

September 2017

# Environmental Injustice/Racism in Flint, Michigan: An Analysis of the Bodily Integrity Claim in *Mays v. Snyder* as Compared to Other Environmental Justice Cases

Joshua V. Berliner

*Elisabeth Haub School of Law at Pace University*, [jberliner@law.pace.edu](mailto:jberliner@law.pace.edu)

Follow this and additional works at: <https://digitalcommons.pace.edu/pelr>

 Part of the [Civil Rights and Discrimination Commons](#), [Environmental Law Commons](#), [Human Rights Law Commons](#), and the [Water Law Commons](#)

---

### Recommended Citation

Joshua V. Berliner, *Environmental Injustice/Racism in Flint, Michigan: An Analysis of the Bodily Integrity Claim in *Mays v. Snyder* as Compared to Other Environmental Justice Cases*, 35 Pace Env'tl. L. Rev. 108 (2017)

Available at: <https://digitalcommons.pace.edu/pelr/vol35/iss1/3>

---

---

**NOTE**

**Environmental Injustice/Racism in Flint,  
Michigan: An Analysis of the Bodily Integrity  
Claim in *Mays v. Snyder* as Compared to  
Other Environmental Justice Cases**

JOSHUA V. BERLINER\*

**TABLE OF CONTENTS**

I.	<i>Introduction</i> .....	109
II.	<i>Summary of Alleged Facts from the Complaint</i> .....	112
III.	<i>The Case Law on “Bodily Integrity” Claims</i> .....	115
	A. <i>42 U.S.C. § 1983 and Bodily Integrity Generally</i> ..	115
	B. <i>Bodily Integrity Claims in the Environmental         Justice Context</i> .....	116
IV.	<i>The Flint Residents’ Bodily Integrity Claim</i> .....	118
V.	<i>Applying the Case Law to the Alleged Facts of the Federal Flint Case</i> .....	119
	A. <i>42 U.S.C. § 1983 and Bodily Integrity Generally         – A Positive Result</i> .....	119
	B. <i>Bodily Integrity Claims in the Environmental         Justice Context – Another Positive Result</i> .....	121
VI.	<i>Comparable Environmental Justice Cases to the Federal Flint Case</i> .....	123
	A. <i>Lucero v. Detroit Public Schools – A Favorable         Outcome in the Eastern District of Michigan</i> .....	123
	B. <i>The Fluoride Additive Cases – A Surmountable         Mixed Result</i> .....	125

---

\* J.D. and Environmental Law Certificate candidate, Articles Editor, PACE ENVIRONMENTAL LAW REVIEW, Elizabeth Haub School of Law at Pace University, Class of 2018; B.A., *summa cum laude*, in Environmental Studies and Economics, Bucknell University, Class of 2015. The author would like to thank his parents, Alan and Alison Berliner, for their constant and unconditional support of his educational and environmental pursuits. The author would also like to thank the PACE ENVIRONMENTAL LAW REVIEW Editors and Associates for their hard work on this Note.

VII. *Insights from Mays v. Snyder – Parallel Michigan Court of Claims Flint Case*.....128

A. *Establishing the Constitutional Bodily Integrity Tort – A Potential Benefit* .....129

B. *Availability of a Damage Remedy – A Potential Drawback That Can Be Overcome*.....131

VIII. *Conclusion* .....133

## I. INTRODUCTION

“Environmental injustice/racism” is the disproportionately high level of risk to high-impact environmental hazards that certain communities or human groups, particularly people of color, in the United States face.<sup>1</sup> As of 2014, 134 million U.S. residents live within the “vulnerability” zones (estimates made by a facility of the maximum possible radius where people could be harmed by a worst-case release of certain toxic or flammable chemicals under EPA’s Risk Management Planning program) of 3,433 chemical facilities.<sup>2</sup> Of these 134 million residents, 3.8 million residents live within the “fenceline” zones (which are areas designated as one-tenth the radial distance of the vulnerability zone) closest to potential harm from these facilities with the least time to react in the event of a catastrophe.<sup>3</sup> The percentage of African Americans in fenceline zones is 75% greater than for the U.S. as a whole, and the percentage of Latinos in fenceline zones is 60% greater than for the U.S. as a whole.<sup>4</sup> Additionally, the poverty rate within fenceline zones is 50% higher than for the U.S. as a whole.<sup>5</sup> These statistics—and environmental injustice/racism generally—reflect the unfair treatment and lack of involvement of certain groups based on their race, color, national origin, or income in “the

- 
1. *Environmental Justice/Environmental Racism*, ENERGY JUSTICE NETWORK, <https://perma.cc/2LPQ-CC2V>; *Environmental (in)justice*, EJOLT, <https://perma.cc/X6AG-Q8PN>.
  2. ORUM ET AL., ENVTL. JUSTICE & HEALTH ALL. FOR CHEM. POL’Y REFORM, WHO’S IN DANGER? RACE, POVERTY, AND CHEMICAL DISASTERS - A DEMOGRAPHIC ANALYSIS OF CHEMICAL DISASTER VULNERABILITY ZONES 1–2 (2014), <https://perma.cc/3JXZ-E9CG>.
  3. *Id.* at 1–2, 11.
  4. *Id.* at 3.
  5. *Id.*

development, implementation, and enforcement of environmental laws, regulations, and policies.”<sup>6</sup>

The water crisis in Flint, Michigan is an example of environmental injustice/racism and its poignant relevance to many environmental issues the United States faces in the twenty-first century. Situated sixty-six miles northwest of Detroit, Flint has a population of 99,802 as of 2015—55.1% African American, 39.5% White, 3.7% Hispanic or Latino, 0.6% Native American, 0.4% Asian, and 0.7% other races.<sup>7</sup> Based on this demographic breakdown, it is evident that Flint is predominately African American. In the wake of the Flint water crisis, many Flint residents filed a class action suit in federal district court (in the Eastern District of Michigan): *Mays v. Snyder*.<sup>8</sup> The case was recently dismissed without prejudice by the district court,<sup>9</sup> but after the Flint residents filed an appeal to the Sixth Circuit Court of Appeals,<sup>10</sup> the Sixth Circuit consolidated the case with another similar case, reversed the dismissal, and remanded to the district court for further adjudication on the merits.<sup>11</sup> Neither party has appealed the decision.<sup>12</sup> Plaintiffs—thousands of Flint residents affected by the water crisis—have sued multiple government

