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

BEATRICE BOLER et al., *Plaintiffs*, v. DARNELL EARLEY et al., *Defendants*.	C.A. No. 5:16-cv-10323 JURY DEMAND JUDGE O'MEARA

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AGAINST DEFENDANT CITY OF FLINT

Pursuant to Fed.R.Civ.P. 65, and for all the reasons set forth in the accompanying memorandum, Plaintiffs and the putative class move this Court to enter a preliminary injunction Defendant City of Flint (hereinafter "City") to cease billing for water, and to cease any and all collection efforts (including any shut-offs). To date, despite the uncontestable fact that Flint water has been undrinkable and unuseable since April 25, 2014, the City continues to send bills to Plaintiffs and the putative class and engage in collection efforts designed to coerce representative plaintiffs. As set forth in further detail in the memorandum, only an immediate cessation to billing and collecting ordered by the Court will halt the ongoing deprivation of the Flint payors' Constitutional rights, which, by operation of law, cause irreparable harm.

A proposed Order is attached. Defendant City does not concur with the requested relief. Plaintiffs respectfully request an evidentiary hearing. Fed.R.Civ.P. 65(a)(2).

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PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION AGAINST DEFENDANT CITY OF FLINT

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Plaintiffs and the putative class (hereinafter "Flint payors") request that this Court to enter a preliminary injunction, pursuant to Federal Rule of Civil Procedure 65, against Defendant City of Flint (hereinafter "City"), directing it to cease billing for water, and to cease any and all collection efforts (including any shut-offs). The City's use and distribution of water contaminated with lead and bacteria rather than safe water fit for human consumption caused nothing short of a public health disaster for its residents. The City has continued to bill Flint payors for the contaminated water and engaged in collection efforts designed to coerce Flint payors, including the representative plaintiffs, into paying their water bills despite the uncontestable fact that Flint water has been undrinkable and unuseable since April 25, 2014 and will remain so for the foreseeable future.

An immediate cessation to billing and collecting ordered by the Court will halt the ongoing deprivation of the Flint payors' Constitutional rights. By operation of law, these deprivations cause irreparable harm. *American Civil Liberties Union of Kentucky v. McCreary County Kentucky*, 354 F.3d 438, 445 (6th Cir. 2003) aff'd sub nom. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005). The Flint payors respectfully request an evidentiary hearing. Fed.R.Civ.P. 65(a)(2).

STATEMENT OF FACTS

1. On April 25, 2014, defendants switched the City of Flint's water source away from Detroit Water and Sewer Department ("Detroit Water"), which had safely provided Flint with treated clean water for more than fifty years, to the toxic Flint River, without being compelled by any rational government purpose, and without providing proper water treatment. Defendants repeatedly and falsely assured and reassured Flint residents that the water was safe, and encouraged them to continue consuming contaminated water even though from the beginning, Flint water was, and is, contaminated and unsafe for human use.

2. Before April 25, 2014, Flint residents received safe and fit drinking water in exchange for paying their water bills. *See* City of Flint Ordinance §46-16 (b) (water service deemed the sale of commodity). The City purchased this water from Detroit Water, which obtained it from Lake Huron and properly treated it to ensure its potability. *See Exhibit 1* at 1 (treatment of Detroit water included "optimum corrosion control [by] using phosphoric acid.") The City also operated a small water treatment plant to treat to water from the Flint River, which was used as a back-up water supply. *See Exhibit 2 at 14.*

3. In 2009, despite the demonstrable lack of any problems with Detroit water, the City began to work with three neighboring counties to create a new water authority that would draw water from Lake Huron via a new pipeline. The

