

Punitive damages may be awarded in § 1983 actions "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *King v. Zamiara*, 788 F.3d 207, 216 (6th Cir. 2015) (quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)). Based on the allegations set forth in the above bodily integrity section of this Opinion and Order, Plaintiff plausibly pleads both recklessness and indifference to the right to bodily integrity against Defendants Snyder, Croft, Glasgow, Johnson, Busch, Prysby, Rosenthal, and the City of Flint (*Monell*-liability). As a result, Plaintiff may continue to seek punitive damages against these Defendants with respect to her remaining § 1983 bodily integrity claim.

Plaintiff also alleges she is entitled to punitive damages because she brought professional negligence claims against LAD and Rowe. Plaintiff acknowledges that these issues were already litigated in *Brown* and *Marble*. There, the Court dismissed the plaintiffs' claims for punitive damages related to professional negligence, because the plaintiffs in those cases acknowledged that punitive damages are not available for negligence claims. *See Marble*, 453 F. Supp. 3d at 1010; *Brown*, 2020 WL 1503256, at *16. The result here is no different. Plaintiff's punitive damages claim against LAN and LAD under a professional negligence theory are dismissed.

Rowe answered the complaint and did not move to dismiss this claim. However, in light of this decision, Rowe may file a motion under Rule 12(c) within sixty days, which is Monday December 21, 2020.

6. Joint and Several Liability and Exemplary Damages

Plaintiff acknowledges that her assertions of joint and several liability and exemplary damages are identical to those rejected in *Marble*, *Brown*, and *Walters*. (ECF No. 101, PageID.1394.) While she disagrees with the Court's rulings in those cases, Plaintiff provides no basis for a different result here. (*Id.*)

The Court agrees that the rulings in *Marble*, *Brown*, and *Walters* apply and dictate the same result here. Accordingly, Plaintiff's assertions of joint and several liability and claim for exemplary damages are dismissed.

V. Conclusion

Defendants' motions to dismiss Plaintiffs' Short Form Complaint are granted in part and denied in part. Specifically, Defendants' motions to dismiss:

- Plaintiff's wrongful death claim (Count XIII) is GRANTED as to all Defendants (except Rowe), because Plaintiff did not plead any facts to demonstrate that Bacon's death, or injuries resulting in death, were caused by *legionella* exposure or, in turn, by any wrongful act, neglect or fault Defendants;

- Plaintiff's state-created danger claim (Count I) is GRANTED as to all Defendants;

- Plaintiff's bodily integrity claim (Count II) is GRANTED with respect to Dillon, Cook, and the City of Flint, but DENIED with respect to Snyder, Croft, Glasgow, Johnson, Busch, Prysby, and Rosenthal;

- Plaintiff's wealth-based equal protection claim (Count IV) is granted as to all Defendants;

***16** - Plaintiff's punitive damages claim (Count VIII) is GRANTED with respect to Plaintiffs' professional negligence claims against LAN and LAD, but DENIED with respect to Plaintiff's § 1983 claims; and

- Plaintiff's request for exemplary damages and allegations of joint and several liability are GRANTED.

Plaintiff's request that she be given leave to amend is DENIED.

As set forth above, Rowe may file a motion under Rule 12(c) as to Plaintiff's wrongful death and punitive damages claims within sixty days, which is Monday December 21, 2020.

VI. Order

IT IS ORDERED THAT,

MDEQ Defendants' motion to dismiss (ECF No. 91) is GRANTED in part and DENIED in part; City Defendants' motion to dismiss (ECF No. 93) is GRANTED in part and DENIED in part; LAN and LAD's motions to dismiss (ECF Nos. 89, 90) are GRANTED in part and DENIED in part.

As a result, Plaintiff's bodily integrity claims against Defendants Snyder, Croft, Glasgow, Johnson, Busch, Prysby, and Rosenthal will proceed; her professional negligence claims against LAN and LAD will proceed; and Plaintiff may continue to request punitive damages with respect to her remaining § 1983 claims. All of Plaintiff's other claims are dismissed except as to Rowe as set forth above.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 6218787

Footnotes

1 The Court will refer to Ms. Sapolin, as personal representative of Ms. Bacon's estate as Plaintiff, and will refer to Ms. Bacon herself as Bacon.

2 Defendants former Governor Richard D. Snyder and Andy Dillon filed a notice of joinder/concurrence in the MDEQ Defendants' motion to dismiss. (ECF No. 92.) (Defendants Snyder and Dillon are, collectively, the "State Defendants.") Defendant Adam Rosenthal also filed a joinder and concurrence in the MDEQ Defendants' motion. (ECF Nos. 97, 99.) Rosenthal will be included in the Court's reference to the "MDEQ Defendants."

3 Plaintiff originally included Bradley Wurfel in her operative complaint, but stipulated to his dismissal shortly thereafter. (ECF No. 88.) The operative complaint also named Darnell Earley and Gerald Ambrose. (ECF No. 86.) However, in her response to the City Defendants' motion to dismiss, and as further discussed below, Plaintiff consented to the dismissal of her claims against Earley and Ambrose. (ECF No. 105, PageID.1476.) Accordingly, these three individuals are not included in this list.

4 Plaintiff does not specify whether she sues former Governor Snyder in his official or individual capacity. For the sake of consistency with earlier Flint Water decisions, former Governor Snyder will be referred to as Governor Snyder or the

Governor where it appears that the claim against him is in his individual capacity. Where it appears that the claim is against him in his official capacity, the claim is now against Governor Gretchen Whitmer. *See* Fed. R. Civ. P. 25(d). But, again, for consistency, the Court will still refer to Governor Snyder.

5 Defendant Rowe answered the complaint. (ECF No. 98.)

6 Plaintiff did so pursuant to the Court's order allowing Plaintiffs in any remaining post-*Marble* and post-*Brown legionella* cases to amend their complaints before June 3, 2020. (ECF No. 1150.)

7 Moreover, Plaintiff doubles down on this discrepancy in her sur-reply, claiming that she may have never intended to incorporate the state-court filings at all, where she states:

> The MDEQ Defendants have incorrectly represented that Plaintiff is relying on the Master Long Form Complaint filed in the Genesee County Circuit Court. This is simply not true. Plaintiff is relying on her Amended Short Form Complaint ([ECF No.]86), which expressly adopted the Master Long Form Complaint that was filed with this Court in *Walters* ...

(ECF No. 111-1, PageID.1527.) Her sur-reply is not a factor in this decision, but it does illustrate more of the inconsistencies she presents in this case.

8 In her response to the City Defendants' motion to dismiss, Plaintiff states that, based on *Brown*, dismissal should be denied against all Defendants "except for Defendants Ambrose and Walling." (ECF No. 105, PageID. 1469–70.) However, Walling is not a defendant in this case (ECF No. 86), so it is unclear why Plaintiff includes this argument. However as to Ambrose, the Court accepts Plaintiff's statement in her response that Defendants' motion to dismiss should be denied except as to Ambrose as a stipulation to his dismissal. Ambrose is dismissed.

9 This conclusion still stands even without the facts cited in *Carthan* regarding the September 2014 MDHHS report regarding lead poisoning levels in children being higher than usual, the officials' October 2014 realization that bacterial contamination partly stemmed from the over-75-year-old-pipes, or any of the other later-in-time facts. *Carthan*, 960 F.2d at 315.

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969 F.3d 298
United States Court of Appeals, Sixth Circuit.

IN RE: FLINT WATER CASES.
Marlana Sirls et al.; Leanne Walters, individually and as next friend of her children G.w.1, G.w.2, K.M., J.D. et al., Plaintiffs-appellees,
v.
State of Michigan et al., Defendants, Stephen Busch, Patrick Cook, Michael Prysby, and Bradley Wurfel; Adam Rosenthal; Richard Dale Snyder, Andy Dillon, and Gretchen Whitmer; City of Flint, Michigan, Howard Croft, Daugherty Johnson, Michael Glasgow, Darnell Earley, and Gerald Ambrose, Defendants-Appellants.

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Argued: June 9, 2020
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Decided and Filed: August 5, 2020

Synopsis

Background: Residents brought action against city and government officials, arising out of allegedly causing and covering up the lead poisoning of city residents through their water supply. The United States District Court for the Eastern District of Michigan, Judith E. Levy, J., 2019 WL 3530874, granted in part and denied in part city's and officials' motion to dismiss and residents' motion to amend the master complaint, which contained all the various allegations and claims made by plaintiffs across coordinated litigation. City and officials appealed.

Holdings: The Court of Appeals, Moore, Circuit Judge, held that:

[1] prior appellate decision addressing same claims at motion-to-dismiss stage controlled, and

[2] former Governor was proper party to action.

Affirmed and remanded.

Sutton, Circuit Judge, filed concurring opinion.

See also 960 F.3d 303.

West Headnotes (2)

[1] **Judgment** Appellate courts
Judgment What constitutes identical causes

Prior appellate decision addressing same claims at motion-to-dismiss stage controlled, and thus precluded dismissal of government official in action regarding poisoning of city residents due to switch in water supply, despite contention that allegations against official in subsequent case should have been viewed differently from prior decision; prior decision concluded that same city and state officials plausibly violated city residents' substantive due process right to bodily integrity and were not entitled to qualified immunity, and allegations in subsequent case included that official pressured another to go forward with water switch even though water treatment plant was not ready, and that official stonewalled county health department's attempt to investigate water-quality issues. U.S. Const. Amend. 5.

[2] **States** Governor

Former Governor was proper party to action for damages from decisions that allegedly caused, sustained, and covered up poisoning of city residents due to switch in water supply, despite contention that Governor was too high-ranking to know of risks of switching water supply; Governor was alleged to have coordinated switch of water supplies knowing that water would not be treated for contamination, was alleged to have refused to switch city back to clean water, knowing that residents were being poisoned, and was alleged to have hidden the full extent of the dangers and to have failed to take remedial actions.

***299** Appeal from the United States District Court for the Eastern District of Michigan at Ann Arbor. No. 5:17-cv-10342—Judith E. Levy, District Judge.

Attorneys and Law Firms

ARGUED: Charles E. Barbieri, FOSTER, SWIFT, COLLINS & SMITH, P.C., Lansing, Michigan, for Appellants Busch, Cook, Prysby, and Wurfel. Margaret A. Bettenhausen, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellants Snyder, Dillon, and Whitmer. Christopher J. Marker, O'NEIL, WALLACE & DOYLE, P.C., Saginaw, Michigan, for Appellant Glasgow. Edwar A. Zeineh, LAW OFFICE OF EDWAR A. ZEINEH, Lansing, Michigan, for Appellant Johnson. Renner K. Walker, LEVY KONIGSBERG LLP, New York, New York, for Appellees. ON BRIEF: Charles E. Barbieri, Allison M. Collins, FOSTER, SWIFT, COLLINS & SMITH, P.C., Lansing, Michigan, Jay M. Berger, Michael J. Pattwell, CLARK HILL PLC, Lansing, Michigan, Philip A. Grashoff, Jr., SMITH HAUGHEY RICE & ROEGGE, Grand Rapids, Michigan, for Appellants Busch, Cook, Prysby, and Wurfel. Margaret A. Bettenhausen, Richard S. Kuhl, Nathan A. Gambill, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellants Snyder, Dillon, and Whitmer. Christopher J. Marker, O'NEIL, WALLACE & DOYLE, P.C., Saginaw, Michigan, William Y. Kim, CITY OF FLINT, Flint, Michigan, Edwar A. Zeineh, LAW OFFICE OF EDWAR A. ZEINEH, Lansing, Michigan, Frederick A. Berg, Jr., BUTZEL LONG, P.C., Detroit, Michigan, Sheldon H. Klein, BUTZEL LONG, P.C., Bloomfield Hills, Michigan, Todd R. Perkins, THE PERKINS LAW GROUP PLLC, Detroit, Michigan, Alexander S. Rusek, WHITE LAW, PLLC, Okemos, Michigan, Barry A. Wolf, Flint, Michigan, for Appellants City of Flint, Croft, Johnson, Glasgow, Earley, and Ambrose. James W. Burdick, BURDICK LAW, P.C., Bloomfield Hills, Michigan, James A. Fajen, FAJEN AND MILLER, PLLC, Ann Arbor, Michigan, for Appellant Rosenthal. Renner K. Walker, Corey M. Stern, LEVY KONIGSBERG LLP, New York, New York, Hunter J. Shkolnik, NAPOLI SHKOLNIK PLLC, New York, New York, for Appellees.

Before: MOORE, SUTTON, and WHITE, Circuit Judges.

MOORE, J., delivered the opinion of the court in which SUTTON and WHITE, JJ., joined. SUTTON, J. (pp. 304–06), delivered a separate concurring opinion.

OPINION

KAREN NELSON MOORE.

***300** This is an appeal from one of the many strands of the Flint Water Crisis litigation. The City of Flint and City and State officials (collectively, "Defendants-Appellants") allegedly caused, sustained, and covered up the poisoning of the people of Flint.[1] As Defendants-Appellants for the most part concede that our prior decisions control the outcome of this case, we dispose of their appeal in short order.

LeeAnne Walters and Marlana Sirls (collectively, "Plaintiffs-Appellees") are part of the coordinated stream of Flint Water Crisis cases brought by individual plaintiffs. *See In re Flint Water Cases (Sirls et al. v. Michigan et al.)*, No. 5:17-cv-10342-JEL-EAS, 2019 WL 3530874, at *1 (E.D. Mich. Aug. 2, 2019). "Counsel for the plaintiffs in these cases were selected as coliaison lead counsel." *Id.* On December 15, 2017, counsel filed a "Master Complaint" on the *Walters* docket that contained all the various allegations and claims made by plaintiffs across the coordinated litigation. *See* R. 115 (*Walters* Docket, No. 5:17-cv-10164-JEL-MKM, Master Compl.) (Page ID #1367). Walters and Sirls then filed "short-form" complaints ***301** on their individual dockets on February 1, 2018, charting out the components of the Master Complaint that they were adopting as their own, including named defendants, alleged injuries, and claims. *See* R. 72 (*Sirls* Docket, No. 5:17-cv-10342-JEL-EAS, Short-Form

Compl.) (Page ID #691); R. 124 (*Walters* Docket, No. 5:17-cv-10164-JEL-MKM, Short-Form Compl.) (Page ID #1674). After defendants filed motions to dismiss, plaintiffs moved for leave to amend the Master Complaint, and defendants responded to plaintiffs' motion for leave to amend. *See Sirls*, 2019 WL 3530874, at *1–2. The district court assessed the motions to dismiss and the motion to amend simultaneously and rendered "a single omnibus decision" on August 2, 2019. *Id.* at *2.[2] The district court granted in part and denied in part both sets of motions and adopted aspects of the proposed amended Master Complaint as the operative complaint. *Id.* Defendants-Appellants timely appeal from that decision.

Defendants-Appellants in this case are largely the same as those that were parties in *In re Flint Water Cases (Waid v. Snyder)*, 960 F.3d 303 (6th Cir. 2020).[3] There are no new Defendants-Appellants in this case, the claims at issue are the same, and we again take their appeal at the motion-to-dismiss stage.[4] In *Waid*, we decided that the same City and State officials who are Defendants-Appellants in this case plausibly violated plaintiffs' substantive due process right to bodily integrity and are not entitled to qualified immunity. *Id.* at 311. We additionally rejected the City of Flint's and Governor Whitmer's arguments that the Eleventh Amendment requires their dismissal from the case. *Id.* The full court denied *en banc* rehearing of *Waid* on July 14, 2020. *Waid v. Snyder*, No. 19-1472, slip op. (6th Cir. July 14, 2020) (order). At oral argument in this case, all but one Defendant-Appellant conceded that *Waid* controls our outcome here.[5]

[1] The outlier is Daugherty Johnson, who encourages us to view the allegations against him in this case differently than those levied against him in *Waid*. When pressed at oral argument for any meaningful distinctions between the two sets of allegations, Johnson tried to re-direct our focus to the plausibility of the pleadings. Yet, Johnson acknowledged that, like in *Waid*, the allegations here include that he pressured Michael Glasgow to go forward with the switch to Flint River water even ***302** though the water treatment plant was not ready. *See Waid*, 960 F.3d at 326. And Johnson acknowledged that, like in *Waid*, he is alleged to have stonewalled the county health department's attempt to investigate water-quality issues. *See id.* In light of these key similarities, which formed the basis for our decision with respect to Johnson in *Waid*, we conclude that there is no reason to treat Johnson any differently under the facts alleged in this case.

Separately, Plaintiffs-Appellees, like the plaintiffs in *Waid*, ask that we remand for the district court to decide whether former State Treasurer Andy Dillon should be dismissed in light of the district court's decision in *Brown v. Snyder (In re Flint Water Cases)*, No. 18-cv-10726, 2020 WL 1503256, at *9 (E.D. Mich. Mar. 27, 2020). *See Waid*, 960 F.3d at 332. We see no issue with doing so.

[2] Finally, we find it necessary to address the concurrence's criticisms of *Waid*—a stand it takes today after no judge of this court requested a poll for *en banc* rehearing of that case. *See Waid v. Snyder*, No. 19-1472, slip op. (6th Cir. July 14, 2020) (order). *Guertin v. Michigan*, in the concurrence's view, requires that we treat higher-ups differently than officials making decisions on the ground. *See* 912 F.3d 907 (6th Cir. 2019), *cert. denied*, —— U.S. ——, 140 S. Ct. 933, 205 L.Ed.2d 522 (2020). According to the concurrence, the majority in *Waid* skirted that command. That is the wrong reading of the law and a faithless reading of the facts.

In theory, the concurrence knows that our job is to "closely examine[ ] the culpability of each defendant to see if they 'personally' committed the sort of 'conscience-shocking' conduct required to sustain a substantive due process claim." Conc. Op. at 304 (quoting *Guertin*, 912 F.3d at 929). Yet, the concurrence quickly tumbles out of that test and into one of its own devising: if officials lower in the state-wide hierarchy are entitled to immunity, then higher-up government officials are entitled to immunity, too, according to the concurrence.

The concurrence points out that three high-ranking officials —Daniel Wyant (Director of the Michigan Department of Environmental Quality ("MDEQ")), Nick Lyon (Director of the Michigan Department of Health and Human Services ("MDHHS")), and Eden Wells (Chief Medical Executive at the MDHHS)—were dismissed in *Guertin* because they "were too far removed from the relevant conduct to justify allowing the claims against them to proceed." Conc. Op. at 304-05. The *Guertin* court held that these officials were not among the "chief architects" of the crisis and, accordingly, that they were entitled to immunity. 912 F.3d at 926. Snyder, the concurrence contends, is similarly situated.[6]

Wyant is a conceivable comparator for Snyder. As director of the MDEQ, Wyant in all likelihood was aware of the crisis and should have done more to stop it. The *Guertin* court dismissed Wyant, however, because the complaint did not ground the theoretical in particular allegations. "Plaintiffs d[id] not plausibly allege Wyant *personally* made decisions

regarding the water-source switch, nor d[id] they allege he *personally* engaged in any other [conscience-shocking] conduct." *Id.* at 929 (emphasis added). And, of course, Wyant could be held accountable only "for his own conduct, ***303** not the misconduct of his subordinates." *Id.* For those reasons, the *Guertin* plaintiffs' claims against Wyant failed. As for Lyon and Wells, the MDHHS was responding to the health crisis created by other State and City officials. Thus, the involvement of the MDHHS, the department that Lyon and Wells oversaw, was attenuated to begin with. In the end, the *Guertin* court not only dismissed Lyon and Wells, but two lower-level MDHHS employees as well. *See id.* at 929–32.

The concurrence concedes that Snyder, unlike the high-ranking officials dismissed in *Guertin*, was personally involved in the decision to switch Flint's water supply, and that Snyder knew that there was no plan to update Flint's water treatment plant to make Flint River water safe. "But," according to the concurrence, "the complaint nowhere alleges that [Snyder] knew or should have known about the risk that move posed." Conc. Op. at 305. That assertion is hard to fathom.

The plaintiffs in *Waid* alleged that Snyder personally helped coordinate the City of Flint's switch from clean Detroit Water and Sewerage Department ("DWSD") water to contaminated Flint River water. *Waid*, 960 F.3d at 330. Plaintiffs-Appellees additionally allege in this case that Snyder not only knew that the Flint River would serve as an interim water source, but that he knew that there were no plans to update the water plant so that it could treat the water properly before making the switch. R. 185-2 (Am. Master Compl. at 35–36, ¶ 109) (Page ID #5076–77). Moreover, Snyder's staff were told that "the 'expedited timeframe' for switching to Flint River water 'is less than ideal and could lead to some big potential disasters down the road.' " *Waid*, 960 F.3d at 314 (internal quotation omitted).

Soon after the switch went into effect, General Motors cut off the Flint River water supply to its engine plant because the water's chloride levels were so dangerously high that it would corrode the machinery. *Id.* at 315–16. In response, a member of Snyder's executive staff sent an email to the full team about comments in the media about Flint residents being treated as "lab rats," and fretting that it might come out that the chemical composition of the water "exceeded health-based water quality standards." *Id.* at 316 (internal quotation omitted). To prevent the crisis from snowballing, the executive staff member recommended that the Governor's office ask the Emergency Manager for the City of Flint to switch Flint back to its prior source of clean water, the DWSD. *Id.* Snyder's legal counsel agreed that the Flint River water issues were " 'downright scary' " and "advised that, '[t]hey should try to get back on the [DWSD] system as a stopgap ASAP before this thing gets too far out of control.' " *Id.* (internal quotation omitted).

Yet, Snyder did not try to switch Flint back to clean water, or to mitigate the crisis with protective equipment, or to acknowledge the dangers of the water contamination—even after his own chief of staff told him that "[t]he water issue continues to be a danger flag." *See id.* at 318 (internal quotation omitted). Snyder's office, instead, coordinated with the MDEQ Director of Communications to create political cover for Snyder's administration. *See id.* Snyder's office also managed to supply water coolers for State buildings, while refusing to distribute water filters to the people of Flint. *See id.* at 330. From these allegations, it is hard to imagine that Snyder was kept in the dark about the cause and extent of the crisis, and we do not hesitate to conclude that Snyder's alleged personal actions demonstrated deliberate indifference.

***304** But the concurrence's point is not really about the plausibility of the pleadings or whether Snyder's conduct shocks the conscience. The concurrence's real issue with *Waid* is that we refused to dismiss a high-ranking government official from the litigation. To escape the *Waid* plaintiffs' and Plaintiffs-Appellees' extensive and personal allegations against former Governor Snyder, the concurrence peddles a new appendage to qualified-immunity doctrine that effectively would grant high-ranking officials absolute immunity regardless of the allegations. Snyder, in the concurrence's view, simply is too high-up to be accountable. Perhaps that would be the case for a different governor in a different set of circumstances. Perhaps that would be the winning argument had the crisis in Flint not been under the public eye and had it not been orchestrated and debated at the highest levels of state government. But on these facts, Snyder is alleged to have coordinated the switch to Flint River water knowing that the water would not be treated for contamination. Snyder is alleged to have refused to switch Flint back to clean water, knowing that the people of Flint were being poisoned. Snyder is alleged to have hidden the full extent of the dangers and to have failed to take remedial actions. On these facts, Snyder is named to defend his own actions, not those of his subordinates, and there is no basis for dismissing him from this case. Thus, although we fail to see

why saying so is relevant to the task at hand, we stand by our decision in *Waid*.

In conclusion, we hold that *Waid* controls our outcome here and accordingly **AFFIRM** the district court's denial of the motions to dismiss as to all Defendants-Appellants except former Treasurer Dillon. We **REMAND** for the district court to decide in the first instance whether Dillon should be dismissed in light of the district court's decision in *Brown*, 2020 WL 1503256, at *9.

SUTTON, Circuit Judge, concurring.

CONCURRENCE

Just months ago, we decided *Carthan*, since recaptioned *Waid*, a case involving the same parties pressing the same claims in the same motion-to-dismiss posture. *See In re Flint Water Cases* (*Waid*), 960 F.3d 303 (6th Cir. 2020). A majority rejected each defendant's arguments for dismissal. *Id.* at 311. When it comes to resolving this functionally identical dispute, we must follow the same path. That's why I concur.

But in my respectful view, *Waid* erred in allowing claims to proceed against Governor Rick Snyder and Treasurer Andy Dillon. *Waid* came after our first Flint water case, *Guertin v. State*, 912 F.3d 907 (6th Cir. 2019), which allowed substantive due process claims to proceed against several Michigan officials for their role in the crisis. Right or wrong, *Guertin* did not casually assign blame to all named parties. It closely examined the culpability of each defendant to see if they "personally" committed the sort of "conscience-shocking" conduct required to sustain a substantive due process claim. *Id.* at 929. Of the twelve defendants named in *Guertin*, the court allowed claims to proceed against seven. *See id.* at 916. It dismissed the claims against the remaining five. *See id.*

Guertin dismissed claims against three high-ranking officials: Daniel Wyant (Director of the Michigan Department of Environmental Quality), Nick Lyon (Director of the Michigan Department of Health and Human Services), and Eden Wells (Chief Medical Executive at the Department of Health and Human Services). *See id.* at 916, 927, 929–31. In each case, it concluded that the officials were too far removed from the relevant conduct to justify allowing ***305** the claims against them to proceed. *See id.* at 929–31. Wyant, it's true, "was aware of some of the issues arising with the water supply." *Id.* at 929. And he admitted to his department's "colossal failure" to act. *Id.* But while the conduct of certain "individuals within his department was constitutionally abhorrent," we found the bulk of the responsibility lay with them. *Id.* And we declined to "hold [him] accountable for ... the[ir] misconduct" despite some knowledge of the danger posed. *Id.*

Lyon and Wells, for their part, were "unjustifiably skeptical" of a study showing the danger posed by the water supply. *Id.* at 930. Lyon "tr[ied] to discredit [the] study despite his own department's knowledge that it show[ed] a real problem." *Id.* (quotation omitted). And Wells "discourag[ed] her department [from] look[ing] further" into the study and directed resources toward undermining its conclusions. *Id.* (quotation omitted). Both of those defendants engaged in affirmative conduct that worsened the water crisis. Even so, *Guertin* held, that action "f[ell] well-short of conscience-shocking conduct." *Id.* at 930–31. Too much separation existed between Lyon and Wells and the "chief architects" of the crisis to hold them to account. *Id.* at 926.

Held to these yardsticks, I cannot see a basis for denying qualified immunity to Governor Snyder. *See Waid*, 960 F.3d at 336, 338 (Murphy, J., concurring in the judgment in part and dissenting in part). No doubt, he "was personally involved in the decisional process which led to the transition" to the contaminated water supply. R. 620-3 at 47 (19-1425). But the complaint nowhere alleges that he knew or should have known about the risk that move posed. The plaintiffs argue that (1) Snyder's "senior executive staff was immediately aware" of issues with the water supply and actively concealed it, *id.* at 65; and (2) Snyder waited too long to declare a state of emergency after hearing troubling reports, *id.* at 151. But *Guertin* forecloses both theories. *See Waid*, 960 F.3d at 338 (Murphy, J., concurring in the judgment in part and dissenting in part). It rejected efforts to impute liability from subordinates to their supervisors. *Id.* And it clarified that high officials resisting early evidence of danger cannot make out a constitutional violation. *Id.* Snyder seems *less* like the scheme's "chief architect[ ]" than Wyant, Lyon, and Wells. *Id.* at 336 (quotation omitted). As Judge Murphy pointed out in his partial dissent in *Waid*: "If Snyder's *subordinates* were too far removed from the crisis to remain defendants, that fact should make us think twice before allowing claims to proceed against an official even further removed." *Id.* at 337. Snyder played only an attenuated, supervisory role. And while he evidently delayed acting on information, that failure by itself does not give rise to liability. *See id.* at 338.

The plaintiffs no doubt allege that Snyder knew there was not yet an "agreed upon plan in place" for upgrading Flint's water treatment plant when he "authorized the switch to the Flint River." R. 185-2 at 34–36 (19-2000). But that hardly suggests that he foresaw that the water "would not be treated for contamination," Maj. Op. at 304, when the switch actually happened a year later, let alone that he inferred that the switch posed a "substantial risk of serious harm." *Waid*, 960 F.3d at 336 (Murphy, J., concurring in the judgment in part and dissenting in part) (quotation omitted).

An even weaker case stands against Treasurer Dillon. *See id.* at 338–39. He played a role in the original negotiations that caused Flint to switch to the contaminated water supply. And, yes, he may have ***306** received certain emails discussing complications with the transition to the use of the Flint River water. But none of the emails suggests he knew or should have known of the health risk. Still less do they show that he could have done anything to stop it. The majority would leave the choice whether to dismiss to the district court. I would stop the litigation here and now.

I do not doubt that Governor Snyder and Treasurer Dillon could have done more to avert the contamination of Flint's water supply. Not every mistake in governing, however, amounts to a substantive due process violation. To survive a motion to dismiss, the plaintiffs must plead facts indicating that the officials' conduct "shocks the conscience." *Id.* at 336 (quotation omitted). On my reading, neither Governor Snyder nor Treasurer Dillon reached that inglorious low. If I had *Waid* before me, I would dissent on that basis. Because I don't, I concur.

All Citations

969 F.3d 298

Footnotes

1 The Defendants-Appellants party to this appeal are: Darnell Earley, Gerald Ambrose, Howard Croft, Michael Glasgow, Daugherty Johnson, the City of Flint, Richard Dale Snyder (former Governor of Michigan), Andy Dillon (former Treasurer of Michigan), Gretchen Whitmer (present Governor of Michigan), Stephen Busch, Patrick Cook, Michael Prysby, Bradley Wurfel, and Adam Rosenthal.

2 The district court followed the same procedure in this case that it had in the underlying decision in *In re Flint Water Cases (Waid v. Snyder)*, 960 F.3d 303 (6th Cir. 2020). We noted in *Waid* that we approved the district court's omnibus approach in *Waid v. Snyder*, No. 18-1967, slip op., 2019 WL 4121023 (6th Cir. Feb. 19, 2019) (order). *See Waid*, 960 F.3d at 321–22 n.6.

3 One other defendant, Liane Shekter-Smith, was a party to the appeal in *Waid*, 960 F.3d 303. Plaintiffs' claims against Shekter-Smith were dismissed by the district court in this case as time-barred. *See Sirls*, 2019 WL 3530874, at *11–13.

4 One difference, we note, is that Plaintiffs-Appellees in this case allege that they were injured by lead-poisoning only, and not *legionella*. *See* R. 72 (*Sirls* Docket, No. 5:17-cv-10342-JEL-EAS, Short-Form Compl. at 5) (Page ID #695); R. 124 (*Walters* Docket, No. 5:17-cv-10164-JEL-MKM, Short-Form Compl. at 5) (Page ID #1678). The parties, however, do not assign any significance to that difference for purposes of this appeal.

5 Our decision in *Waid*, in turn, primarily rested upon *Guertin v. Michigan*, 912 F.3d 907 (6th Cir. 2019), *cert. denied*, —— U.S. ——, 140 S. Ct. 933, 205 L.Ed.2d 522 (2020), and *Boler v. Earley*, 865 F.3d 391, 412–13 (6th Cir. 2017). *Waid* is our most comprehensive decision to date, in that it addressed allegations against Glasgow, Johnson, Rosenthal, Cook, Snyder, and Dillon (all of whom were not parties in *Guertin*).

6 Andy Dillon's conduct is not worth debating. The parties in *Waid* agreed that it was appropriate to remand the claims against Dillon to the district court to decide whether to dismiss Dillon in light of the district court's decision to dismiss him in a related case. *See* 960 F.3d at 332. That is what we did in *Waid*, and we do the same here.

960 F.3d 820
United States Court of Appeals, Sixth Circuit.

IN RE: FLINT WATER CASES.
Luke Waid, Parent and Next-Friend of SR, a minor; et al., Plaintiffs,
Elnora Carthan, et al., Plaintiffs-Appellees,
v.
Darnell Earley, et al., Defendants,
Richard Dale Snyder, former Governor of Michigan; Andy Dillon, former Treasurer of Michigan, Defendants-Appellants,
Veolia North America, Inc., Veolia North America, LLC, Veolia North America Operating Services, LLC, Intervenors-Appellees.

No. 20-1352
|
Decided and Filed: June 2, 2020

Synopsis
Background: In consolidated putative class action relating to injuries from city's corroded water, former Governor and former State Treasurer, whose dismissal motion based on qualified immunity had been denied as to § 1983 substantive due process claim for violation of bodily integrity, requested protective order with respect to plaintiffs and private-party defendants taking depositions of them as non-party fact witnesses for separate claims against other defendants. The United States District Court for the Eastern District of Michigan, Judith E. Levy, J., denied the request. Former Governor and former Treasurer filed interlocutory appeal and filed motion for stay pending appeal

Holdings: The Court of Appeals, Moore, Circuit Judge, held that:

[1] former Governor and former Treasurer were not likely to succeed on merits of appeal from denial of protective order;

[2] former Governor and former Treasurer would not suffer irreparable harm absent a stay;

[3] plaintiffs would be harmed by a stay;

[4] public interest weighed against a stay; and

[5] non-final order denying protection from discovery was not immediately appealable under collateral order doctrine.

Motion denied; appeal dismissed.

West Headnotes (15)

[1] Federal Courts Supersedeas or Stay of Proceedings

Four interrelated factors are balanced when considering whether to grant a stay pending appeal: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the party seeking the stay will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

1 Cases that cite this headnote

[2] Federal Courts Injunction and temporary restraining order cases

Former Governor and former State Treasurer were not likely to succeed on merits, as factor weighing against stay pending appeal, of their appeal from denial of order for protection, in consolidated putative class action relating to city's corroded water, from depositions of them as non-party fact witnesses with respect to separate claims against other defendants, in which action their dismissal motion based on qualified immunity had been denied as to § 1983 substantive due process claim for violation of bodily integrity; former Governor and former Treasurer incorrectly claimed that they could not be deposed on any matter pending resolution of their qualified-immunity appeal. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

[3] **Federal Civil Procedure** Persons subject

Federal Civil Procedure Proceedings to obtain

Civil rights actions brought under § 1983 play out in stages in order to shield government officials from the burdens of litigation, and if an official files a motion to dismiss based on qualified immunity, the court must stay discovery until that issue is decided, but if the official is denied qualified immunity on the motion to dismiss, then the plaintiff ordinarily will be entitled to some discovery. 42 U.S.C.A. § 1983.

[4] **Public Employment** Qualified immunity

Public Employment Trial, judgment, and relief

Qualified immunity protects government officials only from unnecessary and burdensome discovery or trial proceedings, because qualified immunity is a right to immunity from certain claims, not from litigation in general, and granting qualified immunity on only one of the claims may reduce discovery but it does not eliminate it.

[5] **Federal Courts** Depositions and discovery

Discovery rulings, no doubt, are high stakes, but the Court of Appeals usually leaves decisions on how best to manage discovery to the District Court's discretion.

[6] **Federal Civil Procedure** Persons subject

It is up to the District Court to take qualified immunity for public officials into account when developing its discovery plan, in order to protect the substance of the qualified immunity defense.

[7] **Public Employment** Qualified immunity

Qualified immunity for public officials grants immunity from suit rather than a mere defense to liability.

[8] **Federal Courts** Injunction and temporary restraining order cases

Former Governor and former State Treasurer would not suffer irreparable harm absent a stay, as factor weighing against a stay pending their appeal from denial of order for protection, in consolidated putative class action relating to city's corroded water, from depositions of them as non-party fact witnesses with respect to separate claims against other defendants, in which action their dismissal motion based on qualified immunity had been denied as to § 1983 substantive due process claim for violation of bodily integrity; even if former Governor and former Treasurer ultimately were granted qualified immunity, plaintiffs and private-party defendants would still request the depositions because, in their view, the former officials were key factual witnesses regarding other claims. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[9] **Federal Courts** Injunction and temporary restraining order cases

Harm to plaintiffs from issuance of a stay was a factor weighing against a stay pending appeal by former Governor and former State Treasurer from denial of order for protection, in consolidated putative class action relating to city's corroded water, from depositions of them as non-party fact witnesses with respect to separate claims against other defendants, in which action their dismissal motion based on qualified immunity had been denied as to § 1983 substantive due process claim for violation of bodily integrity; plaintiffs alleged ongoing serious health injuries that continued to worsen over time, so a delay in the litigation could have a real effect on their ability to secure a meaningful remedy. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

[10] **Federal Courts** Injunction and temporary restraining order cases

The public interest in developing the facts and resolving the case expeditiously was a factor weighing against a stay pending appeal by former Governor and former State Treasurer from denial of order for protection, in consolidated putative class action relating to city's corroded water, from depositions of them as non-party fact witnesses with respect to separate claims against other defendants, in which action their dismissal motion based on qualified immunity had been denied as to § 1983 substantive due process claim for violation of bodily integrity. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

[11] **Federal Courts** Interlocutory and Collateral Orders

When a party appeals something other than the last order possible to be made in a case, a decision of a district court is appealable under the collateral order doctrine if it falls within the small class of decisions that finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. 28 U.S.C.A. § 1291.

[12] **Federal Courts** Immunity

The collateral order doctrine entitles government officials to an immediate appeal from a non-final order denying qualified immunity from civil liability. 28 U.S.C.A. § 1291.

[13] **Federal Courts** Preliminary proceedings; depositions and discovery

Discovery orders generally are non-final, non-appealable orders. 28 U.S.C.A. § 1291.

[14] **Federal Courts** Immunity

Non-final order denying protection from discovery could not be construed as a denial of qualified immunity that would be immediately appealable under collateral order doctrine, on interlocutory appeal by former Governor and former State Treasurer from denial of order for protection, in consolidated putative class action relating to city's corroded water, from depositions of them as non-party fact witnesses with respect to separate claims against other defendants, in which action their dismissal motion based on qualified immunity had been denied as to § 1983 substantive due process claim for violation of bodily integrity. U.S. Const. Amend. 14; 28 U.S.C.A. § 1291; 42 U.S.C.A. § 1983.

[15] **Federal Courts** Immunity

There are two appeals based upon a public official's claim of qualified immunity from civil liability that can be taken under the collateral order doctrine prior to final judgment: first, after denial of a motion to dismiss on the pleadings, and second, after denial of a motion for summary judgment following discovery. 28 U.S.C.A. § 1291; Fed. R. Civ. P. 12, 56.

***823** Appeal from the United States District Court for the Eastern District of Michigan at Ann Arbor. Nos. 5:16-cv-10444; 5:16-cv-11247—Judith E. Levy, District Judge.

Attorneys and Law Firms

ON MOTIONS: Richard S. Kuhl, Margaret Bettenhausen, Nathan A. Gambill, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellants. ON RESPONSE: Emmy L. Levens, COHEN MILSTEIN SELLERS & TOLL PLLC, Washington, D.C., Paul Novak, Gregory Stamatopoulos, WEITZ & LUXENBERG, P.C., Detroit, Michigan, for Plaintiffs-Appellees. James M. Campbell, CAMPBELL CONROY & O'NEIL, P.C., Boston, Massachusetts, for Veolia Appellees.

Before: MERRITT, MOORE, and MURPHY, Circuit Judges.

OPINION

KAREN NELSON MOORE, Circuit Judge.

Former State of Michigan Governor Richard Dale Snyder and former State Treasurer Andy Dillon claim that they cannot be deposed as non-party fact witnesses with respect to claims against other defendants in the litigation stemming from the Flint Water Crisis. In their view, they are immune from all discovery until they have exhausted every opportunity for appeal from the district court's denial of their motions to dismiss based on qualified immunity. Meanwhile, other defendants and certain plaintiffs are pursuing discovery on wholly separate claims and have noticed Snyder and Dillon for non-party fact witness depositions. Snyder and Dillon moved for a protective order in the district court to stop the depositions from going forward. When their request was denied, they appealed the district court's discovery order to this court and shortly thereafter requested a stay of the depositions until we resolve their appeal from the denial of a protective order. We **DENY** Snyder's and Dillon's request for a stay of non-party depositions pending resolution of their appeal from the district court's order denying their request for a protective order, and we **DISMISS** for lack of jurisdiction their appeal from the denial of a protective order.

I. BACKGROUND

This appeal derives from the consolidated putative class action in the *In re Flint Water Cases* litigation.[1] It is one of dozens of ongoing actions brought by individuals, businesses, and putative classes in state and federal court challenging the actions of state and private actors in creating, sustaining, and covering up the Flint Water Crisis. Defendants include government officials from the State of Michigan, the City of Flint, and state agencies. R. 620-3 (Fourth Am. Compl. at 1–2, ¶ 2) (Page ID #17804–05). Defendants also include private ***824** engineering companies like Veolia that are facing claims of professional negligence for failing to explain the need to treat the water properly for corrosion and for lying to the public about the existence and extent of the crisis. *Id.* at 1–3, ¶ 2 (Page ID #17804–06). While government officials like Snyder and Dillon have been litigating the issue of qualified immunity, discovery against private parties like Veolia has proceeded.

On April 1, 2019, the district court ruled on the defendants' motions to dismiss. R. 798 (Op. & Order) (Page ID #21103). The district court granted the government officials' motions to dismiss plaintiffs' claims alleging 42 U.S.C. § 1983 equal-protection violations, § 1985(3) conspiracy, Michigan's Elliott Larsen Civil Rights Act ("ELCRA"), § 1983 state-created danger, and gross negligence. *Id.* at 128 (Page ID #21230). The district court denied, however, defendants' motions to dismiss plaintiffs' § 1983 bodily-integrity claim on the bases of qualified and absolute immunity. *Id.* at 127 (Page ID #21229). Thus, the only surviving claim against the state defendants, including Snyder and Dillon, is plaintiffs' bodily-integrity claim.

After deciding defendants' motions to dismiss based on qualified immunity, the district court entered a comprehensive case management order ("CMO") on April 30, 2019, to direct the course of discovery. R. 827 (Case Management Order 4/30/19) (Page ID #22804). The order distinguished between discovery as to parties and non-parties. *See id.* Then, on May 20, 2019, the district court ruled on the state defendants' motion for a stay of discovery pending final resolution of their motions to dismiss based on qualified immunity. R. 861 (Discovery Order 5/20/19) (Page ID #23407).

As context, the district court noted in its May 20, 2019 discovery order that other defendants with no claim to immunity had begun discovery pursuant to the CMO. *Id.* at 1, 7–8 (Page ID #23407, 23413–14). The state defendants, however, sought a stay of "*all* discovery across the Flint Water Cases until their claims of immunity have been decided by this Court, the Sixth Circuit, and the United States Supreme Court, if necessary." *Id.* at 1–2 (Page ID #23407–08) (emphasis added). The district court granted in part and denied in part the state defendants' request. *Id.* at 2 (Page ID #23408).

The district court recognized that the state defendants must be treated as though they are immune from the claims brought against them until they have exhausted their opportunities to appeal the district court's denial of their motions to dismiss based on immunity. *Id.* at 6–7 (Page ID #23412–13). Accordingly, the district court issued a stay with respect to "discovery on claims for which they continue to litigate the issue of immunity." *Id.* at 2 (Page ID #23408). Thus, the court ruled, "the state and MDEQ defendants will not be subjected to discovery with respect to the sole allegation against them, which is that they violated plaintiffs' right to bodily integrity, until they have exhausted their opportunities to pursue their qualified immunity claim on appeal." *Id.* at 6–7 (Page ID #23412–13).

The state defendants' request for a stay of discovery was partly denied in the sense that the state defendants would "be treated as non-parties pending the outcome of their qualified immunity appeals." *Id.* at 5 (Page ID #23411). That meant that they could be subject to discovery requests only as non-party fact witnesses regarding wholly separate claims against other defendants. The district court explained that, "[i]f the state and MDEQ defendants are eventually dismissed as a result of their pending appeals, they will still be required ***825** to respond to discovery as a non-party." *Id.* at 8 (Page ID #23414). Discovery from the state defendants as non-party fact witnesses therefore was "inevitable." *Id.*

Eventually, Snyder, Dillon, and other state defendants received deposition notices from the Veolia defendants and certain plaintiffs. The state defendants promptly moved for a protective order in the district court to stay non-party fact witness depositions until after they exhausted their appeals from the denial of their motions to dismiss on the issue of qualified immunity. *See* R. 1047 (Mot. for Protective Order) (Page ID #26634). The district court denied their request for a protective order and reiterated that they are required to comply with discovery requests as non-parties. R. 1100 (Protective Order Ruling 4/9/20 at 2) (Page ID #27458).

Presently, certain plaintiffs seek to depose former Governor Snyder starting on June 25, 2020, and the Veolia defendants seek to depose former Treasurer Dillon starting on July 7, 2020. When the district court denied their request for a protective order, Snyder and Dillon appealed the denial of a protective order to this court. They informed the district court of their appeal and obtained a statement from the district court that an additional request for a stay of the non-party depositions would be futile. R. 1130 (Conference 5/8/20 at 10–11) (Page ID #27846–47). They then requested a stay from us to stop the depositions from going forward while we decide their appeal from the district court's denial of their request for a protective order against taking the non-party depositions.

We note at the outset that we recently affirmed the district court's denial of qualified immunity as to Snyder, and we remanded for the district court to consider whether to dismiss Dillon in light of the district court's decision in *Brown v. Snyder (In re Flint Water Cases)*, No. 18-cv-10726, 2020 WL 1503256, at *9 (E.D. Mich. Mar. 27, 2020). *In re Flint Water Cases (Waid v. Snyder)*, 960 F.3d 303, 311–12 (6th Cir. May 22, 2020). We recognize, as the district court did, that our resolution of the qualified immunity issue does not exhaust Snyder's and Dillon's opportunities for review by the Supreme Court on the qualified immunity issue and, thus, does not render these proceedings moot.

II. REQUEST FOR A STAY

[1] We have authority over Snyder's and Dillon's request for a stay of the district court's discovery ruling because they have shown that filing an initial motion for a stay in the district court would be futile. *See* FED. R. APP. P. 8(a). We balance four interrelated factors when considering whether to grant a stay: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Michigan State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 661 (6th Cir. 2016) (quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)).

[2] First, Snyder and Dillon are not likely to succeed on appeal from the district court's order denying their request for a protective order. They claim that they cannot be deposed on *any* matter pending resolution of their qualified-immunity appeal. That is incorrect.

[3] Snyder and Dillon stress that qualified immunity protects them from discovery until their claim of entitlement to immunity has been conclusively denied on ***826** their motions to dismiss. The Supreme Court requires that civil-rights actions brought under § 1983 play out in stages to shield government officials from the "burdens of litigation." *Kennedy v. City of Cleveland*, 797 F.2d 297, 299–300 (6th Cir. 1986) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 527, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)). If the defendant files a motion to dismiss based on qualified immunity, the court must "stay discovery until that issue is decided." *Id.* at 299. If the defendant is denied qualified immunity on the motion to dismiss, then "the plaintiff ordinarily will be entitled to some discovery." *Crawford-El v. Britton*, 523 U.S. 574, 598, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998).

[4] Yet, qualified immunity protects government officials from "unnecessary and burdensome discovery or trial proceedings" only. *Id.* at 597–98, 118 S.Ct. 1584; *see also Mitchell*, 472 U.S. at 526, 105 S.Ct. 2806 (explaining that qualified immunity relieves defendants of "the burdens of *broad-reaching* discovery" (quoting *Harlow v. Fitzgerald*,

457 U.S. 800, 817–18, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)) (emphasis added))). The "right to immunity is a right to immunity *from certain claims*, not from litigation in general ...." *Behrens v. Pelletier*, 516 U.S. 299, 312, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996) (emphasis added). "Granting qualified immunity on only one of the claims may reduce discovery but it does not eliminate it." *McLaurin v. Morton*, 48 F.3d 944, 949 (6th Cir. 1995); *see also Alice L. v. Dusek*, 492 F.3d 563, 565 (5th Cir. 2007) ("To the extent that [the defendant] is subject to discovery requests on claims for which she does not or cannot assert qualified immunity, such discovery requests do not implicate her right to qualified immunity.").

Here, the district court granted the state defendants effective immunity pending the final resolution of their motions to dismiss based on qualified immunity. In other words, the district court recognized that no discovery may be sought from the state defendants on the claims against them unless and until they are conclusively denied qualified immunity on their motions to dismiss. The district court carefully sculpted a discovery plan that afforded the state defendants their full entitlement to immunity, while permitting other parties to seek discovery from them as fact witnesses on wholly separate claims. The discovery plan would permit state defendants to be deposed as non-party fact witnesses to events regarding separate claims brought against different defendants to prevent the litigation from stalling out for *all* defendants during the pendency of *these state defendants*' appeals of the denial of their motions to dismiss based on qualified immunity. *See* R. 827 (Case Management Order 4/30/19 at 1) (Page ID #22804); R. 861 (Discovery Order 5/20/19 at 5, 8–10) (Page ID #23411, 23414–16). The state defendants obtained a broad stay from discovery that treats them as though they had already proven their immunity and were dismissed from the case. The district court's exception to that stay was limited, and it was necessary for discovery to proceed for other parties in the sprawling litigation. Doing so was well within the district court's discretion.

[5] **[6]** Discovery rulings, no doubt, are high stakes, but we usually leave decisions on how best to manage discovery to the district court's discretion. *See Criss v. City of Kent*, 867 F.2d 259, 261 (6th Cir. 1988) ("[I]t is well established that the scope of discovery is within the sound discretion of the trial court." (quotation omitted)). It is up to the district court to take qualified immunity into account when developing its discovery plan. *See Crawford-El*, 523 U.S. at 597–98, 118 S.Ct. 1584 ("[T]he trial court must exercise its discretion in a way ***827** that protects the substance of the qualified immunity defense. It must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings."). And, in fact, the district court did so here.

The district court refrained from issuing its discovery plan until after it resolved defendants' motions to dismiss asserting qualified immunity. *See* R. 827 (Case Management Order 4/30/19) (Page ID #22804); R. 861 (Discovery Order 5/20/19 at 5) (Page ID #23411). Then, recognizing that its ruling on qualified immunity was subject to appeal, the district court ordered a stay of discovery regarding the sole remaining claim against the state defendants—plaintiffs' bodily integrity claim. R. 861 (Discovery Order 5/20/19 at 6–7) (Page ID #23412–13). "[T]he state and MDEQ defendants," the district court ruled, "will not be subjected to discovery with respect to the sole allegation against them, which is that they violated plaintiffs' right to bodily integrity, until they have exhausted their opportunities to pursue their qualified immunity claim on appeal." *Id.* In the same order, the district court made a limited exception to the stay to permit discovery from state defendants as non-party fact witnesses to events relevant to entirely separate claims brought against different defendants. *Id.* at 7–8 (Page ID #23413–14). The district court explained that "[p]laintiffs have counts pending against other defendants that have filed answers and are ready to defend their positions." *Id.* "It follows that the Court can order discovery to proceed with respect to these other defendants." *Id.* at 8 (Page ID #23414).

[7] The key Supreme Court cases that Snyder and Dillon cite for us—*Mitchell*, *Crawford-El*, and *Harlow*—feature prominently in the district court's order delineating the state officials' discovery obligations. The district court recognized that *Mitchell* "established that qualified immunity grants 'immunity from suit rather than a mere defense to liability.' " *Id.* at 6 (Page ID #23412) (quoting *Mitchell*, 472 U.S. at 526, 105 S.Ct. 2806). "[C]ourts must take care," the district court wrote, "to ensure that government officials are not subjected to unnecessary and burdensome discovery until issues of immunity have been resolved at the earliest opportunity." *Id.* (citing *Crawford-El*, 523 U.S. at 597, 118 S.Ct. 1584). Accordingly, the district court struck a balance between the discovery needs of other defendants and the state defendants' immunity interest: "If the state and MDEQ defendants are eventually dismissed as a result of their pending appeals, they will still be required to respond to discovery as a non-party. So in the interim, this litigation will go forward and the state

and MDEQ defendants are required to respond to discovery requests as if they were already dismissed from the case." *Id.* at 8 (Page ID #23414).[2]

***828** We disagree with Snyder and Dillon that the district court's "non-party" versus "party" distinction is meaningless, or that it permits an end-run around their entitlement to immunity. The district court was clear that no party may seek discovery from the state defendants on the particular claim that they continue to litigate with respect to immunity. *See id.* at 2 (Page ID #23408) ("The state and MDEQ defendants are entitled to a stay of discovery on claims for which they continue to litigate the issue of immunity."). If these non-party depositions turn out to be a ruse—as Snyder and Dillon assert that they are—Snyder and Dillon are free to object and move for a protective order at the district court level as issues arise. It is inappropriate for us, however, to issue a prophylactic order to stop these depositions from going forward based on hypothetical horrors before a single problematic question has been asked.

For all these reasons, we conclude that Snyder and Dillon are not likely to succeed on their appeal from the district court's order denying them a protective order.

[8] Second, and for the same reason, Snyder and Dillon will not suffer irreparable harm absent a stay. The district court forbade the noticing parties from using depositions to probe Snyder and Dillon regarding the sole surviving claim against them, which is that they violated plaintiffs' right to bodily integrity. *See id.* at 5, 8–10 (Page ID #23411, 23414–16). Snyder and Dillon will not be effectively denied their "entitlement not to stand trial or face the other burdens of litigation" if we deny their request for a stay of the district court's denial of their protective order pending their appeal from that denial. *Mitchell*, 472 U.S. at 526, 105 S.Ct. 2806. Even if Snyder and Dillon ultimately should be granted qualified immunity, the noticing parties would still request these depositions because, in their view, Snyder and Dillon are key factual witnesses regarding other claims. The discovery at issue is not only suitably tailored to the situation, but also inevitable.

We further emphasize that our decision does not leave Snyder and Dillon without a remedy. They may file for a protective order in the district court if they object to the noticing parties' line of questioning. What they cannot do is ask us to resolve a run-of-the-mill discovery dispute on an interlocutory appeal. For each of these reasons, Snyder and Dillon will not suffer any irreparable harm absent a stay of the district court's discovery order.

[9] Third, the noticing parties will be harmed if we grant a stay. The plaintiffs have alleged ongoing serious health injuries that continue to worsen over time. *See In re Flint Water Cases (Waid v. Snyder)*, 960 F.3d 303, 320–21 (6th Cir. 2020). Thus, the progress of the litigation has a real effect on plaintiffs' ability to secure a meaningful remedy. A delay also could interfere with the scheduled start of the bellwether trials, presently set to begin in January 2021. R. 1150 (Order 5/21/20 at 3) (Page ID #28167). A delay similarly would prejudice the Veolia defendants, who are also invested in the efficient resolution of this case.

[10] Finally, the public interest favors the development of the facts and the expeditious resolution of this case. And as described above, Snyder's and Dillon's immunity interest—and the public's accompanying interest in their immunity—is not at stake in this limited non-party fact witness ***829** discovery. We conclude that all four factors weigh against granting a stay of the district court's order allowing the non-party depositions to proceed. We accordingly **DENY** Snyder's and Dillon's motion for a stay of non-party depositions pending resolution of their appeal from the district court's order denying their motion for a protective order.

III. MOTION TO DISMISS

The Veolia Defendants-Appellees have filed a motion to dismiss this appeal No. 20-1352. They assert that we lack jurisdiction under either 28 U.S.C. § 1291 or the collateral order doctrine to review a discovery order. Snyder and Dillon have filed a response, contending that the district court's discovery order is an implicit denial of their qualified immunity. We conclude that we do not have jurisdiction to entertain Snyder's and Dillon's appeal from the district court's order denying their request for a protective order.

[11] **[12]** Section 1291 vests us with jurisdiction over appeals from "final decisions of the district courts." 28 U.S.C. § 1291. When a party appeals something other than "the last order possible to be made in a case," "a decision of a district court is appealable if it falls within 'that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself

to require that appellate consideration be deferred until the whole case is adjudicated." *Mitchell*, 472 U.S. at 524–25, 105 S.Ct. 2806 (quotations omitted). This is known as the collateral order doctrine, and it entitles government officials to an immediate appeal from the denial of qualified immunity. *Id.* at 525–27, 105 S.Ct. 2806.

[13] **[14]** Because discovery orders generally are non-final, non-appealable orders, even under the collateral order doctrine, *see Coleman v. Am. Red Cross*, 979 F.2d 1135, 1138 (6th Cir. 1992), Snyder and Dillon want us to construe the district court's order denying their request for a protective order as an implicit order denying them qualified immunity. We do not think that the collateral order doctrine stretches so far.

[15] "[T]here can be two appeals based upon claims of immunity and which can be taken prior to final judgment: first, after denial of a motion to dismiss on the pleadings and, second, after denial of a motion for summary judgment following discovery." *Sinclair v. Schriber*, 834 F.2d 103, 104 (6th Cir. 1987). Orders regarding discovery do not fit either of these categories and, for that reason, are not independently appealable under the collateral order doctrine. Neither our court nor the Supreme Court has endorsed the extension of the collateral order doctrine that Snyder and Dillon ask for here. We acknowledge that the rationale for permitting government officials to take an immediate appeal from the denial of a motion to dismiss based on qualified immunity rests in part on the concern that forcing officials to wait for a final judgment on the merits would subject them to potentially unwarranted discovery. *See Harlow*, 457 U.S. at 816–18, 102 S.Ct. 2727; *Mitchell*, 472 U.S. at 526, 105 S.Ct. 2806. But these cases simply do not establish an entitlement to an interlocutory appeal from a discovery order itself.

Snyder and Dillon have not pointed to a single case in which we permitted an immediate appeal from a discovery order like the one at issue here. They have, however, pointed to a couple of cases that they claim are close enough. *See Skousen v. Brighton High Sch.*, 305 F.3d 520, 525–26 (6th Cir. 2002); ***830** *Everson v. Leis*, 556 F.3d 484, 490–93 (6th Cir. 2009). In *Skousen* and *Everson*, for example, we held that we had jurisdiction over the district court's decisions to hold in abeyance summary judgment motions based on qualified immunity pending completion of discovery. *Skousen*, 305 F.3d at 525–26; *Everson*, 556 F.3d at 490–93. There was a question as to whether we had jurisdiction over the orders holding the summary judgment motions in abeyance because we may entertain an appeal from the denial of summary judgment only if it presents issues solely of law. *Skousen*, 305 F.3d at 525 (citing *Mitchell*, 472 U.S. at 526–28, 105 S.Ct. 2806). We decided that we had jurisdiction to entertain the appeals because, even though the district courts denied summary judgment so that the parties could conduct more discovery, the decisions did not turn on the existence of a genuine issue of material fact. *Id.* at 526, 105 S.Ct. 2806; *Everson*, 556 F.3d at 493. We explained that it did not matter that the order denying summary judgment was styled as an order holding disposition of the motion for summary judgment in abeyance. "If a district court can thwart interlocutory appeal by refusing to address qualified immunity through abeyance rather than dismissal, then the district court can effectively ignore this court's directive that district courts address qualified immunity promptly." *Everson*, 556 F.3d at 492. Snyder and Dillon assert that the district court's discovery order at issue here similarly is tantamount to a denial of qualified immunity. We disagree.

The critical difference between *Skousen*/*Everson* and this case is that *Skousen* and *Everson* concerned a district court's delay in ruling on a motion for summary judgment on the issue of qualified immunity. The district courts temporarily denied the defendants' summary judgment motions to permit additional discovery—but we authorized the appeal because that decision operated, for our purposes, as a denial of summary judgment on the question of qualified immunity. Thus, the orders at issue in *Skousen* and *Everson* fall into *Sinclair*'s second bucket for the types of rulings that are eligible for immediate interlocutory appeal. The orders in those cases were not discovery orders. The collateral order doctrine is already an exception to the general finality rule. Snyder and Dillon are not entitled to appeal any number of discovery matters that they believe have some impact on their immunity interest. We can only imagine the deluge of appeals that would descend upon us if standard discovery orders could so easily be rebranded as final judgments.

Finally, we underscore that the district court's discovery order fully takes into account the need for a pause in discovery regarding the claim on which Snyder and Dillon assert qualified immunity, and it orders limited discovery as non-party fact witnesses regarding other claims in the litigation. The district court took the state defendants' immunity seriously. If the noticing parties fail to comply with the district court's order by pressing an inappropriate line of questioning, Snyder and Dillon may assert their objections in the district court. But ordering Snyder and Dillon to comply

with discovery requests as non-party fact witnesses to events regarding wholly separate claims against different defendants does not, in the abstract, interfere with their immunity.

We reject Snyder's and Dillon's attempt to dress up the district court's discovery order as an implicit denial of qualified immunity. We accordingly **DISMISS** for lack of jurisdiction their appeal No. 20-1352.

All Citations

960 F.3d 820

Footnotes

1 The facts alleged in the derivative case are set out in our opinion in *In re Flint Water Cases (Waid v. Snyder)*, 960 F.3d 303, 311–23 (6th Cir. 2020).

2 The district court's decision to permit discovery from government officials as non-party fact witnesses to events related to claims against other defendants is not out of the ordinary. *See, e.g.*, *Mendia v. Garcia*, No. 10-cv-03910-MEJ, 2016 WL 3249485, at *5 (N.D. Cal. June 14, 2016) ("While discovery directed to Defendants as to the *Bivens* claims against them is inappropriate given their pending qualified immunity appeal, ... limited discovery as to these Defendants is appropriate because regardless of whether they are entitled to qualified immunity, they will still need [to] participate in discovery as percipient witnesses related to the FTCA claims against the United States."); *Harris v. City of Balch Springs*, 33 F. Supp. 3d 730, 733 (N.D. Tex. 2014) ("The court can think of no legal reason why discovery and pretrial matters may not proceed with respect to [the counts not being appealed on qualified-immunity grounds]. ... [E]ven if the Fifth Circuit were to grant [him] qualified immunity ... he would necessarily be required to testify on behalf of the City regarding [those counts]. ... Whether [he] is subjected to discovery on these counts now or after the resolution of qualified immunity is quite beside the point.").

960 F.3d 303
United States Court of Appeals, Sixth Circuit.

IN RE: FLINT WATER CASES.
Luke Waid, Parent and Next-Friend of SR, a minor, et al., Plaintiffs,
Elnora Carthan et al., Plaintiffs-Appellees,
v.
Darnell Earley, Gerald Ambrose, Howard Croft, Michael Glasgow, Daugherty Johnson, and City of Flint, Michigan; Richard Dale Snyder, former Governor of Michigan, Andy Dillon, former Treasurer of Michigan, and Gretchen Whitmer, present Governor of Michigan; Liane Shekter-Smith, Stephen Busch, Patrick Cook, Michael Prysby, and Bradley Wurfel; and Adam Rosenthal, Defendants-Appellants.

Nos. 19-1425/1472/1477/1533
|
Argued: April 27, 2020
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Decided and Filed: May 22, 2020

Synopsis

Background: City residents brought putative class actions under § 1983 against state officials, financially-distressed city that was under emergency management, and city officials, alleging injuries from lead contamination and legionella contamination in city's water supply, and asserting violation of substantive due process right to bodily integrity. The United States District Court for the Eastern District of Michigan, Judith E. Levy, J., 384 F.Supp.3d 802, denied officials' motions for dismissal based on qualified immunity, and denied reconsideration, 2019 WL 8060586. Officials filed interlocutory appeal.

Holdings: The Court of Appeals, Moore, Circuit Judge, held that:

[1] fact issues existed as to whether emergency managers and city officials had independent knowledge beyond their alleged reliance on opinions from employees of Michigan Department of Environmental Quality (MDEQ) and professional engineering firms;

[2] fact issues existed as to whether MDEQ officials acted based on honest mistakes in law or fact;

[3] fact issues existed as to Governor's reliance on MDEQ and professional engineering firms;

[4] financially-distressed city was not acting as an arm of the State, as would provide basis for city's Eleventh Amendment immunity from suit in federal court; and

[5] *Ex parte Young* exception to a State's Eleventh Amendment immunity from suit in federal court applied to request for prospective injunctive relief against successor Governor.

Affirmed in part and remanded.

Murphy, Circuit Judge, filed an opinion concurring in the judgment and dissenting in part.

West Headnotes (29)

[1] Federal Courts Immunity

Under the collateral order doctrine, to extent that legal questions were raised by the interlocutory appeals, the Court of Appeals had appellate jurisdiction for state officials' and city officials' interlocutory appeals from denial of their motions to dismiss, based on qualified immunity, in putative class actions brought by city residents under § 1983, alleging deliberate indifference to violations of substantive due process right to bodily integrity, relating to injuries from lead contamination and legionella contamination in city's water supply. U.S. Const. Amend. 14; 28 U.S.C.A. § 1291; 42 U.S.C.A. § 1983; Fed. R. Civ. P. 12(b)(6).

[2] Federal Courts Immunity

Under the collateral order doctrine, the Court of Appeals had appellate jurisdiction for interlocutory appeals by state's Governor, and financially distressed city that had been under emergency manager control, from denial of their motions to dismiss based on Eleventh Amendment immunity from suit in federal court, in putative class actions brought by city residents under § 1983, alleging violations of the substantive due process right to bodily integrity, relating to injuries from lead contamination and legionella contamination in city's water supply. U.S. Const. Amends. 11, 14; 28 U.S.C.A. § 1291; 42 U.S.C.A. § 1983; Mich. Comp. Laws Ann. § 141.1549; Fed. R. Civ. P. 12(b)(6).

1 Cases that cite this headnote

[3] **Federal Civil Procedure** Construction of pleadings

Federal Civil Procedure Matters deemed admitted; acceptance as true of allegations in complaint

On a motion to dismiss for failure to state a claim, the court construes the complaint in the light most favorable to plaintiffs, accepts all well-pleaded factual allegations as true, and draws all reasonable inferences in plaintiffs' favor. Fed. R. Civ. P. 12(b)(6).

[4] **Federal Courts** Immunity

The Court of Appeals reviews de novo a district court's decision to deny qualified immunity to public officials.

[5] **Civil Rights** Government Agencies and Officers

Civil Rights Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

United States Qualified immunity in general

Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing: (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct.

1 Cases that cite this headnote

[6] **Constitutional Law** Egregiousness; "shock the conscience" test

The substantive due process aspect of the Fourteenth Amendment protects against conscience-shocking deprivations of liberty. U.S. Const. Amend. 14.

[7] **Constitutional Law** Personal and bodily rights in general

Violating a person's bodily integrity is a grave deprivation of their liberty, against which deprivation substantive due process provides protection. U.S. Const. Amend. 14.

[8] **Constitutional Law** Negligence, recklessness, or indifference

The standard for government officials' deliberate indifference to an individual's substantive due process rights is subjective recklessness, and the plaintiff must show that 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. U.S. Const. Amend. 14.

[9] **Federal Civil Procedure** Immunity

Federal Civil Procedure Civil rights cases in general

Because the facts at the motion to dismiss stage are undeveloped, it is generally inappropriate for a district court to grant a motion to dismiss on the basis of a public official's qualified immunity from civil liability, and while an official's entitlement to qualified immunity is a threshold question to be resolved at the earliest possible point, that point is usually summary judgment. Fed. R. Civ. P. 12(b)(6), 56.

1 Cases that cite this headnote

[10] **Federal Civil Procedure** Fact issues

Issue of whether emergency managers for financially distressed city, city's public works director, and city's utilities administrators had qualified immunity from liability under § 1983 to city residents, for alleged deliberate indifference to residents' substantive due process right to bodily integrity, arising from lead contamination and legionella contamination in city's water supply, could not be resolved at motion to dismiss phase because of factual disputes as to whether those managers and officials had knowledge that city's water supply was causing a public health crisis independent of their alleged reliance on opinions from professional engineering firms and employees of Michigan Department of Environmental Quality (MDEQ). U.S. Const. Amend. 14; 42 U.S.C.A. § 1983; Mich. Comp. Laws Ann. § 141.1549; Fed. R. Civ. P. 12(b)(6).

[11] **Constitutional Law** Water, sewer, and irrigation

Water Law Civil claims arising from failure to meet quality standards

City residents plausibly alleged, as required to state a claim, that emergency manager for financially distressed city was deliberately indifferent to their substantive due process right to bodily integrity, in § 1983 actions arising from lead contamination and legionella contamination in city's water supply, by alleging that manager forced an interim switch in city's source of water, during development of new long-term source, when he knew that city's water treatment plant was not ready to treat the water from interim source, that manager directed city officials to lie to the public and tell them that a Legionnaires' disease outbreak was an internal issue at a hospital, and that manager refused to reconnect to old source of water despite his knowledge of water quality issues. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983; Fed. R. Civ. P. 12(b)(6).

1 Cases that cite this headnote

[12] **Constitutional Law** Water, sewer, and irrigation

Water Law Civil claims arising from failure to meet quality standards

City residents plausibly alleged, as required to state a claim, that supervisor for city's water treatment plant laboratory was deliberately indifferent to their substantive due process right to bodily integrity, in § 1983 actions arising from lead contamination and legionella contamination in city's water supply, by alleging that supervisor covered up extent of lead contamination, and distorted water quality tests to downplay the extent of lead contamination. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983; Fed. R. Civ. P. 12(b)(6).

[13] **Constitutional Law** Water, sewer, and irrigation

Water Law Civil claims arising from failure to meet quality standards

City residents plausibly alleged, as required to state a claim, that city's public works director was deliberately indifferent to their substantive due process right to bodily integrity, in § 1983 actions arising from lead contamination and legionella contamination in city's water supply, by alleging that director permitted switch to interim source of water supply, during development of new long-term source, despite his knowledge that city's water treatment plant was not prepared to deliver safe drinking water, and that director did nothing after learning that Legionnaires' disease outbreak was connected to city's interim source. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983; Fed. R. Civ. P. 12(b)(6).

[14] **Constitutional Law** Water, sewer, and irrigation

Water Law Civil claims arising from failure to meet quality standards

City residents plausibly alleged, as required to state a claim, that city's utilities administrator was deliberately indifferent to their substantive due process right to bodily integrity, in § 1983 actions arising from lead contamination and legionella contamination in city's water supply, by alleging that administrator pressured supervisor for city's water treatment plant laboratory, despite supervisor's warnings, to make interim change in source of city's water during development of new long-term source, and that administrator stonewalled county health department's attempts to investigate water quality from interim source and attempts to investigate the outbreak of Legionnaires' disease. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983; Fed. R. Civ. P. 12(b)(6).

[15] **Federal Civil Procedure** Fact issues

Issue of whether officials of Michigan Department of Environmental Quality (MDEQ) had qualified immunity from liability under § 1983 to city residents, for alleged deliberate indifference to their substantive due process right to bodily integrity, arising from lead contamination and legionella contamination in city's water supply, could not be resolved at motion to dismiss phase because of factual disputes as to whether those officials, despite their allegedly honest mistakes in law or fact when interpreting and applying Environmental Protection Agency's (EPA) Lead and Copper Rule, rushed to switch city's interim source of water supply, during development of new long-term source, knowing that interim source would deliver contaminated water, and whether officials cared only about cost to financially-distressed city, not water quality. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983; Fed. R. Civ. P. 12(b)(6).

[16] **Constitutional Law** Water, sewer, and irrigation

Water Law Civil claims arising from failure to meet quality standards

City residents plausibly alleged, as required to state a claim, that Michigan Department of Environmental Quality's (MDEQ) Chief of Office of Drinking Water and Municipal Assistance was deliberately indifferent to their substantive due process right to bodily integrity, in § 1983 actions arising from lead contamination and legionella contamination in city's water supply, by alleging that Chief, despite knowing of health risks presented by city's switch to interim water source during development of new long-term source, secured the necessary administrative consent order (ACO) so city could borrow funds for development of new source and rushed the interim switch before city's water treatment plant was ready, and by alleging that Chief did nothing to mitigate the problem when city residents reported that city's water from interim source was making them ill, and that Chief instead covered up the crisis. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983; Fed. R. Civ. P. 12(b)(6).

[17] **Constitutional Law** Water, sewer, and irrigation

Water Law Civil claims arising from failure to meet quality standards

City residents plausibly alleged, as required to state a claim, that Michigan Department of Environmental Quality's (MDEQ) Water Quality Analyst was deliberately indifferent to their substantive due process right to bodily integrity, in § 1983 actions arising from lead contamination and legionella contamination in city's water supply, by alleging that Analyst did not stop city's switch to interim source of water, during development of new long-term source, despite warning from supervisor for city's water treatment plant laboratory that the plant was not ready, that he did nothing after learning that city's water contained levels of total trihalomethanes (TTHM) that were above regulatory limit, and that he distributed a distorted water quality report that was altered to exclude high levels of TTHM. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983; Fed. R. Civ. P. 12(b)(6).

2 Cases that cite this headnote

[18] **Constitutional Law** Water, sewer, and irrigation

Water Law Civil claims arising from failure to meet quality standards

City residents plausibly alleged, as required to state a claim, that Michigan Department of Environmental Quality's (MDEQ) District Supervisor was deliberately indifferent to their substantive due process right to bodily integrity, in § 1983 actions arising from lead contamination and legionella contamination in city's water supply, by alleging that Supervisor, despite knowing that city's switch to interim source of water during development of new long-term source would require significant water treatment, did not stop the switch even after learning that city's water treatment plant was not ready, and that he lied to Environmental Protection Agency (EPA) employee, when MDEQ came under EPA scrutiny for lead contamination, by telling him that city was using corrosion control. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983; Fed. R. Civ. P. 12(b)(6).

2 Cases that cite this headnote

[19] **Constitutional Law** Water, sewer, and irrigation

Water Law Civil claims arising from failure to meet quality standards

City residents plausibly alleged, as required to state a claim, that Michigan Department of Environmental Quality's (MDEQ) engineer was deliberately indifferent to their substantive due process right to bodily integrity, in § 1983 actions arising from lead contamination and legionella contamination in city's water supply, by alleging that engineer, despite warnings from supervisor for city's water treatment plant laboratory, did not stop the switch to city's interim source of water during development of new long-term source, that engineer did nothing in response to Environmental Protection Agency (EPA) employee's report of high lead levels in city's water from interim source, and that he directed laboratory supervisor to distort water quality tests by excluding high results for lead contamination. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983; Fed. R. Civ. P. 12(b)(6).

[20] **Constitutional Law** Water, sewer, and irrigation

Water Law Civil claims arising from failure to meet quality standards

City residents plausibly alleged, as required to state a claim, that Michigan Department of Environmental Quality's (MDEQ) Water Treatment Specialist was deliberately indifferent to their substantive due process right to bodily integrity, in § 1983 actions arising from lead contamination and legionella contamination in city's water supply, by alleging that Specialist initially did nothing in response to Environmental Protection Agency (EPA) employee's report of high lead levels in city's water, and later misled EPA regarding necessity of using corrosion control, by stating that city's water testing results were within regulatory limit for lead. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983; Fed. R. Civ. P. 12(b)(6).

