

FLINT'S FIGHT FOR ENVIRONMENTAL RIGHTS

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ABSTRACT—This Essay reviews the recent development of environmental rights within U.S. constitutional law, advanced through a series of federal court decisions in the wake of the Flint water crisis. The residents of Flint were poisoned and lied to by their government for nearly two years. They experienced how American environmental governance has failed at the state and federal levels and how our environmental laws leave individuals and communities unprotected. And then Flint fought back, in the courts, for five years. Flint residents have been overwhelmingly successful, achieving some justice for themselves and advancing substantive rights and remedies within our constitutional framework for all Americans. Their legal victories established precedents for courts to use their equitable powers to order systemic remedies to environmental injustices, protect the right to bodily integrity—as guaranteed by the Fourteenth Amendment's Substantive Due Process Clause—against involuntary pollution and toxic exposure, and hold the U.S. government accountable for inaction in administering our environmental laws. Flint's fight for environmental rights has turned the Flint water crisis into a breakthrough event in environmental and constitutional law.

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NORTHWESTERN UNIVERSITY LAW REVIEW

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INTRODUCTION

In this Essay, I present the Flint water crisis as the outcome of both specific state actions and broader failures of environmental law. The story begins chronologically with the role of the State of Michigan, focusing on state decisions from approximately 2011 to 2015 that culminated in the delivery of drinking water without proper treatment to Flint residents. The injustice of the Flint water crisis peaked during the final eighteen months of this period under the federal Environmental Protection Agency’s administration of the Safe Drinking Water Act. The failure of federal environmental law and governance apparent in the Flint water crisis is structural and systemic and a direct cause of ongoing environmental injustices necessitating changes in policy and politics.

There are lessons to be learned from why and how Flint residents were poisoned by their state and failed by the EPA. But the focus of this Essay is not how Flint was victimized; it is how Flint has fought back successfully and cleared new legal paths for environmental justice in the courts. Flint residents have sought accountability for wrongs and vindication of rights in an ongoing five-year legal campaign—and have been overwhelmingly successful. Flint plaintiffs have won orders and opinions from federal courts to require the state to deliver safe water to every Flint resident, to protect due process and equal rights regardless of compliance with environmental laws, to recognize a violation of the right to bodily integrity by the state for providing unsafe water, and to recover damages from the EPA for its negligent administration and enforcement of the Safe Drinking Water Act. These are tremendous legal victories for advancing meaningful

environmental rights in U.S. law, and potential precedents for many other communities suffering from environmental injustice.

I am not an objective observer of the Flint water crisis or the legal fights that followed. In 2016, I was appointed by then-Michigan Attorney General Bill Schuette as Special Assistant Attorney General with the Office of Special Counsel for the Flint water crisis, independent of the state, and charged with investigating state officials along with all other responsible parties.¹ I was the lead attorney for the civil investigation and attorney of record for the People on civil litigation.² I also supported the work of Special Prosecutor Todd Flood and the criminal investigation that led to criminal charges against fifteen government officials.³ Attorney General Dana Nessel ended both my appointment (apparently directing Solicitor General Fadwa Hammoud to terminate me) and the independent Office of Special Counsel in 2019 for various policy reasons, including a “desire to appoint in-house ‘career prosecutors’ to the cases.”⁴

Although all then-pending criminal charges relating to the Flint water crisis filed during my appointment were dismissed under Attorney General

¹ For more information, see Brad Devereaux, *Environmental Attorney Noah Hall Joins AG Probe of Flint Water Crisis*, MLIVE (Mar. 16, 2016, 9:44 PM), https://www.mlive.com/news/2016/03/enviromental_legal_expert_join.html [<https://perma.cc/6VM2-3JH2>]; Noah Hall, *Appointment as Special Assistant Attorney General for the Flint Water Investigation*, GREAT LAKES L. (Mar. 2016), <https://www.greatlakeslaw.org/blog/2016/03/appointment-as-special-assistant-attorney-general-for-the-flint-water-investigation.html> [<https://perma.cc/P2LP-QCRW>].

² For additional information about my role, see *Schuette Files Civil Suit Against Veolia and LAN for Role in Flint Water Poisoning*, MICH. DEP'T OF ATT'Y GEN., <https://perma.cc/Z94S-RJ5P>.

³ For more information on this investigation, see Isabella Isaacs-Thomas, *Flint Water Investigator Calls for Independent Oversight of Michigan DEQ*, MICH. RADIO (Jan. 8, 2019, 6:02 PM), <https://www.michiganradio.org/politics-government/2019-01-08/flint-water-investigator-calls-for-independent-oversight-of-michigan-deq> [<https://perma.cc/2FXE-J5FM>].

⁴ Beth LeBlanc, *Cloud of Flint Crisis Remains Hanging over Snyder*, DETROIT NEWS (Mar. 19, 2019, 10:25 PM), <https://www.detroitnews.com/story/news/local/michigan/2019/03/19/letter-snyders-attorney-preceded-flint-lawyers-firing/3151650002/> [<https://perma.cc/ZHA8-7GUQ>] (including statements by Attorney General Nessel's spokesman offering various reasons for terminating independent counsel); see also Beth LeBlanc, *Nessel's Office Reviews Potential Conflict in Flint Water Civil Cases*, DETROIT NEWS (Feb. 27, 2019, 6:02 PM), <https://www.detroitnews.com/story/news/local/michigan/2019/02/27/nessels-office-reviewing-potential-conflict-flint-civil-cases/2984613002/> [<https://perma.cc/52U4-2FPX>]; *AG Nessel Responds to Criticism of Decision to Remove Independent Counsel from Flint Water Lawsuit*, MICH. RADIO (Mar. 6, 2019, 6:09 PM), <https://www.michiganradio.org/politics-government/2019-03-06/ag-nessel-responds-to-criticism-of-decision-to-remove-independent-counsel-from-flint-water-lawsuit> [<https://perma.cc/8RGP-9FQ7>]; Steve Carmody, Tracy Samilton & Cheyna Roth, *State Drops All Pending Flint Water Crisis Charges, Restarting Investigation*, MICH. RADIO (June 13, 2019, 4:08 PM), <https://www.michiganradio.org/law/2019-06-13/state-drops-all-pending-flint-water-crisis-charges-restarting-investigation> [<https://perma.cc/Q4PT-JUMA>].

Nessel on June 13, 2019,⁵ the prosecution filed new charges against many of the same defendants (and the former governor).⁶ To be clear: A charge is merely an accusation, and the defendants are presumed innocent until and unless proven guilty beyond a reasonable doubt. In my work as a Special Assistant Attorney General for the Flint water crisis, I was involved in the extensive investigation led by Special Prosecutor Flood and then-Chief Investigator Andrew Arena. I personally reviewed thousands of documents and interviewed numerous witnesses. I was also present during one or more investigative subpoena examinations—highly confidential procedures pursuant to Michigan law, the subjects and dates of which cannot be disclosed.

To protect the constitutional rights of defendants facing criminal charges and to uphold and respect the ethical duties of a former prosecutor, I do not discuss the criminal charges still pending in state court in this Essay, except to explain their context as it relates to the federal constitutional cases.⁷ The focus of this Essay is the failure of environmental law in Flint and Flint's subsequent fight for constitutional rights and government accountability. Further, I do not reference or rely upon any confidential information I have from my former position. Throughout this Essay, I rely entirely and exclusively on published court opinions, easily accessible court filings, and local contemporaneous newspaper stories for the details of this ongoing historic event. I do not and cannot discuss what I personally saw as a lawyer investigating the poisoning of Flint, but these lines from my favorite poet ring perfectly true:

⁵ See *Flint Water Prosecution Team Expands Investigation Based on New Evidence, Dismisses Cases Brought by Former Special Counsel*, MICH. DEP'T OF ATT'Y GEN. (June 13, 2019), <https://www.michigan.gov/ag/news/press-releases/2019/06/13/flint-water-prosecution-team-expands-investigation-based-on-new-evidence> [<https://perma.cc/2HG7-HP8B>].

⁶ See *Nine Indicted on Criminal Charges in Flint Water Crisis Investigation*, MICH. DEP'T OF ATT'Y GEN. (Jan. 14, 2021), <https://www.michigan.gov/ag/news/press-releases/2021/01/14/nine-indicted-on-criminal-charges-in-flint-water-crisis-investigation> [<https://perma.cc/855K-6XQQ>]. For an update on the investigation, see Ed White, *Year Later, Flint Water Criminal Cases Move Slowly in Court*, AP NEWS (Jan. 12, 2022), <https://apnews.com/article/health-environment-and-nature-environment-michigan-rick-snyder-2c5a150deacc902e197d449999b88dc5> [<https://perma.cc/34Q8-DMSY>]; and Ed White, *Court Kills Flint Water Charges Against Ex-Governor, Others*, AP NEWS (June 28, 2022), <https://apnews.com/article/health-crime-michigan-indictments-rick-snyder-609f461af3bb2d7f10a40c5d663620eb> [<https://perma.cc/Q73V-MLBJ>].

⁷ See MICH. PROF'L CONDUCT R. 3.6 & cmt. (“[T]here are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.”).