- 
6. *Learn About Environmental Justice*, EPA, <https://perma.cc/U4L5-U8SY> (last updated Sept. 26, 2017).
  7. *ACS Demographic and Housing Estimates*, U.S. CENSUS BUREAU, <https://perma.cc/4PH7-REZT>.
  8. Complaint at 1, *Mays v. Snyder*, No. 5:15-cv-14002, 2017 WL 445637 (E.D. Mich. Feb. 2, 2017), *aff'd in part, rev'd in part, reh'g en banc denied sub nom. Boler v. Earley*, 865 F.3d 391 (6th Cir. 2017) [hereinafter Complaint].
  9. *Mays*, 2017 WL 445637, at \*3.
  10. Jiquanda Johnson, *Lawyers to Appeal Dismissal of Flint Water Crisis Lawsuit*, MLIVE (Feb. 3, 2017), <https://perma.cc/3QVF-LXXP>.
  11. *Mays* was consolidated on appeal with *Boler v. Earley*, No. 16-10323, 2016 WL 1573272 (E.D. Mich. Apr. 19, 2016). *Earley*, 865 F.3d at 400, 417. The Sixth Circuit reversed the dismissal and held that plaintiffs' Section 1983 bodily integrity claim in *Mays* was not precluded by the Safe Drinking Water Act. *Id.* at 409. In its decision, the Sixth Circuit reasoned that the statute's text and lack of a comprehensive remedial scheme, as well as the divergent contours of the rights and protections found in the constitutional claim, cannot imply that Congress intended to foreclose the Section 1983 bodily integrity claim with the Safe Drinking Water Act. *Id.* at 403–10.
  12. Following the issuance of its decision, the Sixth Circuit received and denied a petition for rehearing en banc. *Id.* at 391. As of the date of this Note's publishing, neither party has filed a petition for writ of certiorari to the U.S. Supreme Court.

officials from the City of Flint, the Michigan Department of Environmental Quality (“MDEQ”), and the State of Michigan.<sup>13</sup>

This Note examines the merits of the “bodily integrity” claim that the Flint residents have alleged in *Mays* (but does not discuss any claims asserted in *Earley*, the case *Mays* was consolidated with on appeal), and asserts that they should be successful on this claim on remand, assuming that the facts alleged in the Flint residents’ complaint are true. This Note outlines the alleged facts and then discusses the existing case law on bodily integrity claims generally, both in the non-environmental justice and environmental justice fields. Following is an explanation of the specific bodily integrity claim the Flint residents have made and an application of the existing case law (from both the non-environmental justice and environmental justice fields) to the alleged facts. Lastly, this Note compares this federal Flint case to the parallel Flint-related state class action suit filed with the Michigan Court of Claims.

Although there might be some legal hurdles that the Flint residents will have to overcome, their bodily integrity claim can be successful on remand and will likely not be precluded by federal statute if appealed to the U.S. Supreme Court. As a result, similar bodily integrity claims should be used as a remedy for contamination of other public drinking water sources across the country. The Flint residents should be able to establish that: (1) defendants’ actions occurred “under color of state law,” and (2) a constitutional right exists and was deprived.<sup>14</sup> The Flint residents can best establish this by showing that defendants’ conduct was “outrageous and shocking” to the point where it “shocks the conscience” of the judiciary, as the defendants’ actions exhibited “deliberate indifference” to plaintiffs’ rights to clean water.<sup>15</sup> On remand, no deference should be given to the district judge’s initial dismissal of the case because the district court made virtually no findings of fact and did not consider the merits of whether defendants actually violated the Flint residents’ established

---

13. Complaint, *supra* note 8, at 5–10. On appeal, the Sixth Circuit dismissed the Flint residents’ claims against the State of Michigan because it is sovereignly immune from such claims under the Eleventh Amendment to the U.S. Constitution. *Earley*, 865 F.3d at 413.

14. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

15. *Lucero v. Detroit Public Schools*, 160 F. Supp. 2d 767, 798–99 (E.D. Mich. 2001).

constitutional right to bodily integrity. Within the environmental justice context specifically, the magnitude of defendants' intrusion on plaintiffs' bodily integrity rights far outweighs the public health benefit (if there is any in this case) and its innocuous effect on the Flint residents resulting from defendants' actions.<sup>16</sup>

Although two state cases, which deal with the addition of fluoride to public water systems, disadvantage environmental justice bodily integrity claims like that asserted in the federal Flint case, other fluoride cases counter—and overcome—the force of these two state cases. Additionally, the Michigan Court of Claims's decision can further bolster the Flint residents' claim on remand that they have established a prima facie 42 U.S.C. § 1983 (“Section 1983”) case against defendants—as required under the second element (that a constitutional right exists and was deprived)—because the court held that defendants' actions “shock the conscience.”<sup>17</sup> Also, the possibility of the Court of Claims denying a damage remedy to the Flint residents is not an issue because the Flint residents will likely be successful in suing defendants in their individual capacities. The Flint residents can overcome the argument that defendants are entitled to “qualified immunity” from being sued in their individual capacities because they can establish that: (1) the facts, considered in the light most favorable to the Flint resident, demonstrate a constitutional violation; and (2) the constitutional right is “clearly established.”<sup>18</sup>

## II. SUMMARY OF ALLEGED FACTS FROM THE COMPLAINT

The Flint residents allege that City of Flint officials commissioned a study in 2011 to determine if the Flint River could be used by the City as its primary source of drinking water (in anticipation of switching from the Detroit water system to an alternative system governed by a regional water authority to cut costs).<sup>19</sup> The report found that the Flint River water was highly corrosive and could not be consumed safely without an anti-

---

16. *Minn. State Bd. of Health by Lawson v. City of Brainerd*, 241 N.W.2d 624, 633 (Minn. 1976).

17. *Mays v. Snyder*, No. 16-000017-MM, at 28 (Mich. Ct. Cl. Oct. 26, 2016).

18. *Saucier v. Katz*, 533 U.S. 194, 200–01 (2001).

19. Complaint, *supra* note 8, at 16.

corrosive agent to prevent lead, copper, and other heavy metals from leaching from the lead-, copper-, and iron-based water lines.<sup>20</sup> In 2013, Flint officials delivered this report to the MDEQ, warning the MDEQ of these dangers.<sup>21</sup> That same year, the Flint City Council approved the switch to the alternative system governed by a regional water authority and scheduled the new water source to become operational in 2016.<sup>22</sup> In the meantime, water from Detroit would be made available to Flint until the transition was complete.<sup>23</sup> Despite this, in April 2014, the Flint Emergency Manager ordered the City to draw water from the Flint River, even though he knew that the corrosive River was not being treated with anti-corrosive agents.<sup>24</sup>

Within days of the switch, the Flint residents immediately complained to the City of Flint and the MDEQ, citing the water's unusual smell, color, and taste.<sup>25</sup> Despite these repeated complaints over an eight-month period—and the fact that defendants were made aware in April 2014 that anti-corrosive treatments were not being used—the City and the MDEQ continually assured residents that the water was safe to drink.<sup>26</sup> Additionally, MDEQ and City officials were aware of elevated levels of Trihalomethanes (“TTHM”) in the tap water above legal Safe Drinking Water Act (“SDWA”) levels (and residents were made aware of this by mail as well).<sup>27</sup> Despite this, the Flint Emergency Manager continued to deny that the water was unsafe and did not do anything about it.<sup>28</sup> In January 2015, the Emergency Manager resigned, but his replacement likewise failed to do anything about the corrosive water.<sup>29</sup>

During this same eight-month period, MDEQ officials knew of the high lead levels and that inaccurate test results were providing false assurances to residents about true lead levels (they were also informed of this by an EPA representative in June 2015 and by

---

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 16–17.

