Guertin v. State: The Sixth Circuit Embraces the Substantive Right to Bodily Integrity as a Means of Holding Government Officials Accountable for Flint's Contaminated Water

I. OVERVIEW

Between April 2014 and December 2015, the City of Flint, Michigan, channeled corrosive water through lead-based pipes into the homes of its residents.[1] The City faced a $25 million deficit in 2011 when the state took over its day-to-day operations and appointed emergency managers to help deal with Flint's financial distress.[2] In an attempt to reduce city expenses, officials sought alternatives to Flint's water provider, the Detroit Water and Sewerage Department (DWSD), which pumped water from Lake Huron to Flint.[3] The City initiated plans to build its own pipeline to connect to the Karegnondi Water Authority (KWA), a move projected to save the region $200 million over the course of twenty-five years.[4] However, the City's

1. Guertin v. State, 912 F.3d 907, 915 (6th Cir. 2019).

2. *Id.* at 937; Melissa Denchak, *Flint Water Crisis: Everything You Need to Know*, NAT'L RESOURCES DEF. COUNCIL (Nov. 8, 2018), https://www.nrdc.org/stories/flint-water-crisis-everything-you-need-know.

3. Merrit Kennedy, *Lead-Laced Water in Flint: A Step-By-Step Look at the Makings of a Crisis*, NPR (Apr. 20, 2016), https://www.npr.org/sections/thetwo-way/2016/04/20/465545378/lead-laced-water-in-flint-a-step-by-step-look-at-the-makings-of-a-crisis.

4. *Id.*

pipeline to KWA would not become operational immediately, so Flint needed an interim water source.[5] City officials turned to the Flint River as an alternative, processing the water through "an outdated and previously mothballed water treatment plant," beginning on April 25, 2014.[6]

Water from the Flint River was nineteen times more corrosive than that from Lake Huron, causing the water piped into residents' homes—untreated for corrosivity—to leach lead out of the city's lead-based service lines.[7] Health consequences appeared just weeks later: Flint residents began to lose their hair and develop skin rashes.[8] Within a year, residents were testing positive for E. coli, dying at higher rates from Legionnaires' disease, and reporting dangerously high blood-lead levels in children.[9]

Yet Flint officials twice turned down opportunities to reconnect to the DWSD after becoming aware of significant problems with the new water source.[10] Michigan Department of Environmental Quality (MDEQ) officials repeatedly and falsely assured the public that the water was safe, despite their knowledge of the "public-health-compromising complications" associated with drinking water from the Flint River.[11] The plaintiffs alleged that Michigan Department of Health and Human Services (MDHHS) executives attempted to assemble evidence disproving alarming outside studies, and that MDHHS employees participated in the department's efforts to hide information.[12] Not until September 25, 2015 did Flint issue a lead advisory to residents.[13] Finally, on October 16, 2015, the City of Flint switched back to the DWSD to supply its residents with water.[14] The Michigan Auditor General issued an investigative report on the crisis soon after, finding that corrosion controls should have been maintained from the beginning.[15]

Flint resident Shari Guertin subsequently filed suit on behalf of herself and her minor child in the Eastern District of Michigan against the State of Michigan, the City of Flint, and fourteen public officials.[16] The Eastern District of Michigan dismissed many of the original complaints

5. *Id.*
6. *Guertin*, 912 F.3d at 915.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 927.
11. *Id.*
12. *Id.* at 929-31.
13. Kennedy, *supra* note 3.
14. *Id.*
15. Guertin v. Michigan, No. 16-cv-12412, 2017 WL 2418007, at *8 (E.D. Mich. 2017).
16. *Id.*

against many of the original defendants; however, Guertin's allegation that several defendants violated her and her child's rights to bodily integrity survived dismissal.[17]

The apex of the defendants' subsequent appeal was whether plaintiffs pled a plausible Fourteenth Amendment violation of their right to bodily integrity, and whether the defendants enjoyed qualified immunity from suit.[18] On appeals, defendants also contended that the district court erred in denying the City of Flint sovereign immunity under the Eleventh Amendment.[19] The Sixth Circuit *held* that plaintiffs failed to adequately allege that MDHHS defendants violated their substantive due process rights to bodily integrity, but that plaintiffs did adequately allege such violations of their rights by Flint and MDEQ defendants, who did not enjoy qualified immunity from suit, and that the City of Flint was not protected by Eleventh Amendment immunity. *Guertin v. State*, 912 F.3d 907, 927-37 (6th Cir. 2019).[20]

