UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAWRENCE WASHINGTON, JR., individually and as next friend of five minor children, T.W., M.W.1, C.W., M.W.2, and L.W.; *et al.*,

Plaintiffs,

v

GOVERNOR RICHARD DALE SNYDER, in his individual capacity, *et al.*,

Defendants.

No. 5:16-cv-11247-JCO-MKM

HON. JOHN CORBETT O'MEARA

MAG. MONA K. MAJZOUB

STATE DEFENDANTS' MOTION TO DISMISS UNDER FED. R. CIV. PROC. 12(b)(1) & (6)

ORAL ARGUMENT REQUESTED

Defendants State of Michigan, Governor Rick Snyder, Dennis Muchmore, Andy Dillon, R. Kevin Clinton, Michigan Department of Environmental Quality (MDEQ), Michigan Department of Health & Human Services (MDHHS), Nick Lyon, Eden Wells, and Linda Dykema (State Defendants) move this Court to dismiss Plaintiffs' complaint

under Fed. R. Civ. P. 12(b)(1) and (6) for the reasons more fully explained in the attached brief.

Respectfully submitted,

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Dated: October 6, 2016

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   b. The State, its agencies, and its officials acting in an official capacity are entitled by the Eleventh Amendment to assert immunity from suit in federal court unless such immunity is waived or abrogated by Congress. The State has not waived immunity and Congress has not abrogated it by either § 1983 or RICO. Is the State entitled to immunity from suit on all claims brought in this case?

   c. This Court should decline supplemental jurisdiction over state claims when they raise complex issues of state-law. This suit raises complex questions regarding governmental immunity. Should this Court exercise supplemental jurisdiction?

2. Do Plaintiffs' claims fail to state a claim on which relief may be granted?

a. State officials are entitled to qualified immunity, which protects them from suit for money damages so long as they do not violate any clearly established constitutional or statutory right. Here, Plaintiffs have not identified any recognized right, let alone shown that it was violated and clearly established at the time of the violation. Are the individual State Defendants entitled to qualified immunity?

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c. The Equal Protection Clause of the 14th Amendment forbids the State from treating similarly situated persons differently without a rational basis for doing so. Plaintiffs have not alleged that the State treated similar persons differently but only that the distinct municipal governments utilized different water sources—and incorrectly compare Flint to municipalities that were not under emergency management. Have Plaintiffs failed to state a claim for a violation of Equal Protection?

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INTRODUCTION

Plaintiffs' 153-page Second Amended Complaint asserts 12 claims, including seven counts under 42 U.S.C. § 1983 (§ 1983), one count under the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1964(c), and several state tort or contract claims. But this latest attempt to repackage their allegations is not viable because this Court lacks jurisdiction and the claims fail to state a claim on which relief may be granted.

Importantly, the new complaint runs afoul of this Court's recent decision in *Boler, et al. v. Earley, et al.*, Case No. 16-cv-10323, which instructed the plaintiffs—who, like the Plaintiffs here, had as their core grievance that they were harmed by contaminated water—that their only federal claim was under the Safe Drinking Water Act (SDWA). 42 U.S.C. § 300f *et seq*. Accordingly, all of Plaintiffs' federal claims are precluded by the SDWA.

Additionally, the State and its officials are immune from suit under the Eleventh Amendment. Plaintiffs also do not plead any claim for prospective injunctive relief based on an ongoing violation of federal law, so *Ex parte Young* is inapplicable.

Plaintiffs also fail to state a claim because (1) State Defendants are entitled to qualified immunity since Plaintiffs cannot show that State Defendants violated any "clearly established" right under any of their asserted theories; (2) State Defendants are immune from Plaintiffs' state-law tort claims; (3) their civil RICO claim fails to sufficiently plead *as to each individual defendant*, does not allege *any* predicate acts for these individual Defendants, or show that the alleged enterprise lasted for a sufficient duration to establish a "pattern"; and (4) their equal-protection claim fails because other municipalities were not similarly situated since they were not under emergency management and because it is premised on the inaccurate assumption that these State Defendants had authority to order other municipalities to switch their water sources.[1] For all of these reasons, this Court should grant State Defendants' motion to dismiss.

STATEMENT OF FACTS

MDEQ's regulatory role under the SDWA

[1] Due to space limitations, State Defendants address only the most salient of their individual federal claims.

The SDWA sets national standards that must be met by drinking water suppliers, such as the City of Flint. 42 U.S.C. § 300g-1(b). States may obtain primary enforcement responsibility under the SDWA (known as "primacy") by adopting regulations that are no less stringent than the federal standards. 42 U.S.C. § 300g-2. Michigan gained primacy by enacting the Michigan Safe Drinking Water Act, Act 399 of 1976 (Act 399). The Michigan Department of Environmental Quality's (MDEQ) Office of Drinking Water and Municipal Assistance has regulatory oversight under the SDWA for all public water supplies, including approximately 1,400 community water supplies, and 10,000 non-community water supplies.

As the owner of the public water supply, Flint is responsible under the SDWA for knowing and following all Act 399's requirements, such as ensuring proper design, construction, operations, and maintenance, so that contaminants in tap water do not exceed the standards established by law. *See, e.g.,* Mich. Comp. Laws § 325.1007(1). So although Michigan has some enforcement responsibilities, the City is ultimately responsible for compliance. Mich. Comp. Laws § 325.1007(4).

In 2013, the City decided to join a new water supplier, Karegnondi Water Authority (KWA). (Second Am. Compl. ¶ 193, Pg. ID #516.) It next decided to leave the Detroit Water and Sewerage Department (DWSD) and temporarily take its water from Flint River until the KWA began operations. (*Id*., at ¶ 196, Pg. ID #516.) The switch necessitated decisions such as how to achieve compliance with the SDWA "Lead and Copper Rule" (LCR). *See* 40 C.F.R. § 141.80 *et seq.,* and Mich. Admin. Code R. 325.10410, 325.10710a–0710d, & 325.10604f. The purpose of the LCR is to protect public health by minimizing lead and copper levels in drinking water. 40 C.F.R. § 141.81; Mich. Admin. Code R. 325.10604f(d). Once a supply has "optimized," it is required to "continue to operate and maintain optimal corrosion control treatment. . . ." 40 C.F.R. § 141.81(b); Mich. Admin. Code R. 325.10604f(2)(b).

