IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JACQUELINE TAYLOR, LISA BROOKS, MICHELE COWAN, TUANA HENRY, MATTIE MCCORKLE, RENEE WILSON, and PEOPLE'S WATER BOARD COALITION, on behalf of themselves and all others similarly situated, Plaintiffs, v. CITY OF DETROIT, a Municipal Corporation, through the Detroit Water and Sewerage Department, its Agent; GOVERNOR GRETCHEN WHITMER, in her official capacity; MAYOR MICHAEL DUGGAN, in his official capacity; and GARY BROWN, in his official capacity. Defendants.	Case No. 4:20-cv-11860 Hon. Stephanie Dawkins Davis

PLAINTIFFS'BRIEF IN OPPOSITION TO DEFENDANT WHITMER'S MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

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QUESTIONS PRESENTED

1. Is the relief sought by Plaintiffs prospective and injunctive, and of a kind not barred by the Eleventh Amendment?

2. Are any costs of relief sought by Plaintiffs ancillary to compliance with Constitutional requirements, and therefore not money damages barred by the Eleventh Amendment?

3. Whether Plaintiffs have stated a claim that Defendant Whitmer created conditions that are likely to cause the introduction of infectious diseases into the bodies of the Plaintiffs while remaining deliberately indifferent to Plaintiffs' circumstances, and thereby engaging in conduct that shocks the conscience and violates Plaintiffs' constitutional right to bodily integrity.

4. Whether Plaintiffs have stated a claim that Defendant Whitmer knowingly caused a state-created danger to Plaintiffs by selectively responding to an emergency in a way that targeted and subjected the Plaintiffs to infectious diseases.

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Ex parte Young, 209 U.S. 125 (1908)

Milliken v. Bradley, 433 U.S. 267 (1977)

Edelman v. Jordan, 415 U.S. 651 (1974)

Ingraham v. Wright, 430 U.S. 651 (1977)

Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998)

DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 (1989)

Sacramento v. Lewis, 523 U.S. 833, 846 (1998).

Koulta v. Merciez, 477 F.3d 442 (6th Cir. 2007)

INTRODUCTION

Plaintiffs file this brief in opposition to Defendant Gretchen Whitmer's Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) ("Motion to Dismiss") and supporting brief ("Def's Br."). Plaintiffs request that this Court deny Defendant Whitmer's Motion to Dismiss.

Through this lawsuit, Plaintiffs allege that Defendant Whitmer has violated and will continue to violate their right to bodily integrity in violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution by exhibiting deliberate indifference to the known risks of living without water service that could, did, and will cause harm to Plaintiffs. Plaintiffs' claim against Governor Whitmer in her official capacity, which seeks declaratory and injunctive relief, is properly stated in their Complaint. To avoid responsibility for actual and potential widespread disease and death, Defendant Whitmer seeks to dismiss Plaintiffs' claim against her by contending that it is barred by the Eleventh Amendment and that Plaintiffs have not properly alleged their claim. These arguments have no merit.

First, Plaintiffs' claim is not barred by the Eleventh Amendment. Governor Whitmer has been an active participant in the challenged water shutoff policy at issue in the Complaint, and Plaintiffs properly allege an ongoing violation of federal law. They seek only declaratory and injunctive relief against the Governor, not monetary damages or the equivalent of damages.

Second, Plaintiffs have properly pleaded their substantive due process claim against the Governor. Defendant Whitmer incorrectly asserts that Plaintiffs base their claims on the fundamental right to water. While the Sixth Circuit has stated that there is no fundamental right to water, *see In re City of Detroit, Mich.*, 841 F.3d 684, 700 (6th Cir. 2016), the dicta in that case is not controlling here because it did not address the fundamental right that is at issue in this case: Plaintiffs' right to bodily integrity. By Defendant Whitmer's own admission, water is essential to preventing the spread of disease, and consequently it is essential to the protection of bodily integrity, especially in the midst of a pandemic. By failing to ensure permanent access to water, Defendant Whitmer engages in a course of conduct that will create conditions in Detroit certain to result in widespread infection—i.e., the introduction of infectious diseases into the bodies of members of the Plaintiff class in violation of their fundamental right to bodily integrity.

Remarkably, Defendant Whitmer's vigorous defense of measures she has taken to prevent widespread infection during the COVID-19 pandemic, as described in her supporting brief, speaks powerfully to Plaintiffs' point that the lack of water service can lead to bodily infections. Specifically, if extraordinary measures to ensure access to water are required to fight COVID-19, then such are no less necessary to control or fight other infectious diseases after COVID-19 is contained. In sum, this lawsuit challenges Defendant Whitmer's analysis-based, deliberate

creation of conditions in Detroit that are certain to result in widespread infection in the Plaintiff class. Defendant Whitmer's motion to dismiss should be denied.

