A Constitutional Right to Safe, Affordable, Accessible Drinking Water

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I. INTRODUCTION

Despite its geographic location as the epicenter of one of the world's largest and most important freshwater resources, the state of Michigan and its residents have faced multiple crises related to inadequate drinking water in recent years. Two of the most significant have included the widespread termination of water service to residential customers of the Detroit Water and Sewerage Department in Detroit and Flint and the contamination of Flint's drinking water with lead following the city's switch from Lake Huron to the Flint River as the primary source of drinking water for the area. Multiple lawsuits seeking relief for those that have suffered and continue to suffer harm as a result of a lack of access to drinking water that is both safe and affordable have arisen from these twin crises. The Sixth Circuit issued opinions in two such cases, both with significant implications for the future of environmental justice as it relates to drinking water. These cases are *In re City of Detroit*[1] (*Lyda*) and the consolidated appeal of class action suits *Boler v. Early* and *Mays. v. Snyder* (*Boler*).[2]

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1. *In re* City of Detroit, 841 F.3d 684, 688 (6th Cir. 2016).

2. Boler v. Earley, 865 F.3d 391, 396 (6th Cir. 2017), *cert. denied sub nom.* Wright v. Mays, 138 S. Ct. 1281(2018), *and cert. denied sub nom.* Wyant v. Mays, 138 S. Ct. 1285 (2018), *and cert. denied sub nom.* City of Flint v. Boler, 138 S. Ct. 1294 (2018).

This Article reviews the constitutional claims alleged by the plaintiffs in both *Lyda* and *Boler* and the court's differing treatment of those claims. This Article then assesses the viability of *Boler* as a potentially replicable win in the context of cases involving water unaffordability that may be factually similar to *Lyda*. Specifically, this Article will explore the question of how *Boler* might change the legal landscape for water affordability and water quality issues. Would a case like *Lyda* turn out differently? This Article will argue that *Boler* could provide a new set of legal tools that could be applied to other communities facing water quality issues and could also provide precedent for similar constitutional claims to be brought against government actors that deny citizens water access through water service shutoffs.

II. BACKGROUND

A. In re City of Detroit

In July 2014, ten residential customers of Detroit Water and Sewerage Department (DWSD) and four organizations representing them and other residential customers throughout Detroit commenced an adversary proceeding in Detroit's Chapter 9 bankruptcy case, alleging multiple claims arising from DWSD's termination of their water service for nonpayment.[3] The federal civil rights claims pursuant to 42 U.S.C. § 1983 included alleged violations of due process and equal protection.[4] Specifically, the plaintiffs alleged that DWSD denied them procedural due process by terminating their water service "without sufficient prior notice, without the opportunity for a hearing, or without an effective post-termination hearing process."[5] Further, they alleged that the department violated their right to equal protection by "treating residential account holders in arrears differently than commercial account holders" in that DWSD did not terminate service for commercial account holders that were also delinquent in their water bills.[6] Additionally, the bankruptcy court "read the allegations to include a substantive due process claim for continued water service at an affordable rate," although the plaintiffs did not explicitly allege this.[7] The plaintiffs requested injunctive and declaratory relief, including preliminary and permanent injunctions to stop

3. Adversary Complaint for Declarative and Injunctive Relief, *In re* City of Detroit, No. 13-53846, 2014 WL 4425716 (Bankr. E.D. Mich. July 21, 2014).

4. *Id.*

5. *Id.*

6. *Id.*

7. *In re* City of Detroit, 841 F.3d 684, 689 (6th Cir. 2016).

water service terminations and restore service to residential customers; an order directing DWSD to enact a water affordability plan allowing payment plans based on income for residential customers; and "a declaration that DWSD's billing and shutoff procedures violated due process and equal protection rights, as well as the human right to water and the public trust doctrine."[8] The plaintiffs then moved for a temporary restraining order that would require DWSD to both restore service to residential customers and prohibit additional service terminations.[9]