Broken hands on broken ploughs
Broken treaties, broken vows
Broken pipes, broken tools
People bending broken rules
Hound dog howling, bullfrog croaking
Everything is broken⁸

I. THE FLINT WATER CRISIS

The term “Flint water crisis,” as used by courts, refers to the approximately eighteen months in 2014 and 2015 when government officials “caused, sustained, and covered up the poisoning of an entire community with lead- and *legionella*-contaminated water.”⁹ In this Essay, I organize the actions and inactions of government that caused the Flint water crisis into two parts: state and federal. First, I summarize the key state actions and decisions beginning in 2011 that eventually led to the ongoing poisoning of Flint’s drinking water starting in April 2014. My focus on state actions ends in late 2015, by which time the Environmental Protection Agency’s oversight and federal court litigation steered responsibility for the still-unfolding water crisis in Flint. This leads to the second part of the story of the Flint water crisis—the failure of the federal Safe Drinking Water Act and the EPA to stop the poisoning of Flint for nearly two years. While the actions of the state discussed first are specific to Flint, the failures of federal environmental law and governance discussed in the second Part are broadly applicable. And while state actions explain why Flint was poisoned by its public water, federal legal and governance failures explain how it could happen for nearly two years with the EPA’s involvement.

A. *The Poisoning of Flint’s Water by the State*

To begin, the Sixth Circuit Court of Appeals describes the basic facts, chemistry, and public harms of the Flint water crisis:

As a cost-saving measure until a new water authority was to become operational, public officials switched the City of Flint municipal water supply from the Detroit Water and Sewerage Department (DWSD) to the Flint River to be processed by an outdated and previously mothballed water treatment plant. With the approval of State of Michigan regulators and a professional engineering firm, on April 25, 2014, the City began dispensing drinking water to its customers without adding chemicals to counter the river water’s known corrosivity.

⁸ BOB DYLAN, *Everything Is Broken*, on OH MERCY (Colum. Recs. 1989).

⁹ *In re Flint Water Cases (Flint II)*, 960 F.3d 303, 310, 312 (6th Cir. 2020).

The harmful effects were as swift as they were severe. Within days, residents complained of foul smelling and tasting water. Within weeks, some residents' hair began to fall out and their skin developed rashes. And within a year, there were positive tests for *E. coli*, a spike in deaths from Legionnaires' disease, and reports of dangerously high blood-lead levels in Flint children. All of this resulted because the river water was . . . [highly] corrosive . . . and because, without corrosion-control treatment, lead leached out of the lead-based service lines at alarming rates and found its way to the homes of Flint's residents. The crisis was predictable, and preventable.¹⁰

Flint is about sixty miles inland from Lake Huron, the world's fourth-largest lake¹¹ and one of the four Great Lakes (along with Superior, Michigan, and Erie) that frame Michigan as the iconic freshwater peninsulas. Since 1965, the sprawling Detroit regional water system¹² had delivered treated water from Lake Huron to Flint using a 72-inch pipeline.¹³ Flint thus received treated Lake Huron water from the Detroit regional water system, pursuant to a contracted price, for distribution to its residents and other water users.¹⁴

Government officials were interested in building a new pipeline that would essentially parallel the existing pipeline from Lake Huron to Flint, but under the control of a newly chartered government corporation, the Karegnondi Water Authority (KWA).¹⁵ As federal courts would later find, Flint did not need this new pipeline. Funding the pipeline would create a

¹⁰ *Guertin v. Michigan (Guertin I)*, 912 F.3d 907, 915 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 933, 933 (2020).

¹¹ *How Far Is Port Huron from Flint?*, MAPSOF.NET, <https://www.mapsof.net/distance/port-huron-to-flint> [<https://perma.cc/3TFF-HQDV>]. Lake Huron is the world's fourth-largest lake by surface area. Nick Routley, *The World's 25 Largest Lakes, Side by Side*, VISUAL CAPITALIST (Sept. 7, 2021), <https://www.visualcapitalist.com/worlds-25-largest-lakes/> [<https://perma.cc/FRW7-2W2L>]. The lake has over 3,800 miles of shoreline. *Lake Huron*, MICH. SEA GRANT, <https://www.michiganseagrant.org/topics/great-lakes-fast-facts/lake-huron/> [<https://perma.cc/98ZX-MJZG>]. It also has the world's largest freshwater island (Manitoulin Island). Tony Briscoe, *On the Largest Freshwater Island in the World, Lake Huron's Native Americans Warn of the Fragility of Water*, CHI. TRIB. (Jan. 13, 2020, 6:06 AM), <https://www.chicagotribune.com/news/environment/great-lakes/ct-lake-huron-climate-change-native-americans-20200113-tf4vprfjmbgwhepnkh52gssihe-story.html> [<https://perma.cc/K95V-NHK5>].

¹² The regional water system was historically called the Detroit Water and Sewerage Department and controlled by the City of Detroit; its assets in Flint were later leased to the Great Lakes Water Authority with a different governance structure. See *Mich. Dep't of Env't Quality v. City of Flint*, 282 F. Supp. 3d 1002, 1005–06 (E.D. Mich. 2017); see also Claire Sabourin, *Responding to the Detroit Water Crisis: The Great Lakes Water Authority and the City of Detroit*, 51 WASH. U. J.L. & POL'Y 305, 313–14 (2016); Anna Rossi, *Regionalizing the Detroit Water and Sewerage Department, the Effects of Privatization on Metro Detroit Residents and the Importance of Community Control*, 17 J.L. SOC'Y 59, 61–68 (2016) (providing additional history and analysis of the regionalization of the Detroit water system).

¹³ *Mich. Dep't of Env't Quality*, 282 F. Supp. 3d at 1005–06.

¹⁴ See *id.* at 1006.

¹⁵ See *id.*

drinking water problem out of a solution to nothing.¹⁶ Further, these investment decisions and water supply changes were not made by local elected officials accountable to residents and water users, but by centralized, state-appointed, state-directed managers.¹⁷

In 2011, the City of Flint was put under the State of Michigan's management and direct control. Pursuant to the then-recent Local Government and School District Fiscal Accountability Act (known as "Act 4"), the governor could appoint an "emergency manager" for certain local governments, who served at the governor's pleasure.¹⁸ These governor-appointed emergency managers in cities including Flint took over authority to exercise typical local government powers. Emergency managers were 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."¹⁹

The voters did not approve of the legislature's work. On November 5, 2012, Public Act 4 was repealed by referendum.²⁰ However, in December 2012, "the Michigan Legislature responded by enacting the Local Financial Stability and Choice Act ('Act 436')."²¹ Like the voter-rejected Act 4, the

¹⁶ See *id.* The court in *Michigan Department of Environmental Quality v. City of Flint* ultimately ordered an end to the Flint-KWA arrangement, returning Flint to the Detroit regional water system, with a negotiated transfer of the KWA debt. See *id.* And a personal disclosure: As the former Executive Director of the Great Lakes Environmental Law Center, I was involved in advocacy work opposing the state's authorization of this proposed new pipeline beginning in 2009, based on concerns that the new spending would undermine existing infrastructure investment and divert resources from drinking water protection. Letter from All. for the Great Lakes, et al. to Brant O. Fisher, Env't Eng'r, Mich. Dep't of Env't Quality (July 15, 2009), <https://www.greatlakeslaw.org/files/genessee-final-comments.pdf> [<https://perma.cc/6Q7K-QPH6>]; see also Nick Schroeck, *Genesee County's Proposed Lake Huron Water Withdrawal Would Drain Public Resources and Undermine Regional Cooperation*, GREAT LAKES L. (July 2009), <https://www.greatlakeslaw.org/blog/2009/07/genessee-countys-proposed-lake-huron-water-withdrawal-would-drain-public-resources-and-undermine-regi.html> [<https://perma.cc/BAG4-ST8E>] (providing additional commentary at the time with concerns regarding the proposed KWA pipeline and the impact on regional water infrastructure).

¹⁷ See *Boler v. Earley*, 865 F.3d 391, 396–97 (6th Cir. 2017).

¹⁸ MICH. COMP. LAWS § 141.1549(1) (2013); see also *Guertin I*, 912 F.3d 907, 939–40 (6th Cir. 2019). The history of the Michigan emergency manager laws is directly intertwined with the Flint water crisis and deserves more attention than this Essay can provide. Other authors and published works have detailed the direct connection between the centralization of power from local governments to the state under emergency management and the resulting decisions about Flint's water supply from 2011 through 2015. See Sara Hughes, Andrew Dick & Anna Kopec, *Municipal Takeovers: Examining State Discretion and Local Impacts in Michigan*, 53 STATE & LOC. GOV'T. REV. 223, 225 (2021); Sara Hughes, *Flint, Michigan, and the Politics of Safe Drinking Water in the United States*, 19 PERSPS. ON POLS. 1219, 1219 (2020).

¹⁹ MICH. COMP. LAWS § 141.1549(2) (2013) (codifying Public Act 436 of 2012 with the same language as Public Act 4 of 2011, as discussed in the text accompanying notes 21–24 *infra*).

²⁰ *Boler*, 865 F.3d at 397.