COUNTER-STATEMENT OF FACTS

For more than fifteen years the Detroit Water and Sewerage Department (DWSD) has terminated water service as a means of collecting unpaid water debts. Between 2014 and 2019, there were more than 141,000 of these shutoffs. Class Action Complaint ("Compl."), ¶ 4. Often, those targeted by this practice are families trapped in chronic poverty and who have not been able - and will not be able - to afford the high rates charged for water in Detroit. *Id.* ¶ 45) Because water is a necessity these families must sign on for water service they cannot afford. Inevitably, their water service is terminated, sometimes on multiple occasions because of short-lived service restorations. *Id.* ¶ 63.

Termination of water service has tragic and dangerous consequences. Before the COVID-19 crisis, water shutoffs were identified as a likely cause of outbreaks of water-borne intestinal diseases that included: shigellosis, giardiasis, and campylobacter. *Id.* ¶ 105. In addition, chronic illnesses like asthma and diabetes (among many others) flourish in Detroit's low-income communities and water is needed for nebulizers, medically-required meals and other medical needs. *Id.* ¶

100. These water-related conditions and water shutoffs created a public health emergency that pre-dates the coronavirus pandemic. *Id.* ¶ 231.

In July 2019, a coalition of lawyers and legal organizations petitioned the Michigan Department of Health and Human Services (MDHHS) for declaration of a public health emergency and a moratorium on water shutoffs in Detroit. *Id.* ¶ 68. That request was denied in September 2019 with the MDHHS director claiming no causal association between water shutoffs and water-borne diseases. *Id.* ¶ 69. The coalition then requested that Defendant Whitmer act pursuant to the Michigan Emergency Management Act (MCL Sec. 30.403). Compl. ¶¶ 70, 71. On February 21, 2020, Defendant Whitmer's counsel stated in a letter: "As to your request for the governor to issue a moratorium on water shutoffs, she does not have that power because there is insufficient data to support the use of emergency powers in this instance." *Id.* ¶ 73.

Nevertheless, only 17 days later, Defendant Whitmer used her emergency powers to impose a water moratorium and "water restart" plan in response to the then-looming threat of COVID-19. *Id.* ¶ 75. A series of emergency orders followed along with her explicit acknowledgment of the connection between water needed for hand washing and disease prevention. *Id.* ¶¶77, 236.

The only response by DWSD to the issue of chronic poverty and water insecurity has been shutoffs or water assistance programs that aid those

experiencing temporary financial hardships. *Id.* ¶¶ 46-52. Defendant Whitmer has purposefully and actively participated in maintaining DWSD policies and practices that terminate water service to largely poor and Black Detroit residents. *Id.* ¶ 244. Emergency Order 2020-144 explicitly states water customers will not be relieved of their obligation to pay amounts that accrue during the moratorium. *Id.* ¶ 241.

STANDARD OF REVIEW

A Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction may involve either a facial attack or a factual attack. A facial attack questions the sufficiency of the pleading, and the court takes the allegations in the complaint as true. If those allegations establish federal claims, jurisdiction exists. A factual challenge requires the court to weigh the conflicting evidence to determine whether there is a factual basis for subject-matter jurisdiction. *Gentek Bldg. Products, Inc. v. Sherwin-Williams Co*., 491 F.3d 320, 330 (6th Cir. 2007). When considering a Rule 12(b)(6) motion, a court "must accept all well-pleaded factual allegations as true and construe the complaint in the light most favorable to plaintiffs." *Bennett v. MIS Corp*., 607 F.3d 1076, 1091 (6th Cir. 2010). Defendant Whitmer bears the burden of proving a complaint fails to state a claim as a matter of law. *Id.*

ARGUMENT

I. THE ELEVENTH AMENDMENT DOES NOT BAR PLAINTIFFS' CLAIMS AGAINST DEFENDANT WHITMER.

Defendant Whitmer contends that Plaintiffs' claim against her is barred by the Eleventh Amendment. Def's Br. at 7-13. This is incorrect. Eleventh Amendment immunity does not apply here, where Defendant Whitmer has been an active participant in the challenged policy, where an ongoing violation of federal law is occurring, and where Plaintiffs seek only prospective relief.