II. BACKGROUND

The Due Process Clause of the Fourteenth Amendment establishes that "[n]o State shall . . . deprive any person of life, liberty, or property."[21] This includes a right to substantive due process, the purpose of which is "to protect the people from the State."[22] However, state officials are entitled to qualified immunity from suit "unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct."[23]

A. The Substantive Due Process Right to Bodily Integrity

The Fourteenth Amendment includes a "substantive sphere" that bars government actions that are "egregious" and "arbitrary in the

17. *Guertin*, 912 F.3d at 915.
18. *Id.*
19. *Id.* at 935.
20. This Case Note will focus on the substantive due process and qualified immunity issues, rather than the sovereign immunity argument, as the sovereign immunity argument does not present any novel issues of law and is not raised by defendants in their petition for certiorari to the Supreme Court.
21. U.S. CONST. amend. XIV, § 1.
22. DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989).
23. Ashcroft v. al-Kidd, 563 U.S. 731, 735 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

constitutional sense."[24] The Due Process Clause protects "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition."[25] One such right is a person's right to bodily integrity.[26] The contours of this right have not been defined precisely by the U.S. Supreme Court.[27]

Precedent is nevertheless useful in determining what the right to bodily integrity entails. Cognizable claims under the substantive due process right to bodily integrity have included a person's right to refuse medical treatment.[28] The U.S. Supreme Court has permitted violations of such rights only in the face of a compelling state interest.[29] For example, in *Washington v. Harper*, the state administered antipsychotic drugs to an inmate against his will.[30] The U.S. Supreme Court found that a violation of the inmate's liberty interest in not being subject to involuntary medical treatment could only be permitted "if, in a judicial hearing at which the inmate had the full panoply of adversarial procedural protections, the State proved by 'clear, cogent, and convincing' evidence that the administration of antipsychotic medication was both necessary and effective for furthering a compelling state interest."[31] Similarly, the Court recognized in *Cruzan v. Director, Missouri Department of Health* that "the Due Process Clause protects an . . . interest in refusing life-sustaining medical treatment," though it also found that, in that case, the State had an overwhelming "interest in the preservation of human life."[32] In each of these cases, the right to refuse medical treatment was found to constitute a

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24. Cty. of Sacramento v. Lewis, 523 U.S. 833, at 840; 845 (1998).

25. Washington v. Glucksberg, 521 U.S. 702, 703 (1997).

26. Missouri v. McNeely, 569 U.S. 141, 159 (2013) ("We have never retreated . . . from our recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests.").

27. Ingraham v. Wright, 430 U.S. 651, 673-74 ("Among the historic liberties so protected [by the Due Process Clause] was a right to be free from . . . unjustified intrusions on personal security. While the contours of this historic liberty interest . . . have not been defined precisely, they always have been thought to encompass freedom from bodily restraint.").

28. Washington v. Harper, 494 U.S. 210, 221-22 (1990) ("[R]espondent possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment."); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269; 279 (1990) ("This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment."; "[T]he logic of [precedent] would embrace . . . a liberty interest . . . [in] artificially delivered food and water essential to life.").

29. *Harper*, 494 U.S. at 210-22.

30. *Id.* at 214-15.

31. *Id.* at 217-18.

32. *Cruzan*, 497 U.S. at 281-82 (also noting that the State "may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements").

cognizable claim for the right to bodily integrity, though that right was outweighed by legitimate, compelling state interests.[33]

Since its decision in *Rochin v. California*, the Court has held that a cognizable substantive due process claim must allege an "executive abuse of power . . . which shocks the conscience."[34] To meet the shocks-the-conscience standard, the Government's *purpose* need not be to harm the plaintiff; acting "with full appreciation of . . . the brutality of [its] acts" is sufficient.[35] In *Rochin*, for instance, the plaintiff brought a substantive due process claim after deputy sheriffs directed physicians to forcibly pump his stomach to recover illegally possessed morphine capsules.[36] The Court found that the Government's forcible intrusion on the plaintiff's person in *Rochin* was precisely the sort of "conduct that shocks the conscience."[37]

However, in some cases, it can be more difficult to determine "where conscience-shocking behavior resides on the continuum of actions," particularly when government conduct "is worse than negligent but . . . not done for the purpose of injuring someone or in furtherance of invidious discrimination."[38] The Sixth Circuit has identified three key factors useful in analyzing when "deliberate indifference" rises to meet a shocks-the-conscience standard: "(1) the voluntariness of the plaintiff's relationship with the government, (2) whether there was time for the government actor to deliberate, and (3) whether the government actor was pursuing a legitimate government interest."[39] This Sixth Circuit test is derived from the Supreme Court's analysis in *Sacramento v. Lewis* and other cases, which similarly analyze these three factors in determining whether government conduct that falls somewhere between negligence and intentional harm (often characterized as "deliberate indifference" or "gross negligence") is such that "shocks the conscience."[40]