25. *Id.* at 17.

26. *Id.* at 17–18.

27. *Id.* at 18.

28. *Id.*

29. *Id.* at 19.

Flint officials throughout the entire eight months).<sup>30</sup> Various landmark studies and reports released during the spring and summer of 2015 also showed that Flint River water levels exceeded legal SDWA limits and that the water was having adverse health effects on the Flint residents.<sup>31</sup> Flint also did not keep any records of which users had or did not have lead service pipes or plumbing—a direct violation of federal law.<sup>32</sup> In October 2015, Governor Snyder ordered that Flint reconnect its water source to the Detroit water system.<sup>33</sup> Despite the reconnection, the Flint residents continued to experience adverse health effects and still do at the time of this Note’s writing and publication.<sup>34</sup>

The Flint residents filed a complaint in the U.S. District Court for the Eastern District of Michigan in November 2015.<sup>35</sup> In the interim, the Flint residents moved to amend the complaint, both parties moved to add parties, and defendants moved to extend response time.<sup>36</sup> In late June 2016, Governor Snyder and two other state officials named as defendants filed a motion to dismiss, which the district court then granted in February 2017.<sup>37</sup> The Flint residents subsequently appealed to the Sixth Circuit,<sup>38</sup> which reversed the dismissal and remanded the case to the district court for further proceedings on the merits.<sup>39</sup> It remains to be seen whether either party will appeal the case to the U.S. Supreme Court.

---

30. *Id.* at 20.

31. *Id.* at 20–21.

32. *Id.* at 21.

33. *Id.* at 22.

34. *Id.*

35. *Id.* at 1.

36. *We Have Subpoenaed Documents on Behalf of the Class*, FLINT WATER CLASS ACTION, <https://perma.cc/85W5-HX2B>.

37. Johnson, *supra* note 10.

38. *Id.*

39. *Boler v. Earley*, 865 F.3d 391, 396 (6th Cir. 2017).



### III. THE CASE LAW ON “BODILY INTEGRITY” CLAIMS

#### A. 42 U.S.C. § 1983 and Bodily Integrity Generally

The bodily integrity claim in the federal Flint case derives from Section 1983. This section of the U.S. Code enables a person to be compensated when another person, acting “under color of state law,” deprives this person of a federal constitutional right.<sup>40</sup> In order to establish a *prima facie* case under Section 1983, plaintiffs must establish that: (1) the action occurred “under color of state law” and (2) that a constitutional right exists and was deprived.<sup>41</sup> Meeting the first element is not difficult in cases where those who are sued are government employees or entities who were acting within their governmental duties and powers.<sup>42</sup> The U.S. Supreme Court has held that the first element pertains to government actors—those who “carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.”<sup>43</sup> Such actors also include “municipalities and other government units.”<sup>44</sup>

Aggrieved parties can assert violations of Substantive Due Process constitutional rights under Section 1983 (from the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution), regardless of how fair the procedures used to implement the government actions at issue were.<sup>45</sup> In general, Substantive Due Process violations successfully brought under Section 1983 have been limited to “matters relating to marriage, family, procreation, and the right to bodily integrity.”<sup>46</sup> Similarly, the U.S. Supreme Court has been reluctant to expand the scope of these Substantive Due Process rights.<sup>47</sup> This historically narrow approach also applies to one’s implied right to bodily integrity. This implied right derives from one’s fundamental privacy right under the Fourteenth Amendment, in the sense that nothing is more

---

40. 15 AM. JUR. 2D *Civil Rights* § 72 (2016).

41. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

42. *Tennessee v. Garner*, 471 U.S. 1, 4–5 (1985).

43. *Monroe v. Pape*, 365 U.S. 167, 172 (1961).

44. *Monell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658, 690 (1978).

45. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

46. *Albright v. Oliver*, 510 U.S. 266, 272 (1994).

47. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

important to life and liberty than a person's health and their ability to control it.<sup>48</sup> Most of the case law on this topic relates to sexual assault, medical autonomy, and children, but environmental justice scholars assert that, under certain circumstances, substantive due process rights extend to polluting activity in the form of a toxic trespass to one's bodily integrity.<sup>49</sup>

The key inquiry in determining whether one's fundamental right to bodily integrity has been violated is whether the alleged actions were "outrageous and shocking" to the point where they "shock the conscience" of the judiciary.<sup>50</sup> When a government official has an opportunity beforehand to deliberate over their committed act, the judiciary will be "shocked" if that "official acts in a way that exhibits deliberate indifference to others' rights."<sup>51</sup> An aggrieved party can satisfy "deliberate indifference" if they can prove that the official disregarded an obvious "risk of harm" that will likely result in a violation of a constitutional right.<sup>52</sup>

In order to rebut the "outrageous and shocking" inquiry, the government must "provide more than minimal justification for its action."<sup>53</sup> This is true because, unlike most deprivations of property, bodily invasions most often cannot be remedied by simply awarding the injured party money damages.<sup>54</sup> Because the damage is often permanent in these situations, a crucial factor in providing more than a minimal justification is whether the action involved "needless severity" that caused a "risk of irreversible injury to health and danger to life itself."<sup>55</sup>

## **B. Bodily Integrity Claims in the Environmental Justice Context**

Another approach courts have used to evaluate bodily integrity claims in the environmental justice context is to balance

---

48. Uma Outka, *Environmental Injustice and the Problem of the Law*, 57 ME. L. REV. 209, 248 (2005).

49. *Id.* at 250.

50. *Lucero v. Detroit Public Schools*, 160 F. Supp. 2d 767, 799 (E.D. Mich. 2001).

51. *Waller v. Trippett*, 179 F. Supp. 2d 724, 731 (E.D. Mich. 2001), *aff'd in part, rev'd in part sub nom.* *Waller v. Trippett*, 49 F. App'x 45 (6th Cir. 2002).

52. *Farmer v. Brennan*, 511 U.S. 825, 836 (1994).

53. *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 813 (S.D. Ohio 1995).

54. *Id.*

55. *Id.* at 814.

the substantial public health benefit and its innocuous effect on the individual with the magnitude of the intrusion on one's bodily integrity.<sup>56</sup> To perform this balancing test—"the *Minnesota State Board of Health* balancing test"—the court must consider four factors: (1) the importance of the state's purpose for requiring the environmentally harmful action; (2) the nature and magnitude of the effect of the action on the individual; (3) whether the state's purpose justified intrusion of bodily integrity; and (4) whether the means adopted by the state to accomplish its purpose were proper and reasonable.<sup>57</sup>

In addition to the *Minnesota State Board of Health* balancing test, the court must also consider whether the potential for a bodily integrity violation through exposure to an environmental harm is only "speculative" (which weighs *against* a bodily integrity violation) or is a risk of harm likely to result in exposure (which weighs *in favor of* a bodily integrity violation).<sup>58</sup> The burden is on the Flint residents to prove a risk of harm that is likely to result in exposure.<sup>59</sup> Environmental justice advocates believe this burden is unfair and places an inappropriate presumption in favor of profit-driven polluters because proving the "potential" of the harm to create a "risk of harm likely to result" in exposure creates a seemingly insurmountable uncertainty problem.<sup>60</sup> Additionally, bodily integrity is not coextensive with the right to be free from someone acting "under color of state law" (a government actor) who introduces an allegedly contaminated substance into public drinking water.<sup>61</sup> Although the U.S. Supreme Court has not weighed in on this issue specifically, federal courts throughout the country have been consistently clear that the U.S. Constitution does not provide the right to a contaminant-free environment.<sup>62</sup>

---

56. *Minn. State Bd. of Health by Lawson v. City of Brainerd*, 241 N.W.2d 624, 633 (Minn. 1976).