The bankruptcy court denied this motion and granted the City of Detroit's motion to dismiss the plaintiffs' claims.[10] The court held that it lacked authority to grant the injunctive relief under § 904 of the bankruptcy code[11] and that the plaintiffs' allegations of constitutional violations of due process and equal protection failed to state a claim on which relief could be granted.[12] In a supplemental opinion, the bankruptcy court clarified its analysis of the plaintiffs' due process claims but did not alter its previous holding.[13] The opinion stated: "Based on the City's legal obligation to provide municipal water service to its residents, it is plausible that the plaintiffs could establish a liberty or property right to water service to which procedural due process rights apply."[14]

Despite this finding, the court reaffirmed its previous conclusion that the plaintiffs had failed to state a claim on which relief could be granted in their allegations that the city's procedures for terminating water service were constitutionally insufficient.[15] The court concluded that "there is no

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8. *Id.*
9. *Id.*
10. *Id.* at 690.
11. See § 904 of the bankruptcy code:

> Notwithstanding any power of the court, unless the debtor consents or the plan so provides, the court may not, by any stay, order, or decree, in the case or otherwise, interfere with—
> (1) any of the political or governmental powers of the debtor;
> (2) any of the property or revenues of the debtor; or
> (3) the debtor's use or enjoyment of any income-producing property.

11 U.S.C. § 904 (2018).

12. *In re* City of Detroit, No. 13-53846, 2014 WL 6474081, at *1, *5 (Bankr. E.D. Mich. Nov. 19, 2014), *aff'd sub nom. In re* City of Detroit, No. 15-CV-10038, 2015 WL 5461463 (E.D. Mich. Sept. 16, 2015), *aff'd in part, vacated in part sub nom. In re City of Detroit*, 841 F.3d 684.
13. *Id.*
14. *Id.*
15. *Id.* at *6.

> The Fourteenth Amendment to the United States Constitution prohibits states from depriving citizens of "life, liberty, or property" without "due process of law." A two-step analysis guides our evaluation of procedural due process claims. We must first determine "whether there exists a liberty interest or property interest which has been

constitutional or fundamental right either to affordable water service or to an affordable payment plan for account arrearages."[16]

The U.S. District Court for the Eastern District of Michigan affirmed the bankruptcy court, as did the U.S. Court of Appeals for the Sixth Circuit in part, while also vacating in part.[17] Although the Sixth Circuit found that § 904 not only barred the plaintiff-appellants from recovering under the state-law claims, but also the federal constitutional claims, the court nevertheless addressed the merits of the constitutional claims.[18] Regarding the plaintiff-appellants' substantive due process claims, the court stated that "[s]ubstantive due process affords only those protections so rooted in the traditions and conscience of our people as to be ranked as fundamental"[19] and that such rights are "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[20] The court found that the plaintiff-appellants' alleged property right to continued affordable water service was neither "rooted in our nation's traditions" nor "implicit in the concept of ordered liberty," but rather rooted in state law, if the right actually exists at all.[21] Further undercutting the plaintiff-appellants' claim, the court noted that substantive due process merely requires that DWSD's policy regarding water service termination be "rationally related to the asserted legitimate governmental purpose of maintaining a financially stable municipal entity," and that Michigan law met this standard.[22] Michigan law requires that municipalities determine water rates based on "the reasonable cost of providing" water to its customers, and the court found this policy to be "rationally related to maintaining DWSD's financial stability."[23]

> interfered with by the defendants." Second, if such a deprivation occurred, we must decide whether the procedures that accompanied the interference were constitutionally sufficient.

Id. at *6 (quoting Herrada v. City of Detroit, 275 F.3d 553, 556 (6th Cir. 2001)).

16. *Id.* at *9.

17. *In re* City of Detroit, No. 15-CV-10038, 2015 WL 5461463, at *1 (E.D. Mich. Sept. 16, 2015), *aff'd in part, vacated in part sub nom. In re* City of Detroit, 841 F.3d 684 (6th Cir. 2016); *In re City of Detroit*, 841 F.3d at 703.

18. *In re City of Detroit*, 841 F.3d at 688.

19. *Id.* at 700 (quoting EJS Props., LLC v. City of Toledo, 698 F.3d 845, 862 (6th Cir. 2012)).