Because the Flint River was a *new* supply with chemical characteristics distinct from the water previously provided by DWSD, MDEQ believed Flint could not be required to "maintain" the previous corrosion control treatment under the LCR. Instead, MDEQ required Flint to conduct "initial monitoring" over two, six-month periods to

determine if treatment was required, and if so, to provide information to determine the required treatment consistent with the standard SDWA imposed on every other large water system in the State and enforced through Act 399, prior to achieving corrosion control optimization. 40 C.F.R. § 141.81(d); Mich. Admin. Code R. 325.10604f(2)(d).

The results of Flint's decision to switch drinking water sources

On April 25, 2014, Flint implemented the switch to the Flint River as the City's water source. (Second Am. Compl. ¶ 213, Pg. ID #520–521.) The City's residents soon began experiencing issues with the taste, smell, and odor of the water, as well as other issues. (*Id.* ¶¶ 252–253, Pg. ID #526.) In the year following the switch, the City issued boil water advisories, added activated carbon to plant filters, repaired infrastructure, and flushed system components—all in consultation with MDEQ. (*Id.* ¶ 263, Pg. ID #527–528.)

The City also conducted the required two rounds of initial sampling to determine lead levels. 40 C.F.R. § 141.81(d); Mich. Admin. Code R. 325.10604f(2)(d). These sample results submitted by the City did not exceed the LCR's ninetieth percentile action level of 0.015 mg/L for lead. But MDEQ advised Flint on August 17, 2015 that the City

needed to implement corrosion control treatment measures as lead levels had risen since switching to the Flint River. Although the LCR allows a water supply to perform a corrosion control study to determine the appropriate treatment prior to implementation, 40 C.F.R. § 141.81(d); Mich. Admin. Code R. 325.10604f(3)(c), MDEQ advised Flint to forego the study and accelerate the schedule to begin treatment. (*Id.*)

MDHHS monitored blood lead levels in Flint

While the Michigan Department of Health and Human Services (MDHHS) (formerly Department of Community Health, *see* Ex. 1, Executive Order) has no regulatory authority over lead levels in water, it does have responsibility to monitor blood lead levels in Michigan's children. Mich. Comp. Laws §§ 333.567a and 333.547c. In addition, if MDHHS's Director is not a physician, "the director shall designate a physician as chief medical executive for the department." Mich. Comp. Laws § 333.2202(2). The Chief Medical Executive (CME) "shall be responsible to the director for the medical content of policies and programs." *Id.*

MDHHS's Director Defendant Lyon and Dr. Eden Wells, as the CME, administer the Childhood Lead Poisoning and Prevention

Program. Defendant Lyon was acting within the scope of his employment and executive authority at all relevant times. (Second Am. Compl. ¶¶ 104–105, Pg. ID #503.) Defendant Dr. Eden Wells was appointed to the position of CME effective May 1, 2015. As the CME, she was effectively the medical "alter ego" of MDHHS Director Lyon and was responsible for the Department's medical policies and programs. Mich. Comp. Laws § 333.2202(2). She was acting within the scope of this employment and executive authority at all relevant times. (Second Am. Compl. ¶¶ 102–103, Pg. ID #503.) Defendant Linda Dykema was director of the MDHHS Division of Environmental Health. (*Id*. at ¶¶ 108–109, Pg. ID #503.) She was acting within the scope of this employment and authority at all relevant times. (*Id.*)

ARGUMENT

I. This Court lacks jurisdiction over the federal claims and should decline to exercise supplemental jurisdiction over the state-law claims.

This Court lacks jurisdiction over this case for several reasons. First, Plaintiffs' § 1983 claims are precluded by the Safe Drinking Water Act. Additionally, the Eleventh Amendment is a jurisdictional bar to suit against State Defendants. Finally, this Court should decline

to exercise supplemental jurisdiction over the remaining state tort and contract claims.

A. Plaintiffs' federal claims are precluded by the Safe Drinking Water Act.

Plaintiffs' Second Amended Complaint includes, among other claims, seven counts under § 1983, a civil RICO count under 18 U.S.C. § 1964(c), and several state tort or contract claims. But however Plaintiffs dress up their claims, the gravamen of each is the allegation that defendants failed to provide safe drinking water. As such, this Court should reach the same conclusion it did in a related action, *Boler, et al. v. Earley, et al.*, Case No. 16-cv-10323 (E.D. Mich. 2016): "Plaintiffs' *federal* remedy is under the [Safe Drinking Water Act], regardless of how their legal theories are framed in the complaint." (Ex. 2, Order of Dismissal, *Boler v. Early*, pp 7–8) (emphasis in original). Accordingly, this Court should rule that all Plaintiffs' federal claims are precluded by the SDWA, decline supplemental jurisdiction, and dismiss all claims against State Defendants. (*Id.* at 3 and 8.)

1. This Court has already determined that the Safe Drinking Water Act is the sole federal remedy for grievances about the failure to provide safe drinking water.

The plaintiffs in *Boler* made § 1983 claims similar to those made by Plaintiffs here—various constitutionally based § 1983 claims against the State, its agencies, and the governor including (1) claiming the state impaired substantive and procedural due process rights to contract for potable water; and (2) alleging a violation of a right to be free from state-created danger. (Ex. 3, Complaint in *Boler*, Counts II & III.) And this Court rejected those claims, reasoning that the SDWA provided the plaintiffs' exclusive remedy and precluded other federal claims based on alleged unsafe public drinking water.