City-retained engineers issued a report in September 2009 that set forth an approach to creating a new water authority (called Karegnondi Water Authority or KWA) that would draw and treat water from Lake Huron. The report assumed "a single water treatment plan, centrally located amongst the four communities" would be responsible for the water treatment. *See Exhibit 2 at Appendix 10-4.* The report noted that any alternative water supply had to be evaluated not only on cost, but also on quality. *See Exhibit 2.* Although the report noted the City had a water treatment plant, it concluded that the plant would have to be substantially upgraded before it could be used as the place for treatment of all the water. Specifically, the plant needed "disinfection upgrades, chemical feed systems, finished water pumping" and "updated controls and monitoring," among other things. *See Exhibit 2 at 14.*

4. The City had no rational reason to stop using Detroit water. Costs were not the issue, as Detroit Water offered myriad ways to keep costs lower than the available alternatives. *See Exhibit 3* (Detroit presenting "worthwhile operational and cost-saving options that would have been mutually beneficial to all parties.") Nor did the KWA alternative provide greater water redundancy and thus greater water security. *See Exhibit 4 at 19* (KWA pipeline plan "offers less redundancy to Flint than the current DWSD system.") The evidence suggests the

City wanted to switch to KWA for "autonomy" and because it did not want to be held hostage to Detroit's rate-setting power. *See Exhibit 4 at 20.*

5. Even assuming for the sake of argument that the City had a rational reason to move to KWA, the City failed to wait until the completion of the KWA pipeline to sever the relationship with Detroit Water, and instead prematurely opted to switch to using the Flint River as the exclusive source of water to fulfill its contracts with the Flint residents. On April 25, 2014, two years before the anticipated completion of the KWA pipeline, the City announced that "[t]oday the valve to the pipeline from Detroit was closed and the Flint River officially became Flint's water supply." *See Exhibit 5.*

6. The City knew that the Flint River was a poor source of water because it had been severely polluted for many years. *See Exhibit 5.* The City was well aware of the serious public health risks associated with use of the Flint River water. In 2011, for example, the City commissioned two private engineering companies to perform an "Analysis of the Flint River as a Permanent Water Supply." *Exhibit 17.* This study concluded that over $61,000,000 in capital expenditures were needed to "produce finished water in conformance with the current federal and state drinking water regulations." Not only did the Flint water treatment facility need major structural overhauls, the water needed to be treated for microbial contaminants as well as for its corrosive properties and expected

elevated levels of trihaomethanes. *Id.* These necessary improvements were so extensive that the report concluded the "total time to proceed to project completion" would be "*52 to 60 months*." *Id.*

7. No evidence exists that the City implemented the recommended safety measures prior to switching water supplies. In fact, four years later, the City commissioned additional water quality studies that also recommend water disinfection, softening, trihalomethane-reduction measures strikingly similar to those recommended in 2011. *Exhibit 18.*

8. Additionally, at the time of the water switch, the City obliquely admitted to "lingering uncertainty about the quality of the water." *See Exhibit 5 at 2.* Yet the City forged ahead, falsely claiming "it was both sensible and safe for us to use our own water as a primary water source in Flint." *See Exhibit 5 at 4.* The City's Director of the Department of Public Works falsely stated, "[t]he test results have shown that our water is not only safe, but of the high quality that Flint customers have come to expect." *See Exhibit 5 at 2.* The City said that it used the Flint River "for residential water on a few different occasions, with the most recent temporary switchover happening in 2009, and falsely claimed that each temporary stint on local water proved three things to city employees and residents alike: That a transition to local river water could be done seamlessly, and that it was both sensible and safe for us to use our own water as a primary water source in Flint."

See Exhibit 5 at 4. In fact, the City had only used Flint River as an emergency back up in 2009 once for *two days* and another time for *three days*. *See Exhibit 6 at 3.* Discrete emergency use for five total days in 2009 with the primary water supply coming from the Detroit Water did not establish the Flint River as a safe water supply.