Plaintiffs' claim is that Defendant Whitmer is uniquely obligated and authorized by the Michigan Emergency Management Act to address public emergencies using the full power of the state. Her failure to respond effectively to any public emergency can spell catastrophic disaster for many Michigan residents. At issue in this case is the ever-present prospect of a public health emergency in the form of not only infectious disease epidemics, but also the practical lethal consequences of the unavailability of water to large numbers of people living in poverty. Defendant Whitmer has engaged in analysis of this problem and deliberately engaged in conduct that will ensure the spread of disease in Detroit's low-income communities.

A. Defendant Whitmer Has Been Actively Involved in the Challenged Water Shutoff Policy.

The *Ex parte Young* doctrine is an exception to Eleventh Amendment sovereign immunity that "allows plaintiffs to bring claims for prospective relief against state officials sued in their official capacity to prevent future federal constitutional or statutory violations[.]" *Boler v. Early*, 865 F.3d 391, 412 (6th Cir. 2017). "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Maryland, Inc. v. Public Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997)). The Eleventh Amendment does not bar suits for prospective injunctive relief against state officials sued in their official capacities. *Ex parte Young*, 209 U.S. 125, 155-56 (1908); *Milliken v. Bradley*, 433 U.S. 267, 289 (1977). Consequently, Defendant Whitmer may be sued to enjoin an unconstitutional state policy. *Ex parte Young*, 209 U.S. at 155-56. She is liable if she has "some connection" with the policy's enforcement or execution. *Id*. at 157; *see also Caspar v. Snyder*, 77 F. Supp. 3d 616, 633 (E.D. Mich. 2015). The Sixth Circuit has also said that the Eleventh Amendment is not implicated if the state official is "actively involved" with the challenged conduct. *Russell v. Lundergan-Grimes*, 784

F.3d 1037, 1048-49 (6th Cir. 2015); *accord Doe v. DeWine*, 910 F.3d 842, 848-49 (6th Cir. 2018).

Additionally, even if some control is delegated to local authorities, supervisory liability may attach to a state officer for an unconstitutional policy. *Ex parte Young*, 209 U.S. at 157; *Gary B. v. Whitmer*, 957 F.3d 616, 631 (6th Cir. 2020) (citing *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1048-49 (6th Cir. 2015)). In fact, the Sixth Circuit recently held that if the state maintains primary authority to control and supervise the administration of a policy, it is a properly named party to an official capacity suit. *Id*. at 632.

As Plaintiffs allege in their Complaint, local officials in Detroit have developed and administered a policy of mass water shutoffs purportedly for purposes of debt collection that includes, as a prominent feature, water assistance programs that do not address the water insecurity of those trapped in chronic poverty. Compl. ¶ 49. Plaintiffs' counsel and other advocates have repeatedly brought to Defendant Whitmer's administration's attention the fact that the water shutoff policy is creating a public health emergency in Detroit by fostering the spread of disease and other health problems. Defendant Whitmer has nonetheless tacitly approved the implementation of this policy by previously refusing to use her emergency powers to prohibit Detroit from carrying out water shutoffs. *Id.* ¶¶ 68-73. She has more than "some connection" to this practice. She is at least "actively involved" and in some

instances she plays a supervisory role. Pursuant to *Ex parte Young*, Plaintiffs' efforts to prospectively enjoin Defendant Whitmer from practices that threaten the health of the Plaintiff class are not barred by the Eleventh Amendment.

B. Plaintiffs Challenge an Ongoing Violation of Federal Law.

Defendant Whitmer argues that this case is not governed by *Ex parte Young* because there is no constitutional right to water service or to affordable water[1] and because there is no ongoing violation of federal law. Def's Br. at 8-9.

First, the previous case law concerning the fundamental right to water is not controlling, as it did not address bodily integrity claims. Plaintiffs allege that they have a clearly established fundamental right to bodily integrity under the Fourteenth

[1] On August 20, 2020, a week before this response was due, Defendant Whitmer filed a vague and ambiguous Notice stating that she is "withdrawing the portions of Argument sections I. and II.A in the brief in support [of her Motion to Dismiss] that are premised on the absence of a constitutional right to water service." Defendant Whitmer's Notice further asserts that "[t]he portions of sections I. and II.A. that are premised on the existence of a constitutional right to water service, as well as the other arguments in the brief in support, remain." Notice of Withdrawal of Argument (ECF No. 18) at 1. There have been no changes in the instant action that would necessitate such a puzzling notice. Plaintiffs sought, but did not obtain, clarity on Defendant Whitmer's position from Defendant's counsel via telephone on August 21, 2020. Given that the constitutional right to water is discussed throughout Defendant's brief and the vagueness of the Notice, Plaintiffs cannot reasonably respond to this notice in this pleading without prejudicing their interests. *See* Def's Br. at 8, 14-15, 19. Therefore, Plaintiffs' response is to Defendant Whitmer's originally-filed Motion to Dismiss. Regardless, Plaintiffs do not assert a constitutional right to water in this case, but rather claim that Defendant Whitmer has violated their right to bodily integrity, which is guaranteed by the Substantive Due Process Clause of the 14th Amendment.