57. *Id.* at 631.

58. *Lucero v. Detroit Public Schools*, 160 F. Supp. 2d 767, 800 (E.D. Mich. 2001).

59. *Outka*, *supra* note 48, at 251.

60. *Id.*

61. *Coshov v. City of Escondido*, 34 Cal. Rptr. 3d 19, 31 (Ct. App. 2005).

62. *Concerned Citizens of Neb. v. U.S. Nuclear Regulatory Comm'n*, 970 F.2d 421, 426–27 (8th Cir. 1992) (finding no fundamental right to be free of non-naturally occurring radiation); *In re Agent Orange Prod. Liab. Litig.*, 475 F. Supp. 928, 934 (E.D.N.Y. 1979) (finding no constitutional right to a healthful environment based on spraying foliage with chemical agents); *Gasper v. La. Stadium & Exposition Dist.*, 418 F. Supp. 716, 721 (E.D. La. 1976) (finding

#### IV. THE FLINT RESIDENTS' BODILY INTEGRITY CLAIM

The Flint residents' main claim is that defendants violated Section 1983 because their actions unconstitutionally invaded upon the Flint residents' implied fundamental right to "bodily integrity," as established by Substantive Due Process under the Fourteenth Amendment.<sup>63</sup> Overall, the Flint residents claim that defendants violated this right because defendants: (1) had a "duty to protect" the Flint residents from "foreseeable risk of harm" from the Flint River's contaminated water; (2) "knew of serious medical risks" from exposure to this contaminated water; (3) "failed to protect" the Flint residents from these known risks; and (4) the Flint residents "suffered bodily harm as a result of [this] exposure."<sup>64</sup>

Additionally, the Flint residents claim that defendants' conduct was "so egregious and outrageous that it shocks the conscience."<sup>65</sup> This is because, in the Flint residents' view, defendants made a conscious and deliberate decision to continually expose Flint residents to toxic water while ignoring the serious medical risks of doing so for over eighteen months.<sup>66</sup> Lastly, the Flint residents claim that, as both direct and proximate results of defendants' unconstitutional acts, they have suffered serious—and in some cases, life-threatening and irreversible—bodily injury, emotional turmoil, and substantial economic losses (in the form of medical expenses and lost wages from time missed at work).<sup>67</sup>

---

no fundamental right to breathe clean air free of tobacco smoke); Molly McNulty, Annotation, *Validity, Construction, and Effect of Statute, Ordinance, or Other Measure Involving Fluoridation of Public Water Supply*, 78 A.L.R. 6th 229, § 7 (2012).

63. Complaint, *supra* note 8, at 26.

64. *Id.*

65. *Id.* at 2, 26.

66. *Id.* at 26.

67. *Id.* at 26–27.

**V. APPLYING THE CASE LAW TO THE ALLEGED  
FACTS OF THE FEDERAL FLINT CASE**

**A. 42 U.S.C. § 1983 and Bodily Integrity Generally – A  
Positive Result**

When the existing case law is applied to the facts alleged in the complaint in the federal Flint case, it is evident that the bodily integrity claim can be viable on remand. If the dismissal of the case is appealed to the U.S. Supreme Court, plaintiffs will be able to affirm that their bodily integrity claim is not precluded by the SDWA. Conversely, if the case is not appealed on the preclusion issue and is instead remanded to the district court in accordance with the Sixth Circuit’s opinion, the Flint residents can establish a *prima facie* Section 1983 case against defendants (that (1) the action occurred “under color of state law,” and (2) that a constitutional right exists and was deprived). Although the Flint residents might run into problems satisfying the second element, the facts of the case seem to satisfy the first element of the case law so definitively as to outweigh the potential problems with meeting the second element.

The first element is met because all defendants, as stated in the complaint, are employees of the State of Michigan or the City of Flint and acted “under color of state law” within their governmental duties and powers.<sup>68</sup> The second element might present issues because of how narrow the Supreme Court has defined bodily integrity (and fundamental rights in general) from the Due Process Clause of the Fourteenth Amendment in the past.<sup>69</sup> As discussed above, there is no established fundamental right to be free from someone introducing an allegedly contaminated substance into public drinking water.<sup>70</sup>

Although this is the case, the second element can be bolstered by the notion that defendants’ actions qualify as “outrageous and shocking.” This is because defendants acted in a way that exhibits “deliberate indifference” to the Flint residents’ rights to clean

---

68. *Id.* at 2. Issues of immunity are further discussed *infra* Section VII but should not present an issue in meeting this first element.

69. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

70. *Coshov v. City of Escondido*, 34 Cal. Rptr. 3d 19, 29 (Ct. App. 2005).

water.<sup>71</sup> “Deliberate indifference” is defined as when the “state official knows of and disregards an excessive risk to [the victim’s] health or safety.”<sup>72</sup> Defendants repeatedly ignored various complaints made by the Flint residents for eighteen months and several warnings made over the same time period by the EPA, the Flint-commissioned water study, and other high-profile publications.<sup>73</sup> One of these publications, completed during the spring and summer of 2015 by Professor Marc Edwards of Virginia Tech, found that 10% of the samples taken from the Flint River had lead levels of twenty-five parts per billion—substantially in excess of the federal limit of fifteen parts per billion—and that the Flint River water was nineteen times more corrosive than the water pumped from Lake Huron by the Detroit water system.<sup>74</sup> Another such study, published in August 2015 by Dr. Mona Hanna-Attisha of Hurley Children’s Hospital in Flint, Michigan, found a dramatic and dangerous spike in blood lead levels in many Flint children corresponding with the time of exposure to the highly corrosive Flint River water.<sup>75</sup> Both of these studies were seemingly ignored by defendants in their decision to continually expose the Flint residents to lead-contaminated water from the Flint River to the point where it could be classified as “deliberate indifference.”

Moreover, defendants knew that they did not have any record of which users did or did not have lead service pipes or plumbing, yet still ensured residents that the water was safe.<sup>76</sup> In further spite of this knowledge, defendants also repeatedly decided to not treat the water with anti-corrosive agents.<sup>77</sup> Through these actions, defendants disregarded an obvious “risk of harm” likely to result in a possible violation of bodily integrity.<sup>78</sup> The deleterious effects, especially to children, of prolonged lead exposure are well

---

71. *Lucero v. Detroit Public Schools*, 160 F. Supp. 2d 767, 798 (E.D. Mich. 2001).