20. *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

21. *Id.*

22. *Id.* (quoting Mansfield Apartment Owners Ass'n v. City of Mansfield, 988 F.2d 1469, 1477 (6th Cir. 1993)).

23. *Id.*

> Nothing suggests that it is arbitrary for the State of Michigan to require its municipalities to set water rates at the reasonable cost of delivering the service. Rather, the substantial

The court also rejected the plaintiff-appellants' claim that the government had violated their right to equal protection by terminating service for residential water customers but not doing the same to commercial customers who had also failed to pay their water bills.[24] The court noted that the standard for stating an equal protection claim is adequately pleading that the government treated the plaintiff differently from other persons similarly situated and that this difference in treatment "burdens a fundamental right, targets a suspect class, or has no rational basis."[25] If there is a "legitimate government purpose" for the differential treatment, courts will uphold the government action.[26] The court then proposed several potential justifications for the difference in treatment, including the "more complex service connections" of commercial customers, the economic harm water service termination would cause businesses, and the higher likelihood that a commercial customer would eventually pay the balance of their overdue water bills as compared to a residential customer.[27] The court found that plaintiff-appellants had failed to assert any facts that would overcome these suggested explanations, and thus that the bankruptcy court's dismissal of plaintiff-appellants' equal protection claim was correct.[28]

B. Boler v. Earley

Less than a year after the Sixth Circuit's decision in *Lyda*, the court decided a case arising from another water crisis in Michigan: in the consolidated appeal of two class-action suits arising out of the Flint water crisis—*Boler v. Earley*[29] and *Mays v. Snyder*[30]—the Sixth Circuit reversed the decisions of the Eastern District of Michigan and remanded the

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> costs involved [in] making water service available to customers suggests that it is entirely rational to fix the rates according to those costs rather than ability to pay. In a rate structure based on ability to pay, every dollar that a customer would not pay because of an inability to pay is one more dollar that other customers, or taxpayers, would have to pay. It is not irrational for the state to determine not to permit its municipalities to adopt such an alternative rate structure.

Id.

24. *Id.* at 702.

25. *Id.* at 701 (citing Ctr. for Bio-Ethical Reform, Inc. v. Napolitano, 648 F.3d 365, 379 (6th Cir. 2011)).

26. *Id.* (quoting Heller v. Doe, 509 U.S. 312, 320 (1993)).

27. *Id.* at 702 (quoting *In re* City of Detroit, No. 15-CV-10038, 2015 WL 5461463, at *1, *4 (E.D. Mich. Sept. 16, 2015), *aff'd in part, vacated in part sub nom.*).

28. *Id.* (citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).

29. Boler v. Earley, No. 16-10323, 2016 WL 1573272 (E.D. Mich. Apr. 19, 2016).

30. Mays v. Snyder, No. 15-14002, 2017 WL 445637 (E.D. Mich. Feb. 2, 2017).

consolidated case back to that court for further proceedings.[31] The district court had dismissed for lack of subject matter jurisdiction the plaintiffs' claims in both cases that various state and local officials and entities had violated a number of their constitutional rights and that plaintiffs were entitled to recover for these violations pursuant to 42 U.S.C. § 1983.[32] Similar to the claims in *Lyda*, the alleged constitutional violations included violations of the plaintiffs' substantive due process right through state-created danger and through an invasion of the fundamental right to bodily integrity, and violations of the Equal Protection Clause through intentional race discrimination and through impermissible wealth-based discrimination. The district court had found that the plaintiffs' § 1983 claims were precluded by the Safe Drinking Water Act (SDWA).[33] The Sixth Circuit, however, determined that Congress did not intend for the SDWA to preclude such constitutional claims and remedies and thus held that the lower court had erred.[34] While the Sixth Circuit did not address the merits of these constitutional claims, their preclusion analysis provides insight into how the court might analyze these claims on their substance if so tasked.