9. Soon after the City began to use Flint River water, it became evident that the water was not safe for human use and consumption. August and September 2014 water quality tests detected hazardous *coliform and E Coli* bacteria in the water supply. *See Exhibit 6 at 3.* December 2014 water tests identified high levels of total trihalomethanes ("TTHM), which is also hazardous to humans. *See Exhibit 7 at 5.*

10. Then, in February 2015, water testing prompted by a Flint resident found high levels of lead. *See Exhibit 8.* This Flint resident notified the United States Environmental Protection Agency (EPA) Region 5 on February 25, 2015, and tests revealed that her children had indeed been lead-poisoned. To hide the truth, Defendants Michigan DEQ and the City falsely told EPA that the high lead levels in this resident's water came from the pipes in the house and not from the switch to the Flint River water supply. In fact, her internal plumbing was all NSF approved CPVC pipe that is certified safe for drinking water use. *See Exhibit 8 at 3.* Despite having knowledge of the alarming test results and the deleterious

effects of the water on consumers including children, the City failed to take action. Instead, it continued to supply Flint residents with toxic water, and wrongfully billed and collected for it. *Exhibit 12.*

11. Eventually, on April 24, 2015, DEQ admitted to EPA that the City had itself caused the water supply to become lead contaminated. Specifically, DEQ admitted to EPA that the City used ferric chloride as a coagulant for the Flint River water without also implementing proper corrosion treatment. This caused the leaded pipes to corrode and leach lead into the water being supplied to Flint residents under contract. *See Exhibit 9 at 4.* As EPA's Ground Water expert explains, "[i]n the absence of any corrosion control treatment, lead levels in drinking water can be expected to increase." *See Exhibit 8 at 2.* Even after the EPA brought to light that the Flint River water was not safe for human consumption, the City did nothing to address this urgent public health concern. The City continued to downplay the serious health risks, noting "some attention has shifted to lead and copper concerns" but "recent internal testing numbers still show approximately 2-3 out of 100 with high levels, and "lead and copper issues trace back to household plumbing and service lines nationally." *See Exhibit 10 at 1*.

12. The City kept advising Flint residents to "pre-flush" their taps prior to collection of test samples even though the EPA had expressly advised against pre-

flushing because it "could provide a false sense of security to the residents of Flint regarding lead levels in their water and may result in residents not taking necessary precautions to protect their families from lead in the drinking water." *See Exhibit 8 at 2*.

13. The City and the other defendants were on notice that shifting to use of the Flint River for water was dangerous. For more than a decade, water treatment facilities across the nation have known minor changes in the treatment of drinking water can impact the amount of lead corrosion occurring in lead pipes. As explained in an article disseminated by the American Water Works Association in 2011, "lead corrosion is sometimes severely affected by seemingly innocuous changes in drinking water treatment, and in a few cases, has been linked to elevated blood lead levels in children." *See Exhibit 11 at 81*. When water flowing through lead pipes is treated properly, a concentration of sulfate develops on the pipe, which serves to form a precipitate that protects the lead surface of the leaded pipe from any agitation. *Exhibit 11 at 82*. However, if the water treatment varies, and the amount of chloride-to-sulfate mass ratio (termed "CSMR" in the industry) increases, the corrosiveness of the water increases and disturbs the precipitate protecting the water from the lead. *Exhibit 11 at 83.*

14. The City and the other defendants attempted to minimize and discredit those who identified an increased level of lead poisoning in the children of Flint.

For example, defendant MDHHS attempted to discredit the data on lead poisoning collected by the Hurley hospital physician, and suggested as a remedy that "SNAP beneficiaries are able to purchase bottled water with their SNAP funds." *See Exhibit 12 at 2.* Defendants also tried to minimize the seriousness of lead poisoning, stating to one mother of a child poisoned by the water: "[h]e is barely lead poisoned. If CDC had not changed their lead poisoning standard from 10 down to 5, we would not be having this conversation. I am working with kids in their 40's and 50's. It is just a few IQ points…it is not the end of the world." *See Exhibit 13.*

15. The City and Defendant Dayne Walling issued a lead advisory on September 25, 2015 that misled residents, including Plaintiffs, into believing that the water was safe to use. The advisory claimed that the "City is in full compliance with the Federal Safe Drinking Water Act" and that the water was safe to use after running cold water for five minutes. This advisory advocated using the contaminated water for "making baby formula." *See Exhibit 14.*

