

No. 24-60370

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PRISCILLA STERLING, individually and on behalf of all others similarly
situated; RAINE BECKER, individually and on behalf of all others similarly
situated; SHAWN MILLER, individually and on behalf of all others similarly
situated; JOHN BENNETT,

PLAINTIFFS - APPELLANTS

v.

THE CITY OF JACKSON, MISSISSIPPI; CHOKWE A. LUMUMBA; TONY
YARBER; KISHIA POWELL; ROBERT MILLER; JERRIOT SMASH;
TRILOGY ENGINEERING SERVICES, L.L.C.,

DEFENDANTS - APPELLEES.

On Appeal From The United States District Court,
For the Southern District of Mississippi, Northern Division
USDC No. 3:22-cv-00531-KHJ-MTP

**EN BANC BRIEF OF APPELLANTS PRISCILLA STERLING, RAINE
BECKER, SHAWN MILLER, AND JOHN BENNETT**

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. R. 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Statement Regarding Oral Argument

Plaintiffs-Appellants request oral argument pursuant to Fed. R. App. P. 34(a)(1). On March 5, 2026, the Court calendared this case for en banc oral argument on May 12, 2026, at 9:00 a.m. (ECF No. 162.)

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Jurisdictional Statement

The District Court had subject matter jurisdiction under 28 U.S.C. § 1331 and supplemental subject matter jurisdiction under 28 U.S.C. § 1367. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

Statement of Issues

I. Whether the District Court employed the correct standard for a claim under 42 U.S.C. § 1983 for violation of the right to bodily integrity guaranteed by the Fourteenth Amendment when the District Court stated that such a claim requires “something more” than deliberate indifference.

II. Whether the District Court correctly held that the facts pleaded by Plaintiffs-Appellants cannot give rise to liability for the City of Jackson and City Officials under § 1983 for violation of the right to bodily integrity because those facts do not “shock the conscience” even when assumed to be true and construed in the light most favorable to Plaintiffs-Appellants.

III. Whether the District Court correctly granted qualified immunity to City Officials in determining that the right to bodily integrity guaranteed by the Fourteenth Amendment is not “clearly established” for this case.

IV. Whether the Fifth Circuit Court of Appeals should recognize a theory of liability under § 1983 for violation of rights guaranteed by the Fourteenth Amendment for injuries caused by a state-created danger.

V. Whether the facts pleaded by Plaintiffs-Appellants would give rise to liability under § 1983 for violation of rights guaranteed by the Fourteenth Amendment for injuries caused by a state-created danger.

Statement of the Case

I. Factual Background

This is a case about lead and lies. Officials of the City of Jackson knew their reckless acts had caused widespread contamination of the public water system with lead, a neurotoxin that is unsafe at any level, and then they chose to lie about it. In this instance, residents of the City of Jackson have been deprived of their life and liberty within the meaning of the Fourteenth Amendment. The residents seek redress under 42 U.S.C. § 1983, the text of which provides, in relevant part, “Every person who, under color of [law], *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[.]” 42 U.S.C § 1983 (emphasis added). It is noteworthy that the text of the statute makes no mention of immunities for defendants, qualified or otherwise.

This case comes to this Court at the initial pleadings stage. Plaintiffs-Appellants (“Plaintiffs”) set forth two core allegations, each composed of numerous facts and actions, which together paint a more than plausible picture that Defendants-Appellees (“Defendants”) violated Plaintiffs’ constitutional rights:

- (1) Knowingly and with deliberate indifference to the

consequences, Defendants actively created conditions in the public water system where lead contamination would reach Plaintiffs' homes undetected.

(2) Defendants' deliberate actions actively dissuaded Plaintiffs from taking protective action and induced Plaintiffs to drink the lead-poisoned water by publicly stating that the water was safe to drink and by suppressing test results and regulatory orders, among other actions.

This case is not merely about bad local governing. And this is not a case solely about causing lead contamination, nor is it solely about public misrepresentations. Instead, this case is about a tapestry of deliberate conduct that subjected and caused residents to be subjected to deprivations of their constitutional rights to life and liberty, by, among other wrongs, causing lifelong physical harm.

A. Defendants Caused Lead Contamination of the PWS

The Jackson Public Water System ("PWS") provides water for human consumption to a population of approximately 173,514 persons in and around the City of Jackson, almost a quarter of whom are children. ROA.1460–61. By ordinance, Jackson residents' homes must use water supplied by Jackson PWS; residents have no choice in water suppliers for their home plumbing systems. ROA.1455. The Jackson PWS includes many aging pipes which contain significant

amounts of lead. ROA.1461–62. Lead will typically only leach out of the pipes if the water becomes sufficiently acidic (i.e. low pH) and corrosive. ROA.1464.

The federal and Mississippi Safe Drinking Water Acts require water system operators to monitor water quality across various parameters, including pH.

ROA.1508-09. As Plaintiffs detail in their complaint, the Jackson PWS monitoring system was not functional: monitoring equipment including pH monitors was nonfunctional for years, and lead and copper tap monitoring procedures such as sample collection protocols were not implemented, as later reports would show.

ROA.1502–03, 1509–10. As water system professionals, Defendants, including then-Public Works Director Powell, knew of the seriously impaired, malfunctioning, and nonfunctioning corrosion control methods. ROA.1478.

In 2009, triennial testing showed that the water contained 8.8 parts per billion (“ppb”) for lead at the 95th percentile. ROA.1468. Although the “Maximum Contaminant Level” (“MCL”) under the Safe Drinking Water Act is 15 ppb at the 90th percentile, this finding should have triggered a response given that any amount of lead is not safe to consume. ROA.1463. At minimum, these tests show that Defendants had knowledge that lead was present at least since 2009.

Triennial testing from 2010 to 2013 showed that the concentration of lead in Jackson’s drinking water increased at an alarming rate: lead levels were measured at 13.7 ppb at the 90th percentile and 33.5 for the 95th percentile. ROA.1468–69.

Again, this showed that the corrosion control equipment and methods were not working—in fact, they were causing or contributing to the increase in lead levels. Defendants had knowledge of these facts. ROA.1474. As Plaintiffs allege, “[t]o this day, Jackson has not identified any materials, studies, reports, documents, treatises, or other information that was relied upon in good faith by former Mayor Yarber, former Public Works Director Powell, or Jackson in deciding to ignore the pH levels of the source water or the lack of corrosion control methods at the O.B. Curtis Water Treatment Plant.” *Id.*

The increase in lead in the water was not happenstance: In 2013, Interim Director of Public Works Willie Bell gave a presentation to then-Mayor Lumumba and Defendant Yarber, then a City Council member. Director Bell explained that a defective lime pump was causing pH issues. ROA.1469–70. Lime, a basic substance, is added to reduce acidity. ROA.1467. Bell told Mayor Lumumba and Yarber that the lime feeding system likely had a clogged valve and had been malfunctioning for years. *Id.* The clogging was exacerbated because the Jackson PWS chose to use solid lime powder instead of liquid lime, which the system was designed for. *Id.*

In spring 2014, Mayor Lumumba passed away and Yarber was elected Mayor to finish Lumumba’s term. ROA.1471. Despite having actual knowledge of rising pH levels and impending lead contamination, Yarber scrapped the plan to fix

the lime feed issue and chose to replace Director Bell with Defendant Kishia Powell.. Despite having actual knowledge of these issues from direct experience and from Bell’s presentation, Defendants Yarber and Powell exhibited deliberate indifference and actively impeded efforts to remediate the public health crisis facing them. However, this proved to be only the beginning.

The City switched water sources for a portion of its water users from relatively safe well water to the highly acidic water drawn from the Pearl River and the Reservoir. ROA.1476. Plaintiffs allege that Powell, due to her experience as a public water system professional in Jackson, was aware that the water drawn from the Pearl River and the Reservoir was very acidic. ROA.1472–73. Following this switch, in June 2015, triennial testing showed that lead levels in Jackson had jumped again, exceeding the 15 ppb regulatory limit at 28 ppb. ROA.1478–80. As described below, Defendants did not notify the public of these extremely hazardous conditions until seven months later.

Following the pervasive lead contamination, MSDH issued a compliance plan for the City requiring an engineer-designed corrosion control study and plan for water treatment. ROA.1487. Until that plan was approved, the City was required to make repairs or modifications “as soon as possible, but no later than October 1, 2016” to maintain a constant pH of at least 8.5, among other requirements. *Id.* However, the City chose not to comply with this emergency

directive and did not even begin installing necessary components until more than a year later, in October 2017. ROA.1488–89.