In making the determination that the plaintiff's constitutional claims were not precluded by the SDWA, the Sixth Circuit relied on the analytical framework set forth by the Supreme Court in *Fitzgerald v. Barnstable*,[35] which concluded that if Congress intended for a statute to preclude constitutional claims, a plaintiff could not recover for those claims under § 1983.[36] The Court identified three factors in ascertaining this congressional intent to preclude: the express language of the statute and

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31. Boler v. Earley, 865 F.3d 391 (6th Cir. 2017), *cert. denied sub nom.* Wright v. Mays, No. 17-666, 2018 WL 1369145 (U.S. Mar. 19, 2018), *and cert. denied sub nom.* Wyant v. Mays, No. 17-901, 2018 WL 1369146 (U.S. Mar. 19, 2018), *and cert. denied sub nom.* City of Flint v. Boler, No. 17-989, 2018 WL 1369147 (U.S. Mar. 19, 2018).

32. The provisions of 42 U.S.C. § 1983 may serve as a vehicle for a plaintiff to obtain damages for violations of the Constitution or a federal statute. Section 1983 provides in part:

> 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 . . . 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 . . . .

Boler, 865 F.3d at 401.

33. 42 U.S.C. § 300f (2018).

34. *Boler*, 865 F.3d at 396.

35. Fitzgerald v. Barnstable, 555 U.S. 246, 249 (2009).

36. *Boler*, 865 F.3d at 405.

its legislative history, the comprehensive nature of the remedial scheme, and the "contours of the rights and protections of the statute."[37]

Applying this congressional intent-based analysis, the Sixth Circuit found that neither the text nor the legislative history of the SDWA demonstrated a congressional intent to preclude § 1983 claims to enforce constitutional rights.[38] The court found that the language of the SDWA does not address constitutional rights and instead centers on instructions to the EPA to establish the requirements for national drinking water standards.[39] Further, the court noted that, because Congress enacted the SDWA pursuant to its Commerce Power under Article I, Section 8 of the U.S. Constitution, rather than under Congress's power to enforce constitutional rights under Section 5 of the Fourteenth Amendment, "the findings enunciated in the SDWA emphasize Congress's focus on the interstate economic impacts of polluted drinking water, not on any constitutional violations that may accompany the pollution."[40]

The Sixth Circuit also found that the scope of the SDWA's remedial scheme is not comprehensive enough to demonstrate congressional intent to preclude the remedies available under § 1983 for constitutional violations.[41] The court determined that the remedies available under the SDWA are more limited than those available under § 1983 in that the SDWA only provides for injunctive relief, and not for recovery of damages, as § 1983 provides.[42] Further, the court noted that although the SDWA contains a private right of action, it also includes a savings clause establishing that such private action does not restrict the rights a person may have under other laws to seek relief outside the SDWA.[43]

Particularly instructive is the court's analysis of the "contours of the rights and protections" of the SDWA as compared to § 1983. The Sixth Circuit concluded that the contours of the rights and protections provided by the SDWA and those existing under the Constitution diverge significantly, further indicating that Congress did not intend for the SDWA to preclude § 1983 constitutional claims.[44] The court noted that the plaintiffs alleged violations of the Equal Protection Clause and the Due Process Clause and reasoned that, under a wide variety of circumstances,

37. *Id.* at 403-06 (citing *Fitzgerald*, 555 U.S. at 252).
38. *Boler*, 865 F.3d at 405.
39. *See* 42 U.S.C. § 300g-1 (2018).
40. *Boler*, 865 F.3d at 404.
41. *Id.* at 406.
42. *Id.*
43. *Id.*
44. *Id.* at 409.

conduct that violates one of these provisions would not violate the SDWA, and vice versa.[45] Regarding the Equal Protection Clause, 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.[46]

The court also noted that the plaintiffs alleged that, in exposing them to contaminated drinking water sourced from the Flint River, the defendants denied them due process of law through the state-created danger doctrine, and that establishing a due process violation through the state-created danger doctrine requires showing that the state acted with deliberate indifference in placing the plaintiff at risk of harm.[47] However, the court stated:

> A violation of the SDWA that does not meet a deliberate indifference standard, such as a state actor's negligent action resulting in contaminant levels above the established maximum, plainly would not meet the requirements of a due process violation. Likewise, a state actor's deliberately indifferent action concerning contaminants in public water systems, which created a special danger to a 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.[48]