This Court noted that in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), the U.S. Supreme Court held that "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate the congressional intent to preclude the remedy of suits under § 1983." (Ex. 2 at *3) (quoting *National Sea Clammers*, 453 U.S. at 20.) Further, this Court relied on *Mattoon v. Pittsfield*, 980 F.2d 1 (1st Cir. 1992), where the First Circuit specifically addressed the

interaction between the SDWA's private cause of action and § 1983 and federal common law remedies, holding that the SDWA precluded both. (Ex. 2 at *4) (citing *Mattoon*, 980 F.2d at 4.)

Based on these and other cited authorities, this Court concluded that Congress occupied the field by the SDWA such that it precluded the plaintiffs' claims. (*Id*. at 6–7.) The Court rejected the *Boler* plaintiffs' argument that their claims should survive because they did not seek to enforce the SDWA through § 1983. (*Id*. at 6–7.) In doing so, the Court remarked that "[t]he label does not change the substance of plaintiffs' claims" as "the crux of each . . . is that they have been deprived of 'safe and potable water.'" (*Id*. at 7.) Because "the safety of public water systems is a field occupied by the SDWA," this Court concluded that "Plaintiffs' *federal* remedy is under the SDWA, regardless of how their legal theories are framed in the complaint." (*Id*. at 7–8.) Therefore, as all federal claims were precluded by the SDWA, the Court lacked federal question jurisdiction. (*Id*. at 8.)

2. Plaintiffs' claims here should be treated the same as those in *Boler*.

This Court's holding in *Boler* applies with equal force in this case. Several of the § 1983 claims raised in this matter are nearly identical to those in *Boler*. (Second Am. Compl. ¶¶ 608–623, 645–677, Pg. ID ## 612–615, 618–623.) And those that are not identical are also based on the same core assertion that the Plaintiffs have been injured because they did not receive safe and potable water. (*Id*. at ¶¶ 627, 637, Pg. ID ## 615, 617.) Thus, regardless of the legal theory, the claims are "virtually identical" to an SDWA claim and are therefore precluded. *Smith v. Robinson*, 468 U.S. 992, 1009 (1984).

Nor does Plaintiffs' civil RICO claim change the analysis. Like all of Plaintiffs' claims, the RICO claim is based on the allegation that defendants failed to supply safe drinking water—with the added assertion that Defendants conspired to lie about the water quality to balance the City of Flint's budget. (Second Am. Compl. ¶¶ 550–553, 570a.i–ii, 571–574, Pg. ID 587–588, 590–592). But this nuance does not alter the core grievance, and an SDWA claim by another name must still be brought under the SDWA. (Ex. 2 at *7.)

Indeed, both the D.C. Circuit and the Second Circuit have recognized that claims addressed by comprehensive statutory schemes providing exclusive remedies—although clothed in RICO pleadings—are precluded by the exclusive remedy Congress provided. *Danielson v. Burnside-Ott Aviation Training Ctr.*, 941 F.2d 1220, 1226 (D.C. Cir. 1991) ("We agree . . . that the statutory scheme for administrative relief set forth by Congress in the SCA leaves no room for a RICO action . . . ."); *Norman v. Niagara Mohawk Power Corp.*, 873 F.2d 634, 637 (2d Cir. 1989). As the Second Circuit remarked, the "[a]rtful invocation of controversial civil RICO . . . cannot conceal the reality that the gravamen of the complaint" is a claim for administrative relief under a regulatory scheme that provides an exclusive remedy. *Id.*; *see also DeSilva v. N. Shore-Long Island Jewish Health Sys.*, 770 F. Supp. 2d 497, 516 (E.D.N.Y., 2011) ("[O]ther courts . . . have found civil RICO claims to be precluded where another federal statute has set forth a broad remedial scheme and where the RICO claims are based on the same facts that would allow recovery under that alternative scheme.").

Second, as this Court explained in *Boler*, the First Circuit's decision in *Mattoon* "found that the Safe Drinking Water Act (SDWA)

precluded other federal remedies for unsafe public drinking water." (Ex. 2 at *4.) That conclusion was not limited to § 1983 claims. (*Id.*); *Mattoon*, 980 F.2d at *4 ("The federal common law nuisance claims cannot escape preemption . . . .").

Indeed, the test for preclusion, as stated by the Sixth Circuit, is whether the regulatory act's "remedial provisions are comprehensive, which would indicate that Congress *intended to exclude other remedies*." *Diaz v. Michigan Dep't of Corrections*, 703 F.3d 956 (6th Cir. 2013) (emphasis added). If it appears that "Congress intended the [regulatory act] to be *the exclusive avenue* through which a plaintiff may assert" a claim, then "virtually identical" external claims are precluded. *Smith*, 468 U.S. at 1009 (addressing constitutional claims similar to the grievance under the regulatory act) (emphasis added). Therefore, the legal theory of the external claims is less significant than the determination that a regulatory scheme provides the *exclusive* remedy.

Both this Court and the First Circuit in *Mattoon* have already recognized that the SDWA is "the exclusive avenue" for asserting a claim based on the alleged failure to provide safe drinking water.

Inventive pleading will not save Plaintiffs' claims. Their civil RICO claim is precluded as much as their § 1983 claims.

This Court should dismiss all federal claims and dismiss all claims against State Defendants for lack of jurisdiction consistent with *Boler*.

B. State Defendants are entitled to Eleventh Amendment immunity from suit.

This Court must also dismiss all claims against State Defendants because State Defendants are immune from suit under the Eleventh Amendment. With few exceptions, none of which apply here, the State of Michigan, its agencies, and officials acting in their official capacity may not be sued in federal court. Therefore, this Court should dismiss all claims against State Defendants.