[21] **Federal Civil Procedure** Construction of pleadings

On a motion to dismiss, when a document attached to the complaint contradicts the complaint's allegations by utterly discrediting the allegations, the document trumps the allegations. Fed. R. Civ. P. 12(b).

[22] **Constitutional Law** Water, sewer, and irrigation

Water Law Civil claims arising from failure to meet quality standards

City residents plausibly alleged, as required to state a claim, that Michigan Department of Environmental Quality's (MDEQ) Director of Communications was deliberately indifferent to their substantive due process right to bodily integrity, in § 1983 actions arising from lead contamination and legionella contamination in

city's water supply, by alleging that when concerns and criticisms reached their peak, Director repeatedly lied to the public and assured them that city's water was safe, while distorting water quality tests and attacking independent whistleblower reports that city was in midst of major public health emergency. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983; Fed. R. Civ. P. 12(b)(6).

[23] **Federal Civil Procedure** Fact issues

Issue of whether Michigan Governor had qualified immunity from liability under § 1983 to city residents, for alleged deliberate indifference to their substantive due process right to bodily integrity, arising from lead contamination and legionella contamination in city's water supply, could not be resolved at motion to dismiss phase because of factual disputes as to whether Governor's actions or failures to act relied on assessments from Michigan Department of Environmental Quality (MDEQ) and professional engineering firms, and whether Governor's disinformation or inaction arose from legitimate disagreements over nature and extent of problems and the appropriate solution. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983; Fed. R. Civ. P. 12(b)(6).

[24] **Constitutional Law** Water, sewer, and irrigation

States Governor

Water Law Civil claims arising from failure to meet quality standards

City residents plausibly alleged, as required to state a claim, that Governor was deliberately indifferent to their substantive due process right to bodily integrity, in § 1983 actions arising from lead contamination and legionella contamination in city's water supply, by alleging that Governor was personally aware, from public reports and from his own staff, that city's interim source of water during development of new long-term source was contaminated yet he downplayed the problem and delayed in switching back to original source and in declaring a state of emergency that provided valuable resources to abate the harm in financially-distressed city. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983; Fed. R. Civ. P. 12(b)(6).

[25] **Federal Courts** Immunity

Whether Eleventh Amendment immunity from suit in federal court exists in any particular case is a question of constitutional law that is reviewed de novo. U.S. Const. Amend. 11.

[26] **Federal Courts** Municipal corporations; cities

The Eleventh Amendment generally bars suits in federal courts against States, but generally does not bar suits against cities. U.S. Const. Amend. 11.

[27] **Federal Courts** Municipal corporations; cities

Financially-distressed city was not acting as an arm of the State, as would provide basis for city's Eleventh Amendment immunity from suit in federal court, when city was under State's emergency management, and thus, Eleventh Amendment immunity did not apply to city's alleged deliberate indifference to violation of city residents' substantive due process right to bodily integrity, arising from lead contamination and legionella contamination in city's water supply while city was under State's emergency management. U.S. Const. Amends. 11, 14; 42 U.S.C.A. § 1983; Mich. Comp. Laws Ann. § 141.1549.

[28] **Federal Courts** Suits for injunctive or other prospective or equitable relief; Ex parte Young doctrine

Federal Courts Agencies, officers, and public employees

While a State generally has Eleventh Amendment immunity from suit in federal court, the *Ex parte Young* exception allows plaintiffs

to seek prospective injunctive relief against State actors in their official capacity. U.S. Const. Amend. 11.

[29] **Federal Courts** Suits for injunctive or other prospective or equitable relief; Ex parte Young doctrine

Federal Courts Other particular entities and individuals

Ex parte Young exception to a State's Eleventh Amendment immunity from suit in federal court applied to city residents' request for prospective injunctive relief against successor Governor, in her official capacity, to remediate ongoing harms stemming from lead contamination and legionella contamination in city's water supply that originated during predecessor Governor's term in office, though successor Governor had not personally committed the alleged violations of city residents' substantive due process right to bodily integrity. U.S. Const. Amends. 11, 14; 42 U.S.C.A. § 1983.

***309** Appeal from the United States District Court for the Eastern District of Michigan at Ann Arbor. No. 5:16-cv-10444—Judith E. Levy, District Judge.

Attorneys and Law Firms

ARGUED: William Y. Kim, CITY OF FLINT LAW DEPARTMENT, Flint, Michigan, for Appellant City of Flint, and Christopher J. Marker, O'NEIL, WALLACE & DOYLE, P.C., Saginaw, Michigan, for Appellant Glasgow in 19-1425. Margaret A. Bettenhausen, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan for Appellants in 19-1472. Charles E. Barbieri, FOSTER, SWIFT, COLLINS & SMITH, P.C., Lansing, Michigan, for Appellants in 19-1477. James A. Fajen, FAJEN AND MILLER, PLLC, Ann Arbor, Michigan, for Appellant in 19-1533. Samuel R. Bagenstos, Ann Arbor, Michigan, for Appellees. ON BRIEF: William Y. Kim, CITY OF FLINT LAW DEPARTMENT, Flint, Michigan, Frederick A. Berg, Jr., BUTZEL LONG, P.C., Detroit, Michigan, Sheldon H. Klein, Joseph E. Richotte, BUTZEL LONG, P.C., Bloomfield Hills, Michigan, Christopher J. Marker, O'NEIL, WALLACE & DOYLE, P.C., Saginaw, Michigan, Todd R. Perkins, THE PERKINS LAW GROUP PLLC, Detroit, Michigan, Alexander S. Rusek, WHITE LAW, PLLC, Okemos, Michigan, Barry A. Wolf, Flint, Michigan, Edwar A. Zeineh, LAW OFFICE OF EDWAR A. ZEINEH, Lansing, Michigan, for Appellants in 19-1425. Margaret A. Bettenhausen, Richard S. Kuhl, Nathan A. Gambill, Zachary C. Larsen, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan for Appellants in 19-1472. Charles E. Barbieri, FOSTER, SWIFT, COLLINS & SMITH, P.C., Lansing, Michigan, Michael J. Pattwell, Jay M. Berger, CLARK HILL PLC, Lansing, Michigan, Thaddeus E. Morgan, FRASER, TREBILCOCK, DAVIS & DUNLAP, Lansing, Michigan, Philip A. Grashoff, Jr., SMITH HAUGHEY RICE & ROEGGE, Grand Rapids, Michigan, for Appellants in 19-1477. James A. Fajen, FAJEN AND MILLER, PLLC, Ann Arbor, Michigan, James W. Burdick, BURDICK LAW, P.C., Bloomfield Hills, Michigan, for Appellant in 19-1533. Samuel R. Bagenstos, Ann Arbor, Michigan, for Appellees.

Before: MERRITT, MOORE, and MURPHY, Circuit Judges.

MOORE, J., delivered the opinion of the court in which MERRITT, J., joined. MURPHY, J. (pp. 335-39), delivered a separate opinion concurring in the judgment in part and dissenting in part.

CONCURRING IN THE JUDGMENT IN PART AND DISSENTING IN PART

OPINION

KAREN NELSON MOORE, Circuit Judge.

***310** This is a case about the Flint Water Crisis. From 2014 to 2015, City of Flint and Michigan State officials caused, sustained, and covered up the poisoning of an entire community with lead- and *legionella*-contaminated water. The crisis started in April 2014 when the City began delivering Flint River water to its predominantly poor and African-American residents, knowing that it was not treated for corrosion. In a matter of weeks, Flint residents reported that there was something wrong with the way the water looked, tasted, and smelled, and that it was causing rashes. In response, the City treated the water with additional chlorine —exacerbating the corrosion in the old water lines. The corrosion contaminated the water with hazardous levels of

lead and caused an outbreak of Legionnaires' disease. State and City officials failed to stop the delivery of Flint River water and obstinately assured the public that the water was safe, when they knew it was not. Now, Flint residents can expect to see their children permanently developmentally stunted. It has been six years since the start of the crisis and corroded pipes still infect the water and poison the people of Flint. The question before us is whether these Defendants-Appellants allegedly responsible for the crisis are immune from suit.

***311** This appeal arises out of a consolidated class action in the *In re Flint Water Cases* litigation. It follows from the denial of motions to dismiss certain defendants based on qualified and absolute immunity. The Plaintiffs-Appellees are individuals affected by the Flint Water Crisis.[1] The Defendants-Appellants are City and State officials and the City of Flint.[2] Plaintiffs-Appellees claim that City and State officials' deliberate indifference to their being poisoned violated their substantive due process right to bodily integrity, a constitutional claim we have already recognized in *Guertin v. Michigan*, 912 F.3d 907, 921 (6th Cir. 2019), *cert. denied*, —— U.S. ——, 140 S. Ct. 933, 205 L.Ed.2d 522 (2020). Acknowledging that *Guertin* controls, Defendants-Appellants contend that their alleged individual conduct does not plausibly amount to a constitutional violation. Or, in the case of the City of Flint and Governor Whitmer,[3] that the Eleventh Amendment requires their dismissal from this action —an argument we rejected in prior appeals. *See Guertin*, 912 F.3d at 936; *Boler v. Earley*, 865 F.3d 391, 412–13 (6th Cir. 2017), *cert. denied*, —— U.S. ——, 138 S. Ct. 1281, 200 L.Ed.2d 469 (2018).

We **AFFIRM** the district court's denial of the motions to dismiss with respect to every Defendant-Appellant except Treasurer Dillon. We **REMAND** for the district court to decide whether Dillon should be dismissed in light of its decision in *Brown v. Snyder (In re Flint Water Cases)*, No. 18-cv-10726, 2020 WL 1503256, at *9 (E.D. Mich. Mar. 27, 2020).

I. BACKGROUND[4]

Plaintiffs allege that, from June 2013 through April 25, 2014, City and State officials created a public health crisis. R. 620-3 (Fourth Am. Compl. at 47–48, ¶ 133) (Page ID #17850–51). Officials "ordered and set in motion the use of highly corrosive and toxic Flint River water knowing that the [treatment plant] was not ready." *Id*. "By January 29, 2015, State officials understood that the public health crisis was caused by the corrosion of the entire infrastructure of the Flint water system. Yet no action was taken to warn the public of the health crisis or to correct the harm." *Id.* at 81, ¶ 238 (Page ID #17884).[5] Accordingly, "the complaint alleges constitutional violations that occurred during two relevant ***312** periods: (1) the period leading up to the April 2014 switch to the Flint River, during which Defendants were callously indifferent to the facts showing that the water would be dangerous; and (2) the 18-month period from April 2014 to October 2015, during which Defendants were callously indifferent to the mounting evidence that the water was actually causing serious harm, including death." Appellees Br. at 4–5.

A. The Switch to the Flint River

The City of Flint did not always receive its water from the Flint River. For decades, the City received clean water from Lake Huron through the Detroit Water and Sewerage Department ("DWSD"). R. 620-3 (Fourth Am. Compl. at 34–35, ¶¶ 86–91) (Page ID #17837–38). At some point, however, the City became concerned with the DWSD's cost and decided to look into alternative water sources. *Id.* at 35–37, ¶ 92 (Page ID #17838–40). In 2011, City officials had a study conducted to see if the Flint River could be used as a safe water source if it was processed through the old Flint Water Treatment Plant ("FWTP"). *Id.* at 33–34, ¶¶ 82–86 (Page ID #17836–37); *id.* at 36–37, ¶ 92 (Page ID #17839–40). The reports issued from the study concluded that Flint River water could meet regulatory requirements if properly treated—but that would require over $69 million in improvements to the FWTP, including improvements that would protect the water from corrosion. *Id.* at 36–37, ¶ 92 (Page ID #17839–40). For the moment, the City decided against switching to the Flint River as its primary drinking source. *Id.* at 37, ¶ 94 (Page ID #17840).

But by August 2012, the City was embroiled in a financial emergency, leading Governor Snyder to appoint Edward Kurtz as Emergency Manager for the City. *Id.* at 38–39, ¶ 101 (Page ID #17841–42). In Michigan, the State can appoint emergency managers to take over financially distressed cities, control their operations, and rein in spending. *See Guertin*, 912 F.3d at 939; R. 620-3 (Fourth Am. Compl. at 39, ¶ 102) (Page ID #17842). To carry out their mission, emergency managers are granted "broad powers" to "act for and in the place and stead of the governing body and the office of

chief administrative officer of the local government." MICH. COMP. LAWS § 141.1549(2).

As Emergency Manager, Kurtz made a pitch to Governor Snyder and State Treasurer Andy Dillon that the City of Flint should switch to receiving water from an altogether new source, the Karegnondi Water Authority ("KWA"). R. 620-3 (Fourth Am. Compl. at 38–39, ¶ 101–02) (Page ID #17841–42). The DWSD, on the other hand, made its case to Snyder, Dillon, and Kurtz that its water was cheaper and more reliable. *Id.* at 39, ¶ 103 (Page ID #17842). Caught between competing offers, Dillon requested an independent assessment of cost effectiveness for each plan by the engineering firm of Tucker, Young, Jackson and Tull ("TYJT"). *Id.* at 39–40, ¶ 104 (Page ID #17842–43). In February 2013, TYJT informed Dillon that "it would be more cost-effective for Flint on both a short term and long term basis to continue to be supplied with water from DWSD." *Id*. Accordingly, on March 17, 2013, Treasurer Dillon wrote to Governor Snyder that "the KWA representatives were misrepresenting the benefits of the deal and that the '(r)eport that I got is that Flint should stay w DWSD.' " *Id.* Then, on March 28, 2013, Dillon reversed course and emailed Snyder recommending that he authorize the City of Flint's switch to the KWA, noting that Kurtz, the Mayor, and City Council all supported that decision. *Id.* at 41, ¶ 107 (Page ID #17844). Even though the KWA was more costly than the DWSD, the City would be able to borrow ***313** funds to pay its share of the project if it obtained an Administrative Consent Order ("ACO") from a State Agency attesting to need due to "fire, flood, or other calamity." *Id.* at 127, ¶¶ 375–76 (Page ID #17930).

The Michigan Department of Environmental Quality ("MDEQ") ultimately backed the interim plan, even though it knew "that the decision to switch the water source for Flint was not based on a scientific assessment of the suitability of the Flint River water." *Id.* at 40–41, ¶ 106 (Page ID #17843–44). The MDEQ Deputy Director wrote, "[W]e are in a situation with Emergency Financial Managers so it's entirely possible that they will be making decisions relative to cost." *Id.* In March 2013, MDEQ officials, including Stephen Busch and Liane Shekter-Smith, knew that "the use of Flint River water would pose increased health risks to the public ..., the triggering of additional regulatory requirements, and significant upgrades to the Flint Water Treatment Plant." *Id.* at 40, ¶ 105 (Page ID #17843).

In 2013, both the City of Flint and the City of Detroit were under State emergency management. *Id.* at 42, ¶ 114 (Page ID #17845). As Governor, "Snyder was briefed on reports from *both* Flint's and Detroit's emergency managers and issued directions to both managers as it related to the transition" away from the DWSD. *Id.* Thus, "Governor Snyder was personally involved in the decisional process which led to the transition from DWSD to the KWA." *Id.* On April 4, 2013, Snyder's Chief of Staff emailed him, stating "(a)s you know, the Flint people have requested Dillon's ok to break away from the DWSD." *Id.* at 43, ¶ 115 (Page ID #17846). Snyder then instructed Dillon, Kurtz, Detroit's Emergency Manager, and other key players to have the DWSD submit one last offer to the City of Flint. *Id.* The DWSD did so, Kurtz rejected the offer, and Snyder "authorized Kurtz, through Department of Treasury officials, to enter into a contractual relationship with KWA for the purpose of supplying water to Flint *beginning in mid-year 2016 or 2017*." *Id.* at 43, ¶¶ 115–18 (Page ID #17846) (emphasis added). The City would need to rely on a water source other than the KWA until then. "At the time the Governor authorized Kurtz to contractually bind Flint to the KWA project, the Governor and State officials knew that the Flint River," rather than the DWSD, "would be used as an interim source and that the use of the interim source had the backing of Snyder, Andy Dillon, and MDEQ Director Wyant." *Id.* at 44, ¶ 119 (Page ID #17847).

In June 2013, Dillon, Kurtz, and other key players developed the interim Flint River plan that would supply the City with water from April 25, 2014 until approximately December 2016. *Id.* at 44, ¶ 120 (Page ID #17847). A "critical part" of the interim plan was to upgrade the FWTP so that it could treat the Flint River water and then later treat water delivered through the KWA. *Id.* at 44, ¶ 122 (Page ID #17847). In September 2013, Governor Snyder appointed Darnell Earley as the City of Flint's new Emergency Manager. *Id.* at 45, ¶ 125 (Page ID #17848). Earley worked to ensure that the interim Flint River plan would not be displaced by a return to the DWSD, even as the FWTP "was deemed unready for service by several people involved with its management." *Id.* at 51, ¶ 147 (Page ID #17854).

In March 2014, MDEQ officials, led by Chief of the Office of Drinking Water and Municipal Assistance Liane Shekter-Smith, put the interim Flint River plan into motion by ensuring, at the Treasury's direction, that the City quickly obtain the necessary ACO so that the KWA would not need to stop construction. *See* ***314** *id.* at 45–46, ¶ 128 (Page ID #17848–49); *id.* at 130, ¶¶ 382–83 (Page ID #17933). The ACO "(i) required Flint to make use of the Flint Water Treatment Plant, (ii) attempted to prevent Flint from ever

returning to the DWSD and (iii) mandated Flint to 'undertake the KWA public improvement project or undertake other public improvement projects to continue to use the Flint River....' " *Id.* at 45–46, ¶ 128 (Page ID #17848–49). "After obtaining the ACO, Flint entered a Bond Purchase Agreement allowing it to borrow funds despite being in receivership so that the KWA could move on to the next phase of construction. Unfortunately, the Flint Water Treatment Plant was nowhere near ready to begin distributing water." *Id.* at 131, ¶ 384 (Page ID #17934).

On March 14, 2014, the associate director of the Governor's Office of Urban and Metropolitan Initiatives stated in an email to other members of Snyder's staff that the "expedited timeframe" for switching to Flint River water "is less than ideal and could lead to some big potential disasters down the road." *Id.* at 45, ¶ 127 (Page ID #17848). His warning went unheeded, as plans stayed in motion.

On April 16, 2014—a week before the date set for the switch to the Flint River—Michael Glasgow, the City's water treatment plant laboratory and water quality supervisor, emailed MDEQ Water Quality Analyst Adam Rosenthal, "... it looks as if we will be starting the plant up tomorrow and are being pushed to start distributing water as soon as possible.... I would like to make sure we are monitoring, reporting and meeting requirements before I give the OK to start distributing water." *Id.* at 46, ¶ 129 (Page ID #17849). The next day, Glasgow informed the MDEQ that "the FWTP was not fit to begin operations and that 'management' was not listening to him." *Id.* On April 17, 2014, Glasgow wrote to MDEQ District Supervisor Stephen Busch and MDEQ District 11 (Flint) Engineer Michael Prysby,

> I have people above me making plans to distribute water ASAP. I was reluctant before, but after looking at the monitoring schedule and our current staffing, I do not anticipate giving the OK to begin sending water out anytime soon. If water is distributed from this plant in the next couple of weeks, it will be against my direction. I need time to adequately train additional staff and to update our monitoring plans before I will feel we are ready. I will reiterate this to management above me, but they seem to have their own agenda.

Id. "Glasgow later told State investigators that he received pressure from superiors—particularly Defendants Johnson and Croft—to begin the switch to the Flint River." *Id.* at 47, ¶ 130 (Page ID #17850).

MDEQ Water Treatment Specialist Patrick Cook signed the permit that was the last necessary approval for use of the FWTP. *Id.* at 47, ¶ 132 (Page ID #17850).

B. Lead Poisoning and Legionnaires' Disease

"On April 25, 2014, Flint officially began using the Flint River as its primary water source, despite the fact that the proper preparations had not been made and Glasgow had warned that the FWTP was not ready." *Id.* at 57, ¶ 164 (Page ID #17860). Flint River water had high chloride levels that, left untreated, would corrode the water pipes and cause lead to "leach into drinking water." *Id.* at 55, ¶ 161 (Page ID #17858). The MDEQ purportedly believed that it needed to collect data on the water for an entire year, in two consecutive six-month tests, before it could treat the water for corrosion. *Id.* at 95–96, ¶ 290 (Page ID #17898–99). Prior to the switch, City and ***315** MDEQ officials "discussed optimization for lead," but "decided that having more data was advisable before implementing an optimization method." *Id.* at 55, ¶ 159 (Page ID #17858). Rather than delay the switch to the Flint River, the City began delivering *untreated* water to its residents.

Within weeks of the switch, residents reported to Shekter-Smith that there was something wrong with the smell, taste, and color of the water, and that it was causing rashes. *Id.* at 57, ¶¶ 165–66 (Page ID #17860). By June 2014, residents were reporting that "the water was making them ill." *Id.* at 57, ¶ 167 (Page ID #17860). The City and State did nothing. *Id.* "On August 14, 2014, Flint's water tested above legal limits for total coliform and E. coli bacteria." *Id.* at 57, ¶ 168 (Page ID #17860). In response, the City issued boil water advisories and treated the water with additional chlorine. *Id.* at 57–58, ¶¶ 168–69 (Page ID #17860–61). Chlorine, however, "as has been well known for decades," "preferentially reacts with the bare metal [in corroded pipes] instead of attacking solely bacteria." *Id.* at 57–58, ¶ 169 (Page ID #17860–61). Unsurprisingly, then, the bacterial problem did not abate—so the City added still more chlorine. *Id.* The water then tested high in total trihalomethanes ("TTHM"), a byproduct of chlorine interacting with metal, and a "red flag that the steel in the pipes had been laid bare," and that lead was leaching into the water. *Id.* at 58, ¶¶ 170–71 (Page ID #17861). Back in May 2014, MDEQ officials—including Busch, Prysby, and Rosenthal—knew that TTHM levels were above the EPA's maximum contaminant level but did nothing, even as residents raised concerns about the water. *Id.* at 58, ¶ 172 (Page ID #17861). From May 2014 to August 2015, the City sampled the water six times to test for corrosivity, and "[t]he

sampling results all showed that the drinking water was very corrosive." *Id.* at 62, ¶ 187 (Page ID #17865).

In the summer of 2014, just "[a]s officials were beginning to assess the extent of Flint's TTHM problems, ... the Michigan Department of Health and Human Services (MDHHS) reported an outbreak of Legionnaires' disease—another red flag." *Id.* at 58–59, ¶ 173 (Page ID #17861–62). Legionnaires' disease "is a severe form of pneumonia." *Id.* at 59, ¶ 174 (Page ID #17862). It infects people who inhale or consume water contaminated with *legionella* bacteria. *Id.* "Extensive studies of *legionella* have established that the pathogen enters the water supply when the 'bio-film' protecting pipes is stripped away—which is exactly what happened when the River's corrosive water entered the City's pipes." *Id.* When a City officer informed Earley and his then-advisor Gerald Ambrose of the outbreak, Earley responded by "disclaiming any connection between the outbreak and Flint's water." *Id.* at 59, ¶ 175 (Page ID #17862). Earley stated that "the City's 'message' should be that the outbreak was 'an internal issue at McLaren [Hospital] that they are working on with our assistance, not a Flint water problem that we are trying to resolve.' " *Id.*

In September 2014, MDHHS reported that "lead poisoning rates 'were higher than usual for children under age 16 living in the City of Flint during the months of July, August and September, 2014.' " *Id.* at 59–60, ¶ 176 (Page ID #17862–63). And in early October 2014, officials realized that the bacterial contamination partly stemmed from the use of over-75-year-old cast iron pipes that comprised most of the City's water distribution system. *Id.* at 60, ¶ 177 (Page ID #17863). Still no action.

On October 13, 2014, General Motors stopped using Flint River water at its engine plant out of fear that the high ***316** levels of chloride would corrode its machinery. *Id.* at 60, ¶ 179 (Page ID #17863). The next day, a member of Governor Snyder's executive staff wrote to the team:

> Now we are getting comments about being lab rats in the media, which are going to be exacerbated when it comes out that after the boil water order, there were chemicals in the water that exceeded health-based water quality standards. I think we should ask the [Emergency Manager] to consider coming back to the Detroit system in full or in part as an interim solution to both the quality, and now the financial, problems that the current solution is causing.

Id. at 60–61, ¶ 180 (Page ID #17863–64). Snyder's legal counsel similarly stated that the Flint River water issues are "downright scary" and "advised that, '[t]hey should try to get back on the Detroit system as a stopgap ASAP before this thing gets too far out of control.' " *Id.* at 61, ¶ 182 (Page ID #17864). The executive staff directed MDEQ officials to brief Earley on the water quality issues, *id.* at 60–61, ¶ 180 (Page ID #17863–64), but Earley refused to reconnect to the DWSD, *id.* at 61, ¶ 181 (Page ID #17864).

With their awareness of the dangers of Flint River water only increasing, officials nonetheless failed to disclose the risks to Flint Residents. *Id.* at 80, ¶ 235 (Page ID #17883). "On December 31, 2014, the first round of lead monitoring showed results exceeding the Lead and Copper Rule's action levels for lead, 15 parts per billion." *Id.* at 61–62, ¶ 183 (Page ID #17864–65). And the samples had not even been drawn from the highest risk homes. *Id.* In January 2015, State officials met to discuss the *legionella* problem. *Id.* at 80, ¶ 233 (Page ID #17883). Around that time, MDEQ Director of Communications Bradley Wurfel wrote in an email, "I don't want my director to say publicly that the water in Flint is safe until we get back the results of some county health department of epidemiological trace-back work on [the] 41 cases of Legionnaires' disease" diagnosed since the switch to the Flint River. *Id.* at 62, ¶ 184 (Page ID #17865).

On January 9, 2015, the University of Michigan turned off certain water fountains on its Flint campus because tests it conducted revealed high levels of lead. *Id.* at 62, ¶ 185 (Page ID #17865). "That same day, Earley," again, "refused to return to DWSD water." *Id.* at 62, ¶ 186 (Page ID #17865). A few days later, Earley resigned as Emergency Manager, and Governor Snyder appointed Gerald Ambrose in his stead. *Id.* at 80, ¶ 234 (Page ID #17883).

On January 21, 2015, State officials had water coolers discreetly installed in State buildings located in Flint, careful not to make their actions known to the public. *Id.* at 80, ¶ 235 (Page ID #17883). On January 27, 2015, the Genesee County Health Department ("GCHD") reported a likely "association between the spike in Legionnaires' disease reports and the onset of the use of Flint River water." *Id.* at 81, ¶ 237 (Page ID #17884). The City and State did nothing. *Id.* On January 29, 2015, the DWSD offered Emergency Manager Ambrose "an opportunity to purchase DWSD water at attractive rates ... includ[ing] waiving the re-connection fee." *Id.* at 81, ¶ 239 (Page ID #17884). Ambrose refused. *Id.* "On February 17, 2015, Flint water users staged public demonstrations demanding that Flint reconnect with DWSD." *Id.* at 82, ¶ 243 (Page ID #17885). Ambrose again refused. *Id.*

C. The Coverup

With the crisis growing undeniable, City and State officials attempted to cover it up. They lied to the public and to regulators, and they took no action to protect the people of Flint. *Id*.

***317** On February 26, 2015, Jennifer Crooks of the EPA followed up on a request from a Flint resident to test her water after she and her family became physically ill, developed rashes, and even experienced hair loss after drinking from the tap. *Id.* at 81, ¶ 240 (Page ID #17884); *id.* at 82–83, ¶ 244 (Page ID #17885–86). Crooks wrote to MDEQ and EPA officials that "the iron contamination was so high that the testing instrumentation could not measure it" and that the water tested for 104 parts per billion ("ppb") of lead, well over the 15 ppb regulatory maximum. *See id.* at 82–83, ¶ 244 (Page ID #17885–86). Crooks further noted that, with two children under the age of three residing at the house, there were "[b]ig worries here." *Id.* This prompted another EPA employee, Miguel Del Toral, to wonder whether the City of Flint was implementing optimized corrosion control, and whether the high lead levels were isolated to that one family's neighborhood or were more widespread. *See id.* at 83, ¶ 245 (Page ID #17886). The EPA shared its concerns with the MDEQ. In response, MDEQ District Supervisor Stephen Busch lied and told Del Toral that the City was using corrosion control. *Id.* at 83, ¶ 246 (Page ID #17886).

"Likewise, [City Utilities Administrator Daugherty] Johnson inhibited efforts by [GCHD] to obtain information about Flint's water through the Freedom of Information Act ("FOIA")." *Id.* at 83–84, ¶ 248 (Page ID #17886–87). On January 27, 2015, GCHD requested water-testing information that would help it understand perceived water quality issues and the outbreak of Legionnaires' disease. *See id.* A week later, Johnson responded that he had not received the FOIA request but would fulfill it as soon as possible. *Id.* Yet, "by March 2015, GCHD still had not received the information they requested by FOIA." *Id.* The GCHD soon gathered that it was "being stonewalled." *Id.* at 84, ¶ 250 (Page ID #17887).

By March 2015, Governor Snyder and other State officials knew "that they had a massive public health emergency which *probably included widespread lead poisoning* on their hands and began discussing distributing water filters to Flint water users." *Id.* at 84, ¶ 249 (Page ID #17887). Nevertheless, "these public officials took no action to warn or otherwise protect Plaintiffs and the Class, and continued to conceal from them and the public the true nature, extent, and severity of the public health crisis." *Id.* The Governor's office's talking points included false statements that the City was practicing corrosion control consistent with federal protocols and that Flint's water was in compliance with federal lead and copper rules. *Id.* at 149–50, ¶ 419 (Page ID #17952–53).

On March 10, 2015, the GCHD wrote to Croft, Prysby, Ambrose, the mayor, and other City officials that the threat of *legionella* was serious and tied to Flint River water. *Id.* at 138, ¶ 401 (Page ID #17941). The GCHD official noted that he had requested to meet with the water plant staff and MDEQ to discuss his concerns, but that the water plant staff did not respond and that the MDEQ declined. *Id.* On March 12, 2015, Shekter-Smith emailed MDEQ employees that, "[w]hile the change in source may have created water quality conditions that could provide additional organic nutrient source to support *legionella* growth, there is no evidence or confirmation of *legionella* coming directly from the Water Treatment Plant or in the community water supply distribution system at this time." *Id.* at 85, ¶ 252 (Page ID #17888). The next day, Shekter-Smith approved a response from Busch to the GCHD that stated the following:

- "conclusions that legionella is coming from the public water system without ***318** the presentations of any substantiating evidence from your epidemiologic investigations appears premature and prejudice toward that end;
- "[i]t is highly unlikely that legionella would be present in treated water coming from the City of Flint water treatment plan[t] given the treatment plant's use of ozone along with complete treatment and chlorine disinfect contact time to comply with federal surface water treatment rules for potable water;" and
- "there is no direct correlation that can be made to the presence of legionella."

Id. at 85–86, ¶ 253 (Page ID #17888–89). "That same day, Wurfel wrote in an email to Snyder administration officials, 'Political flank cover out of the City of Flint today regarding the spike in Legionnaire cases.... Also, area ministers put a shot over the bow last night ... with a call for Snyder to declare a state of emergency there and somehow "fix" the water situation....' " *Id.* at 86, ¶ 254 (Page ID #17889).

On March 25, 2015, the Flint City Council voted to re-connect to the DWSD. *Id.* at 86, ¶ 255 (Page ID #17889). Ambrose rejected their vote. *Id.*

On April 24, 2015, MDEQ Water Treatment Specialist Patrick Cook admitted in an email to Miguel Del Toral of the EPA that "Flint is currently not practicing corrosion control at the [F]WTP." *Id.* at 86–87, ¶ 257 (Page ID #17889–90). In the same email, however, Cook "misled the EPA regarding the necessity of using corrosion control in Flint after the switch," *id.* at 83, ¶ 247 (Page ID #17886), touting distorted water quality test results that showed that the water was within the regulatory limit of 15 ppb for lead, R. 735-3 (Cook Email at 2) (Page ID #20343).

On April 28, 2015, Governor Snyder's chief of staff told Snyder and other staff members that "[t]he water issue continues to be a danger flag." R. 620-3 (Fourth Am. Compl. at 87, ¶ 258) (Page ID #17890).

On June 24, 2015, Del Toral released an EPA report (the "Del Toral Report") warning of high lead levels in Flint water. *Id.* at 87, ¶ 259 (Page ID #17890). On the following day, Del Toral wrote an internal email with respect to 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.

Id. He "further warned that the failure to inform Flint water users of the elevated lead levels was 'bordering on criminal neglect.' " *Id.* at 87, ¶ 260 (Page ID #17890). The Del Toral Report was shared with MDEQ officials Shekter-Smith, Cook, Busch, and Prysby. *Id.* at 87, ¶ 261 (Page ID #17890). State and City officials did nothing. *Id.* at 88, ¶ 262 (Page ID #17891).

On July 9, 2015, City Utilities Administrator Michael Glasgow emailed MDEQ Water Quality Analyst Adam Rosenthal the following "Key Points" in all caps:

> 1) Flint has lots of lead pipe, no corrosion control treatment, and has had no legitimate LCR testing for at least a year.
>
> 2) Amongst low income infants, breast feeding rates are lower, and formula use is higher. Many Flint[ ] residents cannot afford to flush due to higher water rates. They cannot afford bottled water. This is an unprecedented situation and EPA needs to take this seriously. Now.
>
> 3) We have one child with an elevated blood lead already ... In fact, that is the only reason we know about any of the above.
>
> ***319** 4) MDEQ is still publicly insisting Flint water has tested safe, is safe, and that [F]lint has no violations of any sort.

Id. at 89, ¶ 267 (Page ID #17892).

"On July 10, 2015, MDEQ [Director of Communications] Brad Wurfel, in an effort to conceal the public health crisis, appeared on public radio and advised listeners that Flint water was safe and that it was not causing 'any broad problem' with lead leaching into residential water." *Id.* at 88, ¶ 265 (Page ID #17891). Wurfel knowingly lied and assured parents in particular that "anyone who is concerned about lead in the drinking water can relax." *Id.*

On July 22, 2015, Governor Snyder's Chief of Staff wrote to the Director of MDHHS that residents' concerns were being "blown off" by the Defendants. *Id.* at 89, ¶ 268 (Page ID #17892). Around the same time, Snyder's Director of Urban Initiatives spoke to Snyder directly and "advised him of the growing concerns among Flint residents that they were being exposed to toxic levels of lead." *Id.* at 89, ¶ 269 (Page ID #17892).

On July 24, 2015, Wurfel publicly stated that "residents of Flint do not need to worry about lead in their water supply, and DEQ's recent sampling does not indicate an imminent health threat from lead or copper." *Id.* at 89–90, ¶ 270 (Page ID #17892–93). But the sampling Wurfel referenced was "purposefully skewed ... to minimize the crisis." *Id.* at 90, ¶ 271 (Page ID #17893). Glasgow would later confess that the MDEQ altered water quality reports by removing the highest lead levels—"we threw out bottles everywhere just to collect as many as we can, just to hit our number." *Id.*; *see also id.* at 91, ¶ 273 (Page ID #17894). Glasgow also "distort[ed] the City's water test results by instructing residents to run their water—or 'flush' it—before testing, and fail[ed] to obtain water from certain houses." *Id.* at 90–91, ¶ 272 (Page ID #17893–94). He claims that he skewed the samples at Busch's and Prysby's direction. *Id.* at 91, ¶ 273 (Page ID #17894).

When a July 2015 water quality report was altered to exclude some high lead levels, Rosenthal forwarded it on. *Id.* Rosenthal was investigated for "willful participation in the manipulation of lead testing results and falsely report[ing]

that the 90th percentile of the results for lead water testing was below the federal action level." *Id.*

In August 2015, Professor Marc Edwards from Virginia Tech publicly announced that the City of Flint was experiencing a major public health emergency. *Id.* at 91, ¶ 274 (Page ID #17894). Wurfel countered his announcement by stating that Professor Edwards and his team "only just arrived in town and (have) quickly proven the theory they set out to prove, and while the state appreciates academic participation in this discussion, offering broad, dire public health advice based on some quick testing could be seen as fanning political flames irresponsibly." *Id.* at 92, ¶ 275 (Page ID #17895).

In the summer of 2015, Dr. Mona Hanna-Attisha published her own study to alert Flint residents to the dangers of drinking Flint River water. *Id.* at 93, ¶ 279 (Page ID #17896). Dr. Hanna-Attisha's study showed a "spike in the percentage of Flint children with elevated blood lead levels from blood drawn in the second and third quarter of 2014." *Id.* Although MDHHS had data of its own indicating a similar spike, *id.* at 92, ¶ 276 (Page ID #17895), Wurfel lied and stated on September 25, 2015, that "MDHHS officials have re-examined its blood lead level data and the MDHHS statistics do not show the same upward trend documented by Dr. Hanna-Attisha," *id.* at 94, ¶ 283 (Page ID ***320** #17897). "On September 28, 2015, Wurfel stated publicly that the Flint water crisis was becoming 'near-hysteria' because of Dr. Hanna-Attisha's report. He said that he wouldn't call her reports 'irresponsible. I would call them unfortunate.' Wurfel finished his remarks that day by falsely stating that 'Flint's drinking water is safe in that it's meeting state and federal standards.' " *Id.* at 94, ¶ 284 (Page ID #17897).

Over a year into the crisis, on October 8, 2015, Governor Snyder finally ordered the City of Flint to reconnect with the DWSD. *Id.* at 95, ¶ 287 (Page ID #17898). The City made the switch on October 16, 2015. *Id.* at 95, ¶ 288 (Page ID #17898). On October 18, 2015, the Director of the MDEQ emailed Governor Snyder and admitted that failing to implement optimized corrosion control for an entire year while Flint residents were being poisoned was a mistake. *Id.* at 95–96, ¶ 290 (Page ID #17898–99). The Governor's own task force on the crisis reported in March 2016 that the Governor's office failed to act, or even to conduct a comprehensive review of the water situation in Flint, in part because of cost. *Id.* at 150–51, ¶¶ 420–21 (Page ID #17953–54).

D. Aftershock

"Flint is currently in a state of crisis: Mayor Karen Weaver declared a State of Emergency on December 14, 2015 and on January 4, 2016, the Genesee County Commissioners declared a State of Emergency." *Id.* at 96–97, ¶ 294 (Page ID #17899–17900). Governor Snyder did the same on January 5, 2016, but chose not to disclose the threat of *legionella*. *Id.* at 97, ¶ 295 (Page ID #17900). He disclosed that threat for the first time on January 13, 2016, on the same day that he activated the Michigan National Guard to assist the City of Flint. *Id.* at 97, ¶ 296 (Page ID #17900).

The water crisis has created persistent harms. The effects of lead poisoning are "catastrophic," particularly for young children. *Id.* at 104–05, ¶ 314 (Page ID #17907–08). "In children, low levels of exposure have been linked to damage to the central and peripheral nervous system, learning disabilities, shorter stature, impaired hearing, and impaired formation and function of blood cells." *Id.* (quoting EPA). "[L]ead affects children's brain development resulting in reduced intelligence quotient (IQ), behavioral changes such as shortening of attention span and increased antisocial behavior, and reduced educational attainment.... The neurological and behavioral effects of lead are believed to be irreversible." *Id.* at 105, ¶ 315 (Page ID #17908) (quoting World Health Organization). In some cases, "ingestion of lead can cause seizures, coma and even death." *Id.* at 105, ¶ 316 (Page ID #17908) (quoting EPA). In pregnant women, the fetus can be exposed to lead in the mother's body, causing reduced growth and premature birth. *Id.* at 105, ¶ 317 (Page ID #17908). "Flint's children have suffered specific, measurable damages in the form of lost earning potential. They have also incurred damages in the form of required special educational, medical, sociological, occupational and disability services, and related education assistance programs." *Id.* at 106–07, ¶ 322 (Page ID #17909–10).

In adults, lead exposure can damage cardiovascular, kidney, and reproductive functions. *Id.* at 107, ¶ 323 (Page ID #17910). A recent study shows a drastic drop in fertility following the water crisis. *Id.* at 107, ¶ 324 (Page ID #17910). "Given the long-lasting risks of lead exposure and the potential for lead sediment to be disturbed and re-mobilized into the water system, Plaintiffs will require regular medical and tap water testing and evaluation, at bare minimum, in accordance with government ***321** standards." *Id.* at 107, ¶ 325 (Page ID #17910).

"Although the City has begun adding polyphosphate to its system to reduce the leaching of lead from its service lines,

this is unlikely to render Flint's water safe because many of the pipes have become so corroded that not even phosphate will be able to fully encapsulate the surface of the pipes and prevent lead from leaching into the water supply." *Id.* at 109, ¶ 331 (Page ID #17912). The same problem applies to home pipes and appliances—meaning that solely replacing municipal pipes will not fix the health crisis. *Id.* at 109–12, ¶¶ 332–40 (Page ID #17912–15); *id.* at 119, ¶ 359 (Page ID #17922). And because "the health effects of lead poisoning often go undetected for some time," there is a need for "ongoing medical monitoring[,] educational programs[, and] other remedial programs." *Id.* at 119–20, ¶ 360 (Page ID #17922–23). In many ways, the crisis has never ended.

E. Procedural History

This case is a consolidated class action in the *In re Flint Water Cases* litigation. *See* R. 173 (Order Consolidating Cases) (Page ID #8072). The only claim before us on appeal is Plaintiffs-Appellants' 42 U.S.C. § 1983 substantive due process claim for deprivation of bodily integrity. The Putative Class includes Flint residents and businesses, but only Flint residents are parties to this appeal. The Defendants include City and State officials, the City of Flint, and private engineering firms, but only the government defendants are parties to this appeal.

Plaintiffs filed their First Amended Consolidated Class Action Complaint on September 29, 2017. R. 214 (1st Am. Compl.) (Page ID #8494). They filed a Second Amended Complaint on October 27, 2017. R. 238 (2d Am. Compl.) (Page ID #8737). Defendants then filed motions to dismiss under Rule 12 of the Federal Rules of Civil Procedure. *See* R. 273 (Mot. to Dismiss) (Page ID #9797); R. 274 (Mot. to Dismiss) (Page ID #9909); R. 276 (Mot. to Dismiss) (Page ID #9986); R. 277 (Mot. to Dismiss) (Page ID #10111); R. 278 (Mot. to Dismiss) (Page ID #10167); R. 279 (Mot. to Dismiss) (Page ID #10237); R. 281 (Mot. to Dismiss) (Page ID #10644); R. 282 (Mot. to Dismiss) (Page ID #10789); R. 283 (Mot. to Dismiss) (Page ID #10931); R. 294 (Mot. to Dismiss) (Page ID #11358). Before those motions were resolved, Plaintiffs filed a Third Amended Complaint on January 25, 2018. R. 349 (Third Am. Compl.) (Page ID #11759).

On August 1, 2018, the district court issued an opinion and order granting in part and denying in part the motions to dismiss. *Carthan v. Snyder (In re Flint Water Cases)*, 329 F. Supp. 3d 369 (E.D. Mich. 2018). Some Defendants appealed, while others filed motions for reconsideration. R. 560 (Mot. for Recons.) (Page ID #17043); R. 561 (Mot. for Recons.) (Page ID #17072); R. 570 (Notice of Appeal) (Page ID #17246); R. 573 (Notice of Appeal) (Page ID #17253); R. 575 (Notice of Appeal) (Page ID #17256); R. 579 (Notice of Appeal) (Page ID #17281); R. 589 (Notice of Appeal) (Page ID #17316). We declined to adjudicate the appeals until the district court resolved the motions for reconsideration. Notice of Abeyance, *Waid v. Snyder*, No. 18-1967, slip op., 2019 WL 4121023 (6th Cir. Feb. 19, 2019). But before the district court could resolve those motions, Plaintiffs moved for leave to amend the Complaint, attaching a proposed Fourth Amended Complaint. R. 620 (Mot. for Leave to File Fourth Am. Compl.) (Page ID #17764).

To dispose of the essentially competing motions, the district court "adopted an ***322** unorthodox but necessary plan." R. 798 (Op. & Order at 5) (Page ID #21107).[6] The district court "interpreted plaintiffs' motion [for leave to amend the complaint] as a joint motion for relief from judgment and a motion for leave to file an amended complaint. Finding just cause, the Court vacated its August 1 decision on November 9, 2018, so that it could consider plaintiffs' motion for leave to amend." *Id.* Because there was significant overlap between the Third Amended Complaint and the proposed Fourth Amended Complaint, and because the standards for leave to amend and Rule 12 dismissal are substantively the same, the district court adjudicated all pending motions in a single opinion and order. *Id.* at 5–6 (Page ID #21107–08). Accordingly, the district court "issue[d] an omnibus opinion and order, adjudicating plaintiffs' motion for leave to file a fourth amended complaint, and, if successful, defendants' motions to dismiss it in a single decision." *Id.* (entered April 1, 2019). The district court granted Defendants-Appellants' motions to dismiss Plaintiffs' claims alleging § 1983 equal-protection violations, § 1985(3) conspiracy, Michigan's Elliott Larsen Civil Rights Act ("ELCRA"), § 1983 state-created danger, and gross negligence. *Id.* at 128 (Page ID #21230). But the district court denied Defendants-Appellants' motions to dismiss Plaintiffs-Appellees' § 1983 bodily-integrity claim on the bases of qualified and absolute immunity.[7] *Id.* at 127 (Page ID #21229).

Plaintiffs filed a Motion for Reconsideration of the April 1 order on April 15, 2019, regarding certain claims not at issue on this appeal. R. 809 (Pls. Mot. for Recons.) (Page ID #21864). The district court disposed of that motion on June 11, 2019. R. 880 (Order Den. Pls. Mot. for Recons.) (Page ID #23632).

II. JURISDICTION

[1] **[2]** Under the collateral order doctrine, we have jurisdiction over the City and State officials' interlocutory appeals of the district court's denial of qualified immunity to the extent they raise legal questions. *Mitchell v. Forsyth*, 472 U.S. 511, 526–27, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); *Bunkley v. City of Detroit*, 902 F.3d 552, 559 (6th Cir. 2018). The collateral order doctrine also provides us with jurisdiction over the City of Flint's and Governor Whitmer's interlocutory appeals from the district court's denial of Eleventh Amendment sovereign immunity. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993). We accordingly have jurisdiction over each party's appeal. *See* 28 U.S.C. § 1291.

III. DISCUSSION

[3] Defendants-Appellants argue that they are immune from suit and that the district court should have granted their Rule 12(b)(6) motions to dismiss Plaintiffs-Appellees' § 1983 bodily-integrity claim. "Given this procedural posture, we construe the complaint in the light most favorable to plaintiffs, accept all well-pleaded factual allegations as true, and draw all reasonable inferences in plaintiffs' favor." *Guertin*, 912 F.3d at 916. At the same time, Plaintiffs' factual allegations must state a plausible claim. *Id.* (citing ***323** *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–58, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

Defendants-Appellants are City and State officials, sued in their individual capacities; the City of Flint; and Governor Whitmer, sued in her official capacity. We have already decided key issues of law in this case that came up in separate appeals:

(1) the creation and cover-up of the Flint Water Crisis violated Flint residents' substantive due process right to bodily integrity, *Guertin*, 912 F.3d at 921;

(2) that right was clearly established at the time, *id.* at 934;

(3) the City of Flint is not entitled to Eleventh Amendment immunity, even though it was under State Emergency Manager control during the crisis, *id.* at 936; and

(4) a request for prospective injunctive relief in the form of compensatory education, medical monitoring, and evaluation services can be pursued against the current Governor in her official capacity under *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), *Boler*, 865 F.3d at 412–13.

Some (but not all) Defendants-Appellants were parties to the *Guertin* appeal and were denied qualified immunity in that case.

A. Qualified Immunity

[4] **[5]** The Defendant-Appellant City and State officials argue that qualified immunity shields them from suit. We review de novo a district court's decision to deny qualified immunity. *See Sutton v. Metro. Gov't of Nashville & Davidson Cty.*, 700 F.3d 865, 871 (6th Cir. 2012). "Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011) (internal quotation marks omitted); *see also Guertin*, 912 F.3d at 917. Plaintiffs allege that Defendants-Appellants violated their substantive due process right to bodily integrity. R. 620-3 (Fourth Am. Compl. at 167–69, ¶¶ 463–70) (Page ID #17970–72). Because Plaintiffs do not allege that Defendants-Appellants intended to harm them, Plaintiffs-Appellees must demonstrate that they acted with deliberate indifference. *Guertin*, 912 F.3d at 926. The district court found Plaintiffs' allegations sufficient to state a claim against Defendants-Appellants. R. 798 (Op. & Order at 100) (Page ID #21202).

[6] **[7]** In *Guertin*, we held that City and State officials' role in creating, sustaining, and covering up the Flint Water Crisis violated Flint residents' right to bodily integrity, *Guertin*, 912 F.3d at 921, and that this right was clearly established at the time, *id.* at 934. The substantive due process clause of the Fourteenth Amendment protects against conscience-shocking deprivations of liberty. *Id.* at 918. Violating a person's bodily integrity is a grave deprivation of their liberty. *See id.* at 918–19. The *Guertin* plaintiffs were deprived of their bodily integrity when government officials forcibly invaded their bodies by misleading them into consuming a life-threatening substance. *Id.* at 920–22. Once that hurdle is met, whether the alleged conduct amounts to deliberate indifference depends on the circumstances, including whether the defendants had time to deliberate, whether there was an

involuntary relationship, and whether there was a legitimate government purpose. *See id.* at 922–26. Each of these factors weighed against the defendants in *Guertin*. *Id.* at 925–26. And what was true there is true here: "the ***324** generally alleged conduct [i]s ... egregious." *Id.* at 925.

The parties agree that lead and *legionella* are life-threatening substances and that these contaminants spread to residents through the water supply. R. 798 (Op. & Order at 43) (Page ID #21145). Flint residents had no choice but to receive their water through the City's water plan. *See Guertin*, 912 F.3d at 925 (citing Flint City Charter § 4-203(A); Flint Code of Ord. §§ 46-7, 46-50(b), 46-51, 46-52). On top of that, "various defendants' assurances of the water's potability hid the risks, turning residents' voluntary consumption of a substance vital to subsistence into an involuntary and unknowing act of self-contamination." *Id.* at 925–26. The Flint Water Crisis was a "predictable harm" set into motion by alleged decisions that "took place over a series of days, weeks, months, and years." *See id.* at 925. Given officials' ample time to deliberate, "this known risk cannot be excused on the basis of split-second decision making." *See id.* Worse, the officials stood their ground. The crisis was undeniable, but they refused to switch the City back to clean water, or even to take the meager step of introducing corrosion control, or even to admit that the water was poisoned. "When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." *County of Sacramento v. Lewis*, 523 U.S. 833, 853, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998).

No legitimate government purpose justifies the City and State officials' actions. *See Guertin*, 912 F.3d at 926. "[J]ealously guarding the public's purse cannot, under any circumstances, justify the yearlong contamination of an entire community." *Id.* The question remains whether each Defendant-Appellant's alleged actions individually amount to deliberate indifference. *See id.*

[8] To state a claim for bodily integrity, Plaintiffs-Appellees must demonstrate that the officials' actions "shock the conscience"—here, through deliberate indifference. *See Guertin*, 912 F.3d at 922, 926; *see also Claybrook v. Birchwell*, 199 F.3d 350, 359 (6th Cir. 2000). The standard for deliberate indifference is subjective recklessness. *Guertin*, 912 F.3d at 926. "[P]laintiffs 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.' " *Id.* (quoting *Range v. Douglas*, 763 F.3d 573, 591 (6th Cir. 2014)).

[9] Critically, this case comes to us at the motion to dismiss stage. The allegations in the Complaint must be taken as true. *Id.* at 916. Some judges of this court have even noted that, because the facts at this stage are yet undeveloped, "it is generally inappropriate for a district court to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity. Although an officer's entitlement to qualified immunity is a threshold question to be resolved at the earliest possible point, that point is usually summary judgment and not dismissal under Rule 12." *Wesley v. Campbell*, 779 F.3d 421, 433–34 (6th Cir. 2015) (internal quotation omitted). With these principles in mind, Plaintiffs-Appellees have plausibly alleged that Defendants-Appellants violated their right to bodily integrity.

1. City Officials

[10] Defendant-Appellant City Officials include Emergency Managers Earley and Ambrose, Public Works Director Croft, and Utilities Administrators Glasgow and Johnson. The *Guertin* court described Earley, Ambrose, and Croft as "instrumental in creating the crisis." 912 F.3d at 926. We have not had the opportunity previously ***325** to address the conduct of Glasgow and Johnson.

All of the Defendant-Appellant City Officials argue that they are entitled to qualified immunity because they acted based on professional opinions from MDEQ officials and private engineering firms. *See Butz v. Economou*, 438 U.S. 478, 507, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) ("Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law."); Appellant Br. (19-1425) at 25, 27–29, 31–34. We have already held, however, that, "[t]o the extent these defendants claim 'mistakes in judgment' because they reasonably relied upon the opinions of Michigan Department of Environmental Quality (MDEQ) employees and professional engineering firms, those are facts to be fleshed out during discovery and are not appropriate to resolve at the motion-to-dismiss posture." *Guertin*, 912 F.3d at 927 (citation omitted). The same reasoning applies here. At this stage, we must credit Plaintiffs' allegation that the Defendant-Appellant City Officials had *independent* knowledge that the Flint River water was causing a public health crisis—regardless of what the MDEQ or the engineering firms reported.

a. Earley

[11] Darnell Earley was Emergency Manager for the City from September 2013 (prior to the crisis) to January 2015 (in the midst of the crisis). Earley forced the switch to Flint River water when he knew that the FWTP was not ready and that it was important that the water be treated. R. 620-3 (Fourth Am. Compl. at 51, ¶ 147) (Page ID #17854); *see also Guertin*, 912 F.3d at 927. Plaintiffs-Appellees also allege that Earley directed City officials to lie to the public and tell them that the Legionnaires' disease outbreak in the summer of 2014 "was 'an internal issue at McLaren [Hospital] that they are working on with our assistance, not a Flint water problem that we are trying to resolve.' " R. 620-3 (Fourth Am. Compl. at 59, ¶ 175) (Page ID #17862). Even after he was briefed on water quality issues by the MDEQ in the fall of 2014, Earley refused to reconnect to the DWSD. *Id.* at 60–61, ¶¶ 180–81 (Page ID #17863–64). He again refused to reconnect to the DWSD in January 2015, when officials were aware of the lead and *legionella* problems and after the University of Michigan ceased use of Flint River drinking water because of lead contamination. *Id.* at 62, ¶¶ 185–86 (Page ID #17865). These actions plausibly demonstrate deliberate indifference to the crisis that would likely result.

b. Ambrose

Gerald Ambrose took over as Emergency Manager for the City of Flint in January 2015 (in the midst of the crisis). Prior to that, he had served as Earley's advisor, and had been notified about the Legionnaires' disease outbreak in the summer of 2014. *Id.* at 59, ¶ 175 (Page ID #17862). Like Earley, he repeatedly refused to reconnect to the DWSD—showcasing an indifference that was "especially egregious" in light of the undeniable and worsening crisis. *See Guertin*, 912 F.3d at 927. After State officials installed water coolers in Flint offices and the GCHD reported that the outbreak of Legionnaires' likely was connected to the use of Flint River water, the DWSD offered Ambrose a deal for reconnecting in January 2015. R. 620-3 (Fourth Am. Compl. at 81, ¶ 239) (Page ID #17884). He refused. *Id.* In February 2015, Flint residents publicly demanded reconnecting to the DWSD, and he again refused. *Id.* at 82, ¶ 243 (Page ID #17885). In March 2015, the Flint City Council voted to re-connect to DWSD. *Id.* at 86, ¶ 255 (Page ID #17889). Ambrose rejected their vote. *Id.* City and State officials were well ***326** aware of the crisis by January 2015 and were under the scrutiny of the GCHD and the EPA by March 2015. Ambrose's staunch refusal to stop use of Flint River water in spite of what he knew plausibly demonstrates deliberate indifference to the crisis.

c. Glasgow

[12] Michael Glasgow was a City Utilities Administrator, and the City's water treatment plant laboratory and water quality supervisor. Prior to making the switch to the Flint River, he knew that the FWTP was not ready and that the City would be distributing contaminated water. *Id.* at 46, ¶ 129 (Page ID #17849). He tried to stop the switch from happening but nevertheless participated in the transition. *Id.* He later told State investigators that Croft and Johnson, who were his superiors, pressured him to make the switch. *Id.* at 47, ¶ 130 (Page ID #17850). Plaintiffs-Appellees concede that Glasgow's conduct in implementing the switch did not demonstrate deliberate indifference. *See* Oral Argument at 1:12:52–1:13:10.

What Plaintiffs-Appellees take issue with is Glasgow's later role in covering up the extent of lead contamination. In July 2015, Glasgow wrote to Rosenthal that "Flint has lots of lead pipe, no corrosion control treatment" and that "[t]his is an unprecedented situation and EPA needs to take this seriously. Now." *Id.* at 89, ¶ 267 (Page ID #17892). Despite what he knew, he distorted water quality tests to downplay the extent of the lead contamination. *Id.* at 89–91, ¶¶ 270–72 (Page ID #17893–94). Glasgow claims that he did so at the direction of MDEQ officials Busch and Prysby. *Id.* at 91, ¶ 273 (Page ID #17894). But as Plaintiffs-Appellees point out, Busch and Prysby were MDEQ (not City) officials who, unlike Croft and Johnson, had no authority over him. The facts, when fully developed, ultimately might show that Glasgow truly was coerced into distorting the water quality tests, so that he cannot be said to have acted with deliberate indifference. But at this stage, the allegations plausibly support a reasonable inference that he did act with deliberate indifference when he helped to cover up the crisis.

d. Croft

[13] Howard Croft was Public Works Director for the City of Flint. Croft permitted the switch to the Flint River even though he knew that the FWTP was not prepared to deliver safe drinking water. *Id.* at 47, ¶ 130 (Page ID #17850); *see*

also Guertin, 912 F.3d at 927. In fact, Glasgow stated that Croft pressured him to make the switch despite Glasgow's warnings. R. 620-3 (Fourth Am. Compl. at 47, ¶ 130) (Page ID #17850). Croft also knew from the GCHD that the Legionnaires' disease outbreak was connected to Flint River water, and he did nothing. *Id.* at 138, ¶ 401 (Page ID #17941). His alleged role in creating and failing to mitigate the crisis plausibly demonstrates deliberate indifference.

e. Johnson

[14] Daugherty Johnson was another City Utilities Administrator. Along with Croft, he purportedly pressured Glasgow to make the switch to the Flint River despite Glasgow's warnings. *Id.* at 47, ¶ 130 (Page ID #17850). He also stonewalled the GCHD's attempt to investigate Flint River water quality issues and the outbreak of Legionnaires' disease. *Id.* at 83–84, ¶¶ 248–50 (Page ID #17886–87). His alleged role in creating and covering up the crisis plausibly demonstrates deliberate indifference.

2. MDEQ Officials

[15] Defendant-Appellant MDEQ Officials include State agency employees who ***327** permitted the switch to the Flint River, distorted water quality tests, and resisted concerns from other agencies like the EPA and the GCHD regarding the quality of Flint River water. In *Guertin*, we stated that the MDEQ Officials—there, Busch, Shekter-Smith, Prysby, and Wurfel—"played a pivotal role in authorizing Flint to use its ill-prepared water treatment plant to distribute drinking water[,] ... falsely assured the public that the water was safe[,] and attempted to refute assertions to the contrary." 912 F.3d at 927. We have not had the opportunity previously to address the conduct of Rosenthal and Cook.

The MDEQ Officials argue that they decided not to use corrosion control based on a mistaken, but reasonable, interpretation of the EPA Lead and Copper Rule. Appellant Br. (19-1477) at 3–4, 38, 45. But as we stated in *Guertin*, "[t]o the extent these defendants made 'honest mistakes in judgment'—in law or fact—in interpreting and applying the Lead and Copper Rule, that defense is again best reserved for after discovery." 912 F.3d at 928 (citation omitted). At this stage, we must accept the reasonable inference from Plaintiffs' allegations that, whatever the MDEQ's purported justifications for its actions, it rushed the switch to the Flint River knowing it would deliver contaminated water and that the decision-makers cared only about cost, not water quality. Their purported defense also does not explain why they failed to treat the water after they came under the EPA's scrutiny, or why they lied to the EPA.

Plaintiffs-Appellees plausibly allege a constitutional violation for each Defendant-Appellant MDEQ Official for the reasons stated below.

a. Shekter-Smith

[16] Liane Shekter-Smith was the MDEQ Chief of the Office of Drinking Water and Municipal Assistance. Despite knowing that Flint River water presented health risks, *see* R. 620-3 (Fourth Am. Compl. at 40, ¶ 105) (Page ID #17843), she secured the necessary administrative consent order (or ACO) and rushed the switch to the Flint River before the FWTP was ready, *see id.* at 45–46, ¶ 128 (Page ID #17848–49). When reports poured in from residents that something was wrong with the water and that it was making them ill, she did nothing. *See id.* at 57, ¶¶ 165–67 (Page ID #17860). After privately suggesting that the water might be contaminated, *id.* at 85, ¶ 252 (Page ID #17888), she publicly combatted the GCHD's *legionella* analysis, *id.* at 85–86, ¶¶ 252–53 (Page ID #17888–89). And she did nothing to mitigate the crisis even after the Del Toral Report blew the whistle on high lead levels in Flint's water. *Id.* at 87–88, ¶¶ 259–62 (Page ID #17890–91). Her alleged role in creating, failing to mitigate, and covering up the crisis plausibly demonstrates deliberate indifference.

b. Rosenthal

[17] Adam Rosenthal was the MDEQ Water Quality Analyst. He did not stop the switch to the Flint River in spite of Glasgow's warning that the FWTP was not ready. *Id.* at 46, ¶ 129 (Page ID #17849). He knew as early as May 2014 that the water contained high TTHM levels that were above regulation (and indicated lead contamination), and did nothing. *Id.* at 58, ¶ 172 (Page ID #17861). In July 2015, Glasgow wrote to him that "Flint has lots of lead pipe, no corrosion control treatment" and that "[t]his is an unprecedented situation and EPA needs to take this seriously. Now." *Id.* at 89, ¶ 267 (Page ID #17892). Yet, Glasgow wrote, "MDEQ is still publicly insisting Flint water has tested safe, is safe, and that [F]lint has no ***328** violations of any sort." *Id.* Rosenthal, apparently unmoved, soon afterward distributed a distorted water quality report that was altered to exclude high lead levels. *Id.* at

91, ¶ 273 (Page ID #17894). He has also been accused of manipulating and falsely reporting the test results. *Id.* His alleged role in creating, failing to mitigate, and covering up the crisis plausibly demonstrates deliberate indifference.

c. Busch

[18] Stephen Busch was the MDEQ District Supervisor. Busch knew as early as March 2013 that Flint River water presented health risks and would require significant treatment, *id.* at 40, ¶ 105 (Page ID #17843), but he did not stop the switch to the Flint River even after Glasgow warned him that the FWTP was not ready, *id.* at 46, ¶ 129 (Page ID #17849); *see also Guertin*, 912 F.3d at 927. When the MDEQ came under the EPA's scrutiny for lead contamination, Busch lied and told Del Toral that the City was using corrosion control. R. 620-3 (Fourth Am. Compl. at 83, ¶ 246) (Page ID #17886); *see also Guertin*, 912 F.3d at 928. Busch claims that he did not lie and that, instead, he simply informed the EPA that the City had a corrosion control *program* in place, meaning that the City was monitoring the water without treating it. *See* Appellant Br. (19-1477) at 54. That is quibbling with the facts and asks us to do what we cannot at this stage—to view the allegations in the light most favorable to him. *See Guertin*, 912 F.3d at 916. Plaintiffs' allegation stands.

Busch also lied to the GCHD. He told them that the evidence did not support a connection between the outbreak of Legionnaires' disease and the switch to the Flint River. R. 620-3 (Fourth Am. Compl. at 85–86, ¶ 253) (Page ID #17888–89). And according to Glasgow, Busch directed him to distort water quality tests to exclude high results for lead contamination. *Id.* at 91, ¶ 273 (Page ID #17894). Busch's alleged role in creating, failing to mitigate, and covering up the crisis plausibly demonstrates deliberate indifference.

d. Prysby

[19] Michael Prysby worked under Busch as an MDEQ Engineer for District 11, which serviced the City of Flint. Along with Busch, he did not stop the switch to the Flint River in the face of Glasgow's warnings, *id.* at 46, ¶ 129 (Page ID #17849); *see also Guertin*, 912 F.3d at 927; he did nothing in response to the Del Toral Report, R. 620-3 (Fourth Am. Compl. at 87–88, ¶¶ 259–62) (Page ID #17890–91); and he purportedly directed Glasgow to distort water quality tests to exclude high results for lead contamination, *id.* at 91, ¶ 273 (Page ID #17894). His alleged role in creating, failing to mitigate, and covering up the crisis plausibly demonstrates deliberate indifference.

e. Cook

[20] Patrick Cook was the MDEQ Water Treatment Specialist. He signed the permit that was the last necessary approval for the (rushed) use of Flint River water and the FWTP. *Id.* at 47, ¶ 132 (Page ID #17850). Like other officials, he at first did nothing in response to the Del Toral Report. *Id.* at 87–88, ¶¶ 259–62 (Page ID #17890–91). Then, in April 2015, he admitted in an email to Del Toral that "Flint is currently not practicing corrosion control at the [F]WTP," *id.* at 86–87, ¶ 257 (Page ID #17889–90), after Busch had lied and told the EPA that the City was using corrosion control, *id.* at 83, ¶ 246 (Page ID #17886). In the same email, however, Cook "misled the EPA regarding the necessity of using corrosion control in Flint after the switch." *Id.* at 83, ¶ 247 (Page ID ***329** #17886). Cook contends that the email itself renders Plaintiffs' reading of it implausible. Reply Br. (19-1477) at 6–7.

[21] When a document attached to the complaint contradicts the allegations, the document trumps the allegations. *Williams v. CitiMortgage, Inc.*, 498 F. App'x 532, 536 (6th Cir. 2012). For a document to contradict the complaint, it must "utterly discredit" the allegations. *Cagayat v. United Collection Bureau, Inc.*, 952 F.3d 749, 755 (6th Cir. 2020) (quoting *Bailey v. City of Ann Arbor*, 860 F.3d 382, 386–87 (6th Cir. 2017)). The email at issue here does not utterly discredit Plaintiffs' allegations. Though Cook admits at the start of the email that the City is not using corrosion control, he then states that there was and is no need to do so because the Flint River water's testing results were within the regulatory limit of 15 ppb for lead. R. 735-3 (Cook Email at 2) (Page ID #20343) ("The first round of samples after switch-over from DWSD ... had 90th percentiles of 6 ppb for Lead.... The highest lead result out of the 20 [samples] received [from the second round of testing] thus far is 13 ppb."). Touting allegedly distorted water quality test results and false compliance plausibly was misleading. Therefore, the district court was right to credit Plaintiffs' allegations. Cook's alleged role in creating and covering up the crisis plausibly demonstrates deliberate indifference.[8]

f. Wurfel

[22] Bradley Wurfel was the MDEQ Director of Communications and was instrumental in the coverup. In the summer of 2015, as concerns and criticism reached their peak, he repeatedly lied to the public and assured them that Flint River water was safe. R. 620-3 (Fourth Am. Compl. at 88–90, ¶¶ 265–70) (Page ID #17891–93); *see also Guertin*, 912 F.3d at 928. He told parents that "anyone who is concerned about lead in the drinking water can relax." R. 620-3 (Fourth Am. Compl. at 88, ¶ 265) (Page ID #17891). He cited distorted water quality tests as evidence that "residents of Flint do not need to worry about lead in their water supply." *Id.* at 89–90, ¶ 270 (Page ID #17892–93). He even attacked independent whistleblower reports by Professor Edwards and Dr. Hanna-Attisha that stated that the City of Flint was in the midst of a major public health emergency. He accused Professor Edwards of "quickly prov[ing] the theory [he] set out to prove" and decried the "near-hysteria" resulting from Dr. Hanna-Attisha's report. *Id.* at 92, ¶ 275 (Page ID #17895); *id.* at 94, ¶¶ 283–84 (Page ID #17897); *see also Guertin*, 912 F.3d at 928.

Wurfel asks us to consider the context and totality of the statements he made, but points to nothing that directly negates Plaintiffs' allegations. *See* Appellant Br. (19-1477) at 50–52. We will not view the allegations in the light most favorable to the defendant—and that is essentially what Wurfel asks us to do. *See Guertin*, 912 F.3d at 916. We also reject his attempt to reargue his position in *Guertin* that "mere" public statements cannot violate a person's right to bodily integrity. *See* Reply Br. (19-1477) at 11–13. The *Guertin* court concluded that public statements like those alleged here did amount to a constitutional ***330** violation. 912 F.3d at 929. That decision controls. Wurfel's alleged role in covering up the crisis plausibly demonstrates deliberate indifference.

3. State Officials

The Defendant-Appellant State Officials sued in their individual capacities are Governor Snyder and Treasurer Dillon. We have not had the opportunity previously to address their conduct. We hold that Plaintiffs-Appellees plausibly allege a constitutional violation as to Snyder, but we refrain from deciding this question for Dillon until the district court has an opportunity to reconsider in light of *Brown v. Snyder (In re Flint Water Cases)*, No. 18-cv-10726, 2020 WL 1503256, at *9 (E.D. Mich. Mar. 27, 2020).

a. Governor Snyder

Governor Snyder was in office for the entire relevant time period. He "was personally involved in the decisional process which led to the transition from DWSD to the KWA," *id.* at 42, ¶ 114 (Page ID #17845), having himself coordinated the switch, *id.* at 43, ¶ 115–18 (Page ID #17846). And he knew that the Flint River would serve as the City's interim water source until the KWA went online. *Id.* at 44, ¶ 119 (Page ID #17847). Prior to the switch, a member of his staff warned him that it "could lead to some big potential disasters down the road." *See id.* at 45, ¶ 127 (Page ID #17848). In spite of that warning, Snyder did not stop the switch from going forward.

Soon after the switch, there was evidence of corrosion and accompanying lead and *legionella* contamination. *See id.* at 58–60, 62, ¶¶ 173, 177, 187 (Page ID #17861–63, 17865). On October 13, 2014, General Motors stopped using Flint River water at its engine plant out of fear that the water would corrode its machinery. *Id.* at 60, ¶ 179 (Page ID #17863). The next day, a member of Snyder's executive staff expressed concern with the reports coming out about the water's contamination and recommended that they ask the Emergency Manager to switch back to the DWSD "as an interim solution to both the quality, and now the financial, problems that the current solution is causing." *Id.* at 60–61, ¶ 180 (Page ID #17863–64). Snyder's legal counsel similarly stated that the dangers posed by Flint River water were "downright scary" and "advised that, '[t]hey should try to get back on the Detroit system as a stopgap ASAP before this thing gets too far out of control.' " *Id.* at 61, ¶ 182 (Page ID #17864). Snyder evidently was unmoved.

In January 2015, the University of Michigan turned off certain water fountains on its Flint campus after tests revealed high levels of lead contamination. *Id.* at 62, ¶ 185 (Page ID #17865). Around the same time, the GCHD reported a likely "association between the spike in Legionnaires' disease reports and the onset of the use of Flint River water." *Id.* at 81, ¶ 237 (Page ID #17884). Meanwhile, State officials had water coolers discreetly installed in State buildings located in Flint, without announcing their concerns to the public. *Id.* at 80, ¶ 235 (Page ID #17883). At some point in 2015, Snyder met with other government officials to discuss the serious threats posed by lead and *legionella* contamination, and his office even considered distributing water filters to protect

Flint water users. *Id.* at 80, ¶ 233 (Page ID #17883); *id.* at 84, ¶ 249 (Page ID #17887). But ultimately Snyder did nothing.

In addition to public reports from whistleblowers, Snyder's own staff kept him personally apprised of the worsening crisis. In April 2015, Snyder's chief of staff emailed Snyder and other staff members ***331** that "[t]he water issue continues to be a danger flag." *Id.* at 87, ¶ 258 (Page ID #17890). Soon afterward, Snyder's Director of Urban Initiatives spoke to Snyder directly and "advised him of the growing concerns among Flint residents that they were being exposed to toxic levels of lead." *Id.* at 89, ¶ 269 (Page ID #17892). Nothing came of it. All the while, Snyder kept the crisis under wraps and stood by as the public continued to be poisoned. The Governor's own task force eventually would disclose that Snyder failed to act in part because of cost. *Id.* at 150–51, ¶¶ 420–21 (Page ID #17953–54).

Finally, after more than a year into the crisis, Snyder relented and ordered the City of Flint to reconnect with the DWSD on October 8, 2015. *Id.* at 95, ¶ 287 (Page ID #17898). He declared a State of Emergency *three months later* on January 5, 2016, and disclosed the *legionella* problem on January 13, 2016. *Id.* at 97, ¶¶ 295–96 (Page ID #17900). "Without a state of emergency, plaintiffs were denied valuable resources that could have helped abate the harm that they were still suffering." R. 798 (Op. & Order at 46–47) (Page ID #21148–49).

[23] Snyder argues in the first instance that he is entitled to qualified immunity because he acted (or failed to act) in reliance on the MDEQ and engineering firms' assessments. *See* Appellant Br. (19-1472) at 37–40. Again, "those are facts to be fleshed out during discovery and are not appropriate to resolve at the motion-to-dismiss posture." *Guertin*, 912 F.3d at 927 (citations omitted). For the same reason, his defense that any alleged disinformation or inaction arose from legitimate disagreements over "the nature and extent of the problems and the appropriate solution" is misplaced at this stage. *See* Reply Br. (19-1472) at 8–11.

[24] We agree with the district court that the allegations against Governor Snyder are sufficient to state a claim for deliberate indifference. *See* R. 798 (Op. & Order at 39–47) (Page ID #21141–49). Unlike the executive defendants in *Guertin*, Snyder personally contributed to creating this crisis. The executives that we decided should have been dismissed in *Guertin* were Wyant, the Director of the MDEQ; Lyon, the Director of the MDHHS; and Wells, the Chief Medical Executive of the MDHHS. *Guertin*, 912 F.3d at 929–31. Wyant may have been "aware of some of the issues arising with the water supply post-switch," but there were no plausible allegations that "Wyant personally made decisions regarding the water-source switch" or that "he personally engaged" in other conscience-shocking conduct. *Id.* at 929. As for Lyon and Wells, we noted that "[t]he complaint set[ ] forth no facts connecting Lyon and Wells to the switch to the Flint River or the decision not to treat the water, and there [wa]s no allegation that they took any action causing plaintiffs to consume the lead-contaminated water." *Id.* at 929–30. All that the plaintiffs alleged was a general "fail[ure] to 'protect and notify the public' of the problems with Flint's water," rather than allege a particular action taken by Lyon or Wells that would demonstrate their deliberate indifference. *Id.* at 930.