Plaintiffs allege that Defendants made knowingly self-interested and financially motivated decisions with respect to the MSDH compliance plan. In selecting an engineering firm to assist with corrosion control, the City chose Defendant Trilogy Engineering Services (“Trilogy”). ROA.1493. Plaintiffs allege that this selection was made because Trilogy’s owner, Thessalonian LeBlanc, held an unreported campaign fundraiser for Defendant Yarber in 2014. *Id.* As this case is at the initial pleading stage, Plaintiffs do not yet have a complete picture of the deliberations undertaken by Defendants. What is clear, however, is that Trilogy recommended feeding solid soda ash through the liquid lime pump, much in the same manner as solid lime powder was fed. ROA.1495. This choice was made despite Defendants Yarber and Powell having actual knowledge of the failure of the solid powder lime system employed earlier. ROA.1497–98.

On March 27, 2020, the EPA issued an Administrative Order which cited multiple SDWA violations and noted that the water system “present[s] an imminent and substantial endangerment to the persons served by the system;” a fact already known to City Officials for years. ROA.1508. The EPA Order summarized numerous serious issues which were present in the preceding years, including malfunctioning pH meters, failure to implement lead and copper tap

water monitoring, failure to conduct public education or provided required consumer notifications of lead exceedances, and failure to calibrate and operate turbidity monitoring equipment necessary for bacterial control. ROA.1509–10. As described below, Defendants kept the EPA Order hidden for a year.

In sum, Plaintiffs allege not mere negligence or mere bad governing; Plaintiffs allege a lengthy set of detailed facts showing that Defendants had actual knowledge of lead contamination and, even with more than ample time to deliberate about their conduct, made choices which worsened these conditions until Jackson residents were poisoned en masse. However, even these facts, egregious as they are on their own, must yet still be considered in totality with Defendants’ deliberate concealment and false statements.

B. Defendants Cover Up the Dangerous Conditions and Lie to the Public

Plaintiffs allege that the City deceived Plaintiffs into unknowingly putting toxic chemicals into their bodies. ROA.1449. For years, the City knowingly contaminated otherwise clean water with lead and then pumped that water to its residents’ taps. Perhaps to avoid public criticism and negative media reports—especially in light of the influx of media attention on the Flint water crisis, which began in April 2014—or perhaps for other reasons yet unknown without discovery, City officials chose to cover up and downplay the severity of the Jackson water crisis and publicly deny that it was physically harming its residents.

City Officials knew that lead has devastating health effects on humans, especially on children's development. ROA.1498–99. Increased lead levels in childhood are associated with an increased likelihood of ADHD behaviors, delinquent behaviors, and arrests. *Id.* Because lead in drinking water cannot be seen or tasted, Plaintiffs could not know that the City was providing lead contaminated water to their homes. For this reason, the SDWA requires water system operators such as Defendants to promptly issue public notifications when there are lead exceedances. 42 U.S.C. § 300g-3(c)(1)(D).

Testing performed in June 2015 showed for lead a contamination level of 28 ppb at the 90th percentile. ROA.1480. Moreover, lead levels exceeding the MCL of 15 ppb were found in 22% of the Jackson homes sampled, a higher proportion above the MCL than in Flint, Michigan. *Id.* Defendants had knowledge of the lead exceedance in June 2015. *Id.* Critically, Defendants delayed over six months from when testing was performed in June 2015 to January 2016 in notifying the public—indeed the residents of the very homes from which these samples were taken—of the lead exceedances in their water. Defendants do not and cannot dispute that this is a violation of the federal Lead and Copper Rule of the SDWA. *See* 40 C.F.R. § 141.203 (requiring public notice no later than 30 days). This period of total concealment caused injury.

When the first mention of lead occurred in January 2016, the City and its policy-making officials affirmatively mislead the public into thinking the water was safe to drink when it was not. ROA.1481–86. For example, Defendant Powell lied, stating to the public via the Jackson Free Press that, “This is not a situation where you have to stop drinking the water.” ROA.1481, 1482 (“We are nowhere near the levels seen in Flint.”). At the same conference, Powell stated, the June 2015 finding of lead above the Lead and Copper Rule’s action level does “not mean that the City has violated the Safe Drinking Water Act, and our water is safe.” ROA.1481–82. Additionally, Powell actively covered up the crisis by immediately firing one of her employees for alerting the public that in fact, the City’s pipes contained bands of lead every 20 feet. ROA.1492.

Like Powell, Defendant Yarber lied to the public and chose to deny the crisis in Jackson. ROA.1483 (“I don’t want to sound the wrong alarm [and have] folks saying, ‘We’re Flint.’ We’re not Flint.”). Throughout 2018, City officials made false and misleading statements to avoid public outrage and delay spending on necessary infrastructure. Defendant Former Public Works Director Robert Miller falsely stated, “there’s been no detecting of lead or copper in the water supply.” ROA.1485–86. Even when Jackson had just been cited for failing to comport with the MSDH compliance plan, he lied to the residents that the “water is still safe to drink.” ROA.1486. Plaintiffs relied on the representations that the water was safe

for use and was not harmful to human health and were falsely assured when Defendants said the situation is not comparable to Flint. ROA.1518.

In fact, one recommendation that the City made to residents actually exacerbated the lead problem. From January to March 2016, Jackson issued boil water notices, but boiling water causes lead concentrations to increase because it causes the water to evaporate, leading to a higher concentration of lead in each glass. ROA.1491–92.

Buried among Defendants’ false reassurances were some recommendations aimed at children, such as that children under age 5 not drink unfiltered tap water and that children undergo lead testing. As an initial matter, on a Rule 12 motion, courts are not asked to weigh competing facts and decide which set of facts is more compelling to the court; the role of the court on a Rule 12 motion is to view the pleaded facts in favor of the claimant and draw all reasonable inferences in favor of the claimant. *Parker v. Blackwell*, 23 F.4th 517, 522 (5th Cir. 2022). Here, the adequacy of Defendants’ limited statements in the face of their headline untruthful statements and how residents would have reasonably understood them is, at best, a disputed factual issue appropriate for fact and expert discovery and perhaps an

issue to be revisited at the Federal Rule of Civil Procedure 56 summary judgment stage¹.

The 2015–16 period would not be the last time Defendants actively concealed critical information from the public. On March 27, 2020, the EPA issued an Emergency Administrative Order detailing numerous monitoring equipment failures and other issues imperative to the remediation of the Jackson PWS and ordering Defendants to take action. ROA.1508–11. However, the EPA Order was not revealed to City Council or the public for a year. ROA.1511–12 (“City Council member Ashby Foote [said,] ‘an emergency administrative order was issued by the EPA, which is a formal document with a long list of things that needs to do, and we were not informed that it had been issued. And we had those responsibilities dictated by the EPA. So I was very disappointed when I found out a week ago that this was this has been around for a year, and we had not been notified of it.’”).

II. Procedural History

A. District Court Proceedings

This case remains at the initial pleading stage over three years after Plaintiffs filed their complaint. Plaintiffs filed their initial complaint on September 16, 2022. On February 5, 2024, the District Court ruled on Defendants’ motion for judgment

¹ It should also be noted that Plaintiffs and the proposed class include children older than five and adults. And lead is also physically harmful to older children and adults. ROA.1498–1500.

on the pleadings and individual motions for qualified immunity. The District Court separated Plaintiffs' allegations into failures to act versus actions taken and held that no individual acts or failures to act were conscience-shocking because there is no fundamental right to clean water and because of the presumption that government decision making is rational. ROA.1427–31. The District Court dismissed the bodily integrity claim without prejudice, permitting Plaintiffs to submit a Second Amended Complaint. (“SAC”). ROA.1432. The District Court dismissed the state-created danger claim and granted qualified immunity to the individual Defendants. ROA.1434–38.

Plaintiffs filed their SAC on February 20, 2024, and on March 14, 2024, Defendants moved to dismiss. ROA.1445, 1632. On June 11, 2024, the District Court held that Plaintiffs' allegations do not shock the conscience and dismissed the bodily integrity claim with prejudice, holding that “something more” than deliberate indifference is required to state a bodily integrity claim. ROA.1938–42.

B. Panel Proceedings

Plaintiffs initiated this appeal on July 22, 2024. (ECF No. 1.) Plaintiffs appealed from the District Court's two orders dismissing Plaintiffs' bodily integrity and state-created danger claims against the City and City Officials.

A panel of this Court held oral argument on April 2, 2025 (ECF No. 123) and issued an opinion on November 17, 2025 (ECF No. 127). The majority opinion

held that the unique and shocking situation alleged sufficiently states a bodily integrity claim and that the Court would recognize the state-created danger claim. Issuance of the mandate was withheld by order of the Court on November 18, 2025 (ECF No. 131), and Defendants filed a petition for rehearing en banc on December 1, 2025 (ECF No. 134). Following Plaintiffs' response (ECF No. 141), the Court granted the petition for rehearing en banc (ECF No. 154).