72. *Ewolski v. City of Brunswick*, 287 F.3d 492, 513 (6th Cir. 2002) (quoting *Farmer v. Brennan*, 511 U.S. 825, 837(1994)).

73. Complaint, *supra* note 8, at 2, 16–18.

74. *Id.* at 20.

75. *Id.* at 21.

76. *Id.*

77. *Id.* at 17–19.

78. *Lucero v. Detroit Public Schools*, 160 F. Supp. 2d 767, 789 (E.D. Mich. 2001).

documented.<sup>79</sup> Also, defendants were continually informed of this risk—both before and after they decided to switch to the Flint River as Flint’s main source—yet did nothing about it.<sup>80</sup>

Defendants also will likely not be able to offer “more than minimal justification for [their] action[s].”<sup>81</sup> Such a justification is necessary here because the Flint residents, many of whom have suffered permanent bodily harm, cannot simply be compensated like most other deprivations of property.<sup>82</sup> Defendants decided to use the Flint River as a drinking source primarily to cut costs.<sup>83</sup> Defendants had the option to continue receiving water from Detroit in the interim while Flint transitioned to a new regional authority, but refused to take advantage of this option.<sup>84</sup> Additionally, arguing that the Flint River water was safe is not valid because defendants were repeatedly warned to the contrary.<sup>85</sup> The “severity” of the effects of defendants’ actions was “needless”<sup>86</sup> (meaning that defendants’ decision to switch to the Flint River, and the resulting negative effects, were both avoidable) because defendants only needed to use the Detroit interim option to avoid this harm altogether. Instead, this unnecessary severity led to an unjustifiable “risk of irreversible injury to health and danger to life itself.”<sup>87</sup>

### **B. Bodily Integrity Claims in the Environmental Justice Context – Another Positive Result**

The four factors of the *Minnesota State Board of Health* balancing test also lean in favor of the Flint residents and constitute an alternative argument the Flint residents can make to assert that their bodily integrity rights were violated. In terms of factor (1) (the importance of the State’s purpose for requiring the

---

79. *Lead – Childhood Lead Poisoning Data, Statistics, and Surveillance*, CTR. FOR DISEASE CONTROL & PREVENTION (Sept. 1, 2016), <https://perma.cc/P93B-TAXB>.

80. Complaint, *supra* note 8, at 17–19.

81. *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 813 (S.D. Ohio 1995).

82. Complaint, *supra* note 8, at 22.

83. *Id.* at 16.

84. *Id.* at 16–17.

85. *Id.* at 16–18, 20.

86. *In re Cincinnati Radiation Litig.*, 874 F. Supp. at 814.

87. *Id.*

environmentally harmful action), saving on costs was arguably the only reason why the state's purpose for committing this environmentally harmful action was important.<sup>88</sup>

In terms of factor (2) (the nature and magnitude of the effect of the action on the individual), the nature and magnitude of the effect is significant. Victims have suffered—and continue to suffer—immense physical damage and injury in the form of skin lesions and hair loss, chemically induced hypertension, autoimmune disorders, neurological disorders like “brain fog,” seizure, vision loss, and memory loss, and psychological disorders like depression, chronic anxiety, post-traumatic stress disorder, and an inability to cope with normal stress.<sup>89</sup> Victims also have suffered—and continue to suffer—chronic and acute abdominal and stomach discomfort,<sup>90</sup> chronic and acute respiratory disorders like chronic rhinitis and aggravation of asthma,<sup>91</sup> and an inability to overcome (or a worsening of) developmental disorders.<sup>92</sup> Additionally, victims have experienced—and continue to experience—substantial economic losses in the form of property damage and decreased property value from irreparably damaged service line pipes,<sup>93</sup> medical expenses,<sup>94</sup> and lost wages from time missed at work due to illness.<sup>95</sup> Compared to *Minnesota State Board of Health* (where there was actually a public benefit through fluoridation of a public water source),<sup>96</sup> the federal Flint case poses a substantial health risk without any public benefit. Additionally, compared to *Minnesota State Board of Health* (where fluoridation of a public water source only caused innocuous effects on individuals),<sup>97</sup> the lead in the federal Flint case has caused significant effects on the individuals in Flint.

In terms of factor (3) (whether the State's purpose justified intrusion of bodily integrity), the State's purpose, as discussed in

---

88. Complaint, *supra* note 8, at 16.

89. *Id.* at 11.

90. *Id.* at 12.

91. *Id.* at 13.

92. *Id.* at 15.

93. *Id.* at 11.

94. *Id.* at 25.

95. *Id.* at 27.

96. *Minn. State Bd. of Health by Lawson v. City of Brainerd*, 241 N.W.2d 624, 633 (Minn. 1976).

97. *Id.*



factor (1), does not justify intrusion of bodily integrity. In terms of factor (4) (whether the means adopted by the State to accomplish its purpose were proper and reasonable), the means adopted to achieve factor (1) were not “proper and reasonable.”<sup>98</sup> Defendants continually ignored sound advice and warnings without any adequate justification for doing so.<sup>99</sup> Switching to another water source would have been a simple fix, but defendants continually chose not to resolve the problem.<sup>100</sup>

Furthermore, these four factors demonstrate that the Flint residents can show that they were continually exposed to a risk of harm likely to result in exposure, not merely a “speculative” danger.<sup>101</sup> This is mainly because the health effects in the federal Flint case are well documented and have persisted for over a year. These are not simply projected health risks.

## VI. COMPARABLE ENVIRONMENTAL JUSTICE CASES TO THE FEDERAL FLINT CASE

### A. *Lucero v. Detroit Public Schools* – A Favorable Outcome in the Eastern District of Michigan

One environmental justice case that parallels favorably to the federal Flint case in the same jurisdiction is *Lucero v. Detroit Public Schools*, where the Detroit Board of Education decided to construct a new elementary school on a known contaminated site.<sup>102</sup> The new school consolidated two elementary schools, one of which had a student body that was 61% Hispanic and 13% African American, and the other 21% Hispanic and 58% African American.<sup>103</sup> The Board proceeded with the plan, despite a recently published University of Michigan study that found that the site could have a significant presence of many toxins, including volatile organic compounds (“VOCs”), polychlorinated biphenyls

---

98. *Id.* at 631.

99. Complaint, *supra* note 8, at 16–18, 20.

100. *Id.*

101. *Lucero v. Detroit Public Schools*, 160 F. Supp. 2d 767, 800 (E.D. Mich. 2001).

102. *Id.* at 771.