First, when considering the voluntariness of the plaintiff's relationship with a state official, the Sixth Circuit has found that the "more voluntary the plaintiff-government relationship . . . the less arbitrary we should deem a bodily injury . . . caused by the state actor."[41] For example,

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33. *Harper*, 494 U.S. at 221; *Cruzan*, 497 U.S. at 281.

34. Cty. of Sacramento v. Lewis, 523 U.S. 833, 846 (citing Rochin v. California, 342 U.S. 165 (1952)).

35. *Id.* at 865 n.9 (citing *Rochin*, 342 U.S. at 172).

36. Rochin v. California, 342 U.S 165, 166.

37. *Id.* at 209.

38. Range v. Douglas, 763 F.3d 573, 590 (6th Cir. 2014); Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ., 542 F.3d 529, 536 (6th Cir. 2008).

39. *Range*, 763 F.3d at 573 (citing *Hunt*, 542 F.3d at 536).

40. *Hunt*, 542 F.3d at 536-43 (collecting cases).

41. Durham v. Estate Losleben, 744 F. App'x 268, 271 (6th Cir. 2018).

in *Hunt v. Sycamore Community School District Board of Education*, plaintiff Rosella Hunt alleged that her employer-school district violated her substantive due process rights by "subjecting her to dangerous working conditions."[42] Hunt worked with special education students, including an autistic girl who assaulted Hunt on a school trip, thereby rupturing disks in Hunt's neck.[43] Prior to her assignment to the girl's classroom, Hunt knew of the autistic student's history of assaulting staff.[44] The Sixth Circuit found that the school district's actions were not constitutionally arbitrary "[i]n light of Hunt's voluntary undertaking of this hazardous employment."[45]

Second, when analyzing the state actor's time to deliberate, the "critical question" is whether the state actor had sufficient time "to fully consider the potential consequences of their conduct."[46] For example, in *Lewis*, the parents of a motorcycle passenger killed in a high-speed chase with law enforcement officers brought suit alleging substantive due process violations.[47] The U.S. Supreme Court found that actual deliberation must be practical in the given circumstances to meet the conscience-shocking standard.[48] In *Lewis*, however, the circumstances "demand[ed] an instant judgment" by the officer, and the Court stated that in such circumstances, "only a purpose to cause harm . . . will satisfy the shocks-the-conscience test."[49]

Finally, when evaluating whether a state actor was pursuing a legitimate government interest, a court must "make some assessment that he did not act in furtherance of a countervailing governmental purpose" that justified the risky conduct in question.[50] When a state actor chooses between legitimate government purposes, the choice is generally deemed not to be arbitrary.[51] However, the Sixth Circuit has "held open the possibility that[,] in extreme cases[,] the governmental actor's choice to endanger a plaintiff" for the sake of a legitimate state purpose could be deemed arbitrary.[52]

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42. *Hunt*, 542 F.3d at 532.
43. *Id.*
44. *Id.* at 533.
45. *Id.* at 545.
46. Ewolski v. City of Brunswick, 287 F.3d 492, 510 (6th Cir. 2002) (citing Moreland v. Las Vegas Metro. Police Dep't, 159 F.3d 365, 373 (9th Cir. 1998)).
47. Cty. of Sacramento v. Lewis, 523 U.S. 833, 833 (1998).
48. *Id.* at 851.
49. *Id.* at 834.
50. *Hunt*, 542 F.3d at 541.
51. *Id.* at 543.
52. *Id.*

B. Qualified Immunity

Government officials are generally immune from suit when their performance of discretionary duties "does not violate clearly established statutory or constitutional rights."[53] The Court has explained that conduct violates a clearly established law when "'[t]he contours of a right [are] sufficiently clear' that every 'reasonable official would [have understood] that what he is doing violates that right.'"[54] While a directly-on-point case need not exist, precedent must have placed the existence of the right in question "beyond debate."[55]