²¹ *Id.*

new Act 436 authorized the state to appoint emergency managers who could exercise the power of local governments.²² But unlike Act 4, Act 436 also contained new appropriations provisions—and Michigan law does not allow a public act with an appropriations provision to be rejected by referendum like Act 4.²³ Public Act 436 went into effect March 28, 2013, immune from referendum. Thus, Flint immediately returned to the control of a state emergency manager.²⁴

On the day the new Public Act 436 took effect and the governor's appointed emergency manager was again running Flint, the state treasurer emailed the governor recommending Flint leave the Detroit regional water system and join the KWA.²⁵ In 2013, as the Sixth Circuit noted, the governor was directing the emergency managers for both Flint and Detroit, alongside the Detroit Water and Sewerage Department—the regional water authority serving Flint since 1965.²⁶ The alignment of interests of Flint and Detroit was supported by an independent engineering report. Commissioned by the state treasurer, the report found that the most cost-effective plan was to continue to get treated water through the Detroit regional water system rather than joining a new water authority or building a treatment plant to take water from the Flint River.²⁷ Soon, however, the governor instead directed Flint to leave the Detroit regional water system and join the KWA.²⁸

For Flint, joining the KWA meant paying 34% of the costs associated with the new pipeline's construction, up-front, through bonding.²⁹ Flint borrowed \$85,000,000 to fund the pipeline construction. Flint was also responsible for paying an annual share of the KWA's yearly operating costs. This left Flint with a monthly bill of about \$675,000 for KWA bond debt and other KWA costs.³⁰ But the KWA pipeline wouldn't be completed or delivering water for another two or three years.³¹ So the state planned for

²² *Id.* (citing *Phillips v. Snyder*, 836 F.3d 707, 711 (6th Cir. 2016)).

²³ *Id.* (citing *In re City of Detroit*, 504 B.R. 191, 251–52 (Bankr. E.D. Mich. 2013)); *Mich. United Conservation Clubs v. Sec'y of State*, 630 N.W.2d 297, 298 (Mich. 2001)).

²⁴ *See Boler*, 865 F.3d at 396.

²⁵ *Flint II*, 960 F.3d 303, 312 (6th Cir. 2020).

²⁶ *Id.*; *Mich. Dep't of Env't Quality v. City of Flint*, 282 F. Supp. 3d 1002, 1005–06 (E.D. Mich. 2017) (laying out the timeline of Flint's water-sourcing).

²⁷ *Flint II*, 960 F.3d at 312 (referencing the Tucker, Young, Jackson and Tull report).

²⁸ *Id.* at 313.

²⁹ *Mich. Dep't of Env't Quality*, 282 F. Supp. 3d at 1006.

³⁰ *Id.* at 1008.

³¹ *Flint II*, 960 F.3d at 313 (noting that in 2013, the governor “authorized [the emergency manager], through Department of Treasury officials, to enter into a contractual relationship with the KWA for the purpose of supplying water to Flint beginning in mid-year 2016 or 2017” and that “[t]he City would need to rely on a water source other than the KWA until then” (emphasis omitted) (quoting Fourth Consol.

Flint to simply take water from the Flint River, without a new water treatment plant, until the new KWA pipeline was constructed.³²

Please don't blame the Flint River for the resulting drinking water disaster. The government did not pay for treated water or invest in water treatment from any source for Flint citizens for approximately eighteen months—April 2014 to October 2015.³³ The Flint River could provide safe and reliable drinking water with a proper water treatment plant, concluded a 2011 study for Flint and state government officials.³⁴ That study called for over \$69 million in improvements to the existing historic Flint Water Treatment Plant or a new facility, including improvements for corrosion control, for the water to meet regulatory requirements.³⁵ None of these improvements was made.³⁶ The Detroit regional water system did invest in a water treatment plant at the Lake Huron intake when it built Flint's pipeline in the 1960s, but the Flint emergency manager undermined that investment by leaving the system for the parallel KWA project.³⁷ Acting as though there was an urgency to end investment in Detroit's water system, the state directed Flint to break from the Detroit regional water system in 2014, years before either the KWA pipeline or a new Flint water treatment plant could be operational.³⁸

April 25, 2014, was the scheduled date of the switch to the Flint River.³⁹ In the weeks before the switch, the Flint water plant supervisor warned senior state environmental department regulators that adequate treatment *could not* and *would not* be accomplished in time.⁴⁰ Key to adequate treatment was corrosion control, as the “Flint River water had high chloride levels that, left untreated, would corrode the water pipes and cause lead to leach into

Amended Class Complaint for Injunctive and Declaratory Relief, Money Damages, and Jury Demand at 43, *In re Flint Water Cases*, 384 F. Supp. 3d 802 (E.D. Mich. 2019) (No. 16-10444) [hereinafter Fourth Amended Complaint]).

³² *Id.*

³³ *Id.* at 312.

³⁴ *Id.* (citing Fourth Amended Complaint, *supra* note 31, at 36–37).

³⁵ *Id.*

³⁶ *Boler v. Earley*, 865 F.3d 391, 398 (6th Cir. 2017).

³⁷ *See Mich. Dep't of Env't Quality v. City of Flint*, 282 F. Supp. 3d 1002, 1005–06 (E.D. Mich. 2017).

³⁸ *Id.* at 1006.

³⁹ *Flint II*, 960 F.3d at 313. On this date, the last contract between Flint and the Detroit regional system for the delivery of treated water ended. At this time, and all times during the breakdown between Flint and the Detroit regional water system, both Flint and Detroit were under emergency managers that reported to the governor per statute. *Id.* at 313.

⁴⁰ *See id.* at 314 (“I need time to adequately train additional staff and to update our monitoring plans before I will feel we are ready.” (quoting Fourth Amended Complaint, *supra* note 31, at 46)).

drinking water.”⁴¹ Regulators ignored the warnings. On April 25, 2014, with the state’s legal permission and direction pursuant to the Safe Drinking Water Act,⁴² Flint switched from the Detroit regional water system to the Flint River and “began delivering *untreated* water to its residents.”⁴³ The Sixth Circuit succinctly explained the science—both chemical and political—behind this decision which resulted in unsafe water for Flint:

Within weeks of the switch, residents reported to [senior state regulatory officials] that there was something wrong with the smell, taste, and color of the water, and that it was causing rashes. By June 2014, residents were reporting that “the water was making them ill.” The City and State did nothing. “On August 14, 2014, Flint’s water tested above legal limits for total coliform and *E. coli* bacteria.” In response, the City issued boil water advisories and treated the water with additional chlorine. Chlorine, however, “as has been well known for decades,” “preferentially reacts with the bare metal [in corroded pipes] instead of attacking solely bacteria.” Unsurprisingly, then, the bacterial problem did not abate—so the City added still more chlorine. 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.⁴⁴

The poisoning of Flint’s water had begun. In September 2014, the state health department reported “higher than usual” lead poisoning rates for children in Flint during the preceding three months.⁴⁵ On October 13, 2014, “General Motors stopped using Flint River water at its Flint engine plant” due to concerns about the high levels of chloride corroding its machinery.⁴⁶ The following day, a member of the governor’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

⁴¹ *Id.* (quoting Fourth Amended Complaint, *supra* note 31, at 55).

⁴² *Burgess v. United States*, 375 F. Supp. 3d 796, 803 (E.D. Mich. 2019) (describing how state environmental regulators “approved Flint’s water source change, but did not require Flint to begin corrosion control prior to the switch”).

⁴³ *Flint II*, 960 F.3d at 314–15. The state and local authorities did not, and were not required to, notify the EPA of the changing water sources for Flint. “The EPA does not approve such a switch in a primacy State.” *Burgess*, 375 F. Supp. 3d at 803; *see also infra* note 55 and accompanying text (discussing primacy state).

⁴⁴ *Flint II*, 960 F.3d at 315 (quoting Fourth Amended Complaint, *supra* note 31, at 57–58).

⁴⁵ *Id.* (quoting Fourth Amended Complaint, *supra* note 31, at 59–60).

⁴⁶ *Id.* at 315–16.

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.⁴⁷

Around this time, the governor's legal counsel further cautioned that the Flint River water issues 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."⁴⁸

They didn't get back on the Detroit system ASAP, and things soon got too far out of control. In January 2015, just before the EPA got involved, the University of Michigan closed water fountains at its Flint campus because testing showed high lead levels, and state officials "discreetly" installed water coolers "in State buildings located in Flint."⁴⁹ But despite the state's efforts, the public knew something was wrong with Flint's water. And so did the EPA.

B. How the Safe Drinking Water Act and the EPA Failed Flint

The Safe Drinking Water Act of 1974 (SDWA) governs the regulation of public drinking water in the United States and is the legal authority for setting regulatory standards. It works like other major federal environmental regulatory laws, notably the Clean Air Act⁵⁰ and Clean Water Act,⁵¹ which were enacted in the two preceding sessions of Congress. These federal environmental laws empower and direct the federal and state governments to set standards and regulate pollution sources. As Flint residents experienced, the federal government is not *really* in charge of these federal laws, the standards are fundamentally unjust, and regulating pollution sources is not the same as actually delivering safe drinking water.⁵² The administration of environmental law in Flint by the EPA and the state, briefly summarized below, exemplifies why millions of U.S. citizens are delivered unsafe water every year despite nearly fifty years of the SDWA and drinking water regulatory bureaucracies in both the federal and state governments.⁵³

⁴⁷ *Id.* at 316 (quoting Fourth Amended Complaint, *supra* note 31, at 60–61).