Plaintiffs' allegations here demonstrate that Governor Snyder personally was aware that Flint River water was contaminated and that he personally made the decision to switch the City from the DWSD to Flint River water. The allegations demonstrate that Snyder personally understood not just from public reports, but from *his own staff*, that Flint residents were being poisoned. Plaintiffs' allegations demonstrate that Snyder downplayed the problem and delayed taking action to protect the people of Flint, first by refusing to ***332** switch back to the DWSD, then by failing to supply Flint residents with protective supplies, and finally by waiting three months after the City connected back to the DWSD to declare a state of emergency. Snyder's alleged role in creating, failing to mitigate, and covering up the crisis plausibly demonstrates deliberate indifference.[9]

b. State Treasurer Dillon

Andy Dillon was Treasurer for the State of Michigan when the City was in the process of switching to Flint River water. Dillon was asked to assess the cost effectiveness of staying with the DWSD or switching to the KWA. *See id.* at 39–40, ¶ 104 (Page ID #17842–43). Dillon ultimately recommended to Snyder that the Governor authorize the City to switch to the KWA, after Dillon learned that the City could fund the switch with an ACO that would require use of Flint River water in the interim. *Id.* at 41, ¶ 107 (Page ID #17844). Dillon was part of the core team that developed the interim Flint River plan, *see id.* at 44, ¶ 119 (Page ID #17847), and he knew that the FWTP would need to undergo significant upgrades before it could treat the water properly, *id.* at 44, ¶ 122 (Page ID #17847).

In spite of what he knew, the Treasury pressed the MDEQ to secure the ACO quickly, so that the switch to the Flint River would take place before the FWTP was ready. *Id.* at 130, ¶ 383 (Page ID #17933).

Plaintiffs-Appellees ask that we remand for the district court to decide whether to dismiss Dillon from this case. Defendants-Appellants do not protest that request. After we accepted this appeal, the district court dismissed Dillon as a defendant in a separate Flint Water Crisis case, *Brown v. Snyder (In re Flint Water Cases)*, No. 18-cv-10726, 2020 WL 1503256, at *9 (E.D. Mich. Mar. 27, 2020). The district court recently discovered that Dillon was not Treasurer at the time of the actual switch to Flint River water in April 2014. *Id.* at *9 n.13. In light of that, the district court found that Dillon did not have authority over the switch and, therefore, that he cannot be found liable. *Id*. Without passing judgment on that decision, we see no issue with Plaintiffs-Appellees' request that we remand for the district court to decide in the first instance whether to dismiss Dillon in light of that fact. *See Lopez v. Foerster*, 791 F. App'x 582, 586 (6th Cir. 2019) ("Although we have jurisdiction to decide the qualified-immunity question, given the unique circumstances of this case, we remand to the district court to consider the issue in the first instance.").

B. Eleventh Amendment Immunity

[25] The City of Flint and Governor Whitmer argue that they are entitled to Eleventh Amendment sovereign immunity. "Whether Eleventh Amendment sovereign immunity exists in any particular case is a question of constitutional law that we review *de novo*." *Mingus v. Butler*, 591 F.3d 474, 481 (6th Cir. 2010).

[26] The Eleventh Amendment generally bars suits against the State, but generally does not bar suits against cities. ***333** U.S. CONST. amend. XI ("The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."); *see also S&M Brands, Inc. v. Cooper*, 527 F.3d 500, 507 (6th Cir. 2008); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.54, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Two quirks of immunity doctrine are at play in this appeal. The district court correctly concluded that precedent from prior Flint Water cases precludes the City's and Governor Whitmer's arguments in this case.

1. City of Flint

[27] The City argues that it is entitled to Eleventh Amendment sovereign immunity because it was under State emergency management during the events leading up to and during the Flint Water Crisis. "Although municipalities typically do not enjoy sovereign immunity, 'arms of the state' do." Appellant Br. (19-1425) at 36; *Metcalf*, 506 U.S. at 144, 113 S.Ct. 684 ("[A] State and its 'arms' are, in effect, immune from suit in federal court."). We already foreclosed this argument in *Guertin*. The *Guertin* court held that the City was not acting as an arm of the State when it was under State emergency management and, accordingly, that it was not entitled to sovereign immunity. 912 F.3d at 936. The City acknowledges that *Guertin*'s holding is binding on this panel. Appellant Br. (19-1425) at 36 n.15. It makes its present argument "for the purpose of preserving the issue for further appeal," if any. *Id.* We accordingly note that the City has preserved its argument and that we abide by our decision in *Guertin*.

2. Governor Whitmer

Plaintiffs seek prospective injunctive relief against Governor Whitmer in her official capacity to combat the ongoing effects from the violation of their constitutional rights. They accordingly seek "[a]n injunctive order to remediate the harm caused by the Government Defendants' unconstitutional conduct including, but not limited to: repairs of private property and establishment of medical monitoring to provide health care and other appropriate services to Class members for a period of time deemed appropriate by the Court." R. 620-3 (Fourth Am. Compl. at 214) (Page ID #18017). They also seek "[a]ppointment of a monitor who will assist in the development of remedial plans including, but not limited to: early education, education intervention programs, criminal and juvenile justice evaluations." *Id.*

Under Rule 25(d) of the Federal Rules of Civil Procedure, the successor to an officer sued in their official capacity is "automatically substituted as a party." Fed. R. Civ. P. 25(d). When Whitmer succeeded Snyder in January 2019, she automatically became a party to this action in her official capacity as Governor. Whitmer argues that she is entitled to sovereign immunity because Plaintiffs fail to plead a proper *Ex parte Young* claim against her.

[28] The State generally is immune from suit, but *Ex parte Young* provides an exception for plaintiffs seeking prospective injunctive relief against State actors in their

official capacity. 209 U.S. at 156, 28 S.Ct. 441; *S&M Brands*, 527 F.3d at 507. Plaintiffs originally pleaded their *Ex parte Young* claims against Governor Snyder, but since Governor Whitmer has taken office, they have not amended their Complaint to include allegations against her personally. Appellant Br. (19-1472) at 52–53. Whitmer argues that, because the alleged unconstitutional conduct occurred solely in the past, the pleadings are deficient to state a claim for prospective injunctive ***334** relief. Plaintiffs-Appellees point out that we rejected a similar argument by Governor Snyder in *Boler*, a previous Flint Water case. 865 F.3d at 412–14.

[29] Plaintiffs-Appellees seek prospective injunctive relief to remediate the ongoing harms stemming from the Flint Water Crisis. This type of relief is proper under *Ex parte Young*. *See Milliken v. Bradley*, 433 U.S. 267, 290, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977). In *Milliken*, the Supreme Court held that, under *Ex parte Young*, courts could order newly integrated schools to implement remedial education programs in order to combat the lasting effects of *de jure* school segregation. *Id.* "[T]he victims of Detroit's *de jure* segregated system will continue to experience the effects of segregation," the Court reasoned, "until such future time as the remedial programs can help dissipate *the continuing effects of past misconduct*." *Id.* (emphasis added). Like the remedial education programs at issue in *Milliken*, the remedial measures that Plaintiffs-Appellees request here "are plainly designed to wipe out continuing [harms] produced by" the unconstitutional acts of Defendants-Appellants. *See id.*[10]

What was true in *Boler* remains true today: "Damage to the water pipes has been done, and has ongoing effects." 865 F.3d at 413. The year-long corrosion of public and private water pipes continues to contaminate the water, and the prolonged and extreme exposure to lead—particularly in children and mothers—will leave lasting developmental effects. *See supra* pp. 320-21. Plaintiffs have alleged ongoing effects from constitutional violations, even if the conduct at issue occurred solely in the past. *See Boler*, 865 F.3d at 413. Moreover, Plaintiffs' requests for repairs, medical monitoring, educational programs, and criminal and juvenile justice evaluations are identical to those sought and upheld in *Boler*. *See Boler*, 865 F.3d at 413.

Nevertheless, Whitmer argues, this case is different because she personally did not commit the initial constitutional violations and she is not alleged to be deliberately indifferent now. That distinction makes no difference. As Plaintiffs-Appellees aptly state, "[a]n official-capacity suit for prospective relief is simply the vehicle by which the state can be compelled to fix a constitutional violation" committed in the past that has continuing effects. Appellees Br. at 82 (citing *Lewis v. Clarke*, —— U.S. ——, 137 S. Ct. 1285, 1290–91, 197 L.Ed.2d 631 (2017)). It does not matter what Whitmer *personally* did or did not do in the past, or even in the present. "Injunctive relief is appropriate here, not because the defendants will be deliberately indifferent again in the future, but because the past deliberate indifference has continuing effects." *Id.* at 83 (citing *Boler*, 865 F.3d at 413). We conclude that the district court ***335** rightly rejected Whitmer's Eleventh Amendment argument.

IV. CONCLUSION

We **AFFIRM** the district court's denial of the motions to dismiss with respect to every Defendant-Appellant except Treasurer Dillon. We **REMAND** for the district court to decide whether Dillon should be dismissed in light of its decision in *Brown v. Snyder (In re Flint Water Cases)*, No. 18-cv-10726, 2020 WL 1503256, at *9 (E.D. Mich. Mar. 27, 2020).

MURPHY, J., concurring in the judgment in part and dissenting in part.

Like other cases that have reached our court, this case arises out of the tragedy known as the Flint water crisis. *See Guertin v. Michigan*, 912 F.3d 907 (6th Cir. 2019); *Boler v. Earley*, 865 F.3d 391 (6th Cir. 2017). The district court held that the plaintiffs' complaint stated actionable claims against many government actors in Michigan. *Carthan v. Snyder*, 384 F. Supp. 3d 802, 839–43, 857–61 (E.D. Mich. 2019). These government actors have taken this immediate appeal on qualified-immunity grounds. Yet our court recently allowed similar claims to proceed against many of the same actors. *Guertin*, 912 F.3d at 926–32. I joined Judge Kethledge's dissent from the denial of rehearing en banc in that case. *Guertin v. Michigan*, 924 F.3d 309, 315 (6th Cir. 2019) (Kethledge, J., dissenting from the denial of rehearing en banc). While "the sympathies of every decent person run entirely to the plaintiffs" in all of these cases, I did not believe that the complaint's allegations met the Supreme Court's high bar "for prying away an officer's qualified immunity"—even at the early motion-to-dismiss stage. *Id.* at 315–16; *cf. Ziglar v. Abbasi*, —— U.S. ——, 137 S. Ct. 1843, 1865–69, 198 L.Ed.2d 290 (2017).

Now, however, *Guertin* is circuit law that we must faithfully follow. And this case's similarities to *Guertin* are striking. This case's plaintiffs? Flint residents who allege serious harm from contaminated water, just as in *Guertin*. Its defendants? State and local actors, many of whom were defendants in *Guertin*. The claim? That these actors violated the same substantive-due-process right to bodily integrity at issue in *Guertin*. The procedural posture? An appeal from the denial of a motion to dismiss the complaint, just as in *Guertin*. The allegations? Largely the same as in *Guertin*—that government actors played various roles in switching Flint's water supply to a contaminated source and then in concealing the water's contaminated nature. The defenses? The same qualified-immunity and sovereign-immunity defenses from *Guertin* (and *Boler*).

What does this background mean for this case? As an initial matter, I would have written the majority opinion "in a different key." *Guertin*, 924 F.3d at 311 (Sutton, J., concurring in the denial of rehearing en banc). This appeal arises at the pleading stage. We must assume that the complaint's allegations are true even though many remain hotly contested by the defendants. If discovery ends up showing only negligence on their part, the defendants may raise their qualified-immunity defenses at the summary-judgment stage. *See id.* at 315; *Guertin*, 912 F.3d at 935. Still, I agree with most of my colleagues' conclusions. Under *Guertin*, I agree that the substantive-due-process claims must proceed against the defendants from the City of Flint (Emergency Managers Gerald Ambrose and Darnell Earley, Director of Public Works Howard Croft, and Utility Administrators Michael Glasgow and Daugherty Johnson). And I agree that the claims must proceed against the defendants from the Michigan Department ***336** of Environmental Quality (Stephen Busch, Patrick Cook, Michael Prysby, Adam Rosenthal, Liane Shekter-Smith, and Bradley Wurfel). Yet I respectfully disagree with my colleagues over whether *Guertin* permits the claim against former Governor Rick Snyder, and I also would resolve the claim against former Treasurer Andy Dillon now. I read *Guertin* as requiring us to reject the claims against Snyder and Dillon.

Keep in mind that the *Guertin* appeal involved twelve individual defendants, but our court allowed claims to proceed against only seven of them. 912 F.3d at 932. *Guertin* noted that public actors infringe a due-process right to bodily integrity when they injure individuals through conduct that "shocks the conscience." *Id.* at 918–24. And it chose a deliberate-indifference test to measure whether the defendants' actions in that case shocked the conscience. *Id.* at 926. That test (which *Guertin* called a "particularly high hurdle") required the plaintiffs to plausibly allege that the 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." *Id.* (internal quotation marks omitted). Importantly, *Guertin* then explained that it must apply this test to "each individual defendant's conduct" because public actors cannot be held vicariously liable for the conduct of others under 42 U.S.C. § 1983. *Id.* at 926, 929.

Why did *Guertin* find this test met for some defendants but not for others? As I read our opinion, it distinguished the actors with the most day-to-day involvement in allegedly causing the crisis (or in allegedly covering it up) from higher-level officials with more supervisory roles or other employees with more tangential roles. *See id.* at 926–32; *cf. Ashcroft v. Iqbal*, 556 U.S. 662, 680–84, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

On the one hand, *Guertin* allowed claims against the City of Flint employees who were allegedly the "chief architects" of the switch to the Flint River and who made that change while knowing that the Flint water-treatment plant was not ready. 912 F.3d at 926. *Guertin* also allowed claims against the "front and center" employees in the Michigan Department of Environmental Quality who allegedly "authorized use of Flint River water with knowledge of its contaminants and then deceived others to hide the fact of contamination." *Id.* at 927.

On the other hand, *Guertin* rejected a claim against Daniel Wyant, the Director of the Michigan Department of Environmental Quality, who managed these employees and who was "aware of some of the issues" with the water after the transition. *Id.* at 929. The plaintiffs did not allege that he "personally made decisions regarding the water-source switch, nor [did] they allege he personally engaged in any other conduct that [we found] conscience-shocking." *Id.* Similarly, the court rejected claims against Nick Lyon, the Director of the Michigan Department of Health and Human Services, and another executive in his department. *Id.* at 929–30. While these actors allegedly knew of problems with the water and failed to warn the public, those allegations fell "well-short of conscience-shocking conduct[.]" *Id.* at 930. *Guertin* lastly dismissed claims against two other lower-level employees in that department even though they allegedly sought to hide evidence of the crisis. *Id.* at 931–32. *Guertin*

reasoned that the failure to "blow the whistle" did not suffice to meet its deliberate-indifference test. *Id.* at 932.

Now apply these standards to the thirteen defendants sued in their personal capacities ***337** in this appeal. *Guertin* already denied qualified immunity to seven of them—three defendants with the city (Earley, Ambrose, and Croft) and four with the Michigan Department of Environmental Quality (Busch, Prysby, Shekter-Smith, and Wurfel). *See id.* at 926–29. The complaint in this case makes allegations against these defendants that are analogous to those in *Guertin*. So *Guertin* requires us to allow the claims to proceed against these defendants in this case too.

Guertin did not consider two other defendants with the Michigan Department of Environmental Quality (Cook and Rosenthal) and two other defendants with the City of Flint (Glasgow and Johnson). But the complaint's allegations against these actors fit the profile of those that *Guertin* found to shock the conscience. As I read *Guertin*, the key conscience-shocking allegations against the relevant actors were that they knowingly authorized use of contaminated water and engaged in "lies" by "deceiv[ing] others to hide the fact of contamination." *Id.* at 929; *see id.* at 927. The complaint in this case asserts similar claims against Cook and Rosenthal. Cook is alleged to have intentionally misled the EPA about the need for corrosion control by knowingly providing the EPA with false information. Compl., R.620-3, PageID#17886. And Rosenthal is alleged to have "willful[ly] participat[ed] in the manipulation of lead testing results[.]" *Id.*, PageID#17894. Similarly, Glasgow allegedly participated in testing that "purposefully skewed the results to minimize the crisis," wrongly telling residents "to run their water —or 'flush' it—before testing[.]" *Id.*, PageID#17893–94. Finally, in the days before the switch to the Flint River water source, Johnson allegedly pressured Glasgow to complete the transition even though Glasgow told him that the Flint plant was not ready to safely operate. *Id.*, PageID#17849–50. Under *Guertin*, these allegations against these defendants are enough.

That leaves the claims against former Governor Snyder and Treasurer Dillon, neither of whom were addressed by *Guertin*. As I see it, both are entitled to qualified immunity under *Guertin*'s own logic. Start with the former governor. From a bird's-eye view, *Guertin* already dismissed two of Snyder's cabinet-level officials—Directors Wyant and Lyon—because it viewed them as too far removed from the conscience-shocking conduct. 912 F.3d at 929–32. If Snyder's *subordinates* were too far removed from the crisis to remain defendants, that fact should make us think twice before allowing claims to proceed against an official even further removed.

To be sure, we are reviewing a different complaint. But the new allegations against Snyder do not overcome the "particularly high hurdle" that *Guertin* set. *Id.* at 926. Those allegations fall into two general time periods—those before the April 2014 transition to the Flint River water source and those after it. The allegations for both time periods fail to establish an actionable claim.

Before the transition, the complaint at least alleges that Snyder took an action. Sometime in mid-2013, he allegedly approved the transition after subordinates and city officials recommended it to him. Compl., R.620-3, PageID#17842–46. But the complaint fails to plausibly allege facts suggesting that this approval was callously indifferent to a then-known risk of harm. *See Guertin*, 912 F.3d at 926. Indeed, the complaint itself identifies an earlier study suggesting that Flint River water *could* satisfy regulations if the Flint plant received $69 million in upgrades. Compl., R.620-3, PageID#17839–40. And it also suggests that the switch contemplated upgrades. *Id.*, PageID#17853–59. Nothing in ***338** these allegations takes this claim outside the usual rule that most "governmental policy choices come with risks attached to both of the competing options, and yet 'it is not a tort for government to govern' by picking one option over another." *Guertin*, 912 F.3d at 924–25 (quoting *Schroder v. City of Fort Thomas*, 412 F.3d 724, 729 (6th Cir. 2005)).

In that respect, Snyder's sign-off is nothing like the conscience-shocking actions allegedly taken by the "chief architects" of the transition. *Id.* at 926. Much later in April 2014, some of those defendants allegedly forced the transition through despite full knowledge that the Flint water-treatment plant was not ready to safely operate. *Id.* Indeed, the complaint alleges that Glasgow initially refused to approve the change but was pressured to proceed anyway. Compl., R.620-3, PageID#17849–50. The complaint makes no equivalent allegations against Snyder. At most, it identifies a March 2014 email from someone in the governor's office sent "to several others in the governor's office" suggesting that the expedited time frame was "less than ideal and could lead to some big potential disasters down the road." *Id.*, PageID#17848. The complaint does not even allege that the governor saw this email. Regardless, *Guertin* held that a claim could not proceed against Director Wyant even though

the complaint alleged that he "was aware of some of the issues arising with the water supply post-switch[.]" *Guertin*, 912 F.3d at 929. Even if Snyder did receive this email, it would establish no more than the general awareness of issues followed by inaction that *Guertin* found insufficient.

After the transition, the complaint alleges that Snyder was "aware of the health crisis" by early 2015, but failed to take any "corrective action" until October 2015 (when he ordered a return to the prior water source) and January 2016 (when he declared a state of emergency). Compl., R.620-3, PageID#17885; *see id.*, PageID#17887, 17891, 17898–17900. The complaint adds that "public assurances provided by members of his Administration that Flint's water was 'safe' were recklessly false, and caused or contributed to the poisoning of Flint's citizenry." *Id.*, PageID#17904; *see Carthan*, 384 F. Supp. 3d at 841–43.

In two ways, these allegations are similar to the allegations against Directors Wyant and Lyon that *Guertin* found insufficient. *First*, the complaint asserts no well-pleaded allegations that Snyder himself deceived the public; instead, it raises generic claims of deception against his "Administration." Compl., R.620-3, PageID#17904. Yet, as with respect to Director Wyant in *Guertin*, even if "the conduct of individuals within his [chain of command] was constitutionally abhorrent, we may only hold [Snyder] accountable for his own conduct, not the misconduct of his subordinates." *Guertin*, 912 F.3d at 929 (citing *Iqbal*, 556 U.S. at 676–77, 129 S.Ct. 1937). *Second*, the complaint alleges that Snyder knew of the problems and failed to disclose them to the public or to act sooner. Yet, as with respect to Director Lyon in *Guertin*, an alleged "fail[ure] to 'protect and notify the public' " cannot state a claim because substantive due process "is a limitation only on government action." *Id.* at 930. I thus would grant Snyder qualified immunity and dismiss him from this suit.

Turn to former Treasurer Dillon. My colleagues remand the claim against him so that the district court may reconsider its earlier decision in light of a later decision granting him qualified immunity in a parallel case. Yet my analysis concerning Governor Snyder requires me to find Dillon entitled to qualified immunity too. The complaint's only allegations against Dillon ***339** are that he was involved in the mid-2013 negotiations that led to Snyder's approval to switch Flint's water source. Compl., R.620-3, PageID#17842–44, 17847, 17851; *Carthan*, 384 F. Supp. 3d at 858. As I explained for Snyder, that decision did not plausibly allege any deliberate indifference to a then-known risk of harm. *See Guertin*, 912 F.3d at 924–25 (citing *Schroder*, 412 F.3d at 729).

* * *

One final loose end: the two sovereign-immunity defenses. For these defenses too, I agree with my colleagues. *Guertin* forecloses the City of Flint's invocation of sovereign immunity. *See id.* at 936. And *Boler* forecloses Governor Gretchen Whitmer's contention that the plaintiffs may not seek injunctive relief (identical to the injunctive relief requested in *Boler*) against the governor in her official capacity. *See* 865 F.3d at 413.

All told, then, I respectfully concur in the judgment in part and dissent in part.

All Citations

960 F.3d 303

Footnotes

1 We use the term "Plaintiffs" when referring to all plaintiffs belonging to the putative class, and we use the term "Plaintiffs-Appellees" when referring solely to the plaintiffs that are party to this appeal.

2 We use the term "Defendants" when referring to all named defendants, and we use the term "Defendants-Appellants" when referring solely to the defendants that are party to this appeal.

3 Governor Whitmer was elected into office in January 2019 and continues to serve as Michigan's Governor at the time of this writing. For the sake of consistency with its earlier Flint Water decisions, the district court solely referred to Governor Snyder in its opinion, even where claims are made against the present Governor in her official capacity. R. 798 (Op. & Order at 8 n.4) (Page ID #21110).

4 The facts are taken from Plaintiffs' Fourth Amended Complaint, as we take all factual allegations to be true at this stage. *See Guertin*, 912 F.3d at 916.

5 Some Defendants-Appellants contend that they were not aware that the water was contaminated. They point out that Plaintiffs themselves allege that private engineering firms provided inaccurate information about water quality

to government officials. *See* R. 620-3 (Fourth Am. Compl. at 51–80, ¶¶ 148–232) (Page ID #17854–83). But those allegations do not negate the separate allegations that City and State officials nevertheless had knowledge from other sources that the water was contaminated. Therefore, the role of private engineering firms is irrelevant at the motion to dismiss stage.

6 We approved this approach in *Waid v. Snyder*, No. 18-1967, slip op., 2019 WL 4121023 (6th Cir. Feb. 19, 2019) (order).

7 The district court granted motions to dismiss in favor of some Defendants, who accordingly are not a part of this appeal. R. 798 (Op. & Order at 128) (Page ID #21230). Additionally, Plaintiffs' *Monell* claim was not certified for interlocutory appeal. *Id.* at 109 (Page ID #21211).

8 Defendant Cook notified us that the district court dismissed him from a separate Flint Water Crisis case, *Brown v. Snyder (In re Flint Water Cases)*, No. 18-cv-10726, 2020 WL 1503256, at *12 (E.D. Mich. Mar. 27, 2020). He contends that his dismissal from *Brown* similarly warrants his dismissal here. We disagree. The district court in *Brown* dismissed Cook because his wrongful conduct occurred after the plaintiff's injury in that case. *Id.* at *10, 12. The plaintiff in *Brown* had died of Legionnaires' disease before Cook allegedly misled the EPA. *Id.* There is no similar timing issue in this case.

9 We note, without passing judgment, that the district court dismissed Governor Snyder from the action in *Guertin*. *See Guertin v. Michigan*, No. 16-cv-12412, 2017 WL 2418007, at *24 (E.D. Mich. June 5, 2017). It did so because there were no plausible allegations in that case that Governor Snyder personally was involved in the decision-making process for using Flint River water. *Id.* The plaintiffs' theory in *Guertin* was that Snyder should be on the hook merely because he appointed the City Managers who helped to create and sustain the crisis. *Id.* The same cannot be said here, as Plaintiffs have alleged Snyder's personal actions and knowledge in great detail.

10 Defendants-Appellants argue that we should look to *Green v. Mansour*, 474 U.S. 64, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985)—not *Milliken*—to decide this case. They rely upon the Supreme Court's statement in *Green* that the Eleventh Amendment permits suits against the State only "designed to prevent ongoing violations of federal law." *Id.* at 71, 106 S.Ct. 423. *Green* is not on point. There, the Supreme Court held that plaintiffs could not seek notice relief ancillary to a declaratory judgment under *Ex parte Young* that would, in effect, serve only to provide them with retroactive monetary relief. *See Green*, 474 U.S. at 73, 106 S.Ct. 423 ("The issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment."). *Green* did not confront the same issue that is involved in this case—whether remedial measures to combat the effects of past constitutional violations are available as a form of prospective injunctive relief under *Ex parte Young*.

384 F.Supp.3d 802
United States District Court, E.D. Michigan, Southern Division.

IN RE FLINT WATER CASES.
This Order Relates to:
Carthan
v.
Snyder

Case No. 16-10444
|
Signed 04/01/2019

Synopsis

Background: City residents and property owners brought consolidated class actions against various defendants, including state and city government officials, alleging, inter alia, violation of the Equal Protection Clause and the right to bodily integrity under the Fourteenth Amendment pursuant to § 1983, arising from injuries allegedly sustained as a result of the contamination of city's water supply. Residents and property owners moved for leave to file fourth amended complaint, and defendants moved to dismiss.

Holdings: The District Court, Judith E. Levy, J., held that:

[1] proposed amended complaint stated plausible claim against state governor for violation of the right to bodily integrity;

[2] proposed amended complaint failed to state plausible claim for wealth-based discrimination in violation of the Equal Protection Clause;

[3] proposed amended complaint failed to state plausible claim for violation of the Equal Protection Clause based on race discrimination;

[4] proposed amended complaint failed to state plausible claim for conspiracy to interfere with civil rights;

[5] residents stated claim violation of the right to bodily integrity;

[6] residents and owners stated § 1983 *Monell* claim against city; and

[7] residents and owners failed to state a claim for exemplary damages under Michigan law.

Motions granted in part and denied in part.

West Headnotes (103)

[1] Federal Civil Procedure Complaint

When evaluating the interests of justice, for purposes of determining whether leave to amend a complaint is warranted, courts consider various factors, including: (1) undue delay in filing; (2) lack of notice to the opposing party; (3) bad faith by the moving party; (4) repeated failure to cure deficiencies by previous amendments; and (5) undue prejudice to the opposing party. Fed. R. Civ. P. 15(a).

[2] Federal Civil Procedure Injustice or prejudice

Federal Civil Procedure Time for amendment

Mere delay on its own is insufficient to warrant denial of a motion to amend a complaint; instead, courts examine the competing interests of the litigants and the likelihood of prejudice to the non-moving party. Fed. R. Civ. P. 15(a).

[3] Federal Civil Procedure Form and sufficiency of amendment; futility

Regardless of the equities, leave to amend a complaint must be denied if an amendment would be futile. Fed. R. Civ. P. 15(a).

[4] Federal Civil Procedure Form and sufficiency of amendment; futility

A proposed amendment of a complaint is futile if it could not withstand a motion to dismiss for

failure to state a claim. Fed. R. Civ. P. 12(b)(6), 15(a).

[5] **Federal Civil Procedure** Time for amendment

Federal Civil Procedure New cause of action in general

Allowing plaintiffs in consolidated class actions to file fourth amended complaint would not prejudice defendants, so as to preclude grant of motion to amend, even though case had been pending for several years; case had complex procedural history and claims and involved an extraordinary number of plaintiffs, defendants resisted start of discovery so that they were unable to claim that they would have been subject to duplicative discovery, plaintiffs did not change their allegations to the extent that defendants would need to completely overhaul their strategy, and amended complaint did not contain new claims so far outside the scope of prior complaint such that granting leave to amend may have later led to confusion. Fed. R. Civ. P. 15(a).

[6] **Constitutional Law** Personal and bodily rights in general

The right to bodily integrity is a fundamental interest protected by the Due Process Clause of the Fourteenth Amendment. U.S. Const. Amend. 14.

[7] **Constitutional Law** Personal and bodily rights in general

Although violations of the right to bodily integrity under the Due Process Clause usually arise in the context of physical punishment, the scope of the right is not limited to that context. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[8] **Constitutional Law** Personal and bodily rights in general

There is no difference between the forced invasion of a person's body with a substance and misleading that person into consuming a substance involuntarily, for purposes of determining whether activity violates the right to bodily integrity under the Due Process Clause. U.S. Const. Amend. 14.

[9] **Constitutional Law** Personal and bodily rights in general

Government officials can violate an individual's bodily integrity in violation of the Due Process Clause by introducing life-threatening substances into that person's body without their consent. U.S. Const. Amend. 14.

[10] **Constitutional Law** Substantive Due Process in General

To state a substantive due process claim, plaintiffs must do more than point to the violation of a protected interest; they must also demonstrate that it was infringed arbitrarily. U.S. Const. Amend. 14.

[11] **Constitutional Law** Egregiousness; "shock the conscience" test

In regards to government executive action, only the most egregious conduct infringing on a protected interest can be classified as unconstitutionally arbitrary, for purposes of stating a substantive due process claim; in legal terms, the conduct must shock the conscience. U.S. Const. Amend. 14.

[12] **Constitutional Law** Purpose or intent

Where unforeseen circumstances demand the immediate judgment of an executive government official, liability for violation of substantive due process turns on whether decisions were made maliciously and sadistically for the very purpose of causing harm. U.S. Const. Amend. 14.

[13] **Constitutional Law** Negligence, recklessness, or indifference

Where an executive government official has time for deliberation before acting, conduct taken with deliberate indifference to the rights of others shocks the conscience, for purposes of stating a claim for violation of substantive due process. U.S. Const. Amend. 14.

[14] **Constitutional Law** Negligence, recklessness, or indifference

In order to demonstrate that executive government officials had time for deliberation before acting, so that the officials' conduct, taken with deliberate indifference to the rights of others, shocks the conscience for purposes of stating claim for violation of substantive due process, plaintiffs must demonstrate that: (1) officials knew of facts from which they could infer a substantial risk of serious harm; (2) that they did infer it; and (3) that they nonetheless acted with indifference, demonstrating a callous disregard towards the rights of those affected. U.S. Const. Amend. 14.

2 Cases that cite this headnote

[15] **Constitutional Law** Water, sewer, and irrigation

States Governor

Water Law Civil claims arising from failure to meet quality standards

City residents and property owners' proposed amended complaint plausibly pointed to bodily integrity violation under the Due Process Clause, for purposes of claim in consolidated class actions against state governor, arising from alleged injuries sustained as a result of contamination of city's water supply, where case implicated the consumption of life-threatening substances such as lead and legionella, residents ingested contaminants through water supply, and intrusion was involuntary as the level of lead in the water was hidden and under state and municipal law residents and owners were not permitted to receive water in any other way. U.S. Const. Amend. 14.

[16] **Constitutional Law** Water, sewer, and irrigation

States Governor

Water Law Civil claims arising from failure to meet quality standards

City residents and property owners' proposed amended complaint against state governor plausibly alleged that governor's actions were deliberately indifferent and exhibited callous disregard for their right to bodily integrity, so as to shock the conscience for purposes of due process claim for violation of right to bodily integrity pursuant to § 1983, in consolidated class actions arising from alleged injuries resulting from contamination of city's water supply; plaintiffs alleged that governor knew facts from which he could infer a substantial risk of serious harm, such as an outbreak of Legionnaires' disease, that governor inferred risk of harm, such as by meeting with government officials to discuss water's health threat, and that governor acted indifferently to risk of harm, such as by encouraging drinking of the water. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

4 Cases that cite this headnote

[17] **Public Employment** Qualified immunity

Qualified immunity shields public officials from undue interference with their duties and from potentially disabling threats of liability.

[18] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

Qualified immunity provides protection to government officials who make reasonable yet mistaken decisions that involve open questions of law.

[19] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

A government official cannot avail herself of qualified immunity if the right violated was clearly established at the time of the challenged conduct.

[20] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

For purposes of determining whether government officials are entitled to qualified immunity, if controlling caselaw or a body of persuasive authority has put the constitutional question beyond debate, government officials are on notice that their conduct must conform to an established legal standard.

[21] **Civil Rights** States and territories and their officers and agencies

State governor's alleged conduct of knowing that river's water was unsafe for public use, failing to take steps to counter its problems, and assuring public in the meantime that the water was safe, violated city residents' and property owners' clearly established right to bodily integrity, and thus governor was not entitled to qualified immunity from due process claim for violation of the right to bodily integrity pursuant to § 1983, in consolidated class actions arising from alleged injuries resulting from contamination of city's water supply; any reasonable government official should have known that contaminating a community through its public water supply with deliberate indifference was a government invasion of the highest magnitude. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

[22] **Constitutional Law** Similarly situated persons; like circumstances

Broadly speaking, the Equal Protection Clause requires that state officials treat all persons alike, under like circumstances and like conditions. U.S. Const. Amend. 14.

[23] **Constitutional Law** Similarly situated persons; like circumstances

When state officials treat similar individuals differently, the Equal Protection Clause demands a justification. U.S. Const. Amend. 14.

[24] **Constitutional Law** Levels of Scrutiny

Because all state action tends to disfavor some more than others, courts take this practical reality into account by evaluating state action under differing levels of scrutiny, for purposes of a claim under the Equal Protection Clause. U.S. Const. Amend. 14.

[25] **Constitutional Law** Rational Basis Standard; Reasonableness

If official state conduct neither burdens a fundamental right nor targets a suspect class, courts will uphold it under the Equal Protection Clause so long as it bears a rational relation to some legitimate end. U.S. Const. Amend. 14.

[26] **Constitutional Law** Poverty or Wealth; The Homeless

A class of less wealthy persons is not a protected class for the purposes of equal protection. U.S. Const. Amend. 14.

[27] **Constitutional Law** Equal protection

Under rational basis equal protection review, official state decisions are afforded a strong presumption of validity; even at the motion to dismiss stage, this presents a formidable bar for plaintiffs to surmount. U.S. Const. Amend. 14.

[28] **Constitutional Law** Rational Basis Standard; Reasonableness

To plausibly allege that state action fails under rational basis equal protection review, plaintiffs must negate every conceivable basis which might support the challenged conduct. U.S. Const. Amend. 14.

[29] **Constitutional Law** Rational Basis Standard; Reasonableness

Under rational basis equal protection review, courts do not consider the wisdom of the challenged state action, and defendants do not need to offer any justification; it is enough that the reviewing court can fairly conceive of one existing. U.S. Const. Amend. 14.

[30] **Constitutional Law** Other particular issues and applications

Municipal Corporations Public works and improvements

Water Law Civil claims arising from failure to meet quality standards

City residents and property owners' proposed amended complaint against state and city government officials failed to negate every rational basis which supported officials' challenged conduct of creating an interim plan to supply city with river water, while continuing to provide the remainder of county with other water, as required to support claim in consolidated class actions for wealth-based discrimination in violation of the Equal Protection Clause pursuant to § 1983, arising from injuries allegedly sustained as a result of contamination of city's water supply; having city obtain water from river was financially expedient. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

[31] **Constitutional Law** Other particular issues and applications

States Governor

City residents and property owners' proposed amended complaint against state governor failed to negate every rational basis which supported governor's challenged conduct of delaying declaration of state of emergency in city while allegedly promptly doing so in other emergency situations, as required to support claim in consolidated class actions for wealth-based discrimination in violation of the Equal Protection Clause pursuant to § 1983, arising from injuries allegedly sustained as a result of contamination of city's water supply; it was conceivable that governor initially decided not to expend state resources believing that water crisis could have been addressed without them. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

[32] **Constitutional Law** Discrimination and Classification

Class-based discrimination is the essence of an equal protection claim. U.S. Const. Amend. 14.

[33] **Constitutional Law** Discrimination and Classification

Constitutional Law Intentional or purposeful action

Constitutional Law Sex or Gender

In limited situations, a plaintiff does not need to identify a specific group of persons who were treated differently in order to state an equal protection claim; for instance, if government conduct was premised on a protected classification such as race or gender, a showing of discriminatory purpose may suffice. U.S. Const. Amend. 14.

[34] **Constitutional Law** Similarly situated persons; like circumstances

Outside of the narrow range of cases involved discrimination based on race or gender, plaintiffs must plead sufficient facts from which it can be inferred that defendants treated similarly situated individuals differently in order to state an equal protection claim. U.S. Const. Amend. 14.

[35] **Constitutional Law** Other particular issues and applications

Municipal Corporations Public works and improvements

Water Law Actions

City residents and property owners' proposed amended complaint against state government officials did not explain how treatment by officials, including by allegedly failing to comply with sampling and optimized corrosion control protocols required under state and federal Lead and Copper Rule, differed from that of a similarly situated class of persons, as required to support claim in consolidated class actions for wealth-based discrimination in violation of the Equal Protection Clause pursuant to § 1983, arising from injuries allegedly sustained as a result of contamination of city's water supply; allegations did not explain in anything but conclusory terms how defendants acted differently in other situations, and complaint revealed nothing about possibility that defendants failed to enforce laws on a statewide basis. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

[36] **Constitutional Law** Race, national origin, or ethnicity

When state action is premised on a racial classification, courts strictly scrutinize the challenged conduct on claims under the Equal Protection Clause. U.S. Const. Amend. 14.

[37] **Constitutional Law** Equal protection

State conduct subject to equal protection strict scrutiny is presumptively invalid; only official action that is narrowly tailored to meet a compelling state interest will survive. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[38] **Constitutional Law** Intentional or purposeful action

Proof of discriminatory intent or purpose is required to show a violation of the Equal Protection Clause on the basis of race discrimination. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[39] **Constitutional Law** Race, national origin, or ethnicity

If discriminatory intent is missing on a claim for violation of the Equal Protection Clause based on race discrimination, such claims are analyzed under rational basis review. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[40] **Constitutional Law** Intentional or purposeful action

In order to demonstrate discriminatory intent, for purposes of stating a claim for violation of the Equal Protection Clause based on race discrimination, the facts must offer more than intent as volition or intent as awareness of consequences; rather, the facts must demonstrate that a decisionmaker selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon a particular racial group. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[41] **Constitutional Law** Intentional or purposeful action

At the motion to dismiss stage in a case alleging violation of the Equal Protection Clause based on race discrimination, plaintiffs need only raise an inference of discriminatory purpose; to do so, plaintiffs must demonstrate that the application of a facially neutral law or policy had a discriminatory impact, and sufficient evidence exists to suggest an invidious motive. U.S. Const. Amend. 14; Fed. R. Civ. P. 12(b).

[42] **Constitutional Law** Intentional or purposeful action

To raise an inference of discriminatory purpose, for purposes of stating a claim for violation of the Equal Protection Clause based on race discrimination, the challenged conduct does not need to rest solely on racially discriminatory

purposes, but this must have been a motivating factor. U.S. Const. Amend. 14.

[43] **Constitutional Law** Intentional or purposeful action

Although discriminatory impact is an important starting point to demonstrate discriminatory intent, for purposes of stating a claim for violation of the Equal Protection Clause based on race discrimination, it is rarely enough on its own; instead, courts must conduct a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. U.S. Const. Amend. 14.

[44] **Constitutional Law** Race, National Origin, or Ethnicity

Discriminatory impact alone is sufficient to state a claim for violation of the Equal Protection Clause based on race discrimination in the rarest case where a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[45] **Constitutional Law** Intentional or purposeful action

In order to raise an inference of discriminatory purpose, for purposes of stating a claim for violation of the Equal Protection Clause based on race discrimination, plaintiffs can show that a law or policy explicitly classifies on the basis of race. U.S. Const. Amend. 14.

[46] **Constitutional Law** Intentional or purposeful action

Several non-exhaustive factors guide the inquiry to determine whether there is proof of discriminatory intent, for purposes of stating a claim for violation of the Equal Protection Clause based on race discrimination: (1) the historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes; (2) the specific sequence of events leading up to the challenged decision may shed light on the decisionmaker's purposes; (3) departures from the normal procedural sequence particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached; and (4) the legislative or administrative history especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[47] **Constitutional Law** Other particular issues and applications

Municipal Corporations Public works and improvements

Water Law Civil claims arising from failure to meet quality standards

Proposed amended complaint of residents and property owners of city, which had a majority African American population, against state and city government officials, failed to show that race motivated officials' decision to switch city's water supply to river while providing other water to remainder of county, as would have raised inference of discriminatory purpose, so as to support claim in consolidated class actions for violation of the Equal Protection Clause based on race discrimination pursuant to § 1983, arising from injuries allegedly sustained as a result of contamination of city's water supply; alleged facts indicated that cost of water, not racial bias, motivated officials' decision. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

[48] **Constitutional Law** Other particular issues and applications

States Governor

Proposed amended complaint of residents and property owners of city, which had a majority African American population, against state governor, failed to show that race motivated governor's purported decision to treat emergency in city differently than in majority white communities, as would have raised inference

of discriminatory purpose, so as to support claim in consolidated class actions for violation of the Equal Protection Clause based on race discrimination pursuant to § 1983, arising from injuries allegedly sustained from contamination of city's water supply; comparative states of emergency identified in complaint involved drastically different situations, and plaintiffs did not point to clear pattern of discrimination where governor consistently delayed declaring states of emergency in mostly African American areas. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

[49] **Constitutional Law** Other particular issues and applications

States Particular persons or agencies; scope of employment

Water Law Primary enforcement responsibility

Water Law Actions

Proposed amended complaint of residents and property owners of city, which had a majority African American population, against state government officials, failed to show race motivated officials' alleged decision to not enforce certain laws and policies, as would have raised inference of discriminatory purpose, so as to support claim in consolidated class actions for violation of the Equal Protection Clause based on race discrimination pursuant to § 1983, arising from injuries allegedly sustained from contamination of city's water supply, despite contention that officials failed to develop non-discrimination policy required by federal Environmental Protection Agency; allegations did not link officials' decisions to discriminatory intent, and allegations that nonconformities with law and policy never occurred in white communities were conclusory. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

[50] **Civil Rights** Purpose and construction in general

Michigan's Elliott Larsen Civil Rights Act (ELCRA) is aimed at the prejudices and biases borne against persons because of their membership in a certain class, and seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases. Mich. Comp. Laws Ann. § 37.2301 et seq.

[51] **Civil Rights** Public Services, Programs, and Benefits

To state a claim under public service provision of Michigan's Elliott Larsen Civil Rights Act (ELCRA), plaintiffs must allege: (1) discrimination based on a protected characteristic (2) by a person, (3) resulting in denial of the full and equal enjoyment of a public service. Mich. Comp. Laws Ann. § 37.2301.

[52] **Civil Rights** Public Services, Programs, and Benefits

The public service provision of Michigan's Elliott Larsen Civil Rights Act (ELCRA) uses the same framework to establish discrimination as that used generally under other provisions of the ELCRA. Mich. Comp. Laws Ann. § 37.2301, et seq.

[53] **Civil Rights** Public Services, Programs, and Benefits

To establish discrimination, for purposes of stating a claim under the public service provision of Michigan's Elliott Larsen Civil Rights Act (ELCRA), plaintiffs must show either intentional discrimination directly or raise an inference of discrimination based on a disparate treatment theory. Mich. Comp. Laws Ann. § 37.2301.

[54] **Civil Rights** Public Services, Programs, and Benefits

In a case involving allegations of race-based discrimination, for purposes of stating a claim under public service provision of Michigan's Elliott Larsen Civil Rights Act (ELCRA), plaintiffs can plead intentional discrimination by pointing to direct evidence that defendants were pre-disposed to discriminate against people of

a certain race, and that they acted on that predisposition. Mich. Comp. Laws Ann. § 37.2301.

[55] **Civil Rights** Evidence

"Direct evidence" that defendants were predisposed to discriminate based on race is evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in defendants' actions, for purposes of stating a claim under public service provision of Michigan's Elliott Larsen Civil Rights Act (ELCRA). Mich. Comp. Laws Ann. § 37.2301.

[56] **Civil Rights** Evidence

Plaintiffs can raise an inference of racial discrimination, for purposes of a claim under the public service provision of Michigan's Elliott Larsen Civil Rights Act (ELCRA), by pleading that defendants treated them differently from non-protected individuals under the same or similar circumstances; but they must also point to sufficient indirect evidence from which it can be inferred that race was a motivating factor, even if not the sole factor. Mich. Comp. Laws Ann. § 37.2301.

[57] **Civil Rights** Public Services, Programs, and Benefits

Proposed amended complaint of residents and property owners of city, which had a majority African American population, against various defendants, including state and city officials, failed to plead sufficient facts to raise an inference of racial discrimination in officials' conduct, which allegedly included providing city with inferior water compared to rest of county, as required to state plausible claim in consolidated class action under public service provision of Michigan's Elliott Larsen Civil Rights Act (ELCRA), arising from injuries allegedly sustained as a result of contamination of city's water supply. Mich. Comp. Laws Ann. § 37.2301.

[58] **Conspiracy** Certainty, definiteness, and particularity in general

Conspiracy claims must be pled with some degree of specificity; vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim.

[59] **Conspiracy** Equal privileges and immunities; equal protection

Conspiracy Civil rights conspiracies

To state a claim for conspiracy to interfere with civil rights, plaintiffs must plead facts consistent with (1) a conspiracy between two or more persons, (2) conceived for the purpose of depriving a person or class of people of the equal protection of the laws, (3) an act committed in furtherance of the conspiracy, and (4) that a person was either injured in his or her person or property, or deprived of a right guaranteed by the Constitution. U.S. Const. Amend. 14; 42 U.S.C.A. § 1985(3).

[60] **Conspiracy** Intent, motive, or animus

In stating a claim for conspiracy to interfere with civil rights, plaintiffs must demonstrate that the conspiracy was motivated by racial or other constitutionally suspect class-based animus. 42 U.S.C.A. § 1985(3).

[61] **Conspiracy** Civil Rights Conspiracies

Statute governing claims for conspiracy to interfere with civil rights is not a general federal tort law, providing a federal cause of action for every assault and battery. 42 U.S.C.A. § 1985(3).

[62] **Conspiracy** Intent, motive, or animus

The intent requirement, for purposes of stating a claim for conspiracy to interfere with civil rights, ensures that only those conspiracies that aim at a deprivation of the equal enjoyment of rights secured by the law to all are actionable under

the statute governing such claims. 42 U.S.C.A. § 1985(3).

[63] **Conspiracy** Particular Rights or Privileges; Particular Deprivations

African American city residents and property owners' proposed amended complaint against state and city officials failed to plausibly allege that officials were motivated by racial or any other invidious class-based animus, as required to support claim in consolidated class actions for conspiracy to interfere with civil rights, arising from injuries allegedly sustained as a result of contamination of city's water supply; residents and owners possibly showed impact that historical race discrimination played a role in the city's water crisis, but not that it was a motivating factor. 42 U.S.C.A. § 1985(3).

[64] **Municipal Corporations** Liability of officers or agents

Public Employment State, local, and other non-federal personnel in general

To identify whether a lower-level public employee was the proximate cause of an injury, so as to preclude immunity from tort liability under Michigan's Government Tort Liability Act (GTLA), courts must: (1) evaluate the conduct and any legal responsibility of the various parties to an accident, where legal responsibility is assessed by determining whether the accident was a foreseeable consequence of an individual's actions, and (2) jointly consider the actions of those legally responsible to determine whose conduct was the one most immediate, efficient, and direct cause of any injury; if the answer is anyone but the employee, the employee can claim immunity. Mich. Comp. Laws Ann. § 691.1401 et seq.

[65] **Public Employment** Particular torts

States Personal injuries in general

City residents and property owners' proposed amended complaint did not sufficiently allege that lower-level state government employees were the proximate cause of their harm, as would have precluded employees' immunity from gross negligence claim under Michigan law under the Michigan's Government Tort Liability Act (GTLA), in consolidated class actions arising from injuries allegedly sustained as a result of contamination of city's water supply, even though complaint stated that employees' conduct was a direct and proximate cause of the injuries; complaint failed to explain why employees were legally responsible for the harm in anything but conclusory terms, and why employees' conduct was the most immediate, efficient, and direct cause preceding the injuries. Mich. Comp. Laws Ann. § 691.1401 et seq.

[66] **Public Employment** State, local, and other non-federal personnel in general

States Acts or Omissions of Officers, Agents, or Employees

For purposes of a state government employee's immunity from tort claims under Michigan's Government Tort Liability Act (GTLA), the more governmental actors that are involved in causing a massive tort in Michigan, the less likely it is that state tort claims can proceed against the individual government actors. Mich. Comp. Laws Ann. § 691.1401.

[67] **Federal Courts** Substantiality of federal question

Federal Courts Pleadings and Motions

To survive a motion to dismiss for lack of subject matter jurisdiction, plaintiffs need only show that the complaint alleges a claim under federal law, and that the claim is substantial; this is a relatively light burden. Fed. R. Civ. P. 12(b)(1).

[68] **Federal Courts** Substantiality of federal question

Dismissal for lack of subject-matter jurisdiction is proper only when the claim is so insubstantial, implausible, foreclosed by prior decisions of United States Supreme Court, or otherwise

completely devoid of merit as not to involve a federal controversy. Fed. R. Civ. P. 12(b)(1).

[69] **Federal Courts** Suits for injunctive or other prospective or equitable relief; Ex parte Young doctrine

Federal Courts Agencies, officers, and public employees

Ex parte Young doctrine allows plaintiffs to bring claims for prospective injunctive relief against state officials sued in their official capacity to prevent future federal constitutional or statutory violations.

[70] **Federal Courts** Waiver by State; Consent

An exception to a state's sovereign immunity is when the state has waived immunity by consenting to the suit. U.S. Const. Amend. 11.

[71] **Federal Courts** Suits for injunctive or other prospective or equitable relief; Ex parte Young doctrine

Federal Courts Other particular entities and individuals

City residents and property owners sought injunctive relief against state governor in his official capacity, and thus the *Ex parte Young* exception to sovereign immunity applied to allow claims for injunctive relief against governor for, inter alia, repairs of private property and establishment of medical monitoring, in consolidated class actions arising from injuries allegedly sustained as a result of contamination of city's water supply. U.S. Const. Amend. 11.

[72] **Public Employment** Particular torts

States Particular persons or agencies; scope of employment

Defendants, state Department of Environmental Quality (DEQ) directors, did not explain how their claim of absolute immunity, which was based on immunity granted to federal officials carrying out discretionary prosecutorial actions, interacted with city residents and property owners' allegations, and thus defendants were not entitled to absolute immunity from suit in consolidated class actions, arising from injuries allegedly sustained as a result of contamination of city's water supply, even though defendants argued they were functionally acting as federal officials despite working for state agency; defendants merely speculated that absolute immunity would apply if claims ultimately proved to be an alleged failure to sufficiently enforce Safe Drinking Water Act or initiate enforcement proceedings against city. Public Health Service Act, § 1401 et seq., 42 U.S.C.A. § 300f et seq.

[73] **Constitutional Law** Business organizations; corporations

City property owners were not individuals, as required to support due process claim for violation of the right to bodily integrity pursuant to § 1983 against various defendants, including state and city government officials, in consolidated class actions arising from allegedly sustained as a result of contamination of city's water supply; property owners were businesses. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

[74] **Constitutional Law** Water, sewer, and irrigation

States Liabilities of officers for negligence or misconduct

Water Law Civil claims arising from failure to meet quality standards

City residents sufficiently alleged that state treasurer demonstrated an indifference to the risk of serious harm residents faced, as required to state due process claim against treasurer for violation of the right to bodily integrity pursuant to § 1983, in consolidated class actions arising from injuries allegedly sustained as a result of contamination of city's water supply; allegations included that treasurer knew that river used as city's water source had been rejected as a water source, and that despite this knowledge treasurer

helped to develop an interim plan that saw city transition to river water. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

[75] **Constitutional Law** Water, sewer, and irrigation

States Liabilities of officers for negligence or misconduct

Water Law Civil claims arising from failure to meet quality standards

City residents failed to allege that former director of state Department of Health and Human Services was deliberately indifferent to the risk of harm that residents faced, as required to state due process claim against director for violation of the right to bodily integrity pursuant to § 1983, in consolidated class actions arising from injuries allegedly sustained as a result of contamination of city's water supply; while director did not make public aware or alert other government departments about information he received regarding lead contamination in city's water, director directed his team to investigate reports and emails which showed his concern, and residents did not allege that director attempted to cover up what was happening. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

[76] **Constitutional Law** Water, sewer, and irrigation

States Liabilities of officers for negligence or misconduct

Water Law Civil claims arising from failure to meet quality standards

City residents sufficiently alleged that state Department of Environmental Quality director of communications was deliberately indifferent to the risk of harm that residents faced, as required to state due process claim against director for violation of the right to bodily integrity pursuant to § 1983, in consolidated class actions arising from injuries allegedly sustained as a result of contamination of city's water supply; residents' allegations included that director knew about outbreak of Legionnaires' disease and that he aware that something was wrong with city's water, that director appeared on radio and television to advise listeners that city's water was safe to consume and bathe in, and that director discredited others who suggested that lead was leaching into city's water. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

[77] **Constitutional Law** Water, sewer, and irrigation

States Liabilities of officers for negligence or misconduct

Water Law Civil claims arising from failure to meet quality standards

City residents sufficiently alleged that state Department of Environmental Quality officials were aware of the substantial risk of harm residents faced and were deliberately indifferent to the risk of harm, as required to state due process claim against officials for violation of the right to bodily integrity pursuant to § 1983, in consolidated class actions arising from injuries allegedly sustained as a result of contamination of city's water supply; residents' allegations included that officials knew of risks associated with river water prior to city's transition to river, that one official resolved the regulatory hurdles associated with city's use of river, and that officials took steps to deceive city's residents into continuing to drink and bathe in contaminated water. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

[78] **Constitutional Law** Water, sewer, and irrigation

States Liabilities of officers for negligence or misconduct

Water Law Civil claims arising from failure to meet quality standards

City residents failed to allege that state Department of Environmental Quality director was deliberately indifferent to the risk of harm that residents faced, as required to state due process claim against director for violation

of the right to bodily integrity pursuant to § 1983, in consolidated class actions arising from injuries allegedly sustained as a result of contamination of city's water supply, even though residents alleged that director was likely aware of the health risks posed by using river as a water source; complaint contained nothing to suggest that director either publicly denied there was a problem with city's water, or that director otherwise encouraged city residents to use contaminated water. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

[79] **Constitutional Law** Water, sewer, and irrigation

Municipal Corporations Public works and improvements

Water Law Civil claims arising from failure to meet quality standards

City residents sufficiently alleged that city emergency managers and were aware of the substantial risk of harm residents faced and were deliberately indifferent to the risk of harm, as required to state due process claim against managers for violation of the right to bodily integrity pursuant to § 1983, in consolidated class actions arising from injuries allegedly sustained as a result of contamination of city's water supply; residents' allegations included that managers knew about outbreak of Legionnaires' disease after city transitioned to river water, and that one manager publicly denied any connection between Legionnaires' disease outbreak and city's water despite knowing that other branches of government concluded that there was a link. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

[80] **Constitutional Law** Water, sewer, and irrigation

Municipal Corporations Public works and improvements

Water Law Civil claims arising from failure to meet quality standards

City residents sufficiently alleged that city director of public works and utilities administrators were aware of the substantial risk of harm residents faced and were deliberately indifferent to the risk of harm, as required to state due process claim against director and administrators for violation of the right to bodily integrity pursuant to § 1983, in consolidated class actions arising from injuries allegedly sustained as a result of contamination of city's water supply; residents' allegations included that director was aware of the lead and Legionnaires' disease issues which followed city's transition to river water, that administrator tested for and found high concentrations of lead in the water, and that administrator altered reports to hide high lead concentrations in city's water. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

[81] **Constitutional Law** Water, sewer, and irrigation

Counties Acts of officers or agents

Water Law Civil claims arising from failure to meet quality standards

City residents failed to allege how county drain commissioner either caused or prolonged their exposure to contaminated water, as required to state due process claim against commissioner for violation of the right to bodily integrity pursuant to § 1983, in consolidated class actions arising from injuries allegedly sustained as a result of contamination of city's water supply, even though commissioner may have been aware of the risk of harm residents faced; commissioner was in charge of county's water system but not city's, and residents did not allege that commissioner took steps to deceive residents about safety of city's water or that he otherwise played a role in any coverup. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

[82] **Civil Rights** Liability of Public Employees and Officials

Constitutional Law Water, sewer, and irrigation

Municipal Corporations Particular Officers and Official Acts

Water Law Civil claims arising from failure to meet quality standards

City residents failed to allege how city's former emergency manager and city's mayor caused or prolonged residents' exposure to contaminated water, as required to state due process claim against manager and mayor for violation of the right to bodily integrity pursuant to § 1983, in consolidated class actions arising from injuries allegedly sustained as a result of contamination of city's water supply, even though manager may have set in motion chain of events that led to city's transition to river water; manager resigned before transition and lacked control over decision, mayor was stripped of virtually all authority over operations during emergency management, and residents did not allege that defendants deceived residents about the safety of city's water or that they helped coverup the crisis. U.S. Const. Amend. 14.

[83] **Civil Rights** Color of law; state action

City residents and property owners failed to allege that any act taken by any state actor created or increased the risk of private violence by a third party to residents and owners, as required to state claim against state and city government officials for violation of their right to be free from a state created danger under the Fourteenth Amendment pursuant to § 1983, in consolidated class actions arising from injuries allegedly sustained as a result of contamination of city's water supply; residents and owners only alleged that city residents used the water without knowing the danger it posed. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[84] **Civil Rights** Particular Causes of Action

City residents and property owners failed to allege a special danger to a discrete class of individuals, as required to state claim against state and city government officials for violation of their right to be free from a state created danger under the Fourteenth Amendment pursuant to § 1983, in consolidated class actions arising from injuries allegedly sustained as a result of contamination of city's water supply, even though residents and owners alleged that city's entire population constituted a discrete class; residents and owners' alleged discrete class included those who visited, worked, or passed through city, which was the general public of state residents. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[85] **Civil Rights** Governmental Ordinance, Policy, Practice, or Custom

Under *Monell*, a plaintiff can bring a § 1983 claim against a city for the unconstitutional conduct of its employees if the employees' conduct implemented an unofficial custom, or a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. § 1983.

[86] **Civil Rights** Governmental Ordinance, Policy, Practice, or Custom

City emergency managers were state officials whose edicts or acts may fairly have been said to represent official city policy, as required for city residents and property owners to state § 1983 *Monell* claim against city based on managers' alleged due process violation of the right to bodily integrity, in consolidated class actions arising from injuries allegedly sustained as a result of contamination of city's water supply. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

[87] **Negligence** Trades, Special Skills and Professions

City resident and minor daughter alleged that they used city water to bathe, wash, and cook during time period that water quality consultant was involved in city's water crisis, so as to support professional negligence claim against consultant under Michigan law, in consolidated class actions arising from injuries allegedly sustained as a result of contamination of city's water supply.

[88] **Federal Civil Procedure** Fraud, mistake and condition of mind

City residents and property owners alleged with sufficient particularity that water quality consultant made fraudulent statements, including that city's water was safe in compliance with drinking water standards, as required to state fraud claim under Michigan law against consultant, in consolidated class actions arising from injuries allegedly sustained as a result of contamination of city's water supply; complaint's allegations included that city's water was not safe or in compliance with drinking water standards, that tainted water specifically caused medical problems apart from standard problems that might have been associated with a population's sensitivity to a clean water supply, and that this information was generally known absent consultant's representations to the contrary. Fed. R. Civ. P. 9(b).

[89] **Federal Civil Procedure** Fraud, mistake and condition of mind

City residents and property owners' allegations that water quality consultant hired by city knew that its representations were made recklessly, which included that city's water was safe in compliance with drinking water standards, were pled with sufficient particularity, as required to state fraud claim under Michigan law against consultant, in consolidated class actions arising from injuries allegedly sustained as a result of contamination of city's water supply, even though residents and owners alleged knowledge based on information and belief; information about consultant's recklessness was solely within knowledge of consultant's decision-makers, and residents and owners alleged a voluminous factual background about the information known to city and to the public at large. Fed. R. Civ. P. 9(b).

[90] **Federal Civil Procedure** Fraud, mistake and condition of mind

City residents and property owners failed to allege reliance on water quality consultant's fraudulent statements with sufficient particularity, which included statements that city's water was safe in compliance with drinking water standards, as required to state fraud claim under Michigan law against consultant, in consolidated class actions arising from injuries allegedly sustained as a result of contamination of city's water supply; phrase "which plaintiffs did" was sole factual allegation in complaint stating that any plaintiff specifically relied on statements in continuing to drink city's water, and that statement lacked any specificity as to when or how any plaintiff heard the allegedly fraudulent statements. Fed. R. Civ. P. 9(b).

[91] **Damages** Particular cases

City residents and property owners failed to allege that water quality and engineering consultants committed an act that was sudden or brief, as required to state claims against consultants for negligent infliction of emotional distress under Michigan law, in consolidated class actions arising from injuries allegedly sustained as a result of contamination of city's water supply; residents and owners alleged that, over a period of months for one consultant and years for the other, the consultants repeatedly failed to properly evaluate or treat city water, which resulted in prolonged injury.

[92] **Negligence** Trades, Special Skills and Professions

Negligence Nature and form of remedy

City residents and property owners claims for negligence under Michigan law against water quality and engineering consultants were only able to be brought as professional negligence claims, in consolidated class actions arising from injuries suffered as a result of contamination of city's water supply; an ordinary layperson would have had little to no knowledge about the appropriate methods and techniques for remediating, containing, and eliminating lead and bacteria in a municipal water supply.

[93] **Negligence** Gross negligence

Gross negligence is not an independent cause of action in Michigan.

[94] **Negligence** Gross negligence

Negligence Elements of Negligence

Negligence Defenses and Mitigating Circumstances

Statutory gross negligence is an affirmative defense to be raised by a defendant under Michigan law; plaintiffs bringing a tort claim must still plead the common law elements of ordinary negligence.

[95] **Damages** Nature and Theory of Damages Additional to Compensation

In Michigan, exemplary damages are a special class of compensatory damages; they are available under limited circumstances to reimburse for a non-economic harm.

[96] **Damages** Grounds for Exemplary Damages

Exemplary damages under Michigan law, which are available under limited circumstances to reimburse for a non-economic harm, only includes losses for the humiliation, sense of outrage, and indignity that results from malicious, willful, and wanton conduct.

[97] **Damages** Grounds for Exemplary Damages

The malicious, willful, and wanton element, for purposes of determining whether exemplary damages are warranted under Michigan law, is equivalent to malice.

[98] **Damages** Grounds for Exemplary Damages

Because damages for mental pain and anxiety are normally included under actual damages, only intentional actions that show a reckless disregard for a plaintiff's rights will suffice to support an award of exemplary damages under Michigan law.

[99] **Damages** Grounds for Exemplary Damages

Mere negligence is insufficient to support an award of exemplary damages under Michigan law; a defendant's conduct must amount to more than a lack of care.

[100] **Damages** Grounds for Exemplary Damages

It is the reprehensibility of a defendant's conduct that intensifies the emotional injury and justifies exemplary damages under Michigan law, not the magnitude of the harm caused.

[101] **Damages** Particular cases in general

City residents and property owners did not state a claim for allegedly malicious, willful, and wanton conduct, or claim exemplary damages for any intentional tort, as required for residents and owners to state claim for exemplary damages under Michigan law against water quality and engineering consultants, in consolidated class actions arising from injuries allegedly sustained as a result of contamination of city's water supply; residents and owners merely alleged that consultants were professionally negligent and that their negligence caused the city's water crisis.

[102] **Federal Civil Procedure** Tort Cases in General

Engineering consultant was not entitled to grant of motion for a more definite statement in action brought by city residents and property owners seeking damages for injuries allegedly sustained as a result of contamination of city's water supply, notwithstanding claim that residents and

owners' failure to distinguish between various related entities made it impossible to tell what each entity did; complaint treated all three companies as a single entity since, based on the corporate structure of the companies, they were indistinguishable for lawsuit's purposes.

[103] Federal Civil Procedure Tort Cases in General

Engineering consultant was not entitled to grant of motion for a more definite statement in action brought by city residents and property owners' seeking damages for injuries allegedly sustained as a result of contamination of city's water supply, notwithstanding claim that contractor was being "lumped in" with defendant water quality consultant with regard to some allegations; complaint clearly specified the actions each defendant took with respect to city's water supply, and complaint sometimes referred to consultants jointly because either both sets of defendants had similar duties, or because similar claims were asserted against both sets of defendants.

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OPINION AND ORDER GRANTING IN PART AND DENYING IN PART PUTATIVE CLASS PLAINTIFFS' MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT [620] AND GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS

JUDITH E. LEVY, United States District Judge

***822** This is a class action lawsuit that is part of the litigation collectively referred to as the Flint Water Cases. To those following these cases, the facts are by now well known. Plaintiffs, residents and property owners in Flint, Michigan, were exposed to lead, legionella, and other contaminants within the municipal water supply. They allege that defendants, a collection of government officials and private parties, caused or prolonged this exposure, injuring them and damaging their property. In this opinion and order, the Court will address the following: plaintiffs' motion for leave to file a fourth amended complaint and defendants' motions to dismiss the entire case.

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I. Procedural History

Although this lawsuit is still in its early phases, its procedural history is complicated. This case was consolidated with eight other Flint water class action complaints on July 27, 2017.

(Dkt. 173.)[1] In September 2017, plaintiffs filed their first amended consolidated class action complaint. (Dkt. 214.) A second amended complaint followed less than a month later. (Dkt. 238.) Then, plaintiffs filed a third amended complaint on January 25, 2018. (Dkt. 349.)

Defendants filed motions to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and (6). (Dkts. 273, 274, 276–79, 281–83, 294.) On August 1, 2018, after hearing oral argument on the motions to dismiss, the Court issued an opinion and order granting defendants' motions in part and denying them in part. *Carthan v. Snyder (In re Flint Water Cases)*, 329 F.Supp.3d 369 (E.D. Mich. 2018), *vacated*, No. 16-cv-10444, 2018 U.S. Dist. LEXIS 192371 (E.D. Mich. Nov. 9, 2018). Several defendants appealed part of the ruling to the Sixth Circuit Court of Appeals (Dkts. 570, 573, 575, 579, 589); others filed motions for reconsideration. (Dkts. 560–61.) And under the prevailing rules, the Sixth Circuit awaited the resolution of the motions for reconsideration prior to taking jurisdiction. *Carthan v. Snyder*, No. 18-1967 (6th Cir. Aug. 28, 2018).

Plaintiffs filed a motion for leave to amend the complaint for a fourth time before the Court had resolved the pending motions for reconsideration. (Dkt. 620.) The Court granted leave for plaintiffs in other Flint water lawsuits to file similar motions,[2] and, as a result, there was a significant risk that the Flint Water Cases would proceed in a piecemeal fashion. (Dkt. 670.) The Court was managing filings from more than 150 lawyers and coordinating with related federal and state cases. Having different lawsuits proceed on divergent allegations and differing claims would further complicate the case. Such a scenario would also burden defendants, who would be unable to wage consistent defenses. In the interest of handling the cases in a consistent manner, the Court interpreted plaintiffs' motion as a joint motion for relief from judgment and a motion for leave to file an amended complaint. Finding just cause, the Court vacated its August 1 decision on November 9, 2018, so that it could consider plaintiffs' motion for leave to amend. (*Id.*)[3]

***824** To fulfill its duty to ensure that the litigation proceeds efficiently, the Court adopted an unorthodox but necessary plan. Noting that there was significant overlap between the proposed fourth amended complaint and the third amended complaint, and that a motion for leave to amend and a motion to dismiss turn on substantively the same standard, the Court determined that it would treat defendants' responses to the motion for leave to amend as addenda to their previously filed motions to dismiss. (Dkt. 714.) The Court would then issue an omnibus opinion and order, adjudicating plaintiffs' motion for leave to file a fourth amended complaint, and, if successful, defendants' motions to dismiss it in a single decision. Mindful of the parties' rights, the Court also gave plaintiffs and defendants the opportunity to file supplemental briefing. (*Id.*)

The Court now addresses plaintiffs' motion for leave to amend the complaint and defendants' motions to dismiss. Accordingly, this opinion and order will proceed as follows: Part II will address plaintiffs' motion for leave to file a fourth amended complaint, and, for the reasons set forth below, the Court will grant it in part and deny it in part. In Part III, rather than wait for plaintiffs to file their amended complaint, the Court will adopt the fourth amended complaint as the operative complaint and rule on defendants' motions to dismiss it. The Court's ruling in Part II will be preclusive, so any claim found lacking there will not be addressed separately in Part III. The result will be that the fourth amended complaint, to the extent permitted below, will become the operative complaint for the purposes of this litigation.

II. Motion for Leave to Amend the Complaint

a. Background

i. The Parties

There are three types of named plaintiffs. First, the following Flint residents claim personal injury and property damage: Elnora Carthan, a seventy-two year old African American woman; Rhonda Kelso, a fifty-four year old African American woman who also represents the interests of her minor child; Darrell and Barbara Davis, both African Americans; Marilyn Bryson, a fifty-eight year old African American woman; and David Munoz, a Hispanic man.

Next, the following Flint residents only claim personal injury: Michael Snyder, the personal representative of the estate of John Snyder, who received medical treatment in Flint before his death; Tiantha Williams, a forty-year old African American woman and her minor child; and Amber Brown and her minor child.

Finally, the following individuals only claim property damage: Frances Gilcreast, on behalf of her Flint real estate partnership FG&S Investments; EPCO Sales, a domestic

limited liability company located in Flint; and Angelo's Coney Island Palace, a Michigan corporation located in Flint.

The named defendants can be separated into two groups: government and private defendants. First, the government defendants include the state defendants Rick Snyder, the former Governor of Michigan;[4] ***825** the State of Michigan; Andy Dillon, then-Treasurer for the State of Michigan; Nick Lyon, the previous Director of the Michigan Department of Health and Human Services (MDHHS); and Nancy Peeler, former MDHHS Director for the Program for Maternal, Infant, and Early Childhood Home Visiting.

The government defendants also include the Michigan Department of Environmental Quality (MDEQ) defendants Daniel Wyant, Director of the MDEQ; Liane Shekter-Smith, MDEQ Chief of the Office of Drinking Water and Municipal Assistance; Adam Rosenthal, an MDEQ Water Quality Analyst; Stephen Busch, an MDEQ District Supervisor; Patrick Cook, an MDEQ Water Treatment Specialist; Michael Prysby, an MDEQ Engineer assigned to MDEQ District 11 (where Flint is located); and Bradley Wurfel, the MDEQ Director of Communications.

Additionally, the government defendants include the city defendants Edward Kurtz, Flint's Emergency Manager from August 2012 to July 2013; Darnell Early, Emergency Manager from September 2013 to January 2015; Gerald Ambrose, Emergency Manager from January 2015 to April 2015; Dayne Walling, Mayor of Flint from August 2009 to November 2015; Howard Croft, Flint's former Director of Public Works; Michael Glasgow, Flint's former Utilities Administrator; Daugherty Johnson, another former Utilities Administrator; and the City of Flint.

Finally, Jeffrey Wright is also a government defendant. Wright is the Genesee County Drain Commissioner and current Chief Executive Officer of the Karegnondi Water Authority (KWA).

The private defendants include Lockwood, Andrews & Newman, PC, Lockwood Andrews & Newman, Inc., and the Leo. A. Daly Company (collectively "LAN"); and Veolia, LLC, Veolia, Inc., and Veolia Water (collectively "Veolia"). LAN performed consultancy work in Flint related to the water supply transition to the Flint River, whereas Veolia performed consultancy work in Flint after the transition, in February and March 2015.

ii. Facts As Pleaded in the Third Amended Complaint

What follows is a summary of the facts set forth in the third amendment complaint, as summarized in the Court's vacated August 1, 2018, opinion and order:

> An 1897 city ordinance required that all water pipes in Flint be made of lead. (Dkt. 349 at 38.) In 1917, the Flint Water Treatment Plant (FWTP) was constructed, and drew water from the Flint River as Flint's primary water source until 1964, when it went dormant. (*Id.*) From 1964 through 2014, users of municipal water in Flint, Michigan received their water through the Detroit Water and Sewerage Department (DWSD). (*Id.* at 38.) In 2014, Flint's water supply switched back to the Flint River, and the water was treated at the FWTP. (*Id.* at 54.) This case concerns the decision to return to the Flint River as Flint's primary water source in 2014, and the alleged injuries that arose from that switch.
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> Beginning in the 1990s, Flint, along with other local governments relying on the DWSD water supply, had concerns about the cost of that supply, and began studying the viability of alternative water supplies. (*Id.* at 38.) In 2001, Michigan's Department of Natural Resources noted that businesses along the Flint River had permits to discharge industrial and mining runoff, as well as petroleum and gasoline cleanups. (*Id.* at 39.) In 2004, a study by the United States Geological Survey, the [MDEQ], and the Flint Water Utilities Department determined ***826** that the Flint River was a highly sensitive drinking water source susceptible to contamination. (*Id.*) In 2006 and 2009, Flint and other local governments commissioned a study from LAN regarding the viability of continuing to purchase water from the DWSD or constructing a new pipeline, which would be administered by what would later be known as the [KWA]. (*Id.*)
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> In 2011, Flint commissioned a study by Rowe Engineering and LAN to determine if the Flint River could be safely used as a water supply. (*Id.*) The study determined that water from the Flint River would require more treatment than water from Lake Huron, and that proper treatment for Flint River water would require upgrades to the FWTP. (*Id.*) The report included an addendum that set forth over sixty-nine million dollars in improvements that would be necessary to use Flint River water through the FWTP, including the use of corrosion control chemicals. (*Id.* at 40.)