Amendment's guarantee of substantive due process. Compl. ¶ 226. In addition, Plaintiffs allege that they have a fundamental liberty interest in personal security, derived from the Fourteenth Amendment, including the right to be free from bodily punishment that strips them of the essence of their personhood. *Id.* ¶ 245. This includes the right to be free of disease caused by the lack of water service. *Id*. Plaintiffs further allege that Defendant Whitmer's actions, or lack thereof, will violate Plaintiffs' right to personal bodily integrity by causing conditions leading to the introduction of infectious disease into Plaintiffs' bodies and/or the substantial likelihood that such will occur. *Id.* ¶ 247.

The allegations described above represent an ongoing violation of federal law, as the Plaintiffs allege that, upon information and belief, some families in Detroit still lack water service. *Id.* ¶¶ 16, 237. The exhibits Defendant Whitmer filed in support of her Motion to Dismiss further bolster this claim. In each of the compliance reports sent by DWSD to the State of Michigan, which were attached as exhibits to Defendant's Motion to Dismiss, DWSD reports a smaller number of households without water than are reconnected the following month. For instance, in its June 12, 2020 compliance report, DWSD stated that "sixteen homes remain without water," Def's Br., Ex. 4, however in the July 13, 2020 report it stated that "34 homes were restored" in the month since the previous report. Def's Br., Ex 5. Additionally, in each compliance report, DWSD states that they hired an organization that conducted

door to door outreach to notify the 9,000 homes they believe could be without water service about the Water Restart program. *See* Def's Br., Exs. 2-5. By their own admission, "12 percent [of households without water service] appeared to have occupants who did not answer the door." Def's Br., Ex. 2 at 2; Ex. 3 at 2; Ex. 4 at 2; Ex. 5 at 2. DWSD states that they called the last known phone numbers associated with those accounts, however, it is not clear how many of those numbers were still active, nor how many of those households were confirmed to have water service. There is no indication that any of these compliance reports have been independently verified or even reviewed for accuracy by Defendant Whitmer.

Further, the fact that the named Plaintiffs currently have water service does not change the nature of their claim. Although the named Plaintiffs and other putative class members have received temporary protection from water shutoffs by Defendant Whitmer's Executive Order, they still face certain loss of water service after the moratorium ends, as well as the crushing burden of ever-increasing debts for water service they are receiving during the moratorium.

For example, Plaintiff Lisa Brooks lives in her Detroit home with two of her children, ages 14 and 16. Compl. ¶ 134. Plaintiff Brooks has a number of physical disabilities, including chronic pulmonary disease, diabetes, and arthritis. *Id.* ¶ 135. In addition, Plaintiff Brooks' son has asthma and uses a nebulizer for treatment, which requires water. *Id.* Although Plaintiff Brooks receives around $1,200 in

monthly income from Social Security disability benefits and the Michigan Bridges food assistance program, she was unable to afford her water bills and, consequently, her water service was disconnected for the first time in 2018. *Id.* ¶ 138. Her water service was reconnected by DWSD in 2019 after she entered into a payment plan which required her to pay her monthly bill (typically around $100 per month) as well as an additional $98 per month—an amount that was approximately 17% of her total monthly income. *Id.* ¶ 139. Because of her limited income, Plaintiff Brooks was unable to keep up with her payment plan, and DWSD disconnected her water service again in late 2019. *Id.* ¶ 140.

DWSD reconnected Plaintiff Brooks' water service in March 2020 after the announcement of the Water Restart Plan and EO 2020-28. *Id.* ¶ 142. Although Plaintiff Brooks is currently able to afford the $25 a month payment to continue her service as part of that plan, she currently owes around $2,000 in arrearages and is at immediate risk of losing service once DWSD resumes water shutoffs given her low income and inability to pay her water bill. *Id.* ¶¶ 142-44. As the Complaint demonstrates, the other individual Plaintiffs also face an immediate risk of losing service one DWSD resumes water shutoffs. *See id.* ¶¶ 148-189.