1. The Eleventh Amendment bars the claims against the State, MDEQ and MDHHS.

The Eleventh Amendment to the U.S. Constitution bars litigants from bringing claims in federal court against a state or its agencies with few exceptions. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996). The amendment "confirm[s] the structural understanding that States entered the Union with their sovereign immunity intact,

unlimited by Article III's jurisdictional grant . . . ." *Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011). As a result, the states' sovereign immunity "is a constitutional limitation on the federal judicial power established in Art[icle] III . . . ." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984). In the absence of a state's consent or Congress abrogating that immunity, neither of which apply here, this Court lacks jurisdiction over claims made against the State and its agencies whatever the nature of the relief requested. *Id.* at 99–100. Jurisdiction over Plaintiffs' claims against the State, MDEQ, and MDHHS is therefore barred.

2. The Eleventh Amendment also bars the claims against individual State Defendants.

The Eleventh Amendment's immunity from suit is not limited solely to the State as a body politic. In addition to that core aspect of sovereign immunity, "state officers acting in their official capacity are [also] immune from suits for damages in federal court." *Buckhannon Bd. & Care Home v. W. Va. Dep't. of Health & Human Res.*, 532 U.S. 598, 609 n. 10 (2001). That is so because "[a] suit against a state official in his or her official capacity is not a suit against the official but rather

is a suit against the official's office." *Will v. Mich. Dep't. of State Police*, 491 U.S. 58, 71 (1989). Moreover, "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and [it] is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Ford Motor Co v. Dep't. of Treasury*, 323 U.S. 459, 464 (1945).

In this case, the Eleventh Amendment bars jurisdiction over Plaintiffs' "official capacity" claims against individual State Defendants (none of which seek the type of relief permitted under *Ex parte Young*) in the same manner as claims against the State. Neither 42 U.S.C. § 1983 nor 18 U.S.C. §1964 (RICO) abrogate state sovereign immunity. *Quern v. Jordan*, 440 U.S. 332, 345 (1979) (§ 1983 did not abrogate sovereign immunity); *Masterson v. Meade Co. Fiscal Court*, 489 F. Supp. 2d 740, 753 (W.D. Ky., 2007) (RICO claims brought against individual State Defendants in their official capacity were barred by the Eleventh Amendment). Nor has the State waived its immunity, which can occur "only where stated 'by the most express language.'" *Edelman v. Jordan*, 415 U.S. 651, 671 (1974). Therefore, the Court lacks jurisdiction over

the money damages claims against the individual State Defendants in their official capacity.

Further, Plaintiffs generically request injunctive relief in an apparent attempt to avoid the State's immunity via *Ex parte Young*. (Second Am. Compl., ¶ 1, Pg. ID 635). But that doctrine is inapplicable. Because Plaintiffs seek remedial damages and not prospective injunctive relief for an "ongoing violation of federal law," this exception to State immunity does not apply.

Under *Ex parte Young*, 209 U.S. 123 (1908), a suit may avoid Eleventh Amendment immunity if it is one to enjoin a state official's "ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. P.S.C.*, 535 U.S. 635, 645 (2002). But "*Ex parte Young* cannot be used to obtain an injunction requiring the payment of funds from the State's treasury." *Virginia Office for Protection and Advocacy*, 563 U.S. at 256–257. Nor is *Ex parte Young* applicable "when 'the state is the real, substantial party in interest.'" *Pennhurst*, 465 U.S. at 101.

None of Plaintiffs' federal claims in this matter assert an "ongoing violation of federal law" by any of the individual State Defendants; each

requests damages based on past actions related to the City of Flint's switching its water source in April 2014. (Second Am. Compl. ¶¶ 540, 623, 640, 651, 661, 666 & 677 Pg. ID ## 615, 618–623 & 625.) And their RICO claim permits only the recovery of damages based on an injury to "business or property" alleged to have occurred through a scheme to balance the books of the City and relating to past statements about the quality of Flint River water. 18 U.S.C. § 1964(c); (Second Am. Compl. ¶ 607, Pg. ID # 611.) While they nominally seek injunctive relief, they make no effort to support that claim nor do they tie it to any ongoing violation of federal law—or even to a specific count of the complaint. (*Id.*, Pg. ID # 636.)

Accordingly, because Plaintiffs seek remedial damages and have not alleged any ongoing violation of federal law, *Ex parte Young* is inapplicable. Thus, this Court lacks jurisdiction over all of the "official capacity" claims against individual State Defendants.

C. The Court should decline supplemental jurisdiction because the state-law claims raise complex issues of state-law.

Finally, this court should decline supplemental jurisdiction over any surviving state-law claims. This Court may decline to exercise

supplemental jurisdiction over state-law claims based on four different grounds set out in 28 U.S.C. § 1367(c): whether the claim raises a novel or complex issue of state-law, whether the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, whether the district court has dismissed all claims over which it has original jurisdiction, or whether there are other compelling reasons for declining jurisdiction.

Particularly persuasive here, these claims raise complex issues of state-law related to the viability of the claims asserted and the application of governmental immunity. Such issues include: (1) whether a gross-negligence claim may be maintained against State employees for regulatory decisions; (2) whether Plaintiffs can demonstrate that conduct by the individual State Defendants was "'*the* one most immediate, efficient, and direct cause of the injury or damage,'" *In Re Estate of Beals*, 871 N.W.2d 5, 8 (2015) (emphasis added) (quoting *Robinson v. Detroit*, 613 N.W.2d 307, 319 (2000)), when they allege a variety of aggregating and confounding actions; and (3) the application of governmental immunity to the State, MDEQ, Governor Snyder, Director Lyons, Dr. Wells, and the other individual State

Defendants. Accordingly, this Court should decline to exercise supplemental jurisdiction.

II. Plaintiffs have failed to state a claim for which relief may be granted.

This Court should further dismiss Plaintiffs' claims against State Defendants because they have failed to state a claim for various reasons: first, the individual State Defendants are entitled to federal qualified immunity; second, State Defendants are immune under state-law; third, Plaintiffs have failed to state a claim under civil RICO; and finally, they have failed to plead facts to show discrimination under the Equal Protection Clause.