The plaintiff must establish that the official had "fair warning" that the alleged conduct was unconstitutional in order to show that the official is not entitled to qualified immunity.[56] To establish that officials had fair warning that their conduct violated a constitutional right, a court should first look to the decisions of the Supreme Court, and then to its own decisions and decisions within its circuit, and finally to the decisions of other circuits.[57] It is not just the existence of a particular right that must be established; it must be so established that the defendant should have known that his *conduct* would violate that right.[58] The unconstitutionality of particular conduct "can be apparent from direct holdings, from specific examples described as prohibited, or from the general reasoning that a court employs."[59] However, "officials can be on notice that their conduct violates established law even in novel factual situations."[60] This is in part due to the fact that "[t]he easiest cases don't even arise."[61]

Generally, it is inappropriate for a district court to grant a Federal Rules of Civil Procedure 12(b)(6) motion to dismiss on the basis of qualified immunity.[62] That point is better resolved on summary judgment,

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

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

55. *Id.*

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

57. Higgason v. Stephens, 288 F.3d 868, 876 (6th Cir. 2002).

58. *Anderson*, 483 U.S. at 640 ("This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." (internal citations omitted)); *see also Hope*, 536 U.S. at 741 ("[I]n *United States v. Lanier*, . . . the Court expressly rejected a requirement that previous cases be 'fundamentally similar.'").

59. Feathers v. Aey, 319 F.3d 843, 848 (2003) (citing *Hope*, 536 U.S. at 743).

60. *Hope*, 536 U.S. at 741.

61. United States v. Lanier, 520 U.S. 259, 271 (1997).

62. Wesley v. Campbell, 779 F.3d 421, 434 (6th Cir. 2015).

after discovery has taken place, because determining the applicability of qualified immunity involves a fact-intensive analysis.[63]

III. COURT'S DECISION

In the noted case, the Sixth Circuit reversed the district court's ruling that plaintiffs adequately alleged Substantive Due Process claims against MDHHS defendants, largely because the claims centered around those defendants' failure to act.[64] However, the Sixth Circuit upheld the district court's ruling that plaintiffs adequately alleged Substantive Due Process claims against the various City and MDEQ officials.[65] The Sixth Circuit also held that Flint and MDEQ officials were not protected from suit by qualified immunity, finding that the plaintiffs properly pled a violation of the right to bodily integrity because the defendants' alleged conduct involved an "egregious violation of the right to bodily integrity."[66]

A. Adequate Allegations of Substantive Due Process Violations

Before applying the conscience-shocking standard to the individual defendants in *Guertin*, the Sixth Circuit analyzed the three factors established in *Hunt*: (1) the voluntariness of the plaintiff-government relationship, (2) the defendants' time to deliberate on the potential consequences of their actions, and (3) the arbitrariness of the government's decision.[67]

The court found that the plaintiff's relationship with the City of Flint was involuntary in this case.[68] Because Flint's city ordinances required the city to supply water to its residents and required residents to take and pay for the city-supplied water (unless they had access to an approved spring or well), the relationship was not voluntary.[69] Further, the court noted that because Flint assured residents of the water's potability—thereby hiding

63. *Id.* (collecting cases); *see also* Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist., 428 F.3d 223, 235 (6th Cir. 2005).
64. Guertin v. State, 912 F.3d 907, 929-32 (6th Cir. 2019).
65. *Id.* at 926-29.
66. *Id.* at 935.
67. *Id.* at 925-26.
68. *Id.* at 925.
69. *Id.* ("Flint's transmission of drinking water to its residents is mandatory on both ends.").

the risks inherent in drinking the water—residents' consumption of toxins was doubly involuntary.[70]

The court also found that the government officials sued in *Guertin* had months and sometimes years in which to deliberate and make decisions.[71] This time included ample opportunity for reflection on potential consequences.[72] Quoting the Supreme Court, the Sixth Circuit noted that "[w]hen such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking."[73]

Finally, the Sixth Circuit found there was, in this case, no legitimate government purpose for violating plaintiffs' bodily integrity by knowingly contaminating residents' water supply.[74] While the court recognized that Flint's decisions were based on economic concerns, it found the decision was still unjustifiable, characterizing the suit as one of the "extreme cases" described in *Hunt*.[75] The Sixth Circuit declared that "jealously guarding the public's purse cannot . . . justify the yearlong contamination of an entire community."[76]

The court then turned to an analysis of whether each defendant's alleged conduct met the conscience-shocking standard so as to constitute a violation of the Due Process Clause.[77]

1. MDHHS Defendants

Guertin made allegations against both MDHHS executives and employees.[78] Her primary allegation against executive officials Director Nick Lyon and Chief Medical Executive Eden Wells was that the pair failed to protect and notify Flint residents of the problems with Flint's water supply in the days shortly before the City switched back to DWSD.[79] However, the Court found that because the Due Process Clause only limits

70. *Id.* at 925-26 ("[V]arious defendants' assurances of the water's potability hid the risks, turning residents' voluntary consumption of a substance vital to subsistence into an involuntary and unknowing act of self-contamination.").