A water customer like Ms. Brooks who could not afford to pay $198 per month will certainly be unable to pay more than $2,000 in arrearages to maintain her water service. While Defendant Whitmer's executive order requiring water

reconnections is in effect through the end of the year, this does not affect the ongoing nature of Plaintiffs' claim against her, particularly given their allegations regarding other residents without water service. Plaintiffs properly allege an ongoing violation of federal law and the Eleventh Amendment does not apply.

C. Plaintiffs Do Not Seek the Equivalent of Monetary Damages.

Next, Defendant Whitmer argues that Plaintiffs' claim seeking a permanent injunction of water shutoffs, affordable water rates, and debt relief must be paid by public funds, and such relief is barred by the Eleventh Amendment. Def's Br. at 10-11. But the relief Plaintiffs seek will not involve expenditures from the State Treasury.

Plaintiffs are seeking injunctive relief requiring the Governor (among other things) to utilize her superintending power to address public health emergencies and prohibit the City of Detroit from resuming water shutoffs unless and until it implements an affordable water payment process to minimize future violations to their right to bodily integrity. Compl. ¶¶ 237-48. Such prospective relief would not necessarily require expenditures from the Treasury. It would be the duty of the municipality to incur the cost of its new plan.

Assuming, however, that state funds can be affected by this lawsuit, there is an exception that is applicable to this case. The *Ex parte Young* exception allows federal courts to "issue prospective injunctive and declaratory relief compelling a

state official to comply with federal law, regardless of whether compliance might have an ancillary effect on the state treasury." *S & M Brands, Inc. v. Cooper*, 527 F.3d 500, 507 (6th Cir. 2008) (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974)). As the Court in *Edelman* explained:

> State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*[.]

415 U.S. at 668.

The *Ex parte Young* exception applies here. As stated above, Plaintiffs seek an injunction requiring the implementation of an affordable water payment process to minimize future violations to their right to bodily integrity. Plaintiffs' claims against Defendant Whitmer are not barred by the Eleventh Amendment even if injunctive relief would entail monetary expenditures from the state treasury. Michigan had this experience when there was a cost to school desegregation, and the Supreme Court has previously sustained a desegregation order that involved the expenditure of state funds to achieve constitutional compliance. *See Milliken v. Bradley*, 433 U.S. 267, 289 (1977). As the Court in *Milliken* explained:

> The decree to share the future costs of educational components in this case fits squarely within the prospective-compliance exception reaffirmed by *Edelman*. That exception, which had its genesis in *Ex*

> *parte Young*, permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury. The order challenged here does no more than that. The decree requires state officials, held responsible for unconstitutional conduct, in findings which are not challenged, to eliminate a de jure segregated school system.

Id. at 433 U.S. at 289-90 (citations omitted).

With more water shutoffs on the horizon, and by virtue of the legislature having determined that it is the Governor's responsibility to address public health emergencies, Defendant Whitmer's constitutional duty is to ensure against disease epidemics and other mass health problems in Detroit that threaten Plaintiffs' bodily integrity. As in *Milliken*, where there was an ancillary financial cost to ensuring against further unconstitutional segregation in public schools, in this case there may be ancillary and unavoidable costs for measures that will ensure against unconstitutional conditions in the City of Detroit that are conducive to the spread of disease and other threats to public health. If that means a permanent moratorium on water shutoffs, a water affordability program, and forgiveness of debts that are certain to make water unavailable, then that is fully consistent with *Ex parte Young*.

Defendant Whitmer has attempted to liken this case to a personal injury suit for damages. However, by no means can any measures proposed by Plaintiffs be regarded as "compensation" for past acts. That includes the forgiveness of debts. Debt forgiveness, which would be an integral part of the comprehensive water affordability plan Plaintiffs seek here, only reflects a recognition of the fact that

license to terminate water service for unpaid bills guarantees the loss of access to water for those customers trapped in chronic poverty and who will never have sufficient resources to pay substantial arrearages. If the practice of shutoffs is not to be abandoned in its entirety, forgiveness of debts, that would otherwise trigger shutoffs, is a necessary and unavoidable measure. Even Defendant Whitmer strongly implies, if not outright admits, that water shutoffs will resume, stating that "no Plaintiff or purported class member will have their water shut off for non-payment until at least January 1, 2021[.]" Def's Br. at 13. The primary focus of Plaintiffs' claim against the Governor is what will happen to the Plaintiff class after December 31, 2020, and the relief Plaintiffs' are seeking is aimed at preventing water shutoffs after that date. A case cannot be more prospective in its focus.