16. Throughout this public health disaster – up to and including the present – the City constantly billed Flint households and businesses for the contaminated water, and engaged in collection efforts designed to coerce them into paying for the contaminated water, such as disconnecting water service and asserting liens against their real property. *See Exhibit 15.* EPA continues to advise

that the Flint water is not safe to drink. *See Exhibit 16*. As of February 18, 2016, according to the EPA team leader Diane Russell assigned to the crisis, there is no predictable ending date for the "do not drink" advisory.

17. Although defendants Snyder and the State of Michigan have proposed legislation addressing the City's past billing, the proposed legislation does not stop the City from continuing to bill and collect for toxic water. Nor does it return the funds wrongfully charged to the Flint payors.

ARGUMENT

The Flint payors seek a preliminary injunction against the City because it is continuing to bill Flint payors for contaminated water, and collecting or attempting to collect amounts owed on past water bills. These ongoing violations need to be halted immediately. Fed.R.Civ.P. 65 empowers this Court to grant a preliminary injunction because the Flint payors satisfy the four criteria for injunction: (1) a strong likelihood of success on the merits of the Constitutional claims; (2) irreparable injury (namely, deprivation of Constitutional rights) without the issuance of the injunction; (3) lack of substantial harm to others if the injunction issues; and (4) the public interest would be served by the issuance of an injunction. *See* Fed.R.Civ.P. 65; *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008); *Overstreet v. Lexington Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002); *Certified Restoration Dry Cleaning*

Network, L.L.C. v. Tenke Corp., 511 F.3d 535, 542 (6th Cir. 2002); *Obama for American, et al. v. Jon Husted, et al.*, 697 F.3d 423 (6th Cir. 2012); *Jolivette v. Husted et al.*, 694 F.3d 760 (6th Cir. 2012); *Winnett v. Caterpillar, Inc.*, 609 F.3d 404, 408 (6th Cir.2010); *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 689-90 (6th Cir. 2014).

I. THE FLINT PAYORS LIKELY WILL SUCCEED ON THE MERITS OF THEIR CONSTITUTIONAL CLAIMS.

Plaintiffs' lawsuit sounds under 42 U.S.C. Section 1983, which imposes liability on a person acting under color of state law who deprives another of the "right, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. §1983. *See also Baker v. McCollan*, 443 U.S. 1437, 140, 99 S.Ct. 2689, 2692-93, 61 L.Ed.2d 443 (1970). Here, the City substantially impaired the Flint payors' Constitutionally-protected right to contract by substituting poisonous water for safe water, and billing for such poison. *See* Statement of Facts at ¶¶ 1-15. Such misconduct violates the Article I, section ten of the United States Constitution ("Contract Clause"). *Welch v. Brown*, 935 F. Supp. 2d 875, 881 (E.D. Mich. 2013). This same course of conduct by the City also violates plaintiffs' rights to substantive and procedural due process, as well as the right to be free from a danger created by the State. *See Kallstrom v. City of Columbus*, 136 F.3d 1055, 1060 (6th Cir. 1998)(state created danger). Having created this danger, the City has a duty to alleviate the danger. Instead, the City continues to abuse its

governmental status by persisting in water billing and revenue collection efforts from Plaintiffs. Such conduct rises to the level of an unconstitutional taking. Finally, the City's conduct resulted in Flint payors being treated differently, and to their distinct disadvantage than the Michigan public without any reasoned basis. Such differences in treatment violate the Flint payors' right to equal protection under the law.

A. Constitutional Right To Contract (Count I)

The City is substantially impairing plaintiffs' Constitutional right to contract for clean water fit for use and consumption. The Contracts Clause circumscribes any government's ability to "impair[] the Obligation of Contracts. . . ." U.S. Const. art. I, § 10, cl. 1. This Clause has been read to prohibit government acts that result in retroactive impairment of an existing contract against its citizens such as Plaintiffs. *See Ogden v. Saunders*, 25 U.S. 213 (1827). Not every contractual impairment rises to the level of a Constitutional deprivation. Rather, the impairment caused by the government action is balanced against any "legitimate public purpose" served by government action. *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 22 (1977); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, n.15 (1978).