In August 2012, Michigan Governor Rick Snyder appointed Edward Kurtz as Flint's Emergency Manager, following the declaration of a financial emergency in Flint. (*Id.* at 40.) Emergency managers may be appointed by the governor of Michigan "to address a financial emergency within" a local government, subject to the limitations in Michigan Public Act 436 of 2012. M.C.L. § 141.1549(1).

> Upon appointment, an emergency manager shall act for and in the place and stead of the governing body and the office of chief administrative officer of the local government. The emergency manager shall have broad powers in receivership to rectify the financial emergency and to assure the fiscal accountability of the local government and the local government's capacity to provide or cause to be provided necessary governmental services essential to the public health, safety, and welfare. Following appointment of an emergency manager and during the pendency of receivership, the governing body and the chief administrative officer of the local government shall not exercise any of the powers of those offices except as may be specifically authorized in writing by the emergency manager or as otherwise provided by this act and are subject to any conditions required by the emergency manager.

M.C.L. § 141.1549(2).

In November 2012, Kurtz suggested to State of Michigan Treasurer Andy Dillon that Flint join the proposed KWA under the belief that doing so would save money over continuing to purchase water from the DWSD. (Dkt. 349 at 40.) The KWA was to be an administrative body overseeing a pipeline that would use Lake Huron water for the areas it serviced. (*Id.* at 39.) Genesee County Drain Commissioner Jeff Wright had encouraged the formation of the KWA in 2009. (*Id.* at 40.)

DWSD argued throughout 2012 that Flint should not join the KWA based on cost and reliability projections. (*Id.*) It made these arguments to Governor [Snyder], Wright, Kurtz, Dillon, and then-Mayor of Flint Dayne Walling. (*Id.*) During that period, Wright consistently argued to Kurtz, Dillon, and Governor Snyder that the DWSD studies were wrong. (*Id.* at 41.) In late 2012, Dillon requested that an independent engineering firm assess the cost effectiveness of joining the KWA. (*Id.*) The firm concluded that remaining with DWSD was more cost-effective both in the short and long term. (*Id.*) On March 17, 2013, Dillon e-mailed Governor Snyder and stated that the KWA advocates were misrepresenting ***827** the benefits of a switch, and that the "[r]eport I got is that Flint should stay w [sic] DWSD." (*Id.*)

On March 26, 2013, MDEQ District Supervisor Stephen Busch sent an e-mail to MDEQ Director Daniel Wyant and MDEQ Chief of the Office of Drinking Water and Municipal Assistance Liane Shekter-Smith setting forth risks associated with using the Flint River as Flint's drinking water source. (*Id.*) The e-mail stated that the water posed increased health risks, including a microbial risk, a risk of trihalomethane (known as "Total Trihalomethanes" or "TTHM") exposure, and would come with additional regulatory requirements, including significant upgrades to the FWTP. (*Id.* at 41–42.)

On March 27, 2013, MDEQ officials acknowledged that the decision to stay with the DWSD or switch to the Flint River was not based on the scientifically determined suitability of the water, but instead that it was "entirely possible that they will be making decisions relative to cost," in the words of MDEQ Deputy Director Jim Sygo. (*Id.* at 42.)

On March 28, 2013, Dillon e-mailed Governor Snyder and other officials, and recommended that the state "support the City of Flint's decision to join the KWA," and that all relevant officials supported the move. (*Id.* at 42–43.) During this period, Governor Snyder was personally involved in the decision-making process. (*Id.* at 43.) On April 4, 2013, Governor Snyder's Chief of Staff Dennis Muchmore informed Governor Snyder that "[a]s you know, the Flint people have requested Dillon's ok to break away from the DWSD." (*Id.*) Governor Snyder then instructed his Chief of Staff, Dillon, the Emergency Manager of Detroit Kevin Orr, DWSD, and Kurtz to solicit an additional offer from the DWSD before permitting the transition away from the DWSD. (*Id.*)

DWSD submitted its final proposal later in April. (*Id.*) Kurtz and Orr, according to an e-mail from a Senior Policy Advisor in the Michigan Department of Treasury, determined that Flint would not accept the DWSD offer. (*Id.* at 44.) Governor Snyder's Executive Director forwarded the e-mail to Governor Snyder on April 29, 2013, and stated that it "[l]ooks like they adhered to the plan." (*Id.*)

Following this communication, Governor Snyder authorized Kurtz to enter into a contractual relationship with the KWA beginning in mid-2016. (*Id.*) At the time

Governor Snyder authorized the switch, he did so knowing the Flint River would be used as an interim source. (*Id.*) In June 2013, Dillon, Kurtz, Wright, and Walling developed an interim plan to govern the provision of water to Flint between April 25, 2014, and October 2016. (*Id.*)

On June 10, 2013, LAN submitted a proposal to Flint for upgrading the FWTP. (*Id.* at 48.) The proposal included a "Scope of Services" section that proposed upgrades to the FWTP that would permit "use of the Flint River as a water supply," and a "Standards of Performance" section that promised LAN would "exercise independent judgment" and "perform its duties under this contract in accordance with sound professional practices." (*Id.* at 49.) Flint retained LAN to advise it on the water source transition through 2015. (*Id.* at 49–50.)

On June 29, 2013, LAN met with representatives from Flint, the Genesee County Drain Commissioner's Office, and MDEQ to discuss logistics related to the transition to the Flint River as Flint's primary water source. (*Id.* at 50.) ***828** At that meeting, the participants determined that the Flint River was a viable water source, if more difficult to treat, and that upgrades could be made to the FWTP to properly treat the water. (*Id.*) The parties also determined that it was possible to conduct proper quality control with LAN's assistance, the FWTP did not have the capacity to meet the needs of both Flint and Genesee County, and the transition could occur by April or May of 2014. (*Id.* at 51.) LAN agreed to present a comprehensive project proposal with cost estimates. (*Id.*) LAN ultimately provided engineering services for the transition from July 2013 until the transition occurred on April 25, 2014, including creating the plans and specification for the transition. (*Id.* at 53–54.)

Kurtz resigned from his Emergency Manager position effective July 2013. (*Id.* at 45.) Following Michael Brown serving as Emergency Manager for two months, Darnell Earley was appointed as Emergency Manager for Flint in September 2013. (*Id.*) Part of Earley's job included making sure Flint was in compliance with state and federal laws governing safe drinking water. (*Id.*)

The transition to the Flint River continued. On March 14, 2014, Brian Larkin, then associate director of the Governor's Office of Urban and Metropolitan Initiatives, sent an e-mail to others in the Governor's office stating that the timeframe for switching water supplies was "less than ideal and could lead to some big potential disasters down the road." (*Id.* at 45–46.)

On March 20, 2014, MDEQ Chief of the Office of Drinking Water and Municipal Assistance Liane Shekter-Smith ensured that the City of Flint received an Administrative Consent Order requiring use of the FWTP, mandating Flint take steps to continue use of Flint River water or take steps to join the KWA, and attempting to prevent Flint's return to use of the DWSD. (*Id.* at 46.) Shekter-Smith had been warned nearly a year earlier about the potential dangers of switching Flint's water supply to the Flint River. (*Id.*)

In April 2014, LAN, Flint, and MDEQ officials discussed optimization for lead in the water supply, and decided to seek more data before implementing an optimization method. (*Id.* at 52.)

On April 16, 2014, former Flint Utility Administrator Michael Glasgow had informed MDEQ Water Analyst Adam Rosenthal that he would like additional time to ensure the FWTP was meeting requirements before giving the okay to distribute water from it. (*Id.* at 46.) On April 17, 2014, Glasgow informed MDEQ that the FWTP was not fit to begin operation, and that "management" refused to listen to his warnings. (*Id.*) On April 18, 2014, Glasgow wrote to Busch and MDEQ Engineer Michael Prysby and informed them that although he was receiving pressure to begin distributing water, he would not give the okay to do so, because he did not feel that staff was trained or proper monitoring was in place. (*Id.* at 46–47.) Glasgow felt that "management" had its "own agenda." (*Id.* at 47.) Glasgow later told investigators that former Flint Director of Public Works Howard Croft and former Flint Utilities Administrator Daugherty Johnson pressured Glasgow to approve and begin the switch to Flint River water. (*Id.*)

At some point in 2014, MDEQ Water Treatment Specialist Patrick Cook signed the final permit necessary to restart use of the FWTP with the Flint River as the city's primary water source. (*Id.* at 48.) The FWTP officially went into service and began delivering Flint ***829** River water to Flint water users on April 25, 2014. (*Id.*)

When the transition occurred, Flint's water treatment system was not prepared to safely deliver Flint River water to users. The river was contaminated with rock-salt chlorides from treatment of roads in and around Flint during past winters. (*Id.* at 52.) Chlorides are corrosive, and water must be treated to neutralize their corrosive properties. (*Id.*) This is particularly true in a city like Flint,

where most of Flint's water mains are over seventy-five years old and made of cast iron, leaving them subject to internal corrosion called "tuberculation." (*Id.* at 57.) Tuberculation leads to the development of "biofilms," which are layers of bacteria attached to the interior pipe wall. (*Id.*) Although LAN provided professional engineering services related to the transition, and those services included ensuring the safety of the water from the Flint River, it did not recommend treatment of the water to prevent corrosion of the pipes. (*Id.* at 53.)

Within weeks of the transition to Flint River water, residents of Flint began complaining about the smell, taste, and color of the drinking water. (*Id.* at 54.) Shekter-Smith received many of those complaints, including one forwarded from an Environmental Protection Agency (EPA) employee regarding rashes linked to the Flint River water. (*Id.*) Complaints and symptoms related to consumption of the water continued, and, on August 14, 2014, Flint water tested above legal limits for coliform and E. coli bacteria. (*Id.* at 55.) Flint issued boil water advisories on August 16, 2014, and September 5, 2014. (*Id.*)

In response to these issues, Flint treated the water with additional chlorine. (*Id.*) However, because Flint's old water lines were corroded, chlorine attacked the bare metal, rather than the bacteria, leading to further corrosion and the release of TTHM into the water supply. (*Id.*) A PowerPoint presentation circulated among MDEQ officials in March and April 2015, including Busch, Prysby, and Rosenthal, showed that MDEQ officials knew as early as May 2014 that Flint water contained elevated levels of TTHM. (*Id.*)

In the summer of 2014, MDHHS reported an outbreak of Legionnaires' disease in Flint. (*Id.* at 56.) Legionnaires' disease infects humans when water droplets containing legionella bacteria are inhaled or legionella-contaminated water is consumed. (*Id.*) Legionella can enter a water supply when the biofilm attached to a water pipe is stripped away, as happened when the Flint River water entered the city's pipes, and more chlorine was added to treat the water. (*Id.*)

On October 3, 2014, Flint's Public Information Officer informed Earley and Ambrose about the spike in Legionnaires' cases via e-mail. (*Id.*) Earley responded by denying any connection between Flint water and the outbreak, and stated that the city's message should be that the outbreak was an internal issue at McLaren Hospital. (*Id.*) MDHHS personnel did not agree with Earley's message. (*Id.* at 57.)

In September 2014, elevated blood lead levels were beginning to be noted in children under the age of sixteen who were living in Flint. (*Id.*) By October 1, 2014, it was known that the iron pipes making up most of Flint's water distribution system [were] one of the causes of the contamination of the water. (*Id.*)

On October 13, 2014, General Motors stopped the use of Flint River water at its engine plant due to the corrosive ***830** nature of the water. (*Id.*) Governor Snyder's executive staff was immediately aware of the problem, and on October 14, 2014, Governor Snyder's Deputy Legal Counsel and Senior Policy Advisor Valerie Brader wrote an e-mail in which she suggested asking Earley to "consider coming back to the [DWSD] in full or in part as an interim solution to both the quality, and now the financial, problems that the current solution is causing." (*Id.*) Brader intentionally did not distribute this message to MDEQ officials so that it would be exempted from the Freedom of Information Act [(FOIA)], but she did coordinate discussions with Earley and officials at MDEQ. (*Id.* at 58.) In response to this e-mail, Earley rejected the idea of returning to the DWSD on October 14, 2014. (*Id.*) On October 15, 2014, Governor Snyder's Legal Counsel, Michael Gadola, stated that use of the Flint River as a water source was "downright scary," and that Flint "should try to get back on the Detroit system as a stopgap ASAP before this thing gets too far out of control." (*Id.* at 59.)

By November 2014, LAN knew of the need to analyze the cause of the high TTHM levels in Flint water. (*Id.* at 60.) On November 26, 2014, LAN issued a twenty-page Operational Evaluation Report regarding the transition, which addressed compliance with EPA and MDEQ regulations, but did not address the potential for lead contamination resulting from the corrosive water flowing through the lead pipes in Flint's water system. (*Id.*)

By December 31, 2014, lead monitoring showed water testing results exceeding the federal Lead and Copper Rule's action level for lead, which is 15 parts per billion (ppb). (*Id.* at 59.) On January 9, 2015, University of Michigan – Flint water tests revealed elevated lead levels in two locations on campus, which led the University to turn off certain water fountains. (*Id.*) On January 9, 2015, Earley again refused to return Flint to the DWSD. (*Id.*)

On January 13, 2015 Earley resigned as Emergency Manager for Flint, and was replaced by Gerald Ambrose. (*Id.* at 78.) On January 29, 2015, DWSD offered Ambrose an opportunity to reconnect to the DWSD water supply, with the re-connection fee waived. Ambrose rejected the offer. (*Id.* at 79.)

In January 2015, LeeAnn Walters, a Flint homeowner, contacted the EPA regarding complaints that Flint River water was making her and her family physically ill. (*Id.*) On January 21, 2015, the State of Michigan ordered water coolers to be installed in state buildings operating in Flint, but did not share this information with the public. (*Id.* at 78.) On January 27, 2015, Flint received notice from the Genesee County Health Department that it believed the spike in Legionnaires' disease cases was linked to the switch to Flint River water. (*Id.*) On January 28, 2015, MDHHS Director Nick Lyon received materials from an MDHHS epidemiologist showing the 2014 outbreak of Legionnaires' disease in Genesee County. (*Id.*)

On February 26, 2015, Jennifer Crooks, an EPA employee, e-mailed MDEQ and EPA employees regarding Walters' complaints of black sediment in her water. (*Id.* at 80.) The e-mail noted very high testing results for iron contamination, and noted that Glasgow suggested testing for lead and copper, which resulted in test findings of 104 ppb, well over the federal action levels of 15 ppb. (*Id.*) The e-mail also noted that the high presence of lead was a sign that there were other contaminants in the water, as well. (*Id.*) That day, Crooks ***831** also sent an e-mail to MDEQ and EPA representatives, opining that the black sediment from Walters' water was actually lead, and questioning whether the issue was more widespread. (*Id.* at 80–81.) Crooks also wondered if Flint was using optimal corrosion control. (*Id.* at 81.) On February 27, 2015, Busch told [Miguel] Del Toral [at the EPA] that Flint was using corrosion control, which was false. (*Id.*)

At some point, Flint issued a request for proposals for engineering companies to serve as a water quality consultant to the city. (*Id.* at 60–61.) Flint sought a consultant who could review and evaluate the City's water treatment process and its procedures to maintain and improve water quality, to recommend ways to maintain compliance with state and federal agencies, and to assist Flint in implementing those recommendations. (*Id.* at 61.) In February 2015, Veolia was hired to be Flint's water quality consultant. (*Id.*) The contract retaining Veolia stated that Flint would rely on the "professional reputation, experience, certification, and ability" of Veolia. (*Id.* at 62.)

On February 10, 2015, Veolia and Flint issued a joint press release that touted Veolia's expertise in "handling challenging river water sources," and notifying the public of Veolia's role in evaluating Flint's water treatment processes. (*Id.*) On February 10 and 12, 2015, executives at Veolia made statements professing the expertise of the companies and promising to address the issues with Flint's water. (*Id.* at 62–63.)

On February 18, 2015, Veolia made an interim report to Flint's City Council. (*Id.* at 63.) The report indicated that Flint's water was "in compliance with drinking water standards," but that the discoloration of the water "raises questions." (*Id.*) The report also stated that medical issues arising from consumption of the water were explained by the fact that "[s]ome people may be sensitive to any water." (*Id.* at 64.) LAN also released a report addressing TTHM concerns, but that report did not analyze the causes of the high TTHM levels. (*Id.* at 66.)

On March 12, 2015, Veolia issued a final Water Quality Report. (*Id.* at 64.) That report was based on a 160-hour assessment of the FWTP, Flint's distribution system, and related administrative and financial aspects of Flint's water system. (*Id.*) The report found that Flint water was in compliance with state and federal water quality regulations, despite public concerns about the color and quality of the water. (*Id.*) The report also recommended that Flint add polyphosphates to the water supply to minimize the discoloration from iron in the pipes, but that discoloration might happen because of regular breaks and maintenance on the pipes. (*Id.* at 64–65.) But polyphosphates only addressed issues with the iron pipes, and were not a solution to the issues with the lead pipes. (*Id.* at 65.)

Meanwhile, Cook told the EPA that Flint was using corrosion control with Flint River water, and forwarded information he knew to be false to the EPA to back up the contention. (*Id.* at 81.) On January 27, 2015, James Henry, Environmental Health Supervisor at the Genesee County Health Department, filed a [FOIA] request with Flint to obtain information about Flint's water supply. (*Id.*) Johnson stated on February 5, 2015, that he had not received the request and would fulfill it as soon as possible. However, he had not done so by March 2015. (*Id.* at 82.) On March 10, 2015, Henry expressed public concern that Flint and the

State of Michigan ***832** were stonewalling his requests for information. (*Id.*)

On March 12, 2015, Shekter-Smith e-mailed Wurfel and MDEQ employees Jim Sygo and Sarah Howes to discuss a FOIA request related to legionella and stated that although the switch to the Flint River may have created conditions that supported legionella growth, there was no evidence that legionella was coming directly from the FWTP or Flint's water distribution system at the time. (*Id.* at 83.) On March 13, 2015, Busch made statements that denied any provable connection between the switch to Flint River water and the presence of legionella bacteria in that water supply, and Shekter-Smith approved them. (*Id.*) During March, members of Governor Snyder's office were aware of mobilization by Flint area pastors focused on the odor and appearance of Flint water, and of a request by those pastors for water filters. (*Id.* at 84.)

On March 25, 2015, the Flint City Council voted to reconnect to the DWSD, but Ambrose rejected that vote. (*Id.*) On April 24, 2015, almost exactly one year after the switch to Flint River water, Cook e-mailed ... Del Toral ... and informed him, in contradiction of Cook's earlier representations, that Flint was not practicing corrosion control at the FWTP. (*Id.*) On June 24, 2015, Del Toral issued a report noting high lead levels in Flint and the State of Michigan's complicity in both the high lead levels and the failure to inform users of Flint's water supply. (*Id.* at 84–85.) The report was shared with Shekter-Smith, Cook, Busch, and Prysby, but neither they nor any other public official named as a defendant in this lawsuit took measures to effectively address any danger identified in the report. (*Id.* at 85.)

Between June 30, 2015, and July 2, 2015, Walling and EPA Region 5 Director Dr. Susan Hedman discussed the report, and Hedman stated that it was a preliminary draft from which it would be premature to draw any conclusions. (*Id.*)

On July 9, 2015, Glasgow sent an e-mail to Rosenthal describing the clear and undeniable issues that Flint's lead- and bacteria-tainted water was causing. (*Id.* at 86.) On July 10, 2015, Wurfel appeared on public radio and made knowingly false statements asserting that Flint River water was safe and causing no "broad problem[s]" with elevated lead levels in the water. (*Id.* at 85–86.) On July 22, 2015, Governor Snyder's Chief of Staff wrote to Lyon and stated that the concerns of Flint water users were being "blown off" by the defendants. (*Id.* at 87.) On July 24, 2015, Wurfel again falsely stated that there were no worries about lead or copper contamination in Flint's water supply. (*Id.*)

In that July 24, 2015 statement, Wurfel referenced sampling of the water supply by MDEQ, but that sampling was skewed, and did not resample most lower-lead homes between 2014 and 2015, or any high-lead homes between 2014 and 2015. (*Id.*) The sampling actually covered up high-lead samples. (*Id.* at 88.) Glasgow ultimately pleaded no contest to willful neglect of duty after being accused of distorting the water test results by asking residents of Flint to run or flush their water before testing, and of failing to obtain water samples from certain houses. (*Id.*)

During this time period, Glasgow also stated that Busch and Prysby directed him to alter water quality reports to remove the highest lead levels. (*Id.*) Rosenthal also allegedly manipulated test results, including a July 28, 2015 report ***833** from which Rosenthal excluded high lead-level tests. (*Id.* at 88–89.)

In August 2015, Professor Marc Edwards of Virginia Tech, who had been testing Flint River water, announced that he believed there was serious lead contamination of the Flint water system, which constituted a major public health emergency. (*Id.* at 89.) In response, Wurfel attempted to discredit Edwards' statements by calling the testing "quick" and implying that it was irresponsible. (*Id.*)

By late 2014 or early 2015, Lyon also knew about the increase in children with elevated blood lead levels and Legionnaires' disease cases, but did not report these findings to the public or other government officials, or take any steps to otherwise intervene. (*Id.* at 89–90.) In the summer of 2015, Dr. Mona Hanna-Attisha used data from Hurley Hospital in Flint to note a rise in the number of Flint children with elevated blood lead levels in the second and third quarters of 2014 to publish a study, the purpose of which was to alert Flint water users about the health risks associated with the water. (*Id.* at 90.) The governmental defendants immediately accused Dr. Hanna-Attisha of providing false information to the public. (*Id.*) On September 28, 2015, Lyon directed his staff to provide an analysis rebutting Dr. Hanna-Attisha's findings and portraying the rise in elevated blood lead levels as normal results corresponding to seasonal fluctuations. (*Id.* at 90–91.) Throughout September 2015, Wurfel and the MDEQ continued to issue false statements claiming the water in Flint was safe, and that the people sounding alarms about

Flint's water quality were mistaken or "rogue." (*Id.* at 91–92.)

On October 2, 2015, the State of Michigan announced that it would create a Flint Water Advisory Task Force and provide water filters to Flint water users. (*Id.* at 92.) On October 8, 2015, Governor Snyder ordered Flint to reconnect to the DWSD, and that reconnection took place on October 16, 2015. (*Id.*) On October 18, 2015, Wyant e-mailed Governor Snyder and admitted that MDEQ made a mistake in not implementing optimized corrosion control from the beginning. (*Id.* at 93.) On October 19, 2015, the City of Flint Technical Advisory committee listed LAN as the "owner" of the "corrosion control" issue. (*Id.*)

Current Flint Mayor Karen Weaver declared a state of emergency in Flint on December 14, 2015. (*Id.* at 94.) On January 4, 2016, the Genesee County Commissioners likewise declared a state of emergency; Governor Snyder did so on January 5, 2016, and activated the Michigan National Guard to assist Flint on January 13, 2016. (*Id.*)

Carthan, 329 F.Supp.3d at 382–89.

iii. Additional Allegations in the Proposed Fourth Amended Complaint

The proposed fourth amended complaint adds new factual allegations as follows. During the middle of the twentieth century, Flint's water supply was taken from the Flint River and was of poor quality due to the presence of fecal coliform bacteria and contaminants. (Dkt. 620-3 at 38–39.) Because of these environmental concerns, Flint began evaluating different water sources in the 1960s. (*Id.*) Flint eventually mothballed the FWTP around 1965, and entered into an agreement to receive its water from DWSD. (*Id.*) This agreement gave Flint the exclusive right to sell DWSD water to the remainder of Genesee County. (*Id.*) And the Genesee County Drain Commission (GCDC) contracted ***834** with Flint to buy DWSD water in order to resell it to local customers. (*Id.*)

In 1973, the GCDC updated its contract with Flint. (*Id.* at 39.) The GCDC had to accept water from Flint as delivered, so long as it met "all requirements of the various State Regulatory Agencies." (*Id.* at 39–40.) In return, Flint was required to sell water "generally sufficient to supply the County's system use." (*Id.* at 40.) In 2003, the contract was again updated. (*Id.*) It similarly required the "City ... to sell water to the [GCDC] in such quantities as will meet the demands of the County Agency's customers" and "the [GCDC] agree[d] to purchase water exclusively from the City[.]" (*Id.*) This was the situation until 2014, when Flint transitioned back to the Flint River as its source of water. (*Id.* at 52–53.)

Flint was not the only municipality looking to switch its water supply in the early 2000s. Various communities in the same region had formed the KWA in 2009 to explore this possibility. (*Id.* at 42.) Specifically, the KWA was aiming to construct a new water pipeline connected to Lake Huron. (*Id.*) Walling was elected as the KWA's chair, and Wright was elected its Chief Executive Officer. (*Id.*) Wright later stated that he was motivated to establish the KWA at least in part because DWSD was "the poster child for Detroit corruption." (*Id.* at 43.)

To be viable, the KWA would have to construct a water intake at Lake Huron and sixty-three miles of pipeline. (*Id.*) The system would have to supply sixty million gallons of water each day. (*Id.*) It was estimated that Genesee County would require forty-two million gallons a day and Flint eighteen. (*Id.*) The projected capital cost ran to approximately $ 300 million, of which Flint would shoulder eighty-five million and serve 34.2% of the debt. (*Id.*) Unlike the treated water supplied by DWSD, the KWA water would be raw and would require considerable treatment before use. (*Id.*)

By 2013, Wright had secured long-term commitments from most of its members to purchase their future water from the KWA. (*Id.* at 46.) The commitments were necessary to fund the bonds required to finance the project. (*Id.*) However, at that time, Flint had not committed to the KWA. (*Id.*) And Wright knew that it was doubtful the financing would be successful without Flint's backing. (*Id.* at 46–47.) So beginning in March and April of that year, Wright aggressively argued the case for Flint joining the KWA. (*Id.*) All officials involved in the decision knew that the FWTP would have to be upgraded to process the future supply of raw water. (*Id.* at 47.)

Yet there was a problem with Flint's participation in the KWA: how would it pay for its share of the costs? Under state law, Flint could not issue new bonds because it was in financial receivership. (*Id.* at 55.) An Administrative Consent Order (ACO) would permit Flint to circumvent this problem. (*Id.* at 129–32.) But the only way Flint could obtain an ACO was from a state agency as a result of an emergency. (*Id.* at 132.) Accordingly, Flint began pursuing an ACO from the MDEQ.

(*Id.* at 133.) And although initially hesitant, the MDEQ began to help with the ACO even though there was no prerequisite emergency. (*Id.* at 133–34.) The MDEQ executed the ACO on March 20, 2014. (*Id.* at 136.) Pursuant to its terms, Flint was bound to adopt the interim plan to use the Flint River as its water source. (*Id.*) The bond issue that followed allowed the KWA project to move forward. (*Id.*)

When developing the interim plan, a group of people including defendants Wright, Dillon, and Walling recognized that the FWTP could not process enough ***835** water for all of Genesee County. (*Id.* at 53.) So together with other officials, these defendants eventually planned for Flint to receive Flint River water while Genesee County would continue to receive DWSD water. (*Id.*) This was despite evidence that the use of the Flint River would "[p]ose an increased microbial risk to public health," "an increased risk of disinfection by-product (carcinogen) exposure," and "[r]equire significant enhancements to treatment [sic] at the [FWTP.]" (*Id.* at 131.)

As a necessary part of the interim plan, MDEQ officials issued an operating permit for the FWTP in April 2014. (*Id.* at 52.) However, they did so without following the required procedures. (*Id.* at 126.) Federal law requires states to "review and approve the addition of a new source or long-term change in water treatment[.]" (*Id.* at 136.) In turn, Michigan law regulates the MDEQ's authority to issue permits that impact the State's water systems. Before issuing a permit for certain water sources, the MDEQ is required to provide a public comment period of "not less than 45 days." (*Id.* at 136–37.) This regulation applied to the FWTP permitting process. (*Id.* at 137.) Publicly, the MDEQ stated that "the city would just continue to buy water from [DWSD]" if no permit was issued in time. (*Id.* at 138.) And Flint officials assured people that there would be a series of open forums to permit public questions. (*Id.*) But when Flint eventually submitted its permit application on March 31, 2013, it was approved in a matter of days, without an opportunity for public comment. (*Id.* at 138–39.)

Flint transitioned to the Flint River on April 25, 2014. (*Id.* at 62.) And in the months that followed, members of Governor Snyder's senior staff began to discuss the possibility of lead contamination. (*Id.* at 104–05.) In March 2015, a Flint resident wrote an open letter to Walling stating that "the water is dangerous to our health!" (*Id.* at 158.) Ambrose eventually received the letter, forwarding it to Flint's public relations firm simply stating, "[w]elcome to Monday." (*Id.*) Civic groups tried to get the government defendants to take the issue seriously. (*Id.* at 158–59.) But officials dismissed their concerns as unwarranted. (*Id.*)

Even as the EPA continued to uncover evidence of lead contamination and some senior members of Governor Snyder's administration voiced the view that the problem was not being taken seriously (*id.* at 159–60), many officials continued to deny that anything was wrong. (*Id.* at 160–62.) Instead, they put it down to "old time negative racial experiences." (*Id.* at 161.) Several officials recommended that more money be spent on public relations to combat the issue, rather than looking to resolve the underlying problem. (*Id.* at 159.)

On April 28, 2015, Governor Snyder received an e-mail from his chief of staff advising him that the water issue in Flint continued to be a "danger flag" for the administration. (*Id.* at 92.) Later that summer, the Governor's Director of Urban Initiatives discussed with him the growing concerns among Flint residents that they were being exposed to contaminated water. (*Id.* at 94.) And on September 25, the Governor's chief of staff again e-mailed the Governor to discuss the issue of lead exposure and the potential political implications. (*Id.* at 103.) In the same communication, the chief of staff opined that the residents of Flint were having their concerns about water quality inappropriately dismissed. (*Id.* at 104.) The Governor received this e-mail almost a week before he publicly acknowledged in October 2015 that Flint's water was contaminated with lead. (*Id.* 103.) In the meantime, MDEQ officials continued to tell the public that "the drinking water distributed to city customers ***836** currently meets all drinking water standards[.]" (*Id.* at 162.)

Following his public acknowledgment of the crisis in October 2015, the Governor was told in December that in addition to elevated lead levels, Flint residents were also at risk of legionella exposure. (*Id.* at 101.) Despite all this knowledge, Governor Snyder did not disclose this risk when he declared a state of emergency on January 5, 2016. (*Id.* at 102.) It was not until January 13 that he publicly admitted that Flint's water contained legionella bacteria. (*Id.*) He did this while activating the Michigan National Guard to assist the people of Flint. (*Id.*) On January 14, Governor Snyder asked the federal government to issue an emergency declaration. (*Id.*) The federal government did so two days later. (*Id.*)

In the aftermath of the crisis, facts about how the MDEQ dealt with the disaster came to light. For example, the MDEQ failed

to comply with various rules and regulations. (*Id.* at 126.) State law requires the MDEQ to notify the public if a source of water is found to be out of compliance. (*Id.* at 142.) In August 2014, MDEQ officials discussed whether a Flint boil water advisory was caused by a sampling error in a test or a high fecal coliform result. (*Id.*) It was far from certain that sampling error was the culprit. (*Id.*) And although the MDEQ suspected that the water was contaminated, no one made an effort to investigate the issue or notify the public. (*Id.* at 143–44.)

Additionally, the MDEQ lacked a nondiscrimination policy required by federal law. (*Id.* at 126.) In 1992, the EPA found that the MDEQ had discriminated against Flint's majority African American population in the public participation processes for a power station permit. (*Id.* at 145–46.) In conducting its investigation, the EPA concluded that the MDEQ had insufficient formalized safeguards to protect against operational discrimination as required by federal regulations. (*Id.* at 146.) In 2014, the EPA informed the MDEQ that it was still not in compliance and needed to have in place a non-discrimination policy. (*Id.* at 147.) And even when the MDEQ provided the EPA with a written policy, the EPA determined that it was legally insufficient. (*Id.*) The same defective policy remains in place. (*Id.*)

Throughout the crisis and its aftermath, the concerns and fears of the people of Flint were not taken seriously. In the opinion of some government officials, residents "making noise about civil unrest, violence, [Michigan State Police] shootings and an [emergency manager], [were] the naysayers[.]" (*Id.* at 156.) These officials believed that too many of them had "their handout [sic] and their voices raised," and caving to their demands was part of the reason that Flint had been "placed in receivership twice in the past decade." (*Id.* at 156–57.) In the view of these officials, the problem an "entitlement mentality." (*Id.* at 157.) Ultimately, the Task Force charged with investigating the causes of the crisis summed it up: "Flint residents, who are majority Black or African American and among the most impoverished of any metropolitan area in the United States, did not enjoy the same degree of protection from environmental and health hazards as that provided to other communities."[5] (*Id.* at 165.)

iv. Prior Flint Water Cases

Litigation from the Flint Water Cases has already resulted in several opinions from the Sixth Circuit. The Court must ***837** follow these as they are binding precedent, including *Guertin v. Michigan*, 912 F.3d 907 (6th Cir. 2019); *Boler v. Earley*, 865 F.3d 391 (6th Cir. 2017); and *Mays v. City of Flint*, 871 F.3d 437 (6th Cir. 2017).[6] Other decisions have been issued by this Court, which will be adhered to where appropriate. This includes *Guertin v. Michigan*, No. 16-cv-12412, 2017 WL 2418007, 2017 U.S. Dist. LEXIS 85544 (E.D. Mich. June 5, 2017), and the Court's vacated August 1, 2018 opinion in the present case. 329 F.Supp.3d 369.

b. Standard of Review

[1] **[2]** Plaintiffs seek leave to amend the complaint under Federal Rule of Civil Procedure 15(a)(2). Rule 15(a)(2) states that "a party may amend its pleading only with ... the court's leave."[7] However, "court[s] should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2); *see also Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615 (6th Cir. 2010) (noting that Rule 15(a) requests are normally liberally granted). And when evaluating the interests of justice, courts consider various factors. These include " '[u]ndue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, [and] undue prejudice to the opposing party[.]' " *Wade v. Knoxville Utils. Bd.*, 259 F.3d 452, 458–59 (6th Cir. 2001) (quoting *Head v. Jellico Hous. Auth.*, 870 F.2d 1117, 1123 (6th Cir. 1989)). Mere delay on its own is insufficient to warrant denial. *Oleson v. United States*, 27 F. App'x 566, 569 (6th Cir. 2001). Instead, courts examine the competing interests of the litigants and the likelihood of prejudice to the non-moving party. *See Morse*, 290 F.3d at 799.

[3] **[4]** Yet regardless of the equities, leave must be denied if an amendment would be futile. *Parchman v. SLM Corp.*, 896 F.3d 728, 736, 738 (6th Cir. 2018) (citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). And a "proposed amendment is futile if [it] could not withstand a Rule 12(b)(6) motion[.]" *Beydoun v. Sessions*, 871 F.3d 459, 469 (6th Cir. 2017). Under Rule 12(b)(6), the Court must "construe the complaint in the light most favorable to the plaintiff and accept all allegations as true." *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). A plausible claim need not contain "detailed factual allegations," but it must

contain more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Ultimately, a claim is only facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937.

c. Threshold Issues

i. Jurisdiction

Several parties question the Court's jurisdiction to rule on plaintiffs' motion. (Dkt. 635 at 4–5; Dkt. 650 at 1–2; Dkt. 653 ***838** at 12–13; Dkt. 655 at 12–14; Dkt. 657 at 11–12.) They argue that the Court was divested of jurisdiction by appeals filed in response to its August 1, 2018 opinion and order. (*Id.*) However, as explained in its November 9, 2018 order, the Court retained jurisdiction. (Dkt. 670.) And the Sixth Circuit recently affirmed this position, dismissing defendants' appeals in the process. *Carthan v. Snyder*, No. 18-1967 (6th Cir. Feb. 19, 2019). As such, the Court retains the authority to rule on the present motion.

ii. Class Definitions

Plaintiffs seek leave to amend the class definitions. The third amended complaint broadly defined the class as including all individuals and entities who were exposed to Flint's contaminated water and who experienced injuries or damages to their persons or property. (Dkt. 349 at 112–13.) The fourth amended complaint keeps this general definition but adds a subclass of African Americans. (Dkt. 620-3 at 167–68.) Plaintiffs also further divide the proposed classes into a series of even smaller subclasses based on property damage, personal injury, injunctive relief, and a set of common issues relating to liability and causation. (*Id.* at 167–72.)

Class certification should occur "at an early practicable time." Fed. R. Civ. P. 23(c)(1)(A). The Court is currently preparing a comprehensive case management order that will set forth the timeframe for consideration of class definitions and certification. Therefore, plaintiffs may amend the complaint to include the amended class definitions with the understanding that this issue will be revisited.

d. Main Analysis

Plaintiffs seek leave to amend the following six counts:

Count	Claim	Defendants
I	42 U.S.C. § 1983 - Bodily Integrity	All government defendants
II-III	42 U.S.C. § 1983 - Equal Protection	Snyder, Dillon, Wright, Ambrose, Kurtz, Earley, Wyant, Shekter-Smith, Prysby, and Busch
IV	42 U.S.C. § 1985(3) - Conspiracy	Snyder, Dillon, Wright, Ambrose, Kurtz, and Earley
V	Elliott-Larsen Civil Rights Act	Snyder, Dillon, Wright, Ambrose, Kurtz, Earley, The City of Flint, Wyant, Shekter-Smith, Prysby, and Busch
XIV	Gross Negligence	Snyder, Dillon, Lyon, Shekter-Smith, Rosenthal, Busch, Cook, Prysby, Wurfel, Wright, Kurtz, Earley, Ambrose, Croft, Johnson, and Glasgow.

i. Competing Interests and Likelihood of Prejudice

[5] Some of the defendants argue that leave to amend the complaint should be denied because plaintiffs' request is unduly delayed. (Dkt. 651 at 19–20; Dkt. 653 at 33–34). The Court disagrees.

It is true that the present case has been pending for several years. This is now plaintiffs' fourth amended complaint, and if ***839** this were a routine case, their attempt to amend the pleadings again might be unusual. But this litigation is far from routine. The harm alleged and the number of parties involved are extraordinary. What started out as a series of individual suits has become a large consolidated action. And the complex nature of the claims coupled with less than straightforward procedure must be considered. This weighs in plaintiffs' favor.

Conversely, defendants do not explain how they will be prejudiced. Having resisted the start of discovery, they cannot claim that they will be subject to duplicative discovery. *See Morse*, 290 F.3d at 800–01. Plaintiffs have not changed their allegations so much that defendants will need to completely overhaul their strategy. *See Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1259 (6th Cir. 1990). And the fourth amended complaint does not contain new claims so far outside the scope of the third amended complaint such that granting leave to amend may later lead to confusion. *See Lover v. D.C.*, 248 F.R.D. 319, 323 (D.D.C. 2008). As a result, leave to amend will not be denied on the basis of prejudice. Instead, the Court will examine each count for futility.

ii. Futility of Amendments

1. Bodily Integrity

Plaintiffs first seek leave to amend their bodily integrity claim brought under § 1983 against defendant Governor Snyder. (Dkt. 620-1 at 13.) In their view, the newly pleaded allegations establish that the Governor was aware of the significant risks posed by the Flint River water as early as April 2015, but he did nothing to inform Flint's residents until the crisis could no longer be denied many months later. (*Id.* at 14–15.) Additionally, Governor Snyder not only denied the crisis in the intervening period, but later played down the risks for months after having publicly acknowledged the disaster. (*Id.*) Because plaintiffs' state a plausible bodily integrity claim against Governor Snyder, granting leave to include it would not be futile.

a. Constitutional Violation

[6] **[7]** **[8]** **[9]** The right to bodily integrity is a fundamental interest protected by the Due Process Clause of the Fourteenth Amendment. *Guertin*, 912 F.3d at 918–19; *Guertin*, 2017 WL 2418007, at *21, 2017 U.S. Dist. LEXIS 85544, at *63 (citing *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251, 11 S.Ct. 1000, 35 L.Ed. 734 (1891)). And although violations of the right to bodily integrity usually arise in the context of physical punishment, the scope of the right is not limited to that context. *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1062–63 (6th Cir. 1998). For instance, the "forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty[.]" *Guertin*, 912 F.3d at 919 (citing *Washington v. Harper*, 494 U.S. 210, 229, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990)). And "compulsory treatment with anti-psychotic drugs may [also] invade a patient's interest in bodily integrity[.]" *Guertin*, 2017 WL 2418007, at *22, 2017 U.S. Dist. LEXIS 85544, at *66 (citing *Lojuk v. Quandt*, 706 F.2d 1456, 1465–66 (7th Cir. 1983)). The key is whether the intrusion is consensual. *See Guertin*, 912 F.3d at 920. There is no difference between the forced invasion of a person's body and misleading that person into consuming a substance involuntarily. *Guertin*, 2017 WL 2418007, at *24, 2017 U.S. Dist. LEXIS 85544, at *71 (citing *Heinrich v. Sweet*, 62 F.Supp.2d 282, 313–14 (D. Mass. 1999)). As such, officials can violate an individual's bodily integrity by introducing life-threatening substances into that person's body without their consent. *Guertin*, 2017 WL 2418007, at *22, 2017 U.S. Dist. LEXIS 85544, at *65 (citing ***840** *Washington*, 494 U.S. at 229, 110 S.Ct. 1028).

[10] **[11]** However, to state a claim, plaintiffs must do more than point to the violation of a protected interest; they must also demonstrate that it was infringed arbitrarily. *Guertin*, 912 F.3d at 922. *But see Range v. Douglas*, 763 F.3d 573, 589 (6th Cir. 2014) (observing that in some contexts government action may violate substantive due process without a liberty interest at stake). And with executive action, as here, only the most egregious conduct can be classified as unconstitutionally arbitrary. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). In legal terms, the conduct must "shock[ ] the conscience." *Guertin*, 2017 WL 2418007, at *21, 2017 U.S. Dist. LEXIS 85544, at *63 (quoting *Lewis*, 523 U.S. at 846, 118 S.Ct. 1708).

[12] **[13]** **[14]** Whether government action shocks the conscience depends on the situation. *Ewolski v. City of Brunswick*, 287 F.3d 492, 510 (6th Cir. 2002). Where unforeseen circumstances demand the immediate judgment of an executive official, liability turns on whether decisions were made "maliciously and sadistically for the very purpose of causing harm." *Lewis*, 523 U.S. at 852–53, 118 S.Ct. 1708 (quoting *Whitley v. Albers*, 475 U.S. 312, 320–21, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986)). But where an executive official has time for deliberation before acting, conduct taken with "deliberate indifference" to the rights of others "shocks the conscience." *See Claybrook v. Birchwell*, 199 F.3d 350, 359 (6th Cir. 2000). This case involves the latter of these two situations. And as a result, plaintiffs must demonstrate that (1) officials knew of facts from which they could infer a "substantial risk of serious harm," (2) that they did infer it, and (3) that they nonetheless acted with indifference, *Range*, 763 F.3d at 591 (citing *Ewolski*, 287 F.3d at 513), demonstrating a callous disregard towards the rights of those affected, *Guertin*, 912 F.3d at 924 (quoting *Schroder v. City of Fort Thomas*, 412 F.3d 724, 730 (6th Cir. 2005)).

[15] As a preliminary matter, plaintiffs point to a bodily integrity violation. This is not a case about the right to a contaminant-free environment or clean water. *But see Guertin*, 912 F.3d at 955–57 (McKeague, J., dissenting). Rather, this case implicates the consumption of life-threatening substances. Indeed, neither side disagrees that

lead and legionella are life threatening, nor that plaintiffs ingested these contaminants and others through the water supply. This intrusion was also involuntary. "[I]t was involuntary because defendants hid from plaintiffs that Flint's water contained dangerous levels of lead," *Guertin*, 2017 WL 2418007, at *24, 2017 U.S. Dist. LEXIS 85544, at *71, and, "because under state and municipal law, plaintiffs were not permitted to receive water in any other way[,]" *id.* (citing Flint Code of Ord. §§ 46-25, 46-26, 46-50(b)). Plaintiffs' claim therefore implicates the right to bodily integrity.

[16] Plaintiffs also plead facts which, when taken as true, show that Governor Snyder was deliberately indifferent. First, plaintiffs plausibly allege that Governor Snyder knew of facts from which he could infer that plaintiffs faced a substantial risk of serious harm. As early as March 2014, members of the Governor's administration were warning that transitioning to the Flint River could lead to a potential disaster. Initial warning signs included an outbreak of Legionnaires' disease in the Flint area. And by October 2014, senior staff, including the Governor's Chief of Staff, were discussing the need to return to DWSD water because of a growing awareness that the treated Flint River water did ***841** not meet established quality standards. In July 2015, this clamor continued to build when the Governor's Chief of Staff wrote that concerns over lead contamination were being inappropriately dismissed. There was also a public outcry. Concerned religious leaders informed the administration of problems with the Flint River. News articles discussed lead in Flint's drinking water. And General Motors stopped using Flint water because it was corroding machinery. Considering the seriousness of the potential problem, the widespread reports, and the seniority of the government staff involved, it is reasonable to infer from plaintiffs' allegations that Governor Snyder was aware of this information. As a result, the Governor possessed sufficient facts from which he could have deduced that plaintiffs faced a substantial risk of serious harm from the Flint River.

Second, plaintiffs successfully claim that Governor Snyder did in fact infer that plaintiffs faced such a risk of harm. In January 2015, the Governor met with other government officials to discuss the ongoing threat to public health posed by legionella bacteria in the Flint River water. A couple of months later, the Governor and his staff discussed whether to distribute water filters to Flint residents as a form of mitigation against possible contamination. At the same time, the Governor's Chief of Staff informed the Governor that the water issue in Flint continued to be "a danger flag" and was something that needed addressing sooner rather than later. (*Id.* at 92.) And in the summer, a senior member of the administration spoke with Governor Snyder about the fear that Flint's residents were being exposed to toxic levels of lead through the Flint River water. So when plaintiffs state that by February 2015, the Governor was fully aware of a public health threat posed by the water supply in Flint, and that by July 2015, at the very latest, the Governor knew that the water supply was contaminated, these conclusions are supported by well-pleaded factual allegations. It is reasonable to infer that Governor Snyder knew that the residents of Flint faced a substantial risk of serious harm emanating from the water.

Third, plaintiffs plausibly state that the Governor acted indifferently to the risk of harm they faced, demonstrating a callous disregard for their right to bodily integrity. This indifference manifested itself in two ways. Initially, the Governor was indifferent because instead of mitigating the risk of harm caused by the contaminated water, he covered it up. In private, he worried about the need to return Flint to DWSD water and the political implications of the crisis. But in public, he denied all knowledge, despite being aware of the developing crisis. As a result, plaintiffs were lured into a false sense of security. They could have taken protective measures, if only they had known what the Governor knew. Instead, the Governor misled them into assuming that nothing was wrong. Governor Snyder's administration even encouraged them to continue to drink and bathe in the water.

Subsequently, the Governor continued to show indifference to the risk of harm plaintiffs faced. Even once he acknowledged the crisis, he downplayed the risks that plaintiffs faced. By October 2015, the Governor had publicly admitted that the water was contaminated and Flint had returned to DWSD water. Yet the Governor still waited many months to declare a state of emergency. This was despite local area leaders requesting such a declaration as far back as March 2015. Without a state of emergency, plaintiffs were denied valuable resources that could have helped abate the harm that they were still suffering. It is reasonable to infer that the rationale for ***842** the delay was in part because the Governor wanted to act as if the issue was resolved. But by downplaying the continuing risk of harm, the Governor undermined efforts to enact protective measures. And as with his initial form of indifference, this led to plaintiffs involuntarily ingesting lead and other contaminants, violating their bodily integrity.

These two ways of showing indifference represent a continuum of actions, more powerful combined than when viewed in isolation. They depict indifference in the form of

deception, from the Governor's unwillingness to admit the crisis, to his downplaying of its severity once it became public knowledge. Viewed as a whole, the allegations plausibly describe "conscience shocking" conduct. Governor Snyder's actions were deliberately indifference and exhibited a callous disregard for plaintiffs' right to bodily integrity.[8]

b. Qualified Immunity

[17] **[18]** **[19]** **[20]** Although plaintiffs plausibly plead that Governor Snyder violated their right to bodily integrity, qualified immunity shields public officials "from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). It provides protection to government officials who make reasonable yet mistaken decisions that involve open questions of law. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011). But an official cannot avail herself of qualified immunity if the right violated was "clearly established at the time of the challenged conduct." *Guertin*, 912 F.3d at 917 (quoting *al-Kidd*, 563 U.S. at 741–42, 131 S.Ct. 2074). If controlling caselaw or a body of persuasive authority has put the constitutional question beyond debate, government officials are on notice that their conduct must conform to an established legal standard. *Id.* at 932.

[21] As the Sixth Circuit recently held, the right to bodily integrity was clearly established at the time of the challenged conduct. *Id.* at 932–35. "Knowing the Flint River water was unsafe for public use," failing to take "steps to counter its problems, and assuring the public in the meantime that it was safe" was " 'conduct that would alert a reasonable person to the likelihood of personal liability.' " *Id.* at 933 (quoting *Scicluna v. Wells*, 345 F.3d 441, 446 (6th Cir. 2003)). In other words, any reasonable official should have known that "contaminat[ing] a community through its public water supply with deliberate indifference is a government invasion of the highest magnitude." *Id.* As a result, the Governor is not entitled to qualified immunity.

2. Equal Protection

Plaintiffs also seek leave to revise their equal protection claims under § 1983. ***843** Plaintiffs' third amended complaint included two equal protection counts, one alleging discrimination on the basis of race and the other on wealth. (Dkt. 349 at 119, 123.) Under both counts, plaintiffs alleged that defendants Snyder, Dillon, Wright, Walling, Ambrose, Kurtz, and Earley developed and executed an interim plan to deliver contaminated water to the predominantly poor African American residents of Flint, while providing the mostly white higher income residents of Genesee County with safe water. (*Id.* at 120–21, 124–25.)

The fourth amended complaint makes two important changes. First, only those plaintiffs who are African American allege race discrimination. (Dkt. 620-3 at 174, 180.) Second, both counts are broken into three theories of liability: (1) like in the third amended complaint, defendants Snyder, Dillon, Wright, Ambrose, Kurtz, and Earley violated their right to equal protection by providing Flint with contaminated water while supplying the remainder of Genesee County with clean water (*id.* at 174–76, 181–83);[9] (2) Governor Snyder violated their right to equal protection by delaying his decision to declare a state of emergency in Flint while promptly doing so in other emergency situations (*id.* at 177–78, 183–84); and (3) MDEQ defendants Wyant, Shekter-Smith, Prysby, and Busch violated their right to equal protection by not enforcing certain laws and regulations in Flint. (*Id.*) For the reasons that follow, the fourth amended complaint fails to state an equal protection claim under any of these theories, and so granting leave to amend the complaint to include these claims would be futile.

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[22] **[23]** **[24]** **[25]** "The Equal Protection Clause of the Fourteenth Amendment commands that no state shall 'deny to any person within its jurisdiction the equal protection of the laws[.]' " *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982)). Broadly speaking, it requires that state officials treat all persons alike, under like circumstances and like conditions. *Cleburne*, 473 U.S. at 439, 105 S.Ct. 3249; *see also Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 682 (6th Cir. 2011). When officials treat similar individuals differently, the Equal Protection Clause demands a justification. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 602, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008). But because all state action tends to disfavor some more than others, courts take this practical reality into account by evaluating state action under differing levels of scrutiny. *See Breck v. Michigan*, 203 F.3d 392, 395 (6th Cir. 2000). If official conduct "neither burdens a fundamental right nor targets a suspect class," courts will uphold it "so long as it bears a

rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996); *see also Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 312 (6th Cir. 2005) (citing *Vacco v. Quill*, 521 U.S. 793, 799, 117 S.Ct. 2293, 138 L.Ed.2d 834 (1997)).

a. Wealth-Based Discrimination

[26] Plaintiffs fail to state a claim that defendants violated their right to equal protection on the basis of wealth discrimination. A class of less wealthy persons is ***844** not a protected class for the purposes of equal protection. *Molina-Crespo v. U.S. Merit Sys. Prot. Bd.*, 547 F.3d 651, 660 (6th Cir. 2008). The challenged conduct will therefore be upheld if it satisfies a rational basis. *Romer*, 517 U.S. at 631, 116 S.Ct. 1620.

[27] **[28]** **[29]** Under rational basis review, official decisions are afforded a strong presumption of validity. *See Walker v. Bain*, 257 F.3d 660, 668 (6th Cir. 2001). And even at the motion to dismiss stage, this presents a formidable bar for plaintiffs to surmount. *Theile v. Michigan*, 891 F.3d 240, 243 (6th Cir. 2018). To plausibly allege that state action fails under rational basis review, plaintiffs must negate "every conceivable basis" which might support the challenged conduct. *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012). Courts do not consider the wisdom of the challenged action. *Theile*, 891 F.3d at 244 (citing *Breck*, 203 F.3d at 395). And defendants do not need to offer any justification. *Walker*, 257 F.3d at 668. It is enough that the reviewing court can fairly conceive of one existing. *Id.*

[30] As outlined above, plaintiffs' first theory is that defendants Snyder, Dillon, Wright, Ambrose, Kurtz, and Earley created an interim plan to supply Flint with Flint River water, while continuing to provide the remainder of Genesee County with DWSD water. (Dkt. 620-3 at 181–82.) In plaintiffs' view, there was no rational basis for this decision. (*Id.* at 182–83.)

Even assuming that Flint and the remainder of Genesee County were similarly situated for equal protection purposes, there are many rational reasons that could justify providing only Flint with Flint River water. The KWA could not proceed without Flint's participation. Flint's participation was contingent on the FWTP's ability to process the raw water that the KWA pipeline would provide, and upgrading the FWTP would cost millions. One key way defendants could accomplish this was to stop paying for the relatively expensive DWSD water and to start taking water from the Flint River. Indeed, even plaintiffs allege that this was a critical part of the interim plan.

In hindsight, this was a terrible decision. It placed financial interests above the health and safety of Flint's residents. Assuming the allegations are true, defendants harmed plaintiffs in the pursuit of fiscal expedience. But the Court cannot consider the wisdom of the decision. And it does not matter that defendants may have had other options available to them. It only matters that there is a rational basis for the decision. As such, plaintiffs' first theory fails to state a claim.

[31] Plaintiffs' second theory fails for a similar reason. They draw a comparison between Flint and other communities with respect to emergencies across the state. Governor Snyder allegedly waited several months to declare a state of emergency in Flint from the date he publicly acknowledged the seriousness of the problem. (Dkt. 620-3 at 102). With other disasters, he typically acted within days. (*Id.* at 152–53.) Plaintiffs again argue that there was no rational basis for this difference in treatment. (*Id.* at 183.)

Again, even assuming that Flint and these other disaster-struck communities were similarly situated for equal protection purposes, there is a conceivable rational basis for treating them differently. In part, plaintiffs were harmed by the Governor's delay in declaring a state of emergency because it limited their access to state resources to remedy the problem. It is thus conceivable that the Governor initially decided not to expend these resources, believing that the Flint Water Crisis could be addressed without them. In retrospect, ***845** this was objectively the wrong decision. And the Governor undoubtedly was within his authority to declare a state of emergency at an earlier time. But the Court cannot inquire further under rational basis review. As a result, plaintiffs' second theory also fails to state a claim.

Plaintiffs' third theory runs into a different problem. Plaintiffs allege that the MDEQ defendants Wyant, Shekter-Smith, Prysby, and Busch treated them differently by:

> (1) granting a fraudulent [ACO] to allow Flint to borrow funds to participate in the KWA; (2) issuing the [FWTP] a permit pursuant to the Michigan Safe Drinking Water Act without observing the statutorily mandated 45-day notice and comment period; (3) failing to comply with sampling and optimized corrosion control protocols as required under the State and Federal Lead and Copper

Rule; and (4) lacking any nondiscrimination policy for more than 30 years and ignoring EPA requirements to update its policy for years.

(*Id.* at 183–84.) However, they fail to explain how this treatment differed from that of a similarly situated class of persons.

[32] **[33]** **[34]** Class-based discrimination is the essence of an equal protection claim. *See Herron v. Harrison*, 203 F.3d 410, 417 (6th Cir. 2000) (citing cases). In limited situations, a plaintiff does not need to identify a specific group of persons who were treated differently. For instance, if government conduct was premised on a protected classification such as race or gender, a showing of discriminatory purpose may suffice. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–68, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (explaining that a single act, if motivated by a desire to treat persons differently on the basis of race, can result in a violation of the Equal Protection Clause). However, outside of that narrow range of cases, plaintiffs must plead sufficient facts from which it can be inferred that defendants treated similarly situated individuals differently. *Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564, 574–75 (6th Cir. 2008); *see also Klinger v. Dep't of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994) ("Absent a threshold showing that she is similarly situated to those who allegedly receive favorable treatment, the plaintiff does not have a viable equal protection claim.").

[35] Here, plaintiffs highlight several instances in which defendants failed to enforce either a law or a policy, but the allegations do not explain in anything but conclusory terms how defendants acted differently in other situations. For example, to the extent that defendants failed to observe the statutory forty-five day notice and comment period before issuing the FWTP an operating permit, it may be that they normally dispensed with this requirement. Likewise, although plaintiffs plead that defendants did not comply with state and federal lead and copper testing requirements, the complaint reveals nothing about the possibility that defendants failed to enforce these laws on a statewide basis. Accordingly, plaintiffs' third and final theory also fails to state a claim.

In some of their briefing, plaintiffs argue that rational basis review should not apply to their wealth-based equal protection claim because the claim should be construed as one involving discrimination implicating the fundamental right to bodily integrity. (Dkt. 379 at 88.) However, plaintiffs have not pleaded the claim this way in the fourth amended complaint. And in fact, plaintiffs do not raise this argument in their most recent briefing. The Court therefore continues to view the claim as one involving discrimination on the basis of wealth. For these reasons, leave to amend ***846** the complaint to include this claim would be futile.

b. Race-Based Discrimination

[36] **[37]** Plaintiffs also fail to state a claim that defendants violated their right to equal protection on the basis of race discrimination. When state action is premised on a racial classification, courts strictly scrutinize the challenged conduct. *Cleburne*, 473 U.S. at 440, 105 S.Ct. 3249; *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976); *see also United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938) (noting that courts act with greater vigilance when equal protection claims affect the politically powerless). Conduct subject to strict scrutiny is presumptively invalid; only official action that is narrowly tailored to meet a compelling state interest will survive. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 276 F.3d 876, 879 (6th Cir. 2002).

[38] **[39]** **[40]** Yet " 'proof of ... discriminatory intent or purpose is required' to show a violation of the Equal Protection Clause" on the basis of race discrimination. *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 194, 123 S.Ct. 1389, 155 L.Ed.2d 349 (2003) (quoting *Arlington Heights*, 429 U.S. at 265, 97 S.Ct. 555); *Washington v. Davis*, 426 U.S. 229, 239–41, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). If discriminatory intent is missing, claims are analyzed under rational basis. *See Radvansky*, 395 F.3d at 312. And the facts must offer more than "intent as volition or intent as awareness of consequences." *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). Rather, they must demonstrate that a decisionmaker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon a particular racial group." *Id.*; *Bennett v. City of Eastpointe*, 410 F.3d 810, 818 (6th Cir. 2005) (quoting *King v. City of Eastpointe*, 86 F. App'x 790, 802 (6th Cir. 2003)).

[41] **[42]** **[43]** **[44]** **[45]** At this stage in the case, plaintiffs need only raise an inference of discriminatory purpose. To do so, they must demonstrate that the application of a facially neutral law or policy had a discriminatory impact, and sufficient evidence exists to suggest an invidious motive. *Arlington Heights*, 429 U.S. at 265–66, 97 S.Ct. 555; *Ne.*

Ohio Coal. for the Homeless v. Husted, 837 F.3d 612, 636–37 (6th Cir. 2016).[10] The challenged conduct does not need to rest "solely on racially discriminatory purposes," but this must have been a "motivating factor." *Arlington Heights*, 429 U.S. at 265, 97 S.Ct. 555. And although discriminatory impact is an important starting point, it is rarely enough on its own. *Id.* Instead, courts must conduct "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266, 97 S.Ct. 555. Discriminatory impact alone is only sufficient in the rarest case where "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action[.]" *Id.* at 266, 97 S.Ct. 555 (citations omitted).

[46] Several non-exhaustive factors guide this inquiry: (1) "[t]he historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes," *id.* at 267, 97 S.Ct. 555; (2) "the ***847** specific sequence of events leading up to the challenged decision ... may shed ... light on the decisionmaker's purposes," *id.*; (3) "[d]epartures from the normal procedural sequence ... particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached," *id.*; and (4) "[t]he legislative or administrative history ... especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports," *id.* at 268, 97 S.Ct. 555.[11]

As a starting point, plaintiffs plead discriminatory impact for all three theories. Under each theory, they allege that defendants' conduct negatively impacted Flint. And Flint is majority African American. However, this is not the "rarest case" where the discriminatory impact is so stark as to immediately warrant an inference of discriminatory purpose. *See Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) (invalidating state action where redrawing of city boundaries disenfranchised all but four or five of the municipality's 400 African American voters); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (finding a violation of equal protection where an ordinance was exclusively applied against Chinese-owned laundries). After all, Flint is 40.4% white. (Dkt. 620-3 at 128.)

Plaintiffs also point to the historical background for all three theories. They identify a long history of race discrimination and segregation and argue that this should factor into the Court's analysis. (Dkt. 620-1 at 18.) But plaintiffs do not connect Flint's history of systemic racism to defendants' conduct. They imply that the legacy effects of historical racism should be imputed to defendants because they were state actors carrying out official business. But this alone is not enough to warrant an inference of discriminatory purpose. It will be considered with the other evidence.

[47] Plaintiffs' first theory, the decision to switch Flint's water supply to the Flint River while providing DWSD water to the remainder of Genesee County, lacks sufficient facts to warrant an inference of discriminatory purpose. Little about the sequence of events indicates that a racial bias was driving defendants. In the months leading up to the switch, cost studies suggested that DWSD water was the more economic mid-term option. But the KWA would only be viable if the Flint River was used as an interim water source. And defendants were concerned that DWSD water would become increasingly expensive.

Likewise, defendants' contemporary statements do not change the outcome. Defendant Wright expressed the view that DWSD is a corrupt entity.[12] But this does not indicate racial animus and the fourth amended complaint offers nothing further. Therefore, when all the facts are taken into consideration, the allegations fail to show that race motivated defendants' decision. At most they show that defendants ***848** acted in spite of the risk of harm that plaintiffs faced, not that they were driven by it. Plaintiffs' first theory thus fails to state a claim.

[48] With their second theory that the Governor treated the emergency situation in Flint differently, plaintiffs also fail to allege sufficient facts to warrant an inference of discriminatory purpose. Governor Snyder allegedly knew that Flint's water supply was contaminated months before publicly acknowledging it, but he did not alert the public until October 2015, when it was impossible to deny. The Governor also took many months more to declare a state of emergency. And presumably the conditions that gave rise to the eventual emergency declaration existed the whole time. Similarly, a departure from past practice works in plaintiffs' favor. Governor Snyder's conduct in Flint differed from that in some majority white communities, where he promptly issued states of emergency.

Nonetheless, these facts taken as a whole do not support an inference of discriminatory intent. The comparative states of emergency identified in the fourth amended complaint involved drastically different situations, such as several wildfires and floods, meaning plaintiffs' comparison is less

apples-to-apples than it initially appears. And in the one instance where plaintiffs cite to an emergency involving water contamination, they identify an incident that occurred several years after the facts pertinent to this present case. Accordingly, it is hard to know whether the Governor's prompt response was a reaction to the criticism about his handling of Flint, rather than evidence of a desire to harm African Americans. Moreover, plaintiffs do not point to a clear pattern of discrimination where Governor Snyder consistently delayed declaring states of emergency in mostly African American areas. In fact, a close inspection of the analogous emergencies suggests the opposite was almost true. During a flood in Wayne County, which is 45.4% non-white, the Governor declared an emergency within two days. (Dkt. 620-3 at 152.)[13] The departure from practice is less salient.

Plaintiffs point to no other facts sufficient to support a finding of discriminatory purpose. During the crisis, a senior member of the Governor's administration dismissed complaints from Flint activists as the product of "old time negative racial experiences." (*Id.* at 161.) But even if the same thoughts are attributed to Governor Snyder, it only shows that he acted in spite of the fact that Flint was majority African American, not because of this fact. When the allegations are collectively considered, they do not warrant an inference of invidious intent. And as such, plaintiffs' second theory fails to state a claim.

[49] Finally, plaintiffs' third theory that the MDEQ defendants failed to enforce certain laws and policies also fails to allege sufficient facts to warrant an inference of discriminatory purpose. As discussed above, plaintiffs generally point to Flint's history of racial discrimination, and this alone is insufficient to show invidious intent. However, here, plaintiffs also note that the EPA had concluded earlier that the MDEQ had discriminated against Flint's African Americans when issuing an operating permit for a local power station. In particular, the EPA found that the MDEQ did not have a sufficient non-discrimination ***849** policy in place. And this lack of policy persisted during the Flint Water Crisis. As recently as 2017, the EPA was still raising concerns that the MDEQ did not take its non-discrimination obligations seriously.

However, the MDEQ's failure to develop a sufficient non-discrimination policy does not demonstrate discriminatory intent. Plaintiffs do not allege that Shekter-Smith, Prysby, and Busch were responsible for the MDEQ's internal policies. Nor is there any sign that they obstructed or otherwise hindered the development of other procedural safeguards. Defendant Wyant, as MDEQ director, was presumably ultimately responsible for the non-discrimination policy, but plaintiffs do not plead facts that suggest his failure to develop such a policy was motivated by a nefarious purpose.

Neither the specific sequence of events nor any departure from standard procedures suggest a race-based motive. Defendants Shekter-Smith and Busch were allegedly involved in helping Flint secure a fraudulent ACO. Yet there is no suggestion that a desire to harm African Americans motivated their conduct. The same is true of the decision to grant the FWTP an operating permit without sufficient public participation, and the MDEQ's failure to enforce lead and copper testing requirements. The allegations do not provide any way to link these decisions to a discriminatory intent. Plaintiffs allege that these types of nonconformities with law and policy never occurred in majority white communities, but these are conclusory accusations. These defendants also made no contemporary statements indicating that race motivated their actions. And there is nothing else to connect their conduct to a discriminatory purpose. As such, when the facts are considered together, plaintiffs' third theory fails to state a claim.

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Plaintiffs' equal protection allegations fail to state a claim upon which relief can be granted. The wealth-based claim fails on grounds that rational justifications conceivably exist that explain the challenged conduct. And the race-based claim fails because plaintiffs plead insufficient facts to infer that a discriminatory purpose motivated defendants' decisions. That is not to say that race and poverty did not play a role in the Flint Water Crisis. As plaintiffs explain, multiple sources indicate that historical patterns of discrimination created the conditions for what happened. But under current caselaw, the Equal Protection Clause does not provide redress for the harms as alleged. Granting plaintiffs' leave to amend the complaint to include them would be futile.

3. Elliott Larsen Civil Rights Act

Plaintiffs next seek to revise their claim under Article 3 of Michigan's Elliott Larsen Civil Rights Act (ELCRA), which addresses discrimination in public services and accommodations. Mich. Comp. Laws §§ 37.2301–37.2304 (2017). Plaintiffs' ELCRA allegations mirror their equal

protection claims. Only the African American plaintiffs bring the claim on behalf of an African American class. (Dkt. 620-3 at 190.) And plaintiffs advance similar theories of liability: that (1) defendants Snyder, Dillon, Wright, Ambrose, Kurtz, Earley, and the City of Flint provided Flint's predominantly African American residents with inferior water when compared to the mostly white residents of Genesee County (*id.* at 192–93); (2) Governor Snyder failed to promptly declare a state of emergency in Flint compared to other emergencies in predominantly white communities, (*id.* at 193–94); and (3) the MDEQ defendants Wyant, Shekter-Smith, Prysby, and Busch failed to enforce certain laws and regulations. (*Id.* at 194–95.) For the following ***850** reasons, plaintiffs' ELCRA claim could not withstand a motion to dismiss if leave to amend were granted, and so granting leave would be futile.

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[50] **[51]** The ELCRA "is aimed at 'the prejudices and biases' borne against persons because of their membership in a certain class, and seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases." *Radtke v. Everett*, 442 Mich. 368, 379, 501 N.W.2d 155 (1993) (quoting *Miller v. C.A. Muer Corp.*, 420 Mich. 355, 363, 362 N.W.2d 650 (1984)). To state a claim under Article 3, plaintiffs must allege: "(1) discrimination based on a protected characteristic (2) by a person, (3) resulting in denial of the full and equal enjoyment of [a public service]." *See Haynes v. Neshewat*, 477 Mich. 29, 35, 729 N.W.2d 488 (2007); *Clarke v. K Mart Corp.*, 197 Mich. App. 541, 545, 495 N.W.2d 820 (1992). The ELCRA defines public service as "a public facility ... owned, operated, or managed by or on behalf of ... a political subdivision ... established to provide service to the public." § 37.2301. For the purposes of this analysis, the Court assumes that Flint's municipal water supply is a public service under the ELCRA.

[52] **[53]** **[54]** **[55]** **[56]** The public service provision of the ELCRA uses the same framework to establish discrimination as that used generally under other provisions of the ELCRA. *See Schellenberg v. Rochester Mich. Lodge No. 2225 of the Benev. & Prot. Order of Elks*, 228 Mich. App. 20, 32, 577 N.W.2d 163 (1998); *Clarke*, 197 Mich. App. at 545, 495 N.W.2d 820. Plaintiffs must show either intentional discrimination directly or raise an inference of discrimination based on a disparate treatment theory. *Hazle v. Ford Motor Co.*, 464 Mich. 456, 462–63, 628 N.W.2d 515 (2001); *Clarke*, 197 Mich. App. at 545, 495 N.W.2d 820. In a case like this involving allegations of race-based discrimination, plaintiffs can plead intentional discrimination by pointing to direct evidence that defendants were pre-disposed to discriminate against African Americans, and that they acted on that pre-disposition. *See Reisman v. Regents of Wayne State Univ.*, 188 Mich. App. 526, 538, 470 N.W.2d 678 (1991). Direct evidence is "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in [defendants'] actions." *Hazle*, 464 Mich. at 462, 628 N.W.2d 515 (quoting *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999)). Alternatively, plaintiffs can raise an inference of discrimination by pleading that defendants treated them differently from non-protected individuals under the same or similar circumstances. *See Reisman*, 188 Mich. App. at 538, 470 N.W.2d 678 (citing *Singal v. Gen. Motors Corp.*, 179 Mich. App. 497, 502–03, 447 N.W.2d 152 (1989)); *Schellenberg*, 228 Mich. App. at 33, 577 N.W.2d 163. But here, they must also point to sufficient indirect evidence from which it can be inferred that race was a motivating factor, even if not "the sole factor." *See Reisman*, 188 Mich. App. at 539, 470 N.W.2d 678; *see also* Mich. M Civ. JI 108.04 (2018) (identifying intentional discrimination as an element in an Article 3 ECLRA claim).

It is unclear whether plaintiffs are relying on direct evidence or evidence of disparate treatment to prove this claim. Plaintiffs do not offer direct evidence to show defendants were predisposed to discriminate on the basis of race, nor that they acted on that predisposition. However, they have pleaded facts consistent with a disparate treatment theory and so the Court proceeds on this basis.

[57] Under a disparate treatment approach, plaintiffs fail to plead sufficient ***851** facts to raise an inference of racial discrimination. This is for the same reasons as set forth above with respect to plaintiffs' equal protection claims. *See supra* Section II.d.ii.2.b. Plaintiffs have not explained why their ELCRA claim should be evaluated under a different standard. Therefore, plaintiffs' ELCRA claim could not survive a motion to dismiss, and so granting leave to amend the complaint to include it would be futile.

4. Conspiracy

Plaintiffs next seek leave to amend their conspiracy claim under § 1985(3). (Dkt. 620-3 at 186–90.) This claim is also only brought by the African American plaintiffs on behalf

of an African American class. (*Id.* at 186.) Plaintiffs argue that defendants Snyder, Dillon, Wright, Ambrose, Kurtz, and Earley conspired to expose them to contaminated water from the Flint River (*id.* at 186–87),[14] and the means by which they did this is familiar: defendants developed an interim plan to provide safe water to the predominately white population of Genesee County while supplying unsafe water to Flint residents. (*Id.* at 187–88.) In plaintiffs' view, there was no rational reason to treat these two groups differently. (*Id.* at 188.) Defendants' conduct was based on invidious discrimination, akin to imposing a badge, vestige, or symbol of slavery, as prohibited by the Thirteenth Amendment. (*Id.* at 188–89.)[15]

[58] **[59]** **[60]** In the context of § 1985(3), plaintiffs shoulder a heavy pleading burden. "Conspiracy claims must be pled with some degree of specificity[.]" *Gutierrez v. Lynch*, 826 F.2d 1534, 1538–39 (6th Cir. 1987). "[V]ague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim[.]" *Id.* To state a claim under § 1985(3), plaintiffs must plead facts consistent with (1) a conspiracy between two or more persons, (2) conceived for the purpose of depriving a person or class of people of the equal protection of the laws, (3) an act committed in furtherance of the conspiracy, and (4) that a person was either injured in his or her person or property, or deprived of a right guaranteed by the Constitution. *Peters v. Fair*, 427 F.3d 1035, 1038 (6th Cir. 2005) (citing *Johnson v. Hills & Dales Gen. Hosp.*, 40 F.3d 837, 839 (6th Cir. 1994)).[16] In so doing, plaintiffs must demonstrate that the conspiracy was motivated by racial or other constitutionally suspect class-based animus. *Bartell v. Lohiser*, 215 F.3d 550, 559–60 (6th Cir. 2000) (citing *United Bhd. of Carpenters & Joiners of Am. v. Scott*, 463 U.S. 825, 829, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983)).