Summary of Argument

Defendants' actions caused lead to leach into Jackson's water and then Defendants induced Plaintiffs to drink the water by lying, including by saying the water was safe. First and foremost, this is a clear deprivation of a "life" interest protected by the Fourteenth Amendment. Defendants' actions also deprived Plaintiffs of a "liberty" interest in that they could not make a reasonable choice for themselves on whether to drink the water. These deprivations are actionable under 42 U.S.C. § 1983 since Defendants "subjected or cause[d Plaintiffs] to be subjected" to them through two mediums: pipes and lies. All the Circuit Court decisions addressing similar lead drinking water deception allegations (e.g. in Flint, Michigan and Benton Harbor, Michigan) have concluded that a bodily integrity claim is proper. Dismissal of the bodily integrity claim would put this Court at odds with predominating precedent in other circuits.

Throughout this litigation, Defendants repeatedly mischaracterized Plaintiffs' case as asserting "a new constitutional right to water services" or a "right to competent city services." Plaintiffs do not assert or rely on such rights.

Instead, Plaintiffs allege a years long collection of both actions and knowing omissions including deliberate indifference to the rising lead levels, affirmative decisions which resulted in lead poisoning despite warnings, and knowing lies and

misrepresentations which dissuaded residents from taking protective measures. These allegations, in total, shock the conscience.

This case cannot be fairly characterized as just a lead contamination case, or just a public misrepresentation case, or just a case about incompetent government services. Though there are analogues to Flint and other cases, the clearest and most fundamental guidance on this case comes from the Supreme Court in *Cnty. of Sacramento v. Lewis*, 523 U.S. 833 (1998): courts must analyze the totality of the circumstances, with a particular eye on whether the defendant had time to deliberate. The District Court failed to heed the Supreme Court's instructions.

The District Court also erred by weighing evidence and making value judgments at the pleading stage, before discovery commenced. The District Court accepted Defendants' notion that local governments are free to exercise discretion, no matter the infringement on residents' constitutional rights, and concluded that the conduct here does not shock the conscience as a matter of law. However, the operative complaint contains plausible allegations that the City acted in reckless disregard of substantial dangers to cover up their own malfeasance, thereby causing harm.

The District Court also erred when it granted qualified immunity to the individual Defendants. These officials knew that lead poisoning was occurring, yet decided to continue operating the public water system without proper pH

monitoring or control, and took other actions that worsened the lead problem. Then, when egregious levels of lead were predictably found, they decided to hide the test results and lie about the situation. These individuals had fair warning of the wrongfulness of their conduct as recognized in *Guertin v. State*, 912 F.3d 907 (6th Cir. 2019), *reh'g denied*, 924 F.3d 309 (6th Cir. 2019), *cert. denied*, 589 U.S. 1167 (2020), as well as the state and federal administrative warnings and the obviousness of the violation. Plaintiffs have plausibly alleged that Defendants Powell, Yarber, and Miller knew they were lying.

Defendants also invite the Court to deviate sharply from national consensus on another issue. Defendants call upon this Court to be the only Circuit Court to expressly disavow the state-created danger claim. The Court should decline this invitation. The state-created danger claim is supported by history and tradition, the text and structure of section § 1983, and decades of robust modern jurisprudence, showing that the claim is both conceptually sound and does not create problems for government entities. By contrast, rejecting the claim would contravene precedent and create conflicts between this Circuit and its sister Circuits.

Argument

I. Introduction

[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]

U.S. Const. Amend. XIV, § 1.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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[.]

42 U.S.C. § 1983.

Before this Court is the question of whether Plaintiffs have plausibly pleaded a claim seeking to vindicate the rights protected by these provisions.

The Defendant City of Jackson, by and through its officers Defendants Yarber, Powell, Miller, and Lumumba, displayed egregious indifference to rising lead levels and nonfunctional corrosion control methods in the water system instrumentalities solely within their knowledge and control. Realizing, in the wake of the Flint, Michigan catastrophe, that their actions were wrong, Defendants chose to cover up their mess by concealing test results and publicly lied about the safety of the water, inducing Plaintiffs to consume it with the belief that it was safe.

These conscience-shocking actions “subjected or cause[d Plaintiffs] to be subjected,” for purposes of § 1983, to two well-recognized constitutional harms.

First, Plaintiffs had a right not to be physically harmed or placed in egregious danger by governmental actors without justification. *M. D. by Stukenberg v. Abbott*, 907 F.3d 237, 250. Second, Plaintiffs had a right to make their own informed decision about whether to drink the water, not to be lied to about the lead poisoning in the water—poisoning caused or worsened by Defendants’ conduct—such that they could misled into believing the water was safe. Though the text of § 1983 does not contain this requirement, courts have held added the requirement that these rights are only actionable when government misconduct “shocks the conscience.”

Plaintiffs’ bodily integrity claims should proceed against the City as well as the individual Defendants. The claims here do not require any expansion of the due process right. This case squarely follows the principles set forth in foundational bodily integrity cases like *Washington v. Harper*, 494 U.S. 210 (1990), *Rochin v. California*, 342 U.S. 165 (1952), *Missouri v. McNeely*, 569 U.S. 141 (2013), *Winston v. Lee*, 470 U.S. 753 (1985), and *Cnty. of Sacramento v. Lewis*, 523 U.S. 833 (1998), and indeed the harms here are more serious, permanent, and widespread than those cases. *See Washington v. Harper*, 494 U.S. 210 (1990); *Rochin v. California*, 342 U.S. 165 (1952); *Missouri v. McNeely*, 569 U.S. 141 (2013); *Lewis*, 523 U.S. 833; *Winston v. Lee*, 470 U.S. 753 (1985).

The Court should also recognize the state-created danger claim. It is amply supported by the text of § 1983, Defendants' hyperbole about the impact of recognizing this legal theory; ten other Circuits have applied this claim in its modern formulations for over four decades with no major disruption to the functioning of governments within those Circuits. It has proven to be a narrow claim, yet an important check on government power, implicated fairly rarely. Residents of the Fifth Circuit should be no less safe from government-created harm.

Accordingly, the Court should reverse the District Court's dismissal of the case and remand for further proceedings.

II. Standard of Review

Review of a district court's dismissal under Federal Rule of Civil Procedure 12(b)(6) or 12(c) is de novo. *Aldridge v. Mississippi Dep't of Corr.*, 990 F.3d 868, 873 (5th Cir. 2021). The reviewing court reviews the claims de novo, must accept all well-pleaded facts as true, and view those facts in the light most favorable to the plaintiffs. *Meador v. Apple, Inc.*, 911 F.3d 260, 264 (5th Cir. 2018). Constitutional issues are matters of law reviewed de novo. *Chamber of Com. of United States v. United States Sec. & Exch. Comm'n*, 85 F.4th 760, 767 (5th Cir. 2023).

III. Plaintiffs' Bodily Integrity Claim Should Proceed

Through the Jackson PWS, lead was placed in Plaintiffs' bones and brains and will never come out. The Fourteenth Amendment prohibits unjustified deprivations of "life" as well as "liberty." Plaintiffs' bodily integrity claim asserts two constitutional harms: a life interest in not being physically injured and suffering lifelong developmental issues, and a liberty interest in not being lied to and being able to make an informed decision on whether to drink the water. Both these rights are clearly established in Constitutional history and tradition.

Permitting the bodily integrity claim to proceed here a national consensus that has arisen out of similarly egregious lead poisoning and coverup cases, cases including not only Flint, Michigan but Benton Harbor, Michigan and others. Those cases and the instant case do not create or rely on constitutional rights to clean water or competent government services generally.

A. Permitting This Case to Proceed Would Follow History and Tradition.

1. This Case Follows the Well-Established Rights to Life and to Informed Consent to Physical Invasion.

Plaintiffs allege that Defendants knowingly poisoned their water and then coerced them into drinking it by concealing test results and publicly lying about it. Not only did this physically harmed them—severely and permanently—it also violated their right to informed consent to physical invasions of their bodies. Both these rights have a storied history in American jurisprudence. *See McClendon v.*

City of Columbia, 305 F.3d 314, 322 n.5 (5th Cir. 2002) (en banc) (“This court has recognized a substantive due process right to be free from state-occasioned damage to a person’s bodily integrity in certain contexts.”) (citing *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 450–51 (5th Cir.1994) (en banc)). This case is a natural application of these rights, not an extension.

In *Hurtado v. People of State of California*, 110 U.S. 516, 539 (1884) (Harlan, J. dissenting), Justice Harlan discussed how common law protections against state action that cause injury were imported into our Nation from the English legal tradition: “The phrase ‘due process of law’ is not new [...] In the congress of the colonies, held in New York in 1765, it was declared that the colonists were entitled to all the essential rights, liberties, privileges, and immunities confirmed by *Magna Charta*[.]” See also *id.* at 542 (“By that instrument the king, [. . .] declared that ‘no freeman shall be [. . .] disseized of his freehold, or [. . .] otherwise destroyed [. . .] but by lawful judgment of his peers, or by the law of the land.’”). Thus, the concept of “due process” has, from the very beginning, been understood to protect life and property against government action.