Deliberately maintaining practices that create epidemics and mass health problems is a constitutional violation that must be corrected even if there are ancillary costs. Any costs of remedies proposed by Plaintiffs are appropriate and are not barred by the Eleventh Amendment.

II. PLAINTIFFS' SUBSTANTIVE DUE PROCESS CLAIM AGAINST DEFENDANT WHITMER IS SUFFICIENTLY PLEADED

A. Plaintiffs Challenge Defendant Whitmer's Violation of Their Right to Bodily Integrity

At issue in this case is Plaintiffs' right to preserve their bodily integrity. The courts have described this right as "encompass[ing] freedom from bodily restraint

and punishment." *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977). "[T]his right is fundamental where 'the magnitude of the liberty deprivation that the abuse inflicts upon the victim strips the very essence of personhood.'" *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998) (citation references omitted).

The right is implicated when an individual faces a "'substantial risk of bodily harm . . . from a perceived likely threat.'" *Love v. Johnson*, 146 F. Supp. 3d 848, 854 (E.D. Mich. 2015) (quoting *Kallstrom*, 136 F.3d at 1064). As this Court recognized in *Love*, "there is a long line of cases dating back to the nineteenth century recognizing that 'individuals have a constitutional right to avoid the kind of physical invasions or abuse that 'strip the very essence of personhood.'" *Id.*

Bodily integrity can be violated in different ways. For example, in *Love*, this Court found that Michigan's policy requiring transgender individuals to carry identification that did not comport with their gender identity placed them at risk of bodily harm, even though no actual physical intrusion by the state was at issue. *Id.* In reaching this conclusion, the court noted the plaintiffs' allegations "cut at 'the very essence of personhood' protected under the substantive component of the Due Process Clause," including general statistics regarding the high incidence of hate crimes targeting transgender individuals and the plaintiffs' firsthand experiences of harassing conduct when forced to produce identification that failed to match their

lived gender. *Id*. at 855. The case is significant in that it holds that no direct physical violation by the defendant is required in these claims.

Here, Plaintiffs have properly alleged a bodily integrity violation. Governor Whitmer's complicity with Detroit's policy of shutting off water service to thousands of residents threatens harm to Plaintiffs' "personal security and bodily integrity." The specific threat to the Plaintiffs' bodily integrity is the increased likelihood of viral or bacterial infection, i.e., the introduction of infectious germs into the body because they lack water service. This heightened risk of infection effectively strips from Plaintiffs the very essence of their personhood. Therefore, it is properly regarded as a violation of their substantive due process rights.

B. Defendant Whitmer Has the Duty to Ensure Water Service Is Provided in Detroit.

Defendant Whitmer contends that she has no duty to provide water service to Detroit residents. Def's Br. at 15. This assertion comes in the wake of, and directly conflicts with, the Governor's emergency orders requiring the reconnection of water service in Detroit and throughout Michigan, as well as her "Water Restart Plan" initiative with Detroit Mayor Duggan to provide for moratorium on shutoffs and the reconnection of all water service in Detroit prior to her executive orders. *See, e.g.*, Compl. ¶¶ 13, 75. Indeed, the Governor's executive orders expressly state that she has "broad powers and *duties* to cope with dangers to . . . the people of this state presented by a disaster or emergency," and that it is "necessary" to require the

restoration of clean water during the present crisis. Def's Br., Ex. 1 at 1; Def's Br., Ex. 6 at 2 (emphasis added).

The same statutory authority and inherent power of the Governor's office that made these actions possible are available for a permanent, long-term response to the public health threat posed by mass water shutoffs. *See* Robert F. Koets, Mich. Civil Juris. § 18; *Walsh v. City of River Rogue*, 189 N.W.2d 318, 326 (Mich. 1971) (noting that the Governor has broad emergency powers "to deal with great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger thereof, when public safety is imperiled"). Defendant Whitmer's liability rests firmly in the fact that she has also used her authority to ensure that water shutoffs remain as a standard feature of water delivery practices in Detroit, thereby deliberately creating conditions that lead to health crises for the city's poor.