Once the Contracts Clause is implicated, however, "a court must look to determine whether a particular law 'operated as a substantial impairment of a

contractual relationship.'" *Welch v. Brown*, 935 F. Supp. 2d 875, 881 (E.D. Mich. 2013), *quoting Energy Reserves Group, Inc. v. Kansas Power & Light*, 459 U.S. 400, 411 (1983). As the District Court in *Welch* explained, "[i]f a court determines that a substantial impairment exists, the burden shifts to the state to provide a significant and legitimate public purpose for the regulation." *Id*. at 881 (internal citations omitted). Further, "the severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected." *Id*. at 881.

Here, the Flint payors are able to prove that the City unilaterally abrogated their right to contract for safe water. Statement of Facts ¶ 2. The City impaired – indeed destroyed – the value of the contract for water by providing poison rather than safe water. Statement of Facts ¶¶ 3-11. The City cannot carry the burden of proving that it has a rational public purpose in providing contaminated water, and attempting to mislead Flint residents into drinking it. Statement of Facts ¶¶ 3-15. The decision to change its water source prior to the completion of the KWA pipeline was not a valid exercise of any police power, as no legitimate purpose was served. Statement of Facts at ¶¶ 3-5. Indeed, changing the water supply to the clearly polluted Flint River endangered, not improved, the health of the City residents. Statement of Facts at ¶¶ 6-11. As in *United States Trust Company*, Flint did not exercise any valid municipal public power in causing the public health catastrophe. *United States Trust Company of New York v. New Jersey*, 431 U.S. 1,

22 (1977). *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908) (clean water flow is "one of the great foundations of public welfare and health.") Accordingly, the Flint payors maintain a strong likelihood of success as to Count I because the City substantially impaired the existing contract, and cannot meet the increased burden of justifying this impairment.

B. Constitutional Right To Due Process (Count II)

The City has violated the Flint payors' rights to procedural and substantive due process under the Due Process Clause of the Fourteenth Amendment to the United State Constitution. That Clause states, "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. As the Supreme Court has explained, "[t]he touchstone of due process is the protection of the individual against arbitrary action of government, 'whether the fault lies in the denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification. …" *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), quoting *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 41 L.Ed. 2d 935 (1974).

i. Procedural Due Process

The Flint payors are able to prove the three elements required to demonstrate a procedural violation: (1) a life, liberty, or property interest, (2) that the City deprived them of, (3) without affording them adequate procedural rights before the

deprivation. *Wedgewood Limited Partnership I v. Township Of Liberty, Ohio*, 610 F.3d 340, 352 (6th Cir. 2010).

Flint payors have a Constitutionally-protected property interest in safe water fit for human use. *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908) (clean water flow is "one of the great foundations of public welfare and health."). *See also* Flint Ordinances § 46-16(b) enshrining water as a commodity. *See also Wedgewood Limited Partnership I,*, 610 F.3d at 352(holding that state law may create Constitutionally-protected property interests). Flint payors also have a "life" interest in not being sold contaminated water. The Safe Drinking Water Act reinforces this notion by explicitly stating it is "[a]n act to protect the public health." Mich. Comp. Laws Ann. § Ch. 325.

Flint payors were deprived of these property and life interests without any process whatsoever. Statement of Facts at ¶¶ 1-15. "An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Board of Education. v. Loudermill*, 470 U.S. 532, 542 (1985). "[T]he root requirement of the Due Process Clause [is] that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Id*. In *Wedgewood Limited Partnership I*, the Sixth Circuit found that a municipality's failure to "provide adequate notice and an opportunity to present [Plaintiffs'] objections"

violated procedural due process. *See Wedgewood Limited Partnership*, 610 F.3d at 355. *See also Cleveland Board of Education. v. Loudermill*, 470 U.S. 532.