103. *Id.*

(“PCBs”), chlorinated solvents, heavy metals, radioactive paints, semi-VOCs, and petroleum-related materials.<sup>104</sup>

The Eastern District of Michigan (the same court that dismissed the federal Flint case here) held that, although the plaintiffs properly asserted a bodily integrity right, the defendants’ actions did not constitute an invasion of bodily integrity in violation of the Fourteenth Amendment.<sup>105</sup> The court quoted *Lillard v. Shelby County Board of Education*, where the Sixth Circuit stated that, while a student has a Fourteenth Amendment right to personal security and bodily integrity, there must be a showing that the “force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than merely careless or unwise zeal that it amounted to a brutal and inhuman abuse of official power literally shocking to the conscience.”<sup>106</sup> The court reasoned that the plaintiffs had not shown that the defendants’ actions were based in “malice or sadism,” and that their actions fell short of the outrageous and shocking character required because the harm to the students of the new school was speculative at that time, rather than actual and imminent.<sup>107</sup> Additionally, the court reasoned that the site at issue that has already been found to be contaminated, not the school facility itself, may have caused the injury.<sup>108</sup>

This outcome, although unfavorable to the *Lucero* plaintiffs, favorably compares to the federal Flint case. In the federal Flint case, plaintiffs can argue on remand that the risks of bodily harm were more genuine and probable than in *Lucero* because multiple studies documented the adverse health effects on the Flint residents from defendants’ actions and because, on multiple occasions, several groups notified defendants of these risks.<sup>109</sup> In *Concerned Pastors for Social Action v. Khouri*, a related case about the same Flint water crisis, the same district court acknowledged these severe health risks as uncontested.<sup>110</sup> Additionally, as

---

104. *Id.* at 773.

105. *Id.* at 799.

106. *Id.* (quoting *Lillard v. Shelby Cty. Bd. of Educ.*, 76 F.3d 716, 725 (6th Cir. 1996)).

107. *Id.* at 799.

108. *Id.* at 805.

109. Complaint, *supra* note 8, at 16–18, 20.

110. No. 16-10277, 2016 WL 6647348, at \*8 (E.D. Mich. Nov. 10, 2016).

discussed above, the Flint residents in the federal Flint case have already suffered many severe health effects as a direct result of defendants' actions for over a year. When *Khouri* was appealed, the Sixth Circuit confirmed this by denying the stay of the granting of a preliminary injunction requiring defendants to provide city residents with safe drinking water at point of use<sup>111</sup>: "Flint residents continue to suffer irreparable harm from the lack of reliable access to safe drinking water."<sup>112</sup> In *Lucero*, plaintiffs only asserted severe potential health risks and could not offer any proof of actual health effects because students had yet to attend the new school and suffer from chemical exposure.

### **B. The Fluoride Additive Cases – A Surmountable Mixed Result**

An issue that typically arises in bodily integrity challenges, as evidenced by the cases discussed below, is the addition of fluoride to public water for health benefits.<sup>113</sup> Although groups have brought bodily integrity claims, courts have held that there is no fundamental right to fluoride-free public drinking water to the point where a heightened standard of review applies.<sup>114</sup> This does not severely detract from the Flint residents' argument on remand, though, and should not preclude other aggrieved parties in other Flint-like environmental justice cases from successfully asserting that their bodily integrity rights were violated.

One case that exemplifies this is *Coshov v. City of Escondido*, where the plaintiffs argued that fluoridating public water supplies was similar to "compulsory medication"—held by other courts as a violation of bodily integrity.<sup>115</sup> The court rejected this argument,

---

111. *Concerned Pastors for Soc. Action v. Khouri*, 844 F.3d 546, 550 (6th Cir. 2016).

112. *Id.* at 549.

113. *Fluoride in Water - Fluoride in Water is Safe and It Works*, AM. DENTAL ASS'N, <https://perma.cc/CW9K-D54S>.

114. *See, e.g., Coshov v. City of Escondido*, 34 Cal. Rptr. 3d 19, 27–30 (Ct. App. 2005) (holding that a right to drinking water uncontaminated with fluoride is not explicitly or implicitly guaranteed by either the U.S. or California Constitutions); *Quiles v. City of Boynton Beach*, 802 So. 2d 397, 399 (Fla. Dist. Ct. App. 2001) (holding that inserting fluoride into public drinking water is not akin to a "medical procedure" and is therefore not in violation of either the U.S. or Florida Constitutions).

115. 34 Cal. Rptr. 3d at 31–32.

reasoning that a right to fluoride-free public water is not “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>116</sup> This holding arguably creates problems for the federal Flint case because it is not unreasonable to expect a court to hold that lead-free water is likewise not deeply rooted in the traditions of our country. This means that the federal Flint case might not satisfy the second element of a prima facie Section 1983 claim (that a constitutional right exists and was deprived) because a constitutional right must be deeply rooted in our country’s traditions. Thus, there might be no constitutional right to be violated in the federal Flint case in the first place.

However, *Coshow* is arguably not applicable to the federal Flint case because of how outrageous defendants’ conduct was in the federal Flint case compared to *Coshow*. *Coshow* was based on city government conduct involving a widely accepted, statutorily mandated addition of fluoride to drinking water for public health reasons. Likewise, Michigan state regulation<sup>117</sup> and related case law<sup>118</sup> permit adding fluoride to drinking water for public health reasons. In contrast, the federal Flint case involves an attempt to conceal deliberate indifference to public danger that defendants knew they had created.

Another case that further illustrates this notion is *Quiles v. City of Boynton Beach*, where the introduction of fluoride into the city’s water was held as not akin to a “medical procedure.”<sup>119</sup> The *Quiles* court held this because the fluoride is added to the water before reaching households, rather than directly into the bloodstream—leaving intact the freedom to choose not to ingest the fluoride.<sup>120</sup> As a result, the plaintiffs were not compelled to ingest the fluoride because they could filter the fluoride out of the water, boil or distill the water, mix the water with purifying spirits, or even purchase bottled drinking water to avoid ingesting the fluoride.<sup>121</sup> This case also poses a potential issue for the federal Flint case. Like fluoride additives, it is not unreasonable for a court

---

116. *Id.* at 28 (citing *United States v. Salerno*, 481 U.S. 739, 750–51 (1987)).

117. MICH. COMP. LAWS § 333.12721 (1978).

118. *See Rogowski v. City of Detroit*, 132 N.W.2d 16, 24 (Mich. 1965); *Hastings Mut. Ins. Co. v. Safety King, Inc.*, 778 N.W.2d 275, 281 (Mich. Ct. App. 2009).

119. *Quiles*, 802 So. 2d at 399.

120. *Id.*

121. *Id.*

to hold that lead in water is not a “medical procedure” because nowhere in the complaint does it allege that defendants directly inserted lead into the bloodstream of the Flint residents. The Flint residents did have options other than ingesting the lead-contaminated water and had the freedom to pursue these options, if desired.<sup>122</sup>

Although these two above fluoride cases may disadvantage environmental justice bodily integrity claims like the one in the federal Flint case, other fluoride cases bolster these bodily integrity claims to the point where these two cases do not present much of an issue. Additionally, these two fluoride cases are state cases, meaning that the federal district court has no obligation to follow this persuasive—not binding—precedent on remand when considering the merits of the bodily integrity claim. A case that can support the federal Flint case is *Attaya v. Town of Gonzales*, where the court (like the cases above) held that adding fluoride did not violate bodily integrity.<sup>123</sup> Despite this holding, this case is important for its reasoning. In *Attaya*, the court reasoned that fluoridation was constitutionally permissible because it was merely adding mineral properties to the water that were already found “naturally” in some sections of the country.<sup>124</sup> The federal Flint case significantly differs in this regard because, unlike fluoride, lead is a human-induced additive not “naturally” found in the Flint River or in any water body across the country.<sup>125</sup> Also, lead has only negative health effects on humans when added to public water,<sup>126</sup> whereas fluoride can provide some added health

---

122. *Id.*

123. *Attaya v. Town of Gonzales*, 192 So. 2d 188, 193 (La. Ct. App. 1966).