C. Plaintiffs Have Adequately Alleged that Defendant Whitmer's Actions "Shock the Conscience."

Defendant Whitmer contends that she cannot be liable for violation of Plaintiffs' right to bodily integrity because her actions do not "shock the conscience" as required by *Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). She cites *Claybrook v. Birchwell*, 199 F.3d 350, 359 (6th Cir. 2000), for the proposition that her conduct must have been in "deliberate indifference" to the circumstances of the Plaintiffs for

it to be regarded as conduct that shocks the conscience. In considering this issue, attention must be given to the Supreme Court's admonition:

> Rules of due process are not, however, subject to mechanical application in unfamiliar territory. Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking.

Sacramento v. Lewis, 523 U.S. at 850.

Exceptional attention is given in Defendant Whitmer's brief to her various projects and initiatives related to water and the COVID-19 crisis. The clear purpose of the exposition is to demonstrate that because she is concerned, and has acted on that concern, she cannot be regarded as indifferent to the Plaintiff class. However, heeding the U.S. Supreme Court's cautionary note requires that her actions be considered in context. In the same way that "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another," the converse may also be true.

Defendant Whitmer's supposed noble acts occurred in the wake of a series of unsuccessful efforts to persuade her administration to address the threat of disease presented by mass water shutoffs. For example, in July 2019, advocates petitioned the director of MDHHS to declare a public health emergency in Detroit because of the water shutoffs. Compl., Ex. 2. The petition was denied because of his conclusion

that there is "no causal association between shutoffs and water-borne diseases"—a proposition that directly contradicts generally accepted science. *Id.* at Ex. 3.

Advocates appealed to Defendant Whitmer with hopes she would overrule the MDHHS director. However, on February 21, 2020, her lawyer advised: "As to your request for the governor to issue a moratorium on water shutoffs, she does not have that power because there is insufficient data to support the use of emergency powers in this instance."[2] This response was provided just weeks before COVID-19 became a matter of serious national and statewide concern.

On March 9, 2020, Defendant Whitmer, along with Defendant Duggan, announced the "Water Restart" program as a direct response to the imminent COVID-19 pandemic. It involved a moratorium on water shutoffs and immediate reconnection of water service for those who had lost water service in the past. But, as stated above, Plaintiffs' Complaint alleges that some families in Detroit still lack water service, Compl. ¶¶ 16, 237, and DWSD's reports to the State seem to indicate the same.

This seemingly benign sequence of events has quite alarming implications upon reflection. A blunt assessment of that history is that Defendant Whitmer and

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[2] Compl. ¶ 73, citing Christine Ferretti, *State: 'Insufficient' Data to Support Ban on Water Shutoffs in Detroit*, Detroit News (Feb. 26, 2020), https://www.detroitnews.com/story/news/local/detroit-city/2020/02/26/state-insufficient-data-support-moratorium-detroit-shutoffs/4881623002/.

her administration purposely and flagrantly ignored well-established science when the only people whose health appeared to be at risk from mass water shutoffs were those who were poor and Black in Detroit. A little more than two weeks after her emphatic affirmation of the somewhat ludicrous suggestion that there is no connection between water shutoffs and disease, Defendant Whitmer commenced a series of extraordinary measures to make water available. This occurred only after it became undeniably clear that the coronavirus was a serious threat that, if unchecked in Detroit, would become a statewide crisis. To put an exclamation point on these actions, Defendant Whitmer has made it clear that after the threat of COVID-19 passes, she has no plans to continue to protect those who are poor and Black from further water shutoffs and the consequent diseases which are more likely to be contained in their communities. By any standard this is deliberate disregard of the plight of the Plaintiff class.

III. PLAINTIFFS HAVE PROPERLY ALLEGED THAT DEFENDANT WHITMER'S ACTIONS ARE A STATE-CREATED DANGER.

Defendant Whitmer relies on *DeShaney v. Winnebago County Dep't of Soc. Servs*., 489 U.S. 189, 195 (1989), to challenge Plaintiffs' substantive due process claim. That case holds that the state cannot be liable for a due process violation if it fails to protect victims from the actions of a third party. The case does include an exception: "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume

some responsibility for his safety and general well-being." *Id.* at 199-200. The Sixth Circuit established a second exception:

> Under our exception: When the State 'cause[s] or greatly increase[s] the risk of harm to its citizens . . . through its own affirmative acts,' it has established a 'special danger' and a corresponding duty to protect its citizens from that risk. *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998). An individual wishing to bring a claim under this second exception, what has come to be known as a 'state-created danger' claim, must show three things: "'(1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the plaintiff.'" *Jones v. Reynolds*, 438 F.3d 685, 690 (6th Cir. 2006) (quoting *Cartwright v. City of Marine City*, 336 F.3d 487, 493 (6th Cir. 2003)).