A. The individual State Defendants are entitled to federal qualified immunity.

None of Plaintiffs' allegations would allow this Court to conclude that the individual State Defendants violated a clearly established right. Therefore, they are entitled to qualified immunity.

1. Qualified immunity requires Plaintiffs to plead facts showing that the individual State Defendants violated clearly established rights.

"When properly applied, [qualified immunity] protects all but the plainly incompetent or those who knowingly violate the law." *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015). Further, a plaintiff has the burden of establishing that a defendant is not entitled to qualified immunity. *Cartwright v. Marine City*, 336 F.3d 487, 490–491 (6th Cir. 2003). "[U]nless 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," state and federal officials are shielded by immunity. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011).

To be "clearly established," Plaintiffs bear the burden of showing that the right was "sufficiently clear 'that *every* reasonable official would [have understood] that what he is doing violates that right.'" *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (emphasis added). Moreover, "[t]his inquiry . . . must be undertaken in light of the specific context of the case, not as a broad general proposition . . . ." *Saucier v. Katz*, 533 U.S.

194, 201 (2001). While there need not be a case directly on point, "existing precedent must have placed the statutory or constitutional question *beyond debate*." *Ashcroft*, 563 U.S. at 741 (citing *Anderson*, 483 U.S. at 640 & *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

2. Plaintiffs have not identified any violation of clearly established rights.

Plaintiffs have not met their burden on any of their claims. First, they fail to "allege facts that show the existence of the asserted constitutional rights violation recited in the complaint and what each defendant did to violate the asserted right," as the Sixth Circuit requires for pleading alleged violations of constitutional rights against governmental officials. *Terrance v. Northville Reg'l Psychiatric Hosp.*, 286 F.3d 834, 842 (6th Cir. 2002). Second, they cannot show that any of the rights they assert are legally recognized, let alone that the rights were both violated and "clearly" established at the time of the violation.

a. The courts have not recognized a right to safe drinking water.

The heart of each of Plaintiffs' § 1983 claims is an asserted "right to purchase and receive safe, potable drinking water." (Second Am.

Compl. ¶¶ 653, 663, Pg. ID ## 620, 622.) But no courts have recognized a constitutional right to contaminant-free water. Just the opposite is true: courts have rejected claims to such a right. *See, e.g., Coshow v. City of Escondido*, 34 Cal. Rptr. 3d 19, 30 (Cal. App. 4th 2005) (concluding there is no fundamental right to uncontaminated drinking water). Nor is there a due-process right to continued water service based upon a contract with the utility, as Plaintiffs appear to claim. (Second Am. Compl. ¶¶ 653, 663, Pg. ID ## 620, 622). *See Mansfield Apartment Owners Ass'n v. City of Mansfield*, 988 F.2d 1469, 1476–1477 (6th Cir. 1993); *Golden v. City of Columbus*, 404 F.3d 950, 961 (6th Cir. 2005) ("there is no fundamental right to water service . . . .").

Because courts have rejected the asserted rights on which their claims hinge, Plaintiffs can neither show a violation of such a claimed right nor that the right was "clearly established." Consequently, the individual State Defendants are entitled to qualified immunity.

b. Plaintiffs' RICO claim does not plausibly allege any violation of a clearly established right.

Similarly, Plaintiffs' RICO claim does not sufficiently allege that individual State Defendants violated any clearly established right.

As a preliminary matter, there is nothing about a civil RICO suit that alters the qualified immunity analysis. Rather, the Sixth Circuit has said in the absolute immunity context that "[i]t would be anomalous . . . if officials who are immune from suit for alleged violations of the Constitution itself should be denied immunity from suit for alleged violations of a statute that does not incorporate the Constitution—particularly a statute as amorphous as RICO." *Cullinan v. Abramson*, 128 F.3d 301, 308 (6th Cir. 1997). Likewise, other circuits apply qualified immunity to RICO. *See, e.g., Brown v. Nationsbank Corp.*, 188 F.3d 579, 587 (5th Cir. 1999). Consequently, the same standard applies to a RICO claim.

Plaintiffs fail to meet that standard. The core of Plaintiffs' RICO allegations is their assertion that various city and state officials implicitly or expressly misrepresented the quality of Flint River water in order to continue charging high service rates so they could balance the City's books. (Second Am. Compl. ¶ 585, Pg. ID ## 693–694.) If any right can be derived from their allegations, Plaintiffs appear to assert a right not to be charged for contaminated water. *BEG Invs., LLC v.*

Alberti, 34 F. Supp. 3d 68, 81 (D.D.C. 2014) (defining the right with reference to allegedly unlawful conduct of purported RICO scheme).

But just as the courts have not recognized a right to have the government provide safe drinking water, *see* Argument II.A.2.a, *supra*, Plaintiffs have not shown that it was "clearly established" that they had a right not to be charged for allegedly unsafe water that they used. *Cf.* Ex. 4, *Vajk v. City of Iron River*, Case No. 2:10-cv-114, opinion dated January 12, 2011 (E.D. Mich. 2011) (due process rights were not violated by "readiness to serve charge" for water). Moreover, to the extent that Plaintiffs assert that the alleged RICO predicate acts constitute a violation of clearly established rights, those claims lack merit as further explained below. *See* Argument II.B.

Accordingly, the individual State Defendants are entitled to qualified immunity.

B. State Defendants are entitled to immunity on the state-law claims.

In addition to federal qualified immunity, the State, its agencies, and individual State Defendants are entitled to immunity as provided under Michigan law.

1. The State and its agencies are immune.

First, Plaintiffs assert a gross negligence claim against the State and its agencies. (Second Am. Compl, ¶¶ 720–735, Pg. ID ## 632–635.) But these claims are barred by immunity accorded under Mich. Comp. Laws, §§ 691.1407(1), (2) and (5).