Here, the City never provided the Flint payors any procedure by which they could contest receiving and paying for contaminated water. In fact, the City concentrated its efforts on misleading Flint payors into believing the water they were purchasing was safe and useable, further obfuscating the City's own failures to provide any mechanism by which the payors could seek remedy for such failures. Statement of Facts at ¶¶ 12-13. Such misconduct clearly violates the Flint payors' procedural Due Process rights.

ii. Substantive Due Process

Substantive due process is "[t]he doctrine that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed." *Range v. Douglas*, 763 F.3d 573, 588 (6th Cir. 2014). Substantive due process applies to deprivations of interests "enumerated in the Constitution, those so rooted in the traditions of the people as to be ranked fundamental, and the interest in freedom from government actions that 'shock the conscience.'" *Id*. (Internal citations omitted).

Given that the Contract Clause is "enumerated in the Constitution," the City's misconduct in billing for contaminated water violated the Flint payors' substantive due process interests. The City's continued efforts to bill for and

collect revenue from the Flint payors in exchange for providing poison water also contravenes substantive due process rights "rooted in the traditions of the people." *Range v. Douglas*, 763 F.3d at 588. Indeed, "appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful respect for the teachings of history (and), solid recognition of the basic values that underlie our society." *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977).

The right to clean water is an American value reflected in our federal and state laws. For example, Federal Water Pollution Control Act ("the Clean Water Act"), passed in in 1948, and amended in 1972, 1977, and 1987, reflects the importance in providing citizens, including plaintiffs, drinkable water. *See* 33 U.S.C § 1251. *See also* 40 C.F.R. §§ 104.1. Michigan's statutory scheme reinforces these same values. *See* Mich. Comp. Laws Ann. §§ 325.1001 (Safe Drinking Water Act) and Mich. Admin. Code R. 323.2201 (Ground Water Quality).

The right to substantive due process also protects citizens from governmental actions that shock the conscience. There are "several considerations that bear on the question of whether deliberate indifference amounts to conscience-shocking behavior: 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 governmental purpose."

Range v. Douglas, 763 F.3d 573, 590 (6th Cir. 2014). Here, all factors weigh in favor of a finding that the City's misconduct rises to the level of "shocking the conscience." The Flint payors did not have a voluntary relationship, but were forced to rely on whatever water the City provided as their water source. Statement of Facts at ¶¶ 1-2. Second, the City has had plenty of time – more than 18 months – to stop billing and reimburse the Flint payors for having received contaminated water instead of safe water fit for human use. Statement of Facts at ¶¶ 2-15. Third, the City had no plausible purpose to switch to use of the contaminated Flint River as a water source as it awaited completion of the KWA pipeline. Statement of Facts at ¶¶ 3 -13. Indeed, the City knew or should have known that water from the Flint River was more corrosive to lead pipes, and therefore hazardous. Statement of Facts at ¶ 6. Nothing justifies Flint's efforts to mislead the Flint residents into using the contaminated water. Statement of Facts at ¶¶ 7-14.

The City's conduct is far more egregious than the governmental misconduct criticized in *Rochin v. California*, 342 U.S. 165 (1952). There, the Supreme Court reviewed whether Plaintiff's substantive due process rights were violated when officers directed a physician to pump a person's stomach after witnessing the person swallow drugs while investigating narcotics activity. *See Rochin v. California*, 342 U.S. 165, 166 (1952). The Court, reversing the lower court

decision, held that such government action shocked the conscience even though government actors were purportedly acting with some rational basis – namely, they witnessed the suspect swallow the drugs. *See id*. at 172. The officers also had very little time to reflect given that the swallowing of the drugs and the decision to pump the defendant's stomach occurred within the same day. *Id*. Nonetheless, despite some rational basis for the government action on the facts in *Rochin*, Plaintiff's substantive due process rights prevailed.