71. *Id.* at 925.

72. *Id.*

73. *Id.* (quoting Cty. of Sacramento v. Lewis, 523 U.S. 833, 853 (1998)).

74. *Id.* at 926.

75. *Id.* (quoting Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ., 542 F.3d 529, 543 (6th Cir. 2008)).

76. *Id.*

77. *Id.* at 926-33.

78. *Id.* at 929-33.

79. *Id.* at 930.

government *action*, not inaction, this allegation did not constitute a cognizable due process claim.[80]

Guertin's remaining allegations against Lyon and Wells were that they attempted to discredit an independent study conducted by Dr. Mona Hanna-Attisha that showed rising blood-lead levels in Flint's children.[81] The Court found that Lyon's and Wells' "unjustifabl[e] skeptic[ism]" of Dr. Hanna-Attisha's study and efforts to "assemble evidence to disprove it" fell "well-short of conscience-shocking conduct."[82] For these reasons, the Sixth Circuit reversed the district court's denial of Lyon's and Wells' motions to dismiss.[83]

2. MDEQ Defendants

Guertin's complaint also included allegations against five MDEQ officials: Stephen Busch, Liane Shekter-Smith, Michael Prysby, Bradley Wurfel, and Daniel Wyant.[84] These allegations did not include claims that Wyant personally made any decisions regarding the water-source switch, but rather that "the conduct of individuals within his department was constitutionally abhorrent."[85] The Sixth Circuit noted that Wyant could only be held accountable for his own conduct, not the conduct of his subordinates, and so found that the district court erred in denying his motion to dismiss.[86]

However, Guertin's allegations against Busch, Shekter-Smith, Prysby, and Wurfel were "numerous and substantial."[87] These four MDEQ officials each "played a pivotal role in authorizing" Flint's switch to an unsafe water source and deliberately misled the public about the safety of the water piped into their homes.[88] Guertin alleged that Busch, for example, knowingly lied to the EPA in stating that the Flint Water Treatment Plant "had an optimized corrosion control program" when no corrosion controls had in fact been implemented.[89] The court found these four defendants' behavior conscience shocking, noting that they "created the Flint Water [crisis] and then intentionally attempted to cover-up their

80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 931.
84. *Id.* at 927.
85. *Id.*
86. *Id.* (citing Ashcroft v. Iqbal, 556 U.S. 662, 676-77 (2009)).
87. *Id.* at 927.
88. *Id.* at 927-28.
89. *Id.* at 928.

grievous decision."[90] The Sixth Circuit also noted that it would be inappropriate to accept, at the motion-to-dismiss stage, defendants' argument that they made "honest mistakes" in interpreting the Lead and Copper Rule, which requires that large public water systems (like Flint's) "optimize corrosion control treatment before distribution of water to the public."[91] The Sixth Circuit therefore upheld the district court's denial of Busch's, Shekter-Smith's, Prysby's, and Wurfel's motions to dismiss.[92]

3. City of Flint Defendants

Guertin also made allegations against Flint's Director of Public Works, Howard Croft, and its Emergency Managers, Darnell Earley and Gerald Ambrose.[93] Embracing its obligation to accept plaintiffs' allegations as true and draw reasonable inferences from them, the Sixth Circuit described Croft, Early, and Ambrose as the "chief architects of Flint's decision to switch water sources and then use a plant they knew was not ready to safely process the water."[94] While the court noted that there may be a factual dispute as to whether these defendants simply made "mistakes in judgment" by relying upon MDEQ opinions, it stated that such issues should not be resolved at the motion-to-dismiss stage.[95] The Sixth Circuit concluded that Guertin's complaint "plausibly allege[d] a constitutional violation" caused by the Flint defendants' conduct.[96] The court therefore upheld the district court's denial of the Flint defendants' motions to dismiss.[97]

B. "Egregious Violation" of a Clearly Established Right

The court declined to extend qualified immunity to the MDEQ and Flint defendants who faced surviving claims.[98] The majority rejected the dissent's argument that, to show defendants had fair notice that their conduct was constitutionally prohibited, the plaintiff must be able to point to a factually similar case.[99] The Sixth Circuit noted that "taking