The State, MDEQ, and MDHHS are immune from tort liability when performing a governmental function. Mich. Comp. Laws § 691.1407(1). A governmental function is defined as any activity expressly or impliedly authorized by constitution, statute or other law. Mich. Comp. Laws § 691.1401(b). Significantly, a governmental function is not defined by the specific conduct of individual employees, but rather by the general activity being performed by the government agency. *Smith v. Dept. of Public Health,* 410 N.W.2d 749, 779 (Mich. 1987).

The agencies here were performing regulatory oversight of the Flint Water System and children's blood levels under both the federal SDWA and Michigan's SDWA, Act 399 of 1976 and Mich. Comp. Laws §§ 333.5474c(1), (3). This general activity is authorized by both federal and state-law and is therefore a governmental function. The wrongful

performance of an activity authorized by law is still "authorized" within the meaning of the governmental function test and does not render the activity nongovernmental or *ultra vires*, whether the result of negligent or intentional conduct. *Richardson v. Jackson County,* 443 N.W.2d 105, 108 (Mich. 1989); *Smith,* 410 N.W.2d at 777.

This immunity applies with few statutory exceptions—defective public highway; Mich. Comp. Laws § 691.1402; negligent operation of a motor vehicle, Mich. Comp. Laws § 691.1405; defective public building, Mich. Comp. Laws § 691.1406; operations of a government hospital, Mich. Comp. Laws § 691.1407(4); Mich. Comp. Laws § 691.1413; and a sewage disposal system event, Mich. Comp. Laws § 691.1417—which do not apply here. Further, gross negligence is not an exception to the agencies' immunity but applies only to lower level employees. Thus, the State and its agencies are immune. Mich. Comp. Laws § 691.1407(1).

2. Individual State Defendants are also immune.

The individual State Defendants are also immune. Governor Snyder, his Chief of Staff Muchmore[2] and Dr. Wells, are accorded

[2] Defendant Muchmore, as Chief of Staff (Second Am. Compl. ¶ 67), is the highest appointed official in the Governor's Office.

absolute immunity from liability as the highest elective and appointive executive officials of state government acting in the scope of their executive authority. Mich. Comp. Laws § 691.1407(5); Mich. Const. art. V, § 1; Mich. Comp. Laws, §§ 333.2202(2) and 333.547c. Moreover, although not named with respect to Count XII, MDHHS Director Lyon, as the highest appointed official, is similarly immune. Mich. Comp. Laws § 333.2202(1).

The acts complained of here fall within Governor Snyder's, Dennis Muchmore's and Dr. Well's respective executive authority. (Second Am. Compl. ¶¶ 62–63, 67, 101–102.) Michigan defines executive authority as "all authority vested in the highest executive official by virtue of his or her position in the executive branch." *Petipren v. Jaskowski*, 833 N.W.2d 247, 257 (Mich. 2013). And this immunity extends to all tort claims whether based on negligence or intentional conduct. *Id.*; *American Transm. v. Attorney Gen.*, 560 N.W.2d 50, 53 (Mich. 1997); *Odom v. Wayne Cty.*, 760 N.W.2d 217, 228 (Mich. 2008). Governor Snyder, his Chief of Staff Defendant Muchmore, and the State's Chief Medical Executive Dr. Wells are therefore absolutely immune from liability on the state-law tort claims.

Further, Defendant Linda Dykema has qualified immunity. Lower level government employees are accorded immunity under Mich. Comp. Laws § 691.1407(2) when acting on behalf of a governmental agency and when: (1) the employee believes he or she is acting within the scope of his or her authority; (2) the governmental agency is engaged in the exercise or discharge of a governmental function; and (3) the employee's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

Here, all three elements are met. Defendant Dykema was acting within the authority granted by virtue of her employment and the law. Mich. Comp. Laws §§ 333.5474c(1), (3). MDHSS was engaged in the discharge of a governmental function—an activity authorized by constitution, statute, or other law. Mich. Comp. Laws § 691.1401(1)(b); Mich. Comp. Laws §§ 333.547c(1), (3). Further, the conduct alleged does not rise to the level of gross negligence, which is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Mich. Comp. Laws § 691.1407(8)(a). No facts pled here support the conclusion that Defendant Dykema, an employee of the MDHSS, had any role in the regulation of the Flint

water system, deciding the source of the water for that system, or the treatment of the water system that resulted in corrosion within the water system and its alleged lead or bacterial contamination at various locations.

Finally, Plaintiffs cannot establish that Defendant Dykema is "the proximate cause" of the alleged injuries. For purposes of this analysis, "the proximate cause" means "the one most immediate, efficient, and direct cause preceding an injury." *Robinson v. City of Detroit,* 613 N.W.2d 307, 317 (Mich. 2000). Applied here, Plaintiffs allege multiple confounding factors contributing to their claimed injuries and, at best, Defendant Dykema is in a position similar to the defendant in *Beals*, who the Michigan Supreme Court held did not meet this standard. *Beals*, 871 N.W.2d at 12–13. This claim must be dismissed.

C. Plaintiffs have failed to state a claim under civil RICO.

This Court should also dismiss Count II because Plaintiffs have failed to state a claim for "civil RICO" violations under either 18 U.S.C. §§ 1962(c) or (d).

To state a claim under § 1962(c) of RICO, a plaintiff must plead the "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Ouwinga v. Benistar, 419 Plan Services*, 694 F.3d 783, 791 (6th Cir. 2012). Importantly, these requirements must be established with respect to each individual defendant. *Kerrigan v. ViSalus, Inc.*, 112 F. Supp. 3d 580 (E.D. Mich. 2015); *see also DeFalco v. Bernas*, 244 F.3d 286, 306 (2d Cir. 2001). A claim under § 1962(d) requires all of these same elements with added proof of a conspiracy, or "an illicit agreement to violate the substantive RICO provision." *Grubbs v. Sheakley Group, Inc.*, 807 F.3d 785 (6th Cir. 2015).