⁴⁸ *Id.* (alteration in original) (quoting Fourth Amended Complaint, *supra* note 31, at 61).

⁴⁹ *Id.*

⁵⁰ 42 U.S.C. § 7401.

⁵¹ 33 U.S.C. § 1251.

⁵² Previewing *Boler*, *infra* notes 104–108 and accompanying text, Professors David A. Dana and Deborah Tuerkheimer characterize the Flint water crisis as "a paradigmatic case of unequal protection due to the state's failure to enforce the laws." David A. Dana & Deborah Tuerkheimer, *After Flint: Environmental Justice as Equal Protection*, 111 NW. U. L. REV. ONLINE 93, 93 (2017).

⁵³ In any given year from 1982 to 2015, somewhere between 9 million and 45 million Americans got their drinking water from a source that was in violation of the SDWA. Maura Allaire, Haowei Wu & Upmanu Lall, *National Trends in Drinking Water Quality Violations*, 115 PROC. NAT'L ACAD. SCIS. 2078, 2078 (2018).

The SDWA directs the EPA to promulgate national primary drinking water standards and to regulate public water systems.⁵⁴ But states can borrow primary authority over environmental regulation from the EPA if they have comparable or stricter standards and adequate inspection and monitoring capacity for enforcement.⁵⁵ Overall, environmental regulatory programs (including drinking water in Michigan⁵⁶) are overwhelmingly handed over to the states under this “primacy.”⁵⁷ The EPA still has tremendous oversight authority and power under the SDWA and other laws, from technical assistance to enforcement orders.⁵⁸ This “joint Federal–State system” is called “cooperative federalism.”⁵⁹

In theory, the involvement of three levels of government [federal, state, and local] in the problem of drinking water contamination guards against failure at any one level of government. . . . In actuality, to lesser or greater degrees in different parts of the United States, the SDWA regime resembles a collective abdication, rather than a cooperation, regime.⁶⁰

The first failure under the SDWA was on the regulatory books twenty years before the water switch scheme in Flint and extended nationwide. In 1991, the EPA established requirements for regulating lead in drinking water, known as the Lead and Copper Rule (LCR).⁶¹ The EPA’s rule does

⁵⁴ See 42 U.S.C. § 300f(4).

⁵⁵ See *id.* § 300g-2; see also 40 C.F.R. §§ 142.10, 142.11.

⁵⁶ See *Burgess v. United States*, 375 F. Supp. 3d 796, 802 (E.D. Mich. 2019); *Mays v. City of Flint*, 871 F.3d 437, 446 (6th Cir. 2017).

⁵⁷ See ELENA H. HUMPHREYS & MARY TIEMANN, CONG. RSCH. SERV., RL31243, SAFE DRINKING WATER ACT (SDWA): A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS 9 (2021). The EPA has delegated the SDWA’s public water supply regulatory program to 49 states, all territories, and the Navajo Nation. Similarly, 46 of the 50 states have primacy for the national water pollution permitting program under the Clean Water Act. LAURA GATZ, CONG. RSCH. SERV., RL30030, CLEAN WATER ACT: A SUMMARY OF THE LAW 4 (2016).

⁵⁸ See 42 U.S.C. §§ 300g-3, 300i(a); see also 40 C.F.R. §§ 141.82(i), 141.83(b)(7), 142.15, 142.19, 142.30, 142.34 (describing various situations in which the EPA interacts with the administration of the SDWA). Ultimately, if the EPA determines that a state no longer meets its requirements, the EPA is required to initiate proceedings to withdraw the state’s primacy approval. See 40 C.F.R. § 142.17(a)(2).

⁵⁹ *Mays*, 871 F.3d at 447.

⁶⁰ David A. Dana, *Escaping the Abdication Trap when Cooperative Federalism Fails: Legal Reform After Flint*, 44 FORDHAM URB. L.J. 1329, 1334 (2017); see also Cara Cunningham Warren, *An American Reset—Safe Water & a Workable Model of Federalism*, 27 DUKE ENV’T. L. & POL’Y F. 51, 52 (2016) (describing flaws in the SDWA regime).

⁶¹ 40 C.F.R. § 141.80(c); Drinking Water Regulations, 56 Fed. Reg. 26460 (June 7, 1991); see also Dana, *supra* note 60, at 1336 (“From the outset, however, the LCR has been criticized as setting too low an action level for lead in water; for providing for too little and too infrequent testing for lead; for leaving too much discretion to local water authorities as to how, when, and where to test for lead; and for leaving too much discretion to authorities regarding corrosion control treatment.”). Michigan adopted the 1991 LCR almost verbatim, but after the Flint water crisis it implemented some stricter standards in the existing

not prevent all lead in drinking water—it does not even set an upper limit to the amount of lead that can come through an individual's tap. Instead, the rule requires sampling about 0.1% of a city's taps⁶² for an “action level” of lead in tap water of fifteen parts per billion (ppb),⁶³ and then only taking action if more than 10% of those samples are above fifteen ppb.⁶⁴ And the fifteen ppb sample threshold only triggers action if it occurs over two consecutive six-month periods.⁶⁵ This can add up to a lot of people being poisoned a little (many taps contaminated to just under the fifteen ppb threshold), and some people being poisoned a lot (a few highly contaminated taps), over the course of one to two years under the EPA's and state's administration of the SDWA.⁶⁶ If that wasn't the government's plan for Flint, it soon became obvious that it was the outcome.⁶⁷ And attorneys for both the

regime, most notably lowering the action level for lead to twelve parts per billion, effective 2025. See Nicholas J. Schroeck, *The Flint Water Crisis, Drinking Water Regulations and Gaps in Lead, Copper, and Legionella Protections*, 97 U. DET. MERCY L. REV. 509, 520 (2020).

⁶² The LCR requires sixty samples for a city serving fewer than 100,000 people and 100 samples for larger cities. 40 C.F.R. § 141.86(c).

⁶³ 40 C.F.R. § 141.80(c)(1); see also David Domagala Mitchell, *Preventing Toxic Lead Exposure Through Drinking Water Using Point-of-Use Filtration*, 48 ENV'T L. REP. 11074, 11085 (2018).

⁶⁴ See 40 C.F.R. § 141.80 (“The lead action level is exceeded if the concentration of lead in more than 10% of tap water samples collected during any monitoring period . . . is greater than 0.015 mg/L [fifteen ppb].”).

⁶⁵ 40 C.F.R. § 141.86(a), (d).

⁶⁶ The EPA's lead rule under the SDWA allows a government to deliver tap water with up to fourteen ppb of lead to any number of homes, and further allows delivery of tap water at any lead level to up to 9% of homes. See 40 C.F.R. § 141.81(b), (d).

⁶⁷ Following the switch to untreated Flint River water in April 2014, sampling from July 2014 to December 2014 and from January 2015 to June 2015 showed 90th percentile lead levels of six ppb and eleven ppb respectively, both under the fifteen-ppb action level, during the peak year of the crisis. See *Concerned Pastors for Soc. Action v. Khouri (Khouri II)*, 217 F. Supp. 3d 960, 965 (E.D. Mich. 2016).

federal⁶⁸ and state⁶⁹ governments have argued repeatedly in court that it was a permissible outcome under the SDWA.

The SDWA is structurally and fundamentally flawed. But the EPA also failed to use the powers and processes it does have under the law to protect Flint. Returning to the events of the Flint water crisis, by January 2015, evidence of unsafe water was mounting at the EPA. Flint resident LeeAnn Walters contacted the EPA after the official SDWA test results of her home's tap water showed lead levels of 104 ppb.⁷⁰ In February 2015, the EPA's program managers sent a series of emails to Michigan's program managers detailing concerns with both the water chemistry and the state's regulatory decisions in Flint.⁷¹ The state's succinct written response to the EPA's prescient concerns: "[W]e will take it under consideration."⁷²

Over the next several months, through its drinking water regulations manager, the EPA continued detailing concerns to the state about the unfolding crisis in Flint. And the state, through its respective drinking water program managers, continued its position that the EPA's own lead rule did not require corrosion control treatment until the results exceeded the fifteen-ppb action level for two consecutive six-month testing periods.⁷³ In June 2015, the EPA drinking water regulations manager circulated a report thoroughly and presciently explaining the Flint water crisis. Along with pages of data and evidence, it states plainly:

⁶⁸ "The United States contends that because of ambiguities in the Lead and Copper Rule that existed in 2015, the EPA could not have made a finding of noncompliance to trigger . . . [EPA's enforcement] duties." *In re Flint Water Cases (Flint I)*, 482 F. Supp. 3d 601, 628 (E.D. Mich. 2020). Further:

The United States argues that the EPA's decisions about whether and how to respond to the Flint Water Crisis are all susceptible to policy analysis. The United States contends that the EPA was balancing multiple and competing policy considerations during the Flint Water Crisis, such as the SDWA's goal of cooperative federalism, the effectiveness of state and local authorities in protecting the health of their citizens, and the short and long-term effects of any actions on the relationship between the EPA and primacy State.