The notion of the sanctity of the individual body in the face of state-sponsored intrusion likewise permeates early American jurisprudence. See, e.g., *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (“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[.]”); *Schloendorff v. Soc’y of New York Hosp.*, 211 N.Y. 125, 129 (1914) (Cardozo, J.) (“Every human being of adult years and sound mind has a right to determine what shall be done with his own body[.]”).

This right was examined and applied in *Rochin*, 342 U.S. 165, *McNeely*, 569 U.S. 141, and *Winston*, 470 U.S. 753, three cases which involved physical intrusions to extract evidence from the body. These cases found that the right to bodily integrity was violated since the plaintiff did not consent to the invasion. So too here. By concealing test results and untruthfully stating that the water was safe to drink when it was not, Defendants deprived Plaintiffs of the ability to choose for themselves whether to drink the water.

This alone is a violation of rights, but that is not all. The lead poisoning violated Plaintiffs’ rights in an even more basic and conscience-shocking sense: it caused them severe and permanent harms, including lost IQ, developmental disabilities, and a host of other issues. This was a direct and unjustified physical deprivation of their “life” interest under the Fourteenth Amendment. Indeed, the major Supreme Court cases take this interest as their starting point. *E.g.*, *Lewis*, 523 U.S. 833. This is the same concept at work in bread-and-butter civil rights cases such as unjustified assaults by police officers. *See, e.g.*, *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981) (holding that police officer who

wantonly clubbed tourist bystander who was taking a photo of the scene violated the right to bodily integrity, taking into consideration the potential for lasting harm, the proportionality of the force to the need, and the officer's intentionality). While there is no general duty for a government entity to provide responsive police services, once they are provided, they must be done in a constitutional manner. *See, e.g., Griffin v. Illinois*, 351 U.S. 12, 18 (1956). So too here.

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) does not change the status of either the "life" or "liberty" aspects of the bodily integrity claim asserted here. First, by its own terms, *Dobbs* does not abrogate the right to life asserted here: *Dobbs* called on courts to question the history and tradition of asserted liberty, not life, interests. *Id.* at 234. The right to not have one's life taken or grievously impaired by the state is beyond dispute. Whether the state injects lead into the plaintiff by water or bullet, it violates the Constitution, absent an adequate defense.

With respect to the "liberty" aspect of Plaintiffs' bodily integrity claim, the right to informed consent to physical invasion is steeped in history and tradition. *Dobbs'* admonitions would not fairly call this right into question. Moreover, this Court has recognized that *Dobbs* did not impact bodily integrity jurisprudence. *See, e.g., Tyson v. Sabine*, 42 F.4th 508, 517 & n.4 (5th Cir. 2022) (quoting statement in

Dobbs that it should not “be understood to cast doubt on precedents that do not concern abortion.”).

2. The Means Involved in this Constitutional Violation Are Within the Scope of § 1983.

The physical invasion and harm which Plaintiffs experienced came as a result of two instrumentalities: pipes and lies. Although in a literal sense, the Defendants were physically farther away from Plaintiffs than in some cases, the text, structure, and history of the Fourteenth Amendment and § 1983 make clear that what matters is that Defendants knowingly caused a violation of rights.

The Fourteenth Amendment was conceived at the outset as “directed to the States[.]” *Ex parte Commonwealth of Virginia*, 100 U.S. 339, 346 (1879). Foreseeing that state and local governments would draw constitutional scrutiny in a multitude of unforeseeable ways, the Amendment and its accompanying statutory enactment, § 1983, were drafted such that they would apply to numerous governmental instrumentalities. *See id.*; *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 233 (1897) (“[T]he prohibitions of the amendment refer to all the instrumentalities of the state,—to its legislative, executive, and judicial authorities[.]”). Variegated claims of constitutional harm came to be known by certain labels corresponding to different deprivations of “life,” “liberty,” or “property.”

Although the *means* by which the right of bodily integrity is violated differs from case to case, there is no doubt that the right exists. The rights guaranteed by the Constitution maintain their force even though developments in society may provide new means by which those rights can be infringed. *E.g.*, *Katz v. United States*, 389 U.S. 347 (1967) (holding that the Fourth Amendment, which expressly protects “persons, houses, papers, and effects,” extend to wiretapping of phone booths).

The District Court characterized the invasions in *Rochin* (use of vomit-inducing solution through a tube), *McNeely* (blood draw), *Winston*, and *Harper* (forced medication) as “direct.” Factually, the state actor in those four cases was in immediate spatial proximity to the invasion, whereas here the invasion was mediated through miles of pipes—although the pipes delivered water directly into Plaintiffs’ homes. But immediate spatial proximity is not required nor particularly significant in the shocks-the-conscience analysis. What is significant is whether the invasion was substantially likely to result from government action and whether the government actors were deliberately indifferent to that fact. *See* 42 U.S.C. § 1983 (“causes to be subjected”).

In re Cincinnati Radiation Litig., 874 F. Supp. 796 (S.D. Ohio 1995) is instructive. This case concerned cancer patients who were told they were receiving a therapeutic dose of radiation but were actually receiving a higher dose pursuant

to a clandestine medical study. The court’s core concern was voluntariness, i.e. that patients could not have consented to the study due to the false statements. Were the patients told the truth, there would be no claim. This shows that false statements can be an instrument by which a harmful physical invasion is achieved.

B. The Allegations, Viewed in Total, Shock the Conscience.

Defendants repeatedly sought to subdivide the facts alleged and ask whether each fact, viewed in total isolation from the rest of the narrative, shocks the conscience. This is not the correct approach. The Supreme Court clearly stated in *Lewis*, 523 U.S. at 850 that “substantive due process demands an exact analysis of circumstances[.]” *See also id.* (“That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.”) (citing *Betts v. Brady*, 316 U.S. 455, 462 (1942)).

Viewed in total, Plaintiffs’ allegations equal or even exceed the denials of rights held to be actionable in numerous Supreme Court cases. Moreover, citations to select details in the materials cited by Plaintiffs in the SAC do not absolve Defendants.

1. Plaintiffs Plead Widespread, Severe, Permanent Harm.

The District Court found that the instant case was not as conscience-shocking as foundational bodily integrity cases like *Rochin*, 342 U.S. 165,

McNeely, 569 U.S. 141, and *Winston*, 470 U.S. 753. ROA.1939. *Rochin*, *McNeely*, and *Winston* all involved physical intrusions to extract evidence from the body. However, the instant case is actually more conscience-shocking than these cases in a critical respect, namely that the invasion here caused permanent bodily harm (especially in children), whereas in *Rochin* (use of vomit-inducing solution through a tube) and *McNeely* (blood draw) there was essentially no lasting harm. In *Winston*, the potential for harm caused by surgical invasion was disputed by the parties, and the presence of this dispute supported the Court’s holding that nonconsensual surgery to extract a bullet from a criminal defendant’s chest was unconstitutional. *Winston* makes clear that the potential for lasting harm should be a core concern in a bodily integrity analysis. 470 U.S. at 766.

The District Court also characterized *Rochin*, *McNeely*, *Winston*, and *Harper* as “intentional” invasions. ROA.1940. First, limiting bodily integrity claims to intentional invasions impermissibly forecloses deliberate indifference claims in violation of the framework set forth in *Lewis*. Even still, the present case is not actually less “intentional” than those four cases. None of those cases alleged an actual intent to harm, and in *Harper* the intent was to benefit the prisoner with medication. Yet the Supreme Court found bodily integrity violations in all those cases except *Harper*. Additionally, it was improper for the District Court to infer that City Officials were merely “negligent” before any discovery occurred.

The District Court also relied heavily on *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115 (1992). ROA.1426–28. In *Collins*, the plaintiff alleged that the city failed to train sanitation employees and provide adequate personal protective equipment, leading to a death by asphyxiation in a manhole. 503 U.S. at 117–18. The plaintiff alleged that the city had notice of the dangers because the plaintiff’s supervisor had been rendered unconscious in a manhole one month prior. *Id.* at 118 n.1. The Supreme Court held that the Fourteenth Amendment does not impose a general constitutional duty for government employers to provide a safe working environment and that the plaintiff’s allegations did not shock the conscience. *Id.* at 127–28.

Plaintiffs’ allegations are substantially more conscience-shocking than *Collins* in four respects. First, the degree of certainty of harm is substantially higher here than *Collins* since the introduction of lead into a large number of homes was, by virtue of known chemical processes, certain to result from the lack of corrosion control and affirmatively harmful choices made by Defendants. By contrast, in *Collins* the presence of noxious gasses in manholes was unpredictable. Second, the degree of notice is substantially higher here since Defendants were given significant pH and lead sampling data, as well as directives and notices issued by the EPA and MSDH. In *Collins* the only notice was one anecdotal incident that occurred to one individual. Third, the scope of the harm is

exponentially greater here than in *Collins*: although the plaintiff's death in *Collins* was tragic, deliberate indifference to a safety issue which may affect at most several dozen government employees is simply less conscience-shocking than deliberate indifference to a problem that could—and did—cause lifelong debilitation for thousands of residents and children who consumed the water.