Plaintiffs have not sufficiently pled any of these elements concerning the individual State Defendants. Most notably, they have not alleged any predicate acts committed by the individual State Defendants, and those predicate acts claimed to be committed by the enterprise generally are legally insufficient. Therefore, their civil RICO claims must fail.

1. Plaintiffs have not plausibly alleged that the individual State Defendants engaged in the "conduct" of the alleged enterprise.

Plaintiffs generically allege that the individual State Defendants participated in the alleged RICO enterprise. But their vague assertions do not "plausibly" demonstrate that State Defendants conducted or participated in the alleged enterprise.

To meet the "conduct" element, Plaintiffs must plead facts to show that "defendants conducted or participated in the conduct of the '*enterprise's* affairs,' not just their *own* affairs." *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (emphasis in original). This can be done with facts that indicate that the defendant "had *some* part in directing the enterprise's affairs," *id.* at 179, "either by making decisions on behalf of the enterprise or by knowingly carrying them out." *United States v. Fowler*, 535 F.3d 408, 418 (6th Cir. 2008).

Plaintiffs here make the conclusory allegations that Governor "Snyder conceived, directed, controlled, facilitated, and participated in the fiscal Rico [sic] scheme," but provide no specific facts to support this conclusion. (Pls.' RICO Case State., Pg. ID # 641.) Plaintiffs' factual allegations regarding Governor Snyder are limited to alleging that he

was occasionally briefed regarding the situation in Flint and that he appointed the emergency managers. (Second Am. Compl., ¶¶ 260, 285, 346.) But the Governor's mere appointment of the emergency managers or awareness of water quality concerns in Flint does not support the Plaintiffs' allegations that he participated in fraudulent activity. Moreover, RICO liability generally cannot be established simply by *respondeat superior*. *Schmidt v. Fleet Bank*, 16 F. Supp. 2d 340, 351 (S.D.N.Y. 1998); *Robinson v. Kidder, Peabody & Co.*, 674 F. Supp. 243 (E.D. Mich. 1987).

Plaintiffs make similar generic assertions in their allegations against Defendants Dillon, Clinton, and Muchmore. Because these offer "nothing more than a 'formulaic recitation of the elements'" or are otherwise of a "conclusory nature," *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009), they do not satisfy Plaintiffs' burden to plead facts making out a plausible claim that individual State Defendants engaged in the alleged RICO enterprise. *See Kerrigan*, 112 F. Supp. 3d at 603.

Nor are Plaintiffs' allegations against MDHHS personnel—Director Nick Lyons, Dr. Eden Wells, and Linda Dykema—any less conclusory. Each of the allegations against these State Defendants

contains similar conclusory assertions, with the added statement that the employees "perpetuated this scheme . . . by recklessly coordinating, participating, and facilitating MDHHS' policy to intentionally coverup [sic] information and data in their possession, to withhold this, and failed to warn that after the connection to the Flint River there was a significant uptick in the number of children in Flint with elevated blood levels in Flint [sic]." (Pls.' RICO Case State., Pg. ID ## 667–668.)

Plaintiffs again make merely conclusory assertions of misconduct while lacking any "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Accordingly, Plaintiffs have not sufficiently pled factual content to show that each of the individual State Defendants "conducted or participated in" the alleged RICO scheme.

2. Plaintiffs also cannot show a "pattern" of racketeering activity.

Plaintiffs also have not adequately pled that the individual State Defendants engaged in a "pattern of racketeering activity." 18 U.S.C. § 1961(5). Section 1961(5) explains that a "'pattern of racketeering

activity' requires *at least two acts* of racketeering activity . . . ."
(Emphasis added.) Plaintiffs' complaint neither meets this minimal threshold nor pleads a "pattern" of sufficient duration under case law.

a. Plaintiffs fail to allege that individual State Defendants committed *any* predicate acts.

This Court recently held that "in order to sufficiently allege that a defendant violated § 1962(c), a plaintiff must allege that *that particular defendant* committed a pattern of predicate acts." *Kerrigan*, 112 F. Supp. 3d at 605 (emphasis in original). In reliance on the plain text of 18 U.S.C. § 1962(c) and other court decisions, the Court explained that it is not enough for Plaintiffs to establish a "pattern of racketeering" by the *enterprise*; the "pattern" also must be established for *each defendant*. *Id*. at n. 16 (citing various cases including *Rainieri Construction, LLC v. Taylor*, 63 F. Supp. 3d 1017 (E.D. Mo. 2014)).

This is problematic for Plaintiffs because they do not assert that any of the individual State Defendants committed a single predicate act—let alone a "pattern of racketeering activity." 18 U.S.C. § 1962(c); 18 U.S.C. § 1961(5). Instead, the predicate acts they allege ultimately relate to the City of Flint's mailing of water bills or purportedly false

statements by other individual Defendants—but not the individual State Defendants. Therefore, Plaintiffs have not stated a claim as to individual State Defendants because they have not alleged a sufficient number of predicate acts as to each defendant.

b. The alleged racketeering activity was not of sufficient duration to support a "pattern."

Additionally, even if Plaintiffs could plausibly allege the minimum *number* of predicate acts, their complaint fails to establish a "pattern of racketeering activity" because of the affidavit's insufficient *duration*.

The U.S. Supreme Court has explained that proving a "pattern of racketeering activity" under 18 U.S.C. § 1961(5) requires more than merely alleging the minimum of two predicate acts. Instead, "to prove a pattern of racketeering activity a plaintiff . . . must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). The "relationship" standard requires the acts to "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise [be] interrelated by distinguishing characteristics and [not be] isolated events." *Id.* at 240.

The "continuity" element refers "either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id*. at 241.