***852** **[61]** **[62]** Pleading invidious class-based animus is important. Section 1985(3) is not a "general federal tort law," providing a federal cause of action for every assault and battery. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 299, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) (citing *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971)). The intent requirement ensures that only those conspiracies that "aim at a deprivation of the equal enjoyment of rights secured by the law to all" are actionable under the statute. *Griffin*, 403 U.S. at 102, 91 S.Ct. 1790.

[63] Plaintiffs fail to plausibly allege that defendants were motivated by racial or any other invidious class-based animus. Plaintiffs possibly show that the impact of historical race discrimination played a role in the Flint Water Crisis, but not that it was a motivating factor. For example, plaintiffs repeatedly assert that the interim plan provided safe water to predominantly white Genesee County residents and unsafe water to the mostly African American Flint residents. But this only demonstrates a disparate impact resulting from defendants' decisions. It does not show that they were motivated by the kind of discriminatory animus necessary to state a § 1985(3) claim. Similarly, plaintiffs contend that early complaints from Flint residents would have been taken into account faster had they been affluent and predominantly white. This allegation suffers from the same flaw.

Many of the facts contained in the fourth amended complaint set forth the historic impact of racism in Flint, but not specific instances of racially motivated conduct by the defendants. This history is important to understanding patterns of segregation, poverty, and other conditions that may have left plaintiffs vulnerable to the Flint Water Crisis. Yet such theories do not show invidious class-based animus by the named defendants.

Plaintiffs raise many serious and challenging issues, but they fail to plausibly allege that race discrimination animated defendants' conduct. This is especially so considering the heightened pleading standard. Therefore, their revised § 1985(3) claim could not withstand a motion to dismiss. As such, granting leave to amend the complaint to include it would be futile.

5. Gross Negligence

Finally, plaintiffs seek leave to add a gross negligence claim against defendants Snyder, Dillon, Lyon, Shekter-Smith, Rosenthal, Busch, Cook, Prysby, Wurfel, Wright, Kurtz, Earley, Ambrose, Croft, Johnson, and Glasgow. (Dkt. 620-3 at 217.) Plaintiffs allege that these government defendants owed them a duty not to conduct their official responsibilities recklessly (*id.*), but that they did so by playing a role in Flint's transition to the Flint River and downplaying the resulting harm. (*Id.* at 217–18.) Plaintiffs argue that defendants' conduct was grossly negligent and caused their injuries, and that defendants are not entitled to immunity under Michigan's Government Tort Liability Act (GTLA), Mich. Comp. Laws. § 691.1401–1419 (2014). (Dkt. 620-3 at 218.) However, this claim also could not withstand a motion

to dismiss and amending the complaint to include it would be futile.

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Defendants are immune from tort liability. The GTLA premises immunity on various theories. Pertinently, "the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her ... executive authority." § 691.1407(5). Under this theory, defendants Snyder, Dillon, and Lyon are absolutely immune. *See* ***853** *Guertin*, 2017 WL 2418007, at *25, 2017 U.S. Dist. LEXIS 85544, at *77–78. The same is true of defendants Kurtz, Earley, Ambrose, and Croft, and defendants Shekter-Smith and Wurfel. *See id.*

[64] This leaves the remaining defendants, lower-level government employees. Lower-level employees are "immune from tort liability for an injury to a person or damage to property caused by the ... employee ... while in the course of employment" if the employee is "acting or reasonably believes he or she is acting within the scope of his or her authority," unless the employees' conduct amounts to "gross negligence that is the proximate cause of the injury or damage." § 691.1407(2)(a)–(c). To identify whether a lower-level employee was the proximate cause of an injury, courts must first evaluate "the conduct and any legal responsibility" of the various parties to an accident, *Ray v. Swager*, 501 Mich. 52, 74, 903 N.W.2d 366 (2017), where legal responsibility is assessed by determining whether the accident was a foreseeable consequence of an individual's actions, *see id.* at 69, 903 N.W.2d 366. And second, courts must jointly consider the actions of those legally responsible to determine whose conduct was the "one most immediate, efficient, and direct cause" of any injury. *Id.* at 83, 903 N.W.2d 366 (quoting *Robinson v. City of Detroit*, 462 Mich. 439, 462, 613 N.W.2d 307 (2000)). If the answer is anyone but the employee, the employee can claim immunity.

[65] Plaintiffs do not address *Ray*'s causation requirement. The fourth amended complaint states that defendants' conduct was a direct and proximate cause of plaintiffs' injuries, but fails to explain, first, why they were legally responsible for this harm in anything but conclusory terms, and second, why such conduct was the "one most immediate, efficient, and direct cause" preceding plaintiffs' injuries. Instead, plaintiffs argue that they need only demonstrate that "it was foreseeable that the defendant's conduct could result in harm to the victim." (Dkt. 620-1 at 22 (quoting *Ray*, 501 Mich. at 65, 903 N.W.2d 366).) But this is a misinterpretation of *Ray*, a case this Court is bound to follow. And because plaintiffs ask the Court to do something it cannot, amending the fourth amended complaint to include this claim would be futile.

Plaintiffs raise several counter arguments, but none are persuasive. First, plaintiffs argue that defendants were not acting within the scope of their authority, and, as such, they cannot claim immunity. (Dkt. 663 at 50–52.) For instance, plaintiffs contend that Governor Snyder did not have the power to discriminate against African American communities in his handling of emergencies. (*Id.* at 51.) Similarly, plaintiffs argue that Lyon and Wurfel did not have the authority to downplay the risks of harm posed by the contaminated water. (*Id.* at 52.) But these arguments are circular. Under plaintiffs' view, tortious conduct is sufficient to deprive a government defendant of immunity because tortious conduct is not within the defendant's scope of authority. This is not how the GTLA functions.

Second, plaintiffs claim that even if their interpretation of caselaw is wrong, they have adequately pleaded that defendants were the "most immediate, efficient, and direct cause" of plaintiffs' injuries, because each defendants' conduct served as "the proximate cause" for some discrete harm that, taken in the aggregate, forms a piece of the Flint Water Crisis. (*Id.* at 54–55.) For example, defendant Busch falsely informed an EPA official that Flint was using corrosion control, which proximately caused the State to slowly address the dangers of lead in the water. (*Id.* at 55.) ***854** However, the focus is on the injury claimed. *See Robinson*, 462 Mich. at 462, 613 N.W.2d 307. In other words, it is not enough that plaintiffs are able to point to some cause and effect relationship within the Flint Water Crisis. They must demonstrate how a defendant's action was the "one most immediate, efficient, and direct cause" of their injuries. For this reason, this argument also fails.

[66] The sheer size and scale of the Flint Water Crisis makes it difficult for plaintiffs—or anyone—to identify any defendant most legally responsible for the resulting injuries. As such, "the more governmental actors that are involved in causing a massive tort in Michigan, the less likely it is that state tort claims can proceed against the individual government actors[.]" *Guertin*, 2017 WL 2418007, at *27, 2017 U.S. Dist. LEXIS 85544, at *81. Ultimately, the Court is required to apply the GTLA as interpreted by the Michigan

Supreme Court. It would therefore be futile to amend the complaint to include plaintiffs' gross negligence claim.

6. Res Judicata and Statute of Limitations

Defendants Wyant and Wurfel argue that the doctrine of res judicata or, alternatively, the relevant statutes of limitations prohibit plaintiffs from amending the complaint. (Dkt. 653 at 29–34; Dkt. 657 at 26–28.) Because the Court found plaintiffs' amended claims with respect to defendants Wyant and Wurfel futile, these issues need not be addressed.

e. Conclusion

Plaintiffs' motion for leave to amend the complaint regarding the bodily integrity claim against Governor Snyder is granted, and plaintiffs' motion regarding the remaining claims is denied. Furthermore, the Court finds no reason to deny leave to amend to include the fourth amended complaint's new factual allegations, including the proposed class definitions, the certification of which will be addressed at a later date. Plaintiffs' motion as it relates to these facts is therefore also granted. These conclusions will again be summarized at the end of Part III, *infra*.

III. Motions to Dismiss

As previously stated in Part I, *supra*, the Court adopts the fourth amended complaint as the operative complaint for the purpose of adjudicating defendants' motions to dismiss. If the Court denied leave to amend the complaint to include a particular claim in Part II, that claim will be dismissed with no further discussion.

a. Background

The facts, parties, and proposed classes remain unchanged from those set forth above in Part II. The fourth amended complaint contains the following counts:

Count	Claim	Defendants
I	§ 1983 Bodily Integrity	All government defendants
II-III	§ 1983 - Equal Protection	Snyder, Dillon, Wright, Ambrose, Kurtz, Earley, Wyant, Shekter-Smith, Prysby, and Busch
IV	§ 1985(3) - Conspiracy	Snyder, Dillon, Wright, Ambrose, Kurtz, and Earley
V	ELCRA	Snyder, Dillon, Wright, Ambrose, Kurtz, Earley, The City of Flint, Wyant, Shekter-Smith, Prysby, and Busch
VI	*Monell* Liability	The City of Flint
VII-VIII	Professional Negligence	LAN and Veolia
IX	§ 1983 – State-Created Danger	All government defendants
X	Fraud	Veolia
XI	Negligent Infliction of Emotional Distress	LAN and Veolia
XII	Negligence	LAN and Veolia
XIII-XIV	Gross Negligence	LAN, Veolia, Snyder, Dillon, Lyon, Shekter-Smith, Rosenthal, Busch, Cook, Prysby, Wurfel, Wright, Kurtz, Earley, Ambrose, Croft, Johnson, and Glasgow.

b. Standard of Review

[67] **[68]** A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) challenges the Court's subject matter jurisdiction. When ruling on a Rule 12(b)(1) motion "the court must take the material allegations of the [complaint] as true and construed in the light most favorable to the nonmoving party." *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). Plaintiffs need only show "that the complaint alleges a claim under federal law, and that the claim is substantial." *Musson Theatrical, Inc. v. Fed. Express Corp.*, 89 F.3d 1244, 1248 (6th Cir. 1996) (citing *Transcon. Leasing, Inc. v. Mich. Nat'l Bank*, 738 F.2d 163, 166 (6th Cir. 1984)). This is a relatively light burden. *Id.* "Dismissal for lack of subject-matter jurisdiction ... is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of [the Supreme Court], or otherwise completely devoid of merit as not to involve a federal controversy.' " *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (quoting *Oneida Indian Nation of N.Y. v. Cty. of Oneida*, 414 U.S. 661, 666, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974)).

A motion that challenges the legal sufficiency of a complaint is instead properly brought under Federal Rule of Civil Procedure 12(b)(6). *See supra* Section II.b (setting forth the motion to dismiss standard).

c. Threshold Issues

***855**

i. Sovereign Immunity

The state and city defendants argue that sovereign immunity deprives the Court of subject matter jurisdiction to adjudicate certain claims. They therefore move to dismiss under Rule 12(b)(1). The Court ***856** grants the state defendants' motion in part as it relates to the State of Michigan, but denies the motions in all other respects.

First, the state defendants argue that sovereign immunity bars plaintiffs' claims against the State of Michigan and their claim for injunctive relief against the Governor in his official capacity. (Dkt. 279 at 29–32; Dkt. 739 at 16–18.) The state defendants are correct that sovereign immunity bars claims against the State of Michigan. *Boler v. Earley*, 865 F.3d 391, 413 (6th Cir. 2017). But for the following reasons, the Court has subject matter jurisdiction over claims against Governor Snyder in his official capacity.

[69] **[70]** In *Boler*, the Sixth Circuit explained that there are three exceptions to sovereign immunity, the relevant one here being "when the doctrine set forth in *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) applies."[17] 865 F.3d at 410 (citations omitted). "*Ex Parte Young* allows plaintiffs to bring claims for prospective [injunctive] relief against state officials sued in their official capacity to prevent future federal constitutional or statutory violations." *Id.* at 412. In this case, plaintiffs only seek injunctive relief against Governor Snyder in his official capacity.

[71] *Boler* is a Sixth Circuit decision that forms part of the Flint Water Cases litigation. It held that the *Ex Parte Young* exception applied to the injunctive relief sought by the plaintiffs against Governor Snyder in his official capacity. There, the plaintiffs sought an "injunctive order to remediate the harm caused by Defendants' unconstitutional conduct including, but not limited to: repairs of private property and establishment of medical monitoring to provide healthcare and other appropriate services to Class members for a period of time deemed appropriate by the Court." *Id.* at 413. (quotations omitted). They also requested a "monitor who will assist in the development of remedial plans including, but not limited to: early education, education intervention programs, [and] criminal and juvenile justice evaluations." *Id.* (quotations omitted).

Here, plaintiffs similarly seek an order "to remediate the harm caused by the Government Defendants' unconstitutional conduct." (Dkt. 620-3 at 219.) And this includes the exact same relief as that set forth in *Boler*. *Boler* therefore controls and requires the same outcome. The claim for injunctive relief against Governor Snyder in his official capacity may go forward.

Second, the city defendants argue that sovereign immunity deprives the Court of jurisdiction to adjudicate plaintiffs' claims against the City of Flint because it was an arm of the State in the period leading up to and including the Flint Water Crisis. (Dkt. 276 at 43–55.) According to the city defendants, Flint is therefore entitled to the same cloak of sovereign immunity as that afforded the State. (*Id.*) However, the Sixth Circuit recently rejected this argument in *Guertin v. Michigan*, 912 F.3d 907, 941 (6th Cir. 2019). This argument is therefore denied.

In sum, although immunity with regards to the State of Michigan is granted, it is denied as to Governor Snyder in his official capacity and the City of Flint. The Court has subject matter jurisdiction to adjudicate claims against these latter defendants.

***857 ii. Absolute Immunity**

[72] Defendants Wyant and Wurfel claim absolute immunity from plaintiffs' lawsuit. They rely on the immunity awarded to federal officials carrying out discretionary prosecutorial actions, arguing that they were functionally acting as federal officials despite working for a state agency. (Dkt. 281 at 38–40; Dkt. 282 at 33–34.) However, the Sixth Circuit rejected this argument in *Mays v. City of Flint*, 871 F.3d 437, 444–47 (6th Cir. 2017), *cert. denied*, —— U.S. ——, 138 S.Ct. 1557, 200 L.Ed.2d 743 (2018). Moreover, defendants do not explain how their claim of immunity interacts with plaintiffs' allegations against them, instead speculating that absolute immunity would apply if "[p]laintiffs' claims ... ultimately prove to be an alleged failure ... to sufficiently enforce the [Safe Drinking Water Act] and/or initiate enforcement proceedings against Flint." (Dkt. 281 at 39; Dkt. 282 at 34.) For both reasons, defendants' claims are denied.

iii. Preemption

Several defendants argue that plaintiffs' § 1983 claims are preempted by the Safe Drinking Water Act, 42 U.S.C. §

300f–300j (2016). But this Court and the Sixth Circuit has rejected this argument. *Boler*, 865 F.3d at 409.

d. Main Analysis

i. Federal Claims

1. Bodily Integrity

In Count I, plaintiffs allege that the government defendants violated their substantive due process right to bodily integrity under the Fourteenth Amendment. (Dkt. 620-3 at 172.) According to plaintiffs, they did this by acting with deliberate indifference to the risk of harm plaintiffs faced, creating and perpetuating their exposure to contaminated water. (*Id.* at 172–73.) Defendants move to dismiss. (Dkt. 294 at 3–10; Dkt. 282 at 17–23; Dkt. 281 at 17–28; Dkt. 279 at 37–43; Dkt. 277 at 18–22; Dkt. 276 at 20–23; Dkt. 273 at 32–42.)

As set forth earlier in this opinion, plaintiffs unknowingly drank and bathed in contaminated water, encroaching upon their right to bodily integrity. *See supra* Section II.d.ii.1. Therefore, to state a bodily integrity claim, plaintiffs must demonstrate that (1) the government defendants knew of facts from which they could infer a substantial risk of serious harm, (2) they did infer it, and (3) they nonetheless acted with indifference, demonstrating a callous disregard towards the rights of those affected. *See supra* Section II.d.ii.1.a.

The Court will address the allegations against each group of government defendants in turn. Because the right to bodily integrity is clearly established, defendants cannot rely on qualified immunity if plaintiffs state a valid claim against them. *See supra* Section II.d.ii.1.b.

a. Property Owners

[73] In its August 1, 2018 opinion and order, the Court stated that:

> Numerous plaintiffs in this matter are not individuals, but instead businesses. Bodily integrity claims are premised on "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." The Court can find no case that extends the fundamental right of bodily integrity to a business or business relationship, or to the property owned or used in a business's operations.

329 F.Supp.3d at 395 (citations omitted). For the same reason, plaintiffs Frances Gilcreast, Epco Sales, LLC, and Angelo's Coney Island Palace, Inc. fail to state a bodily integrity claim.

***858 b. State Defendants**

The remaining plaintiffs allege that defendants Governor Snyder, Andrew Dillon, Nick Lyon, and Nancy Peeler violated their right to bodily integrity. For the following reasons, plaintiffs state a claim against defendants Governor Snyder and Dillon, but not against Lyon or Peeler.

*

[74] Plaintiffs state a bodily integrity claim against Dillon. He allegedly knew that the Flint River had been rejected as a water source as recently as 2011, and that the FWTP would require substantial improvements to safely process the river's water. From this, it is reasonable to believe that Dillon was aware of the risks associated with using the Flint River as a water source. Yet despite this knowledge, Dillon helped to develop an interim plan that saw Flint transition to the Flint River. And importantly, he rejected a final bid from DWSD that could have obviated the need to use water from the Flint River until the FWTP had the capacity to treat it safely. This demonstrated an indifference to the risk of serious harm plaintiffs faced, made all the more inexplicable given that he knew DWSD presented the most cost effective mid-term option.[18]

[75] Conversely, plaintiffs do not state a bodily integrity claim against Lyon. It is reasonable to conclude that Lyon was aware of the risk of harm plaintiffs faced. As the crisis unfolded, he received materials showing an outbreak of Legionnaires' disease in Flint. He also received emails from senior government officials raising concerns about possible lead contamination in Flint's water. Moreover, he was surely aware that these incidents coincided with the transition to the Flint River. However, plaintiffs fail to show how Lyon was deliberately indifferent. It is true that he did not make the information he received public, nor did he alert other government departments. But he directed his team to investigate the reports and emails, which shows his concern. And plaintiffs do not plead that Lyon attempted to cover up what was happening. Therefore, without more, the

claim against Lyon does not rise to the level of deliberate indifference.[19]

Finally, plaintiffs' claim against Governor Snyder is successful for the reasons set forth in Section II.d.ii.1. On the other hand, plaintiffs' claim against Peeler fails because the complaint contains no factual allegations against her.

c. MDEQ Defendants

Plaintiffs next allege that defendants Bradley Wurfel, Daniel Wyant, Liane Shekter-Smith, Adam Rosenthal, Stephen Busch, Patrick Cook, and Michael Prysby violated their right to bodily integrity. For ***859** the following reasons, plaintiffs state a bodily integrity claim against Wurfel, Shekter-Smith, Rosenthal, Busch, Cook, and Prysby. They do not state a claim against Wyant.

*

[76] Plaintiffs state a bodily integrity claim against Wurfel. He knew of ample facts from which to infer that plaintiffs were facing a substantial risk of harm, and it is reasonable to conclude that he did infer it. For example, Wurfel knew about the outbreak of Legionnaires' disease. And he was also well aware that something was wrong with Flint's water. Moreover, plaintiffs demonstrate that Wurfel acted with deliberate indifference. On several occasions as the crisis unfolded, he publicly denied that there was a problem with Flint's water. He appeared on radio and television to advise listeners that the water was safe to consume and bathe in, and he discredited others who suggested that lead was leaching into Flint's water. Such indifference showed a callous disregard for plaintiffs' right to bodily integrity.

[77] Plaintiffs also state a claim against Shekter-Smith, Rosenthal, Busch, Cook, and Prysby. It is reasonable to assume that they were aware of the substantial risk of harm plaintiffs faced. Before Flint's transition to the Flint River, Shekter-Smith and Busch knew of the risks associated with the Flint River. In addition, Busch, Rosenthal, and Prysby recognized that the FWTP was not ready to begin operations. After the transition, Rosenthal learned that the FWTP was not practicing corrosion control, and he and Shekter-Smith both knew that no legitimate lead and copper testing was occurring. Moreover, Busch, Shekter-Smith, and Prysby also knew that the transition had created the conditions for legionella bacteria to flourish. Not to mention the fact that the EPA and civic leaders were raising concerns about the quality of Flint's water.

Yet despite knowing of these serious risks, these defendants were indifferent to them. Shekter-Smith ensured that Flint received the ACO that allowed it to transition to the Flint River; Cook signed the final permit necessary for the FWTP to begin operations; and Busch resolved the regulatory hurdles associated with Flint's use of the Flint River. Furthermore, these defendants took steps to deceive Flint's residents into continuing to drink and bathe in the contaminated water. Busch and Cook misled the EPA by falsely suggesting that the proper corrosion control was in use at the FWTP;[20] and Busch, Rosenthal, and Prysby directly or indirectly altered reports to remove results showing high lead concentrations in Flint's water. These actions exhibited a callous disregard for plaintiffs' right to bodily integrity.

[78] In contrast, plaintiffs do not state a claim against Wyant because the allegations do not demonstrate deliberate indifference. Wyant was likely aware of the health risks posed by using the Flint River as a water source. There is also some indication that he knew the FWTP was not utilizing the proper corrosion control techniques and that Flint's water was contaminated. However, the fourth amended complaint contains nothing to suggest that Wyant either publicly denied there was a problem with Flint's water, or that he otherwise encouraged Flint residents to use the contaminated water. Plaintiffs ***860** therefore do not plead that Wyant was deliberately indifferent.

d. City Defendants and Defendant Wright

Finally, plaintiffs allege that defendants Darnell Earley, Gerald Ambrose, Howard Croft, Daugherty Johnson, Michael Glasgow, Jeffrey Wright, Edward Kurtz, and Dayne Walling violated their right to bodily integrity.[21] For the following reasons, plaintiffs state a claim against Earley, Ambrose, Croft, Johnson, and Glasgow. They fail to state a claim against Wright, Kurtz, and Walling.

*

[79] Plaintiffs state a bodily integrity claim against Earley and Ambrose. It is reasonable to infer that Earley and Ambrose were aware of the substantial risk of harm plaintiffs faced. After Flint transitioned to the Flint River, they knew about the outbreak of Legionnaires' disease; General Motors

stopped using Flint water at its Flint factory because of its corrosive nature; and test results revealed high lead levels in two locations on the University of Michigan-Flint's campus. There were even growing calls from senior government officials that Flint "should try to get back on the Detroit system as a stopgap ASAP before this thing gets too far out of control." (Dkt. 630-3 at 66.) Additionally, plaintiffs plead that Earley and Ambrose were indifferent to this risk. Earley publicly denied any connection between the Legionnaires' disease outbreak and Flint's water, despite knowing that other branches of government concluded that there was a link. And he repeatedly refused to consider returning to DWSD water. Having replaced Earley as the Emergency Manager, Ambrose also refused to return to DWSD. He even went so far as rejecting a Flint City Council vote to reconnect to DWSD. In both cases, Earley and Ambrose's conduct thus showed a callous disregard for plaintiffs' right to bodily integrity.

[80] Similarly, plaintiffs state a claim against Croft, Glasgow, and Johnson. As with Early and Ambrose, it is reasonable to conclude that these defendants were aware of the substantial risk of harm facing plaintiffs. As the transition to the Flint River loomed, all three knew that the FWTP was not ready to process the raw water. And Croft, in particular, was aware of the lead and Legionnaires' disease issues that followed the transition. Glasgow tested for and found high concentrations of lead in the water. He also recognized that Flint was not using corrosion control treatment and had no legitimate lead and copper testing in place. Moreover, these defendants acted with a callous disregard for plaintiffs' right to bodily integrity. Despite knowing that the FWTP was not ready to process the Flint River water, Croft and Johnson pressured Glasgow to give the green light to the transition. Johnson later blocked the Genesee County Health Department from scrutinizing Flint's water testing process. And Glasgow altered reports to hide high lead concentrations in Flint's water. Croft, Glasgow, and Johnson were thus deliberately indifferent by deceiving plaintiffs into thinking that there was no problem with Flint's water.

***861** **[81]** In contrast, plaintiffs fail to state a claim against Wright because they do not show how he either caused or prolonged their exposure to the contaminated water. First, plaintiffs do not plausibly allege that Wright caused their exposure because he had no oversight over Flint's transition to the Flint River. Plaintiffs argue that Flint and Genesee County's water systems were unified, suggesting that Wright's position as Genesee County's Drain Commissioner gave him the means to affect the choice of Flint's water. (*Id.* at 53–54 ("[B]ecause of the joint operation of the combined water systems, each of [the defendants] played a role in the decision to provide ... Flint ... with the high risk water[.]").) But the fourth amended complaint reveals that the arrangement between Flint and Genesee County was a standard contractual relationship. Those in charge of Flint's system purchased water and then sold it to Genesee County. And although Genesee County was required to buy it, the County had no say in where it came from. (*Id.* at 39–40 ("[GCDC] agreed to 'accept water as delivered from the water system of the City [of Flint.]' ").) In other words, Wright was in charge of Genesee County's water system, but not Flint's. (*Id.* at 53 ("Wright was in control of the County side of the jointly operated water systems[.]").)

Second, Wright did not prolong plaintiffs' exposure to the contaminated water. Plaintiffs do not plead that Wright took steps to deceive Flint residents about the safety of Flint's water following the transition, or that he otherwise played a role in any coverup. Although Wright may have been aware of the risk of harm plaintiffs faced, he did not cause their injuries.[22]

[82] The same goes for Kurtz and Walling. Here too, plaintiffs fail to state a claim against these defendants because they do not show how they caused or prolonged plaintiffs' exposure to the contaminated water. Although Kurtz may have set in motion the chain of events that led to the transition to the Flint River, he resigned as Flint's Emergency Manager before the transition and therefore lacked control over the final decision. Additionally, Walling was involved in the decision to use the Flint River as an interim source of water but he was stripped of virtually all authority over Flint's operations during emergency management. Plaintiffs also do not allege that either of these defendants deceived plaintiffs about the safety of Flint's water or that defendants helped coverup the crisis. Thus, plaintiffs have failed to state a claim against these defendants.[23]

In summary, plaintiffs state a claim against Earley, Ambrose, Croft, Glasgow, and Johnson. Plaintiffs do not state a claim against Wright, Kurtz, and Walling.

2. Equal Protection

In Counts II and III, the African American plaintiffs allege that defendants Snyder, Dillon, Wright, Ambrose, Kurtz, Earley, Wyant, Shekter-Smith, Prysby, and Busch violated their right to equal protection under the Fourteenth

Amendment. For the reasons set forth above, plaintiffs fail to state a claim. *See supra* Section II.d.ii.2.

***862 3. Conspiracy**

In Count IV, plaintiffs bring suit under § 1985(3) alleging that defendants Snyder, Dillon, Wright, Ambrose, Kurtz, and Earley conspired to violate their rights. For the reasons set forth above, plaintiffs fail to state a claim. *See supra* Section II.d.ii.4.

4. State-Created Danger

In Count IX, plaintiffs allege that the government defendants violated their right to be free from a state-created danger. (Dkt. 620-3 at 208.) Plaintiffs plead that the government defendants created the conditions that led to the Flint Water Crisis and then attempted to cover up the resulting risk of harm. (*Id.*) In their view, because the government defendants knew or should have known of the danger they created, they violated the Due Process Clause of the Fourteenth Amendment. (*Id.* at 208–09.) Defendants move to dismiss. (Dkt. 294 at 13–16; Dkt. 282 at 23–25; Dkt. 281 at 28–30; Dkt. 279 at 35–37; Dkt. 277 at 18–22; Dkt. 276 at 19–20; Dkt. 273 at 24–32.)

[83] **[84]** In its vacated August 1, 2018 opinion and order, the Court granted defendants' motions to dismiss an identical count. Nothing in the fourth amended complaint affects the Court's earlier analysis. Moreover, plaintiffs have not subsequently challenged this part of the August 1 ruling.[24] There, the Court stated that:

> To bring a state[-]created danger claim, the individual must show: (1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the plaintiff.

329 F.Supp.3d at 392 (quoting *Jones v. Reynolds*, 438 F.3d 685, 690 (6th Cir. 2006)). With respect to (1), the Court explained that:

> Plaintiffs do not allege that any defendant created or increased the risk that they would be exposed to an act of violence by a third party. They argue, however, that they do not need to, based on *Schneider v. Franklin Cty.*, 288 F. App'x. 247 (6th Cir. 2008). In that case, the Sixth Circuit analyzed a state-created danger claim without referencing the third-party requirement of the test. *Id.* at 252.

However, it is clear that *Schneider* applied an incomplete version of this circuit's test for a state-created danger claim. The *Schneider* court cited *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998) in setting forth the state-created danger standard. In doing so, however, the *Schneider* court omitted *Kallstrom*'s reference to the threat of violence by a private third party, and then proceeded to analyze the claim without that requirement.

In support of the argument that the *Schneider* standard is good law in the Sixth Circuit, plaintiffs cite *Stiles ex rel. D.S. v. Grainger Cty.*, 819 F.3d 834 (6th Cir. 2016) and *McQueen v. Beecher Cmty. Sch.*, 433 F.3d 460 (6th Cir. 2006), two cases that also analyzed state-created danger claims.

Stiles involved a state-created danger claim arising from the brutal emotional, psychological, and physical bullying of a ***863** junior high school student by other students. *Id.* at 840–46. The *Stiles* court stated:

> As a general rule, the State has no obligation to protect the life, liberty, of property of its citizens against invasion by private actors. Two exceptions to this rule exist: 1) where the State enters into a "special relationship" with an individual by taking that person into its custody, and 2) where the State creates or increases the risk of harm to an individual. Because DS was harmed by students rather than school or government officials, there is no constitutional violation unless one of these two exceptions applies.

Id. at 853 (citing *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989)) (internal citations omitted) (emphasis added). The court then cited *McQueen*, *supra*, for the legal standard for a state-created danger claim. *Id.* at 854. The standard set forth was: "(1) an affirmative act that creates or increases the risk to the plaintiff, (2) a special danger to the plaintiff as distinguished from the public at large, and (3) the requisite degree of state culpability." *Id.* at 854 (citing *McQueen*, 433 F.3d at 464).

In *McQueen*, the Sixth Circuit considered whether a grant of summary judgment on a state-created danger claim was

proper where a first-grader shot and killed his classmate, and the deceased child's parent sued the teacher, principal, and school district. *McQueen*, 433 F.3d at 462–63. The plaintiff brought a variety of claims, among them a state-created danger claim for failing to protect her daughter from her classmate. *Id.* at 463.

Quoting *Kallstrom*, the *McQueen* court stated that "[l]iability under the state-created danger theory is predicated upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence." *Id.* at 464 (quoting *Kallstrom*, 136 F.3d at 1066). The court also noted that a state-created danger claim is traditionally rejected where the act "did not create or increase the risk of private violence to the plaintiff." *Id.* at 465 (collecting cases).

In most other circuits, the third-party requirement is also consistently applied. *See Rivera v. Rhode Island*, 402 F.3d 27, 34–35 (1st Cir. 2005); *Lombardi v. Whitman*, 485 F.3d 73, 80 (2d Cir. 2007); *Pinder v. Johnson*, 54 F.3d 1169, 1175 (4th Cir. 1995); *Doe ex rel. Magee v. Covington Cty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 857 (5th Cir. 2012); *Fields v. Abbott*, 652 F.3d 886, 889 (8th Cir. 2011); *Gray v. Univ. of Colo. Hosp. Auth.*, 672 F.3d 909, 917 (10th Cir. 2012); *Perez-Guerrero v. U.S. Atty. Gen.*, 717 F.3d 1224, 1233–34 (11th Cir. 2013); *Butera v. Dist. Of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001); *but see Doe v. Village of Arlington Heights*, 782 F.3d 911, 916–17 (7th Cir. 2015) (omitting third-party requirement).

In *Kneipp v. Tedder*, 95 F.3d 1199, 1204–11 (3d Cir. 1996) the Third Circuit analyzed the third-party requirement for a state-created danger claim and declined to apply it to the claim in front of it, instead opting to apply a standard requiring only that an individual be placed in danger. However, the Third Circuit has inconsistently applied the third-party requirement to state-created danger claims since *Kneipp*. *See, e.g.*, *LaGuardia v. Ross Twp.*, 705 F. App'x. 130, 133 (3d Cir. 2017) (applying the requirement); *but see Henry v. City of Erie* 728 F.3d 275 (3d Cir. 2013) (omitting the requirement).

***864** Because all events related to plaintiffs' claims occurred in Michigan, the Court must apply the clearly established state-created danger test set forth in *Kallstrom*, *McQueen*, *Stiles*, and *Jones*. The complaint does not plead that any act taken by any state actor created or increased the risk of private violence to the plaintiffs.

At oral argument, plaintiffs' counsel argued that the third-party requirement could be satisfied by, for instance, a situation where a mother fed her child formula mixed with tainted Flint water. The mother would be the private actor, and the child would be the individual harmed under the state-created danger theory. (Dkt. 532 at 212.)

The Court rejects this theory in its entirety. The residents of Flint were all made to use contaminated water that leached lead and bacteria from old lines. Parents, many of them struggling to even pay for the water the city provided, whether from the DWSD or the Flint River, used what resources they had available to them. For much of the time the Flint River was used as Flint's primary water source, residents did not and could not have known the danger the water posed to them or their families. To entertain plaintiffs' counsel's theory of harm, the Court would have to find that a loving parent, seeking only to provide their child with food or water, committed an intentional or at least negligent act of violence against his or her own child. According to counsel, every person who showered or washed their hands or made coffee or boiled pasta with bacteria-infected, lead-tainted water provided to them by their government committed repeated acts of violence against themselves, their families, their friends, and their guests. This is not what the state-created danger theory was developed to address.

Plaintiffs have failed to plead that the actions of the governmental actors named in this claim created or increased the risk of harm from a third party, and for this reason, this particular claim must be dismissed.

Id. at 392–94. And with respect to (2), the Court stated that:

Even if the Court could determine that the third-party harm requirement of plaintiffs' state-created danger claim had been met, such a claim will stand only where "the government could have specified whom it was putting at risk, nearly to the point of naming the possible victim or victims." *Reynolds*, 438 F.3d at 696. The state-created danger must be a "special danger" to a "discrete class of individuals." *Schroder v. City of Fort Thomas*, 412 F.3d 724, 729 (6th Cir. 2005). It is not sufficient for the purposes of this claim if the specific danger is "no more a danger to [the plaintiff] than to any other citizen on the City streets." *Jones v. City of Carlisle*, 3 F.3d 945, 949–50 (6th Cir. 1993). The danger may not be one that "affects the public at large." *Kallstrom*, 136 F.3d at 1066.

> Plaintiffs argue that the entire population of Flint constitutes a discrete class of individuals. (Dkt. 379 at 82–84.) They argue that the "government could have specified whom it was putting at risk, nearly to the point of naming the possible victim or victims," *Reynolds*, 438 F.3d at 696, because "identifying those at risk would have been as simple as looking up the names and addresses of residents and businesses serviced by Flint's water." (Dkt. 379 at 83.)
>
> The Sixth Circuit has routinely held that threats to any person on the street or to the public at large do not constitute risks that are specific enough for the purposes of a state-created danger ***865** claim. *See, e.g.*, *City of Carlisle*, 3 F.3d at 950 (the city permitting an epileptic individual to maintain a driver's license posed a danger to any citizen on the streets); *Janan v. Trammell*, 785 F.2d 557, 560 (6th Cir. 1986) (a parolee's release endangered plaintiff as a member of the public at large); *Schroder*, 412 F.3d at 729 (government's creation of a street, and management of traffic conditions, posed a general risk to the public).
>
> The largest groups the Sixth Circuit has determined were able to pursue a state-created danger claim were in *Kallstrom*, where a city's release of private information from the personnel files of three undercover officers "placed the personal safety of the officers and their family members, as distinguished from the public at large, in serious jeopardy," *id.*; 136 F.3d at 1067, and in *McQueen*, where the risk of a shooter in a school posed a risk to the five students in the room with him and even those in the school building, but all those outside the school building constituted "the general public." *Id.*; 433 F.3d at 468.
>
> An entire city, plus all those who visit, work, or pass through that city is, by definition, "the general public." Plaintiffs set the bar for the general public at "the general public of Michigan residents." (Dkt. 379 at 84.) However, there is no case that supports this definition.
>
> This claim must also be dismissed for failure to satisfy this element of the state-created danger test.

Id. at 394–95. The Court adopts this reasoning in full. Defendants motions to dismiss the state-created danger Count are therefore granted.

5. *Monell* Liability

In Count VI, plaintiffs plead a standalone claim against the City of Flint under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Plaintiffs allege that Flint is responsible for the unconstitutional conduct of its employees because they committed unlawful acts pursuant to Flint's custom or policy. As set forth above, plaintiffs state a claim that the city defendants Earley, Ambrose, Croft, Glasgow, and Johnson violated their right to bodily integrity. *See supra* Section III.d.i.1.d. And their *Monell* claim can rely on these underlying constitutional violations. *See Robertson v. Lucas*, 753 F.3d 606, 622 (6th Cir. 2014). Flint moves to dismiss. (Dkt. 276 at 34–35.)

[85] Under *Monell*, a plaintiff can bring a § 1983 claim against a city for the unconstitutional conduct of its employees if the employees' conduct implemented an unofficial custom, or "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U.S. at 690, 98 S.Ct. 2018. In its vacated August 1, 2018 opinion and order, this Court held that the state-appointed emergency managers were final decisionmakers for Flint with respect to the decision to provide residents with contaminated water. 329 F.Supp.3d at 421–22. As such, their actions represented official policy and Flint could be held liable for their conduct insofar as it violated plaintiffs' rights. (*Id.* at 422.)

[86] Following the Court's August 1 ruling, Flint challenged the decision and requested that the Court certify the issue for interlocutory appeal. (Dkt. 565.) The Court denied that request, explaining that "well-established precedent" controlled its decision. (Dkt. 659). And the Court now adopts the reasoning from its August 1, 2018 opinion and order and its subsequent order denying Flint's request to certify the question of *Monell* liability for interlocutory appeal. Because the emergency managers were state officials whose edicts or ***866** acts may fairly be said to represent official city policy, plaintiffs have stated a *Monell* claim with respect to the alleged bodily integrity violations. But plaintiffs fail to state a *Monell* claim for any other type of constitutional violation.

ii. State Claims

1. ELCRA

In Count V, plaintiffs allege that defendants Snyder, Dillon, Wright, Ambrose, Kurtz, Earley, the City of Flint,

Wyant, Shekter-Smith, Prysby, and Busch violated the rights guaranteed them under Michigan's ELCRA. For the reasons set forth above, plaintiffs fail to state an ELCRA claim. *See supra* Section II.d.ii.3.

2. Professional Negligence

In Counts VII and VIII, plaintiffs allege that defendants LAN and Veolia committed professional negligence. (Dkt. 620-3 at 199–207.) Neither LAN nor Veolia have moved to dismiss these counts in their entirety. However, Veolia asks the Court to dismiss the claims of several named plaintiffs based on alleged pleading deficiencies. (Dkt. 274 at 26–35.) This includes Rhonda Kelso, individually and on behalf of her minor child; David Munoz; Amber Brown, on behalf of her minor child; Frances Gilcreast; EPCO Sales, LLC; and, Angelo's Coney Island Palace, Inc. (*Id.*)

In its vacated August 1, 2018 opinion and order, the Court rejected all but one of Veolia's requested dismissals. 329 F.Supp.3d at 424–25. The third amended complaint alleged that Veolia became involved in the Flint Water Crisis in February 2015. However, Kelso stated only that they "bathed, washed, and cooked with the water until at least January 2015." (Dkt. 349 at 12–13.) Because other plaintiffs specifically pleaded that they used Flint River water for the entire time or did not otherwise mention a limited period of use, the Court inferred that Kelso and her minor child did not use the water after February 2015 and dismissed their claims against Veolia. 329 F.Supp.3d at 424.

[87] In the fourth amended complaint, Kelso revises her allegations. She and her daughter now allege that they "bathed, washed, and cooked with the water until at least *November* 2015." (Dkt. 620-3 at 14 (emphasis added).) As a result, Veolia's motion to dismiss as to Kelso must be denied. And since the fourth amended complaint makes no changes with respect to the other plaintiffs, the Court adopts the remainder of its August 1 decision.

3. Fraud

In Count X, plaintiffs allege that defendant Veolia committed fraud by intentionally making false representations about the safety of Flint's water. (*Id.* at 210–12.) Veolia moves to dismiss, arguing that plaintiffs' complaint fails to identify any false representations (Dkt. 274 at 17–19), plaintiffs do not adequately plead intent (*id.* at 19–20), and plaintiffs fail to explain how they detrimentally relied on any falsity. (*Id.* at 20–21.)

In its vacated August 1, 2018 opinion and order, the Court granted defendants' motions to dismiss an identical count. As with plaintiffs' state-created danger claim, nothing in the fourth amended complaint affects the Court's earlier analysis. Moreover, plaintiffs have not subsequently challenged this aspect of the August 1 ruling.[25]

[88] **[89]** **[90]** There, the Court explained that:

> Unlike other claims at the motion to dismiss stage, fraud claims are subject to a higher pleading standard. The elements of fraud must be pleaded with ***867** particularity, except that malice, intent, knowledge, and other conditions of a person's mind may be alleged generally. Fed. R. Civ. P. 9(b).
>
> In Michigan, a claim for common law fraud requires a plaintiff to plead:
>
> > (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth, and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury.
>
> *Hi–Way Motor Co. v. Intl. Harvester Co.,* 398 Mich. 330, 336, 247 N.W.2d 813 (1976) (internal citations and quotation marks omitted).

All plaintiffs allege that Veolia defrauded them, based on three statements in Veolia's 2015 Interim Report. Those statements are: 1) that Flint's water was "safe" and "in compliance with drinking water standards"; 2) that the observed discoloration was merely aesthetic and not indicative of water quality or health problems; and 3) that medical problems arose in Flint because "[s]ome people may be sensitive to any water." (Dkt. 349 at 146.) Plaintiffs' complaint references no other specific statements made by Veolia, so these are the only three statements the Court may consider in evaluating the sufficiency of their pleadings. *See Republic Bank & Trust Co. v. Bear Stearns & Co.*, 683 F.3d 239, 247 (6th Cir. 2012) (holding that fraudulent statements must be specifically alleged, including the time and place the statements were made).

Veolia raises several arguments regarding the sufficiency of the fraud claim. Chief among those argument are that the specific statements set forth above are inaccurately quoted, that plaintiffs fail to plead Veolia's intent and knowledge properly, and that plaintiffs fail to plead their own reliance properly.

At Veolia's request, the Court has reviewed the quoted statements in their full context in Veolia's 2015 Interim Report. The Court may review documents incorporated into the complaint by reference, such as documents relied on for the specific statements supporting a fraud claim. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007). The statements Veolia challenges are, for the purposes of the assertion of a fraud claim at the motion to dismiss stage, accurate and properly pleaded.

Further, the entirety of the pleading sets forth the basis for the plaintiffs' claim that these statements were false. The complaint alleges the tainted water in Flint in February 2015 was not safe, in compliance with drinking water standards, or merely aesthetically displeasing; that the tainted water did specifically cause medical problems apart from the standard problems that might be associated with a population's sensitivity to a clean water supply; and that this information was generally known absent Veolia's representations to the contrary.

Plaintiffs allege that "[u]pon information and belief, the Veolia Defendants knew the representations were made recklessly without any knowledge about their veracity" and that the representations were made "with the intention that Plaintiffs would act and rely on them." (Dkt. 349 at 147.) Allegations of fraud "cannot be based upon information and belief, except where the relevant facts lie exclusively within knowledge and control of the opposing party, and even then, the plaintiff must plead a particular ***868** statement of facts upon which his belief is based." *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 489 (6th Cir. 1990).

At the motion to dismiss stage for a fraud claim, "the plaintiff ... must plead facts about the defendant's mental state, which, accepted as true, make the state-of-mind allegation plausible on its face." *Republic Bank & Trust Co.*, 683 F.3d at 247 (internal quotation marks and citation omitted). Veolia argues that plaintiffs' allegation of recklessness is insufficiently pleaded. However, the allegation meets the fraud pleading standard. Information about Veolia's recklessness in 2015 is solely within the knowledge of Veolia's decision-makers. On a theory of recklessness and ignorance about the veracity of a statement in a fraud claim, the plaintiffs' voluminous factual background about the information known to Flint, which retained Veolia, and to the public at large in 2015, satisfies this pleading requirement. To require further pleading regarding Veolia's alleged recklessness would be to ask the plaintiffs to plead facts they could not possibly know at this stage.

To sustain a fraud claim in Michigan, "the party claiming fraud must reasonably rely on the material representation." *Zaremba Equip., Inc. v. Harco Nat'l Ins. Co.*, 280 Mich. App. 16, 39, 761 N.W.2d 151 (2008) (emphasis in original). As set forth above, this information cannot be pleaded based upon information and belief, because this information is solely within the knowledge of the plaintiffs, not the defendants.

Plaintiffs' complaint alleges only that "[u]pon information and belief, the Veolia Defendants made the representations with the intention that Plaintiffs would act and rely on them, which Plaintiffs did." (Dkt. 349 at 147.) The phrase "which Plaintiffs did" is the sole factual allegation in the complaint stating that any plaintiff specifically relied on these statements in continuing to drink Flint River water after February 2015. That statement lacks any specificity as to when or how any plaintiff heard the allegedly fraudulent statements, which were set forth in a report purportedly on the city's website.

At oral argument, plaintiffs argued that specific reliance was pleaded with regard to at least one plaintiff: Tiantha Williams. The portion of the complaint introducing Williams states that "[p]rior to [December 2015], the family trusted previous reports that the condition of the water was not an immediate health emergency. They also relied on statements about the safety of the water that were made in public forums." (*Id.* at 17.) These general allegations are insufficient to specifically plead that Williams heard and relied on Veolia's statements. Between April 2014 and December 2015, numerous parties, including Earley in October 2014, Busch and Shekter-Smith on March 13, 2015, and Wurfel on July 10 and July 24, 2015, issued allegedly false statements to the public. The general reference to "statements" may include any or all of these other false statements, and do not specifically implicate Veolia's 2015 Interim Report.

In the alternative, plaintiffs argue that reliance may be inferred because Veolia's report was available on Flint's public website. (Dkt. 379 at 123 n.47.) Plaintiffs failed to plead this information in the complaint, and the Court cannot rely on it to determine if reliance was properly pleaded. Even if the Court considers this additional information, the particular plaintiffs in this case do not plead that they specifically became aware of and relied on Veolia's statements in continuing ***869** to use Flint water after February 2015.

Plaintiffs argue that they need not show direct reliance on a fraudulent misrepresentation to assert a fraud claim, citing *Nernberg v. Pearce*, 35 F.3d 247 (6th Cir. 1994). In *Nernberg*, a plaintiff properly asserted a fraud claim where fraudulent misrepresentations were made to a third party, and the misrepresentations were repeated by that third party to induce the plaintiff's reliance. *Id.* at 251. However, the plaintiff still specifically demonstrated that he actually heard and relied on the misrepresentations. *Nernberg* does not mean that a plaintiff may allege a fraud claim where a third party heard and relied on a false statement, but the plaintiff does not allege with particularity that he or she also did so.

Finally, plaintiffs argue that questions as to reliance "pertain[s] to questions of fact, not sufficiency of the pleadings." (Dkt. 379 at 124 (citing *State Farm Mut. Ins. Co. v. Elite Health Ctrs., Inc.*, No. 16-cv-13040, 2017 WL 2351744, at *9, 2017 U.S. Dist. LEXIS 82736, at *25 (E.D. Mich. May 31, 2017). *Elite Health* does not stand for the rule that a plaintiff does not need to plead reliance with particularity. That case did not concern a defendant's argument that the pleadings were insufficient as to reliance. Instead, the defendant in *Elite Health* argued that the plaintiff's allegations were "contradictory and/or self[-]serving," and that contention pertained to questions of fact rather than sufficiency of the pleadings. *Id.* The *Elite Health* complaint contained a "116-page description of how the alleged scheme to defraud" worked, *id.* at *8, 2017 U.S. Dist. LEXIS 82736, at *23, and determined that the plaintiff had properly "alleged that it justifiably relied on Defendants' misrepresentations," *id.* at *9, 2017 U.S. Dist. LEXIS 82736, at *26.

This analysis does not foreclose a fraud claim against Veolia by other plaintiffs. However, those plaintiffs *must* plead the necessary elements of their fraud claim with particularity, including their reliance on Veolia's allegedly fraudulent statements. Because these plaintiffs did not plead the reliance element of their fraud claim with sufficient particularity, their fraud claim must be dismissed. 329 F.Supp.3d at 417–20. The Court adopts this reasoning in full. Therefore, plaintiffs fail to state a fraud claim.

4. Negligent Infliction of Emotional Distress

[91] In Count XI, plaintiffs allege that LAN and Veolia negligently caused them emotional distress. (Dkt. 620-3 at 212.) In its vacated August 1, 2018 opinion and order, the Court addressed the identical claim and decided that it was actually "a request for emotional distress damages arising from the negligence claims asserted against LAN and Veolia." 329 F.Supp.3d at 421. Nothing in the fourth amended complaint affects the Court's earlier analysis, and again plaintiffs have not subsequently challenged this aspect of the August 1 ruling. Specifically, the Court stated that:

> Plaintiffs assert what they term a negligent infliction of emotional distress ("NIED") claim against LAN and Veolia. (Dkt. 349 at 148.) The elements of a claim for [NIED] under Michigan law are:
>
> > (1) serious injury threatened or inflicted on a person, not the plaintiff, of a nature to cause severe mental disturbance to the plaintiff, (2) shock by the plaintiff from witnessing the event that results in the plaintiff's actual ***870** physical harm, (3) close relationship between the plaintiff and the injured person (parent, child, husband, or wife), and (4) presence of the plaintiff at the location of the accident at the time the accident occurred or, if not presence, at least shock "fairly contemporaneous" with the accident.
>
> *Hesse v. Ashland Oil, Inc.*, 466 Mich. 21, 34, 642 N.W.2d 330 (2002).
>
> Plaintiffs argue that they are bringing a "direct negligent infliction of emotional distress" claim, different from the NIED claim set forth in *Hesse*. Plaintiffs rely on *Daley v. LaCroix*, 384 Mich. 4, 179 N.W.2d 390 (1970), to argue that NIED does not require an injury to a third party for a plaintiff to pursue the claim. In *Daley*, the Michigan Supreme Court considered whether a plaintiff alleging "a definite and objective physical injury [ ] produced as a result of emotional distress proximately caused by defendant's negligent conduct ... may recover in damages for such physical consequences to himself notwithstanding

the absence of any physical impact upon plaintiff at the time of the mental shock." *Id.* at 12–13, 179 N.W.2d 390[.]

Daley did not create a cause of action for [NIED] absent an injury to a closely related third party. "[R]ather than create a cause of action, [*Daley* and cases following it] merely allow damages for emotional distress when the plaintiff has prevailed on a negligence cause of action." *McNeil ex rel. McNeil v. Metinko*, Nos. 194595, 194596, 1998 WL 2016585, at *3, 1998 Mich. App. LEXIS 2506, at *7–8 (Mich. Ct. App. Mar. 13, 1998).

Plaintiffs rely on two other cases, *Apostle v. Booth Newspapers, Inc.*, 572 F.Supp. 897, 900 (W.D. Mich. 1983) and *Maldonado v. Nat. Acme Co.*, 73 F.3d 642, 645–46 (6th Cir. 1996), to argue that *Daley* did establish a tort of negligent infliction of emotional distress that did not require an injury to a third party. First, both cases predate *Hesse*, in which the Michigan Supreme Court limited the tort as set forth above. Second, *Hesse* explicitly stated that "[t]he common-law cause of action for negligent infliction of emotional distress has been recognized and applied in Michigan, although this Court has never ruled on the issue." *Hesse*, 466 Mich. at 34, 642 N.W.2d 330. It is impossible to read *Daley*, a Michigan Supreme Court decision, to create a type of NIED claim when Michigan courts have stated that *Daley* did not do so, and when as of 2002, the Michigan Supreme Court had not recognized NIED at all.

Further, an NIED claim "clearly contemplates a sudden, brief, and inherently shocking accidental event which causes the injury ..., which contemporaneously, and by its very nature, results in emotional and physical injury to the plaintiff." *Brennan v. Chippewa Cty. War Mem'l Hosp., Inc.*, Nos. 318452, 318594, 2014 WL 5306621, at *9, 2014 Mich. App. LEXIS 1912 at *25 (Oct. 16, 2014) (further citation omitted). Plaintiffs do not allege that either LAN or Veolia committed an act that was sudden or brief, but instead allege that over a period of months for Veolia and even years for LAN, these defendants repeatedly failed to properly evaluate or treat Flint's water, resulting in prolonged injury to all who used Flint River water after April 25, 2014.

On review of plaintiff's complaint, this claim is a request for emotional distress damages arising from the negligence claims asserted against LAN and Veolia. Because the claim is presented as one for NIED, it is dismissed on the grounds that it fails to plead an NIED claim under Michigan law.

> However, this ruling does not preclude plaintiffs from ***871** seeking emotional distress damages arising from their surviving negligence claims.

Id. at 420-21. The Court adopts this reasoning in full. Plaintiffs may still pursue damages for emotional suffering, where permitted.

5. Negligence

In Count XII, plaintiffs allege that defendants LAN and Veolia were negligent with respect to their conduct in Flint, causing plaintiffs injury. (Dkt. 620-3 at 212–14.) LAN and Veolia move to dismiss on the ground that plaintiffs' negligence claim is preempted by plaintiffs' claim for professional negligence.

[92] In the context of the Flint Water Cases, the Court has twice held that negligence claims against LAN and Veolia may only be brought as professional negligence claims. First, in *Guertin*, the Court held that the professional negligence claims against LAN and Veolia could proceed, but the ordinary negligence claims had to be dismissed. 2017 WL 2418007, at *30, 2017 U.S. Dist. LEXIS 85544, at *90–93. Second, in its vacated August 1, 2018 opinion and order, the Court determined that since "[a]n ordinary layperson would have little to no knowledge about the appropriate methods and techniques for remediating, containing, and eliminating lead and bacteria in a municipal water supply," the claim was properly brought as a professional negligence claim and it dismissed the ordinary negligence claim. 329 F.Supp.3d at 423–24.

What was true in *Guertin* and the Court's August 1 decision is true here. Plaintiffs have thus failed to state a claim to ordinary negligence.

6. Gross Negligence

In Count XIII plaintiffs allege that defendants LAN and Veolia committed gross negligence. (Dkt. 620-3 at 215–17.) In Count IV, plaintiffs allege the same against defendants Snyder, Dillon, Lyon, Shekter-Smith, Rosenthal, Busch, Cook, Prysby, Wurfel, Wright, Kurtz, Earley, Ambrose, Croft, Johnson, and Glasgow. (*Id.* at 217–19.) For the reasons set forth above in Section II.d.ii.5, plaintiffs fail to state a claim with respect to Count IV. And for the following reasons, plaintiffs also fail to state a claim with respect to Count XIII.

*

[93] Gross negligence is not an independent cause of action in Michigan. *See Xu v. Gay*, 257 Mich. App. 263, 268–69, 668 N.W.2d 166 (2003). At common law in Michigan, gross negligence was not a higher degree of negligence; it was a device to escape contributory negligence. *Gibbard v. Cursan*, 225 Mich. 311, 319, 196 N.W. 398 (1923), *overruled by Jennings v. Southwood*, 446 Mich. 125, 131–132, 521 N.W.2d 230 (1994), *abrogated on other grounds*. However, Michigan replaced the rule of contributory negligence with comparative negligence. *Placek v. Sterling Heights*, 405 Mich. 638, 650, 275 N.W.2d 511 (1979). And the Michigan Supreme Court therefore discarded the doctrine of common law gross negligence, recognizing that it had outlived its practical usefulness. *Jennings*, 446 Mich. at 129, 521 N.W.2d 230.

Gross negligence has since received a new life in the statutory context. *See supra* Section II.d.ii.5. The GTLA confers various degrees of immunity on tortious government actors. § 691.1407. This includes lower-level government officials, unless their conduct amounted to *gross negligence* that was the proximate cause of a plaintiff's injuries. § 691.1407(2).

[94] But despite its reference to gross negligence, neither the GTLA nor any other immunity statute created a new tort. ***872** *See Rakowski v. Sarb*, 269 Mich. App. 619, 627, 713 N.W.2d 787 (2006); *Beaudrie v. Henderson*, 465 Mich. 124, 139 n.12, 631 N.W.2d 308 (2001). Statutory gross negligence is instead an affirmative defense to be raised by a defendant. *Odom v. Wayne Cty.*, 482 Mich. 459, 479, 760 N.W.2d 217 (2008). And plaintiffs bringing a tort claim must still plead the common law elements of ordinary negligence. *Rakowski*, 269 Mich. App. at 627, 713 N.W.2d 787.[26]

With this in mind, although plaintiffs style their proposed claim as one of gross negligence, the Court must treat it as one of ordinary negligence. And for the reasons set forth in Section III.d.ii.5., plaintiffs' claims of ordinary negligence against LAN and Veolia must be brought as claims of professional negligence. Thus, plaintiffs fail to state a claim to gross negligence.

7. Exemplary Damages

Plaintiffs seek exemplary damages against defendants Veolia and LAN, solely in connection with their alleged professional negligence. (Dkt. 620-3 at 199–207, 219.) In response, Veolia and LAN move to dismiss the requested relief. (Dkt. 283 22–23; Dkt. 274 at 22–26.)[27] In *Guertin*, under similar circumstances, this Court stated that "plaintiffs may be entitled to exemplary damages." 2017 WL 2418007, at *30, 2017 U.S. Dist. LEXIS 85544, at *94. And the Court therefore permitted "[t]heir request for exemplary damages [to] proceed." *Id.* However, for the reasons stated below, *Guertin* was at odds with Michigan precedent. And because Michigan law controls the question of damages in counts involving professional negligence, plaintiffs fail to state a claim to exemplary damages.

*

[95] **[96]** In Michigan, exemplary damages are a special class of compensatory damages. They are available under limited circumstances to reimburse for a non-economic harm. *Veselenak v. Smith*, 414 Mich. 567, 573–74, 327 N.W.2d 261 (1982); *Unibar Maint. Servs., Inc. v. Saigh*, 283 Mich. App. 609, 630, 769 N.W.2d 911 (2009). And in the context of exemplary damages, this only includes losses for the "humiliation, sense of outrage, and indignity" that results from malicious, willful, and wanton conduct. *Kewin v. Mass. Mut. Life Ins. Co.*, 409 Mich. 401, 419, 295 N.W.2d 50 (1980); *B & B Inv. Grp. v. Gitler*, 229 Mich. App. 1, 9–10, 581 N.W.2d 17 (1998).

[97] **[98]** **[99]** The malicious, willful, and wanton element is equivalent to malice. *See Peisner v. Detroit Free Press, Inc.*, 421 Mich. 125, 136, 364 N.W.2d 600 (1984). Because damages for mental pain and anxiety are normally included under actual damages, only intentional actions that show a reckless disregard for a plaintiff's rights will suffice. *See Veselenak*, 414 Mich. at 574–75, 327 N.W.2d 261; *McPeak v. McPeak*, 233 Mich. App. 483, 487–88, 593 N.W.2d 180 (1999). In other words, mere negligence is insufficient. A defendant's conduct must amount to more than ***873** a lack of care. *See Veselenak*, 414 Mich. at 574–75, 327 N.W.2d 261.

[100] **[101]** Here, the fact that professional negligence is the only claim plaintiffs raise to support exemplary damages against LAN and Veolia negates the mental element required for the award. It is the reprehensibility of a defendant's conduct that intensifies the emotional injury and justifies exemplary damages not the magnitude of the harm caused. *See McPeak*, 233 Mich. App. at 488, 593 N.W.2d 180; *Gitler*,

229 Mich. App. at 10, 581 N.W.2d 17. Plaintiffs do not state a claim for allegedly malicious, willful, and wanton conduct. In fact, they do not state a claim involving exemplary damages for any intentional tort. Rather, they argue that LAN and Veolia were professionally negligent and that their negligence caused the Flint Water Crisis. As such, plaintiffs fail to state a claim for exemplary damages.

LAN also objects to being "lumped in" with Veolia with regard to some allegations. (Dkt. 283 at 26.) The complaint clearly specifies the actions LAN and Veolia each took with respect to Flint's water supply, and sometimes refers to them jointly because either both sets of defendants had similar duties, if at different times, or because plaintiffs are asserting similar claims against both sets of defendants.

329 F.Supp.3d at 391–92.

iii. LAN's Motion for a More Definite Statement

[102] **[103]** Defendant LAN argues that plaintiffs must provide a more definite statement in their complaint. (Dkt. 283 at 24.) The Court addressed this identical motion in its August 1, 2018 opinion and order, and sees no reason to deviate from this prior ruling. Accordingly, for the reasons set forth below, the Court denies LAN's motion.

Motions for more definite statements are disfavored, and should be granted "only if there is a major ambiguity or omission in the complaint that renders it unanswerable." *Farah v. Martin*, 122 F.R.D. 24, 25 (E.D. Mich. 1988).

LAN argues that the complaint does not distinguish between the Leo A. Daly Company ("LAD"), Lockwood, Andrews & Newnam, P.C. ("LAN P.C."), and Lockwood, Andrews & Newnam, Inc. ("LAN, Inc."), making it impossible to tell what each entity did. The Court has addressed the relationship between LAD, LAN P.C., and LAN, Inc. in a prior opinion. (Dkt. 437.) LAD is the parent company of LAN, Inc.; LAN P.C. is a corporation established to satisfy licensing requirements for LAN, Inc. to operate in the state of Michigan. (Id. at 4.) An agreement between LAD and LAN, Inc. establishes a relationship between the two companies in which all LAN, Inc. employees are LAD employees and all LAN, Inc. revenues go to a joint bank account over which LAD had full control. (Id. at 10–11.)

Because LAN P.C. was a legal entity created solely to permit LAN, Inc. to perform work in Michigan, all work LAN, Inc. performed can be attributed to LAN P.C. Because all employees of LAN, Inc. were actually employees of LAD, all work those employees performed, including the work at issue in this case, can be attributed to LAD. The complaint treats all three companies as a single entity for pleading purposes because, based on the corporate structure of the companies, they are indistinguishable for the purposes of this lawsuit.

e. Conclusion and Order

IT IS ORDERED THAT,

***874** Plaintiffs' motion for leave to amend the complaint (Dkt. 620) regarding the bodily integrity claim against Governor Snyder is **GRANTED**. Plaintiffs may include the fourth amended complaint's new factual allegations, including the proposed class definitions. Plaintiffs' motion as it relates to these facts is therefore **GRANTED**. In all other respects, the motion is denied.

Having adopted the fourth amended complaint in part, IT IS FURTHER ORDERED THAT,

Defendants' motions to dismiss count I (bodily integrity) are **DENIED** with respect to defendants Snyder, Dillon, Wurfel, Shekter-Smith, Rosenthal, Busch, Cook, Prysby, Earley, Ambrose, Croft, Glasgow, and Johnson, with the exception of claims relating to property damage. Additionally, the city defendants' motion to dismiss count VI (*Monell* liability) is **DENIED**. LAN and Veolia's motions to dismiss counts VII and VIII (professional negligence) are **DENIED**. And LAN's motion for a more definite statement is also **DENIED**.

IT IS FURTHER ORDERED THAT,

All remaining counts are dismissed for failure to state a claim. Specifically, defendants' motions to dismiss count I (bodily integrity) with respect to defendants Lyon, Peeler, Wyant, Kurtz, Wright, and Walling are **GRANTED**. And defendants' motions to dismiss counts II, III, IV, V, IX, X, XI, XII, XIII, and XIV are also **GRANTED** in their entirety. Additionally, LAN and Veolia's motions to dismiss plaintiffs' claim for exemplary and punitive damages are **GRANTED**.

IT IS SO ORDERED.

All Citations

384 F.Supp.3d 802

Footnotes

1 Other cases were subsequently added to the consolidated docket. (Dkts. 185, 232, 441, 453.)

2 This includes *Walters v. Flint*, No. 17-cv-10164, and *Sirls v. Michigan*, No. 17-cv-10342. Neither of these cases are consolidated with the present case.

3 Some defendants challenged the Court's authority to do so, but the Sixth Circuit upheld this decision. *Carthan v. Snyder*, No. 18-1967 (6th Cir. Feb. 19, 2019).

4 Plaintiffs sue former Governor Snyder in his official and individual capacities. For the sake of consistency with earlier Flint water decisions, former Governor Snyder will simply be referred to as Governor Snyder or the Governor where the claim is against him is in his individual capacity. Where the claim is against him in his official capacity, the count is now against Governor Gretchen Whitmer. *See* Fed. R. Civ. P. 25(d). But, again, for consistency, the Court will still refer to Governor Snyder.

5 According to the fourth amended complaint, Flint's population is 54.3% African American. (Dkt. 620-3 at 152.)

6 On remand from the Sixth Circuit, *Boler* was consolidated with the present case. (Dkt. 453.)

7 Where, as here, leave is sought following a dispositive ruling, the moving party must normally have the ruling set aside. *Morse v. McWhorter*, 290 F.3d 795, 799 (6th Cir. 2002). But in this case, the ruling has already been vacated. (Dkt. 670.)

8 In response, Governor Snyder points out that the new allegations do not indicate that he knew of the risks posed by the Flint River prior to the decision to switch water sources. (Dkt. 654 at 19.) And because, in his view, the right to bodily integrity only limits the State's power to take affirmative action, Governor Snyder argues that what he knew after the switch is irrelevant information. (*Id.* at 20.) Moreover, according to the Governor, the Constitution does not guarantee that the State will remedy local water contamination issues. (*Id.*)

However, the Governor misunderstands the nature of plaintiffs' claim. Plaintiffs do not argue that Governor Snyder violated their right to bodily integrity by authorizing the switch to the Flint River. Nor do they assert that Governor Snyder should have remediated a polluted water source. Rather, plaintiffs contend that the Governor was indifferent to their rights by concealing the risk of harm posed by Flint's contaminated water.

9 This theory is identical to that stated in the third amended complaint, with the omission of Dayne Walling as a named defendant. However, the proposed complaint is somewhat inconsistent on this point. Walling is omitted as a named defendant but is still referred to in subsequent allegations. (Dkt. 620-3 at 174–86.) The Court assumes that plaintiffs intended to omit Walling.

10 Alternatively, plaintiffs can show that a law or policy explicitly classifies on the basis of race. *Hunt v. Cromartie*, 526 U.S. 541, 546, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999). But plaintiffs agree that this case involves a facially neutral policy. (Dkt. 620-1 at 18, 19; Dkt. 663 at 37.)

11 The Sixth Circuit has repeatedly relied on the *Arlington Heights* factors when addressing equal protection claims involving facially neutral laws or policies. *E.g.*, *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 636–37 (6th Cir. 2016); *Smith & Lee Assocs., Inc. v. City of Taylor*, 102 F.3d 781, 790–91 (6th Cir. 1996).

12 In fact, DWSD was at the center of highly publicized public corruption charges. In March of 2013, former Mayor of Detroit, Kwame Kilpatrick was found guilty of twenty-four of thirty counts brought against him, including conspiracy charges related to the DWSD. *United States v. Kilpatrick*, et al., No. 10-cr-20403. Former DWSD Director Victor Mercado had previously pled guilty in November of 2012.

13 Plaintiffs detail the Governor's response to emergencies in majority white communities. (Dkt. 620-3 at 152–53.) However, this only tells half the story. Without knowing how the Governor reacted to emergencies in majority African American communities, it is difficult to assess his motive in Flint. The flood in Wayne County is the closest non majority white jurisdiction that plaintiffs provide.

14 As with the proposed equal protection and ELCRA claims, plaintiffs inconsistently name defendants in the Count. The conspiracy Count lists the defendants mentioned here, but subsequent briefing includes additional individuals.

15 There are two ways to construe plaintiffs' § 1985(3) argument. First, it could be understood as stating a claim based on the theory that defendants' actions burdened plaintiffs' rights under the Thirteenth Amendment, denying them equal protection of the laws. Or it could be read as articulating a violation of the Equal Protection Clause on the basis of racial

discrimination, where defendants acted with racial animus similar to a badge of slavery. Because in plaintiffs' briefing they argue in support of the latter interpretation, the Court will analyze the claim under that theory.

16 In pertinent part, § 1985(3) states: "If two or more persons ... conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws ... [and] do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property ... the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

17 Another exception is "when the state has waived immunity by consenting to the suit." *Boler*, 865 F.3d at 410. However, this exception is not at issue here. Although the State of Michigan has participated in the proceedings to some extent, it has carefully and consistently appeared reluctantly, and without waiving immunity.

18 In his motion to reconsider the now vacated August 1, 2018 opinion and order, Dillon argued that he resigned his position as State Treasurer in 2013, before Flint transitioned to the Flint River in early 2014. In his view, he therefore lacked authority over the Flint water system and could not have caused the harm that resulted. (Dkt. 561 at 16–17.) If true, the Court concedes that plaintiffs' claim against Dillon may ultimately fail. However, plaintiffs dispute whether he truly left the State's employment. (Dkt. 601 at 9–12.) Discovery will resolve this disagreement. For now, the Court must read the allegations in a light favorable to plaintiffs.

19 In its vacated August 1, 2018 opinion and order, the Court denied defendant Lyon's motion to dismiss this count. 329 F.Supp.3d at 403–04. In supplemental briefing, the state defendants argue that the Sixth Circuit's decision in *Guertin* precludes the same result here. (Dkt. 739 at 15–16.) The Court agrees, as now reflected in this decision. Plaintiffs argue that the factual allegations against Lyon in this case are more substantial than in *Guertin*, but they are not so substantial as to warrant a different outcome.

20 Defendant Cook argues that he never misled the EPA. (Dkt. 735 at 24.) According to Cook, he informed the EPA that there was no corrosion control as soon as he was asked by the Agency. (*Id.*) That may be so, but the Court must take plaintiffs' allegations as true at this stage in the litigation.

21 Because it is important to the following analysis, the Court again notes that Kurtz, Early, and Ambrose were all at one time Flint's Emergency Manager. Edward Kurtz was the Emergency Manager from August 2012 through July 2013, Darnell Earley from September 2013 until January 13, 2015, and Ambrose from January 13, 2015 through April 28, 2015. Ambrose was also Flint's Finance Director before he became Emergency Manager.

22 In its vacated August 1, 2018 opinion and order, the Court denied defendant Wrights' motion to dismiss plaintiffs' bodily integrity claim. 329 F.Supp.3d at 407. Having reviewed that analysis, the Court reverses its earlier decision.

23 Defendant Kurtz did not file a motion to dismiss prior to the Court's vacated August 1, 2018 opinion and order. However, the city defendants' supplemental brief argues that he should be dismissed from the case because plaintiffs have failed to state a claim against him. (Dkt. 738 at 11–12). The Court treats these arguments as Kurtz's motion to dismiss.

24 Plaintiffs have not waived the right to appeal this issue. In their original response to defendants' motions to dismiss, plaintiffs argued at length that their state-created danger claim should proceed. (Dkt. 379 at 78–86.)

25 Again, plaintiffs have not waived the right to appeal this issue.

26 Perhaps because a plaintiff must sometimes show gross negligence to overcome immunity, courts have permitted claims styled as gross negligence to go forward under ordinary tort principles. *See, e.g.*, *Holland v. City of Highland Park*, No. 324312, 2016 WL 1072194, 2016 Mich. App. LEXIS 555 (Mar. 17, 2016); *FOLTS v. CIGNA Ins. Co.*, No. 210163, 1999 WL 33438012, at *1, 1999 Mich. App. LEXIS 740 at *1 (Aug. 6, 1999).

27 The fourth amended complaint also seeks punitive damages. However, plaintiffs' claims against Veolia and LAN sound in Michigan law, and plaintiffs concede that Michigan law prevents them from seeking such relief in this case. (Dkt. 379 at 136 n.54.) As such, plaintiffs fail to state a claim to punitive damages.

The New York Times | https://nyti.ms/3bIZO4V

Ex-Governor of Michigan Charged With Neglect in Flint Water Crisis

Rick Snyder, the former governor, faces two misdemeanor counts in the crisis, which left thousands of Flint residents drinking tainted water.

By Julie Bosman

Jan. 13, 2021

Rick Snyder, the former governor of Michigan who oversaw the state when a water crisis devastated the city of Flint, has been charged with two counts of willful neglect of duty, according to court records.

The charges are misdemeanors punishable by imprisonment of up to one year or a maximum fine of $1,000.

Prosecutors in Michigan will report their findings in a wide-ranging investigation into the water crisis on Thursday, officials said, a long-awaited announcement that is also expected to include charges against several other officials and top advisers to Mr. Snyder.

The findings will be announced by Dana Nessel, the Michigan attorney general, Fadwa Hammoud, the state's solicitor general, and Kym L. Worthy, Wayne County's top prosecutor.

Charges had previously been filed in connection to the crisis, which began in 2014, but in June 2019, prosecutors stunned Flint by dropping all pending charges.

Fifteen state and local officials, including emergency managers who ran the city and a member of the governor's cabinet, had been accused by state prosecutors of crimes as serious as involuntary manslaughter. Seven had already taken plea deals. Eight more, including most of the highest-ranking officials, were awaiting trial.

Brian Lennon, a lawyer for Mr. Snyder, said on Wednesday evening, "We believe there is no evidence to support any criminal charges against Gov. Snyder."

Gov. Rick Snyder drank tap water from Flint, Mich., during a news conference in the city in 2016. Jake May/The Flint Journal-MLive.com, via AP

He added that lawyers for the former governor have sought a confirmation of charges — or a copy of them — but have yet to receive them from prosecutors.

Randall Levine, a lawyer for Richard L. Baird, a former top adviser to Mr. Snyder, said on Tuesday that he was informed this week that Mr. Baird would be among the people facing charges connected to the water crisis.

"At this time, we have not been made aware of what the charges are, or how they are related to his position with former Michigan Governor Rick Snyder's administration," Mr. Levine said. "Rich's relationship with the Flint community has always been strong. When the Flint water crisis hit, he wasn't assigned by Governor Snyder to go to Flint, but rather he raised his hand and volunteered."