Here the City's shocking misconduct amounts to an even more egregious substantive due process violation than in *Rochin* because it was done for no legitimate reason. The City's misconduct further reflects its protracted and unremitting disregard for health, and welfare, and absolutely no regard for the Flint payors' right to contract for safe water. Thus, there is a strong likelihood the Flint payors will succeed at trial on Count Two of the Complaint.

C. Constitutional Right To Be Free from State-Created Danger (Count III)

The City's misconduct also violates plaintiffs' Constitutional right to be free from a danger created by the State. As the Sixth Circuit has explained in *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1065 (6th Cir. 1998), "while the state generally does not shoulder an affirmative duty to protect its citizens from private acts of violence, it may not cause or greatly increase the risk of harm to its citizens without due process of law through its own affirmative acts." *Kallstrom v.*

City of Columbus, 136 F.3d at 1065; *See also DeShaney v. Winnebago Country Dep't of Social Serv.*, 489 U.S. 189, 195, 109 S.Ct. 998, 1002-03, 103 L.Ed.2d 249 (1989).

To bring a "state created danger" claim, Plaintiffs must demonstrate (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. *See Cartwright v. City of Marine City*, 336 F.3d 487, 493 (6th Cir.2003)

The Flint payors can prove the necessary facts to establish the three elements of this cause of action. *See generally Kallstrom* 136 F.3d at 1066; *McQueen v. Beecher Community Schools*, 433 F.3d 460, 467-8 (6th Cir. 2006); *Cartwright v. City of Marine City*, 336 F.3d 487, 493 (6th Cir. 2003); *Jones v. Reynolds*, 438 F.3d 685 (6th Cir. 2006). *First*, the City's affirmative acts undoubtedly created or increased the danger to Plaintiffs. Statement of Facts at ¶¶ 1-13. *Second*, the City placed the victims specifically at risk because only Flint payors, not all Michigan residents, were stripped of their rights to contract for and receive safe water. They were the only citizens who received contaminated water despite the City knowing the dangers this created. Statement of Facts at ¶¶ 1-3. *Third*, the City knew or

should have known that its actions placed anyone consuming the water in serious danger. This is made plain by the scores of Flint payors who suffered when exposed to Flint water. Statement of Facts at ¶¶ 7-13. In sum, the Flint payors are likely to succeed at trial on establishing the City's violation of their Constitutional rights to be free from a State-created danger.

D. Constitutional Right To Equal Protection (Count IV)

"The Equal Protection Clause prohibits discrimination by government which … intentionally treats one differently than others similarly situated without any rational basis for the difference." *Loesel v. City of Frankenmuth*, 692 F.3d 452, 461 (6th Cir. 2012) (internal citations omitted). Here, the disparate impact on the Flint payors arose because the City treated them differently than the Michigan public. The City is providing and billing for contaminated water only within Flint, not elsewhere in Michigan or the United States. Statement of Facts at ¶¶ 2-4, 12-14. The City acted without any rational basis when it severed its relationship with Detroit Water, and began to use the polluted Flint River. Statement of Facts at ¶¶ 1-13. Such disparate treatment of the Flint payors violated their Constitutional right to equal protection. Accordingly, plaintiffs will, in all likelihood, prevail on Count Four of the Complaint.

E. Constitutional Right To Be Free from Government Impairment of Property Interest (Count V)

Finally, the City's course of misconduct constitutes an unconstitutional impairment of a property interest. "Governmental action which places a burden on an individual's property which in fairness the entire community should share constitutes a taking and the government must compensate the property owner for the loss." *Amen v. City of Dearborn*, 718 F.2d 789, 794 (6th Cir. 1983). In the context of an unconstitutional taking, "the definition of property is broad, encompassing the entire group of rights incidental to ownership. *Id*. The Supreme Court has made it clear that any government occupation of property constitutes a taking, as long as the confiscation is permanent. *See Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419 (1982). In circumstances similar to those found here, in *United States v. Causy*, 328 U.S. 256 (1948), the Court held that government action constituted an impermissible taking when it destroyed the use of the property. There, the military made regular use of airspace over a chicken farm that destroyed the owner's ability to use the land for a chicken farm. The Court reasoned that the harm to the owner was "a product of a direction invasion of [his] domain." *Id*. at 265-266.