Finally, and importantly, *Collins* entirely lacked a key component of the present case: the lies and misleading statements made in response to the issue. The District Court improperly separated out (into separate orders) the false and misleading statements from the rest of its analysis, ignoring the principle that the totality of the allegations must be considered in the shocks-the-conscience analysis.

2. Defendants Are Not Absolved by Supporting Materials.

As an initial matter, weighing purportedly conflicting evidence at the initial pleading stage is not a burden the Federal Rules put on a district court. Instead, courts considering a Rule 12 motion must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the claimant. *Parker v. Blackwell*, 23 F.4th 517, 522 (5th Cir. 2022).

But even considering evidence Defendants argue supports their defenses, Plaintiffs have plausibly stated claims here. Plaintiffs cited the U.S. Environmental Protection Agency's *NEIC Civil Investigation Report City of Jackson Water System* (Mar. 30, 2020). ROA.1507. Defendants may point to this report's remarks

on the switch from ground water to surface water to argue that this decision was made for necessary technical reasons and was not a mere cost-saving measure or an otherwise arbitrary choice. However, the EPA report itself is framed in terms of “observations,” not determinations, and the report states, “These observations are not final compliance determinations.” ROA.1599. Thus, to the extent Plaintiffs incorporated the report by reference, the report is not determinative by its own terms.

On the water source switch, the overall “observation” made was: “The city of Jackson failed to provide documentation regarding the change in source from groundwater to surface water, and association disinfection differences, in October 2014.” ROA.1602. The report does not state that the switch was necessary or even justified. It states only that switch was made “following the completion of the 5 million-gallon (MG) booster station on TV Road” and that this “was anticipated to be a long-term change.” ROA.1603. Importantly, the report then states that “prior to the source and treatment change, no evidence was provided by the city of Jackson or MSDH that a corrosion control treatment (CCT) study or water quality evaluation had been completed.” *Id.* In sum: (1) there is no technical justification for the switch set forth in the report; and (2) even assuming one may exist, the

switch was still done in a reckless and conscience-shocking manner since important inquiries into the effects were ignored.²

An important allegation is that Defendants delayed over six months from when testing was performed in June 2015 to January 2016 in notifying the public—indeed the residents of the very homes from which these samples were taken—of the lead exceedances in their water. This delay is conscience-shocking, as well as a violation of the SDWA.

Plaintiffs allege that Defendants had notice of the lead exceedances when sampling was performed by MSDH. ROA.1480. Defendants dispute this point but offer no basis for their opposition. Plaintiffs base this allegation on the fact that in many of the news sources cited, MSDH officials and City officials are described as working closely together, therefore it is reasonable to believe that this pattern and practice would have been ongoing in June 2015. *See, e.g.,* Kate Galbraith, *High Levels of Lead Found in Mississippi Capital's Water Likened to Flint Crisis*, The Guardian, Mar. 17, 2016, <https://www.theguardian.com/us-news/2016/mar/17/high-levels-lead-mississippiwater-flint-michigan> (cited at ROA.1475, 1480). More fundamentally, it is simply not credible that MSDH would have conducted lead sampling of 58 homes in Jackson, discovered

² A regulatory violation, by itself, does not necessarily create a constitutional violation. But, that principle does not entail that an act cannot be a constitutional violation, or at least a contributing factor, if it is a regulatory violation.

dangerous levels of lead in the samples, and then failed to inform anyone from the City of its findings.

Plaintiffs’ assertion that Defendants knew about the June 2015 test results must be taken as true at the pleading stage. It is plausible. Even if Defendants could cite—or for that matter, if Plaintiffs had cited—a newspaper article asserting that Defendants did not have knowledge until 2016, that would only create a potential issue of fact appropriate for the jury to resolve, or, at earliest, an issue for summary judgment. *Petrobras Am., Inc. v. Samsung Heavy Indus. Co., Ltd.*, 9 F.4th 247, 255 (5th Cir. 2021) (newspaper articles improper subjects of judicial notice). But that is not the case here. Indeed, no newspaper article actually contradicts Plaintiffs’ assertion. In any event, this factual dispute further illustrates why discovery is warranted in this case. *See, e.g., In re BP p.l.c. Sec. Litig.*, 922 F. Supp. 2d 600, 627 (S.D. Tex. 2013) (“At this stage, however, Plaintiffs are required to present only an inference of scienter *at least* as compelling as any inference that scienter was lacking.”) (emphasis in original).

The Court will decide, as a matter of law, whether Plaintiffs’ allegations “shock the conscience.” *See Galaviz v. Reyes*, 95 F.4th 246, 253 (5th Cir. 2024) (“The Supreme Court has applied a ‘shock the conscience’ standard to determine—as a question of law not fact—whether, for example, the Due Process Clause was violated [. . .] and would therefore be actionable under § 1983.”). However, the

trier of fact, not the court, should decide whether the allegations pleaded by Plaintiffs actually occurred and whether Defendants had the requisite mental states of recklessness and deliberate indifference—in short, whether Defendants knew they were lying. Under the standard of review applicable in this posture, the Court should reverse and remand for further proceedings.

C. This Case Comports with Prevailing Precedent in Other Circuits.

In the aftermath of the Flint water crisis, the Sixth Circuit held that plaintiffs plausibly alleged that government officials violated their bodily integrity because they showed that officials had time to consider the risk that residents would ingest lead if they pumped highly corrosive water through the city’s lead-based service lines, yet chose to do so regardless—creating, sustaining, and covering up the infamous water crisis. *Guertin v. State*, 912 F.3d 907, 915, 925 (6th Cir. 2019); see *In re Flint Water Cases*, 960 F.3d 303, 323 (6th Cir. 2020). Plaintiffs did not claim that the officials intended to harm residents; however, it was sufficient that their complaint alleged “that the lead-contamination inflicted upon the people of Flint was a predictable harm striking at the core of plaintiffs’ bodily integrity, and this known risk cannot be excused on the basis of split-second decision making.” *Id.* at 925–26. Worse, once defendants knew the water was contaminated, the court found that their “assurances of the water’s potability hid the risks, turning

residents’ voluntary consumption of a substance vital to subsistence into an involuntary and unknowing act of self-contamination.” *Id.*

These plausibly culpable defendants included city officials who were “instrumental in creating the crisis.” *Id.* at 926–27. The allegations plausibly demonstrate indifference to the crisis for city officials who “directed [other] [c]ity officials to lie to the public,” refused to take corrective action, “downplay[ed] up the extent of lead contamination,” “creat[ed] and fail[ed] to mitigate the crisis,” and “stonewalled” attempts to investigate it. *Flint Water Cases*, 960 F.3d at 325–26.

Another underserved Michigan community, Benton Harbor, experienced a devastating lead water crisis. Claims against city officials “turn[ed] primarily on the statements the City officials made to the public suggesting that the water in Benton Harbor was safe to drink and that the problem was not as widespread as it turned out to be.” *Mitchell v. City of Benton Harbor, Michigan*, 137 F.4th 420, 436, 438–39 (6th Cir. 2025); *see also Braziel v. Whitmer*, No. 23-1954, 2024 WL 3966238, at *9 (6th Cir. Aug. 28, 2024) (city water plant operator who “repeatedly issu[ed] knowingly false statements to the public about the safety implications of the lead in the water and the steps that citizens should take to address those concerns” plausibly violated residents’ bodily integrity). The Sixth Circuit rejected defendants arguments that the crisis was merely the result of inaction and poor-

decision making and that the allegations were not sufficiently outrageous, holding: “[I]t shocks the conscience when government officials lie to the public about the contamination of the public drinking water with lead.” *Mitchell*, 137 F.4th at 437 (“There is rarely a justification for misleading the public about the extent of a lead-water crisis.”).

Other Circuits agree that “deliberate indifference is the appropriate standard of culpability” for a bodily integrity claim where “the facts alleged show there was ample time to deliberate and reflect on those choices.” *Washington v. Hous. Auth. of the City of Columbia*, 58 F.4th 170, 179 (4th Cir. 2023). In *Washington*, the complaint alleged “years of choices” within the city’s housing authority that led to a tenant’s “entirely preventable” carbon monoxide poisoning death. *Id.* at 175, 179. Like lead, “[c]arbon monoxide is dangerous because it is colorless, odorless and tasteless.” *Id.* (citation modified). While the district court had concluded that the allegations amounted to only negligence, rather than deliberate indifference, the Fourth Circuit reversed because the complaint sufficiently alleged that the housing authority recognized the life-threatening danger and yet exhibited “blatant disregard for tenant safety.” *Id.* at 181.