90. *Id.*
91. *Id.* (citing 40 C.F.R. §§ 141.80-141.91 20 (2019)).
92. *Id.* at 929.
93. *Id.* at 926.
94. *Id.* at 926-27.
95. *Id.* at 927 (citing Wesley v. Campbell, 779 F.3d 421, 433-34 (6th Cir. 2015)).
96. *Id.*
97. *Id.*
98. *Id.* at 934.
99. *Id.* at 933 (first citing Hope v. Pelzer, 536 U.S. 730, 741 (2002); and then citing United States v. Lanier, 520 U.S. 259, 271 (1997)).

affirmative steps to systematically contaminate a community through its public water supply with deliberate indifference is a government invasion of the highest magnitude," and one which any reasonable official should have recognized as conscience-shocking conduct in violation of the Due Process Clause.[100]

In coming to this conclusion, the Sixth Circuit relied on the Supreme Court's reasoning in *Harper* as establishing the right of informed consent as a crucial component of the constitutional right to bodily integrity.[101] The court inferred that if a person has a constitutional right to refuse the consumption of beneficial medical treatment or life-sustaining substances absent compelling state interests, then "certainly any reasonable official would understand that an individual has a right to refuse the consumption of water known to be lead-contaminated."[102]

The Sixth Circuit characterized defendants' actions as "strip[ping] the very essence of personhood" from Flint residents by providing a contaminated life necessity.[103] It found this conduct to be contrary to our country's fundamental ideas of liberty, and of no "redeeming social value" despite its cost-saving effects.[104] As such, the Sixth Circuit reaffirmed the district court's conclusion that the defendants' alleged conduct violated a clearly established right, and thus, the defendants were not entitled to qualified immunity from suit, particularly at the motion-to-dismiss stage.[105]

IV. ANALYSIS AND CRITICISM

In the noted case, the Sixth Circuit came to two surprising conclusions: first, that defendants' alleged conduct was arbitrary despite being motivated by the legitimate government interest in cutting costs; and second, that defendants were not entitled to qualified immunity at the motion-to-dismiss stage because their alleged conduct clearly violated the constitutional right to bodily integrity.

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100. *Id.*

101. *Id.* at 934 ("The Court could not have been clearer in *Harper* when it stated that '[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty.' . . . If an individual has a right to refuse to ingest medication, then surely she has a right to refuse to ingest a life necessity. *Cruzan* instructs as much, recognizing that the 'logic' of its bodily integrity cases . . . encompasses an individual's liberty interest to refuse 'food and water essential to life.'" (internal citations omitted)).

102. *Id.*

103. *Id.* at 935.

104. *Id.*

105. *Id.*

The court's application of the *Hunt* factors to determine whether government actors' deliberate indifference rose to the level of conscience-shocking behavior was largely consistent with existing case law.[106] However, the Sixth Circuit's characterization of the defendants' conduct in the noted case as "arbitrary" despite being motivated by a legitimate governmental interest in cutting costs was a novel conclusion.[107] While the court in *Hunt* recognized the possibility of such extreme cases (in which a legitimate state interest is not enough to render a state decision not arbitrary), it declined to explain what might qualify as this sort of extreme.[108] Generally, only if a state actor does not act in furtherance of some governmental purpose will his decision be deemed arbitrary.[109]

The Sixth Circuit identified the noted case as one of these extreme circumstances in which a legitimate government interest (i.e., in cutting costs during a financial crisis) could not be considered a rational justification for the conduct in question: knowingly contaminating the city's water supply and misleading the public about said contamination.[110] Although novel, this decision is not inconsistent with the court's reasoning in other cases.[111] To implement cost-saving measures that put human health at an immediate and severe risk was an extreme choice that violated our foundational notions of liberty; further, economic considerations could not excuse state officials' failure to inform Flint residents of the dangers accompanying the water-source switch.[112]

The Sixth Circuit came to another surprising conclusion in finding that the defendants were not entitled to qualified immunity.[113] Judge McKeague, writing separately to concur in part and to dissent in part, argued that the defendants' alleged conduct was not clearly established as

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106. *See* Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ., 542 F.3d 529, 536-43 (6th Cir. 2008) (collecting cases); *see also* Range v. Douglas, 763 F.3d 573, 590 (6th Cir. 2014); Cty. of Sacramento v. Lewis, 523 U.S. 833, 851-54 (1998).

107. *Compare Hunt*, 542 F.3d at 543, *with* Guertin v. State, 912 F.3d 907, 926 (6th Cir. 2019).

108. *Hunt*, 542 F.3d at 543.