In 2016, Mr. Snyder offered an apology for what had happened, but for many residents in Flint, it did not go far enough.

"He pushed this whole thing to the side, and he pushed people to the side," said Floyd Bell, a Flint resident whose two small grandchildren were poisoned by lead when they were babies and still struggle developmentally. "If he was truly aware of what was going on, he should be held accountable."

Dr. Mona Hanna-Attisha, a Flint pediatrician who warned officials about lead in the drinking supply, said that the prospect of new charges was a reminder that "accountability and justice are critical to health and recovery."

"This news is a salve, but it isn't the end of the story," she said in an email. "Healing wounds and restoring trust will take decades and long-term resources."

Melissa Mays, one of the first people in Flint to draw attention to the problems with the city's water, said that given the silence from the attorney general's office for more than 18 months, she was apprehensive that the charges would go far enough.

"We in Flint have been living in prison for the past almost 7 years and being forced to pay for water that's still being piped through corroded and damaged

infrastructure in the streets and in our homes while the people responsible have been walking free," she wrote in an email. "We in Flint deserve REAL justice and that means wealthy, white politicians and agency heads going to jail for their actions and inaction that's caused so much harm and loss to us."

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Only the Westlaw citation is currently available.
United States Court of Appeals,
District of Columbia Circuit.

ENVIRONMENTAL HEALTH TRUST, et al., Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents

No. 20-1025 Consolidated with 20-1138
|
Argued January 25, 2021
|
Decided August 13, 2021

On Petitions for Review of an Order of the Federal Communications Commission

Attorneys and Law Firms

W. Scott McCollough argued the cause for petitioners. With him on the joint briefs were Edward B. Myers and Robert F. Kennedy, Jr.

Sharon Buccino was on the brief for amici curiae Natural Resources Defense Council and Local Elected Officials in support of petitioners.

Dan Kleiber and Catherine Kleiber, pro se, were on the brief for amici curiae Dan and Catherine Kleiber in support of peititioners.

James S. Turner was on the brief for amicus curiae Building Biology Institute in support of petitioners.

Stephen L. Goodman was on the brief for amicus curiae Joseph Sandri in support of petitioners.

Ashley S. Boizelle, Deputy General Counsel, Federal Communications Commission, argued the cause for respondents. With her on the brief were Jonathan D. Brightbill, Principal Deputy Assistant Attorney General at the time the brief was filed, U.S. Department of Justice, Eric Grant, Deputy Assistant Attorney General at the time the brief was filed, Jeffrey Beelaert and Justin Heminger, Attorneys, Thomas M. Johnson, Jr., General Counsel at the time the brief was filed, Federal Communications Commission, Jacob M. Lewis, Associate General Counsel, and William J. Scher and Rachel Proctor May, Counsel. Richard K. Welch, Deputy Associate General Counsel, entered an appearance.

Before: HENDERSON, MILLETT and WILKINS, Circuit Judges.

Opinion

Opinion dissenting in part filed by Circuit Judge Henderson.

Wilkins, Circuit Judge:

***1** Environmental Health Trust and several other groups and individuals petition for review of an order of the Federal Communications Commission ("the Commission") terminating a notice of inquiry regarding the adequacy of the Commission's guidelines for exposure to radiofrequency radiation. The notice of inquiry requested comment on whether the Commission should initiate a rulemaking to modify its guidelines. The Commission concluded that no rulemaking was necessary. Petitioners argue that the Commission violated the requirements of the Administrative Procedure Act by failing to respond to significant comments. Petitioners also argue that the National Environmental Policy Act required the Commission to issue an environmental assessment or environmental impact statement regarding its decision to terminate its notice of inquiry.

We grant the petitions in part and remand to the Commission. The Commission failed to provide a reasoned explanation for its determination that its guidelines adequately protect against the harmful effects of exposure to radiofrequency radiation unrelated to cancer.

I.

The Federal Communications Commission regulates various facilities and devices that transmit radio waves and microwaves, including cell phones and facilities for radio, TV, and cell phone communications. 47 U.S.C. §§ 301, 302a(a); *see EMR Network v. FCC*, 391 F.3d 269, 271 (D.C. Cir. 2004). Radio waves and microwaves are forms of electromagnetic energy that are collectively described by the term "radiofrequency" ("RF"). Office of Eng'g & Tech., Fed. Commc'ns Comm'n, *OET Bulletin No. 56, Questions and Answers about Biological Effects and Potential Hazards*

of Radiofrequency Electromagnetic Fields 1 (4th ed. Aug. 1999). The phenomenon of radio waves and microwaves moving through space is described as "RF radiation." *Id.*

We often associate the term "radiation" with the term "radioactivity." "Radioactivity," however, refers only to the emission of radiation with enough energy to strip electrons from atoms. *Id.* at 5. That kind of radiation is called "ionizing radiation." *Id.* It can produce molecular changes and damage biological tissue and DNA. *Id.* Fortunately, RF radiation is "non-ionizing," meaning that it is not sufficiently energetic to strip electrons from atoms. *Id.* It can, however, heat certain kinds of materials, like food in your microwave oven or, at sufficiently high levels, human body tissue. *Id.* at 6–7. Biological effects that result from the heating of body tissue by RF energy are referred to as "thermal" effects, and are known to be harmful. *Id.* Exposure to lower levels of RF radiation might also cause other, "non-thermal" biological effects. *Id.* at 8. Whether it does, and whether such effects are harmful, are subjects of debate. *Id.*

The National Environmental Policy Act ("NEPA") and its implementing regulations require federal agencies to "establish procedures to account for the environmental effects of [their] proposed actions." *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1032 (D.C. Cir. 2008) (per curiam). If an agency proposes a "major Federal action[ ]" that stands to "significantly affect[ ] the quality of the human environment," the agency must prepare an environmental impact statement ("EIS") that examines the adverse environmental effects of the proposed action and potential alternatives. 42 U.S.C. § 4332(C). Not every agency action, however, requires the preparation of a full EIS. *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010). If it is unclear whether a proposed action will "significantly affect[ ] the quality of the human environment," 42 U.S.C. § 4332(C), the responsible agency may prepare a more limited environmental assessment ("EA"). *See* 40 C.F.R. § 1501.5(a). An EA serves to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact." 40 C.F.R. § 1501.5(c)(1). Additionally, an agency may use "categorical exclusions" to "define categories of actions that normally do not have a significant effect on the human environment and therefore do not require preparation of an environmental impact statement." 40 C.F.R. § 1500.4(a); *see also* 40 C.F.R. § 1501.4(a).

***2** To fulfill its obligations under NEPA, the Commission has promulgated guidelines for human exposure to RF radiation. *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 87 (2d Cir. 2000). The guidelines set limits for RF exposure. Before the Commission authorizes the construction or use of any wireless facility or device, the applicant for authorization must determine whether the facility or device is likely to expose people to RF radiation in excess of the limits set by the guidelines. 47 C.F.R. § 1.1307(b). If the answer is yes, the applicant must prepare an EA regarding the likely effects of the Commission's authorization of the facility or device. *Id.* Depending on the contents of the EA, the Commission may require the preparation of an EIS, and may subject approval of the application to a full vote by the Commission. Office of Eng'g & Tech., Fed. Commc'ns Comm'n, *OET Bulletin No. 65*, *Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields* 6 (ed. 97-01, Aug. 1997). If the answer is no, the applicant is generally not required to prepare an EA. 47 C.F.R. § 1.1306(a).

The Commission last updated its limits for RF exposure in 1996. *Resolution of Notice of Inquiry, Second Report and Order, Notice of Proposed Rulemaking, and Memorandum Opinion and Order*, 34 FCC Rcd. 11,687, 11,689–90 (2019) ("2019 Order"); *see also* Telecommunications Act of 1996, Pub. L. No. 104-104, § 704(b), 110 Stat. 56, 152 (directing the Commission to "prescribe and make effective rules regarding the environmental effects of radio frequency emissions" within 180 days). The limits are based on standards for RF exposure issued by the American National Standards Institute Committee ("ANSI"), the Institute of Electrical and Electronic Engineers, Inc. ("IEEE"), and the National Council on Radiation Protection and Measurements ("NCRP"). *In re Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 11 FCC Rcd. 15,123, 15,134–35, 15,146–47 (1996). The limits are designed to protect against "thermal effects" of exposure to RF radiation, but not "non-thermal" effects. *EMR Network*, 391 F.3d at 271.

In March 2013, the Commission issued a notice of inquiry regarding the adequacy of its 1996 guidelines. *See Reassessment of Radiofrequency Exposure Limits & Policies, Notice of Inquiry*, 28 FCC Rcd. 3,498 (2013) ("2013 Notice of Inquiry"). The Commission divided its notice of inquiry into five sections. In the first section, it sought comment on the propriety of its exposure limits for RF radiation, particularly as they relate to device use by children. *Id.* at 3,575–80. In the second section, the Commission sought

comment on how to better provide information to consumers and the public about exposure to RF radiation and methods for reducing exposure. *Id.* at 3,580–82. In the third section, the Commission sought comment on whether it should impose additional precautionary restrictions on devices and facilities that are unlikely to expose people to RF radiation in excess of the limits set by the Commission's guidelines. *Id.* at 3,582–85. In the fourth and fifth sections, the Commission sought comment on whether it should change its methods for determining whether devices and facilities comply with the Commission's guidelines. *Id.* at 3,585–89.

The Commission explained that it was issuing the notice of inquiry in response to changes in the ubiquity of wireless devices and in scientific standards and research since 1996. *Id.* at 3,570. Specifically, the Commission noted that the IEEE had "published a major revision to its RF exposure standard in 2006." *Id.* at 3,572. The Commission also noted that the International Commission on Non-Ionizing Radiation Protection had published RF exposure guidelines in 1998 that differed somewhat from the Commission's 1996 guidelines, and was likely to release a revision of those guidelines "in the near future." *Id.* at 3,573. And the Commission noted that the International Agency for Research on Cancer ("IARC") had classified RF radiation as possibly carcinogenic to humans, and was likely to release a detailed monograph regarding that classification prior to the resolution of the notice of inquiry. *Id.* at 3,575 & n.385. The Commission invited public comment on all of these developments, but underscored that it would "work closely with and rely heavily—but not exclusively—on the guidance of other federal agencies with expertise in the health field." *Id.* at 3,571.

***3** In December 2019, the Commission issued a final order resolving its 2013 notice of inquiry by declining to undertake any of the changes contemplated in the notice of inquiry. *See 2019 Order*, 34 FCC Rcd. at 11,692–97.

In January 2020, Petitioners Environmental Health Trust, Consumers for Safe Cell Phones, Elizabeth Barris, and Theodora Scarato timely petitioned this Court for review of the Commission's 2019 final order. In February 2020, Petitioners Children's Health Defense, Michele Hertz, Petra Brokken, Dr. David O. Carpenter, Dr. Paul Dart, Dr. Toril H. Jelter, Dr. Ann Lee, Virginia Farver, Jennifer Baran, and Paul Stanley, M.Ed., timely petitioned the Ninth Circuit for review of the same order, and the Ninth Circuit transferred their petition to this Court pursuant to 28 U.S.C. § 2112. This Court consolidated the petitions. We have jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

II.

Petitioners challenge the 2019 final order under NEPA and the Administrative Procedure Act ("APA"). We begin with the APA.

A.

Petitioners argue that the order is arbitrary and capricious and therefore must be set aside under 5 U.S.C. § 706(2)(A) for the following reasons: (1) the order fails to acknowledge evidence of negative health effects caused by exposure to RF radiation at levels below the limits set by the Commission's 1996 guidelines, including evidence of cancer, radiation sickness, and adverse effects on sleep, memory, learning, perception, motor abilities, prenatal and reproductive health, and children's health; (2) the order fails to respond to comments concerning environmental harm caused by RF radiation; (3) the order fails to discuss the implications of long-term exposure to RF radiation, exposure to RF pulsation or modulation (two methods of imbuing radio waves with information), and the implications of technological developments that have occurred since 1996, including the ubiquity of wireless devices and Wi-Fi, and the emergence of "5G" technology; (4) the order fails to adequately explain the Commission's refusal to modify its procedures for determining whether cell phones comply with its RF limits; and (5) the order fails to respond to various "additional legal considerations," Pet'rs' Br. at 84.

Before discussing these arguments, and the Commission's responses to them, we clarify our standard of review. The arbitrary and capricious standard of the Administrative Procedure Act "encompasses a range of levels of deference to the agency." *Am. Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987). We completely agree with the dissenting opinion that the Commission's order is entitled to a high degree of deference, both because it is akin to a refusal to initiate a rulemaking, *see id.* at 4–5, and because it concerns highly technical determinations of the kind courts are ill-equipped to second-guess, *see Am. Radio Relay League, Inc., v. FCC*, 524 F.3d 227, 233 (D.C. Cir. 2008). So as to the governing law, the dissenting opinion and we are on the same page. Nevertheless, the Commission's decision to terminate

its notice of inquiry must be "reasoned" if it is to survive arbitrary and capricious review. *See Am. Horse*, 812 F.2d at 5; *Am. Radio*, 524 F.3d at 241. As with other agency decisions not to engage in rulemaking, we will overturn the Commission's decision if there is "compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency[.]" *Flyers Rights Educ. Fund, Inc. v. Fed. Aviation Admin.*, 864 F.3d 738, 743 (D.C. Cir. 2017) (quoting *WildEarth Guardians v. EPA*, 751 F.3d 649, 653 (D.C. Cir. 2014)). When an agency in the Commission's position is confronted with evidence that its current regulations are inadequate or the factual premises underlying its prior judgment have eroded, it must offer more to justify its decision to retain its regulations than mere conclusory statements. *See Am. Horse*, 812 F.2d at 6; *Am. Radio*, 524 F.3d at 241. Rather, the agency must provide "assurance that [it] considered the relevant factors," and it must provide analysis that follows "a discernable path to which the court may defer." *Am. Radio*, 524 F.3d at 241.

i.

***4** Under this highly deferential standard of review, we find the Commission's order arbitrary and capricious in its failure to respond to record evidence that exposure to RF radiation at levels below the Commission's current limits may cause negative health effects unrelated to cancer. (As we explain below, we find that the Commission offered an adequate explanation for its determination that exposure to RF radiation at levels below the Commission's current limits does not cause cancer.) That failure undermines the Commission's conclusions regarding the adequacy of its testing procedures, particularly as they relate to children, and its conclusions regarding the implications of long-term exposure to RF radiation, exposure to RF pulsation or modulation, and the implications of technological developments that have occurred since 1996, all of which depend on the premise that exposure to RF radiation at levels below its current limits causes no negative health effects. Accordingly, we find those conclusions arbitrary and capricious as well. Finally, we find the Commission's order arbitrary and capricious in its complete failure to respond to comments concerning environmental harm caused by RF radiation.

Petitioners point to multiple studies and reports, which were published after 1996 and are in the administrative record, purporting to show that RF radiation at levels below the Commission's current limits causes negative health effects unrelated to cancer, such as reproductive problems and neurological problems that span from effects on memory to motor abilities. *See, e.g.*, J.A. 3,068 (BioInitiative Working Group, BioInitiative Report (Cindy Sage & David O. Carpenter eds., 2012) (describing evidence that human sperm and their DNA are damaged by low levels of RF radiation)); J.A. 5,243 (Igor Yakymenko et al., *Oxidative Mechanisms of Biological Activity of Low-Intensity Radiofrequency Radiation*, Electromagnetic Biology & Med., Early Online, 1–16 (2015)); J.A. 5,259–69 (Henrietta Nittby et al., *Increased Blood-Brain Barrier Permeability in Mammalian Brian 7 Days After Exposure to the Radiation from a GSM-900 Mobile Phone*, 16 Pathophysiology 103 (2009)); J.A. 5,320–68 (Henry Lai, *A Summary of Recent Literature on Neurobiological Effects of Radiofrequency Radiation*, *in* Mobile Communications and Public Health 187–222 (M. Markov ed., 2018)); J.A. 5,994–6,007 (Milena Foerster et al., *A Prospective Cohort Study of Adolescents' Memory Performance and Individual Brain Dose of Microwave Radiation from Wireless Communication*, 126 Env't Health Persps. 077007 (July 2018)). Petitioners also point to approximately 200 comments submitted by individuals who advised the Commission that either they or their family members suffer from radiation sickness, "a constellation of mainly neurological symptoms that manifest as a result of RF[ ] exposure." Pet'rs' Br. at 30–31, 30 n.99.

The Commission argues that its order adequately responded to this evidence by citing the Food and Drug Administration ("FDA")'s determination that exposure to RF radiation at levels below the Commission's current limits does not cause negative health effects. The order cites three statements from the FDA. First, the order cites an FDA webpage titled "Do cell phones pose a health hazard?" that, as of December 4, 2017, stated that "[t]he weight of scientific evidence has not linked cell phones with any health problems." *2019 Order*, 34 FCC Rcd. at 11,692–93, 11,693 n.31. Second, the order cites a February 2018 statement from the Director of the FDA's Center for Devices and Radiological Health advising the public that

> As part of our commitment to protecting the public health, the FDA has reviewed, and will continue to review, many sources of scientific and medical evidence related to the possibility of adverse health effects from radiofrequency energy exposure in both humans and animals and will continue to do so as new scientific data are published. Based on our ongoing evaluation of the issue, the totality of the available scientific evidence continues to not support

> adverse health effects in humans caused by exposures at or under the current radiofrequency energy exposure limits.

Id. at 11,695 n.42. Third, the order cites an April 2019 letter from the Director of the FDA's Center for Devices and Radiological Health that does not discuss non-cancer-related health effects but instead addresses a 2018 study by the National Toxicology Program that found that exposure to RF radiation emitted by cell phones may cause cancer in rodents. *2019 Order*, 34 FCC Rcd. at 11,692 & n.28. The letter explains that "[a]s a part of our ongoing monitoring activities, we have reviewed the results and conclusions of the recently published rodent study from the National Toxicology Program in the context of all available scientific information, including epidemiological studies, and concluded that no changes to the current standards are warranted at this time." Letter from Jeffrey Shuren, M.D., J.D., Dir., Ctr. for Devices & Radiological Health, Food & Drug Admin., Dep't of Health & Hum. Servs., to Julius Knapp, Chief, Off. Of Eng'g & Tech., FCC (April 24, 2019).

***5** We do not agree that these statements provide a reasoned explanation for the Commission's decision to terminate its notice of inquiry. Rather, we find them to be of the conclusory variety that we have previously rejected as insufficient to sustain an agency's refusal to initiate a rulemaking. In *American Horse*, this Court considered whether the Secretary of Agriculture had offered a satisfactory explanation under the APA of his refusal to institute rulemaking proceedings regarding the practice of deliberately injuring show horses by fastening heavy chains or similar equipment—referred to as "action devices"—to the horses' front limbs. 812 F.2d at 2. In response to the argument that a certain study presented facts that merited a new rulemaking, the Secretary offered the following two-sentence explanation:

> 6. I have reviewed studies and other materials, relating to action devices, presented by humane groups, Walking Horse industry groups, and independent institutions, including the study referred to in the Complaint.
>
> 7. On the basis of this information, I believe that the most effective method of enforcing the Act is to continue the current regulations.

Id. at 5. This Court found these "two conclusory sentences ... insufficient to assure a reviewing court that the agency's refusal to act was the product of reasoned decisionmaking." *Id.* at 6. *American Horse* explained that the study at issue "may or may not remove a 'significant factual predicate' of the original rules' gaps[,]" and remanded to the Secretary to make that determination. *Id.* at 7.

Similarly, in *American Radio*, this Court considered whether the Commission had offered a satisfactory explanation for its decision to retain in its regulations a particular "extrapolation factor"—an estimate of the projected rate at which radio frequency strength decreases from a radiation-emitting source—despite studies submitted in a petition for reconsideration indicating that a different extrapolation factor would be more appropriate. 524 F.3d at 240–41. The Commission explained its decision by asserting that "[n]o new information has been submitted that would provide a convincing argument for modifying the extrapolation factor ... at this time." *Id.* (internal alterations omitted). We rejected that explanation as conclusory and unreasoned. *Id.*

The statements from the FDA on which the Commission's order relies are practically identical to the Secretary's statement in *American Horse* and the Commission's statement in *American Radio*. They explain that the FDA has reviewed certain information—here, "all," "the weight," or "the totality" of "scientific evidence." And they state the FDA's conclusion that, in light of that information, exposure to RF radiation at levels below the Commission's current limits does not cause harmful health effects. But they offer "no articulation of the factual ... bases" for the FDA's conclusion. *Am. Horse*, 812 F.2d at 6 (internal quotation marks omitted). In other words, they do not explain why the FDA determined, despite the studies and comments that Petitioners cite, that exposure to RF radiation at levels below the Commission's current limits does not cause harmful health effects. Such conclusory statements "cannot substitute for a reasoned explanation," for they provide "neither assurance that the [FDA] considered the relevant factors nor [do they reveal] a discernable path to which the court may defer." *Am. Radio*, 524 F.3d at 241. They instead represent a failure by the FDA to address the implication of Petitioners' studies: The factual premise—the non-existence of non-thermal biological effects—underlying the current RF guidelines may no longer be accurate.

When repeated by the Commission, the FDA's conclusory statements still do not substitute for the reasoned explanation that the APA requires. It is the Commission's responsibility to regulate radio communications, 47 U.S.C. § 301, and devices that emit RF radiation and interfere with radio communications, *id.* § 302a(a), and to do so in the public interest, including in regard to public health, *Banzhaf v. FCC*, 405 F.2d 1082, 1096 (D.C. Cir. 1968). Even the Commission itself recognizes this. *See 2019 Order*, 34 FCC Rcd. at 11,689

("The Commission has the responsibility to set standards for RF emissions"); *2013 Notice of Inquiry*, 28 FCC Rcd. at 3,571 (explaining that the Commission opened the notice of inquiry "to ensure [it] [was] meeting [its] regulatory responsibilities" and that it would "work closely with and rely heavily—*but not exclusively*—on the guidance of other federal agencies with expertise in the health field" in order to "fully discharge[ ] [its] regulatory responsibility") (emphasis added). And the APA requires that Commission's decisions concerning the regulation of radio communications and devices be reasoned. The Commission's purported reasoning in this case is that it chose to rely on the FDA's evaluation of the studies in the record. Absent explanation from the FDA as to how and why it reached its conclusions regarding those studies, however, we have no basis on which to review the reasonableness of the Commission's decision to adopt the FDA's conclusions. Ultimately, the Commission's order remains bereft of any explanation as to *why*, in light of the studies in the record, its guidelines remain adequate. The Commission may turn to the FDA to provide such an explanation, but if the FDA fails to do so, as it did in this case, the Commission must turn elsewhere or provide its own explanation. Were the APA to require less, our very deferential review would become nothing more than a rubber stamp.

***6** The Commission also argues that its order provided a reasoned explanation for its decision to terminate the notice of inquiry, despite Petitioners' evidence, by observing that "no expert health agency expressed concern about the Commission's RF exposure limits," and that "no evidence has moved our sister health and safety agencies to issue substantive policy recommendations for strengthening RF exposure regulation." *2019 Order*, 34 FCC Rcd. at 11,692. The silence of other expert agencies, however, does not constitute a reasoned explanation for the Commission's decision to terminate its notice of inquiry for the same reason that the FDA's conclusory statements do not constitute a reasoned explanation: silence does not indicate why the expert agencies determined, in light of evidence suggesting to the contrary, that exposure to RF radiation at levels below the Commission's current limits does not cause negative health effects unrelated to cancer. Silence does not even indicate whether the expert agencies made any such determination, or whether they considered any of the evidence in the record.

Our decision in *EMR Network* is not to the contrary. There, we rejected the argument that the Commission improperly delegated its NEPA duties by relying on input from other government agencies and non-governmental expert organizations in deciding whether to initiate a rulemaking to modify its RF radiation guidelines. 391 F.3d at 273. We found the Commission "not to have abdicated its responsibilities, but rather to have properly credited outside experts," and noted that "the FCC's decision not to leap in, at a time when the EPA (and other agencies) saw no compelling case for action, appears to represent the sort of priority-setting in the use of agency resources that is least subject to second-guessing by courts." *Id.* (citing *Am. Horse*, 812 F.2d at 4). We agree with the dissenting opinion that the Commission may credit outside experts in deciding whether to initiate a rulemaking to modify its RF radiation guidelines. To be sure, "[a]gencies can be expected to respect the views of such other agencies as to those problems for which those other agencies are more directly responsible and more competent." *City of Boston Delegation v. FERC*, 897 F.3d 241, 255 (D.C. Cir. 2018) (internal alteration and quotation marks omitted). What the Commission may not do, however, is rely on an outside expert's silence or conclusory statements in lieu of some reasoned explanation for its decision. And while it is certainly true that an agency's decision not to initiate a rulemaking at a time when other agencies see no compelling case for action may represent "the sort of priority-setting in the use of agency resources that is least subject to second-guessing by courts," *EMR Network*, 391 F.3d at 273, the same is true of most agency decisions not to initiate a rulemaking, *see Am. Horse*, 812 F.2d at 4–5. Nevertheless, an agency's decision not to initiate a rulemaking must have some reasoned basis, and an agency cannot simply ignore evidence suggesting that a major factual predicate of its position may no longer be accurate. *Id.* at 5.

Nor does *Cellular Phone Taskforce* help the Commission. There, the Second Circuit rejected the argument that the Commission was required to consult with the Environmental Protection Agency ("EPA") or other outside agencies before declining to modify its RF radiation guidelines in the face of new evidence regarding non-thermal effects caused by RF radiation. 205 F.3d at 90–91. In so holding, the Second Circuit found that "[i]t was fully reasonable for the FCC to expect the agency with primacy in evaluating environmental impacts to monitor all relevant scientific input into the FCC's reconsideration, particularly because the EPA had been assigned the lead role in RF radiation health effects since 1970," and that the Commission was not required to "supply the new evidence to the other federal agencies with expertise in the area." *Id.* at 91. But the Second Circuit did not hold that the Commission could rely solely on the silence or unexplained conclusions of other federal agencies to justify

its own inaction. It merely held that the Commission was not required to consult with outside agencies before declining to modify its RF radiation guidelines. No party before us today questions the propriety of that holding.

***7** Finally, the Commission argues that the Commission itself addressed the major studies in the record in its order terminating the notice of inquiry. Specifically, the Commission points to its statement that "[t]he vast majority of filings were unscientific." *2019 Order*, 34 FCC Rcd. at 11,694. Elsewhere, however, the order acknowledges that "the record include[d] some research information" and "filings that sought to present scientific evidence." *Id.* The order dismisses that research and evidence as "fail[ing] to make a persuasive case for revisiting our existing RF limits," *id.*, but again, such a conclusory statement cannot substitute for the minimal reasoning required at this stage, *Am. Radio*, 524 F.3d at 241. And while "[a]n agency is not obliged to respond to every comment, only those that can be thought to challenge a fundamental premise," *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000), the studies in the record to which Petitioners point *do* challenge a fundamental premise of the Commission's decision to terminate its notice of inquiry—namely, the premise that exposure to RF radiation at levels below the Commission's current limits does not cause negative health effects. But the Commission said nothing at all in its order about any specific health effects unrelated to cancer.

The Commission also points to its statement that "the record [does not] include actionable alternatives or modifications to the current RF limits supported by scientifically rigorous data or analysis." *2019 Order*, 34 FCC Rcd. at 11,692; *see also id.* at 11,694. Had the notice of inquiry focused exclusively on whether the Commission should modify its RF exposure limits, we might agree that the failure of any commenter to propose actionable modifications to the RF limits would have justified the Commission's decision to terminate the notice of inquiry. But the notice of inquiry did not focus exclusively on whether the Commission should modify its RF exposure limits. Instead, it also sought comment on how to better provide information to consumers and the public about exposure to RF radiation and methods for reducing exposure, and whether the Commission should impose additional precautionary restrictions on devices and facilities that are unlikely to expose people to RF radiation in excess of the Commission's limits. The Commission needed no actionable alternative to its current limits in order to provide additional information to the public or to impose precautionary restrictions in addition to its current limits. The failure of any commenter to propose actionable modifications to the Commission's RF exposure limits therefore does not justify the Commission's decision to terminate the notice of inquiry.

ii.

The Commission's failure to provide a reasoned explanation for its determination that exposure to RF radiation at levels below its current limits does not cause negative health effects unrelated to cancer renders the order arbitrary and capricious in three additional respects. First, it undermines the Commission's explanation for retaining its procedures for determining whether cell phones and other portable electronic devices comply with its RF limits. These procedures consist of testing the device against the head of a specialized mannequin, *2013 Notice of Inquiry*, 28 FCC Rcd. at 3,586 n.434, and no more than 2.5 centimeters away from the body of the mannequin, *id.* at 3,588 n.447. Petitioners claim that the testing is inaccurate because of the space between the device and the mannequin's body. On this point, the Commission's order cites the "large safety margin" incorporated in its existing RF exposure limits as a justification for its refusal to modify these procedures to include testing against the body. *2019 Order*, 34 FCC Rcd. at 11,696. Because the Commission's existing RF limits are overprotective, the order explains, the Commission need not worry about whether its testing procedures accurately detect devices that are likely to expose people to RF emissions in excess of the Commission's limits. *See id.* ("[E]ven if certified or otherwise authorized devices produce RF exposure levels in excess of Commission limits under normal use, such exposure would still be well below levels considered to be dangerous, and therefore phones legally sold in the United States pose no health risks."). As the Commission itself recognizes, this explanation depends on the premise that RF radiation does not cause harmful effects at levels below its current limits. *See id.* at 11,696 n.49 ("We note that any claim as to the adequacy of the FCC required testing, certification, and authorization regime is no different than a challenge to the adequacy of the federal RF exposure limits themselves. Both types of claims would undermine the FCC's substantive policy determinations."). The Commission's failure to provide a reasoned explanation for its determination that exposure to RF radiation at levels below its current limits does not cause negative health effects therefore renders inadequate the

Commission's explanation for its refusal to modify its testing procedures.

***8** Second, the Commission equally failed to provide a reasoned explanation for brushing off record evidence addressing non-cancer-related health effects arising from the impact of RF radiation on children. Many commenters, including the American Academy of Pediatrics, urged the Commission to adopt limits that account for the use of RF-emitting devices by vulnerable children and pregnant women. *See, e.g.*, J.A. 4,533–34. In dismissing those concerns, the Commission again relied on a conclusory statement from the FDA that "[t]he scientific evidence does not show a danger to any users of cell phones from RF exposure, including children and teenagers." *2019 Order*, 34 FCC Rcd. at 11,696. But, as we have already explained, such a conclusory and unexplained statement is not the "reasoned" explanation required by the APA. In addition, the Commission noted that the testing to determine compliance with its limits "represents a conservative case" for both adults and children. *Id.* at 11,696 n.50. Whether the testing of compliance with existing limits was conservative is not the point. The unanswered question remains whether low levels of RF radiation allowed by those existing limits cause negative health effects. So once again, the Commission's failure to provide a reasoned or even relevant explanation of its position that RF radiation below the current limits does not cause health problems unrelated to cancer renders its explanation as to the effect of RF radiation on children arbitrary and capricious.

Third, the Commission's failure to provide a reasoned explanation for its determination that exposure to RF radiation at levels below its current limits does not cause negative health effects unrelated to cancer renders inadequate the Commission's explanation for its failure to discuss the implications of long-term exposure to RF radiation, exposure to RF pulsation or modulation, or the implications of technological developments that have occurred since 1996, including the ubiquity of wireless devices and Wi-Fi, and the emergence of "5G" technology. In its brief, the Commission responds that it was not required to address these topics in its order because it "rationally concluded that the weight of scientific evidence does not support the existence of adverse health effects from radiofrequency exposure below the FCC's limits, regardless of the service or equipment at issue." Resp't's Br. at 45–46. (The Commission points out that "5G" cell towers, unlike traditional cell towers, are subject to its RF exposure limits.) Again, this explanation depends on the premise that RF radiation does not cause harmful health effects at levels below the Commission's current limits, and will not suffice absent a reasoned explanation for the Commission's determination that that premise is correct.

iii.

In addition to the Commission's inadequate response to the non-cancer-related effects of RF radiation on human health, the Commission also completely failed even to acknowledge, let alone respond to, comments concerning the impact of RF radiation on the environment. That utter lack of a response does not meet the Commission's obligation to provide a reasoned explanation for terminating the notice of inquiry. The record contains substantive evidence of potential environmental harms. Most relevantly, the record included a letter from the Department of the Interior voicing concern about the impact of RF radiation from communication towers on migratory birds, *see* J.A. 8,379, 8,383–86. In the Department of the Interior's expert view, the Commission's RF radiation limits "continue to be based on thermal heating, a criterion now nearly 30 years out of date and inapplicable today." J.A. 8,383. "The [current environmental] problem," according to the Department of the Interior, "appears to focus on very low-level, non-thermal electromagnetic radiation." *Id.* Although the Commission has repeatedly claimed that it considered "inputs from [its] sister federal agencies[,]" *2019 Order*, 34 FCC Rcd. at 11,689, the Commission entirely failed to address the environmental harm concerns raised by the Department of the Interior. To be sure, the Commission could conclude that the link between RF radiation and environmental harms is too weak to warrant an amendment to its RF radiation limits. All we hold now is that the Commission should have said something about its sister agency's view rather than ignore it altogether. That lack of any reasoned explanation as to environmental harms does not satisfy the requirements of the APA.

iv.

***9** The dissenting opinion portrays this case as about the Commission's disregard of just five articles and one Department of Interior letter. Not so. The record contained substantial information and material from, for example, the American Academy of Pediatrics, J.A. 4,533; the Council of Europe, J.A. 4,242–44, 4,247–57; the Cities of Boston and Philadelphia, J.A. 4,592–99; medical associations, *see, e.g.*, J.A. 4,536–40 (California Medical Association); thousands

of physicians and scientists from around the world, *see, e.g.*, J.A. 4,197–4,206 (letter to United Nations); J.A. 4,208–17 (letter to European Union); J.A. 5,173–86 (Frieburger Appeal by over one thousand German physicians); and hundreds of people who were themselves or who had loved ones suffering from the alleged effects of RF radiation, *see, e.g.*, J.A. 8,774–9,940; *see also* J.A. 4,218–39 (collecting statements from physicians and health organizations expressing concern about health effects of RF radiation).

The dissenting opinion then offers its own explanation as to why those select sources were not worth being addressed by the agency. This in-the-weeds assessment of scientific studies and assessments falls "outside our bailiwick[,]" Dissenting Op. at ——. More to the point, the Commission said none of what the dissenting opinion does. If it had and if those six sources fairly represented the credible record evidence seeking a change in Commission policy, that discussion likely would have sufficed. But just as *post hoc* rationales offered by counsel cannot fill in the holes left by an agency in its decision, neither can a dissenting opinion. *See Grace v. Barr*, 965 F.3d 883, 903 (D.C. Cir. 2020) ("[W]hen 'assessing the reasonableness of [an agency's action], we look only to what the agency said at the time of the [action]—not to its lawyers' post-hoc rationalizations.' ") (second and third alterations in original) (quoting *Good Fortune Shipping SA v. Commissioner*, 897 F.3d 256, 263 (D.C. Cir. 2018)).

Instead, the Commission chose to hitch its wagon to the FDA's unexplained disinterest in some similar information. Importantly, the dissenting opinion does not dispute that the FDA's conclusory dismissal of that evidence ran afoul of our precedent in *American Horse* and *American Radio*. It just says that the deficiency in the FDA's analysis cannot be imputed to a second agency, and so the dissenting opinion would hold dispositive "the fact that the Commission and the FDA are, to state the obvious, distinct agencies." Dissenting Op. at ——.

They certainly are. But that does not amount to a legal difference here. While imitation may be the highest form of flattery, it does not meet even the low threshold of reasoned analysis required by the APA under the deferential standard of review that governs here. One agency's unexplained adoption of an unreasoned analysis just compounds rather than vitiates the analytical void. Said another way, two wrongs do not make a right. *Compare City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006) ("[T]he action agency must not blindly adopt the conclusions of the consultant agency, citing that agency's expertise. Rather, the ultimate responsibility for compliance with the [Endangered Species Act] falls on the action agency."), *and Ergon-West Virginia, Inc. v. EPA*, 896 F.3d 600, 612 (4th Cir. 2018) ("Although the EPA is statutorily required to consider the [Department of Energy]'s recommendation, it may not turn a blind eye to errors and omissions apparent on the face of the report, which [petitioner] pointed out and the EPA did not address in any meaningful way. In doing so, the EPA 'ignore[d] important aspects of the problem.' ") (internal citations omitted), *with Bellion Spirits, LLC v. United States*, No. 19-5252, —— F.4th ——, —— – ——, slip op. at 13-14 (D.C. Cir. Aug. 6, 2021) (approving consultation by the Alcohol and Tobacco Tax and Trade Bureau ("TTB") with the FDA where the TTB "did not rubberstamp FDA's analysis of the scientific evidence or delegate final decisionmaking authority to FDA," but instead "systematically evaluated and explained its reasons for agreeing with FDA's analysis of each scientific study" and "then made its own determinations" about the claims at hand).

B.

***10** Petitioners' remaining challenges under the APA are unavailing.

Petitioners first argue that the Commission failed to respond to record evidence that exposure to RF radiation at levels below the Commission's current limits may cause cancer. Specifically, Petitioners argue the Commission failed to mention the IARC's classification of RF radiation as possibly carcinogenic to humans, and its 2013 monograph regarding that classification, on which the Commission's notice of inquiry specifically sought comment. Petitioners also argue that the Commission failed to adequately respond to two 2018 studies—the National Toxicology Program ("NTP") study and the Ramazzini Institute study—that found increases in the incidences of certain types of cancer in rodents exposed to RF radiation. Had these 2018 studies been available prior to the IARC's publication of its monograph, Petitioners assert, the IARC would have likely classified RF radiation as "probably carcinogenic," rather than "possibly carcinogenic." This is so, according to Petitioners, because the IARC will classify an agent as "possibly carcinogenic" if there is "limited evidence" that it causes cancer in humans and animals, and as "probably carcinogenic" if there is "limited evidence" that it causes cancer in humans and "sufficient evidence" that it causes cancer in animals. In its 2013 monograph, the IARC found "limited evidence" that RF radiation causes cancer in humans and animals, and therefore classified RF

radiation as "possibly carcinogenic." Int'l Agency for Rsch. on Cancer, *Non-Ionizing Radiation, Part 2*: *Radiofrequency Electromagnetic Fields*, 102 IARC Monographs on the Evaluation of Carcinogenic Risks to Humans 419 (2013) (emphases omitted). Petitioners assert that the NTP and Ramazzini Institute studies provide "sufficient evidence" that RF radiation causes cancer in animals. Therefore, according to Petitioners, had those studies been available prior to the IARC's publication of its monograph, the IARC would have found "limited evidence" that RF radiation causes cancer in humans and "sufficient evidence" that it causes cancer in animals, and would have accordingly classified RF radiation as "probably carcinogenic."

Although the Commission's failure to make any mention of the IARC monograph does not epitomize reasoned decision making, we find that the Commission's order adequately responds to the record evidence that exposure to RF radiation at levels below the Commission's current limits may cause cancer. In contrast to its silence regarding non-cancerous effects, the order provides a reasoned response to the NTP and Ramazzini Institute studies. It explains that the results of the NTP study "cannot be extrapolated to humans because (1) the rats and mice received RF radiation across their whole bodies; (2) the exposure levels were higher than what people receive under the current rules; (3) the duration of exposure was longer than what people receive; and (4) the studies were based on 2G and 3G phones and did not study WiFi or 5G." *2019 Order*, 34 FCC Rcd. at 11,693 n.33. And the order cites a response to both studies published by the International Commission on Non-Ionizing Radiation Protection that provides a detailed explanation of various inconsistencies and limitations in the studies and concludes that "consideration of their findings does not provide evidence that radiofrequency EMF is carcinogenic." Int'l Comm'n on Non-Ionizing Radiation Prot., ICNIRP Note on Recent Animal Carcinogenesis Studies 6 (2018), https://www.icnirp.org/cms/upload/publications/ICNIRPnote2018.pdf; *see also 2019 Order*, 34 FCC Rcd. at 11,693 n.34. Petitioners' contention that the IARC would have classified RF radiation as "probably carcinogenic" had the NTP and Ramazzini Institute studies been published earlier is speculative, particularly in light of the International Commission on Non-Ionizing Radiation Protection's evaluation of those studies. And the IARC monograph's classification of RF radiation as "possibly carcinogenic" is not so contrary to the Commission's determination that exposure to RF radiation at levels below its current limits does not cause cancer as to render that determination arbitrary or capricious.

***11** Petitioners also argue that the Commission's order impermissibly fails to respond to various "additional legal considerations." Specifically, Petitioners argue that the order (i) ignores "express invocations of constitutional, statutory and common law based individual rights," including property rights and the rights of "bodily autonomy and informed consent"; (ii) fails to explain whether FCC regulation preempts rights and remedies under the Americans with Disabilities Act and the Fair Housing Act; (iii) does not assess the costs and benefits associated with maintaining the Commission's current limits; (iv) does not resolve the question of whether "those advocating more protective limits have to prove the existing limits are inadequate," or whether the Commission carries the burden of proving that its existing limits are adequate; and (v) overlooks that the Supreme Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905), "flatly requires that the Commission allow for some remedy for those who suffer from exposure." Pet'rs' Br. at 84–101.

These arguments are not properly before us. The Communications Act provides that a petition for reconsideration is a "condition precedent to judicial review" of "questions of fact or law upon which the Commission ... has been afforded no opportunity to pass." 47 U.S.C. § 405(a). We will accordingly only consider a question raised before us if "a reasonable Commission *necessarily* would have seen the question ... as part of the case presented to it." *NTCH, Inc. v. FCC*, 841 F.3d 497, 508 (D.C. Cir. 2016) (quoting *Time Warner Ent. Co. v. FCC*, 144 F.3d 75, 81 (D.C. Cir. 1998)). Petitioners did not submit a petition for reconsideration to the Commission, and they point to no comments raising their "additional legal considerations" in such a manner as to necessarily indicate to the Commission that they were part of the case presented to it.

Although Petitioners assert that the "Cities of Boston and Philadelphia specifically flagged [the issue of whether FCC regulation preempts rights and remedies under the Americans with Disabilities Act and the Fair Housing Act] and sought clarification," Pet'rs' Br. at 86, they are incorrect. The Cities of Boston and Philadelphia merely observed that the Second Circuit's decision in *Cellular Phone Taskforce* did not address whether " 'electrosensitivity' [is] a cognizable disability under the Americans with Disabilities Act," J.A. 4,598. And the Cities noted that "the FCC and its sister

regulatory agencies share responsibility for adherence to the ADA," J.A. 4,598–99, and urged the Commission to "lead in advice to electrosensitive persons about prudent avoidance," J.A. 4,599. This did not put the Commission on notice that the question whether FCC regulation preempts rights and remedies under the Americans with Disabilities Act and the Fair Housing Act was part of the case presented to it. Nor did a comment asserting that "[t]he telecommunications Act should not be interpreted to injure an identifiable segment of the population, exile them from their homes and their city, leave them no place where they can survive, and allow them no remedy under City, State or Federal laws or constitutions." J.A. 10,190. And Petitioners point to no comments that did a better job of flagging their other "additional legal considerations" for the Commission. The Commission therefore did not have an opportunity to pass on these arguments, so we may not review them. 47 U.S.C. § 405(a).

C.

Petitioners also argue that NEPA required the Commission to issue an EA or EIS regarding its decision to terminate its notice of inquiry.

Petitioners are wrong. The Commission was not required to issue an EA or EIS because there was no ongoing federal action regarding its RF limits. The Commission already published an assessment of its existing RF limits that " 'functionally' satisfied NEPA's requirements 'in form and substance.' " *EMR Network*, 391 F.3d at 272 (quoting *Cellular Phone Taskforce*, 205 F.3d at 94–95). NEPA obligations attach only to "proposals" for major federal action. *See* 42 U.S.C. § 4332(c); *see also* 40 C.F.R. § 1502.5. Once an agency has satisfied NEPA's requirements, it is only required to issue a supplemental assessment when "there remains major federal action to occur." *W. Org. of Res. Councils v. Zinke*, 892 F.3d 1234, 1242 (D.C. Cir. 2018) (internal quotation marks omitted) (quoting *Marsh v. Ore. Nat'l Res. Council*, 490 U.S. 360, 374, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989)). An agency's promulgation of regulations constitutes a final agency action that is not ongoing. *Id.* at 1243. Once an agency promulgates a regulation and complies with NEPA's requirements regarding that regulation, it is not required to conduct any supplemental environmental assessment, *even if* its original assessment is outdated. *Id.* at 1242. Such is the case here. As we explained in *EMR Network* in response to the argument that new data required the Commission to issue a supplemental environmental assessment of its RF guidelines under NEPA, "the regulations having been adopted, there is at the moment no ongoing federal action, and no duty to supplement the agency's prior environmental inquiries." 391 F.3d at 272 (internal quotation marks and citation omitted).

***12** That the Commission voluntarily initiated an inquiry to "determine whether there is a need for reassessment of the Commission radiofrequency (RF) exposure limits and policies" does not change the analysis. *2013 Notice of Inquiry*, 28 FCC Rcd. at 3,501. As the Supreme Court explained long ago, "the mere contemplation of certain action is not sufficient to require an impact statement" under NEPA, *Kleppe v. Sierra Club*, 427 U.S. 390, 404, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976) (internal quotation marks omitted), because, as in this case, "the contemplation of a project and the accompanying study thereof do not necessarily result in a proposal for major federal action," *id.* at 406, 96 S.Ct. 2718. *See also Pub. Citizen v. Off. of U.S. Trade Representatives*, 970 F.2d 916, 920 (D.C. Cir. 1992) ("In accord with *Kleppe*, courts routinely dismiss NEPA claims in cases where agencies are merely contemplating a particular course of action but have not actually taken any final action at the time of suit.") (collecting cases). Were the Commission to propose revising its RF exposure guidelines, it might be required to prepare NEPA documentation. But since the Commission for now has not proposed to alter its guidelines, it need not yet conduct any new environmental review.

III.

For the reasons given above, we grant the petitions in part and remand to the Commission to provide a reasoned explanation for its determination that its guidelines adequately protect against harmful effects of exposure to radiofrequency radiation unrelated to cancer. It must, in particular, (i) provide a reasoned explanation for its decision to retain its testing procedures for determining whether cell phones and other portable electronic devices comply with its guidelines, (ii) address the impacts of RF radiation on children, the health implications of long-term exposure to RF radiation, the ubiquity of wireless devices, and other technological developments that have occurred since the Commission last updated its guidelines, and (iii) address the impacts of RF radiation on the evironment. To be clear, we take no position in the scientific debate regarding the health and environmental effects of RF radiation—we merely conclude that the Commission's cursory analysis of material record

evidence was insufficient as a matter of law. As the dissenting opinion indicates, there may be good reasons why the various studies in the record, only some of which we have cited here, do not warrant changes to the Commission's guidelines. But we cannot supply reasoning in the agency's stead, *see SEC v. Chenery Corp.*, 318 U.S. 80, 87–88, 63 S.Ct. 454, 87 L.Ed. 626 (1943), and here the Commission has failed to provide any reasoning to which we may defer.

So ordered.

Karen LeCraft Henderson, Circuit Judge, dissenting in part: "[A] court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). We thus must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.* (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974)). I believe my colleagues' limited remand contravenes these first principles of administrative law. Because I would deny the petitions in full, I respectfully dissent from Part II.A.i.–iv. and Part III of the majority opinion.

I.

It is important to emphasize how deferential our standard of review is here—where, first, an agency's decision to terminate a notice of inquiry without initiating a rulemaking occurred after the agency opened the inquiry on its own and, second, the inquiry involves a highly technical subject matter at the frontier of science. As the majority recognizes, "[t]he arbitrary and capricious standard of the Administrative Procedure Act 'encompasses a range of levels of deference to the agency.' " Maj. Op. —— (quoting *Am. Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987)). The majority further acknowledges that the Federal Communications Commission's (Commission or FCC) "order is entitled to a high degree of deference." *Id.* at ——. And our precedent also makes plain that "[i]t is only in the rarest and most compelling of circumstances that this court has acted to overturn an agency judgment not to institute rulemaking." *WWHT, Inc. v. FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981); *see also Cellnet Commc'n, Inc. v. FCC*, 965 F.2d 1106, 1111 (D.C. Cir. 1992) ("an agency's refusal to initiate a rulemaking is evaluated with a deference so broad as to make the process akin to non-reviewability"). For the reasons that follow, I believe the Commission's order does not fit those rarest and most compelling circumstances.

A.

***13** We have held that research articles containing tentative conclusions do not provide a basis for disturbing an agency's decision not to initiate rulemaking. *See EMR Network v. FCC*, 391 F.3d 269, 274 (D.C. Cir. 2004). Nevertheless, the majority rejects reaching the same conclusion here regarding the petitioners' assertion that radiofrequency (RF) radiation exposure below the Commission's limits can cause negative health effects unrelated to cancer. To do so, it relies on five research articles in an over 10,500-page record. *See* Maj. Op. at —— – ——.[1]

A close inspection of the five research articles confirms that they also "are nothing if not tentative." *EMR Network*, 391 F.3d at 274. The Foerster article concludes "[o]ur findings *do not provide conclusive evidence* of causal effects and should be *interpreted with caution* until confirmed in other populations." Joint Appendix (J.A.) 6,006 (Milena Foerster et al., *A Prospective Cohort Study of Adolescents' Memory Performance and Individual Brain Dose of Microwave Radiation from Wireless Communication*, 126 Env't Health Persps. 077007 (July 2018)) (emphases added).[2] The Lai article provides a similarly murky picture of the current science. *See* J.A. 5,320–68 (Henry Lai, *A Summary of Recent Literature (2007–2017) on Neurological Effects of Radiofrequency Radiation*, *in* Mobile Commc'ns & Pub. Health 187–222 (M. Markov ed., 2018)). In summarizing the results of human studies on the behavioral effects of RF radiation, the Lai article lists 31 studies that showed *no significant* behavioral effects compared to 20 studies that showed behavioral effects. *See* J.A. 5,327–32. Moreover, of the 20 studies that showed a behavioral effect, at least four found behavioral *improvements*, not negative health effects.

Even the Yakymenko article, which asserts that 93 of 100 peer-reviewed studies found low-intensity RF radiation induces oxidative effects in biological systems, fails to address the critical issue—whether RF radiation below the Commission's current limits can cause negative health effects. *See* J.A. 5,243–58 (Igor Yakymenko et al., *Oxidative Mechanisms of Biological Activity of Low-Intensity Radiofrequency Radiation*, Electromagnetic Biology & Med., Early Online, 1–16 (2015)). Specifically, the Yakymenko article discusses the International Commission on Non-

Ionizing Radiation Protection's (ICNIRP) recommended RF exposure limit—a specific absorption rate of 2 W/kg. *See* J.A. 5,243–44. But the ICNIRP's recommended RF exposure limit is significantly higher than the Commission's current limit—0.08 W/kg averaged over the whole body and a peak spatial-average of 1.6 W/kg over any 1 gram of tissue. *See* 47 C.F.R. § 1.1310(c). Accordingly, it is uncertain how many, if any, of the referenced peer-reviewed studies were conducted at RF radiation levels below the Commission's current limits.[3]

***14** Given this record, I believe we should have arrived at the same conclusion we did in *EMR Network*—"nothing in th[e]se studies so strongly evidenc[es] risk as to call into question the Commission's decision to maintain a stance of what appears to be watchful waiting." *EMR Network*, 391 F.3d at 274. "An agency is not obliged to respond to every comment, only those that can be thought to challenge a fundamental premise." *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000). A review of the five articles on which the majority opinion relies makes plain that the articles do not challenge a fundamental premise of the Commission's order. Instead, it "cherry-pick[s] the factual record to reach [its] conclusion." *Ortiz-Diaz v. U.S. Dep't of Hous. & Urb. Dev.*, 867 F.3d 70, 79 (D.C. Cir. 2017) (Henderson, J., concurring in the judgment).

My colleagues assert that "[t]he dissenting opinion portrays this case as about the Commission's disregard of just five articles." Maj. Op. ——. But their attempt to "turn the tables" plainly fails. It is they who chose the five articles, *see* Maj. Op. —— – ——, to rely on as the basis for their remand, *see id.* at —— ("the Commission's order remains bereft of any explanation as to why, *in light of the studies in the record*, its guidelines remain adequate") (emphasis altered); *id.* at —— ("*the studies in the record* to which Petitioners point *do* challenge a fundamental premise of the Commission's decision to terminate its notice of inquiry") (first emphasis added). I discuss the five articles *only* to demonstrate that the studies "are nothing if not tentative." *EMR Network*, 391 F.3d at 274. Because the studies on which the majority relies plainly are tentative, they do not challenge a fundamental premise of the Commission's decision and therefore cannot provide the basis for the majority's limited remand under our precedent.[4]

B.

I reach the same conclusion regarding the majority's remand of the petitioners' environmental harm argument. *See* Maj. Op. —— – ——. The majority relies on a 2014 letter from the U.S. Department of the Interior (Interior) to the U.S. Department of Commerce about, *inter alia*, the impact of communications towers on migratory birds. But the Interior letter itself concedes that "[t]o date, no independent, third-party field studies have been conducted in North America on impacts of tower electromagnetic radiation on migratory birds." J.A. 8,383.

Moreover, the petitioners did not raise the Interior letter in the environmental harm section of their briefs. "We apply forfeiture to unarticulated [legal and] evidentiary theories not only because judges are not like pigs, hunting for truffles buried in briefs or the record, but also because such a rule ensures fairness to both parties." *Jones v. Kirchner*, 835 F.3d 74, 83 (D.C. Cir. 2016) (alteration in original) (citation omitted). And finally, the environmental harm studies on which the petitioners *did* rely "are nothing if not tentative." *EMR Network*, 391 F.3d at 274.[5]

C.

***15** More importantly, the majority's limited remand runs afoul of our precedent on this precise subject matter. In *EMR Network*, the petitioner asked "the Commission to initiate an inquiry on the need to revise [its] regulations to address the non-thermal effects" of RF radiation. 391 F.3d at 271. In denying the petition, we concluded "the [Commission]'s decision not to leap in, at a time when the [Environmental Protection Agency (EPA)] (and other agencies) saw no compelling case for action, appears to represent the sort of priority-setting in the use of agency resources that is least subject to second-guessing by courts." *Id.* at 273.

This time around, the majority faults the Commission for the U.S. Food and Drug Administration's (FDA) allegedly "conclusory statements" in response to the Commission's 2013 notice of inquiry. *See* Maj. Op. ——. The crux of the majority's position is that "[t]he statements from the FDA on which the Commission's order relies are practically identical to the Secretary's statement in *American Horse* and the Commission's statement in *American Radio*." *Id.*[6] But the analogy to *American Horse* and *American Radio* does not hold water. The majority's Achilles' heel is the fact that the Commission and the FDA are, to state the obvious, distinct agencies.

In *American Horse*, the appellant relied on the results of a study commissioned by the U.S. Department of Agriculture (Agriculture) to support its request for revised Agriculture regulations. *Am. Horse*, 812 F.2d at 2–3. The study found that devices Agriculture had declined to prohibit caused effects falling within the statutory definition of the condition known as "sore";[7] and the Congress had charged Agriculture to eliminate the practice of soring show horses. *Am. Horse*, 812 F.2d at 2–3. Against this backdrop, we found the Agriculture Secretary's "two conclusory sentences [dismissing the need to revise agency regulations] ... insufficient to assure a reviewing court that the agency's refusal to act was the product of reasoned decisionmaking." *Id.* at 6. But an agency head's terse dismissal of his own agency's study is not the case here. First, as noted *supra*, there is no conclusive study in the record, much less one commissioned by the agency whose regulations are being considered for revision. Instead, the record contains dozens of highly technical studies from various sources—the credibility and findings of which we are ill-equipped to evaluate. And crucially, unlike in *American Horse*, the Commission requested the opinion of the FDA—the agency charged with "establish[ing] and carry[ing] out an electronic product radiation control program," 21 U.S.C. § 360ii(a)—studied that opinion and explained why it relied thereon in making its decision.

Similarly, in *American Radio*, the studies summarily dismissed by the FCC were studies the FCC sought to evaluate *itself*; we remanded for the FCC to explain why it failed to do so. *See Am. Radio*, 524 F.3d at 241. Moreover, *American Radio* addressed the reasoning underlying the FCC's *promulgation* of a rule, an action subjected to far less deference than an agency's decision not to initiate a rulemaking.[8]

***16** I believe the Commission reasonably relied on the conclusions of the FDA, the agency statutorily charged with protecting the public from RF radiation. *See* 21 U.S.C. § 360ii(a) (FDA "shall establish and carry out an electronic product radiation control program designed to protect the public health and safety from electronic product radiation").[9] Our precedent is well-settled that "[a]gencies can be expected to 'respect [the] views of such other agencies as to those problems' for which those 'other agencies are more directly responsible and more competent.' " *City of Bos. Delegation v. FERC*, 897 F.3d 241, 255 (D.C. Cir. 2018) (second alteration in original) (quoting *City of Pittsburgh v. Fed. Power Comm'n*, 237 F.2d 741, 754 (D.C. Cir. 1956)). That is precisely what the Commission did here.

The Commission's *2013 Notice of Inquiry* explained that the Commission intended to rely on, *inter alia*, the FDA to determine whether to reassess its own RF exposure limits. *See In re Reassessment of Fed. Commc'ns Comm'n Radiofrequency Exposure Limits & Policies*, 28 FCC Rcd. 3,498, 3,501 ¶ 6 (2013) (*2013 Notice of Inquiry*) ("Since the Commission is not a health and safety agency, we defer to other organizations and agencies with respect to interpreting the biological research necessary to determine what [RF radiation] levels are safe."). And the Commission has consistently deferred to expert health and safety agencies in this context. *See id.* at 3,572 ¶ 211 (RF exposure limits adopted in 1996 "followed recommendations received from the [EPA], the [FDA], and other federal health and safety agencies").[10]

The Commission was true to its word. On March 22, 2019, it asked the FDA if changes to the RF exposure limits were warranted by the current scientific research.[11] On April 24, 2019, the FDA responded:

> FDA is responsible for the collection and analysis of scientific information that may relate to the safety of cellphones and other electronic products. ... As we have stated publicly, ... the available scientific evidence to date does not support adverse health effects in humans due to exposures at or under the current limits, and ... the FDA is committed to protecting public health and continues its review of the many sources of scientific literature on this topic.

J.A. 8,187 (Letter from Jeffrey Shuren, M.D., J.D., Dir., Ctr. for Devices and Radiological Health, U.S. Food & Drug Admin., Dep't of Health & Hum. Servs., to Julius Knapp, Chief, Off. of Eng'g & Tech., U.S. Fed. Commc'ns Comm'n (April 24, 2019)).[12] In my view, the Commission, relying on the FDA, reasonably concluded no changes to the current RF exposure limits were warranted at the time. *See In re Reassessment of Fed. Commc'ns Comm'n Radiofrequency Exposure Limits & Policies*, 34 FCC Rcd. 11,687, 11,691 ¶ 10 (2019) (*2019 Order*).

***17** Simply put, the Commission's reliance on the FDA is reasonable "[i]n the face of conflicting evidence at the frontiers of science." *See Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 90 (2d Cir. 2000). The majority takes issue with what it categorizes as "conclusory statements." Maj.

Op. ——. But the Supreme Court's "*State Farm* [decision] does not require a word count; a short explanation can be a reasoned explanation." *Am. Radio*, 524 F.3d at 247 (Kavanaugh, J., dissenting in part). Brevity is even more understandable if the agency whose rationale is challenged relies on the agency the Congress has charged with regulating the matter.

Granted, "[w]hen an agency in the Commission's position is confronted with evidence that its current regulations are inadequate or the factual premises underlying its prior judgment have eroded, it must offer more to justify its decision to retain its regulations than mere conclusory statements." Maj. Op. ——. But the majority opinion rests on an inaccurate premise—the Commission was not confronted with evidence that its regulations are inadequate nor have the factual premises underlying its RF exposure limits eroded. Sifting through the record's technical complexity is outside our bailiwick. If the record here establishes one point, however, it is that there is no scientific consensus regarding the "non-thermal" effects, if any, of RF radiation on humans. More importantly, the FDA, not the Commission, made the allegedly "conclusory statements" with which the majority takes issue and I believe the Commission adequately explained why it relied on the FDA's expertise.[13]

***18** As in *EMR Network*, the record does not "call into question the Commission's decision to maintain a stance of what appears to be watchful waiting." 391 F.3d at 274. To hold otherwise begs the question: what was the Commission supposed to do? It has no authority over the level of detail the FDA provides in response to the Commission's inquiry. It admits that it does not have the expertise "to interpret[ ] the biological research necessary to determine what [RF radiation] levels are safe." *2013 Notice of Inquiry*, 28 FCC Rcd. at 3,501 ¶ 6. The Commission opened the *2013 Notice of Inquiry* "as a matter of good government" despite its "continue[d] ... confidence in the current [RF] exposure limits." *Id.* at 3,570 ¶ 205. If it *had* reached a conclusion contrary to the FDA's, it most likely would have been attacked as *ultra vires*. For us to require the Commission to, in effect, "nudge" the FDA stretches both our jurisdiction as well as its authority beyond recognized limits.

Accordingly, I respectfully dissent from the limited remand set forth in Part II.A.i.–iv. and Part III of the majority opinion.[14]

All Citations

--- F.4th ----, 2021 WL 3573769

Footnotes

1 "The record in an informal rulemaking proceeding is 'a less than fertile ground for judicial review' and has been described as a 'sump in which the parties have deposited a sundry mass of materials.' " *Pro. Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1220–21 (D.C. Cir. 1983) (quoting *Nat'l Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1052 (D.C. Cir. 1979)).

2 *See also* J.A. 5,995 ("[T]he health effects of [exposure to radiofrequency electromagnetic fields (RF-EMFs)] are still unknown. ... [T]o date studies addressing this topic have produced inconsistent results."); J.A. 6,005 ("Although we found decreases in figural memory, some experimental and epidemiological studies on RF-EMF found *improvements* in working memory performance.") (emphasis added).

3 The BioInitiative Report the majority opinion cites is hardly worth discussing because the self-published report has been widely discredited as a biased review of the science.

4 The majority's hand wave to other record information, *see* Maj. Op. —— – ——, does not carry the day. Rather than provide "substantial information," *id.* at ——, the cited material consists primarily of letters expressing generalized concerns about RF limits worldwide.

5 *See, e.g.*, J.A. 5,231 (Albert Manville, II, *A Briefing Memorandum: What We Know, Can Infer, and Don't Yet Know about Impacts from Thermal and Non-Thermal Non-Ionizing Radiation to Birds and Other Wildlife* 2 (2016)) ("the direct relationship between electromagnetic radiation and wildlife health continues to be complicated and in cases involving non-thermal effects, still unclear"); J.A. 6,174 (Ministry of Env't & Forest, Gov't of India, *Report on Possible Impacts of Communication Towers on Wildlife Including Birds and Bees* 4 (2011)) ("exact correlation between radiation of communication towers and wildlife, are not yet very well established").

6 *See Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227 (D.C. Cir. 2008).

7 *See* 15 U.S.C. § 1821(3) ("The term 'sore' when used to describe a horse means that [as a result of any substance or device used on a horse's limb] such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving ....").

8 *See, e.g.*, *ITT World Commc'ns, Inc. v. FCC*, 699 F.2d 1219, 1245–46 (D.C. Cir. 1983), *rev'd on other grounds*, 466 U.S. 463, 104 S.Ct. 1936, 80 L.Ed.2d 480 (1984) ("Where an agency promulgates rules, our standard of review is diffident and deferential, but nevertheless requires a searching and careful examination of the administrative record to ensure that the agency has fairly considered the issues and arrived at a rational result. Where, as here, an agency chooses *not* to engage in rulemaking, our level of scrutiny is even more deferential ..." (emphasis in original) (footnotes and internal quotations omitted)).

9 *See also In re Guidelines for Evaluating the Env't Effects of Radiofrequency Radiation*, 11 FCC Rcd. 15,123, 15,130 ¶ 18 (1996) ("The FDA has general jurisdiction for protecting the public from potentially harmful radiation from consumer and industrial devices and in that capacity is expert in RF exposures that would result from consumer or industrial use of hand-held devices such as cellular telephones.").

10 *See also In re Guidelines for Evaluating the Env't Effects of Radiofrequency Radiation*, 12 FCC Rcd. 13,494, 13,505 ¶ 31 (1997) ("It would be impracticable for us to independently evaluate the significance of studies purporting to show biological effects, determine if such effects constitute a safety hazard, and then adopt stricter standards that [sic] those advocated by federal health and safety agencies. This is especially true for such controversial issues as non-thermal effects and whether certain individuals might be 'hypersensitive' or 'electrosensitive.' ").

11 *See* J.A. 8,184 (Letter from Julius Knapp, Chief, Off. of Eng'g & Tech., U.S. Fed. Commc'ns Comm'n, to Jeffrey Shuren, M.D., J.D., Dir., Ctr. for Devices and Radiological Health, U.S. Food & Drug Admin. (March 22, 2019)) ("Given that existing studies are continually being evaluated as new research is published, and that the work of key organizations such as [the Institute of Electrical and Electronics Engineers] and ICNIRP is continuing, we ask FDA's guidance as to whether any changes to the standards are appropriate at this time.").

12 *See also Statement from Jeffrey Shuren, M.D., J.D., director of the FDA's Center for Devices and Radiological Health on the recent National Toxicology Program draft report on radiofrequency energy exposure*, Food & Drug Admin. (Feb. 2, 2018), https://www.fda.gov/news-events/press-announcements/statementjeffrey-shuren-md-jd-director-fdas-center-devices-and-radiological-health-recent-national (Since 1999, "there have been hundreds of studies from which to draw a wealth of information about these technologies which have come to play an important role in our everyday lives. Taken together, all of this research provides a more complete picture regarding radiofrequency energy exposure that has informed the FDA's assessment of this important public health issue, and given us the confidence that the current safety limits for cell phone radiation remain acceptable for protecting the public health. ... I want to underscore that based on our ongoing evaluation of this issue and taking into account all available scientific evidence we have received, we have not found sufficient evidence that there are adverse health effects in humans caused by exposures at or under the current radiofrequency energy exposure limits.").

13 The majority asserts that "[o]ne agency's unexplained adoption of an unreasoned analysis just compounds rather than vitiates the analytical void." Maj. Op. ——. As set out *supra*, however, the Commission adequately explained its reliance —for the past 25 years—on the FDA's RF exposure expertise. Plus, after a review of "hundreds of studies," the FDA's conclusion is far from unreasoned. *See supra* note 12. And the two cases to which the majority points are inapposite. *See* Maj. Op. —— (citing *City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006), and *Ergon-West Virginia, Inc. v. EPA*, 896 F.3d 600, 612 (4th Cir. 2018)). Importantly, unlike these petitions, neither case involves a decision not to initiate a rulemaking. As noted, inaction is reviewed under an especially deferential standard. It would be inappropriate to apply precedent using a less deferential standard to modify the standard applicable here. And finally, the Commission did not "blindly adopt the conclusions" of the FDA. *See City of Tacoma*, 460 F.3d at 76. Nor did it "turn a blind eye to errors and omissions apparent on the face of" the FDA's conclusions. *See Ergon-West Virginia*, 896 F.3d at 612.

The majority's citation to *Bellion Spirits, LLC v. United States*, No. 19-5252, —— F.4th —— (D.C. Cir. Aug. 6, 2021), is even further afield. First, *Bellion Spirits* addressed a "statutory authority" question—it did not apply arbitrary and capricious review, much less the especially deferential standard applicable to a decision not to initiate a rulemaking. *See Bellion Spirits,* —— F.4th at ——, slip op. at 13. Second, to the extent *Bellion Spirits* is remotely relevant, I believe it supports my position. There, the Alcohol and Tobacco Tax and Trade Bureau "consulted with [the] FDA on a matter implicating [the] FDA's expertise and then considered that expertise in reaching its own final decision." *Id.* at ——, slip op. at 14. Again, in my view, the Commission did the same thing.

14 Although I join Part II.B. of the majority opinion, I do not agree with the majority's aside, contrasting the Commission's purported silence regarding non-cancerous effects and its otherwise reasoned response. *See* Maj. Op. ——. As

explained *supra*, I believe the Commission reasonably relied on the FDA's conclusion that RF radiation exposure below the Commission's limits does not cause negative health effects—cancerous or non-cancerous.

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969 F.3d 1020
United States Court of Appeals, Ninth Circuit.

CITY OF PORTLAND, Petitioner,
v.
UNITED STATES of America; Federal Communications Commission, Respondents,
City and County of San Francisco; City of Arcadia; City of Bellevue; City of Brookhaven; City of Burien; City of Burlingame; City of Chicago; City of Culver City; City of Dubuque; City of Gig Harbor; City of Kirkland; City of Las Vegas; City of Lincoln; City of Monterey; City of Philadelphia; City of Piedmont; City of Plano; City of San Bruno; City of San Jacinto; City of San Jose; City of Santa Monica; City of Shafter; County of Los Angeles; Howard County; Michigan Municipal League; CTIA - The Wireless Association; Town of Fairfax; Town of Hillsborough, Intervenors.
American Electric Power Service Corporation; CenterPoint Energy Houston Electric, LLC; Duke Energy Corporation; Entergy Corporation; Oncor Electric Delivery Company, LLC; Southern Company; Tampa Electric Company; Virginia Electric and Power Company; Xcel Energy Services Inc., Petitioners,
v.
Federal Communications Commission; United States of America, Respondents,
Verizon; US Telecom—The Broadband Association, Respondents-Intervenors.
Sprint Corporation, Petitioner,
v.
Federal Communications Commission; United States of America, Respondents,
City of Bowie, Maryland; City of Eugene, Oregon; City of Huntsville, Alabama; City of Westminster, Maryland; County of Marin, California; City of Arcadia, California; Culver City, California; City of Bellevue, California; City of Burien, Washington; City of Burlingame, California; City of Gig Harbor, Washington; City of Issaquah, Washington; City of Kirkland, Washington; City of Las Vegas, Nevada; City of Los Angeles, California; City of Monterey, California; City of Ontario, California; City of Piedmont, California; City of Portland, Oregon; City of San Jacinto, California; City of San Jose, California; City of Shafter, California; City of Yuma, Arizona; County of Los Angeles, California; Town of Fairfax, California; City of New York, New York, Intervenors.
Verizon Communications, Inc., Petitioner,
v.
Federal Communications Commission; United States of America, Respondents,
City of Arcadia, California; City of Bellevue, California; City of Burien, Washington; City of Burlingame, California; City of Gig Harbor, Washington; City of Issaquah, Washington; City of Kirkland, Washington; City of Las Vegas, Nevada; City of Los Angeles, California; City of Monterey, California; City of Ontario, California; City of Piedmont, California; City of Portland, Oregon; City of San Jacinto, California; City of San Jose, California; City of Shafter,

California; City of Yuma, Arizona; County of Los Angeles, California; Culver City, California; City of New York, New York; Town of Fairfax, California, Intervenors.
Puerto Rico Telephone Company, Inc., Petitioner,
v.
Federal Communications Commission; United States of America, Respondents,
City of Arcadia, California; City of Bellevue, California; City of Burien, Washington; City of Burlingame, California; City of Gig Harbor, Washington; City of Issaquah, Washington; City of Kirkland, Washington; City of Las Vegas, Nevada; City of Los Angeles, California; City of Monterey, California; City of Ontario, California; City of Piedmont, California; City of Portland, Oregon; City of San Jacinto, California; City of San Jose, California; City of Shafter, California; City of Yuma, Arizona; County of Los Angeles, California; Culver City, California; Town of Fairfax, California; City of New York, New York, Intervenors.
City of Seattle, Washington; City of Tacoma, Washington; King County, Washington; League of Oregon Cities; League of California Cities; League of Arizona Cities and Towns, Petitioners,
v.
Federal Communications Commission; United States of America, Respondents,
City of Bakersfield, California; City of Coconut Creek, Florida; City of Lacey, Washington; City of Olympia, Washington; City of Rancho Palos Verdes, California; City of Tumwater, Washington; Colorado Communications and Utility Alliance; Rainier Communications Commission; County of Thurston, Washington; City of Arcadia, California; City of Bellevue, Washington; City of Burien, Washington; City of Burlingame, California; City of Gig Harbor, Washington; City of Issaquah, Washington; City of Kirkland, Washington; City of Las Vegas, Nevada; City of Los Angeles, California; City of Monterey, California; City of Ontario, California; City of Piedmont, California; City of Portland, Oregon; City of San Jacinto, California; City of San Jose, California; City of Shafter, California; City of Yuma, Arizona; County of Los Angeles, California; Culver City, California; Town of Fairfax, California; City of New York, New York, Intervenors.
City of San Jose, California; City of Arcadia, California; City of Bellevue, Washington; City of Burien, Washington; City of Burlingame, California; Culver City, California; Town of Fairfax, California; City of Gig Harbor, Washington; City of Issaquah, Washington; City of Kirkland, Washington; City of Las Vegas, Nevada; City of Los Angeles, California; County of Los Angeles, California; City of Monterey, California; City of Ontario, California; City of Piedmont, California; City of Portland, Oregon; City of San Jacinto, California; City of Shafter, California; City of Yuma, Arizona, Petitioners,
v.
Federal Communications Commission; United States of America, Respondents,
CTIA - The Wireless Association; Competitive Carriers Association; Sprint Corporation; Verizon Communications,

Inc.; City of New York, New York; Wireless Infrastructure Association, Intervenors.
City and County of San Francisco, Petitioner,
v.
Federal Communications Commission; United States of America, Respondents.
City of Huntington Beach, Petitioner,
v.
Federal Communications Commission; United States of America, Respondents,
City of Arcadia, California; City of Bellevue, Washington; City of Burien, Washington; City of Burlingame, California; City of Gig Harbor, Washington; City of Issaquah, Washington; City of Kirkland, Washington; City of Las Vegas, Nevada; City of Los Angeles, California; City of Monterey, California; City of Ontario, California; City of Piedmont, California; City of Portland, Oregon; City of San Jacinto, California; City of San Jose, California; City of Shafter, California; City of Yuma, Arizona; County of Los Angeles, California; Culver City, California; Town of Fairfax, California; City of New York, New York, Intervenors.
Montgomery County, Maryland, Petitioner,
v.
Federal Communications Commission; United States of America, Respondents.
AT&T Services, Inc., Petitioner,
v.
Federal Communications Commission; United States of America, Respondents,
City of Baltimore, Maryland; City and County of San Francisco, California; Michigan Municipal League; City of Albuquerque, New Mexico; National League of Cities; City of Bakersfield, California; Town of Ocean City, Maryland; City of Brookhaven, Georgia; City of Coconut Creek, Florida; City of Dubuque, Iowa; City of Emeryville, California; City of Fresno, California; City of La Vista, Nebraska; City of Lacey, Washington; City of Medina, Washington; City of Olympia, Washington; City of Papillion, Nebraska; City of Plano, Texas; City of Rancho Palos Verdes, California; City of Rockville, Maryland; City of San Bruno, California; City of Santa Monica, California; City of Sugarland, Texas; City of Tumwater, Washington; City of Westminster, Maryland; Colorado Communications and Utility Alliance; Contra Costa County, California; County of Marin, California; International City/County Management Association; International Municipal Lawyers Association; League of Nebraska Municipalities; National Association of Telecommunications Officers and Advisors; Rainier Communications Commission; Thurston County, Washington; Town of Corte Madera, California; Town of Hillsborough, California; Town of Yarrow Point, Washington; City of Arcadia, California; City of Bellevue, Washington; City of Burien, Washington; City of Burlingame, California; City of Culver City, California; City of Gig Harbor, Washington; City of Issaquah, Washington; City of Kirkland, Washington; City of Las Vegas, Nevada; City of Los Angeles, California; City of Monterey, California; City of Ontario, California; City of Piedmont, California; City of

Portland, Oregon; City of San Jacinto, California; City of San Jose, California; City of Shafter, California; City of Yuma, Arizona; County of Los Angeles, California; Town of Fairfax, California, Intervenors.