D. Plaintiffs Do Not Rely On or Seek to Create a Constitutional Right to Clean Water, or to Constitutionalize Basic Tort Claims.

The scenario alleged in this case is not an everyday occurrence. It is a complex set of facts wherein Defendants knowingly ignored the failures of their

pH monitors and the presence of lead—poisonous in any amount—and concealed rising lead levels, then seemingly tried to cover their tracks by untruthfully telling the public the water was safe to drink. Then they exacerbated the situation by letting other equipment fail, then again they concealed the EPA Order—which they then knowingly failed to comply with. It is not just lead leaching or false statements in isolation. Rather, everything is intertwined.

Defendants assert that this case relies on a freestanding right to clean water. This is not the case. Our constitution generally does not provide affirmative rights to goods or services, but if the government does choose to provide such things, it cannot use them as an instrumentality to violate constitutional rights. *See, e.g., Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (“It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty.”); *see also J.W. v. City of Jackson*, 663 F. Supp. 3d 624, 644 (S.D. Miss. 2023) (“[T]he government does not have to provide a service, but once it does, the provision of that service is subject to constitutional constraints[.]”).

Defendants also assert that this case relies on a general right to “competent” government services. It does not. It is true that Plaintiffs’ allegations describe a government acting incompetently, but the allegations also detail government actors

engaged in egregious years-long conduct that violated Plaintiffs’ constitutional rights to bodily integrity.

Moreover, the assertion that this case would interfere with ordinary governmental policy choices not only ignores the severity of the knowing lies told by Defendants Powell, Yarber, and Miller, it glosses over the myriad ways in which Plaintiffs allege that Defendants knowingly acted badly in causing the underlying contamination. Plaintiffs allege pH monitors and other equipment were known to be nonfunctional for years and that Defendants did not perform corrosion control studies at key moments, including the switch from ground to surface water. This is not the sort of policymaking which courts seek to protect. At least, Plaintiffs deserve discovery on what Defendants knew and how it influenced their course of conduct. *See Ramirez v. Guadarrama*, 2 F.4th 506, 517-20 (5th Cir. 2021) (Willett, J., dissenting from denial of rehearing en banc) (“I cannot predict, at this stage, whether discovery will substantiate the existence of superior alternatives. But exploring that vital question is precisely why discovery exists.”).

IV. Qualified Immunity for the Individual Defendants Is Inappropriate.

It is common sense that lying is wrong. Lying is especially wrong when it aims to cover up a major public health crisis which inflicted lifelong debilitating injuries, especially on children, that were entirely preventable. City Officials

Yarber, Powell, Miller, and Lumumba were not faced with split-second decisions, but instead had time to deliberate over many months and years.

Plaintiffs sufficiently allege a violation of the right to bodily integrity. The judicially created doctrine of qualified immunity states that an additional extra-textual requirement for holding a defendant liable for violating a claimant's constitutional rights is proving that a right was clearly established at the time of the conduct. *But see Horvath v. City of Leander*, 946 F.3d 787, 795 (5th Cir. 2020), as revised (Jan. 13, 2020) (Ho, J., concurring in part and dissenting in part) ("Neither the text nor the original understanding of 42 U.S.C. § 1983 supports the 'clearly established' requirement."). "A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (internal quotation omitted); *see also Morgan v. Swanson*, 659 F.3d 359, 372 (5th Cir. 2011) (en banc) ("The *sine qua non* of the clearly-established inquiry is fair warning.") (internal quotation omitted).

Here, Plaintiffs' right to bodily integrity was clearly established by: (1) longstanding Supreme Court bodily integrity precedent and the obviousness of the violation, particularly after Flint, Michigan; (2) the Safe Drinking Water Act and its regulations; and (3) *Guertin*, 912 F.3d 907.

A. Bodily Integrity Precedent and Obvious Wrongful Conduct.

For well over a century, the Supreme Court’s precedents have enshrined the right to bodily integrity, encompassing both a “life” interest and a “liberty” interest in informed consent to physical invasion. These cases do not describe wrongful conduct at such a high level of generality that they cannot guide conduct here. Rather, the *principle* that nonconsensual administration of a chemical is constitutionally wrong speaks precisely to the situation at hand, even if the *means* of the nonconsensual administration is different. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (“[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question[.]”). Indeed, the Court in *Rochin* employed this very reasoning. *See* 342 U.S. at 173 (“It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.”). To hold that a case with the same precise facts is required would result in “Section 1983 meets *Catch-22*.” *Cole v. Carson*, 935 F.3d 444, 471 (5th Cir. 2019), as revised (Aug. 21, 2019) (en banc) (Willett, J., dissenting).

In addition, the wrongfulness of causing a public water system to become contaminated by lead and coercing residents to drink the water by lying and concealing important test results and EPA orders is obvious. The facts about the

Flint, Michigan disaster and coverup were well-known at the time, indeed so much that Defendants Yarber and Powell made explicit misleading statements about it including “We’re not Flint.” ROA.1483. This misleading assertion shows that these Defendants had actual knowledge of the wrongfulness of their conduct.

Moreover, the clearly established requirement is meant to protect government officers when they make split-second decisions, not when officers have ample time to deliberate and still choose to violate rights. *See McMurry v. Weaver*, 142 F.4th 292, 306 (5th Cir. 2025) (Ho, concurring) (“It’s one thing to grant qualified immunity when it comes to police officers who are forced to make split-second judgment calls in life-and-death situations. It’s quite another thing to immunize public officials who make a deliberate and calculated decision to violate one’s constitutional rights.”); *Villarreal v. City of Laredo, Texas*, 134 F.4th 273, 283 (5th Cir. 2025) (en banc) (Oldman, J., concurring). *Taylor v. Riojas*, 592 U.S. 7 (2020) illustrates this point. The Supreme Court, reversing the Fifth Circuit’s grant of qualified immunity, held that correctional officers who confined the plaintiff “in a pair of shockingly unsanitary cells” for “six full days” violated clearly established rights even though a factually identical case had not been identified. *Id.* at 7-8. The Court noted that during this “extended period of time[,]” the officers displayed “deliberate indifference” which was not “compelled by necessity of exigency.” *Id.* at 9.

So too here. Plaintiffs allege that Defendants Yarber, Powell, Miller, and Lumumba worsened the lead problem over years, secreted important test results for months, and then made the decision to lie to the public. If six days was enough for the Supreme Court in *Taylor*, six months—plus all of Plaintiffs’ other allegations such as the yearlong coverup of the EPA Order in 2020—is sufficient here.

B. Safe Drinking Water Act Violations.

Violation of statutory and regulatory laws and administrative guidance can further support that a right is clearly established for qualified immunity purposes. *See Hope*, 536 U.S. at 745 (explaining that a DOJ report issued to the defendant “buttressed” the “conclusion that a reasonable person would have known of the violation[.]”) (internal quotation omitted). This makes sense given that the clearly-established inquiry is focused on “fair warning.” *Morgan*, 659 F.3d at 372.

Plaintiffs allege that Defendants violated the state and federal SDWA by, *inter alia*: (1) hiding the lead exceedances from the public for six months in 2015, ROA.1479-80; (2) violating the MSDH compliance plan issued pursuant to the MSDWA notwithstanding multiple notices and deadline extensions, ROA.1488–89; and (3) violating the EPA Emergency Administrative Order which set forth numerous SDWA violations, ROA.1507–08. Although statutory and regulatory violations do not *per se* mean a constitutional right was violated, these specific

violations are conscience-shocking and the statutory and regulatory requirements provided Defendants fair warning.

C. Guertin v. State

When determining whether a right is “clearly established,” this Court has held that it is appropriate to look to the law of its sister circuits. *McClendon v. City of Columbia*, 305 F.3d 314, 329 (5th Cir. 2002) (en banc). In *Guertin v. State*, 912 F.3d 907 (6th Cir. 2019), *reh’g denied*, 924 F.3d 309 (6th Cir. 2019), *cert. denied*, 589 U.S. 1167 (2020), the Sixth Circuit considered whether the conduct of state actors in the Flint Water Crisis stated a section 1983 bodily integrity claim. As explained in Plaintiffs’ panel briefing, the factual similarities to the instant case are striking.

While *Guertin* was decided in 2019, *Guertin* held that the plaintiffs’ bodily integrity rights were clearly established at the time of the defendants’ conduct which stemmed back to 2014. *Id.* at 915. This rationale applies here. *See also id.* at 933 (“The lack of a comparable government-created public health disaster precedent does not grant defendants a qualified immunity shield. Rather, it showcases the grievousness of their alleged conduct.”).