124. *Id.* at 192.

125. *Basic Information about Lead in Drinking Water*, EPA, <https://perma.cc/L9NR-B3Z5> (last updated Aug. 21, 2017).

126. Mona Hanna-Attisha et al., *Elevated Blood Lead Levels in Children Associated with the Flint Drinking Water Crisis: A Spatial Analysis of Risk and Public Health Response*, 106 AM. J. PUB. HEALTH 283 (2016), <https://perma.cc/CY82-HKUG> (discussing how lead is a potent neurotoxin and can impact many developmental and biological processes during childhood, especially intelligence, behavior, and overall quality of life).

benefits if ingested in drinking water by humans,<sup>127</sup> which Michigan state-level case law has upheld.<sup>128</sup>

Another advantageous fluoride case is the case establishing the *Minnesota State Bd. of Health by Lawson* balancing test. In that case, the court held that fluoridation also did not violate bodily integrity, but reasoned that the substantial health benefit (the importance of the state purpose) outweighed the innocuous effect on the individual and the small intrusion on one's bodily integrity rights (the nature and magnitude of the effect on the individual).<sup>129</sup> As discussed above, the facts of the federal Flint case, when applied to these four factors, favor the Flint residents. In the federal Flint case, there is a substantial public health risk of consuming lead-contaminated water (versus a potential public health benefit of adding fluoride to drinking water in *Minnesota State Board of Health*), a significant effect on the individual of consuming lead (versus an innocuous effect of consuming fluoride in *Minnesota State Board of Health*), and an intrusion on one's bodily integrity rights that is large in magnitude (versus small in magnitude in *Minnesota State Board of Health*).

Although some environmental justice cases within the fluoride context do not apply favorably to the federal Flint case, the overall body of environmental justice case law does. It allows the Flint residents to successfully assert on remand that they have a fundamental right to bodily integrity which was violated, because the Flint crisis is particularly "outrageous and shocking" when compared factually to other environmental justice cases.

## VII. INSIGHTS FROM *MAYS V. SNYDER* – PARALLEL MICHIGAN COURT OF CLAIMS FLINT CASE

A subset of the federal plaintiffs filed a parallel suit at around the same time in the State of Michigan Court of Claims against three of the defendants from the federal case (Governor Rick

---

127. AM. DENTAL ASS'N, *supra* note 113 (discussing how fluoride is safe, prevents tooth decay in at least 25% of children and adults, and is an effective source of cavity protection).

128. See *Rogowski v. City of Detroit*, 132 N.W.2d 16, 24–28 (Mich. 1965); *Hastings Mut. Ins. Co. v. Safety King, Inc.*, 778 N.W.2d 275, 281 (Mich. Ct. App. 2009).

129. *Minn. State Bd. of Health by Lawson v. City of Brainerd*, 241 N.W.2d 624, 633 (Minn. 1976).

Snyder, Darnell Earley, and Jerry Ambrose).<sup>130</sup> In this state Flint case, the Flint residents also asserted that their fundamental due process right to bodily integrity had been unconstitutionally violated, but under Michigan's state constitution.<sup>131</sup> Although this case is at the state level, it nevertheless supports the remanded federal bodily integrity claim, considering that: 1) the district court sits in the same state in which the state claim was filed, and 2) this case derives from a very similar set of facts from the same Flint water crisis.

Before the Court of Claims were dual motions seeking summary disposition pursuant to Michigan statutory law; one was brought by the state defendants (Governor Rick Snyder) and the other by the former emergency managers (Darnell Earley and Jerry Ambrose).<sup>132</sup> In its decision rendered in late October 2016, the court denied summary disposition as to all defendants, without prejudice, for the bodily integrity claim.<sup>133</sup> The court's holdings with respect to establishing a bodily integrity constitutional tort and the availability of a damage remedy—and the court's reasoning for them—can further bolster the federal bodily integrity claim on remand, considering that the Michigan due process provision is “coextensive with the federal provision.”<sup>134</sup>

#### **A. Establishing the Constitutional Bodily Integrity Tort – A Potential Benefit**

The court's discussion of establishing the constitutional tort of bodily integrity supports the federal Flint case such that the district court should find on remand that the Flint residents' constitutional bodily integrity rights have been violated. In this way, this case can further bolster the Flint residents' claim that they have established the second element of a prima facie Section 1983 case against defendants—that a constitutional right exists and was deprived.

Under Michigan law, the Flint residents must plead sufficient facts that, if proven, establish that the state officials' actions were

---

130. *Mays v. Snyder*, No. 16-000017-MM, at 1 (Mich. Ct. Cl. Oct. 26, 2016).

131. *Id.* at 1–2.

132. *Id.* at 2.

133. *Id.*

134. *People v. Sierb*, 456 Mich. 519, 523 (1998).

so arbitrary that they “shock the conscience”<sup>135</sup>—an identical burden to that which the Flint residents bear for federal bodily integrity claims. In its opinion, the Michigan Court of Claims agreed with the Flint residents that defendants’ actions shock the conscience.<sup>136</sup> The court reasoned that the defendants decided to switch to the Flint River as the source of drinking water, despite their awareness of the dangers the water posed and the state’s failure to conduct a scientific assessment of the suitability of the Flint River water by that point.<sup>137</sup> The court also reasoned that defendants intentionally concealed data and made false statements to downplay the health risks of using the water, even though they had data to the contrary.<sup>138</sup> The Flint residents in the federal Flint case can use these same arguments—now backed by on-point case law from the same state on the same set of facts—to bolster its argument on remand.

In this discussion, the court also addressed *Coshow* (discussed above), which defendants used to argue that the Flint residents have not properly asserted that defendants violated their bodily integrity rights.<sup>139</sup> Although *Coshow* could weaken the federal bodily integrity claim—because the right to lead-free water is not deeply rooted in our nation’s traditions (as discussed above)—the court distinguishes the state Flint case from *Coshow* by arguing that *Coshow*, and the cases it relied on, did not address “circumstances even remotely similar to those present in this case.”<sup>140</sup> In other words, the facts of *Coshow* precluded that court from addressing whether bodily integrity rights are implicated when “state actors allegedly abuse state police powers by knowingly and intentionally delivering drinking water contaminated with . . . dangerous levels of lead to a discrete population and thereby create a public health emergency.”<sup>141</sup> Therefore, the Michigan Court of Claims in the state Flint case did not find *Coshow* to be persuasive. If defendants in the federal case

---

135. *Mays.*, No. 16-000017-MM at 28 (citing *Mettler Walloon, LLC v. Melrose Twp.*, 761 N.W.2d 293, 304–07 (2008)).