Koulta v. Merciez, 477 F.3d 442, 445 (6th Cir. 2007)

As previously noted, Defendant Whitmer occupies a unique position in Michigan government. The Emergency Management Act gives her statutory authority to declare a public emergency. She also has a corresponding duty to address those emergencies, using government machinery if necessary.

Prior to the outbreak of COVID-19, Defendant Whitmer was provided with ample evidence of the dangers of mass water shutoffs and the direct connection between disease and the unavailability of water in Detroit. She was asked to declare a public health emergency and a moratorium on water shutoffs. She declined.

It is now apparent that within days after that decision when she came to the realization that more than a discrete group of Michigan residents would be impacted by the coronavirus, she chose to affirmatively act pursuant to her statutory authority and obligations to respond to emergencies. That response, which included a moratorium on shutoffs and reconnection of disconnected water service, was carefully crafted to last only as long as the COVID-19 threat, and to leave the way clear for the resumption of water shutoffs and their consequent threat to public health. That looming public health emergency—a state-created danger—is what this lawsuit seeks to enjoin.

In considering the Sixth Circuit's state-created danger requirements, it is clear that Defendant Whitmer performed an affirmative act harmful to Plaintiffs by purposely designing an emergency response that is certain to leave them vulnerable to diseases after the dangers of COVID-19 no longer threaten those outside of their group. Given Defendant Whitmer's deliberate disregard of Plaintiffs' plight before the coronavirus pandemic, there is every reason to believe she will do nothing to protect them after the pandemic is contained.

The Plaintiff class, which is comprised of Detroiters who are water insecure because of chronic poverty, is a group uniquely impacted by Defendant Whitmer's actions. Those not in that group often take water for granted as an accessible necessity of life. Furthermore, Defendant Whitmer increased or created a danger for

Plaintiffs they would not otherwise face because she crafted a response to their plight that is unique. By virtue of her statutory duty and authority to address public emergencies, she would not knowingly cause for any other group vulnerability to such a danger – in this case the state-created danger posed by no access to water.

Finally, Defendant Whitmer knows that her actions leave the Plaintiff class vulnerable to disease because she explicitly stated in her emergency orders that handwashing is essential to the prevention of disease. That obviously cannot occur if Plaintiffs are deprived of water. For these and other reasons, Defendant Whitmer is responsible for a state-created danger that must be permanently enjoined.

CONCLUSION

Plaintiffs respectfully request that this Court deny Defendant Whitmer's Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

Dated: August 27, 2020

Respectfully submitted,

By: /s/ Mark P. Fancher

Mark P. Fancher (P56223)
Daniel S. Korobkin (P72842)
Bonsitu Kitaba-Gaviglio (P78822)
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
2966 Woodward Avenue
Detroit, Michigan 48201
Tel.: (313) 578-6800
mfancher@aclumich.org
dkorobkin@aclumich.org
bkitaba@aclumich.org

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
Coty Montag
Jason Bailey
700 14th Street NW, Suite 600
Washington, DC 20005
Tel.: (202) 682-1300
cmontag@naacpldf.org
jbailey@naacpldf.org

Monique Lin-Luse
40 Rector Street, 5th Floor
New York, New York 10006
Tel.: (212) 965-2200
mlinluse@naacpldf.org

EDWARDS & JENNINGS, P.C.
Alice B. Jennings (P29064)
Cadillac Tower Building
65 Cadillac Square, Suite 2710
Detroit, Michigan 48226
Tel.: (313) 961-5000
ajennings@edwardsjennings.com

MICHIGAN POVERTY LAW PROGRAM
Lorray S. C. Brown (P60753)
15 South Washington Street, Suite 202
Ypsilanti, Michigan 48197
Tel.: (734) 998-6100 ext. 613
Fax.: (734) 998-9125
lorrayb@mplp.org

THORNBLADH LEGAL GROUP PLLC
Kurt Thornbladh (P25858)
7301 Schaefer
Dearborn, Michigan 48126
Tel: (313) 943-2678
kthornbladh@gmail.com

MELISSA Z. EL, P.C.
Melissa Z. El Johnson (P29865)
500 Griswold Suite 2410
Detroit, Michigan 48226
Tel.: (313) 963-1049
Fax: (313) 963-3342
eljohnsonlaw@gmail.com

Attorneys for Plaintiffs and the Putative Classes

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2020, I electronically filed this document and its attachments with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

/s/ Mark P. Fancher
Mark P. Fancher (P56223)