Even applying *Guertin* only for the notice that it itself provides to conduct after its publication, Plaintiffs detail alleged misconduct that occurred *after* 2019, including the boil water advisories, the City’s 2020 and 2021 violation of the Lead

and Copper Rule, the coverup of the EPA Order in 2020, and the April 2021 EPA Notice of Violation. ROA.1503, 1507–11, 1512–15. Therefore, the District Court erred when it found Plaintiffs had failed to identify a factually analogous case.

V. The Court Should Recognize the State-Created Danger Claim.

Plaintiffs ask this Court to recognize a claim for state-created danger. Plaintiffs do not seek “creation” of the claim in the sense of an expansion of rights, but rather recognition that these rights have already been guaranteed, whether or not someone in this Circuit has yet successfully stated a claim within the contours described by the label.

This claim is amply supported by history and tradition, including from this Court. The state-created danger claim flows naturally from the text and history of the Fourteenth Amendment and 42 U.S.C. § 1983. Ten Circuits have expressly recognized the claim and no Circuit has expressly disavowed the claim. This Court should follow prevailing precedent and provide an avenue for residents of the Fifth Circuit to vindicate constitutional right when trampled by government overreach.

A. The State-Created Danger Claim Is Rooted in History and Tradition.

1. Section 1938 Is Drafted to Respond to Both Direct and Indirect Harms.

At the outset, the Fourteenth Amendment was intended to be a bulwark against multifaceted harms inflicted by those acting under the color of governmental authority. *See Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S.

226, 233 (1897) (explaining that the Fourteenth Amendment applies to “all the instrumentalities of the state,”); *Ex parte Virginia*, 100 U.S. at 346.

The time of the Fourteenth Amendment was one in which persons employed the machinations of government in a multitude of ways to directly and indirectly harm black Americans. *See Monroe v. Pape*, 365 U.S. 167, 172 (1961) (quoting President Grant’s letter explaining: “A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous.”).

What resulted was the Ku Klux Klan Act of 1871. 17 Stat. 13. 42 U.S.C. § 1983 is the modern codification of the Act. *Monroe*, 365 U.S. at 171. The Klan was, on its face, a group of private actors, not state officials. However, the Congressional record makes clear that Congress was concerned that local officials acted in complicity with the Klan to cause harm to Black Americans. Cong. Globe, 42nd Cong., 1st Sess. 377 (1871). Thus, it is clear that section 1983 was intended to apply to harms which a government actor knowingly aided and abetted. *Monroe* summarized this early understanding, explaining that the consistent theme in the legislative history was deliberate indifference of state officials. *See, e.g.*, 365 U.S. at 175.

This is evident in the text of section 1983, which includes both the word “subjects” to describe direct harms, as well as the phrase “or causes to be

subjected” to describe harms which naturally flowed from egregious indifference by state actors. It would violate the canon against surplusage to hold that no substantively distinction is meant by the two phrases. Moreover, the “causes to be subjected” phrase does not merely describe the causation requirement of the statute. Both a “subjects” claim and a “causes to be subjected” claim would have a causation requirement. Congress would not have hidden the statute’s general causation requirement within an “or” clause.

In its first decades, courts repeatedly explained that were state officers to have facilitated private violence, liability under § 1983 would be proper. *See, e.g., U.S. v. Powell*, 151 F. 648 (C.C.N.D. Ala. 1907), *aff’d sub nom. United States v. Powell*, 212 U.S. 564 (1909) (stating that there would be liability if there had been “denial of the right by the state or its officers[.]”); *Civil Rights Cases*, 109 U.S. 3, 17 (1883) (discussing how there could be an action against State officers for deprivation of Fourteenth Amendment rights by private individuals if the deprivation was “sanctioned in some way by the State[.]”). Since the beginning, constitutional liability was intended for state officials who immorally create or increase dangerous conditions.

2. The Snake Pit Cases Employ a State-Created Danger Analysis.

Prior to the coining of the term “state-created danger,” courts recognized claims for harms that arose as a result of government action. *See Kennedy v. City of*

Ridgefield, 439 F.3d 1055, 1061 n.1 (9th Cir. 2006) (collecting cases employing the theory before the doctrine was named as such). There is a line of cases known as the “snake pit” cases, a moniker which stems from Judge Posner’s opinion in *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982). *See id.* at 618 (“If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.”).

A particularly apt case is *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979). In *White*, the Seventh Circuit held that a § 1983 claim could lie against a police officer who arrested a father and left his three young children on the side of the road, who suffered injuries due to prolonged exposure to the cold. *Id.* at 382. Like here, *White* rested on commonsense notions of harm since the harm was environmental and not caused by third party tortfeasors.

3. Circuits Crystalize the Claim After *DeShaney*.

The term “state-created danger” was coined following *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 201 (1989), where the Court said, “While the State may have been aware of the dangers that [a child who social services allegedly failed to protect from an abusive father] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.”

In the same year, *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990) was decided, which would come to be recognized as one of the first post-*DeShaney* “state-created danger” cases, although *Wood* itself did not yet use that term. In *Wood*, a police officer arrested a driver, leaving a female passenger stranded in a high-crime area where she was raped. *Id.* at 586. The court found that the circumstances of the officer’s conduct could “show a disregard for Wood’s safety amounting to deliberate indifference.” *Id.* at 588; *see also id.* n.4 (“When reasonable persons may disagree as to whether particular conduct constitutes negligence, gross negligence or recklessness, the question is one of fact to be decided by a jury.”) (internal quotation omitted).

Cases from this period ranged from similar police abandonment cases (e.g. *Kneipp v. Tedder*, 95 F.3d 1199, 1203 (3d Cir. 1996)) to disclosure of an informant’s identity who was subsequently murdered (*Monfils v. Taylor*, 165 F.3d 511, 517 (7th Cir. 1998)) to sending a suicidal special education student home alone in the middle of the day without parental notification and with known access to firearms (*Armijo v. Wagon Mound Pub. Schs.*, 159 F.3d 1253 (10th Cir. 1998)). Key to these cases were affirmative acts which created or substantially increased the risk of danger, as well as the defendant’s knowledge that those acts would have those results and deliberate indifference to those results. As this line of cases

entered the 21st century, more Circuits expressly adopted the state-created danger claim by that name.

B. Recognition of the State-Created Danger Claim Would Comport with Prevailing Precedent.

Ten Circuits have recognized the state-created danger claim. *See Irish v. Fowler*, 979 F.3d 65, 73 (1st Cir. 2020) (collecting cases). Recognizing courts reason that while the Constitution does not protect against government failure to prevent worldly harms such as private violence, the Due Process Clause does protect against affirmative governmental conduct which causes injury since such conduct would constitute a deprivation without due process. *See, e.g., Okin v. Vill. of Cornwall-On-Hudson Police Dep’t*, 577 F.3d 415, 427–28 (2d Cir. 2009); *Kneipp*, 95 F.3d at 1205. The state-created danger claim is an important check on government overreach.

In the approximately 45 years since the phrase “state-created danger” was coined following *DeShaney*, the Supreme Court has evidently found the use of the doctrine in the Circuit Courts uncontroversial. Dozens of petitions for certiorari have sought determination of whether a State’s affirmative actions to subject citizens to harms constitute a violation of the Due Process Clause. *See, e.g., Wood*, 879 F.2d 583; *Gardner v. Reed*, 986 F.2d 1122 (7th Cir. 1993), *cert. denied*, 510 U.S. 947 (1993). None of these certiorari petitions were granted. Since 2018 alone, Plaintiffs have located 14 instances where the Supreme Court denied certiorari to

examine the existence and viability of a state-created danger claim. *See, e.g., Fisher v. Moore*, 73 F.4th 367, 372, 374 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 569 (2024); *Murguia v. Langdon*, 61 F.4th 1096, 1104 (9th Cir. 2023), *cert. denied sub nom. Tulare v. Murguia*, 144 S. Ct. 553 (2024); *Rakes v. Roederer*, 117 F.4th 968, 982 (7th Cir. 2024), *cert. denied sub nom. Est. of Johnson v. Rakes*, 146 S. Ct. 92 (2025).

The claim is manageable and does not open the floodgates to new litigation. During the last five years, Plaintiffs have found that there have been only 118 Circuit Court opinions involving state-created danger across the country. This rounds to an average of 24 cases per year nationwide, or an average of approximately 2 cases per year in each Circuit. This is a reasonable amount of litigation, certainly not enough to pose a serious challenge to the everyday operation of government.

The Fifth Circuit's own position demonstrates that the claim does not result in overwhelming litigation. As this Court has not foreclosed the claim, litigants have brought the claim repeatedly. If the claim is expressly recognized, the judicial approach to the claim will proceed largely as it already has in recent decades, i.e. the Court will evaluate whether the facts fit the theory. *See, e.g., Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 865 (5th Cir. 2012); *Bustos v. Martini Club Inc.*, 599 F.3d 458, 466 (5th Cir. 2010). If anything, express

recognition of the claim will streamline such cases since explication of the claim itself will no longer be necessary, saving judicial resources.