These divergences between the rights and protections of the SDWA and the constitutional provisions that the defendants allegedly violated provide further evidence that Congress did not intend for the SDWA to preclude § 1983 claims.[49]

Thus, the court held that the defendants failed to demonstrate that Congress intended to preclude the rights and remedies available under § 1983 for constitutional violations when it enacted the SDWA and,

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45. *Id.* at 407.
46. *Id.* at 407-08.
47. *Id.* at 408 (citing McQueen v. Beecher Cmty. Sch., 433 F.3d 460, 469 (6th Cir. 2006)).
48. *Id.*
49. *Id.* at 409.

therefore, the plaintiffs' § 1983 claims were not precluded.[50] Following the Sixth Circuit's decision, state officials, including the City of Flint, Genesee County's drainage commissioner, and the Michigan Department of Environmental Quality, sought review of the decision in the United States Supreme Court.[51] In March 2018, the Court denied this appeal.[52] As a result, the suit was consolidated with a number of other related cases and again heard by the U.S. District Court for the Eastern District of Michigan.[53] The district court issued its opinion in August 2018, but subsequently vacated this opinion in November 2018.[54] At the same time, the court granted plaintiffs' motion for leave to amend their complaint.[55] In addition to numerous other claims, plaintiffs' amended complaint reasserts the constitutional claims first asserted by the *Boler* plaintiffs in their original complaint.[56] The consolidated case is pending in the district court as of this writing.

III. ANALYSIS

While neither the Sixth Circuit nor the Supreme Court addressed the validity of the *Boler* plaintiffs' claims that state and local officials had violated their constitutional rights, by finding that the claims are not precluded by the Safe Drinking Water Act, the court opened the door for these constitutional claims to be considered by the lower court on their merits. Because the district court vacated its earlier opinion and has allowed plaintiffs to amend their complaint, the claims will again be considered on their merits. This Part will analyze the viability of these claims and their potential as legal tools for addressing not only water safety issues but also water affordability issues in factual circumstance like those present in *Lyda*.

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50. *Id.*

51. Petition for a Writ of Certiorari, Wright v. Mays, 2017 WL 5158069 (U.S.); Petition for a Writ of Certiorari, Wyant v. Mays, 2017 WL 6586167 (U.S.); Petition for a Writ of Certiorari, City of Flint v. Boler, 2017 WL 6997924 (U.S.).

52. Wright v. Mays, No. 17-666, 2018 WL 1369145 (U.S. Mar. 19, 2018); Wyant v. Mays, No. 17-901, 2018 WL 1369146 (U.S. Mar. 19, 2018); City of Flint v. Boler, No. 17-989, 2018 WL 1369147 (U.S. Mar. 19, 2018).

53. *In re* Flint Water Cases, 329 F. Supp. 3d 369 (E.D. Mich. 2018), *vacated* (Nov. 9, 2018).

54. *In re* Flint Water Cases, No. 5:16-cv-10444-JEL-MKM (E.D. Mich. Nov. 9, 2018) (order granting plaintiffs' motion for relief from judgment and vacating the court's August 1, 2018 opinion and order).

55. *Id.*

56. Class Plaintiffs' Motion for Leave to File an Amended Complaint, *In re Flint Water Cases*, No. 5:16-cv-10444-JEL-MKM.

A. Violation of Substantive Due Process

Boler plaintiffs (and subsequently *In re Flint Water Cases* plaintiffs) alleged violations of substantive due process through both a state-created danger and through violation of the right to bodily integrity. A plaintiff must show three factors to establish a violation of substantive due process under the state-created danger doctrine: "[1] an affirmative act that creates or increases the risk, [2] a special danger to the victim as distinguished from the public at large, and [3] the requisite degree of state culpability."[57] The requisite degree of culpability "in settings [that] provide the opportunity for reflection and unhurried judgments" is deliberate indifference.[58] "Knowledge and disregard of a significant risk" raises the level of culpability from negligence to deliberate indifference.[59] In order to establish a violation of substantive due process through an invasion of the fundamental right to bodily integrity, a plaintiff must establish that government officials caused the harm to the plaintiffs' bodily integrity and acted with a mental state more culpable than mere negligence.[60] There must be a showing that the action was based on "malice or sadism" and that it amounted to an "abuse of official power literally shocking to the conscience."[61]