American Public Power Association, Petitioner,

v.

Federal Communications Commission; United States of America, Respondents, City of Albuquerque, New Mexico; National League of Cities; City of Brookhaven, Georgia; City of Baltimore, Maryland; City of Dubuque, Iowa; Town of Ocean City, Maryland; City of Emeryville, California; Michigan Municipal League; Town of Hillsborough, California; City of La Vista, Nebraska; City of Medina, Washington; City of Papillion, Nebraska; City of Plano, Texas; City of Rockville, Maryland; City of San Bruno, California; City of Santa Monica, California; City of Sugarland, Texas; League of Nebraska Municipalities; National Association of Telecommunications Officers and Advisors; City of Bakersfield, California; City of Fresno, California; City of Rancho Palos Verdes, California; City of Coconut Creek, Florida; City of Lacey, Washington; City of Olympia, Washington; City of Tumwater, Washington; Town of Yarrow Point, Washington; Thurston County, Washington; Colorado Communications and Utility Alliance; Rainier Communications Commission; City and County of San Francisco, California; County of Marin, California; Contra Costa County, California; Town of Corte Madera, California; City of Westminster, Maryland, Intervenors.

City of Austin, Texas; City of Ann Arbor, Michigan; County of Anne Arundel, Maryland; City of Atlanta, Georgia; City of Boston, Massachusetts; City of Chicago, Illinois; Clark County, Nevada; City of College Park, Maryland; City of Dallas, Texas; District of Columbia; City of Gaithersburg, Maryland; Howard County, Maryland; City of Lincoln, Nebraska; Montgomery County, Maryland; City of Myrtle Beach, South Carolina; City of Omaha, Nebraska; City of Philadelphia, Pennsylvania; City of Rye, New York; City of Scarsdale, New York; City of Seat Pleasant, Maryland; City of Takoma Park, Maryland; Texas Coalition of Cities for Utility Issues; Meridian Township, Michigan; Bloomfield Township, Michigan; Michigan Townships Association; Michigan Coalition To Protect Public Rights-of-way, Petitioners,

v.

Federal Communications Commission; United States of America, Respondents, City of Albuquerque, New Mexico; National League of Cities; City of Brookhaven, Georgia; City of Baltimore, Maryland; City of Dubuque, Iowa; Town of Ocean City, Maryland; City of Emeryville, California; Michigan Municipal League; Town of Hillsborough, California; City of La Vista, Nebraska; City of Medina, Washington; City of Papillion, Nebraska; City of Plano, Texas; City of Rockville, Maryland; City of San Bruno, California; City of Santa Monica, California; City of

Sugarland, Texas; League of Nebraska Municipalities; National Association of Telecommunications Officers and Advisors; City of Bakersfield, California; City of Fresno, California; City of Rancho Palos Verdes, California; City of Coconut Creek, Florida; City of Lacey, Washington; City of Olympia, Washington; City of Tumwater, Washington; Town of Yarrow Point, Washington; Thurston County, Washington; Colorado Communications and Utility Alliance; Rainier Communications Commission; City and County of San Francisco, California; County of Marin, California; Contra Costa County, California; Town of Corte Madera, California; City of Westminster, Maryland, Intervenors.

City of Eugene, Oregon; City of Huntsville, Alabama; City of Bowie, Maryland, Petitioners,

v.

Federal Communications Commission; United States of America, Respondents,

City of Albuquerque, New Mexico; National League of Cities; City of Brookhaven, Georgia; City of Baltimore, Maryland; City of Dubuque, Iowa; Town of Ocean City, Maryland; City of Emeryville, California; Michigan Municipal League; Town of Hillsborough, California; City of La Vista, Nebraska; City of Medina, Washington; City of Papillion, Nebraska; City of Plano, Texas; City of Rockville, Maryland; City of San Bruno, California; City of Santa Monica, California; City of Sugarland, Texas; League of Nebraska Municipalities; National Association of Telecommunications Officers and Advisors; City of Bakersfield, California; City of Fresno, California; City of Rancho Palos Verdes, California; City of Coconut Creek, Florida; City of Lacey, Washington; City of Olympia, Washington; City of Tumwater, Washington; Town of Yarrow Point, Washington; Thurston County, Washington; Colorado Communications and Utility Alliance; Rainier Communications Commission; City and County of San Francisco, California; County of Marin, California; Contra Costa County, California; Town of Corte Madera, California; City of Westminster, Maryland, Intervenors.

No. 18-72689, No. 19-70490, No. 19-70123, No. 19-70124, No. 19-70125, No. 19-70136, No. 19-70144, No. 19-70145, No. 19-70146, No. 19-70147, No. 19-70326, No. 19-70339, No. 19-70341, No. 19-70344

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Argued and Submitted February 10, 2020 Pasadena, California

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Filed August 12, 2020

Synopsis

Background: Local governments, public and private utilities, and wireless service providers petitioned for review of orders of the Federal Communications Commission (FCC), 33 FCC Rcd. 7705, 2018 WL 3738326, 33 FCC Rcd. 9088, 2018 WL 4678555, relating to installation and management of small cell wireless facilities.

Holdings: The Court of Appeals, Schroeder, Senior Circuit Judge, held that:

[1] limitation on fees that state and local governments could charge providers to deploy small cell wireless facilities was in accord with congressional directive in Telecommunications Act;

[2] requirement that aesthetic requirements imposed on small cell wireless facilities be no more burdensome than those imposed on providers of equivalent services exceeded scope of FCC's authority;

[3] requirement that aesthetic requirements imposed on small cell wireless facilities be "objective" was unduly vague;

[4] requirement that aesthetic requirements be "reasonable" was not unduly vague;

[5] time limits within which local governments had to act on applications constituted reasonable interpretation of Telecommunication Act;

[6] FCC did not act arbitrarily in refusing to deem applications to be granted if local governments failed to timely act;

[7] FCC reasonably determined that municipalities, in controlling providers' access to rights-of-way, were therefore subject to preemption under Telecommunications Act;

[8] FCC had authority under Telecommunications Act to remove barriers preventing wireless service providers from accessing existing utility poles owned by public power utilities; and

[9] FCC did not act arbitrarily or capriciously in imposing moratoria on state and local ordinances and practices that were either explicitly or having effect of barring small cell deployment.

Petitions granted in part, denied in part, and dismissed in part.

Bress, Circuit Judge, dissented in part and filed opinion.

West Headnotes (20)

[1] **Administrative Law and Procedure** Telecommunications

Telecommunications Standard and scope of review

Where terms of Telecommunications Act are ambiguous, court will defer to Federal Communications Commission's (FCC) reasonable interpretations. Communications Act of 1934 § 1 et seq., 47 U.S.C.A. § 151 et seq.

[2] **Administrative Law and Procedure** Change of policy; reason or explanation

Where agency is departing from prior policy, court must look to see if it acknowledged that it was changing positions and gave good reasons for new policy. 5 U.S.C.A. § 706(2)(A), (C).

[3] **Municipal Corporations** Political Status and Relations

States Telecommunications; wiretap

Telecommunications Preemption; interplay of federal, state and local laws

Federal Communications Commission (FCC) order limiting fees that state and local governments could charge wireless service providers to deploy small cell wireless facilities was in accord with congressional directive in Telecommunications Act, and not otherwise arbitrary, capricious, or contrary to law, even though FCC did not examine prohibitive effect of fees in each jurisdiction, where record supported FCC's factual determination that above-cost fees, in aggregate, were having prohibitive effect on national basis, FCC adopted presumptively permissible fee levels, and order permitted localities to charge fees above those levels where they could demonstrate that their actual costs exceeded presumptive levels. 5 U.S.C.A. § 706(2)(A), (C); Communications Act of 1934 § 253, 47 U.S.C.A. § 253.

[4] **Zoning and Planning** Telecommunications towers and facilities

Federal Communications Commission (FCC) order requiring that aesthetic requirements imposed on small cell wireless facilities be no more burdensome than those imposed on providers of functionally equivalent services exceeded scope of its authority under Telecommunications Act; Act permitted some

difference in treatment of different providers, so long as treatment was reasonable, and FCC failed to take into account differences among functionally equivalent, but physically different services. Communications Act of 1934 § 332, 47 U.S.C.A. § 332(c)(7)(B)(i)(I).

[5] **Administrative Law and Procedure** Statutory limitation

Agency may not rewrite clear statutory terms.

[6] **Zoning and Planning** Telecommunications towers and facilities

Federal Communications Commission (FCC) order requiring that aesthetic requirements imposed on small cell wireless facilities be "objective"—defined to mean that local regulation "must incorporate clearly-defined and ascertainable standards, applied in a principled manner"—was unduly vague; FCC failed to explain its conclusion that all subjective standards were without public benefit and addressed no public harm. Communications Act of 1934 §§ 253, 332, 47 U.S.C.A. §§ 253, 332.

[7] **Zoning and Planning** Telecommunications towers and facilities

Federal Communications Commission's (FCC) requirement that aesthetic requirements imposed on small cell wireless facilities be "reasonable" was not unduly vague or overbroad; FCC explained that reasonableness requirement resulted in preemption only if aesthetic regulations were not "technically feasible and reasonably directed" at remedying aesthetic harms.

[8] **Zoning and Planning** Time for determination

Federal Communications Commission's (FCC) requirement that local authorities act within 60 days to decide applications for installation on existing wireless infrastructure and 90 days for all other applications—such as building, electric, road closure or other permits—was reasonable interpretation of Telecommunication Act provision requiring that such decisions be made within "reasonable period of time"; limiting time limits to zoning permits could lead states and localities to delay their consideration of other permits to thwart proposed deployment. Communications Act of 1934 § 332, 47 U.S.C.A. § 332(c)(7)(B)(ii).

1 Cases that cite this headnote

[9] **Zoning and Planning** Time for determination

Zoning and Planning Injunctive relief

Federal Communications Commission (FCC) did not act arbitrarily or capriciously in refusing to deem applications for small cell wireless facilities to be granted if local governments failed to act on applications within specified time limits, but instead requiring applicants to seek injunctive relief. Communications Act of 1934 § 332, 47 U.S.C.A. § 332(c)(7)(B)(ii).

1 Cases that cite this headnote

[10] **Municipal Corporations** Political Status and Relations

Telecommunications Preemption; interplay of federal, state and local laws

Federal Communications Commission (FCC) reasonably determined that municipalities, in controlling wireless service providers' access to rights-of-way, were not acting as owners of property, but instead were acting in regulatory manner, and were therefore subject to preemption under Telecommunications Act; rights-of-way, and manner in which municipalities exercised control over them, served public purpose, and they were regulated in public interest, not in cities' financial interests. Communications Act of 1934 § 253, 47 U.S.C.A. § 253.

[11] **Electricity** Permit or consent by public authorities

Telecommunications Construction, Equipment and Maintenance; Towers

Federal Communications Commission (FCC) had authority under Telecommunications Act to remove barriers that would prevent wireless service providers from accessing existing utility poles owned by public power utilities for installation of small cell wireless facilities, despite Act provision governing utility pole attachment rates that contained express exclusion for government-owned utilities; regulation in question did not regulate rates, but instead was promulgated to ensure that state and local statutes did not have prohibitory effect on telecommunications services. Communications Act of 1934 §§ 224, 253, 47 U.S.C.A. §§ 224, 253.

[12] **Municipal Corporations** Political Status and Relations

States Telecommunications; wiretap

Telecommunications Preemption; interplay of federal, state and local laws

Federal Communications Commission (FCC) did not act arbitrarily or capriciously in imposing moratoria on state and local ordinances and practices that were either explicitly or having effect of barring small cell deployment; FCC provided that municipal ordinances of general applicability would qualify as de facto moratoria only where delay caused by ordinances "continues for an unreasonably long or indefinite amount of time." Communications Act of 1934 § 253, 47 U.S.C.A. § 253.

[13] **Eminent Domain** Telecommunications

Federal Communications Commission (FCC) order limiting fees that state and local governments could charge wireless service providers to deploy small cell wireless facilities did not constitute physical taking without just compensation; order precluded local governments from charging unreasonable fees when granting applications and limited cost recovery to actual costs, but continued to allow municipalities to deny access to property for number of reasons. U.S. Const. Amend. 5; Communications Act of 1934 § 253, 47 U.S.C.A. § 253.

[14] **Municipal Corporations** Political Status and Relations

Telecommunications Preemption; interplay of federal, state and local laws

Federal Communications Commission (FCC) order requiring municipalities to respond to applications for use from small cell wireless installers within prescribed period of time or risk immediate control of its property did not violate Tenth Amendment; FCC was interpreting and enforcing Telecommunications Act, adopted by Congress pursuant to its delegated authority under Commerce Clause, to ensure that municipalities were not charging small cell providers unreasonable fees. U.S. Const. art. 1, § 8, cl. 3; U.S. Const. Amend. 10; Communications Act of 1934 §§ 253, 332, 47 U.S.C.A. §§ 253, 332.

[15] **States** Powers Reserved to States

If power is delegated to Congress in Constitution, Tenth Amendment expressly disclaims any reservation of that power to states. U.S. Const. art. 1, § 8, cl. 3; U.S. Const. Amend. 10.

[16] **Telecommunications** Pole attachments

Federal Communications Commission (FCC) rule prohibiting utility from requiring overlashers to conduct pre-overlashing engineering studies or to pay utility's cost of conducting such studies was reasonable attempt to prevent unnecessary costs for attachers, despite utilities' contention that rule undermined their authority to deny pole access; rule allowed overlashers and utilities to negotiate details of overlashing arrangement, and authorized utilities to require that overlashers give 15 days' notice to utilities prior to overlashing so that safety

concerns could be addressed. Communications Act of 1934 § 224, 47 U.S.C.A. § 224.

[17] **Telecommunications** Pole attachments

Federal Communications Commission (FCC) rule prohibiting utilities from denying utility pole access to new attacher solely because of preexisting safety violation that attacher did not cause did not conflict with Telecommunications Act provision allowing utilities to deny access for "reasons of safety." Communications Act of 1934 § 224, 47 U.S.C.A. § 224(f)(2).

[18] **Telecommunications** Pole attachments

Federal Communications Commission (FCC) rule permitting utility-approved contractors to prepare entire pole for attachment was not arbitrary and capricious, despite utilities' contention that permitting attachers to hire contractors to work on upper portion of poles jeopardized safety; rule contained provisions designed to mitigate any increased safety risks, and reasonably addressed delays caused by prior rule. Communications Act of 1934 § 224, 47 U.S.C.A. § 224.

[19] **Telecommunications** Pole attachments

Federal Communications Commission (FCC) had authority under Telecommunications Act to regulate utility-owned pole attachments; FCC could not ensure nondiscriminatory access to poles without allowing make-ready work that would reposition utility attachments, as utilities could otherwise deny access to attachers based on pretextual reasons of insufficient capacity. Communications Act of 1934 § 224, 47 U.S.C.A. § 224.

[20] **Telecommunications** Pole attachments

Federal Communications Commission's (FCC) rate reform rule, which established presumption that all telecommunication carriers were similarly situated and thus entitled to same utility pole attachment rates, was appropriate exercise of FCC's regulatory authority under Telecommunications Act. Communications Act of 1934 § 224, 47 U.S.C.A. § 224.

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On Petitions for Review of Orders of the Federal Communications Commission, FCC No. 18-111, FCC Nos. 18-133, 83-fr-51867

Before: Mary M. Schroeder, Jay S. Bybee, and Daniel A. Bress, Circuit Judges.

Partial Dissent by Judge Bress

OPINION

SCHROEDER, Circuit Judge:

***1031 I. INTRODUCTION**

These matters arise out of the wireless revolution that has taken place since 1996 when Congress passed amendments to the Telecommunications Act to support the then nascent technology. The revolution now represents the triumph of cellular technology over just about everything else in telecommunications services.

The newest generation of wireless broadband technology is known as "5G" and requires the installation of thousands of "small cell" wireless facilities. These facilities have become subject to a wide variety of local regulations. The Federal Communications Commission (FCC) in 2018 therefore promulgated orders relating to the installation and management of small cell facilities, including the manner in which local governments can regulate them. The principal orders we review here thus constitute the FCC's contemporary ***1032** response to these technological and regulatory developments. These orders were promulgated

under the authority of a statute Congress enacted very early in the era of cellular communication, the Telecommunications Act of 1996, to encourage the expansion of wireless communications.

That expansion has been met with some resistance where 5G is concerned, however, particularly from local governments unhappy with the proliferation of cell towers and other 5G transmission facilities dotting our urban landscapes. Petitioners seeking review of the FCC orders thus include numerous local governments, the lead Petitioner being the City of Portland, Oregon. Also unhappy with the expanded installation of 5G technology contemplated by the FCC's orders are public and private power utilities, whose utility poles are often used for wireless facility deployment. Here as well are wireless service providers, who largely support the FCC's orders, but argue the FCC should have gone even further in restricting the authority of state and local governments.

Before us are three FCC orders, issued in 2018, that deal with myriad issues arising from the application of a twentieth century statute to twenty-first century technology. The two orders we deal with first are known as the Small Cell Order and the Moratoria Order. *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 FCC Rcd. 9088 (2018) [hereinafter *Small Cell Order*]; *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 FCC Rcd. 7705, 7775–91 (2018) [hereinafter *Moratoria Order*]. The Orders spell out the limits on local governments' authority to regulate telecommunications providers.

The FCC's statutory authority for limiting local regulation on the deployment of this technology is contained in Sections 253(a) and 332(c)(7) of the Act and reflects congressional intent in 1996 to expand deployment of wireless services. Those provisions authorize the FCC to preempt any state and local requirements that "prohibit or have the effect of prohibiting" any entity from providing telecommunications services. *See* 47 U.S.C. § 253(a), (d).

Many of the issues before us concern whether challenged provisions constitute excessive federal regulation outside the scope of that congressional preemption directive, as understood by our Circuit's leading case interpreting the statute, *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (en banc). We conclude that, given the deference owed to the agency in interpreting and enforcing this important legislation, the Small Cell and Moratoria Orders are, with the exception of one provision, in accord with the congressional directive in the Act, and not otherwise arbitrary, capricious, or contrary to law. *See* 5 U.S.C. § 706(2)(A).

The exception is the Small Cell Order provision dealing with the authority of local governments in the area of aesthetic regulations. We hold that to the extent that provision requires small cell facilities to be treated in the same manner as other types of communications services, the regulation is contrary to the congressional directive that allows different regulatory treatment among types of providers, so long as such treatment does not "unreasonably discriminate among providers of functionally equivalent services." 47 U.S.C § 332(c)(7)(B)(i)(I). We also hold that the FCC's requirement that all aesthetic criteria must be "objective" lacks a reasoned explanation.

The third FCC order before us is intended to prevent owners and operators of utility poles from discriminatorily denying or delaying 5G and broadband service providers access to the poles. ***1033** *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 FCC Rcd. 7705, 7705–91 (2018). Known as the "One-Touch Make-Ready Order," it was issued pursuant to the Pole Attachment Act originally passed in 1978 and expanded in the wake of the Telecommunications Act of 1996. 47 U.S.C. § 224. Section 224 of that Act allows utilities to deny access to pole attachers under some circumstances. Several utilities object to discrete aspects of the One-Touch Make-Ready Order. We uphold the Order, concluding that the FCC reasonably interpreted Section 224 as a matter of law, and the Order is not otherwise arbitrary or capricious.

II. STATUTORY AND INTERPRETIVE FRAMEWORK AND BACKGROUND

What we know as 5G technology is so named because it is the fifth generation of cellular wireless technology. It is seen as transformational because it provides increased bandwidth, allows more devices to be connected at the same time, and is so fast that connected devices receive near instantaneous responses from servers.

Although 5G transmits data at exceptionally fast speeds, it does so over relatively short distances. For this reason, wireless providers must use smaller power-base stations in

more locations, as opposed to the fewer, more powerful base stations used for 4G data transmission. These smaller base stations, known as "small cells," are required in such numbers that 5G technology is currently being deployed on a city-by-city basis. *See generally* Brian X. Chen, *What You Need to Know About 5G in 2020*, N.Y. Times (Jan. 8, 2020), https://www.nytimes.com/2020/01/08/technology/personaltech/5g-mobile-network.html?searchResultPosition=1; Clare Duffy, *What Is 5G? Your Questions Answered*, CNN Business (Mar. 6, 2020), https://www.cnn.com/interactive/ 2020/03/business/what-is-5g/index.html; Sascha Segan, *What Is 5G?*, PCMag (Apr. 6, 2020), https://www.pcmag.com/news/what-is-5g. The prospective proliferation of "small cell" structures throughout our cities, coupled with the inevitable efforts of local governments to regulate their looks and location, gave rise to the FCC's Small Cell and Moratoria Orders—with which local governments are not entirely happy and which were issued under the general provisions of a decades-old statute.

The heart of these proceedings therefore lies in the early efforts of Congress, and now the FCC, to balance the respective roles of the federal government and local agencies in regulating telecommunications services for a rapidly changing technological world. A key statute in these proceedings is Section 253 of the Act. Entitled "Removal of Barriers to Entry," it reflects Congress's intent to encourage expansion of telecommunication service. Section 253(a) provides that "[n]o state or local statute or regulation ... may prohibit or have the effect of prohibiting ... telecommunications service." 47 U.S.C. § 253(a). At the same time Section 253(c) provides that state or local governments can manage public rights-of-way and require reasonable compensation for their use. 47 U.S.C. § 253(c).

In dealing with mobile services, Section 332(c)(7) similarly preserves local zoning authority while recognizing some specific limitations on traditional authority to regulate wireless facilities. 47 U.S.C. § 332(c)(7); *see City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115, 125 S.Ct. 1453, 161 L.Ed.2d 316 (2005) (explaining that section 332(c)(7) "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of ... facilities"). Section 332(c)(7) also contains a limitation on local ***1034** authority nearly identical to Section 253(a). *See* 47 U.S.C. § 332(c)(7)(B)(i)(II) ("The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government ... shall not prohibit or have the effect of prohibiting the provision of personal wireless services."). The other major limitation on local authority relates to ensuring fair treatment of different services. *See* 47 U.S.C. § 332(c)(7)(B)(i)(I). Under that limitation, local governments "shall not unreasonably discriminate among providers of functionally equivalent services." *Id*. Section 332(c)(7) further requires that state or local governments act on requests for placement of personal wireless service facilities "within a reasonable period of time." 47 U.S.C. § 332(c)(7)(B)(ii). We deal with issues pertaining to all of these provisions in the challenges to the Small Cell and Moratoria Orders.

In the One-Touch Make-Ready Order, the FCC was concerned with facilitating attachment of new cellular facilities to existing utility poles. The FCC's authority to regulate pole attachments is found in Section 224 of the Act. That section provides that the FCC "shall regulate the rates, terms, and conditions" imposed upon pole attachments by utilities to ensure that such rates are "just and reasonable," 47 U.S.C. § 224(b)(1), but expressly exempts entities "owned by the Federal Government or any State" from its definition of "utility," *id.* § 224(a)(1). Section 224 also requires utilities to allow service providers "nondiscriminatory access" to its poles, *id.* § 224(f)(1), permitting utilities to deny access "on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes," *id.* § 224(f)(2).

In their petitions, private utilities contend several provisions of the One-Touch Make-Ready Order violate Section 224 or are otherwise arbitrary or capricious in restricting a utility's ability to deny access to attachers. We uphold this Order in all respects.

As relevant to this litigation, the most disputed provision of the Act has been Section 253(a). The provision says that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Soon after the Act's passage, the FCC decided *California Payphone Association*, concerning the location of the now antiquated, but formerly ubiquitous, payphone technology. 12 FCC Rcd. 14,191 (1997). The FCC considered a local regulation that prohibited the installation of payphones on private property outdoors, and held it was not an actual or effective prohibition of services, because phones could still be installed indoors on

public or private property, and outdoors on public property. *Id*. at 14,210. The FCC therefore held the requirement did not "materially inhibit[ ]" payphone service. *Id*. at 14,210.

This court's leading case interpreting Section 253 is our en banc decision in *Sprint*, 543 F.3d 571. We there straightened out an errant panel decision that had been concerned with the phrase "no State or local statute or regulation ... may prohibit ... " in Section 253. That decision read the phrase to mean that Section 253 preempted any state or local regulation that "might possibly" have the effect of prohibiting service. *Id.* at 578. We held in *Sprint* that more than "the mere possibility" of prohibition was required to trigger preemption. *Id*. There must be an actual effect, and we recognized the continuing validity of the material inhibition test from *California Payphone*. *See id.* ("[W]e note ***1035** that our interpretation is consistent with the FCC's.").

Many of the issues we must decide here involve contentions by Petitioners that various provisions of the Small Cell and Moratoria Orders limit state and local regulatory authority to a greater degree than that contemplated in the Act, as interpreted by *California Payphone* and *Sprint*. The application of the FCC's "material inhibition" standard thus comes into play when we consider a number of the challenged provisions.

As a threshold issue, Local Government Petitioners argue that the FCC must demonstrate that an "actual prohibition" of services is occurring before preempting any municipal regulations, and that anything less than that showing is contrary to Section 253(a) and our decision in *Sprint*. We must reject this argument. The FCC's application of its standard in the Small Cell and Moratoria Orders is consistent with *Sprint*, which endorsed the material inhibition standard as a method of determining whether there has been an effective prohibition. The FCC here made factual findings, on the basis of the record before it, that certain municipal practices are materially inhibiting the deployment of 5G services. Nothing more is required of the FCC under *Sprint*.

Local Government Petitioners raise a corollary general objection to the Small Cell and Moratoria Orders, contending that the FCC, without a reasoned explanation, has departed from its prior approach in *California Payphone*, and has made it much easier to show an effective prohibition. *California Payphone*'s material inhibition standard remains controlling, however. The FCC has explained that it applies a little differently in the context of 5G, because state and local regulation, particularly with respect to fees and aesthetics, is more likely to have a prohibitory effect on 5G technology than it does on older technology. The reason is that when compared with previous generations of wireless technology, 5G is different in that it requires rapid, widespread deployment of more facilities. *See, e.g.*, *Small Cell Order* ¶ 53 (explaining that "even fees that might seem small in isolation have material and prohibitive effects on deployment, particularly when considered in the aggregate given the nature and volume of anticipated Small Wireless Facility deployment" (footnote omitted)). The differences in the FCC's new approach are therefore reasonably explained by the differences in 5G technology.

We therefore turn to Petitioners' challenges to specific provisions of the Orders. We deal with the Small Cell and Moratoria Orders together. Both Orders relate to the ways state and local governments can permissibly regulate small cell facilities.

III. SMALL CELL AND MORATORIA ORDERS

The FCC initiated proceedings leading to the Small Cell and Moratoria Orders in response to complaints from wireless service providers. They reported that a variety of state and local regulations and practices were delaying and inhibiting small cell deployment nationwide in violation of Section 253. Those state and local governments now seek review of the Orders. We here summarize the challenged provisions of each Order.

The FCC issued the Moratoria Order in August 2018, and the Small Cell Order the following month. Two principal types of state and local regulation the agency considered relate to fees and aesthetic requirements. The FCC concluded such requirements frequently materially inhibit 5G deployment. The FCC found that when state and local governments charge excessive fees for wireless facility applications, ***1036** the cumulative impact of such charges amounts to an effective prohibition of deployment in other parts of the country. The FCC therefore limited the fees that a state or local government can assess, above a safe harbor amount, to the government's approximate costs. Specifically, the fee is permissible only if it is a "reasonable approximation of the state or local government's costs" of processing applications and managing the rights-of-way. *Small Cell Order* ¶ 50.

With respect to local aesthetic requirements, the FCC concluded such regulations were materially inhibiting small cell deployment within the meaning of the *California Payphone* standard. A key provision of the Small Cell Order sets out the applicable criteria: aesthetic restrictions are preempted unless they are (1) reasonable, (2) no more burdensome than requirements placed on other facilities, and (3) objective and published in advance. *Id.* ¶ 86. To qualify as a "reasonable" aesthetic requirement, an ordinance must be both "technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments." *Id.* ¶ 87.

Another important provision of the Small Cell Order modified the rules for when local jurisdictions have to act on wireless permitting requests, the so-called "shot clock" rules. Nearly a decade earlier, the FCC adopted the first shot clock rules, requiring zoning authorities to decide applications for wireless facility deployment on existing structures within ninety days, and all other applications for zoning permits within 150 days. *Petition for Declaratory Ruling*, 24 FCC Rcd. 13,994 (2009) [hereinafter *2009 Order*]; *see City of Arlington v. FCC*, 668 F.3d 229, 235–36 (5th Cir. 2012), *aff'd*, 569 U.S. 290, 133 S.Ct. 1863, 185 L.Ed.2d 941 (2013). Under the 2009 Order, when a local zoning authority exceeded a shot clock, it was presumed that the municipality violated the statutory requirement to respond within a reasonable time. *City of Arlington*, 668 F.3d at 236. When a local zoning authority failed to act within the proscribed time, the permit applicant could then file a lawsuit seeking a declaration that the city's delay was unreasonable, and the city would have the opportunity to rebut the presumed statutory violation. *2009 Order* ¶¶ 37–38.

The 2018 Small Cell Order broadens the application of these shot clocks to include all telecommunications permits, not just zoning permits, and it shortens the shot clocks. State and local governments now have sixty days to decide applications for installations on existing infrastructure, and ninety days for all other applications. *Small Cell Order* ¶¶ 104–05, ¶ 132, ¶ 136. The Order does not add enforcement mechanisms. If a state or local government misses a permitting deadline, the applicant still must seek an injunction.

In the Moratoria Order, the FCC found that municipal actions that halt 5G deployment, deemed "moratoria," violate Section 253(a) of the Act when they effectively prohibit the deployment of 5G technology. The FCC recognized two general moratoria categories: express and de facto. As with the Small Cell Order, the Moratoria Order does not specifically preempt or invalidate any particular state or local requirement. *See Moratoria Order* ¶ 150. ("[W]e do not reach specific determinations on the numerous examples discussed by parties in our record...."). It lays out the applicable standards.

A. Challenges to the Small Cell Order

[1] **[2]** Following the publication of the Small Cell Order, Local Government and Public Power Petitioners filed these petitions for review, asserting a number of legal challenges. We evaluate these challenges ***1037** under the Administrative Procedure Act by examining whether "an agency's decreed result [is] within the scope of its lawful authority," and whether "the process by which it reaches [a given] result [is] logical and rational." *Michigan v. EPA*, 576 U.S. 743, 135 S. Ct. 2699, 2706, 192 L.Ed.2d 674 (2015) (internal quotation marks omitted); *see* 5 U.S.C. § 706(2)(A), (C). Where terms of the Telecommunications Act are ambiguous, we defer to the FCC's reasonable interpretations. *City of Arlington*, 569 U.S. at 296–97, 133 S.Ct. 1863; *see Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). And where the FCC is departing from prior policy, we look to see if it acknowledged that it was changing positions, and gave "good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009).

To the extent that Petitioners challenge factual findings, we review them for substantial evidence, that is, evidence "a reasonable mind might accept as adequate to support a conclusion." *Biestek v. Berryhill*, —— U.S. ——, 139 S. Ct. 1148, 1154, 203 L.Ed.2d 504 (2019) (internal quotation marks omitted). "[W]hatever the meaning of substantial in other contexts, the threshold for such evidentiary sufficiency is not high." *Id.* (internal quotation marks omitted).

The Small Cell Order covers three major subjects and sets out the standards by which local regulations will be judged in determining whether they are preempted. Local Government Petitioners are not happy with any of them. The subjects are fees, aesthetics, and the time for approving permit applications (shot clocks). We deal with each of them in turn.

1. Fees

State and local governments generally charge a wireless service provider fees to deploy facilities in their jurisdictions. These fees include one-time fees for new wireless facility deployment, as well as recurring annual fees on existing facilities in the public rights-of-way. The FCC concluded in the Small Cell Order that some of these fees were so excessive that they were effectively prohibiting the nationwide deployment of 5G technology and were therefore preempted. The Order places conditions on fees above a certain level to avoid preemption: fees must be: "(1) a reasonable approximation of the state or local government's costs, (2) [with] only objectively reasonable costs ... factored into those fees, and (3) ... no higher than the fees charged to similarly-situated competitors in similar situations." *Small Cell Order* ¶ 50 (footnote omitted).

The Small Cell Order does not require a cost basis for all fees to avoid preemption. There is a safe harbor. Fees are presumptively lawful if, for each wireless facility, application fees are less than $500, and recurring fees are less than $270 per year. *Id.* ¶ 79. If fees exceed those levels, they are not automatically preempted, but can be justified. Localities may charge fees above these levels where they can demonstrate that their actual costs exceed the presumptive levels. *Id.* ¶ 80 & n.234.

The FCC offers two principal rationales for limiting fees above the safe harbor to costs. When local governments charge fees in excess of their costs, they take funds of wireless service providers that would otherwise be used for additional 5G deployment in other jurisdictions. Statements in the record from wireless service providers, and an empirical study, are cited to support the conclusion that limiting fees will lead to additional, faster deployment of 5G technology throughout the country. *See Small Cell Order* ¶¶ 61–64. The FCC explained that high fees also reduce the availability of service in the jurisdiction ***1038** charging the fee. *Id.* ¶ 53. The FCC points to numerous, geographically diverse cities, where excessive fees are delaying deployment of 5G services. In one example, deployment had to be completely halted when a city tried to charge a one-time fee of $20,000 per small cell, with an additional recurring annual fee of $6000.

Local Government Petitioners challenge the fee limitations on a number of grounds. Their primary argument is that there is no rational connection between whether a particular fee is higher than that particular city's costs, and whether that fee is prohibiting service.

[3] The FCC did not base its fee structure on a determination that there was a relationship between particular cities' fees and prohibition of services. The FCC instead found that above-cost fees, in the aggregate, were having a prohibitive effect on a national basis. *See id.* ¶ 53 (explaining that "even fees that might seem small in isolation have material and prohibitive effects on deployment, particularly when considered in the aggregate given the nature and volume of anticipated Small Wireless Facility deployment" (footnote omitted)).

The FCC found there was no readily-available alternative. *See id.* ¶ 65 n.199 (explaining that "the record does not reveal an alternative, administrable approach to evaluating fees without a cost-based focus"). Administrability is important. In *Mayo Foundation for Medical Education & Research v. United States*, 562 U.S. 44, 58–59, 131 S.Ct. 704, 178 L.Ed.2d 588 (2011), the Supreme Court explained that an agency's rule "easily" satisfies *Chevron*'s step two, reasonable interpretation requirement, when the agency concluded that its new approach would "improve administrability." As the FCC explained here, its cost-based standard would prevent excessive fees and the effective prohibition of 5G services in many areas across the country.

Local Government Petitioners are implicitly suggesting an alternative approach that would require an examination of the prohibitive effect of fees in each of the 89,000 state and local governments under the FCC's jurisdiction, a nearly impossible administrative undertaking. Local Government Petitioners do not contend that this is required by statute, nor do they offer any other workable standard. The FCC here made the requisite "rational connection between the facts found and the choice made." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962).

Our colleague's partial dissent offers one legal objection to the fee regulation. The dissent quotes language from our decision in *Qwest Communications Inc. v. City of Berkeley*, 433 F.3d 1253, 1257 (9th Cir. 2006), *overruled on other grounds by Sprint Telephony*, 543 F.3d at 578, to suggest that the FCC's cost based fee regulation should be vacated because it contravenes our precedent. In *Qwest*, however, we considered a challenge to a particular city's fee that was not based on costs. On the basis of then-binding authority we held that city's fee was preempted, but cautioned that we were not holding that "all non-cost based fees are automatically preempted." *Id.* at 1257. Instead we said that in reviewing a

particular city's ordinance "courts must consider substance of the particular regulation at issue." *Id.*

The *Qwest* language has no relevance in this case where we review a nationwide administrative regulation the FCC has adopted, after careful study and notice and comment, that invokes Section 253(a) to preempt only those fees above the safe harbor that exceed municipalities' costs. There has been no "automatic preemption" of "all non-cost based fees."

***1039** Local Government Petitioners also attack the FCC's key factual finding, that high fees were inhibiting deployment both within and outside the jurisdictions charging the fees. Yet, the FCC had statements from wireless service providers, which explained that the providers have been unable to deploy small cells in many cities because both original application and annually recurring fees were excessive. For example, AT&T reported it has been unable to deploy in Portland due to recurring annual fees ranging from $3500 to $7500 per node.

The record also supports the FCC's factual conclusion that high fees in one jurisdiction can prevent deployment in other jurisdictions. In addition to relying on firsthand reports of service providers, the FCC looked to an academic study, known as the Corning Study. A group of economists there estimated that limiting 5G fees could result in carriers reinvesting an additional $2.4 billion in areas "previously not economically viable." The FCC reasonably relied upon this study to support its conclusion that a nationwide reduction in fees in "must-serve," heavily-populated areas, would result in significant additional deployment of 5G technology in other less lucrative areas of the country. The FCC therefore has easily met the standard of offering "more than a mere scintilla" of evidence to support its conclusions regarding the prohibitive effect of above-cost fees. *See Biestek*, 139 S. Ct. at 1154.

We also conclude that the FCC's fee limitation does not violate Section 253(c) of the Act, which ensures that cities receive "fair and reasonable" compensation for use of their rights-of-way. The FCC explained that the calculation of actual, direct costs is a well-accepted method of determining reasonable compensation, and further, that a standard lacking a cost anchor would "have left providers entirely at the mercy of effectively unconstrained requirements of state or local governments." *Small Cell Order* ¶ 74. The statute requires that compensation be "fair and reasonable;" this does not mean that state and local governments should be permitted to make a profit by charging fees above costs. 47 U.S.C. § 253(c). The FCC's approach to fees is consistent with the language and intent of Section 253(c) and is reasonably explained.

Moreover, the FCC did not require local jurisdictions to justify all fees with costs. The FCC adopted presumptively permissible fee levels. In setting those levels, the FCC looked to a range of sources, including state laws that limit fees. *See Small Cell Order* ¶ 78, ¶ 79 n.233. Local Government Petitioners argue that the FCC was in effect, setting rates, and that it was arbitrary and capricious to do so, when it could reference only a few state laws. The FCC was not setting rates, however; it was determining a level at which fees would be so clearly reasonable that justification was not necessary, and litigation could be avoided. The presumptive levels are not arbitrary and capricious.

2. Aesthetics

Local governments have always been concerned about where utilities' infrastructure is placed and what it looks like. When Congress enacted the 1996 Telecommunications Act, it wanted to ensure state and local governments grant fair access to new technologies, and not prefer incumbent service providers over new entrants. Congress recognized that state and local governments could effect such preferential treatment through a wide array of regulations, including regulations on aesthetics. An important provision to prevent this is Section 332(c)(7)(B)(i)(I). It requires that "[t]he regulation of ... personal wireless service facilities by any State or local government ... shall not unreasonably discriminate among providers of functionally ***1040** equivalent services." 47 U.S.C. § 332(c)(7)(B)(i)(I). The legislators who drafted this limitation on local regulation sought to ensure that state and local governments did not "unreasonably favor one competitor over another" in exercising their regulatory authority over facility deployments—including authority to regulate aesthetics. S. Rep. No. 104-230, at 209 (1996) (Conf. Rep.).

Because it recognized that state and local governments often have legitimate aesthetic reasons for accepting some deployments and rejecting others, Congress preempted only regulations that "unreasonably discriminate" among providers. 47 U.S.C. § 332(c)(7)(B)(i)(I). Because there were differences among providers, those who crafted Section 332(c) sought to preserve state and local governments' "flexibility to treat facilities that create different ... aesthetic ... concerns differently, ... even if those facilities provide

functionally equivalent services." S. Rep. No. 104-230, at 209 (1996) (Conf. Rep.).

The provisions of the Small Cell Order dealing with aesthetics are among the most problematic. The Order says, "aesthetics requirements are not preempted if they are (1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance." *Small Cell Order* ¶ 86.

In the Small Cell Order, the FCC does not use Section 332's unreasonable discrimination standard in describing the limits on local regulation of small cell infrastructure. The Small Cell Order says instead that small cell aesthetic requirements must be "no more burdensome" than those imposed on other providers. *Id.* For example, the FCC explained that its standard would prohibit a requirement that small cell carriers "paint small cell cabinets a particular color when like requirements were not imposed on similar equipment placed in the [right-of-way] by electric incumbents, competitive telephone companies, or cable companies." *Id.* ¶ 84 n.241.

Local Government Petitioners point out that the FCC's standard amounts to requiring similar treatment and does not take into account the differences among technologies. The FCC's own justification for its provision bears this out. The FCC asserts that any application of different aesthetic standards to 5G small cells necessarily "evidences that the requirements are not, in fact, reasonable and directed at remedying the impact of the wireless infrastructure deployment." *Id.* ¶ 87. Thus, in the FCC's view, when a state or local government imposes different aesthetic requirements on 5G technology, those requirements are pretextual, unrelated to legitimate aesthetic goals, and must be preempted.

Yet the statute expressly permits some difference in the treatment of different providers, so long as the treatment is reasonable. Indeed, we have previously recognized that Section 332(c)(7)(B)(i)(I) of the Telecommunications Act "explicitly contemplates that some discrimination among providers ... is allowed." *MetroPCS, Inc. v. City & Cty. of S.F.*, 400 F.3d 715, 727 (9th Cir. 2005) (internal quotation marks omitted), *abrogated on other grounds by T-Mobile S., LLC v. City of Roswell*, 574 U.S. 293, 135 S.Ct. 808, 190 L.Ed.2d 679 (2015). We explained that to establish unreasonable discrimination, providers "must show that they have been treated differently from other providers whose facilities are *similarly situated* in terms of the *structure, placement or cumulative impact* as the facilities in question." *Id.* (citation and internal quotation marks omitted). We explained that this "similarly-situated" standard is derived from the text of Section 332, and "strike[s] an appropriate balance ***1041** between Congress's twin goals of promoting robust competition and preserving local zoning authority." *Id.* at 728.

[4] The FCC's regulation here departs from the carefully crafted balance found in Section 332 in at least two critical respects. Unlike Section 332, the regulation does not permit even reasonable regulatory distinctions among functionally equivalent, but physically different services. Under this Order, any local regulation of 5G technology that creates additional costs is necessarily preempted. The FCC's limitation on local zoning authority differs from Section 332 in another respect. The Order requires the comparison of the challenged aesthetic regulation of 5G deployments to the regulation of any other infrastructure deployments, while the statute only requires a comparison with the regulation of functionally equivalent infrastructure deployments. *Small Cell Order* ¶ 87. The prohibition on local regulatory authority in the regulation is in that respect broader than that contemplated by Congress.

[5] The Supreme Court has told us that "an agency may not rewrite clear statutory terms" and that this is a "core administrative-law principle." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014). The FCC has contravened this principle here by placing a limitation on local zoning authority that departs from the explicit directive of Congress in Section 332.

Congress prohibited unreasonable discrimination, but permitted state and local governments to differentiate in the regulation of functionally equivalent providers with very different physical infrastructure. Members of Congress, in writing Section 332, recognized that applying different standards for physically different infrastructure deployments may, in some situations, be a reasonable use of local zoning authority. *See* S. Rep. No. 104-230, at 208 (1996) (Conf. Rep.) ("For example, the conferees do not intend that if a state or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district."). Requirements imposed on 5G technology are not always preempted as unrelated to legitimate aesthetic concerns just because they are "more burdensome" than regulations imposed on functionally equivalent services. We therefore conclude that the requirement in Paragraph 86 of the Small

Cell Order, that limitations on small cells be "no more burdensome" than those applied to other technologies, must be vacated.

[6] The other problematic limitation in the Small Cell Order is that locally-imposed aesthetic requirements be "objective and published in advance." *Small Cell Order* ¶ 86. The Order defines "objective" to mean the local regulation "must incorporate clearly-defined and ascertainable standards, applied in a principled manner." *Id.* ¶ 88.

The FCC explained that it adopted this requirement in response to wireless service providers' complaints that they were being kept in the dark about what requirements they had to meet, and that those requirements were often so subjective that they had no readily ascertainable meaning. As the Order explained, the providers complained that they are unable to "design or implement rational plans for deploying Small Wireless Facilities if they cannot predict in advance what aesthetic requirements they will be obligated to satisfy to obtain permission to deploy a facility at any given site." *Id.* The FCC responded by requiring aesthetic regulations to be "objective and published in advance." *Id.* ¶ 86. The condition of advance publication is not seriously challenged, but the requirement that all local aesthetic regulation be "objective" gives rise to serious concerns.

***1042** Although the FCC was apparently responding to complaints of vague standards, Local Government Petitioners point out that the provision the FCC adopted bars any regulation other than one related to color, size, shape, and placement. It targets for preemption regulations focused on legitimate local objectives, such as ordinances requiring installations to conform to the character of the neighborhood. We do not see how all such regulations, designed like traditional zoning regulations to preserve characteristics of particular neighborhoods, materially inhibit, materially limit, or effectively prohibit the deployment of 5G technology.

We have previously expressed considerable doubt about the view that "malleable and open-ended," aesthetic criteria *per se* prohibit service. *Sprint*, 543 F.3d at 580. In *Sprint*, we recognized that "[a] certain level of discretion is involved in evaluating any application for a zoning permit," and that while "[i]t is certainly true that a zoning board *could* exercise its discretion to effectively prohibit" service, "it is equally true (and more likely) that a zoning board would exercise its discretion only to balance the competing goals of an ordinance," including "valid public goals such as safety and aesthetics." *Id.*

The FCC's position that all subjective aesthetic regulations constitute a *per se* material inhibition must therefore be viewed with considerable skepticism. Its justification for this limitation is that all subjective aesthetic requirements "substantially increase providers' costs without providing any public benefit or addressing any public harm." *Small Cell Order* ¶ 88. This conclusion, that all subjective standards are without public benefit and address no public harm, is unexplained and unexplainable.

The FCC says that its objectivity requirement is "feasible" because some states have adopted laws that prevent cities from applying subjective aesthetic requirements. *See id.* nn.246–47. As the FCC itself recognizes in its brief, aesthetic regulation of small cells should be directed to preventing the "intangible public harm of unsightly or out-of-character deployments." Such harm is, at least to some extent, necessarily subjective. The fact that certain states have prohibited municipalities from enacting subjective aesthetic standards does not demonstrate that such standards never serve a public purpose. We conclude that the FCC's requirement that all aesthetic regulations be "objective" is arbitrary and capricious. At the very least, the agency must explain the harm that it is addressing, and the extent to which it intends to limit regulations meant to serve traditional zoning objectives of preventing deployments that are unsightly or out of neighborhood character.

[7] The only remaining argument of Local Government Petitioners with which we must deal is a challenge to the FCC's requirement that aesthetic regulations be "reasonable." Petitioners contend that it is unduly vague and overbroad. We read this requirement as the FCC does, however, and conclude that it should be upheld. The FCC explains that the reasonableness requirement results in preemption only if aesthetic regulations are not "technically feasible and reasonably directed" at remedying aesthetic harms. *Id.* ¶ 87. We recognized in *Sprint* that imposing an aesthetic requirement that is not technically feasible would constitute an effective prohibition of service under the Act. 543 F.3d at 580. The FCC's justification for adopting this rule is therefore consistent with our case law, as well as congressional intent in enacting Sections 253 and 332, and is not unduly vague or overbroad.

In sum, the requirement that aesthetic regulations be "no more burdensome" than those imposed on other technologies is not ***1043** consistent with the more lenient statutory standard that regulations not "unreasonably discriminate." The requirement that local aesthetic regulations be "objective" is neither adequately defined nor its purpose adequately explained. On its face, it preempts too broadly. We therefore hold those provisions of Paragraph 86 of the Small Cell Order must be vacated.

3. Shot Clocks

Since 2009, the FCC has set time limits, known as shot clocks, for local authorities to act on applications to deploy wireless facilities. In the Small Cell Order, the FCC made two major changes from the shot clocks provisions in the 2009 Order. It expanded the application of shot clock timing requirements from zoning applications to include all permitting decisions. It shortened the shot clock time. State and local governments now have sixty days to decide applications for installation on existing infrastructure, and ninety days for all other applications. *Small Cell Order* ¶¶ 104–05, ¶ 132, ¶ 136. The previous shot clocks were ninety days and 150 days respectively. *Id.* ¶ 104.

To remedy a violation of the 2009 requirements, the applicant had to seek an injunction. During this rulemaking, providers urged the FCC to adopt a "deemed granted" remedy, i.e. where, at the expiration of a shot clock, a permit would be "deemed granted" and the city would have to file a lawsuit to prevent the wireless service provider from beginning construction. The FCC ultimately did not change the remedy, so under the Small Cell Order, when a state or local government misses a shot clock deadline for deciding an application, the applicant must still seek injunctive relief. Wireless Service Provider Petitioners (Sprint et al.) now challenge the FCC's refusal to adopt a deemed granted remedy for shot clock violations.

Local Government Petitioners are unhappy with the shortened time limits for decisions on applications, and with the expansion of shot clocks beyond zoning applications to all applications for deployment of wireless services. We consider their challenges first.

Local Government Petitioners attack the shortened shot clock time frames, contending they arbitrarily restrict municipalities' ability to conduct traditional zoning review that may take longer than the prescribed shot clock requirements. Petitioners criticize the FCC's reliance on a limited survey of state and local laws, contending that those laws had unusual, shorter time frame requirements. Petitioners contend that most state and local governments will be unable to decide permits within the time limits prescribed under the Small Cell Order.

[8] The FCC's reliance on the survey of local laws and practices was reasonable, however, because it served only a limited purpose. The FCC used the survey only to support its unremarkable assertion that some municipalities "can complete reviews more quickly than was the case when the existing Section 332 shot clocks were adopted" in 2009. *Small Cell Order* ¶ 106. It must be remembered that the shot clock requirements create only presumptions. As under the 2009 Order, if permit applicants seek an injunction to force a faster decision, local officials can show that additional time is necessary under the circumstances. *Id.* ¶ 137; *see id.* ¶ 109, ¶ 127; *see also City of Arlington*, 668 F.3d at 259–61 (upholding previous FCC shot-clock presumptions).

The Telecommunications Act itself supports the expansion of shot clocks to all permitting decisions. Section 332(c)(7)(B)(ii) requires a decision to be made within a "reasonable period of time," and applies both to applications "to place" ***1044** wireless facilities as well as requests to "construct, or modify" such facilities. 47 U.S.C. § 332(c)(7)(B)(ii). Together, these enumerations of the categories of applications can reasonably be interpreted to authorize the application of shot clocks to building and construction permits, as well as zoning permits.

The FCC also provided sound reasons for this expansion. It explained that limiting shot clocks to zoning permits could lead states and localities to "delay their consideration of other permits (e.g., building, electric, road closure or other permits) to thwart the proposed deployment." *Small Cell Order* ¶ 134 n.390. Courts interpreting Section 332 have reached a similar conclusion for the same reason. *See, e.g.*, *Ogden Fire Co. No. 1 v. Upper Chichester Twp.*, 504 F.3d 370, 395–96 (3d Cir. 2007) (rejecting the argument that the Act only applies to zoning permits, because the city could use other permits to delay construction of telecommunications infrastructure). The FCC acted well within its authority, and in accordance with the purpose of the Act, when it broadened the application of the shot clocks to encompass all permits, in order to prevent unreasonable delays.

For their part, Wireless Service Provider Petitioners contend that the FCC did not go far enough in modifying the shot clock requirements. Petitioners contend that the FCC should have adopted a deemed granted remedy for shot clock violations, and argue that the Small Cell Order's factual findings compel the adoption of such a remedy.

[9] This argument relies on a mischaracterization of the FCC's factual findings. It is true that the FCC found that delays under the old shot clock regime were so serious they would "virtually bar providers from deploying wireless facilities." *Small Cell Order* ¶ 126. But the FCC concluded that under its new shot clock rules, which shorten the time frames and expand the applicability of the rules, there will be no similar bar to wireless deployment. *Id.* ¶ 129. Because the FCC reasonably explained it has taken measures to reduce delays that would otherwise have occurred under its old regime, the factual findings here do not compel the adoption of a deemed granted remedy.

Wireless Service Providers next argue that the failure to adopt a deemed granted remedy is arbitrary and capricious because the FCC adopted the remedy in a different statutory context, the Spectrum Act, *see* 47 U.S.C. §§ 1451–57, and never explained why it did not do so here. It is understandable that the FCC gave no explanation of the difference because no comments raised any such disparity during the regulatory process. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96, 135 S.Ct. 1199, 191 L.Ed.2d 186 (2015) (explaining that an agency has an obligation to respond to significant comments received). There are critical differences between the language of the Telecommunications Act and the language of the Spectrum Act. The Telecommunications Act requires cities make a decision on applications within a reasonable period of time. *See* 47 U.S.C. § 332(c)(7)(B)(ii) ("A State or local government or instrumentality thereof *shall act* on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time...." (emphasis added)). The Spectrum Act provides that the local government must grant all qualifying applications. 47 U.S.C. § 1455(a)(1) ("[A] State or local government may not deny, and *shall approve*, any eligible facilities request for a modification of an existing wireless tower or base station...." (emphasis added)). The deemed granted remedy in the FCC's Spectrum Act order was in accordance with the text of the statute. There is no similar language in the Telecommunications Act. The FCC's conclusion that a ***1045** different remedy was appropriate here was therefore not arbitrary and capricious.

4. Regulation of Property in the Public Rights of Way

Local governments generally exercise control over public rights-of-way for purposes of determining where installations such as utility poles and traffic lights should be placed. Some of these installations are owned by the municipalities themselves and some are owned by other entities, such as public and private utilities. Local Government and Public Power Petitioners (American Public Power Association et al.) argue that under Supreme Court authority, the preemption provision of Section 253(a) cannot apply to the municipal regulation of access to municipally-owned installations.

The Supreme Court has considered whether a provision of the National Labor Relations Act that preempts local regulation of labor relations prevented a municipality that was running a construction project from enforcing an otherwise valid collective bargaining agreement. *Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I. Inc.*, 507 U.S. 218, 231–32, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993). The Court explained that when a municipality is acting like a private business, and not acting as a regulator or policymaker, there can be no preemption by the NLRA because the municipality was not engaged in regulation of labor relations. *Id.* It was acting as a property owner.

Local Government Petitioners and Public Power Petitioners here contend that the municipalities are acting like private property owners in controlling access to, and construction of, facilities in public rights-of-way and that the Act's preemption provision therefore does not apply. They thus contend the FCC lacks authority to regulate the fees they charge for access to the rights-of-way and to the property on the rights-of-way. They emphasize that the provisions of the Small Cell Order are intended to preempt not only regulation of installations owned by non-municipal entities but also regulation of installations owned by the municipalities themselves.

[10] The issue thus becomes whether the FCC reasonably concluded that local jurisdictions are acting like private property owners when the jurisdictions charge fees or otherwise control the access to public rights-of-way. The FCC's regulations in the Small Cell Order were premised on the agency's determination that municipalities, in controlling access to rights-of-way, are not acting as owners of the property; their actions are regulatory, not propriety, and

therefore subject to preemption. *Small Cell Order* ¶ 96. This is a reasonable conclusion based on the record. The rights-of-way, and manner in which the municipalities exercise control over them, serve a public purpose, and they are regulated in the public interest, not in the financial interests of the cities. As the FCC explained, the cities act in a regulatory capacity when they restrict access to the public rights-of-way because they are acting to fulfill regulatory objectives, such as maintaining aesthetic standards. *Id.*

This conclusion is supported by case law in this Circuit, where we have held that cities operate in a regulatory capacity when they manage access to public rights-of-way and public property thereon. *See Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 881 (9th Cir. 2006). For example, in *Olympic Pipe Line*, we concluded that the City of Seattle operated in a regulatory capacity when it made certain demands of an oil pipeline that operated under city-owned streets in the public rights-of-way. *Id.*; *see also* ***1046** *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1057–58 (9th Cir. 1987) (holding that the City of Santa Monica does not act as a market participant when it sets franchise fees for pipelines that run under its streets).

The FCC's conclusions here about the Order's scope are reasonably explained, and do not violate any presumption against preemption of proprietary municipal conduct. Municipalities do not regulate rights-of-way in a proprietary capacity.

5. Section 224

The FCC adopted the Small Cell Order to remove barriers that would prevent 5G providers from accessing existing facilities for installation of small cells. These existing facilities often include utility poles. Public Power Petitioners, representing the interests of public power utilities, contend the Order cannot affect poles owned by public utilities, because Section 224 of the Telecommunications Act, relating to regulation of utility pole attachment rates, contains an express exclusion for government-owned utilities. *See* 47 U.S.C. § 224(a)(1).

[11] The Small Cell Order is not a regulation of rates pursuant to Section 224, however. It is promulgated under the authority of Section 253 to ensure that state and local statutes do not have a prohibitory effect on telecommunications services. *See* 47 U.S.C. § 253(a); The FCC responded appropriately when it said, "[n]othing in Section 253 suggests such a limited reading, nor does Section 224 indicate that other provisions of the Act do not apply. We conclude that our interpretation of effective prohibition extends to fees for all government-owned property in the [right-of-way], including utility poles." *See Small Cell Order* ¶ 92 n.253. Because Section 253 does not exempt public power utilities from its terms, the FCC reasonably relied on Section 253 to regulate such utilities.

6. Radiofrequency Exposure

More than twenty years ago, the FCC first adopted "radiofrequency standards," (RF standards) which limit the amount of radiation that can be emitted from wireless transmitters. *Guidelines for Evaluating the Envtl. Effects of Radiofrequency Radiation*, 11 FCC Rcd. 15,123 (1996). The FCC is obligated to evaluate the potential impacts of human exposure to radiofrequency emissions under the National Environmental Policy Act. *See* Pub. L. 104-104, 110 Stat. 56 (1996); 47 C.F.R. § 1.1310. In the Telecommunications Act, Congress preempted all municipal regulation of radiofrequency emissions to the extent that such facilities comply with federal emissions standards. 47 U.S.C. § 332(c)(7)(B)(iv).

In 2013, the FCC opened a "Notice of Inquiry," requesting comments on whether it should reassess its RF standards. *See Reassessment of Fed. Commc'ncs Comm'n Radiofrequency Exposure Limits and Policies*, 28 FCC Rcd. 3498 (2013). The agency did not take immediate action on that docket. During the later process leading up to the adoption of the Small Cell Order, Petitioner Montgomery County requested that the Commission complete its 2013 RF proceeding before adopting the Small Cell Order, and that it examine the potential effects of 5G technology on its RF standards. The FCC did not address its RF standards or close the 2013 docket before adopting the Small Cell Order.

Petitioner Montgomery County now challenges the FCC's Small Cell Order as unlawful because the FCC did not complete the 2013 docket review before adopting the Small Cell Order. After its petition was filed, however, the FCC adopted a new order examining radiofrequency exposure in the 5G environment, and concluded that it did not warrant changes to its 1996 standards. Challenges to the FCC's failure ***1047** to perform updated radiofrequency analysis, as contemplated by the 2013 docket, are therefore moot. *See,*

e.g., *Alliance for the Wild Rockies v. U.S. Dep't of Agr.*, 772 F.3d 592, 601 (9th Cir. 2014).

There is no merit to Montgomery County's further suggestion that we should penalize the FCC for what the County calls evasive litigation tactics in not acting earlier. The Supreme Court has emphasized that agencies have "significant latitude as to the manner, timing, content, and coordination of [their] regulations." *Massachusetts v. EPA*, 549 U.S. 497, 533, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007); *see also Mobil Oil Expl. & Producing Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230–31, 111 S.Ct. 615, 112 L.Ed.2d 636 (1991) ("An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities.... [A]n agency need not solve every problem before it in the same proceeding." (citations omitted)). More important, Montgomery County now has what it wanted; the FCC has examined the effects of 5G technology on its RF standards, and closed the 2013 docket. Any challenges to the adequacy of that final agency action must now be brought in a new proceeding.

B. Challenges to the Moratoria Order

The FCC adopted the Moratoria Order in response to complaints from a "broad array of large and small ... wireless providers" that state and local ordinances and practices were either explicitly or having the effect of barring small cell deployment. *Moratoria Order* ¶ 143. In the Order, the FCC concluded that ordinances and practices were materially inhibiting small cell deployment, and the agency provided general standards to differentiate between permissible municipal regulations and impermissible "moratoria." The Moratoria Order describes two general categories of moratoria: express and de facto. *See id.* ¶ 144. It defined express moratoria as "statutes, regulations, or other written legal requirements" in which state or local governments "expressly ... prevent or suspend the acceptance, processing, or approval of applications or permits necessary for deploying telecommunications services." *Id.* ¶ 145. The Order provided such bars to 5G deployment qualify as moratoria even though they are of a limited duration. *Id.*

The FCC then defined de facto moratoria as "state or local actions that are not express moratoria, but that effectively halt or suspend the acceptance, processing, or approval of applications or permits for telecommunications services or facilities in a manner akin to an express moratorium." *Id.* ¶ 149. De facto moratoria violate Section 253 only when they unreasonably or indefinitely delay deployment. *Id.* ¶ 150.

The Order provides a new definition of Section 253(b)'s exemption for local regulations that protect "the public safety and welfare." The Order permits what it describes as "emergency" bans on the construction of 5G facilities to protect public safety and welfare, but only where those laws are (1) "competitively neutral", (2) necessary to address the emergency, disaster, or related public needs, and (3) target only those geographic areas affected by the disaster or emergency. *Id.* ¶ 157.

[12] The City of Portland, not joined by the other Local Government Petitioners, challenges the Order with a handful of criticisms. The City's primary contention is that the Order's definitions of moratoria are overly broad, and therefore unreasonable, because, in the City's view, the Moratoria Order preempts even benign seasonal restrictions on construction, such as freeze-and-frost laws. The City also contends that the Moratoria Order is an invalid application of Section 253, and self-contradictory ***1048** in its definitions. None of these contentions have merit.

As an initial matter, we do not read the Moratoria Order as broadly as the City does in arguing that it would preempt all restrictions on construction, even seasonal ones that cause some delay in small cell deployment. The FCC carefully explained in the Order that municipal ordinances of general applicability will qualify as de facto moratoria only where the delay caused by the ordinances "continues for an unreasonably long or indefinite amount of time such that providers are discouraged from filing applications." *Id.* ¶ 150. Municipal regulations on construction are therefore not preempted if they "simply entail some delay in deployment." *Id.* The explanation is supported by the FCC's assurance in the Order that municipalities retain authority over "construction schedul[ing]." *Id.* ¶ 160. The City's concerns about the breadth of the Moratoria Order are therefore unfounded. The Order does not preempt necessary and customary restrictions on construction.

The City argues that the Moratoria Order preempts laws of general applicability, while Section 253 preempts only those that specifically target the provision of telecommunications services. By its terms, however, Section 253(a) is not so limited. It looks to both the language and impact of local regulations. It preempts all "local statute[s] or regulation[s], or other ... legal requirement[s]" that prohibit or have the effect of prohibiting telecommunications services. 47 U.S.C. § 253(a).

Nor is the Moratoria Order contradictory in its definitions of express and de facto prohibitions. After examining the factual record, the FCC found that some localities had repeatedly re-authorized temporary bans on 5G installation to prohibit the installation of 5G cells indefinitely. *Moratoria Order* ¶ 148 n.546. The FCC therefore clarified that such explicit bans on 5G deployment qualify as express moratoria, even if they have a "limited, defined duration." *Id.* ¶ 148. In a separate paragraph dealing with de facto prohibitions resulting from more general laws, the FCC explained that generally applicable laws, i.e. those that do not facially target small cells, are not preempted unless they cause a delay that "continues for an unreasonably long or indefinite amount of time." *Id.* ¶ 150. There is nothing inconsistent or unexplained in the FCC's separate definitions of express and de facto moratoria.

Finally, the City challenges the FCC's purportedly narrow construction of Section 253(b)'s preemption exception for laws regulating safety and welfare. The FCC reasonably interpreted the phrase "public safety and welfare" in this context to permit emergency bans on 5G deployment where the regulations are competitively neutral and intended to remedy an ongoing public safety concern. The FCC explained such an interpretation was necessary to prevent the pretextual use of safety "as a guise for" preventing deployment. *Id.* ¶ 157. The Order is consistent with the FCC's earlier interpretations of Section 253(b). *See, e.g.*, *New Eng. Pub. Commc'ns Council Petition for Preemption*, 11 FCC Rcd. 19,713 (1996) (rejecting a broad interpretation of Section 253(b)).

The Moratoria Order is not arbitrary, capricious, or contrary to law on a facial basis. As the FCC has recognized, objections to specific applications of the Moratoria Order may be made on a case-by-case basis.

C. Constitutional Challenges to Both Orders

[13] Local Government Petitioners also argue that the Small Cell and Moratoria Orders violate the Fifth and Tenth Amendments. First, Petitioners argue that the Small Cell Order is a physical taking in ***1049** violation of the Fifth Amendment because it requires municipalities to grant providers access to municipal property, including rights-of-way, thereby creating a physical taking without just compensation. Petitioners compare the Small Cell Order to the New York state law at issue in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), which required landlords to permit cable television companies to install cables on their property. In *Loretto*, the Court held the law to be a physical taking because the installation resulted in "permanent occupations of land." *Id.* at 430, 102 S.Ct. 3164. Here, on the other hand, the Small Cell Order precludes state and local governments from charging unreasonable fees when granting applications, and it continues to allow municipalities to deny access to property for a number of reasons. *See Small Cell Order* ¶ 73 n.217. It does not compel access to property in a manner akin to *Loretto*. *See id.* Once again, challenges to particular applications of the Small Cell Order must be made on an as-applied basis.

Petitioners also argue that the Small Cell Order constitutes a regulatory taking by limiting cost recovery. The Supreme Court rejected a similar argument in *FCC v. Florida Power Corp.*, 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987), holding that limiting cost recovery to actual costs did not result in a regulatory taking. *Id.* at 254, 107 S.Ct. 1107. Because the Small Cell Order allows for the recovery of actual costs as well, the Order does not constitute a regulatory taking. *See Small Cell Order* ¶ 50 (explaining that the Small Cell Order continues to allow for fees that "are a reasonable approximation of the state or local government's costs").

[14] **[15]** Finally, Local Government Petitioners argue that, by requiring municipalities to respond to applications for use from 5G and broadband installers within a prescribed period of time or risk immediate control of its property, the Small Cell and Moratoria Orders compel Petitioners to enforce federal law in violation of the Tenth Amendment. In support, they cite *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 579–80, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012) (plurality opinion), where the Court held that financial inducement had the effect of compelling states to enforce a federal program. Nothing like that is happening here. Instead, the FCC is interpreting and enforcing the 1996 Telecommunications Act, adopted by Congress pursuant to its delegated authority under the Commerce Clause, to ensure that municipalities are not charging small cell providers unreasonable fees. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York v. United States*, 505 U.S. 144, 156, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). In addition, by preempting certain State and local policies, the FCC did not commandeer State and local officials in violation of the Tenth Amendment. Although their "language might appear to operate directly on the States,"

the Orders—as applications of the Telecommunications Act—simply "confer[ ] on private entities ... a federal right to engage in certain conduct subject only to certain (federal) constraints." *See Murphy v. Nat'l Collegiate Athletic Ass'n*, —— U.S. ——, 138 S. Ct. 1461, 1480, 200 L.Ed.2d 854 (2018) (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992)). The Orders do not violate the Constitution.

IV. ONE-TOUCH MAKE-READY ORDER

In adopting the One-Touch Make-Ready Order, the FCC intended to make it faster and cheaper for broadband providers to ***1050** attach to already-existing utility poles. *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 FCC Rcd. 7705, ¶ 1 (2018) [hereinafter *One-Touch Make-Ready Order*]. Previously, only the pole owners could perform the preparatory work necessary for attachment. The main purpose of the Order is to create a new process, called one-touch make-ready, that allows new attachers themselves to do all the preparations. *Id.* ¶ 2.

Petitioners American Electric Power Service Corporation et al., a group of private utility companies, do not challenge the most important aspects of the One-Touch Make-Ready Order. Instead, they challenge four secondary aspects of the Order: rules for overlashing, preexisting violations, self-help, and rate reform. For the following reasons, we uphold them all.

A. Overlashing

Overlashing is the process by which attachers affix additional cables or other wires to ones already attached to a pole. The overlashing rule prohibits a utility from requiring overlashers to conduct pre-overlashing engineering studies or to pay the utility's cost of conducting such studies. *Id.* ¶ 119 n.444.

[16] Petitioner utility companies first contend the overlashing rule contradicts the text of Section 224(f)(2), because the rule does not expressly say that a utility can exercise its statutory authority to deny access to poles for safety, capacity, reliability, or engineering reasons. *See* 47 U.S.C. § 224(f)(2). But the overlashing rule does not prevent utilities from exercising their statutory rights, nor has the FCC interpreted the overlashing rule to do so. It is speculative to suggest that it might do so in the future. *See Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998) (declining to consider claim because "it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." (internal quotation marks omitted)). The rule allows overlashers and utilities to negotiate the details of the overlashing arrangement, and is thus consistent with FCC's longstanding policy. *See Amendment of Comm'n's Rules & Policies Governing Pole Attachments*, 16 FCC Rcd. 12,103, ¶ 74 (2001).

Petitioners also argue that the overlashing rule undermines a utility's Section 224(f)(2) authority to deny pole access, because it prevents utilities from requiring overlashers to provide certain information. We conclude that the overlashing rule does not impede a utility's exercise of its statutory authority to deny access to poles. The rule authorizes utilities to require that overlashers give fifteen days' notice to utilities prior to overlashing so that safety concerns can be addressed. *One-Touch Make-Ready Order* ¶¶ 115–16. The record shows that such notice provisions were frequently negotiated in the past on a voluntary basis and supports the FCC's conclusion that such "an advance notice requirement has been sufficient to address safety and reliability concerns." *Id.* ¶ 117. Indeed, in evaluating similar rules, the D.C. Circuit has already held that there is "no merit" to the claim that utilities cannot effectively exercise their rights under Section 224(f)(2) without "prior notice" of overlashing. *See S. Co. Servs., Inc. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002).

Finally, Petitioners argue that by prohibiting the utilities from charging overlashers for the cost of conducting pre-overlashing studies, the overlashing rule contradicts Section 224(d)(1). That section ensures cost recovery, but it does so only for attachments by cable television providers. *See* 47 U.S.C. § 224(d)(1)–(3). It does not apply here. The overlashing rule is ***1051** thus a reasonable attempt by the FCC to prevent unnecessary costs for attachers.

B. Preexisting Violation Rule

[17] The preexisting violation rule prohibits utilities from denying access to a new attacher solely because of a preexisting safety violation that the attacher did not cause. *One-Touch Make-Ready Order* ¶ 122. Petitioners contend that this is contrary to Section 224(f)(2), which allows utilities to deny access for "reasons of safety." There is no conflict.

The rule defines the term "reasons of safety" as preventing a utility from denying access to a new attacher because of a safety hazard created by a third party. *Id.* ¶ 122. Such denials

have the effect of forcing an innocent would-be attacher to fix the violation. This rule prevents the utilities from passing the costs off on entities that did not cause the safety problem in the first place. The FCC confirmed at oral argument that the preexisting violation rule would not prevent utilities from rejecting proposed attachments that increase safety risks on a utility pole. The rule thus operates to prevent utilities from relying on preexisting violations pretextually to deny pole access to attachments that pose no greater safety risk than existing attachments. Because the preexisting violation rule reasonably defines the term "reasons of safety," the FCC's interpretation is reasonable.

C. Self-Help Rule

[18] Prior to the One-Touch Make-Ready Order, attachers could hire contractors to perform preparatory work only on the lower portion of a pole. The self-help rule lets the utility-approved contractors prepare the entire pole for attachment. *Id.* ¶¶ 97–99. Petitioners argue that this expansion is contrary to Section 224(f)(2) because permitting attachers to hire contractors to work on the upper portion of poles jeopardizes safety. Yet, the rule has a number of provisions designed to mitigate any increased safety risks. For example, the rule gives a utility a ninety-day window to complete the pre-attachment work itself (thereby circumventing the rule's contractor provisions entirely). *Id.* ¶ 99. The rule also requires new attachers to use a utility-approved contractor to perform the self-help work, and it requires the attacher to give the utility advanced notice of when the self-help work will occur so that the utility can be present if it wishes. *Id.* ¶¶ 99–106.

The rule represents a change from earlier rules on what self-help measures an attacher could perform, and the FCC explained that use of approved contractors would improve efficiency. *Id.* ¶ 97. A complaint process in the old self-help rule allowed new attachers to file complaints when a utility was not preparing the pole in a timely fashion. This did not encourage efficiency. It was an "insufficient tool for encouraging [a utility's] compliance with [the FCC's] deadlines." *Id.* ¶ 98. The FCC reasonably views the deployment of new 5G technology to be a matter of "national importance," justifying extension of the self-help rule to promote timely installations. *Id.* ¶ 97. The self-help rule is thus not arbitrary or capricious.