C. The State-Created Danger Claim Is Narrow and Practical.

Plaintiffs appreciate that the claim should not become a vehicle for essentially ordinary tort claims. There are three primary elemental bulwarks which, properly applied, eliminate the vast majority of hypothetical cases where liability would be unbecoming. They are: (1) the affirmative act requirement; (2) the specific victim requirement; and (3) the shocks-the-conscience requirement.

1. Affirmative Act Requirement

The affirmative act requirement means that the state must do something to create or substantially increase the danger to the plaintiff. Inaction alone cannot suffice. *See, e.g., Dykema v. Skoumal*, 261 F.3d 701, 706-07 (7th Cir. 2001). Even callous inaction, rising to the level of deliberate indifference, would not, on its own, underpin a successful state-created danger claim.

This requirement tracks a core theme of state-created danger claims, which is restraint of personal liberty. In general, the Constitution does not guarantee any minimum degree of personal safety. *See K.H v. Morgan*, 914 F.2d 846, 848 (7th Cir. 1990) (Posner, J.) (discussing “negative liberties[.]”).

However, even critics of state-created danger claims recognize that the claim is viable when affirmative state action egregiously eliminates the ability for an

individual to take protective actions themselves. *See, e.g., Murguia v. Langdon*, 73 F.4th 1103, 1115 (9th Cir. 2023) (Bumatay, J., dissenting from denial of rehearing en banc) (“[P]laintiffs [. . .] must point to the State’s affirmative act of restraining the individual’s freedom to act on his own behalf to trigger the protections of the Due Process Clause. Only then can we say that there was some arbitrary exercise of the powers of government.”) (internal quotations omitted).

The affirmative act requirement ensures that ordinary operations of government will not become successful state-created danger claims. Courts treat the typical operations of government buildings such as schools as background conditions, and a state-created danger claim requires a clear act which significantly departs from the background conditions. *See, e.g., Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir. 1994); *D.R. by L.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1375 (3d Cir. 1992).

2. Specific Victim Requirement

In tort law, persons generally owe a duty to all foreseeable victims of their negligence, even if the victim’s specific identity is unknown. The state-created danger claim is much stricter. The state-created danger claim is only viable when the state action targets a specific, known victim or victims. A general hazardous condition out in the public, including crime, which anyone may encounter does not suffice. *See Sinclair v. City of Seattle*, 61 F.4th 674, 676, 683 (9th Cir. 2023).

Beyond the violent acts of third parties, this requirement has been applied to foreclose claims based on the hazards generally inherent in government property. *See, e.g., Estate of C.A. v. Grier*, 918 F. Supp. 2d 619, 628 (S.D. Tex. 2013). This requirement prevents broad litigation for generally hazardous conditions, even where they cause serious injury or death.

3. Shocks-the-Conscience Requirement

The requirement that alleged behavior shocks the conscience, like the other core requirements, prevents ordinary tort claims from becoming constitutional violations. The shocks-the-conscience requirement is not a mechanical inquiry. It permits courts to evaluate the totality of the circumstances and find no constitutional liability for claims that might technically meet other requirements. In the context of a state created danger claim, it is a safety valve to protect against excessive governmental liability.

One central consideration is the mental state of the defendant, especially whether the defendant had time to deliberate. *See Lewis*, 523at 849–53 (explaining that there are cases which stem “from something more than negligence but less than intentional conduct, such as recklessness or gross negligence,” as well as “deliberately indifferent conduct” which are a “matter for closer calls” and require a totality-of-the-circumstances analysis, guided by whether the state actor had the

time and capacity for “actual deliberation” versus decisions “made in haste, under pressure, and frequently without the luxury of a second chance.”).

Because the police officer in *Lewis* was operating in a fast-paced environment, the Court held that his actions during the high-speed chase were not conscience-shocking. *Id.* at 855. Likewise, in future cases, this requirement will prevent state-created danger liability for in-the-moment decisions of police officers, school officials, and other government actors.

4. Application of Requirements

The affirmative act requirement will eliminate cases where harm is caused by a naturally hazardous condition or by the acts of a third party without affirmative prompting by government actors, such as if a tree fell and killed someone, even if known to be dangerous.

The affirmative act requirement would also, naturally, eliminate cases based on government inaction. Governmental decisions to allocate resources which result in some harms not being prevented would not be actionable as a state-created danger. So, complaints that allege that city policy or lax border enforcement made a certain neighborhood more crime-ridden would likely fail since those actions do not directly create or increase the danger, they just fail to prevent danger.

The distinction between action and inaction may sometimes be “matters for closer calls.” However, some factual distinctions are relevant. Inaction which, in

context, amounts to concealment of a dangerous condition may be considered action, especially if the instrumentality of the danger is within the sole control of the government entity and especially if coupled with statements which conceal the dangerous condition. *See Doe v. Jewell*, 151 F.4th 236, 249 (5th Cir. 2025) (school official with knowledge of teacher molesting student yet did nothing despite multiple complaints displayed “struthious inaction” and met the standard).

The affirmative decision to continue on a course previously set may be an action if the decision not to alter course is made in the face of new information which shows the harmfulness of that path. Moreover, pure inactions, while they cannot underpin a state-created danger claim alone, may nonetheless be considered in analyzing whether the totality of the circumstances shocks the conscience. *Lewis*, 523 U.S. at 853 (“When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking.”).

The specific victim requirement significantly curtails liability where the affirmative act is a public statement. A scenario where a city official declares a pothole-ridden road is “safe” despite continued existence of potholes likely would fail because potholes are a paradigmatic hazard which any random person may encounter. The same applies for scenarios where government officials declare a neighborhood “safe” from local crime or international gang activity or that certain medical treatments are “safe.”

Not all verbal acts are so general as to defeat the specific victim requirement. The question then becomes whether the act shocks the conscience, including analysis of legitimate governmental purpose. Sometimes, calling something “safe” is a matter of interpretation, such as with crime which cannot be predicted, or with medicines which have some benefits and some harms. In other scenarios, calling something “safe” is an outright lie and might be conscience-shocking. Moreover, the time-to-deliberate analysis would be highly determinative since public statements made with evolving or incomplete information would likely not be conscience-shocking.

D. The State-Created Danger Claim Should Proceed in this Case.

Plaintiffs allege numerous affirmative acts, most notably declaring the water to be “safe” when it was in fact poisoned by lead. This statement is not a judgment call like calling a neighborhood “safe” with respect to crime would be. Some of Plaintiffs’ alleged affirmative acts are of the type where the officials continued on a course of action (doing nothing to fix pH monitors and the lime distribution system) despite obtaining actual knowledge of impending serious harm (viz. increasing lead test results). Some are actions to conceal dangerous conditions, such as not notifying residents of the lead results for six months in 2015 and not notifying the public, including City Council, of the EPA Emergency Order in 2020. Nevertheless, even if some of Plaintiffs’ allegations are deemed “inactions,” they

may still be considered in evaluating whether the total course of conduct shocks the conscience.

Plaintiffs' case meets the specific victim requirement. A group of persons can be specific victims if the group is discrete and identifiable. *See, e.g., Polanco v. Diaz*, 76 F.4th 918, 927 (9th Cir. 2023). Here, the names of each household can be ascertained by water billing records, which are ostensibly in the possession of Defendants. Discovery will likely reveal additional information on the extent of the records available.

VI. Conclusion

The Court, accepting all well-pleaded facts as true and in the light most favorable to Plaintiffs, *Meador*, 911 F.3d at 264, should hold that: (1) Plaintiffs state a bodily integrity claim against all Defendants; (2) the individual Defendants are not entitled to qualified immunity; (3) the state-created danger claim is recognized in this Circuit; and (4) Plaintiffs state a state-created danger claim against all Defendants.

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Respectfully submitted,

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Certificate of Service

I, Mark P. Chalos, attorney for Appellants, hereby certify that I have this day caused to be delivered the foregoing document via the ECF electronic system to all counsel of record.

So certified, this 20th day of March, 2026.

/s/ Mark P. Chalos

Mark P. Chalos

Certificate of Compliance

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 12,984 words.

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/s/ Mark P. Chalos

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March 23, 2026

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No. 24-60370 Sterling v. City of Jackson
USDC No. 3:22-CV-531

Dear Mr. Chalos,

You have 5 days from the date of this letter to furnish 22 paper copies of your en banc brief. The color of the cover on your en banc brief will be the same as the color of the cover on your merits brief (blue for the appellant and red for the appellee).

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Melissa V. Mattingly, Deputy Clerk
504-310-7719

cc:

Mr. Sheridan A. Carr
Mr. Dennis Jason Childress
Mr. Jeremy Daniels
Mr. Jack Robert Davis
Mr. Robert Lewis Gibbs
Mr. Terris Caton Harris
Mr. John Frederick Hawkins
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