Here, the City's actions similarly destroyed the value of water purchased by Flint payor because those actions contaminated the water with lead and bacteria. Statement of Facts at ¶¶ 1-13. Destroying the water supply amounts to an

unconstitutional taking because the City exercised its governmental power and authority, provided poison water, yet billed for and took Plaintiffs money based on the fiction that the water was clean and potable. The City acted, and continues to act, as if the water supply is not contaminated. The City has kept all the revenue generated from the Flint payors being duped into paying for poison water. The Flint payors paid for safe and useable water and they are entitled to such water under their contracts. Thus, plaintiffs are substantially likely to succeed on the merits of Count Five of the Complaint.

II. THE FLINT PAYORS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF AN INJUNCTION.

Plaintiffs' foregoing showing of a substantial likelihood of success on the merits necessarily implies a finding of irreparable injury. This is because

> "when reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is **mandated**."

American Civil Liberties Union of Kentucky v. McCreary County Kentucky, 354 F.3d 438, 445 (6th Cir. 2003) aff'd sub nom. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005) (emphasis added). When constitutional rights are impaired, "the irreparable harm factor 'merges' with the likelihood of success, such that if the plaintiff shows he is likely to succeed on the merits, he has simultaneously proven he will suffer an irreparable harm." *Legatus*

v. Sebelius, 901 F. Supp. 2d 980, 997 (E.D. Mich. 2012). The analysis is simple and cannot be plausibly controverted: under *McCreary*, the impingement of Plaintiffs' constitutional rights "mandates" a finding of irreparable harm. See *American Civil Liberties Union of Kentucky v. McCreary County Kentucky*, 354 F.3d at 445.

III. THE EQUITIES WEIGH IN FAVOR OF AN INJUNCTION WHEN CONSTITUTIONAL RIGHTS ARE BEING VIOLATED.

In circumstances involving constitutional violations such as the instant case, showing the likelihood of success on the merits "often will be the determinative factor." *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009); *see also Obama for American v. Husted*, 697 F.3d 423 (6th Cir. 2012). Given that the City is engaged in the ongoing violations of the plaintiffs' Constitutional rights, the balance of equities tips toward the issuance of an injunction. Requiring the City to conform its behavior to the Constitution cannot be considered a harm. And clearly the public interest is served by issuing an injunction that prevents further violations of the Constitutional rights of the Flint payors.

CONCLUSION

In sum, both the facts and controlling legal precedents support the Flint payors' motion for preliminary injunction. For all the reasons set forth above, the Flint payors respectfully request an evidentiary hearing, and the entry of an Order

prohibiting the City for billing and collecting for water. A proposed Order is attached.

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

BEATRICE BOLER et al., *Plaintiffs*, v. DARNELL EARLEY et al., *Defendants*.	C.A. No. 5:16-cv-10323 JURY DEMAND

[PROPOSED] ORDER

Having reviewed the Plaintiffs' motion for a preliminary injunction, and the opposition thereto, the Court hereby GRANTS the preliminary injunction and ORDERS Defendant City of Flint to:

(1) cease sending any new bills seeking payment for water, and

(2) cease any collection efforts directed towards obtaining payment for past water bills, including but not limited to shutting off water, threatening to shut off water, placing tax liens, and engaging in other collection efforts.

Nothing in this Order shall be construed to prevent the Defendant City of Flint from billing and collecting for sewage.

_____
Judge, United States District Court for the
Eastern District of Michigan

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of February, 2016 a copy of the aforegoing was served via the court's ECF filing system.

/s/ Susan L. Burke
Susan L. Burke