136. *Id.* at 28.

137. *Id.*

138. *Id.*

139. *Id.* at 29.

140. *Id.*

141. *Id.*



were to use this pivotal environmental bodily integrity case (which is likely, as these defendants are also defendants in the federal case), the district court, on remand, may invoke the Michigan Court of Claims’s rationale—and hold that the Flint residents have successfully asserted the existence and violation of a federal constitutional bodily integrity right.

### **B. Availability of a Damage Remedy – A Potential Drawback That Can Be Overcome**

The Michigan state court’s discussion of the availability of a damage remedy might reduce the federal Flint case’s likeliness of satisfying element one of their prima facie Section 1983 case. This is because the Flint residents have sued defendants in different capacities in each of the state and federal cases. But, this drawback can be overcome. In the state case, the Flint residents sued the three defendants mentioned above (Snyder, Earley, and Ambrose) in their official capacities *only*,<sup>142</sup> whereas in the federal case, the Flint residents sued Snyder, Earley, Ambrose, and others exclusively in their individual capacities or in their individual as well as official capacities.<sup>143</sup> In the state case, the Court of Claims held that “a damage remedy for the constitutional tort alleged” should be recognized because no other remedy is available to the Flint residents.<sup>144</sup> The court reasoned that a suit against defendants for monetary damages under Section 1983 for violating constitutional rights cannot be maintained in a federal or state court against a state or state official sued in his or her official capacity due to Eleventh-Amendment immunity.<sup>145</sup> In other words, all defendants in the state case are not “persons” under Section 1983 and have “sovereign immunity” under the Eleventh Amendment.<sup>146</sup>

The issue this presents for the federal plaintiffs is that, for all defendants, the Flint residents brought their bodily integrity claim against them in their individual capacity or in their individual *and*

---

142. *Id.* at 33.

143. Amended Complaint at 7–15, *Mays v. Snyder*, No. 16-000017-MM, at 28 (Mich. Ct. Cl. Oct. 26, 2016).

144. *Mays*, No. 16-000017-MM at 43.

145. *Id.* at 36 (citing *Howlett v. Rose*, 496 U.S. 356, 365 (1990)).

146. *Id.* at 42.

official capacities. As a result, the U.S. Supreme Court, if the case is appealed, could take the stance that the Flint residents do, in fact, have alternative remedies available to them for all defendants. By suing these defendants in their individual capacities, the Flint residents in the federal case avoid the Eleventh Amendment immunity issues presented when suing a defendant only in their official capacity under Section 1983. Therefore, the U.S. Supreme Court might not find it appropriate on appeal to offer a damage remedy to the Flint residents in the federal case if they can instead obtain relief by suing defendants in their individual capacities. The Court of Claims acknowledged this but decided to not comment on the merits of the federal claim.<sup>147</sup>

The Flint residents in the federal case can, however, overcome this issue on remand, as it is likely that they will succeed through this other available remedy. Since the Flint residents in the federal case are suing all defendants in their individual capacities, all defendants are claiming “qualified immunity” in response, which protects government officials from being sued unless they “are plainly incompetent or . . . knowingly violate the law.”<sup>148</sup> In order to assert that defendants are not entitled to qualified immunity, the Flint residents must establish that: (1) the facts, considered in the light most favorable to the Flint residents, demonstrate a constitutional violation; and (2) the constitutional right is “clearly established.”<sup>149</sup> The Flint residents have likely met the first element because they can successfully assert that their bodily integrity rights were violated (as discussed above).

The Flint residents have also likely met the second element because they can assert that the “contours of the right” are sufficiently clear that a “reasonable official” would have fair warning to understand that her actions violate that right.<sup>150</sup> Also, the Flint residents can satisfy this without proving that the specific actions in question have previously been held unlawful.<sup>151</sup> Due to defendants’ direct involvement in the incident, and their repeated disregard for information provided to them about the health risks of using the Flint River, it will be difficult for defendants to argue

---

147. *Id.* at 41.

148. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

149. *Saucier v. Katz*, 533 U.S. 194, 200–01 (2001).

150. *United States v. Lanier*, 520 U.S. 259, 270 (1997).

151. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

that a reasonable person in their positions did not or should not have known that the Flint residents would be subject to harm.

Because the Flint residents can meet both elements, defendants will likely not have qualified immunity on remand, meaning that the Flint residents can successfully sue defendants in their individual capacities.<sup>152</sup> The sovereign immunity issue present in the state case should therefore not be problematic for the federal Flint residents for the first element of their prima facie Section 1983 bodily integrity case. Moreover, the Michigan Court of Claims noted in its opinion that its holding on whether defendants were sovereignly immune from these claims could change, depending on how the federal case comes out on whether the relief sought by the Flint residents is only “prospective” or something more.<sup>153</sup>

### VIII. CONCLUSION

By applying the relevant case law to the facts of the federal Flint case, and by comparing the federal Flint case to the above-discussed environmental justice cases, the bodily integrity claim should succeed on remand. If the case is appealed to the U.S. Supreme Court, the Flint residents would likely be able to affirm the holding that the SDWA does not preclude their bodily integrity claim. Even though the Flint residents can assert this, they could have trouble on remand establishing that a constitutional right exists, especially given some of the fluoride cases discussed above. Yet, it is a challenge that the Flint residents can overcome, considering how favorably the facts apply to existing case law in the bodily integrity and environmental justice contexts.

---

152. The Sixth Circuit discussed the issue of qualified immunity in its opinion but decided not to affirm the district court’s dismissal of the case on that basis. *Boler v. Earley*, 865 F.3d 391, 416 (6th Cir. 2017). The court concluded this because it acknowledged that applying the facts to both elements of the qualified immunity test would involve ruling on the merits of the constitutional bodily integrity claim, which it left to the district court to determine on remand. *Id.* at 416–17.

153. *Mays v. Snyder*, No. 16-000017-MM, at 35 n.11 (Mich. Ct. Cl. Oct. 26, 2016). In its opinion, the Sixth Circuit discussed how the relief sought by the Flint residents is “prospective,” as the relief’s main purpose is to direct the Governor to provide services to those affected by the crisis itself, not simply cost the state money. *Earley*, 865 F.3d at 412. As a result, the court held that only the State of Michigan was sovereignly immune from the bodily integrity claim, not the Governor or any other state defendant. *Id.* at 413–14.

Additionally, the parallel case from the Michigan Court of Claims further supports the Flint residents' argument and strongly suggests a favorable outcome for the federal claim. Moving forward, bodily integrity claims can continue to provide relief to victims of the Flint water crisis and in other similar environmental justice crises nationwide. The prospects are good that bodily integrity claims can provide victims with an adequate remedy and can help mitigate the disproportionately high level of harm minority populations in this country face in the wake of environmental disasters.<sup>154</sup>

---

<sup>154</sup>. EJOLT, *supra* note 1; ENERGY JUSTICE NETWORK, *supra* note 1.