The Sixth Circuit has previously found violations of substantive due process under the state-created danger theory. In *Kallstrom v. City of Columbus*,[62] the Sixth Circuit held that police officers established that the city violated their substantive due process right when the city released private information about the officers and their families from the officers' personnel files.[63] The court found that this affirmative action placed the officers in special danger of harm unique from the general public in that the officers lost the anonymity necessary for undercover investigation.[64] The court also found that the city knew or should have known that this release of information would substantially increase the probability of

57. McQueen v. Beecher Cmty. Sch., 433 F.3d 460, 464 (6th Cir. 2006).
58. *Id.* at 469.
59. Phillips v. Roane Cty., 534 F.3d 531, 540 (6th Cir. 2008).
60. Opening Brief of Appellants Melissa Mays et al., at *32, Boler v. Earley, 865 F.3d 391 (6th Cir. 2017), *cert. denied sub nom.* Wright v. Mays (No. 17-666), 2018 WL 1369145 (U.S. Mar. 19, 2018), *and cert. denied sub nom.* Wyant v. Mays (No. 17-901), 2018 WL 1369146 (U.S. Mar. 19, 2018), *and cert. denied sub nom.* City of Flint v. Boler, No. 17-989, 2018 WL 1369147 (U.S. Mar. 19, 2018).
61. Lillard v. Shelby Cty. Bd. of Educ., 76 F.3d 716, 725 (6th Cir.1996).
62. Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998).
63. *Id.* at 1067.
64. *Id.*

officers' risk of harm at the hands of those they were investigating.[65] Additionally, in *Schneider v. Franklin County*,[66] the Sixth Circuit found that the plaintiff established a state-created danger claim when a police officer ordered the plaintiff out of her car, despite having already observed that she had a severely injured ankle, because the officers knew that this would place her in special danger of further injury.[67]

In their initial complaint to the district court, *Mays* plaintiffs alleged that the defendants violated substantive due process through a state-created danger in that they "deliberately exposed Plaintiffs . . . to dangerous, unsafe and untreated (or inadequately treated) Flint River water knowing that it could and would result in widespread permanent serious damage caused by the toxic water including the irreversible lead poisoning of children and other vulnerable persons."[68] The plaintiffs also alleged a violation of substantive due process through a violation of the right to bodily integrity in that defendants had "a duty to protect Plaintiffs . . . from a foreseeable risk of harm from contaminated water . . . knew of the serious medical risks associated with exposure to" this water, yet failed to protect the plaintiffs from these known risks, and that, as a result, the plaintiffs suffered bodily harm.[69] The evidence the plaintiffs provided in support of these allegations at the pleading stage included, for example, the fact that Emergency Manager Ambrose, acting in his official capacity, "overruled the city council's vote to reconnect to Lake Huron water" in March 2015, despite his knowledge of the growing evidence that continued use of Flint river as a drinking water source posed a danger to the health of Flint residents.[70]

Although the district court rejected plaintiffs' state-created danger claims in its since-vacated opinion, on the basis that the plaintiffs did not demonstrate that the defendants created or increased the risk of harm from a third party and that the class of individuals harmed was too broad for purposes of a state-created danger claim, the court found that the plaintiffs had successfully stated a claim for violation of substantive due process under the violation of bodily integrity theory against some, but not all,

65. *Id.*
66. Schneider v Franklin Cty., 288 F. App'x 247 (6th Cir. 2008).
67. *Id.* at 253.
68. Complaint for Injunctive and Declaratory Relief, Money Damages, and Jury Demand, Mays v. Snyder, 2015 WL 7175656 (E.D. Mich. Nov. 13, 2015).
69. *Id.*
70. Opening Brief of Appellants Melissa Mays, et al., *supra* note 60, at *19-20.

named defendants.[71] When the claims are heard again, the outcome may be similar but, given new developments in other Flint-related litigation and new facts alleged in the plaintiffs' amended complaint, the plaintiffs may ultimately succeed on the state-created danger claim. The outcome may turn on whether the appellants can establish that officials acted with the requisite mental state, as this factor can be challenging to establish. Given the serious harm to a vulnerable community and the widespread public outrage that followed, the events that formed the basis of the plaintiffs' claims certainly appear to be shocking to the conscience.