Id. at 633; *see also* *Burgess v. United States*, 375 F. Supp. 3d 796, 807 (E.D. Mich. 2019) (describing arguments "maintaining that the State's lead compliance sampling procedures comply with federal SDWA requirements").

⁶⁹ *See Burgess*, 375 F. Supp. 3d at 803–04 ("MDEQ interpreted the Lead and Copper Rule ('LCR') as allowing Flint to complete two consecutive six-month rounds of sampling prior to determining what, if any corrosion control treatment was needed for the Flint River water. Its wrongful and damaging interpretation was later admitted by [the state environmental agency] Director Dan Wyant." (citations omitted)).

⁷⁰ *Id.* at 804 n.3. In subsequent litigation, the United States expressly admitted to the facts cited in this Essay from the trial court's opinion in *Burgess. Flint I*, 482 F. Supp. 3d at 608.

⁷¹ *Burgess*, 375 F. Supp. 3d at 805.

⁷² *Id.* (alteration in original) (quoting Plaintiff's Response Exhibit 1, *Burgess*, 375 F. Supp. 3d 796 (No. 17-cv-11218)). The state also noted, as discussed above, that its 90th percentile of lead levels from sampled households had never exceeded the fifteen-ppb action level. *Id.*

⁷³ *Id.* at 805–06.

They have no corrosion control treatment in place for over a year now and they have lead service lines. It's just basic chemistry on lead solubility. . . . We don't need to drop a bowling ball off every building in every town to know that it will fall to the ground in all of these places.⁷⁴

Based on information in the report circulated in June 2015, the EPA could have issued an enforcement order directing the state to switch back to the Detroit regional water system and stopped the crisis at that time.⁷⁵ Instead, for another six months, EPA regional staff merely continued to offer “technical assistance” while EPA headquarters developed a “policy memorandum” “clarifying” its interpretation of its own lead rule (stating “that there are differing possible interpretations” of the rule as applied to Flint’s situation).⁷⁶

On October 8, 2015, the governor ordered Flint to reconnect with the Detroit regional water system for treated water.⁷⁷ On October 16, 2015, Flint switched back to getting treated water from the Detroit regional water system.⁷⁸ The EPA eventually issued an Emergency Administrative Order pursuant to the SDWA on January 21, 2016,⁷⁹ a year after EPA staff were emailing each other and the state with concerns about the unfolding crisis, six months after the EPA drinking water manager’s report recommending

⁷⁴ *Id.* at 806 (quoting Exhibit 5, *Burgess*, 375 F. Supp. 3d 796 (E.D. Mich 2019) (No. 17-cv-11218)).

⁷⁵ *Flint I*, 482 F. Supp. 3d at 634 (citing the EPA Office of Inspector General’s report). The June report detailed five separate violations of the SDWA in Flint from September 2014 to June 2015. *Id.* at 628. Instead of directing immediate enforcement, the EPA’s regional administrator disavowed the drinking water regulation manager’s report in communications with state and local officials, calling it “preliminary” and “premature.” *Id.* at 619–20. Much of the report material was eventually officially released by the EPA after Flint switched back to treated Detroit regional water. *Id.*

⁷⁶ *Burgess*, 375 F. Supp. 3d at 807 & n.4 (quoting Defendant’s Response Exhibit 31, *Burgess*, 375 F. Supp. 3d 796 (E.D. Mich 2019) (No. 17-cv-11218)).

⁷⁷ *Flint II*, 960 F.3d 303, 320 (6th Cir. 2020). Back on March 25, 2015, the practically powerless Flint City Council had voted to reconnect to the Detroit regional water system to get treated and safe water; the governor’s appointed emergency manager had rejected the vote. Perhaps coincidentally, the Detroit regional water system had changed political hands by the time the governor ordered Flint to return to it. See Matt Helms, *Duggan Nominates New Leaders for Water Department*, DETROIT FREE PRESS (Oct. 6, 2015, 9:13 PM ET), <https://www.freep.com/story/news/local/michigan/detroit/2015/10/06/duggan-nominates-new-leaders-water-department/73440798/> [<https://perma.cc/5RCK-DFK6>]. In October 2015, Flint contracted with the regionally controlled Great Lakes Water Authority (GLWA)—which had become the lessee of Detroit Water and Sewerage Department’s assets outside of Detroit. *Mich. Dep’t of Env’t Quality v. City of Flint*, 282 F. Supp. 3d 1002, 1006 (E.D. Mich. 2017).

⁷⁸ *Burgess*, 375 F. Supp. 3d at 808. That same date, the EPA established its “Flint Safe Drinking Water Task Force” to provide technical expertise. *Id.*

⁷⁹ U.S. ENV’T. PROT. AGENCY, OFF. OF ENF’T & COMPLIANCE ASSURANCE, EMERGENCY ADMINISTRATIVE ORDER (2016), https://www.greatlakeslaw.org/Flint/EPA_Emergency_Administrative_Order.pdf [<https://perma.cc/MYD6-E5GV>]. The EPA’s administrative order found that the state’s response to the Flint water crisis was inadequate to protect public health and gave Flint and the state specific water treatment, monitoring, reporting, and management tasks. The EPA order did not find an ongoing violation of the SDWA or issue any fines or penalties. *Id.*

urgent action, two months after the state relented to public pressure and switched Flint back to treated Detroit system water, and almost a week after President Obama declared a federal emergency in Flint.⁸⁰ Nearly *two years* after the poisoning of Flint began, the EPA *finally* took the legal position that the state’s operation of the Flint water supply “present[ed] an imminent and substantial endangerment to the health of persons” and enforced the SDWA.⁸¹

II. FLINT’S FIGHT FOR JUSTICE

“At the end of the day, we are not just victims, we’re fighters.”

—Melissa Mays⁸²

With Flint switched back to the Detroit regional water system and receiving treated water, and after the state promised new resources and funding to help Flint’s residents,⁸³ the EPA’s Emergency Administrative Order in January 2016 could have been the last legal word on the Flint water crisis. But for Flint’s residents, it was too little too late. They wanted legal justice, not just improved compliance.

A. *Winning Equitable Remedies to Correct Systemic Environmental Injustice*

The first major case was a citizen suit under the SDWA, filed January 27, 2016.⁸⁴ The citizens had given notice of their intent to sue the government defendants in November 2015, before the EPA took enforcement action.⁸⁵ But, pursuant to the SDWA, the citizens were required to wait sixty days

⁸⁰ *Burgess*, 375 F. Supp. 3d at 804–07. The Obama declaration was on January 16, 2016. *Id.* at 808.

⁸¹ U.S. ENV’T. PROT. AGENCY, OFF. OF ENF’T & COMPLIANCE ASSURANCE, *supra* note 79.

⁸² BENJAMIN J. PAULI, *FLINT FIGHTS BACK: ENVIRONMENTAL JUSTICE AND DEMOCRACY IN THE FLINT WATER CRISIS* 127 (2019). Melissa Mays is a lead plaintiff in numerous published opinions vindicating Flint residents’ constitutional rights. Wendy N. Davis, *Who’s to Blame for Poisoning of Flint’s Water?*, ABA J. (Nov. 1, 2016), https://www.abajournal.com/magazine/article/flint_water_crisis_whos_to_blame [<https://perma.cc/P3LG-U3SZ>].

⁸³ Kristin Moore, *Mayor Dayne Walling Expresses Gratitude to State Legislature for Approval of Funding to Support Flint Water Needs*, CITY OF FLINT (Oct. 15, 2015), <https://www.cityofflint.com/2015/10/15/mayor-dayne-walling-expresses-gratitude-to-state-legislature-for-approval-of-funding-to-support-flint-water-needs/> [<https://perma.cc/8DEB-PZGC>].

⁸⁴ Complaint for Declaratory and Injunctive Relief, Concerned Pastors for Soc. Action v. Khouri, No. 16-10277, 2016 WL 9223838 (E.D. Mich. Apr. 26, 2016), http://www.greatlakeslaw.org/files/concerned_pastors_for_social_action_aclu_nrdc_v_khouri_complaint.pdf [<https://perma.cc/6S2R-B46S>].