109. *Id.* at 541; *cf.* Doe v. Claiborne, 103 F.3d 495 (6th Cir. 1996) (where a teacher's sexual abuse of a student, serving no legitimate government purpose, was found to violate substantive due process rights); Estate of Owensby v. City of Cincinnati, 414 F.3d 596 (6th Cir. 2005) (where, after beating a suspect, police officers' failure to provide the subdued suspect medical treatment served no legitimate government purpose and thus was found to violate substantive due process rights).

110. *Guertin*, 912 F.3d at 926.

111. *See Hunt*, 542 F.3d at 543; *see also* Ewolski v. City of Brunswick, 287 F.3d 492, 513 (6th Cir. 2002) (clarifying that there were limits to police officers' risk-taking behavior beyond the restriction to not act maliciously or with the intent to cause harm).

112. *Guertin*, 912 F.3d at 925-26.

113. *Id.* at 954 (McKeague, J., concurring in part and dissenting in part)

violating a fundamental constitutional right when the case arose.[114] His dissent alone suggested that the right in question was not one "beyond debate," which would mean defendants should have been entitled to qualified immunity.[115] Judge McKeague's separate opinion argued that various cases contradicted to the majority's opinion in the noted case; however, all of these cases arose in another circuit and each was distinguishable from the noted case in significant ways.[116]

The precedents set by *Harper* and *In re Cincinnati Radiation Litigation* support the finding in the noted case that the defendants were sufficiently warned that their conduct would violate the constitutional right to bodily integrity.[117] *Harper*, as discussed above, established a clear liberty interest in avoiding the unwanted administration of medication that could only be overridden by compelling state interests.[118] *In re Cincinnati*, a district court case decided within the jurisdiction of the Sixth Circuit, was even more on-point. [119] In it, the Southern District Court of Ohio addressed allegations that state actors subjected indigent cancer patients to radiation doses consistent with those expected near blast sites during a nuclear war.[120] The state officials never disclosed the risks of the experiment to their patients, nor even that it *was* an experiment.[121] In finding that the *Cincinnati Radiation* plaintiffs adequately alleged a

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114. *Id.* at 942-63. McKeague's dissent focuses on two concerns: (1) that the defendants' alleged conduct did not rise to meet the conscience-shocking standard, and (2) that the type of conduct alleged here was not clearly established as violative of a constitutional right. McKeague's analysis of the first concern is not convincing because he fails to accept the plaintiffs' allegations as true and rejects the reasonable inferences drawn therefrom by the majority opinion. However, his second concern—that the defendants' conduct was not clearly established as violative of a constitutional right—is worth consideration. *Id.*

115. *See* Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

116. *Guertin*, 912 F.3d at 958-62 (first citing Branch v. Christie, No. 16-2467, 2018 WL 337751 (D. N.J. Jan. 8, 2018)) (an unpublished case that was dismissed in large part because the plaintiff failed to differentiate between the fifteen named defendants in its Complaint or particularize its allegations); then citing Lombardi v. Whitman, 485 F.3d 73 (2d Cir. 2007) (involving statements by public officials regarding air quality in New York after the September 11 attacks, distinguishable because of the presence of competing government interests and the time-sensitive nature of the environmental emergency at issue); and then citing Benzman v. Whitman, 523 F.3d 119 (2d Cir. 2008) (same)); *see also* Coshow v. City of Escondido, 132 Cal. App. 4th 687 (2005) (noting that plaintiffs' decision to fluoridate the water supply in fact served a compelling government interest and did not cause substantial harm).

117. *Guertin*, 912 F.3d at 919-20; *id.* at 921 (first citing Washington v. Harper, 494 U.S. 210, 213-17 (1990); and then citing *In re* Cincinnati Radiation Litig., 874 F. Supp. 796, 802-14 (S.D. Ohio 1995)).

118. *Harper*, 494 U.S. at 221-27.

119. *Cincinnati Radiation*, 874 F. Supp. at 800.

120. *Id.*

121. *Id.*

substantive due process violation of the right to bodily integrity, the court emphasized the involuntary and misleading nature of the plaintiffs' relationship with state actors.[122] The plaintiffs were faced with a life-or-death choice, the consequences of which they were not made aware.[123] The noted case, the Sixth Circuit analogized, similarly put the plaintiffs in the position of making a life-or-death decision without adequate information.[124]

The factual details of the defendants' conduct in the noted case was not precisely the same as the conduct alleged in *Cincinnati Radiation*; however, the reasoning expressed within that opinion made it obvious that the conduct at issue in the noted case would likewise be unconstitutional.[125]

Though the Sixth Circuit's conclusions—first that the defendants' conduct was arbitrary, and second that their behavior so obviously violated the clearly established right to bodily integrity that the defendants were not entitled to qualified immunity—were surprising, they were also consistent with prior case law. The Sixth Circuit's careful reasoning led to a bold conclusion: government officials could be held accountable for the devastating effects of the Flint Water Crisis.