In *Lyda*, the bankruptcy court read a claim of substantive due process into the plaintiffs' pleadings before rejecting the claim.[72] The plaintiffs contended that this was a strawman argument and that the extent of their due process claim was a violation of procedural due process based on DWSD's allegedly insufficient practices regarding notice of water service termination.[73] However, future plaintiffs facing similar factual circumstances could very well establish a claim of substantive due process violation under the state-created danger doctrine, although a claim under the violation of bodily integrity theory may be more challenging to establish given the higher standard of culpability required. The harm caused by a lack of access to water in the home is well-known: lack of water access increases the risk of skin, soft tissue, and gastrointestinal infection, such as *E. coli* and hepatitis.[74] Similarly, the inability of many residential customers to pay their water bills is also well-known: nearly forty percent of the population of Detroit lives at or below the poverty line, as does nearly forty-two percent of Flint residents.[75] By terminating water service or failing to implement a plan to make water service affordable for its residential customers who DWSD knows cannot afford to pay their water bills, DWSD is arguably taking an affirmative action with

71. *In re* Flint Water Cases, 329 F. Supp. 3d 369, 394, 395, 401-10 (E.D. Mich. 2018), *vacated* (Nov. 9, 2018).

72. Plaintiff-Appellants Corrected Brief, at *14, *In re* City of Detroit, No. 15-2236, 2016 WL 105694 (6th Cir. Jan. 6, 2016).

73. *Id.*

74. Jennifer Chambers, *Experts: Water Shutoffs Causing Public Health Emergency*, DETROIT NEWS (July 26, 2017), https://www.detroitnews.com/story/news/local/detroit-city/2017/07/26/detroit-water-shutoffs-health-study/104016812/; Martina Guzman, *Exploring the Public Health Consequences of Detroit's Water Shutoffs*, MODELD (Oct. 6, 2015), http://www.modeldmedia.com/features/water-shut-offs-100615.aspx.

75. *QuickFacts: Detroit, Michigan, Income & Poverty,* U.S. CENSUS BUREAU (July 1, 2017), https://www.census.gov/quickfacts/fact/table/detroitcitymichigan/PST045217; *QuickFacts: Flint, Michigan, Income & Poverty, 2012-2016*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/flintcitymichigan/INC110216 (last visited Feb. 14, 2019).

knowledge and disregard of the significant risk that the action poses to its customers.

B. Violation of the Equal Protection Clause

To establish a violation of the Equal Protection Clause of the Fourteenth Amendment, a plaintiff must establish that "the government treated the plaintiff disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis."[76] In the case of racial discrimination, the government's action need not be facially discriminatory to violate equal protection; discriminatory intent is enough.[77] Further, a plaintiff does not have to prove this discriminatory intent with direct evidence; it may be inferred from the totality of the circumstances, including whether the action negatively impacts one race more than another.[78]

For example, in *Rogers v. Lodge*, the Supreme Court held that a rural county in Georgia violated its black citizens' right to equal protection by using a system of at-large elections because the county continued to maintain the system to harm black citizens by diluting their voting power.[79] The facts that the court found significant in determining discriminatory intent included that black residents were a minority of registered voters despite being a majority of the county's population; evidence of bloc voting along racial lines; that black citizens had been excluded from participating in the political process through past discrimination, such as literacy tests, poll taxes, and white primaries, and through a pattern of unresponsiveness to the needs of the black community by county officials, including "the infrequent appointment of blacks to county boards and committees [and] the overtly discriminatory pattern of paving county roads."[80] While constitutional jurisprudence regarding equal protection violations based on racial discrimination is extensive, it is less robust regarding wealth-based discrimination.