⁸⁵ Notice of Intent to Sue from Concerned Pastors for Social Action et al. to City of Flint et al. (Nov. 16 2015), http://www.greatlakeslaw.org/files/aclu_nrdc_noi.pdf [<https://perma.cc/ELZ7-UDLL>]. The citizens had also petitioned the EPA directly to take Emergency Action. Petition for Emergency Action from Petitioners Coalition for Clean Water et al. to E.P.A. (Oct. 1, 2015), http://www.greatlakeslaw.org/files/aclu_nrdc_petition.pdf [<https://perma.cc/LY4H-6WHU>].

following notice of their intent to sue before a federal court would have jurisdiction over their suit.⁸⁶ This sixty-day notice period before invoking federal court jurisdiction for citizen suits is common to all major federal environmental laws.⁸⁷ As a jurisdictional requirement based on separation of powers, it creates a buffer between the Executive Branch and Judicial Branch, allowing the executive agencies two months to bring an enforcement action, which then precludes the citizen suit.⁸⁸ It is a common hurdle for citizen enforcement and the first requirement to check off in a litigation attack list. And, as if demonstrating the mechanism's design, following the citizen notice of intent to sue in sixty days, the EPA shifted from offering technical guidance to issuing a formal Emergency Administrative Order against the state, naming the State of Michigan, its environmental agency, and the City of Flint as Respondents. This would typically leave the citizens with the recourse of challenging the EPA action pursuant to the SDWA.⁸⁹

But instead of seeking judicial review of the EPA's SDWA enforcement order, as the government claimed was proper, the citizens filed their own complaint against the state defendants under the SDWA. And the citizens did not just want an order to improve compliance with the SDWA in Flint—they sought injunctive relief ordering the State to provide every resident in Flint with safe drinking water immediately.⁹⁰ In its first published decision on the matter, the federal district court allowed the citizen suit to proceed despite the jurisdictional objections of the state government:

[Three citizen organizations], and a Flint resident, have turned to the federal courts for relief from the hardship visited on the population caused by the mishandling of the City's water treatment and distribution system. The . . . [government] defendants have filed motions to dismiss, arguing, among other things, that the federal district court should not, or cannot, get involved, and the plaintiffs should be content with the remedial course charted by the Environmental Protection Agency. The Court disagrees. . . . [T]he Court believes that it should not defer to the EPA's "primary jurisdiction" to address

⁸⁶ See 42 U.S.C. § 300j-8(b)(1).

⁸⁷ See, e.g., 33 U.S.C. § 1365(b)(1)(A) (Clean Water Act); 42 U.S.C. § 7604(b)(1)(A) (Clean Air Act); 42 U.S.C. § 6972(b)(1)(A) (Resource Conservation and Recovery Act).

⁸⁸ See ZYGMUNT PLATER, ROBERT ABRAMS, ROBERT GRAHAM, LISA HEINZERLING, NOAH HALL & DAVID WIRTH, ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 817 (5th ed. 2016); Justin Vickers, *Res Judicata Claim Preclusion of Properly Filed Citizen Suits*, 104 NW. U. L. REV. 1623, 1631 (2010); see also *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 24–25 (1989); Robin Kundis Craig, *Notice Letters and Notice Pleading: The Federal Rules of Civil Procedure and the Sufficiency of Environmental Citizen Suit Notice*, 78 OR. L. REV. 105, 108 (1999).

⁸⁹ See 42 U.S.C. § 300j-7(a)(2) (providing for judicial review of final agency actions under the SDWA).

⁹⁰ See *Concerned Pastors for Soc. Action v. Khouri (Khouri I)*, 194 F. Supp. 3d 589, 595–96 (E.D. Mich. 2016).

the plaintiffs' complaints, the lawsuit is not a disguised appeal of the EPA's January 2016 order, the relief the plaintiffs seek is, in the main, prospective and the Eleventh Amendment does not bar this lawsuit against the State defendants⁹¹

Following an evidentiary hearing wherein witnesses for both the plaintiff citizens and the defendant State testified about their experience with Flint's water, the court concluded: "In modern society, when we turn on a faucet, we expect safe drinking water to flow out. As the evidence shows, that is no longer the case in Flint."⁹²

To remedy this, the court used its equitable powers to order a comprehensive "door-to-door" bottled water delivery program to every Flint household.⁹³ The State sought to stay this extraordinary remedy, arguing again that there were no ongoing violations of the SDWA to warrant relief.⁹⁴ And regardless, the State insisted, the relief ordered—door-to-door delivery of bottled water—was neither possible nor necessary.⁹⁵ The Sixth Circuit ultimately denied the State's requested stay and upheld the district court's entire injunctive order for door-to-door water delivery to all Flint households. The court's per curiam order simply stated "that it is an immediate requirement, under the Safe Drinking Water Act's (SDWA) Lead and Copper Rule that the State Defendants' [sic] provide safe drinking water to all residents of Flint."⁹⁶

The SDWA citizen suit eventually resulted in a comprehensive settlement with the State to replace all lead pipes in Flint within three years and to fix many other issues with the drinking water regulations and

⁹¹ *Id.* at 593.

⁹² *Khouri II*, 217 F. Supp. 3d 960, 972 (E.D. Mich. 2016).

⁹³ *Id.* at 980–81.

⁹⁴ The district court had originally misread the SDWA and lead rule as stating that a result above the action level of fifteen ppb amounted to a *per se* violation of the SDWA, when it instead triggers certain required steps. The district court in its final order denying stay did acknowledge this previous misinterpretation of the lead rule but maintained the Flint system was still not in compliance with the SDWA. *See* *Concerned Pastors for Soc. Action v. Khouri (Khouri III)*, 220 F. Supp. 3d 823, 828 (E.D. Mich. 2016); *Concerned Pastors for Soc. Action v. Khouri (Khouri IV)*, 844 F.3d 546, 553 (6th Cir. 2016) (Sutton, J., dissenting).

⁹⁵ *See Khouri III*, 220 F. Supp. 3d at 826 (recounting the state's argument that ordering bottled water delivery was "unreasonable and overbroad" and that leaving it up to individuals to find their own method of drinking water delivery was "good enough").

⁹⁶ *Khouri IV*, 844 F.3d at 549. Judge Sutton's dissent returned to the question of the federal court's jurisdiction. "On this record, the State is in compliance with the Safe Drinking Water Act and the EPA's regulations. Until the plaintiffs can show an ongoing violation of these or other laws, the court has no basis for issuing injunctive relief." *Id.* at 553 (Sutton, J., dissenting).

management.⁹⁷ This gave the residents the remedies they wanted with the water system moving forward. But the residents also wanted accountability and damages from their government for the harm done. That's not available under the SDWA, even with a court persuaded to use extraordinary equitable powers. Federal environmental laws do not provide any liability for harm or any cause of action for damages done by state or federal actors; the only relief is for compliance orders and government penalties.⁹⁸ To obtain damages from the state for alleged legal wrongs, citizens typically use 42 U.S.C. § 1983 as a cause of action and claim violations of substantive due process rights.⁹⁹ There are numerous doctrinal hurdles and obstacles to bringing these actions for environmental harms. They may have seemed insurmountable—until the Flint residents went to court.

*B. Upholding Due Process and Equal Protection in
Environmental Law and Governance*

Plaintiff citizens seeking damages from government actors for violations of the Constitution or other legal duties must rely on 42 U.S.C. § 1983.¹⁰⁰ However, in 1981, the Supreme Court ruled that § 1983 claims brought by citizens who suffered alleged damages from water pollution to their fishing waters were precluded by federal environmental statutes and their regulatory and enforcement schemes¹⁰¹ (essentially cooperative federalism¹⁰²). The Court's § 1983 preclusion rule from the *Sea Clammers* case would apply broadly:

When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to

⁹⁷ Settlement Agreement, *Khouri III*, 220 F. Supp. 3d 823 (E.D. Mich. 2016) (No. 16-10277), http://www.greatlakeslaw.org/Flint/Concerned_Pastors_for_Social_Action_Settlement_Agreement.pdf [<https://perma.cc/53CP-F3AE>].

⁹⁸ See PLATER ET AL., *supra* note 88, at 817; *see also* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 49 (1987).

⁹⁹ The Supreme Court revitalized § 1983 of the Reconstruction-era Civil Rights Act of 1871 in its 1961 decision *Monroe v. Pape*, 365 U.S. 167, 172 (1961), holding that individuals could utilize the cause of action against state and local officers to vindicate constitutional rights against brutal police tactics.

¹⁰⁰ Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

¹⁰¹ *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981) (citing the remedies given plaintiffs by the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act).

¹⁰² *See supra* notes 59–60 and accompanying text.

preclude the remedy of suits under § 1983. [Similarly,] when “a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983.”¹⁰³

The Supreme Court’s preclusion rule seemed to close the door on using § 1983 for environmental harms. Notably, the First Circuit in 1992 (*Mattoon v. Pittsfield*) ruled that the SDWA precluded § 1983 claims for violations of any rights or duties regarding safe drinking water.¹⁰⁴ The Flint residents persuaded the Sixth Circuit to disagree.

In late 2015 and early 2016, Flint residents brought several individual and class actions against numerous state officials, including the governor and the appointed emergency managers in Flint.¹⁰⁵ They alleged substantive due process and equal protection violations under 42 U.S.C. § 1983. The district court dismissed the § 1983 claims as precluded by the SDWA, relying on the Supreme Court’s *Sea Clammers* preclusion rule and the First Circuit’s holding of preclusion for safe drinking water in *Mattoon*.¹⁰⁶

In a unanimous decision, the Sixth Circuit took a very different view of the interplay between the SDWA and the protection of individual rights regarding safe drinking water:

In a wide variety of circumstances, conduct that violates the SDWA might not violate the Equal Protection Clause, and vice versa. For example, a government entity could provide water through a public system with contaminant levels in excess of national drinking water standards without infringing on any equal protection principles. Likewise, a government entity could provide some customers with water that meets the requirements of SDWA standards, but that is nonetheless dirtier, smellier, or of demonstrably poorer quality than water provided to other customers. The water also could be polluted by a contaminant not regulated by the SDWA. Even though not violating the SDWA, these situations could create an equal protection issue, particularly if such distinction were based on intentional discrimination or lacked a rational basis.¹⁰⁷

The court further explained how a substantive due process violation could occur despite SDWA compliance:

Likewise, a state actor’s deliberately indifferent action concerning contaminants in public water systems, which created a special danger to a

¹⁰³ *Id.* (quoting *Chapman v. Hous. Welfare Rts. Org.*, 441 U.S. 600, 673 n.2 (1979) (Stewart, J., dissenting)).