This decision has already had an impact on litigation in other circuits. For example, in *Hootstein v. Amherst-Pelham Regional School Committee*, a plaintiff-grandparent brought suit against Amherst schools for lead contamination in school drinking fountains caused by lead-based fixtures in his grandson's school.[126] The plaintiff in *Hootstein* alleged that the regional school committee not only "provide[d] lead-contaminated water to students and parents—knowing the extreme danger this entail[ed]—but that it falsely certifie[d] this water [was] safe to drink."[127] In its analysis, the District Court of Massachusetts observed that the allegations were substantially similar to those in *Guertin*, particularly in that the defendants in both cases had "extensive time to deliberate,

122. *Id.* at 812, 814.

123. *Id.*

124. Guertin v. State, 912 F.3d 907, 921 (6th Cir. 2019) ("In both instances, individuals engaged in voluntary actions that they believed would sustain life, and instead received substances detrimental to their health. In both instances, government officials engaged in conduct designed to deceive the scope of the bodily invasion. And in both instances, grievous harm occurred.").

125. *See also* Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011); Feathers v. Aey, 319 F.3d 843, 848 (2003). *Compare id.* at 926-33, *with Cincinnati Radiation*, 974 F. Supp. at 800, 802-04.

126. Hoostein v. Amherst-Pelham Reg'l Sch. Comm., 361 F. Supp. 3d 94, 99-100 (D. Mass. 2019).

127. *Id.* at 112.

plausibly suggesting conscience-shocking deliberate indifference."[128] The court denied the defendant's motion to dismiss plaintiff's bodily integrity theory based on his alleged exposure to lead-contaminated water in Amherst schools.[129]

Shortly thereafter, the Southern District of New York also applied *Guertin* to allow a substantive due process bodily-integrity claim to proceed.[130] The facts alleged in *Davis v. New York City Housing Authority* took the precedent set by *Guertin* a step further by applying *Guertin*'s holding to a novel factual scenario.[131] In *Davis*, the plaintiff brought a putative class action against the New York City Housing Authority (NYCHA), alleging that through affirmative acts, the NYCHA failed to provide adequate heating to residents in its public housing buildings.[132] The plaintiff alleged that the absence of adequate heating in her apartment violated her right to bodily integrity by exposing her to extreme cold within her home, thereby aggravating her asthma and permanent injuries in her leg and hip.[133] The court found that the plaintiff stated a "non-frivolous argument" in claiming that, by involuntarily subjecting her to extreme cold in her home, the NYCHA violated her bodily integrity.[134] Further, based on the NYCHA's awareness of the recurrent problems in the city's public housing and its alleged choice to engage in a cover-up to conceal the extent of the crisis, the court found that the housing authority's conduct "evidence[d] the kind of deliberate indifference that shocks the conscience."[135] The court concluded that the plaintiff in *Davis* had adequately pled a substantive due process claim that the NYCHA violated her right to bodily integrity.[136]

V. CONCLUSION

In the noted case, the Sixth Circuit found that the plaintiffs pled a plausible Fourteenth Amendment violation of their right to bodily integrity because government officials' alleged conduct was such that shocked the conscience, regardless of the cost-saving benefits motivating such conduct. Further, the court found that the defendants did not enjoy

128. *Id.* at 112-13.
129. *Id.* at 115.
130. Davis v. N.Y.C. Hous. Auth., 379 F. Supp. 3d 237, 255-56 (S.D.N.Y. 2019).
131. *See id.* at 243.
132. *Id.* at 243, 252.
133. *Id.* at 255.
134. *Id.*
135. *Id.* at 256-57.
136. *Id.* at 257.

qualified immunity from suit in the noted case because defendants' alleged conduct—which included the knowing contamination of an entire city's water supply—was an egregious violation of the clearly established right to bodily integrity.

The Sixth Circuit's decision in the noted case was a victory for citizens facing arbitrary and inhumane government intrusions on their bodily integrity. Government officials who knowingly poison or freeze their residents, and then attempt to conceal those actions, can no longer hide behind a shield of qualified immunity: *Guertin* made obvious that such conduct violates a clearly established right to bodily integrity.

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