In their opening brief to the Sixth Circuit, the *Boler* appellants alleged that appellees violated the Equal Protection Clause through intentional racial discrimination in that they supplied residents of Flint, a majority-

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76. *In re* City of Detroit, 841 F.3d 684, 701 (6th Cir. 2016) (citing Ctr. for Bio-Ethical Reform, Inc. v. Napolitano, 648 F.3d 365, 379 (6th Cir. 2011)).

77. Rogers v. Lodge, 458 U.S. 613, 622-25 (1982).

78. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

79. *Rogers*, 458 U.S. at 615, 627.

80. *Id.* at 624-26.

black city, with water they knew to be contaminated from the Flint River, while still providing water to the residents of majority-white Genesee County from DWSD, and that this differential treatment would not have occurred if the racial impacts were reversed.[81] Similarly, the *Boler* appellants alleged that this differential treatment also resulted from wealth discrimination between poor Flint residents and wealthier Genesee county residents, and that "there was no rational economic or fiscal justification."[82]

The district court initially dismissed the claim in its now-vacated opinion, stating that residents had failed to demonstrate that defendant officials had jurisdiction to provide water to residents of Genesee county in the first place.[83] In their amended complaint, however, plaintiffs have expanded the scope of their complaint, arguing that state officials treated Flint residents differently from residents of the rest of the state.[84] While this may resolve the jurisdictional issue noted by the district court, establishing that public officials acted with discriminatory intent may still prove challenging for plaintiffs. However, if the court takes a similar approach to the *Rogers* court in the future and considers in its analysis of discriminatory intent the long history of racial segregation, economic disenfranchisement, and disparate health outcomes between black and white citizens in Flint and in Michigan more broadly, the plaintiffs may be successful in their claim.

The plaintiffs in *Lyda* also alleged equal protection violations, but not based on racial discrimination and not clearly based on wealth discrimination. Instead, the plaintiffs alleged DWSD violated their right to equal protection by treating residential and commercial water customers differently.[85] Their evidence of this disparate treatment includes the fact that DWSD terminated water service for thousands of residential water customers that DWSD alleged had been delinquent in their water bills, based on its policy decision to terminate water service for residential customers who either owed more than $150 in arrears or were more than sixty days delinquent in paying these arrears.[86] Additionally, the plaintiffs noted that at least thirty-six commercial water customers had accounts that abided by this policy in that they were not only more than sixty days

81. Opening Brief of Appellants Melissa Mays et al., *supra* note 60, at *27-28.
82. *Id.*
83. *In re* Flint Water Cases, 329 F. Supp. 3d 369, 414 (E.D. Mich. 2018), *vacated* (Nov. 9, 2018).
84. Class Plaintiffs' Motion for Leave to File an Amended Complaint, *supra* note 56.
85. Plaintiff-Appellants Corrected Brief, *supra* note 72, at *24-25.
86. *Id.*

delinquent, but also owed arrears in amounts ranging from more than $30,000 to hundreds of thousands of dollars.[87] Despite these violations of DWSD's own policy, the plaintiffs noted that DWSD did not terminate service for these customers.[88]

Unfortunately, these facts do not seem to easily lend themselves to a claim of equal protection violation. Because there is no fundamental right to water access and customers who are unable to afford their water bill are not considered a "suspect class," the court will continue to apply the rational basis standard to facts such as those in *Lyda*. And, as the outcome of *Lyda* illustrates, courts will likely give public officials the benefit of the doubt in establishing water service rates and termination policies.

IV. CONCLUSION

Although the ultimate outcome of the plaintiffs' claims remains uncertain, *Boler* has already begun to alter the landscape of environmental justice. The case cast a spotlight on the disparities in distribution of environmental burdens amongst citizens and the inadequacies of the framework of environmental law in the United States to prevent such disparities. However, it also may establish a legal foothold for changing this framework, preventing future water quality crises and perhaps providing useful precedent for future legal battles regarding water affordability. While the *Boler* plaintiffs argued that their constitutional claims did not depend on the existence of an independent and fundamental constitutional right to safe, affordable drinking water, if they succeed on the merits of their claims, they could clear a path towards the effective recognition of such a right.

87. *Id.*
88. *Id.*