¹⁰⁴ 980 F.2d 1, 4–6 (1st Cir. 1992).

¹⁰⁵ *Boler v. Earley*, 865 F.3d 391, 399–400 (6th Cir. 2017).

¹⁰⁶ *Id.*; *Mays v. Snyder*, No. 15-14002, 2017 WL 445637, at *2 (E.D. Mich. Feb. 2, 2017), *aff’d in part, rev’d in part, Boler*, 865 F.3d 391.

¹⁰⁷ *Boler*, 865 F.3d at 407–08.

plaintiff that the state knew or should have known about, could violate the Due Process Clause without also violating the SDWA, if the hypothetical contaminants did not exceed the statutory maximums or were not regulated by it.¹⁰⁸

The court's opinion effectively freed the litigant citizens from the limitations of the flawed governance regime and unprotective standards of the SDWA. The ruling should warn environmental regulators and other state actors that they have a solemn duty to protect citizens' constitutional rights, regardless of the state's administrative and regulatory authority pursuant to statutes. Due process and equal protection can—and must—be brought into environmental law and governance.

*C. Advancing a Substantive Right to Bodily Integrity
Against State-Created Pollution*

With SDWA preclusion overcome, Flint residents and the State were primed to argue the underlying constitutional law question: Was the Flint water crisis a violation of constitutional rights? The citizen plaintiffs focused their evidence and arguments on the claim that state actors violated their right to bodily integrity as guaranteed by the Due Process Clause of the Fourteenth Amendment.¹⁰⁹ The clause provides that “no State shall . . . deprive any person of life, liberty, or property.”¹¹⁰

Due process is the foundation of individual liberty in our legal system. The Constitution's due process protection was passed down from the Magna Carta, “intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.”¹¹¹ The Supreme Court often states that “[t]he touchstone of due process is protection of the individual against arbitrary action of government.”¹¹² Substantively, due process protects against “the exercise of power without any reasonable justification in the service of a legitimate governmental objective.”¹¹³ There are procedural aspects to due process, but the substantive guarantee “bar[s] certain government actions regardless of the fairness of the procedures used to implement them.”¹¹⁴

¹⁰⁸ *Id.* at 408.

¹⁰⁹ *Guertin I*, 912 F.3d 907, 915 (6th Cir 2019).

¹¹⁰ U.S. CONST. amend. XIV, § 1.

¹¹¹ *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (internal quotation marks omitted) (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884)).

¹¹² *See, e.g., id.* (alteration in original) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)).

¹¹³ *Id.* at 846 (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

¹¹⁴ *Daniels*, 474 U.S. at 331.

The protections of due process apply to “fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”¹¹⁵ This requires a historical look at the common law for rights and privileges recognized “as essential to the orderly pursuit of happiness by free men.”¹¹⁶ Most essential of these foundational rights is that of bodily integrity.¹¹⁷ “No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”¹¹⁸

The Supreme Court has developed different tests for violations of due process rights depending on whether the government action was legislative or executive. For violations arising from executive actions, such as the Flint water crisis, the protections of substantive due process are limited to circumstances in which the executive’s abuse of power “shocks the conscience.”¹¹⁹ Three factors guide this test: (1) the voluntariness of the plaintiffs’ relationship with the government, (2) the time for the government actor to deliberate, and (3) the legitimacy of the government interest.¹²⁰ These factors then apply to the alleged violation of the right to bodily integrity.

Most bodily integrity cases involve a physical restraint on the individual. But the Supreme Court and the Sixth Circuit have occasionally gone beyond that setting and recognized other circumstances in which individuals were involuntarily or unknowingly subjected to a government intrusion on their persons.¹²¹ In considering the Flint water crisis as a violation of bodily integrity rights, the Sixth Circuit looked back on the

¹¹⁵ *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (citations omitted) (first quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977); and then quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).

¹¹⁶ *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

¹¹⁷ *See id.* at 673–74.

¹¹⁸ *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

¹¹⁹ *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (citing *Rochin v. California*, 342 U.S. 165, 172 (1952)).

¹²⁰ *See id.* at 848–49. The Supreme Court has further explained “shocks the conscience” as somewhere between negligence and intentional harm, like “deliberate indifference” or “gross negligence.” *Id.*

¹²¹ *See Cruzan v. Mo. Dep’t of Health*, 497 U.S. 261, 269–70 (1990) (holding that patients have a right to refuse life-sustaining treatment); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1062–63 (6th Cir. 1998) (finding that the disclosure of confidential information rose to the level of affecting a person’s “security and bodily integrity”).

infamous Cincinnati radiation experiments.¹²² During the Cold War, government officials working at the University of Cincinnati subjected cancer patients to radiation doses consistent with those expected to be inflicted upon military personnel during a nuclear war, without disclosing the risks or obtaining consent.¹²³ The matter never reached the appellate courts, but the district court concluded that the involuntary and misleading nature of the intrusion shocked the conscience and violated the right to bodily integrity protected by due process.¹²⁴

The Sixth Circuit applied this case law¹²⁵ to hold that the Flint water crisis gave rise to plausible substantive due process violations of the right to bodily integrity.¹²⁶ “In providing a tainted life-necessity and falsely assuring the public about its potability, government officials ‘strip[ped] the very essence of personhood’ from those who consumed the water.”¹²⁷ With this, the court announced a new element to protected personhood and bodily integrity in constitutional law: water.

The court did acknowledge its prior holding that there is “no fundamental right to water service.”¹²⁸ But this prior holding now seems limited to the context of government water providers shutting off residential water service for nonpayment, with notice and other procedural due process protections.¹²⁹ More broadly, the court elucidated that “the Constitution does not guarantee a right to live in a contaminant-free, healthy environment.”¹³⁰ Certainly not in an abstract sense, and not if the right requires restricting the lawful exercise of other private rights. But when the pollution contaminating our bodies and damaging our health results from government actions, without consent, the court’s opinion says our constitutional rights are violated.¹³¹

¹²² *Guertin I*, 912 F.3d 907, 921 (6th Cir. 2019).

¹²³ *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 803–04 (S.D. Ohio 1995).

¹²⁴ *Id.* at 810.

¹²⁵ Judge Sutton, concurring in the denial of rehearing en banc, criticized the majority’s extensive reliance on a district court opinion. *Guertin v. Michigan (Guertin II)*, 924 F.3d 309, 312 (6th Cir. 2019) (Sutton, J., concurring).

¹²⁶ *Guertin I*, 912 F.3d at 916.

¹²⁷ *Id.* at 935 (alteration in original) (quoting *Doe v. Claiborne Cnty.*, 103 F.3d 495, 507 (6th Cir. 1996)).

¹²⁸ *Id.* at 921 (quoting *In re City of Detroit*, 841 F.3d 684, 700 (6th Cir. 2016)).

¹²⁹ In 2016, the Sixth Circuit rejected a claim that shutoffs of household water for nonpayment with adequate notice violated a fundamental constitutional right in the context of a city under municipal bankruptcy. See *City of Detroit*, 841 F.3d at 700.

¹³⁰ *Guertin I*, 912 F.3d at 921–22.

¹³¹ *Id.* at 921 (“[A] government actor violates individuals’ right to bodily integrity by knowingly and intentionally introducing life-threatening substances into individuals without their consent” (internal quotation marks omitted)).

The Sixth Circuit's bold due process holding is amplified by its dismantling of the state actors' qualified immunity. Qualified immunity creates a circular defense to a § 1983 suit claiming damages for a violation of constitutional rights. Government officials are generally immune from such suits when their performance of discretionary duties "does not violate clearly established statutory or constitutional rights."¹³² In effect, this means the government actor not only must have violated a constitutional right, but must have done so when a reasonable official would have adequate notice of the violation of constitutional rights.¹³³ Notice is fundamental for any liability regime, and state actors must have fair warning that their conduct was unconstitutional to lose their qualified immunity.¹³⁴ But this creates a chicken-and-egg problem for advancing due process protections in new circumstances. Without a prior case directly on point, plaintiffs have a high bar of notice to enforce substantive due process protections against qualified immunity.¹³⁵ The Sixth Circuit said this bar was met in the Flint water crisis: "If ever there was an egregious violation of the right to bodily integrity, this is the case."¹³⁶ And with that, the majority gifted to future litigants bringing similar due process claims the notice for defendants that the dissent would have wanted.¹³⁷

Clearing the doctrinal hurdles of a § 1983 suit alleging a substantive due process violation of the right to bodily integrity is a tremendous legacy for the Flint resident plaintiffs. *Guertin* has already opened doors for new cases in environmental justice and beyond.¹³⁸ For the Flint plaintiffs, the

¹³² Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

¹³³ Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

¹³⁴ Hope v. Pelzer, 536 U.S. 730, 741 (2002).