[19] Petitioners also argue that the FCC lacks authority to regulate utility-owned pole attachments, since Section 224 defines "pole attachments" to include attachments *to* a utility-owned or -controlled pole. But the FCC has authority to promulgate "regulations to carry out the provisions of" Section 224, 47 U.S.C. § 224(b)(2), which includes regulations addressing "nondiscriminatory access" to utility poles, *id.* § 224(f)(1). It was reasonable for the FCC to conclude that it could not ensure nondiscriminatory access to poles without allowing make-ready work that would reposition utility attachments; ***1052** otherwise, utilities could simply deny access to attachers based on pretextual reasons of insufficient capacity. *See S. Co. v. FCC*, 293 F.3d 1338, 1348 (11th Cir. 2002) ("[T]he FCC must have some way of assessing whether these needs are bona fide; otherwise, a utility could arbitrarily reserve space on a pole ... and proceed to deny attachers space on the basis of 'insufficient capacity.' "). Petitioners' statutory challenge thus fails.

Petitioners mount a procedural challenge to the rule, arguing that the FCC did not comply with the APA's notice requirement, 5 U.S.C. § 553, because it had not issued a proposed rule before announcing the final self-help rule. In raising the issue in a single footnote, petitioners have waived any challenge to the APA's notice requirement. *See Idaho Conservation League v. Bonneville Power Admin.*, 826 F.3d 1173, 1178 (9th Cir. 2016). In any event, the FCC's Notice of Proposed Rulemaking (NPRM) sought proposals to speed up access to poles by allowing new attachers to prepare poles for attachment, and several commenters proposed expanding an attacher's ability to perform preparatory work on the entire pole. We conclude that, at the very least, the self-help rule is a logical outgrowth of the NPRM. *See Rybachek v. EPA*, 904 F.2d 1276, 1288 (9th Cir. 1990) (explaining that an agency need not provide a new NPRM as long as the final published rule is "a logical outgrowth of the notice and comments received"). There is no reason to force the agency to begin the self-help rulemaking process anew.

D. Rate-Reform Rule

The rate reform rule continues regulatory efforts to remove rate disparities between telecommunications carriers who historically owned utility poles (so-called incumbent local exchange carriers, or ILECs) and telecommunications carriers who do not own utility poles (so-called competitive local exchange carriers, or CLECs). *See Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183, 185–86 (D.C. Cir. 2013). This rule establishes a presumption that all telecommunication carriers are similarly situated and thus entitled to the same rates. *One-Touch Make-Ready Order* ¶ 123. But if a utility successfully rebuts the presumption by showing that an ILEC continues to retain "net benefits" that other telecommunications providers do not enjoy, then the rate

reform rule imposes a maximum rate that ILECs and utilities may negotiate. *See id.* ¶¶ 128–29.

Section 224(e)(1) authorizes the FCC to prescribe rates for pole attachments used by CLECs, but not ILECs. *See* 47 U.S.C. § 224(e)(1); *see also id.* § 224(a)(5). Petitioners therefore argue that the FCC lacks the authority to prescribe the same rates for ILECs. Section 224(b)(1), however, requires the FCC to set just and reasonable rates for all telecommunications carriers, and the FCC interpreted that to include ILECs as well as CLECs. *See id.* § 224(b)(1). The FCC has interpreted Section 224(b)(1) this way since 2011, and the D.C. Circuit upheld this interpretation some years ago. *See Am. Elec. Power Serv. Corp.*, 708 F.3d at 188. And the Supreme Court has made clear that Section 224(e)(1) "work[s] no limitation" on the FCC's more general ratemaking authority under Section 224(b)(1), which is the statutory provision that the agency invoked here. *See Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 335–36, 122 S.Ct. 782, 151 L.Ed.2d 794 (2002).

[20] This rule does, for the first time, set the same presumptive rates for ILECs and CLECs, and the FCC explained why its record supported such a rule. *See One-Touch Make-Ready Order* ¶ 126. A study by US Telecom showed that earlier efforts to decrease rate disparities between ILECs and CLECs had not been successful, and that historic differences between ***1053** ILECs and CLECs that supported different rates in the past are now disappearing. *See id.* ¶¶ 124–26. The FCC provided an adequate justification for setting the same presumptive rates for all telecommunications providers.

Finally, Petitioners argue that the rate reform rule may result in their incomplete recovery of costs, because if a utility successfully rebuts the presumption that an ILEC should have the same rates as CLECs, the rule imposes a maximum rate ILECs and utilities may negotiate. *See id.* ¶ 129. The maximum negotiable rate is not arbitrary or capricious, however, because FCC set the rate at a value that is higher than both CLEC and cable operator rates, and the FCC had previously determined those rates were just, reasonable, and allowed full cost recovery. *Id.* ¶ 129 n.483; *see also Implementation of Section 224 of the Act*, 26 FCC Rcd. 5240, ¶ 183 (2011).

The rate reform rule, like the overlashing, preexisting violations, and self-help rules, is an appropriate exercise of the FCC's regulatory authority under the Telecommunications Act.

V. CONCLUSION

We therefore hold that the FCC's requirement in the Small Cell Order that aesthetic regulations be "no more burdensome" than regulations applied to other infrastructure deployment is contrary to the controlling statutory provision. *See* 47 U.S.C. § 332(c)(7)(B)(i)(II). We also hold that the FCC's requirement that all local aesthetic regulations be "objective" is not adequately explained and is therefore arbitrary and capricious. We therefore **GRANT** the petitions as to those requirements, **VACATE** those portions of the rule and **REMAND** them to the FCC. The petition of Montgomery County is **DISMISSED** as moot. As to all other challenges, the petitions are **DENIED**. Each party to bear its own costs.

BRESS, Circuit Judge, dissenting in part:

The majority opinion carefully addresses an array of legal challenges to a series of FCC *Orders* designed to accelerate the deployment of 5G service. I join the court's fine opinion except as to Part III.A.1, which upholds the FCC's decision to preempt any fees charged to wireless or telecommunications providers that exceed a locality's costs for hosting communications equipment. In my view, the FCC on this record has not adequately explained how all above-cost fees amount to an "effective prohibition" on telecommunications or wireless service under 47 U.S.C. §§ 253(a) and 332(c)(7)(B)(i)(II).

The Telecommunications Act of 1996 provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). The Act contains a similar provision for wireless service. *See id.* § 332(c)(7)(B)(i)(II) ("The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof ... shall not prohibit or have the effect of prohibiting the provision of personal wireless services.").

The Act does not define what it means for a local policy to "have the effect of prohibiting" service. Since 1997, however, the FCC has interpreted the phrase to preempt local policies that "materially inhibit" the ability of providers "to compete

in a fair and balanced legal and regulatory environment." *See Small Cell Order* ¶ 35 (quoting *Cal. Payphone Ass'n*, 12 FCC Rcd. 14191, 14206 (1997)). This standard does not require a "complete or insurmountable" barrier to service. *Id.* But it ***1054** does require that a local rule materially inhibit the ability to provide service based upon the "*actual* effects" "of a state or local ordinance," "not [ ] what effects the ordinance *might possibly* allow." *Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (en banc) (emphasis in original); *see also id.* (the statute requires an "actual or effective prohibition, rather than the mere possibility of prohibition") (quotations omitted).

In the *Small Cell Order*, the FCC concluded that state and local fees materially inhibit telecommunications and wireless service when they exceed a locality's reasonable cost of accommodating communications facilities. *Small Cell Order* ¶¶ 50, 53. The FCC cited evidence that certain exorbitant fees have stopped providers from offering service in certain locales. *See, e.g.*, AT&T Aug. 10, 2018 *Ex Parte* Letter (AT& T "has not deployed any small cell sites in Portland, Oregon" due to the city's $7,500 attachment fee and recurring fee of $3,500 to $5,500). The agency also found that "even fees that might seem small in isolation have material and prohibitive effects on deployment particularly considered in the aggregate." *Small Cell Order* ¶ 53. This latter finding was based on the FCC's determination that reduced fees generate cost-savings for providers, which enables them to use the newfound savings to expand wireless and telecommunications coverage. *See id.* ¶ 50, 55–56, 64–65 & nn.194–95. The agency estimated aggregate cost-savings from a reduction in fees to be over $2 billion, relying on a 2018 study by Corning, Inc. *Id.* ¶¶ 7, 60 & n.169.

The FCC carved out a safe harbor from the *Order*'s broad preemption rule for pole construction fees up to $1,000, attachment fees up to $500 (or $100 after a provider's first five 5G facilities), and recurring fees up to $270. *Id.* ¶ 79. Fees may exceed the levels in the *Small Cell Order*'s safe harbor only if they reasonably approximate a locality's costs, which include expenses "related to processing an application," street closures, issuing "building or construction permits," and access to and maintenance of public rights of way. *Id.* ¶¶ 32 n.71, 50 n.131, 79.[1]

No one doubts that exorbitant fees can impede the deployment of communications infrastructure. *See, e.g.*, *P.R. Tel. Co. v. Mun. of Guayanilla*, 450 F.3d 9, 17–19 (1st Cir. 2006). But fees are prohibitive because of their financial effect on service providers, not because they happen to exceed a state or local government's costs. Consider a $500 fee in Small Town A that exceeds the town's costs by 1¢, and a $2,000 cost-based fee in Big City B. By the *Small Cell Order*'s logic, the lower fee is preempted, but the higher fee is not. It is hard to rationalize the former under the statute, which requires an actual and material inhibition of telecommunications or wireless service. *Sprint Telephony*, 543 F.3d at 578.

Perhaps for this reason, this court over a decade ago "decline[d]" to hold "that all non-cost based fees are automatically preempted" under the Telecommunications Act. *See Qwest Commc'ns Inc. v. City of Berkeley*, 433 F.3d 1253, 1257 (9th Cir. 2006), *overruled on other grounds by Sprint Telephony*, 543 F.3d at 578.[2] The ***1055** FCC was aware of this precedent when it issued the *Small Cell Order*, but expressly "reject[ed] the view of those courts that have concluded that [§] 253(a) necessarily requires some additional showing beyond the fact that a particular fee is not cost-based." *See Small Cell Order* ¶ 53 n.143 (citing *Qwest*, 433 F.3d at 1257).

On this record, the FCC has not adequately explained its basis for concluding, contra our precedent, that there is an intrinsic relationship between a fee's approximation of costs and its prohibitive effect on service providers. The FCC's reliance on individual fees it considers "excessive" tells us that fees can work effective prohibitions. But this does not on its own justify a blanket prohibition on all above-cost fees. A $7,500 fee in Portland may well prohibit service, but that is because of the financial toll it inflicts, not because it exceeds the city's costs. And the FCC has not identified in the administrative record the frequency of above-cost fees or the amounts that localities have generally charged above cost.

The FCC has instead determined that a prohibition on all above-cost fees is justified because all above-cost fees, in the aggregate, effectively prohibit 5G deployment. The linchpin of the agency's aggregation theory is a 2018 study by Corning, Inc., which estimates at over $2 billion the cost-savings and reinvestment from reduced fees. *Small Cell Order* ¶¶ 7, 60 & n.169. But the Corning Study is not about fees above costs. And the FCC has not explained how this study tells us about the prevalence of above-cost fees or the burden such fees place on service providers.

Instead, the Corning Study calculated "the cost savings from capping fees at a level in line with the median of recent state regulations," estimating that amount at over $2 billion.

Because this is not a measure of fees above costs, the Corning Study does not say whether the caps it used to measure savings approximate costs. Indeed, the Corning Study notes that "[t]here is still significant uncertainty around what 'typical' rates are." The study further states that "attachment and application fees" are "lesser drivers" of 5G deployment economics, raising questions about the extent to which all fees above costs necessarily effectively prohibit service.

At bottom, what the Corning Study conveys is that if fees are reduced, it will produce cost savings to those who pay the fees. *Small Cell Order* ¶¶ 50, 53, 55–56, 60 & n.169, 64–65 & nn.194–95. But that commonsense observation would be true of any fee considered in the aggregate. And it would seemingly mean that any fee in any amount could qualify as an effective prohibition, once aggregated. The same would be true of the aggregate effects of any form of regulation that localities would apply outside the fee context. I am therefore concerned that on the record as it stands, the FCC's approach lacks a limiting principle. At least absent some estimated quantification of above-cost fees in the aggregate (which the Corning Study does not provide) or some further estimate tied to the rule it adopted, the FCC's logic would appear to justify the preemption of any state or local rule.

The FCC's "reinvestment" theory invites similar concerns. It may be true that every fee imposes some cost that, if avoided, could potentially be reinvested to expand 5G coverage. But it does not follow that every type of fee rises to the level of an "effective prohibition," which is the line Congress drew in the Telecommunications Act. *See* ***1056** *Cal. Payphone*, 12 F.C.C. Rcd. at 14209 (stating that, "standing alone," the fact that providers "would generate less revenue ... does not necessarily mean that [services] are impractical and uneconomic") (quotations omitted); *cf. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 390 n.11, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999) (disagreeing "that a business can be impaired in its ability to provide services—even impaired in that ability in an ordinary, weak sense of impairment—when the business receives a handsome profit but is denied an even handsomer one"). A provider reinvestment theory, without more, would similarly appear to justify the preemption of any local policy that imposes costs on providers.

On this record, the FCC thus has not shown that above-cost fees effectively prohibit service in many, most, or a plurality of cases. I therefore cannot conclude that the agency has articulated "a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (quotations omitted).

The FCC itself recognizes that "in theory, a sufficiently small departure from actual and reasonable costs might not have the effect of prohibiting service," but concludes its cost-based standard is still appropriate because "the record does not reveal an alternative, administrable approach to evaluating fees." *Small Cell Order* ¶ 65 n.199. Concerns about administrability, though important as a policy matter, must still be operationalized under the statute's effective prohibition standard. A rule prohibiting fees that exceed cost by $1 would be equally administrable, but that does not mean such fees are invariably effective prohibitions on service, which is the relevant question under §§ 253(a) and 332(c)(7).

The *Order*'s safe harbors underscore my concerns. The FCC concedes that its safe harbors, which are not based on estimated costs, tolerate fee levels "in excess of costs in many cases." *Small Cell Order* ¶ 79 n.233. That makes it more difficult to credit the agency's finding that above-cost fees are *per se* effective prohibitions on service. The safe harbor also allows local governments to charge recurring fees of $270, which is substantially greater than the $150 cap on recurring fees used to calculate cost-savings in the Corning Study. There are also discrepancies between the FCC's safe harbors for application fees and the Corning Study's caps. The FCC does not estimate how much of the over $2 billion in cost-savings from the Corning Study would be left over under its more expansive safe harbors. Nor has the agency explained what portion of that figure can be attributed to above-cost fees.

I would have vacated and remanded the *Small Cell Order*'s prohibition on above-cost fees. *See* 5 U.S.C. § 706(2)(A), (E). While the FCC's objective of advancing 5G service is undoubtedly an important one, Congress set limits on when local actions can be preempted. While a prohibition on all above-cost fees may well be justifiable, I do not believe the FCC has sufficiently justified it on the present record. With the exception to its references to legislative history, I otherwise join the court's opinion in full.

All Citations

969 F.3d 1020, 20 Cal. Daily Op. Serv. 8306, 2020 Daily Journal D.A.R. 8518

Footnotes

1 The *Small Cell Order* also interpreted the phrase "fair and reasonable compensation" in 47 U.S.C. § 253(c) to limit state and local fees to cost-recovery. *Small Cell Order* ¶ 55. But the agency declined to use this savings clause "as an independent prohibition on conduct that is not itself prohibited by [§] 253(a)." *Id.* ¶ 53 n.143; *see also id.* ¶ 50 n.132.

2 Qwest applied a lenient standard that more easily allowed the FCC to show an effective prohibition, 433 F.3d at 1256, a standard our en banc court later rejected. *See Sprint Telephony*, 543 F.3d at 576–78. If above-cost fees were not *per se* prohibitions under the less stringent *Qwest* standard, it is hard to see how they would be under the stricter approach of *Sprint Telephony*. I do not suggest that *Qwest* imposes a "legal" bar to the FCC's contrary determination, Maj. Op. 1038, but rather that the FCC has not adequately explained the basis for its conclusion here.

Inside: Dealing with COVID firsthand, Page 22

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TAHOE
MOUNTAIN NEWS

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Photo by Taylor Flynn

South Lake Tahoe native Monica Eisenstecken has filed a lawsuit against TRPA and others over cell towers.

Standing Tall

In this month's Cover Story, we look at the issues surrounding cell towers in the Tahoe Basin and the legal battle of one resident to turn the tide.

inside:

Photo by Taylor Flynn

Monica Eisenstecken speaks out against a proposed cell tower near her Ski Run area home.

Legal battle looms over cell tower

By Heather Gould

"I had never gone to one city council or TRPA meeting in my life. I was just minding my own business. You think 'Oh, this is Tahoe, they're going to take care of that stuff," said 47-year-old Tahoe native Monica Eisenstecken. Now, Eisenstecken finds herself headlining a federal lawsuit against the Tahoe Regional Planning Agency, its executive director, Joanne Marchetta, TRPA board members Marsha Berkbigler (Washoe County Commissioner) and Sue Novasel (El Dorado County Supervisor), Eisenstecken's neighbor Guilliam Nel, the Tahoe Prosperity Center and Sacramento Valley Limited, a subsidiary of Verizon.

Eisenstecken is suing over the anticipated placement of a cell tower over 100 feet tall on the property adjacent to her house on Needle Peak Road. The lawsuit alleges 13 violations of the law, from inadequate environmental review, to violations of the Americans with Disabilities Act, to assault. Eisenstecken has been joined in her suit by Tahoe Stewards, Tahoe for Safer Tech and the Environmental Health Trust.

The cell tower was approved by the South Lake Tahoe City Council in a 3-2 vote a year ago. Eisenstecken previously sued the city on similar grounds, but the lawsuit was deemed moot after she narrowly missed the statute of limitations. The installation has now gone to the TRPA for final review. The TRPA previously issued a permit to erect a cell tower at that site several years ago, but it has since expired, said TRPA spokesman, Jeff Cowen. A new application is on file and is currently under review, said Cowen. No hearing date has yet been set by TRPA, he said.

On the environmental front, the lawsuit alleges that TRPA has never required cell tower applicants to complete a full scale environmental assessment, but only a cursory checklist, and believes this project will be no different. The suit notes that TRPA has no standards for the amount or level of RFR (radiofrequency radiation) that can be emitted in the basin, nor does it measure how RFR affects the environment. In the lawsuit, Eisenstecken's attorneys specifically refer to a study published in the International Journal of Forestry showing aspens exposed to RFR are more diseased and suffer more plant death than those that are not. Aspens are a key species in Tahoe's fragile stream environment zone, according to the suit, and further, strip nutrients and debris from groundwater, runoff and streams, preventing it from entering Lake Tahoe and contributing to the growth of algae. Algal growth is one of the main causes of the decline in Lake clarity. "We're getting at the heart of TRPA's mission and... Lake Tahoe's clarity. If they want to build a cell tower that's going to cause damage to a stream environment zone then we ought to consider that and take a look at that" before approving the project, said Tahoe City attorney Greg Lien, one of those representing Eisenstecken.

Eisenstecken's home and the proposed site of the cell tower sit right next to the stream environment zone of the middle reaches of Bijou Creek, which, she says, is also home to the endangered yellow-legged frog. In 2014, the federal Department of the Interior sent a letter to the federal Department of Commerce, which oversees the Federal Communications Commission, which regulates cell phone service. The letter expressed concern regarding the impact of cell tower emissions on all wildlife, but especially with respect to migratory birds, protected by executive order, and stated, "the... radiation standards used by the Federal Communications Commission (FCC) today continue to be based on... a criterion now nearly 30 years out of date and inapplicable today." The Federal Communications Commission recently updated the allowable limits of RFR emissions, but they actually don't differ much from the levels allowed since the industry – and research about possible effects—was in its infancy. Knowledge and technology have both evolved considerably since then.

One of the main violations of TRPA standards the proposed cell tower would pose is scenic, according to Lien. Though it will ostensibly be disguised as a tree, it will still stand out like a sore thumb, according to the suit, in a vicinity that has been deemed one of the most sensitive for scenic value.

Joel Moskowitz of the UC Berkeley School of Public Health, who has studied the issue of cell tower and cell phone emissions since 2009, told the *Mountain News* he believes cell tower technology is harmful to humans as well, especially children and adolescents, in whom it has been associated with memory and concentration deficits, sleep disruption, motor coordination delays, lower verbal expression and Type 2 diabetes. He said most studies on humans show a correlation rather than cause and effect relationship between exposure to cell tower emissions and detrimental health effects. Moskowitz added that studies in animals show a much stronger cause and effect association at levels far below the limits the government allows, lending

Continued on Page 18

"Cell tower lawsuit"

Continued from Page 16

credibility to that type of a parallel in humans. He said cell tower emissions impact DNA and antioxidants in the blood.

Eisenstecken, who suffers from a variety of maladies, such as degenerative disc disease, spinal stenosis, arthritis and more is considered disabled under the Americans with Disabilities Act. It is the belief of her doctors that cell tower emissions within 50 yards of her home will aggravate and magnify her symptoms, according to the suit. Therefore, the placement of a cell tower next to her home is a violation of the ADA, the suit contends. One of her two elementary-aged children is also disabled and will be similarly affected, according to the suit.

Federal law prohibits jurisdictions from denying placement of a cell tower due to health impacts, but in this case, the federal law about cell towers and the federal law regarding people with disabilities come into conflict and must be balanced, according to Mark Pollock, another of Eisenstecken's attorneys. "The preemption language (of the FCC regulations) does not preempt any other federal law which is what the ADA is," said Pollock. "You have to make a reasonable accommodation under the ADA, which they did not do."

Proponents of the cell tower often point to the American Cancer Society's statement of no known adverse health impacts. A fuller reading of the ACS's position states: "At this time, there's no strong evidence that exposure to RF(R) waves from cell phone towers causes any noticeable health effects. However, this does not mean that the RF(R) waves from cell phone towers have been proven to be absolutely safe. Most expert organizations agree that more research is needed to help clarify this, especially for any possible long-term effects."

In fact, according to Eisenstecken's attorneys, a safer alternative for wireless and internet service exists that could be considered and recommended or required – fiberoptic cable that is buried in the ground. A lawsuit in the courts right now, *Irregulators vs. FCC,* contends that wireless companies for years collected money from customers for the eventual rewiring of the country with fiberoptic cable, but have failed to carry out their obligation.

Eisenstecken's suit isn't just about health or environmental impacts. She is also alleging violations of open meeting laws and conflicts of interest.

One of the defendants in the lawsuit is the Tahoe Prosperity Center, which has long advocated for better internet service in the basin. According to the suit, the TPC drew up a plan for the strategic placement of cell towers throughout the basin and that is now the blueprint for expanding internet and cell service. Sitting on the Tahoe Prosperity Center board as well as representing their respective jurisdictions on the TRPA board or as employees are Marchetta, Berkbigler and Novasel, and, at the city level, South Lake Tahoe Councilmember Devin Middlebrook. The suit alleges these people cannot fulfill their independent, objective duties regarding the evaluation and approval of cell towers in their public official capacities when they serve on the board of an organization that has a particular bias and agenda. "There's a lot of incestuous relationships going on between TPC and TRPA," said Lien.

The formulation of a cell tower plan privately by TPC is specifically a violation of California's Brown Act or open meeting laws, according to the suit. Though TPC is a private organization, it formulated public policy with public money and publicly elected officials, the suit contends. According to the First Amendment Coalition, a private organization is subject to the Brown Act "when it shares a member (or members) with a governing body and shares funds with that same agency." This would appear to apply at least with respect to Novasel and Middlebrook (who voted to approve the placement of the cell tower next Eisenstecken's home) as El Dorado County and the city of South Lake Tahoe have given funds to TPC in the past.

Finally, according to the suit, the placement of a cell tower on an adjacent property and the emissions that would penetrate Eisenstecken's home and impact her body constitute trespass and assault on the part of her neighbor, Nel, according to the suit.

Lien said relying on the cell and internet service industry to vouch for the benign nature of the technology is like relying on Big Oil to disclose the harmful effects of fracking or Big Tobacco to expose the dangers of smoking. "People wouldn't believe Big Oil if they said 'hey, let's frack in the Tahoe basin.' They would look at it with a bit of skepticism and there's not the skepticism in Tahoe (about cell towers) among agencies and officials that should be questioning these things," he said.

The *Mountain News* reached out to the various defendants for comment. Novasel said she could not comment on pending litigation. Heidi Hill Drum, executive director of the Tahoe Prosperity Center, said she was precluded from commenting on pending litigation. Heidi Flato of Verizon said the company does not comment on pending litigation. Nel did not respond to a message left for him by press time.

TRPA's Cowen offered the following statement: "TRPA understands the pressing concerns in the community about the health and environmental impacts of cell towers. The agency's role in cell tower permitting is to ensure the project is in compliance with Lake Tahoe's environmental thresholds and zoning requirements. Federal regulators set the emission standards from cell towers and review the environmental impacts of those standards. The agency is not charged with implementing those federal regulations regarding communications equipment.

"Regarding the allegation against TRPA Executive Director Joanne S. Marchetta and individual governing board members, TRPA takes financial conflicts of interest very seriously. Since the Tahoe Prosperity Center is a not-for-profit organization, the allegation does not apply and we see no conflict of interest in this matter."

The bad and ugly with cell towers

The following column was submitted by a local group calling themselves TRAP (Tahoe Residents for Actual Prosperity)

"You can fool some of the people all of the time and those are the ones you should concentrate on." G.W. Bush

Ever get the feeling that's what people think of us? The following is a brief overview of several issues regarding the expansion of cellular infrastructure in South Lake Tahoe. They include real estate values, fire safety, aesthetics, prosperity, ethics and health.

Real Estate Values

The U.S. Census values owner-occupied homes in Tahoe at a median price of $375,000, and with a conservative 20 percent drop, many residents will suffer considerable losses; some very little when a tower is out of sight, but when it's 15 feet from your bedroom, it will be difficult to sell at any price. According to the National Association of Realtors, "An overwhelming 94 percent of home buyers and renters surveyed by the National Institute for Science, Law & Public Policy (NISLAPP) say they are less interested and would pay less for a property located near a cell tower or antenna."

Fire Safety

Sometimes fire knocks out cell towers, causing communications disasters like the 2016 Gatlinburg Fire in Tennessee where firefighters were not able to order residents to evacuate for several days. In a 2004 *Philadelphia Enquirer* article, interference from cell phone signals following a new tower installation caused firefighters to complain "about radio problems at fires in Center City, Grays Ferry and University City." Far from enhancing communication and public safety, we may experience our own catastrophic wildfire, especially in dry conditions.

Aesthetics

This issue is difficult because it goes against the notion of informed consent. Of course, all of these structures are unsightly, but camouflaging them is problematic because "hiding them greatly complicates society's ability to monitor for safety," according to a paper in the *Environmental Review*. If one of them is nearby, people should know so they can turn around or at least cross the street. The ground level portions of these devices are painted a nondescript green. The lower portion should be painted a bright color, perhaps in stripes along with clear legible warning signs.

Health

The simple high school physics assumption that radiation can only cause cancer by being of a high enough photon energy (UV/X-ray) to dislodge electrons and break chemical bonds is wrong. A preponderance of scientific evidence clearly indicates that radio frequency (RF) radiation causes oxidative stress in living cells and free radical production. Microwave radiation alters the antioxidant repair mechanism resulting in a buildup of reactive stress. Free radical DNA damage results, as well as reproductive harm and some electro-hypersensitivity effects.

Laboratory toxicology experiments show DNA damage directly resulting from microwave RF exposure, and epidemiology has found cancer rates near cell towers are upwards of three to four times higher than background rates. Despite long-emerged science, the FCC continues to apply an outdated standard it imported from the "National Council on Radiation Protection" in 1996 before cell phones were widely adopted or any direct science existed to expose actual health effects.

The FCC exposure standards are now 10,000 times higher than the 0.1 ìW/cm2 recommended by current science. Cell towers should not be located less than 1,500 feet (~500 m) from the public. Telecommunications are a trillion-dollar industry, and their corporate lobbying has been tremendous. However, there's currently a bill on the Senate floor to allow cities to consider environmental effects in the installation of cell facilities and overturn the FCC shot-clock for approving applications.

Prosperity

Arbitrary cell tower installations add uncertainty to real estate values, cost homeowner equity, unexpectedly ruin a family's nest egg, and generate large health expenses that we all pay for one way or another. A single cancer treatment regimen costs between $100,000 and $1 million and human life, itself, is invaluable. Even small risks which result in grave consequences must be taken very seriously. Because of the large numbers of residents exposed to this risk, the cost of doing nothing would result in an increasing number of people, many of them young, developing cancer and suffering other health effects.

Ethics

We have long proudly held a constitutional liberty in this country to personally make informed choices over the risks we exclusively take against our own health and bodily integrity. Regarding cancer, these ethos appear in California law through Proposition 65. Cell tower radiation is far worse than purchasing a cup of coffee, processed meat, BPA plastics, MTBE gasoline. Such purchases are all informed choices. Unlike the latter, cell towers incessantly and non-consensually intrude radiation into our bodies with harmful cumulative exposure.

Moreover, carcinogenic risk is not simply additive; there are synergistic effects because when cellular repair is consumed by one genotoxin, DNA is far less protected against additional mutagenic threats such as radon gas, UV light, or "recreational splurges." Callous infliction of bodily harm and disregard for home equity is un-American. We can do better.

60 Cal.App.5th 1092
Court of Appeal, Second
District, Division 8, California.

Laurie BROWN, Plaintiff and Appellant,
v.
LOS ANGELES UNIFIED SCHOOL DISTRICT, Defendant and Respondent.

B294240
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Filed 2/18/2021

Synopsis

Background: Former teacher, who was alleged to have "electromagnet hypersensitivity," filed a complaint against school district alleging district discriminated against her, failed to accommodate her disability, and retaliated against her in violation of the California Fair Employment and Housing Act (FEHA). The Superior Court, Los Angeles County, No. BC697060, Richard E. Rico, J., sustained school district's demurrer and dismissed the action. Teacher appealed.

Holdings: The Court of Appeal, Stratton, J., held that:

[1] former teacher adequately pled that she had a physical disability under the FEHA;

[2] former teacher failed to allege an adverse employment action was taken against her with retaliatory motive;

[3] former teacher adequately pled a cause of action for failure to provide a reasonable accommodation for her physical disability; and

[4] former teacher's allegations were insufficient to state a claim against school district for failure to engage in the interactive process.

Affirmed in part and reversed in part.

Wiley, J., filed a concurring opinion.

West Headnotes (26)

[1] **Pleading** Nature and office of demurrer, and pleadings demurrable

A "demurrer" tests the legal sufficiency of the challenged pleading.

[2] **Appeal and Error** Objections and exceptions; demurrer

Court of Appeal reviews de novo a trial court's ruling on a demurrer.

[3] **Appeal and Error** Objections and exceptions; demurrer

In reviewing a trial court's ruling on a demurrer, Court of Appeal accepts as true all material facts properly pleaded in the complaint, but does not assume the truth of contentions, deductions, or conclusions of fact and law.

[4] **Appeal and Error** Objections and exceptions; demurrer

Pleading Insufficiency of facts to constitute cause of action

In reviewing a trial court's ruling on a demurrer, the question of a plaintiff's ability to prove the allegations, or the possible difficulty in making such proof, does not concern the reviewing court and plaintiffs need only plead facts showing that they may be entitled to some relief.

[5] **Appeal and Error** Objections and exceptions; demurrer

When demurrer is sustained without leave to amend, Court of Appeal decides whether there is reasonable possibility that defect can be cured by amendment: if it can be, trial court has abused its discretion and Court of Appeal reverses; if not, there has been no abuse of discretion and Court of Appeal affirms.

[6] **Civil Rights** Impairments in general; major life activities

Civil Rights Particular conditions, limitations, and impairments

Former teacher adequately pled that she had a physical disability under the California Fair Employment and Housing Act (FEHA); the complaint alleged teacher could not work because she experienced chronic pain, headaches, nausea, itching, burning sensations on her skin, ear issues, shortness of breath, inflammation, heart palpitations, respiratory complications, foggy headedness, and fatigue, which were all symptoms of electromagnetic hypersensitivity (EHS), and the described symptoms affected one or more of the body systems listed in the Act and limited teacher's major life activity of working as a teacher. Cal. Code Regs. tit. 2, §§ 11065(d)(2)(A), (B), 11065(d)(8), 11065 subds. (d)(4)-(6).

[7] **Civil Rights** Public Employment

Education Protected activities in general

Public Employment Causal connection; temporal proximity

Former teacher failed to allege an adverse employment action was taken against her with retaliatory motive, as required to state a claim against school district for retaliation under California Fair Employment and Housing Act (FEHA); teacher complained that school's WiFi system was adversely affecting her health, the parties engaged in the interactive process to arrive at a reasonable accommodation, school district made promises to take certain actions to reasonably accommodate teacher's complaints, school district later reneged on its promises because it decided to rely on the findings of its consultant that the campus was "safe," and teacher alleged no retaliatory actions were taken against her precisely because she engaged in protected activity. Cal. Gov't Code § 12940(a).

[8] **Civil Rights** Particular cases

Former teacher failed to allege an adverse employment action was taken against her by school district with discriminatory motive, as required to state a claim under the Fair Employment and Housing Act (FEHA) against school district for discrimination based on a physical disability; teacher did not alleged that she was the target of disparate treatment, or that school district had a policy or practice that had a disproportionate effect on employees suffering from a disability, and she merely alleged that school district failed to engage meaningfully with her in the interactive process and would not accommodate her disability. Cal. Gov't Code § 12940(a).

[9] **Civil Rights** Employment practices

Evidence of discriminatory motive must be examined carefully in disability discrimination cases to determine whether there is direct evidence that the motive for the employer's conduct was related to the employee's physical or mental condition.

[10] **Civil Rights** Disparate treatment

Civil Rights Disparate impact

The Fair Employment and Housing Act (FEHA) proscribes two types of disability discrimination: discrimination arising from an employer's intentionally discriminatory act against an employee because of his or her disability, referred to as disparate treatment discrimination, and discrimination resulting from an employer's facially neutral practice or policy that has a disproportionate effect on employees suffering from a disability, referred to as disparate impact discrimination. Cal. Gov't Code §§ 12900 et al.

[11] **Civil Rights** Adverse actions in general

What constitutes adverse employment action under Fair Employment and Housing Act (FEHA) is not, by its nature, susceptible to mathematically precise test, and, as result, significance of particular types of adverse actions must be evaluated by taking into

account legitimate interests of both employer and employee. Cal. Gov't Code § 12940(a).

[12] **Civil Rights** Adverse actions in general

For the purpose of discrimination statute, which indicated it was an unlawful employment practice for an employer to discriminate against an employee on the basis of race, sex, or the other enumerated characteristics "in compensation or in the terms, conditions, and privileges of employment," the phrase "terms, conditions or privileges" of employment must be interpreted liberally and with reasonable appreciation of realities of workplace in order to afford employees appropriate and generous protection against employment discrimination that Fair Employment and Housing Act (FEHA) was intended to provide. Cal. Gov't Code § 12940(a).

[13] **Civil Rights** Practices prohibited or required in general; elements

It is appropriate to consider plaintiff's allegations of discrimination based on a physical disability collectively under totality-of-the-circumstances approach in a Fair Employment and Housing Act (FEHA) action. Cal. Gov't Code § 12940(a).

[14] **Civil Rights** Motive or intent; pretext

Even if former teacher's allegations were sufficient to establish an adverse employment action, she failed to allege any facts from which discriminatory motive could be inferred, as required to state a claim for discrimination based on physical disability against school district; teacher alleged no facts from which it could be inferred that school district clung to its belief that school campus was safe and refused to accommodate her because it was biased against her as a person with a disability. Cal. Gov't Code § 12940(a), (k).

[15] **Civil Rights** Particular cases

Former teacher adequately pled a cause of action for failure to provide a reasonable accommodation for her physical disability due to electromagnetic hypersensitivity (EHS), in action against school district; teacher's complaint alleged she suffered from a physical disability, but could perform the essential functions of the position with the accommodation "to which [school district] initially agreed to but subsequently refused to honor and/or other reasonable accommodations, such as use of paints, fabrics and/or other shielding materials to block or minimize exposure to electromagnetic frequencies." Cal. Gov't Code § 12940 (k), (m)(1); Cal. Code Regs. tit. 2, § 11068(a).

[16] **Civil Rights** In general; elements of accommodation claims

To establish a failure-to-accommodate claim, a plaintiff must show (1) she has a disability covered by Fair Employment and Housing Act (FEHA); (2) she can perform the essential functions of the position; and (3) defendant failed reasonably to accommodate her disability. Cal. Gov't Code § 12940(k).

[17] **Civil Rights** What are reasonable accommodations; factors considered

A reasonable accommodation under Fair Employment and Housing Act (FEHA) means a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired. Cal. Gov't Code § 12940(k).

[18] **Civil Rights** Employment practices

Although an accommodation is not reasonable under Fair Employment and Housing Act (FEHA) if it produces an undue hardship to the employer, a plaintiff need not initially plead or produce evidence showing that the accommodation would not impose such an undue hardship. Cal. Gov't Code § 12940(k).

[19] **Civil Rights** Pleading

Whether a plaintiff's requested accommodation under Fair Employment and Housing Act (FEHA) is reasonable cannot be determined on demurrer. Cal. Gov't Code § 12940(k).

[20] **Civil Rights** Requesting and choosing accommodations; interactive process; cooperation

Once notified of disability, employer's burden is to take positive steps to accommodate employee's limitations, and employee also retains duty to cooperate with employer's effort by explaining his or her disability and qualifications; reasonable accommodation under Fair Employment and Housing Act (FEHA) thus envisions exchange between employer and employee where each seeks and shares information to achieve best match between employee's capabilities and available positions. Cal. Gov't Code § 12940(k).

[21] **Civil Rights** Requesting and choosing accommodations; interactive process; cooperation

If reasonable accommodation under Fair Employment and Housing Act (FEHA) does not work, employee must notify employer, who has duty to provide further accommodation. Cal. Gov't Code § 12940(k).

[22] **Civil Rights** Requesting and choosing accommodations; interactive process; cooperation

Former teacher's allegations that school district agreed to hire an independent consultant to determine where on school campus exposure to the electromagnetic frequencies was most minimal, then changed its mind and decided school campus was "safe" were insufficient to state a claim under California Fair Employment and Housing Act (FEHA) against school district for failure to engage in the interactive process; teacher's allegations did not amount to failure to engage in the interactive process, instead, it was failure to follow up with an accommodation. Cal. Gov't Code §§ 12940(n), 12926.1(e).

[23] **Civil Rights** Requesting and choosing accommodations; interactive process; cooperation

Under Fair Employment and Housing Act (FEHA), it is an unlawful practice for an employer to fail to engage in a good faith interactive process with the employee to determine an effective reasonable accommodation if an employee with a known physical disability requests one. Cal. Gov't Code §§ 12940(n), 12926.1(e).

[24] **Civil Rights** In general; elements of accommodation claims

Civil Rights Requesting and choosing accommodations; interactive process; cooperation

Under Fair Employment and Housing Act (FEHA), failure to accommodate and failure to engage in the interactive process are separate, independent claims involving different proof of facts; the purpose of the interactive process is to determine what accommodations is required, and once a reasonable accommodation has been granted, then the employer has a duty to provide that reasonable accommodation. Cal. Gov't Code §§ 12940(n), 12926.1(e).

[25] **Pleading** Authority and discretion of court

The trial court's action in sustaining school district's demurrer without leave to amend was not erroneous, in former teacher's action against school district for discrimination based on physical disability, where teacher failed to propose new facts and state din her reply brief that she "need not specify additional details for an amended complaint because she already alleged more than sufficient ultimate facts to support her claims and any additional allegations would be superfluous evidentiary facts."

[26] **Pleading** Amendment or Further Pleading After Demurrer Sustained

Generally, leave to amend after sustaining demurrer is warranted when the complaint is in some way defective, but plaintiff has shown in what manner the complaint can be amended and how that amendment will change the legal effect of the pleading.

Witkin Library Reference: 8 Witkin, Summary of Cal. Law (11th ed. 2017) Constitutional Law, § 1045 [Discrimination Against Disabled Persons; Statutory Protections.]

****326** APPEAL from a judgment of the Superior Court of Los Angeles County, Richard E. Rico, Judge. Reversed in part and affirmed in part. (Los Angeles County Super. Ct. No. BC697060)

Attorneys and Law Firms

JML Law, Joseph M. Lovretovich and Jennifer A. Lipski, Woodland Hills, for Plaintiff and Appellant.

Anthony J. Bejarano, Los Angeles, and David V. Greco for Defendant and Respondent.

STRATTON, J.

***1097 INTRODUCTION**

Appellant Laurie Brown (Brown) has been a teacher employed by the Los Angeles Unified School District (LAUSD) since 1989. In 2015, LAUSD installed an updated Wi-Fi system at the school where Brown taught. She soon began to experience headaches and nausea, and believed the electromagnetic frequency of the new wireless system was the cause. She requested ***1098** various accommodations from LAUSD, but ultimately sued, alleging LAUSD discriminated against her based on her "electromagnetic hypersensitivity," failed to accommodate her condition, and retaliated against her—in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code,[1] § 12900 et seq.).

Brown appeals from a judgment of dismissal entered after the trial court sustained LAUSD's demurrer to her first amended complaint (FAC) without leave to amend. She contends the trial court erred in sustaining the demurrer because she pled sufficient facts in support of each of her claims. She further contends the trial court abused its discretion by not granting her leave to amend the FAC.

We conclude Brown adequately pled her cause of action for failure to provide reasonable accommodation for her disability. We reverse on this cause of action only. Otherwise, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Relevant Factual Background*

In 2012, LAUSD commissioned URS Corporation (URS) to consult with LAUSD about replacing the existing Wi-Fi system at Millikan Middle School (Millikan) with one that would accommodate iPads, Chromebooks, and tablets LAUSD intended to provide its students.

LAUSD requested public comment on the proposed new Wi-Fi system. Cindy Sage, an environmental scientist and expert on electromagnetic frequency (EMF), stated she could not support URS's conclusions about the safety of the new Wi-Fi system.

During a May 28, 2014, school board hearing, LAUSD's "medical personnel" presented a power point presentation indicating they were uncertain about any long-term effects the Wi-Fi system may have on students and staff. LAUSD promised to continue actively monitoring any developments.

In 2015, Brown began teaching at Millikan. Later that year, in April 2015, LAUSD installed and began operating the upgraded Wi-Fi system at Millikan. Brown ****327** thereafter experienced chronic pain, which she alleged was caused by the new Wi-Fi.

***1099** B. *Brown's First Amended Complaint*

On March 7, 2018, Brown filed a civil complaint against LAUSD. On June 6, 2018, the trial court sustained a demurrer to the complaint with leave to amend.

On June 26, 2018, Brown filed the FAC which alleged five causes of action pursuant to FEHA:

1) Discrimination based on physical disability;

2) Failure to accommodate;

3) Failure to engage in the interactive process;

4) Retaliation; and

5) Failure to prevent discrimination and retaliation.

The FAC alleged:

Following activation of the new Wi-Fi system on April 23, 2015, Brown began to experience chronic pain, headaches, nausea, itching, burning sensations on her skin, ear issues, shortness of breath, inflammation, heart palpitations, respiratory complications, foggy headedness, and fatigue. She reported the symptoms to her superiors at Millikan and was granted leave from work "due to these symptoms, on an intermittent basis, for several days thereafter."

She returned to campus the following week and fell ill again "[w]ithin 2 to 3 hours." Her "medical provider subsequently diagnosed her" with electromagnetic hypersensitivity (EHS), also referred to as "microwave sickness."

On May 22, 2015, Brown filed her first formal request for accommodation with LAUSD.

On July 15, 2015, LAUSD held its first interactive process meeting with Brown. Following the meeting, LAUSD agreed to disconnect the Wi-Fi access points in Brown's assigned classroom and in an adjacent classroom. LAUSD also agreed to use "a hardwired computer lab with Wi-Fi turned off while testing for Common Core."

On August 4, 2015, "Dr. Huy Hoang, internist, wrote that emerging EMF sensitivity was disabling" Brown.

***1100** Brown returned to work in August 2015. She was assigned to Room 22 at the Millikan campus. Brown alleged LAUSD's accommodations were "not reasonable" and "did not work." While LAUSD disconnected the routers in Brown's classroom and one adjoining classroom, "multiple other classrooms in front and to the side of [Brown]'s classroom continued to have their routers active."

On September 3, 2015, Brown's physician, Dr. Jody Levy, placed her on a medical leave of absence through November 16, 2015, due to her "migraines, headaches, and nausea. Restrictions upon returning to work were for [Brown] to work with minimal Wi-Fi exposure."

On September 8, 2015, Brown filed a second request for accommodation "on the grounds her symptoms persisted due to Wi-Fi and radio frequencies to which she was continuously exposed." She requested LAUSD reduce her exposure and consider "using paints and other forms of shielding materials to block Wi-Fi and radio frequencies in her classroom."

On October 22, 2015, LAUSD held its second interactive process meeting with Brown. Brown requested LAUSD authorize "further studies to evaluate and determine the best location on the Millikan campus where [Brown] would encounter minimal exposure to Wi-Fi and radio frequencies, along with consideration of using paints and other shielding materials."

****328** On November 13, 2015, LAUSD denied Brown's second request for accommodation, relying on testing performed by URS that indicated the Wi-Fi system was "safe." Brown appealed LAUSD's denial.

Meanwhile, Brown's medical leave was extended from November 2015 through June 14, 2016 by Dr. Michael Hirt, "citing migraines and nausea. Restrictions include minimal EMF exposure and writes patient could return to work if EMF exposure [or] measurement were reduced."

The appeal hearing took place in February 2016. LAUSD "reversed course" and agreed to provide a "neutral expert EMF inspection for further microwave measurements." Brown was notified that LAUSD will provide Brown "with the test results, but is not required to provide [her] advance information regarding the logistics of the testing."

On April 18, 2016, LAUSD provided Brown with three options for neutral EMF testing: 1) allow LAUSD's retained consultant URS to conduct the requested testing; 2) choose another consultant "which might delay the process"; or 3) advise LAUSD she no longer desired additional EMF testing.

***1101** On April 26, 2016, Brown indicated she wanted a different consultant—not URS—to conduct the additional EMF testing/inspection. She alleged "a new analysis by URS, LAUSD's own consultant, would be inherently biased due to URS' relationship with LAUSD." Brown alleged, however, that LAUSD failed to inform her that "selecting another

consultant would require the consultant to submit to LAUSD's bidding process for a contract to do the inspection."[2]

On June 19, 2016, LAUSD notified Brown it did not agree with her selected consultant and that URS's "prior evaluation of Wi-Fi and radio frequencies at Millikan evidenced a safe and non-hazardous working environment."

In November 2016, Brown followed up with LAUSD about what "reasonable accommodation" LAUSD would provide. In January 2017, Brown sent LAUSD another follow-up email and expressed "frustration and concerns about LAUSD appearing to retract the accommodation it had promised ... a year earlier."

Brown alleged she could not return to work "without being overcome with crippling pain." She was "forced to go out on a disability leave from her job, which exhausted her approximately 800 hours of accrued paid time off and sick leave." As a result, she experienced "an economic loss of earnings due to not receiving her full income."

Based on the foregoing, Brown argued LAUSD "engaged in a course or pattern of conduct that, taken as a whole, materially and adversely affected the terms, conditions, or privileges" of Brown's employment. She believed she "could have continued performing all essential duties and functions of her job" had she been provided reasonable accommodations from LAUSD. She argued LAUSD failed to "engage in an interactive process" with Brown and "explore all reasonable accommodation for her physical disability." Brown also characterized the foregoing as "adverse employment action" and "discriminatory and retaliatory conduct."

She requested general damages, special damages, loss of earnings and benefits, attorney fees and costs, injunctive relief, equitable relief, and any other relief the trial court deemed just and proper.

****329** C. *LAUSD's Demurrer and Brown's Opposition*

On July 31, 2018, LAUSD filed a demurrer to the FAC pursuant to Code of Civil Procedure section 430.10, subdivision (e). LAUSD argued Brown failed ***1102** to allege with particularity sufficient facts in support of her causes of action. Brown's FAC did not include any facts that demonstrated LAUSD's decision not to provide additional testing created adverse work conditions such that a reasonable person would have felt compelled to resign. LAUSD next pointed out that Brown had not pled facts that would establish the original testing by URS was "unreliable or faulty" and instead merely concluded "URS is biased."

LAUSD argued Brown did not suffer any adverse employment action, "much less an adverse action *because* of her alleged medical condition." Per LAUSD, Brown "voluntarily chose" to go on leave; she was never dismissed. LAUSD argued it "went above and beyond to accommodate" Brown's alleged disability and provided examples of accommodations it had granted. LAUSD noted Brown's symptoms mysteriously persisted "despite being away from Millikan's campus and being on a lengthy approved leave of absence."

LAUSD requested the court sustain the demurrer without leave to amend, as Brown could not identify any adverse employment action taken by LAUSD *because* of her disability.

On August 14, 2018, Brown filed her opposition to LAUSD's demurrer. She argued the FAC alleged sufficient facts to establish all five causes of action. She further argued that while LAUSD "*proposed* multiple efforts, [it] *never implemented* any of them fully." (Boldface omitted.)

D. *Hearing and Ruling*

On August 27, 2018, the trial court entertained brief oral argument and took the matter under submission.

The next day, on August 28, 2018, the court sustained the demurrer without leave to amend as to all five causes of action.

On September 20, 2018, the court signed the judgment of dismissal.

Brown timely appealed from the judgment.

DISCUSSION

As a preliminary matter, we disagree with LAUSD that Brown failed to include a complete record. The record does not include a copy of the original complaint, first demurrer, and the court's June 6, 2018 ruling. However, the absence of these pleadings does not foreclose our review of ***1103** Brown's contentions on appeal. Where, as here, Brown amended

the original complaint, the FAC supersedes the original complaint. (See *Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1372, 124 Cal.Rptr.3d 271.) The record on appeal contains the operative FAC and LAUSD's demurrer; these are the pleadings necessary for our review.

A. *Standard of Review*

[1] **[2]** **[3]** **[4]** A demurrer tests the legal sufficiency of the challenged pleading. (*Milligan v. Golden Gate Bridge Highway & Transportation Dist.* (2004) 120 Cal.App.4th 1, 5, 15 Cal.Rptr.3d 25.) We review de novo a trial court's ruling on a demurrer. (*Dudek v. Dudek* (2019) 34 Cal.App.5th 154, 163, 246 Cal.Rptr.3d 27 (*Dudek*).) We accept as true all material facts properly pleaded in the complaint, but do not assume the truth of contentions, deductions, or conclusions of fact and law. (*Ibid.*; *Estate of Holdaway* (2019) 40 Cal.App.5th 1049, 1052, 253 Cal.Rptr.3d 659.) ****330** The question of a plaintiff's ability to prove the allegations, or the possible difficulty in making such proof, does not concern the reviewing court and plaintiffs need only plead facts showing that they may be entitled to some relief. (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496, 86 Cal.Rptr. 88, 468 P.2d 216.)

[5] In addition, " '[w]hen a demurrer is sustained without leave to amend, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm." ' " (*Dudek, supra,* 34 Cal.App.5th at p. 163, 246 Cal.Rptr.3d 27.) Brown shoulders the burden to show a reasonable possibility the FAC can be amended to state a cause of action. (*Id.* at pp. 163–164, 246 Cal.Rptr.3d 27.)

B. *Brown Adequately Pled a Physical Disability.*

[6] In an argument it makes as to all five causes of action, LAUSD contends Brown's alleged disability, electromagnetic sensitivity, is not a "recognized" disability. In support of this contention, LAUSD relies on a federal case from the Seventh Circuit and a federal district court case from the District of Massachusetts, both interpreting the Americans with Disabilities Act of 1990 (ADA): *Hirmiz v. New Harrison Hotel Corp.* (7th Cir. 2017) 865 F.3d 475 and *G v. Fay Sch., Inc.* (D. Mass. 2017) 282 F.Supp.3d 381.

LAUSD's reliance on ADA cases is misplaced. The FEHA protections against torts based on disability are independent of those under the ADA. "The law of this state in the area of disabilities provides protections ***1104** independent from those in the federal Americans with Disabilities Act of 1990 .... Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections." (§ 12926.1, subd. (a); Cal. Code Regs., tit. 2, § 11065, subd. (d)(8).) The Legislature has stated its intent that "physical disability" be construed so that employees are protected from discrimination due to actual or perceived physical impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling. (§ 12926.1, subd. (b); Cal. Code Regs., tit. 2, § 11065, subds. (d)(4)–(6).) And the Legislature has specifically stated its intent that the FEHA provide broader protection than under the ADA. (§ 12926.1, subd. (c); Cal. Code Regs., tit. 2, § 11065, subd. (d)(8).)

FEHA states a "physical disability" includes, but is not limited to, "any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following: [¶] (A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine. [¶] (B) Limits a major life activity. For purposes of this action: [¶] ... [¶] (ii) A ... condition ... limits a major life activity if it makes the achievement of the major life activity difficult. [¶] (iii) 'Major life activities' shall be broadly construed and includes physical, mental, and social activities and working." (§ 12926, subd. (m)(1); see also Cal. Code Regs., tit. 2, § 11065, subd. (d)(2)(A), (B).)

The FAC alleges that Brown could not work because she experienced "the various symptoms of which LAUSD had been warned could occur, namely, chronic pain, headaches, nausea, itching, burning sensations on her skin, ear issues, shortness of breath, inflammation, heart palpitations, respiratory complications, foggy headedness, ****331** and fatigue, all symptoms of Microwave Sickness or EHS." These described symptoms affect one or more of the body systems listed in the statute and limited Brown's major life activity of working as a teacher at Millikan. That the ADA may not "recognize" EHS is immaterial to our interpretation of FEHA. Brown adequately pled physical disability within the four corners of the statute.

C. *Brown Failed to Allege Adverse Employment Action Taken Against Her with Discriminatory or Retaliatory Motive*

LAUSD next argues that the first cause of action for discrimination based on physical disability and the fourth cause of action for retaliation fail for lack of specificity and are insufficient to withstand the demurrer. We agree.

***1105** 1. Retaliation

[7] The elements of a cause of action for retaliation in violation of section 12940, subdivision (h) are: "1) the employee's engagement in a protected activity ...; (2) retaliatory animus on the part of the employer; (3) an adverse action by the employer; (4) a causal link between the retaliatory animus and the adverse action; (5) damages; and (6) causation." (*Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713, 81 Cal.Rptr.3d 406; *Le Mere v. Los Angeles Unified School Dist.* (2019) 35 Cal.App.5th 237, 243, 247 Cal.Rptr.3d 76.)

Here, the FAC alleges no facts coming close to retaliatory actions or motive. According to the FAC, Brown made her complaints that the Wi-Fi system was adversely affecting her health; the parties engaged in the interactive process to arrive at a reasonable accommodation; LAUSD made promises to take certain actions to reasonably accommodate her complaints; LAUSD later reneged on its promises because it decided to rely on the findings of its consultant URS that the campus was "safe." She alleges no retaliatory actions taken against her precisely because she engaged in protected activity, that is, because she made her initial complaint. Brown conflates actions taken by LAUSD in response to the complaint with actions taken by LAUSD to harm her because of her complaint. None of the alleged facts implicate retaliation.

2. Discrimination

[8] **[9]** Under section 12940, it is unlawful for an employer, because of physical disability, to "refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment." (§ 12940, subd. (a).) The elements of a prima facie case of discrimination vary depending on the particular facts. Generally, the plaintiff must provide evidence that he or she (1) was a member of a protected class; (2) was qualified for the position sought or was performing competently in the position already held; (3) suffered an adverse employment action, such as termination, demotion, or denial of an available job; and (4) some other circumstance suggests discriminatory motive. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355, 100 Cal.Rptr.2d 352, 8 P.3d 1089.) Evidence of discriminatory motive must be examined carefully in disability discrimination cases to determine "whether there is direct evidence that the motive for the employer's conduct was related to the employee's physical or mental condition." (****332** *Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 123, 199 Cal.Rptr.3d 462.)

***1106** **[10]** FEHA proscribes two types of disability discrimination: (1) discrimination arising from an employer's intentionally discriminatory act against an employee because of his or her disability (referred to as disparate treatment discrimination) and discrimination resulting from an employer's facially neutral practice or policy that has a disproportionate effect on employees suffering from a disability (referred to as disparate impact discrimination). (*Knight v. Hayward Unified School Dist.* (2005) 132 Cal.App.4th 121, 128–129, 33 Cal.Rptr.3d 287, disapproved on other grounds in *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 115, 186 Cal.Rptr.3d 826, 347 P.3d 976.)

Here, just as with the retaliation cause of action, there are two issues as to the discrimination cause of action: whether Brown sufficiently alleged that LAUSD took any adverse employment actions and whether Brown sufficiently alleged facts to support the allegation of discriminatory motive. Brown contends LAUSD refused to participate in the interactive process in good faith and refused to put in place reasonable accommodations to which it has previously agreed. While these allegations against LAUSD support other causes of action as discussed below, we conclude they do not constitute "adverse employment actions" in the context of a claim of discrimination.

[11] **[12]** **[13]** Our Supreme Court has recognized that what constitutes an adverse employment action "is not, by its nature, susceptible to a mathematically precise test," and, as a result, "the significance of particular types of adverse actions must be evaluated by taking into account the legitimate interests of both the employer and the employee." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1054, 32 Cal.Rptr.3d 436, 116 P.3d 1123.) *Yanowitz* defined an adverse employment action generally as one that materially affects the terms and conditions of employment. (*Id.* at p. 1051, fn. 10, 32 Cal.Rptr.3d 436, 116 P.3d 1123.) The phrase "terms, conditions or privileges" of employment must be interpreted

liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination that the FEHA was intended to provide." (*Id.* at p. 1054, 32 Cal.Rptr.3d 436, 116 P.3d 1123.) It is appropriate to consider plaintiff's allegations collectively under a totality-of-the-circumstances approach. (*Id.* at p. 1052, fn. 11 & pp. 1055–1058, 32 Cal.Rptr.3d 436, 116 P.3d 1123.)

However, we note the FEHA scheme prohibits specific unlawful employment practices by covered employers, e.g., discrimination, retaliation, failure to make reasonable accommodation, failure to engage in the interactive process with the employee. We conclude that the commission of one specific prohibited employment practice does not, in and of itself, constitute commission of all other prohibited employment practices under the broad rubric of policies or practices affecting the "terms, conditions or privileges of employment." Such an interpretation would be contrary to the whole point of ***1107** specifically separating conduct into individual unlawful employment practices. Brown has not alleged she was the target of disparate treatment. Nor has she alleged a policy or practice that had a disproportionate effect on employees suffering from a disability. She simply alleged that LAUSD failed to engage meaningfully with her in the interactive process and would not reasonably accommodate her disability. Those allegations pertain to her remaining causes of action, but we decline to construe them, ****333** without more, as adverse employment actions sufficient to support a claim of discrimination in the terms and conditions of employment. We agree with the trial court that Brown has conflated " 'adverse employment action' with the failure to accommodate and failure to engage claims."

[14] Moreover, even if the allegations are deemed sufficient to constitute adverse employment actions, Brown has alleged no facts from which discriminatory intent be inferred. In other words, she has alleged no facts from which we can infer LAUSD clung to its belief that the campus was safe and refused to accommodate her because it was biased against her as a person with a disability. At most, the FAC alleged facts showing a disagreement between the parties as to whether the Wi-Fi was causing her disability. We conclude she has failed to allege discrimination in employment.

Because we find Brown has failed to allege discrimination or retaliation in employment, we also conclude she has failed to sufficiently allege, in her fifth cause of action, failure to prevent discrimination and retaliation in employment, in violation of section 12940, subdivision (k).

D. *Brown Adequately Pled a Cause of Action for Failure to Provide Reasonable Accommodation for a Physical Disability*

[15] An employer must provide a reasonable accommodation for an applicant or employee with a known mental or physical disability unless the accommodation would cause undue hardship. Failure to do so is an unlawful employment practice. (§ 12940, subd. (m)(1); Cal. Code Regs., tit. 2, § 11068 subd. (a).) Failure to do so is an unlawful employment practice.

[16] **[17]** **[18]** **[19]** To establish a failure to accommodate claim, Brown must show (1) she has a disability covered by FEHA; 2) she can perform the essential functions of the position; and 3) LAUSD failed reasonably to accommodate her disability. (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 256–257, 102 Cal.Rptr.2d 55.) A "reasonable accommodation" means a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired. (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1010, 93 Cal.Rptr.3d 338.) Although an accommodation is not reasonable if it produces an undue ***1108** hardship to the employer, a plaintiff need not initially plead or produce evidence showing that the accommodation would not impose such an undue hardship. (*Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 356, 118 Cal.Rptr.2d 443.) Importantly, whether plaintiff's requested accommodation is reasonable cannot be determined on demurrer. (*Id.* at p. 368–369, 118 Cal.Rptr.2d 443.)

[20] **[21]** Once notified of a disability, the employer's burden is to take positive steps to accommodate the employee's limitations. The employee also retains a duty to cooperate with the employer's effort by explaining his or her disability and qualifications. Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the employee's capabilities and available positions. (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1385, 96 Cal.Rptr.2d 236 (*Spitzer*).) If a reasonable accommodation does not work, the employee must notify the employer, who has a duty to provide further accommodation. (See *id.* at p. 1384, 96 Cal.Rptr.2d 236 [if employer did not know a reasonable accommodation was not working, a duty to provide further accommodation never arose].)

**334 Brown has adequately pled failure to accommodate. The FAC alleges that she suffers from a physical disability, but can perform the essential functions of the position with the accommodation "to which LAUSD initially agreed to but subsequently refused to honor and/or other reasonable accommodations, such as use of paints, fabrics and/or other shielding materials to block or minimize exposure to electromagnetic frequencies." Further, although LAUSD provided Brown with three options to choose from for neutral EMF testing, including the option to choose a consultant other than URS to conduct the testing (which Brown opted for), LAUSD reneged on its agreement, concluded that URS's prior evaluation evidenced a safe, non-hazardous working environment, and took no further action. As mentioned above, "reasonable accommodation" envisions an exchange between employer and employee in good faith; based on our reading of Brown's FAC, LAUSD's actions here do not align with those of an employer taking positive steps to accommodate the employee's limitations (*Spitzer*, *supra*, 80 Cal.App.4th at p. 1385, 96 Cal.Rptr.2d 236).

On appeal LAUSD argues that it attempted to accommodate her multiple times to no avail. It also argues that because Brown alleged that she suffered symptoms at her home, there was nothing LAUSD could do to ameliorate her disability. These are questions for the ultimate finder of fact and not questions properly resolved by demurrer. Brown's allegations were sufficient.

*1109 E. *Brown Failed to Allege Failure to Engage in the Interactive Process.*

[22] [23] [24] Under FEHA, it is an unlawful practice for an employer to fail to engage in a good faith interactive process with the employee to determine an effective reasonable accommodation if an employee with a known physical disability requests one. (§ 12940, subd. (n); see § 12926.1, subd. (e); *A.M. v. Albertsons, LLC* (2009) 178 Cal.App.4th 455, 463, 100 Cal.Rptr.3d 449 (*Albertsons*).) Failure to accommodate and failure to engage in the interactive process are separate, independent claims involving different proof of facts. The purpose of the interactive process is to determine what accommodations is required. Once a reasonable accommodation has been granted, then the employer has a duty to provide that reasonable accommodation. (*Albertsons,* at pp. 463–464, 100 Cal.Rptr.3d 449.)

Here, Brown's FAC alleges LAUSD did agree on a reasonable accommodation (to hire an independent consultant to determine where on campus exposure to the electromagnetic frequencies was most minimal) and then changed its mind, deciding that the campus was "safe." This is not a failure to engage in the interactive process; it is a failure to follow up with an accommodation to which it had agreed. (*Albertsons*, *supra*, 178 Cal.App.4th at pp. 463–464, 100 Cal.Rptr.3d 449.)

Albertsons is instructive in this regard. In that case, employer Albertsons agreed to reasonable accommodations and then failed to advise plaintiff's supervisors about the agreement. As a result, when plaintiff sought to take advantage of the accommodations, her supervisors did not allow her to do so. Plaintiff employee sued for failure to accommodate. Albertsons argued the plaintiff employee had a personal responsibility to advise her supervisors of her disability and of the agreed-upon accommodations. Albertsons argued plaintiff's failure to so advise her supervisors constituted a failure by the employee to continue the interactive process and vitiated her cause of action for failure to accommodate. (*Albertsons*, *supra*, 178 Cal.App.4th at p. 464, 100 Cal.Rptr.3d 449.)

**335 The Court of Appeal disagreed. It held that the Legislature did not intend that "after a reasonable accommodation is granted, the interactive process continues to apply in a failure to accommodate context." (*Albertsons*, *supra*, 178 Cal.App.4th at p. 464, 100 Cal.Rptr.3d 449.) The court held that to "graft an interactive process intended to apply to the determination of a reasonable accommodation onto a situation in which an employer failed to provide a reasonable, agreed-upon accommodation is contrary to the apparent intent of the FEHA and would not support the public policies behind that provision." (*Ibid*.) Thus, a failure to engage in the interactive process cannot be used to support a failure to accommodate cause of action.

*1110 Here we have the inverse of *Albertsons*: the employee using a failure to accommodate in support of a claim of failure to engage in the interactive process. Brown alleged LAUSD agreed upon a reasonable accommodation (to hire a neutral expert to determine locations of minimal exposure) and then failed to follow through. We conclude Brown's allegations fit the logic of *Albertsons* holding. Without more, the allegations are insufficient under *Albertsons* to constitute a failure to engage in the interactive process.

F. *The Trial Court Did Not Err in Sustaining the Demurrer Without Leave to Amend*

[25] **[26]** The trial court sustained the demurrer without granting Brown leave to amend the FAC. Generally, leave to amend is warranted when the complaint is in some way defective, but plaintiff has shown in what manner the complaint can be amended and " 'how that amendment will change the legal effect of [the] pleading.' " (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349, 134 Cal.Rptr. 375, 556 P.2d 737.) In her reply brief, Brown announced that she "need not specify additional details for an amended complaint because she already alleged more than sufficient ultimate facts to support her claims and any additional allegations would be superfluous evidentiary facts." In the absence of proposed new facts, we find no error in the trial court's decision not to grant leave to amend.

DISPOSITION

We reverse as to the cause of action for failure to accommodate. The judgment is affirmed in all other respects. Parties are to bear their own costs on appeal.

I concur:

GRIMES, Acting P. J.

WILEY, J., Concurring.

I join the court's decision, which rejects a pleading challenge. For good reason, California state civil procedure makes complaints easy to write and hard to attack: experience shows litigation effort devoted solely to attacking pleadings is costly and time consuming and rarely yields much helpful information for litigants about the true value of their case. (Cf. Clermont & Yeazell, *Inventing Tests, Destabilizing Systems* (2010) 95 Iowa L.Rev. 821, 829–859 [critique of contrary federal practice that devotes much effort to testing litigation at the complaint stage].)

The consequence of this relatively lax state attitude is relatively easier access to discovery. But California trial judges have the tools and training to curb weaponized discovery.

***1111** Instead of encouraging attacks at the pleading stage, ordinarily it is wiser for a procedural system to save the big litigation investments for stages where judicial rulings can provide the parties with information ****336** that helps them agree on the case's settlement value.

Yet even with our state's healthy attitudes about easy pleading, I worry about giving any sort of green light to this unprecedented and unorthodox disability claim. Plaintiff's counsel was most reluctant at oral argument to admit it, but it seems clear we are the first court in the United States of America—a nation of over 300 million people—to allow a claim that "Wi-Fi can make you sick." Up till now, the main published appellate opinion seems to have been the one where Judge Posner wrote that a "great deal of psychological distress is trivial—fear of black cats, for example." (*Hirmiz v. New Harrison Hotel Corp.* (7th Cir. 2017) 865 F.3d 475, 476.)

Millions use Wi-Fi. Merchants, employers, cafes, hotels—indeed, commercial concerns of every kind throughout the land have been installing Wi-Fi at an impressive pace. Nearly everyone wants the phenomenal convenience of the virtual world in your hand, everywhere you go, and the faster the better. All the potential defendants responding to this popular demand may take solemn note of news that, as of today, their Wi-Fi systems now may possibly invite costly litigation from members of the public who say that Wi-Fi made them sick. And potential plaintiffs and their counsel will have an interest too.

The law worries about junk science in the courtroom. One concern is that a partisan expert witness can bamboozle a jury with a commanding bearing, an engaging manner, and a theory that lacks respectable scientific support. (E.g., *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 595, 113 S.Ct. 2786, 125 L.Ed.2d 469 (*Daubert*) [" 'Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.' "].)

This concern is nothing new. The old fear is that "[e]xperience has shown that opposite opinions of persons professing to be experts may be obtained to any amount ...." (*Winans v. New York & Erie Railroad Co.* (1859) 62 U.S. (21 How.) 88, 101, 16 L.Ed. 68.)

" 'It is often surprising to see with what facility and to what an extent [experts'] views can be made to correspond with the wishes or interests of the parties who call them .... [T]heir judgment becomes so warped by regarding the subject in one point of view that even when conscientiously disposed, they are incapable of expressing a candid opinion.... They

are selected on account of their ability to express a favorable opinion, which, there is great reason to believe, is in many instances the result alone of employment and the bias growing out of it.' " (Foster, *Expert Testimony,—Prevalent Complaints and Proposed Remedies* (1897) 11 Harv. L.Rev. 169, 170–171; see ***1112** Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony* (1901) 15 Harv. L.Rev. 40, 53 (Learned Hand) ["the expert becomes a hired champion of one side"]; *id*. at pp. 54–55 [describing the "absurdity" and "evil" of the "present system"]; *id*. at p. 46 [recounting 1665 case where "Dr. Brown, of Norwich, was desired to state his opinion of the accused persons, and he was clearly of opinion that they were witches"].)

It does not take much experience as a trial judge in Los Angeles to realize the use of expert witnesses has run riot. To get a feel for the situation, try an internet search on "expert witness los angeles." If your client has the budget, the available inventory is remarkable. Surprising numbers of these experts also happen to be lawyers—or perhaps, after reflection, this is not so surprising.

****337** The partisan expert witness has enormous potential as a weapon of pure advocacy. Excellent trial lawyers know this potential. They risk disadvantage and even defeat if they do not wring every drop of advocacy power from their retained experts. In this process, the search for truth can suffer. (E.g., Rubinfeld & Cecil, *Scientists as Experts Serving the Court* (Fall 2018) 147 Daedalus 152, 153 (Rubinfeld & Cecil).)

An expert witness can be the advocate's strongest ally. Mid-trial, after the opening statement and before the closing argument, the expert can argue the client's position in the most forceful terms, speaking directly to the judge and jury with a demeanor chosen for its fluent and compelling sincerity.

The expert's motivation can be prompted by ample compensation and guaranteed through careful selection. For the advocate, finding and selecting experts can be a momentous event in the litigation process. Resume horsepower is useful, but better yet is a captivating communication style married to the proper attitude.

What is the proper attitude? It can be a subtle thing, perhaps detected through give-and-take on casual and seemingly irrelevant issues during a private telephone call or a relaxed interview in a comfortable office. For the trial lawyer puzzling over whether to retain this expert, a core question is whether the expert will become a team player. At some deep level, will the expert come to embrace the cause of the client?

Experts with the proper attitude willingly deploy their potentially awesome experience and intelligence in the advocate's service. The result is unlikely to involve lying or deception, if for no other reason than such conduct rarely survives cross-examination. The result is, however, likely to be highly partisan. And the highly partisan character of expert testimony can imperil the search for truth.

***1113** When one trial lawyer tells a colleague in an unguarded moment that the lawyer is "shopping for an expert," we should reflect on how accurate this phrase truly is.

Our highest courts responded to these concerns by empowering trial judges to be gatekeepers and to sort the reliable from the speculative. (*Daubert*, *supra*, 509 U.S. at pp. 589–597, 113 S.Ct. 2786; *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 753, 149 Cal.Rptr.3d 614, 288 P.3d 1237.) Gatekeeping may be vital to the integrity of this particular case. And rulings on *Sargon* motions can give the parties information that is highly pertinent to the settlement value of a case.

Trial judges also have another tool in their kit: court-appointed experts. (See Evid. Code, §§ 730–732.) Preferably in consultation with counsel and avoiding ex parte contacts, the trial court can select and appoint an independent expert of unquestioned stature. The parties foot the bill. The expert can write a report, be deposed, testify, and be cross-examined, like any other expert. Crucially, the jury can learn this expert has been appointed by the court rather than hired by the parties.

The option of a court-appointed expert has been available in California for generations. Few judges have tried this option, though, because the parties *never* suggest it. The last thing trial lawyers want is another source of uncertainty in the case: something powerful and beyond their control. But the hard-working judges with experience "reported a high degree of satisfaction with the services provided by the expert ...." (Cecil & Willging, ****338** *The Use of Court-Appointed Experts in Federal Court* (1994) 78 Judicature 41, 42; cf. Learned Hand, *supra*, 15 Harv. L.Rev. at p. 56 [advocating "a board of experts or a single expert, not called by either side, who shall advise the jury of the general propositions applicable to the case ...."].)

The trial court may want to consider this option in this case. It is more effort to go off the beaten path, but scholarly literature can help by surveying some practical aspects. (See generally, Rubinfeld & Cecil, *supra* [citing and discussing sources].)

This nation has a vast wealth of genuine scientific expertise, and the pandemic has been forcing our scientists to become familiar with video communication. The internet has reduced the significance of geographic distance.

You don't need a Nobel prize winner: excellent junior faculty and even graduate students can be vastly knowledgeable, motivated, and hungry to boot. After all, few scholars are accustomed to the rates at which California ***1114** lawyers bill. Authentic and objective experts thus may be surprisingly affordable, given the scholarly world's commitment to public service and the prestige and satisfaction that can flow from a judicial appointment like this. And once you appoint that expert, it can be startling how fast the case settles.

With concern and hope, I join the majority opinion.

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Footnotes

1 All further statutory references are to the Government Code unless otherwise designated.

2 We gather from LAUSD's demurrer that Brown was unaware of LAUSD's “statutory obligation to undergo competitive bidding for any contracts until January 2017.”

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