¹³⁵ See *id.* at 740–41; *Anderson*, 483 U.S. at 640.

¹³⁶ *Guertin I*, 912 F.3d at 935.

¹³⁷ Judge Kethledge, dissenting from the denial of rehearing en banc with four colleagues, wrote: "Respectfully, the majority's decision on the issue of qualified immunity is barely colorable." *Guertin II*, 924 F.3d 309, 315 (6th Cir. 2019) (Kethledge, J., dissenting). The ensuing debate is now moot—the majority's substantive due process holding provides notice for future officials seeking qualified immunity.

¹³⁸ See Julie Schwartzwald, *Guertin v. State: The Sixth Circuit Embraces the Substantive Right to Bodily Integrity as a Means of Holding Government Officials Accountable for Flint's Contaminated Water*, 33 TUL. ENV'T L.J. 221, 235–36 (2020) (citing *Hootstein v. Amherst-Pelham Reg'l Sch. Comm.*, 361 F. Supp. 3d 94, 99–100 (D. Mass. 2019)); *Davis v. N.Y.C. Hous. Auth.*, 379 F. Supp. 3d 237, 255–56 (S.D.N.Y. 2019). For potential further expansion of the right of bodily integrity into a right of "biological integrity," see Paul Matouka, *The Fundamental Right to Biological Integrity*, 67 WAYNE L. REV. 57, 80 (2021).

federal court victory in *Guertin* was followed by a similar vindication of fundamental property and liberty rights in the Michigan Supreme Court.¹³⁹

Guertin and subsequent federal cases considered holding liable approximately twenty state and local officials, including the current and former governors, for constitutional violations of the right to bodily integrity.¹⁴⁰ Some of the *Guertin* defendants were also part of a recent settlement with Flint residents pending approval and administration in federal court.¹⁴¹

D. Holding the EPA Accountable for Inaction

The § 1983 cases for violations of the right to bodily integrity provide justice and remedies against individual state actors that caused the Flint water crisis. But as discussed above, the Flint water crisis happened in part due to the EPA's direct involvement and lack of enforcement. Justice for Flint includes accountability for federal inaction.¹⁴² The Flint residents wanted to hold the United States accountable for the negligent actions and inactions of the EPA.¹⁴³

The Flint residents' only legal tool for getting compensation from the United States for the EPA's negligence or other alleged torts is the Federal Tort Claims Act (FTCA).¹⁴⁴ The FTCA waives the United States' sovereign immunity and gives federal district courts jurisdiction over claims for personal injury or death caused by the "negligent or wrongful act or omission" of any government employees acting within the scope of their employment.¹⁴⁵ The threshold standard for the United States' liability under

¹³⁹ See *Mays v. Governor of Mich.*, 954 N.W.2d 139, 155 (Mich. 2020) (allowing plaintiffs' claim of violation of their right to bodily integrity under MICH. CONST., art. 1, § 17).

¹⁴⁰ See *Flint II*, 960 F.3d 303, 324–35 (6th Cir. 2020); *In re Flint Water Cases (Flint III)*, 969 F.3d 298, 301–04 (6th Cir. 2020). For commentary on findings regarding individual state actors in *Guertin* and related cases, see Nathan D. Dupes, *Survey of Michigan Environmental Cases for the Period May 31, 2018 Through June 1, 2019*, 65 WAYNE L. REV. 573, 579–88 (2020). There is some overlap with the criminal defendants from the former and ongoing criminal prosecutions, discussed above. See *supra* notes 3–7 and accompanying text. The legal standards, factual evidence, and applicable procedures for liability in the civil cases are different from criminal prosecutions, but it is not appropriate for me to comment on the federal findings of liability for named individuals given prior and ongoing criminal charges.

¹⁴¹ For confidentiality reasons, I cannot discuss the settlement. See *supra* text accompanying note 7.

¹⁴² Constitutional law scholars have persuasively advanced equal protection claims for underenforcement of environmental law as a remedy for environmental injustice. See Dana & Tuerkheimer, *supra* note 52, at 884 ("In our legal tradition, we turn to the Constitution and constitutional norms when politics—and legal enforcement driven by politics—remain unresponsive to the basic needs of particular groups.").

¹⁴³ *Flint I*, 482 F. Supp. 3d 601, 607 (E.D. Mich. 2020).

¹⁴⁴ 28 U.S.C. §§ 1346, 2679(a).

¹⁴⁵ *Id.* § 1346(b)(1).

the FTCA is “if a private person[] would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”¹⁴⁶

The Flint residents relied on the Good Samaritan doctrine as the basis for EPA liability for negligent action and inaction regarding the Flint water crisis.¹⁴⁷ The Good Samaritan doctrine creates tort liability for an actor who, by affirmative acts, creates or assumes a duty to others and breaches that duty.¹⁴⁸ “Under this doctrine, when the government undertakes to act, it is required to act carefully and will be liable for injuries proximately caused by the failure to do so.”¹⁴⁹

In two related federal district court opinions from the Eastern District of Michigan, the court reviewed the EPA’s actions and inactions in the Flint water crisis and determined that the Flint plaintiffs had sufficiently demonstrated that the EPA was negligent in its undertaking.¹⁵⁰ Pursuant to the Good Samaritan doctrine, the courts further found that the EPA owed a duty to the people of Flint, that Flint residents were harmed because of their reliance on the EPA, and that the EPA’s failure to exercise reasonable care increased the risk of harm to Flint.¹⁵¹

The United States has a powerful defense to this liability under the FTCA called the “discretionary function exception.” The defense exempts “[a]ny claim . . . based upon the exercise or performance [of,] or the failure to exercise or perform[,] a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”¹⁵² If the plaintiffs’ claim falls within this discretionary function exception, the court lacks jurisdiction and must leave the matter to the executive branch or legislature. This protects the separation of powers and prevents “judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.”¹⁵³

The Supreme Court has a two-step test to determine whether the discretionary function exception bars federal court jurisdiction.¹⁵⁴ First, the

¹⁴⁶ *Id.*

¹⁴⁷ Michigan uses section 324A of *Restatement of the Law, Second, Torts* for its Good Samaritan doctrine. See *Fultz v. Union-Com. Assoc.*, 683 N.W.2d 587, 590–91 (Mich. 2004).

¹⁴⁸ RESTATEMENT (SECOND) OF TORTS § 324A (AM. L. INST. 1965).

¹⁴⁹ *Flint I*, 482 F. Supp. 3d 601, 617 (E.D. Mich. 2020).

¹⁵⁰ *Id.* at 620; *Burgess v. United States*, 375 F. Supp. 3d 796, 816, 818 (E.D. Mich. 2019).

¹⁵¹ See *Burgess*, 375 F. Supp. 3d at 818; see also RESTATEMENT (SECOND) OF TORTS § 324A (outlining the Good Samaritan doctrine).

¹⁵² 28 U.S.C. § 2680(a).

¹⁵³ *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984).

¹⁵⁴ *United States v. Gaubert*, 499 U.S. 315, 322–23 (1991).

agency action must have been discretionary, as opposed to specifically prescribed or mandated by statute or other authority.¹⁵⁵ If the action was discretionary, the second step of the test asks “whether that judgment is of the kind that the discretionary function exception was designed to shield.”¹⁵⁶ If so, the court lacks jurisdiction. In this way, the discretionary function exception shields “governmental actions and decisions based on considerations of public policy” from tort law.¹⁵⁷ Further, there is a “strong presumption” that the second step is satisfied upon finding the first step satisfied.¹⁵⁸

The EPA took various actions and failed to take other specific actions pursuant to the SDWA, some of which were clearly discretionary. But the court did not allow step one to steamroll step two of the discretionary function exemption. Instead, the court found that the EPA’s failure to warn Flint citizens of the unsafe water and its negligence in response to citizen complaints did not entail the kind of judgment that the discretionary function exception was designed to shield.¹⁵⁹

The district court’s decisions to allow the FTCA claims against the United States and reject the discretionary function exception have not been substantively reviewed by an appellate court at the time of publication of this Essay. The district court is continuing to hear FTCA claims in consolidated litigation.¹⁶⁰ While this is a preliminary victory and the district court opinions are not precedent, the Flint residents have vanquished another doctrinal hurdle in their successful complaint against the United States.

CONCLUSION

The legal developments in the wake of the Flint water crisis are still unfolding, and the crisis itself in many ways continues. Many of the cases discussed in this Essay are ongoing. Future judges will decide if the Flint water crisis was analogous to other environmental injustices and whether these precedents apply to the disputes of future litigants. But the Flint residents have already changed their roles in the Flint water crisis from political victims to legal victors. And they have given other communities and individuals new precedents to do the same.

¹⁵⁵ See *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 537.

¹⁵⁸ *Gaubert*, 499 U.S. at 324.

¹⁵⁹ *Flint I*, 482 F. Supp. 3d 601, 626 (E.D. Mich. 2020); *Burgess v. United States*, 375 F. Supp. 3d 796, 812–16 (E.D. Mich. 2019).

¹⁶⁰ See *In re FTCA Flint Water Cases*, No. 17-cv-11218, 2021 WL 5999288 (E.D. Mich. Dec. 20, 2021) (denying motion to dismiss).