Here, Plaintiffs cannot demonstrate adequate "continuity." Plaintiffs assert a "closed-ended" scheme, allegedly running from April 25, 2014 (the date of the switch to Flint River water) to March 9, 2016 (when customers were no longer charged for their water). (Compl., ¶ 586.) This, again, incorrectly assumes that the Court should look at the "pattern" of the *enterprise* and not the *individual defendants*, an approach this Court has rejected. *See Kerrigan*, 112 F. Supp. 3d at 605.

But even if this Court accepted Plaintiffs' logic, this period of just over 22 months is not substantial enough to establish "continuity" and support the kind of "pattern" of "long-term criminal conduct" that RICO addresses. *See Vemco, Inc. v. Camardella*, 23 F.3d 129, 133–134 (6th Cir., 1994) (explaining "[t]he requirement of 'continuity,' or a threat of continuing criminal activity, ensures that RICO is limited to addressing Congress's primary concern in enacting the statute, *i.e.* long-term criminal conduct."). For example, the Sixth Circuit in *Vemco* rejected a scheme lasting 17 months, determining that it failed the continuity

requirement. *Id.* at 135. And elsewhere, courts have routinely rejected cases where the distance between alleged predicate acts is less than two years. *See, e.g., First Capital Asset Mgmt. v. Satinwood, Inc.*, 385 F.3d 159, 181 (2d Cir. 2004) (noting "this Court has never found a closed-ended pattern where the predicate acts spanned fewer than two years"). Consequently, Plaintiffs allegations cannot establish a "pattern of racketeering activity." 18 U.S.C. § 1961(5).

Moreover, assuming a 22-month duration of the alleged scheme is too generous. Plaintiffs base the asserted duration of the scheme using the date of the switch to Flint water as the beginning date and the date the City stopped billing residents as the end date. (Second Am. Compl. ¶ 586, Pg. ID # 605.) But Plaintiffs make no claim that the billings themselves contained fraudulent statements. Thus, while "innocent mailings" can support mail fraud, *Schmuck v. United States*, 489 U.S. 705, 715 (1989), the courts have held that "in determining the duration of a scheme involving mail fraud, the relevant criminal conduct is the defendant's deceptive or fraudulent activity, rather than otherwise innocent mailings that may continue for a long period of time." *Kehr Packages v. Fidelcor, Inc.*, 926 F.2d 1406, 1418 (3d Cir. 1991).

Applying that case law here, Plaintiffs only allege deceptive or fraudulent statements by various members of the enterprise occurring from April 25, 2014 through September 28, 2015—a period of 17 months. (Second Am. Compl. ¶¶580.e–k.) But the Sixth Circuit rejected an identical period for insufficient "continuity." *Vemco*, 23 F.3d at 133–134. Thus, no matter how the Court looks at Plaintiffs' claims, they do not establish a "pattern of racketeering activity." 18 U.S.C. § 1962(c).

3. Plaintiffs fail to plead sufficient "racketeering activity."

Lastly, Plaintiffs cannot demonstrate *any* predicate acts of racketeering activity. As noted above, Plaintiffs must plead a "pattern of racketeering activity" against *each* of the individual State Defendants, and they have not done so for these defendants. More generally, the predicate acts they have alleged fail in their own right.

First, Plaintiffs' assertion that the RICO defendants committed fraud "in contemplation" of a bankruptcy under 11 U.S.C. § 152(8) cannot establish a predicate act. Such an act is only "racketeering

activity" if "connected with a case under title 11 . . . ." 18 U.S.C. § 1961(1)(D). But Flint had no related bankruptcy case.

Further, 18 U.S.C. § 152(8) proscribes "knowingly and fraudulently . . . mak[ing] a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs *of a debtor*." (Emphasis added.) That act defines a "debtor" as "a debtor concerning whom a petition has been filed under title 11." 18 U.S.C. § 151. So there can be no bankruptcy fraud in the absence of a case under title 11. Moreover, Plaintiffs' divorce of 18 U.S.C. § 152(8) from any actual case also ignores the purpose of the law, which is "to cover all of the possible methods by which a debtor or any other person may attempt to defeat the intent and effect of the bankruptcy law through any type of effort to keep assets from being equitably distributed among creditors." *United States v. Goodstein*, 883 F.2d 1362, 1369 (7th Cir. 1989). No similar concerns are raised in the absence of a bankruptcy filing.

Additionally, Plaintiffs' mail fraud and wire fraud allegations are insufficient as they fail to plead fraud with the requisite factual specificity. These types of allegations must follow the heightened-

pleading standards for fraud under Fed. R. Civ. P. 9(b); *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 172 (2d Cir. 1999). Particularly, a plaintiff must "allege facts that give rise to a *strong* inference of fraudulent intent." *First Capital Asset Mgmt.,* 385 F.3d at 178 (emphasis in original). But Plaintiffs have not done so here.

Plaintiffs cite no statements by the individual State Defendants alleged to be fraudulent nor facts that would give rise to "a *strong* inference" of intent to commit fraud. Moreover, more broadly, to the extent that the Court considers the predicate acts on an enterprise level, Plaintiffs' allegations against the other Defendants do not meet this standard. Therefore, Plaintiffs' mail and wire fraud claims fail, and they have not adequately pled the existence of at least two predicate acts of "racketeering activity" under 18 U.S.C. § 1961(1).

4. The State cannot be held liable for a RICO violation.

Beyond the elements of a RICO claim, case law is clear that Plaintiffs cannot maintain a suit against the State under RICO—either directly or indirectly.

Plaintiffs inconsistently recognize that a governmental entity cannot be held liable under RICO. Because RICO is premised on the allegation of criminal activity, numerous courts have held that governmental entities are immune from RICO liability generally because the government cannot form the required criminal intent. *See, e.g.*, *County of Oakland v. City of Detroit*, 784 F. Supp. 1275, 1283 (E.D. Mich. 1992) (municipal government cannot be held liable under RICO); *Gil Ramirez Group, L.L.C. v. Houston Indep. Sch. Dist.*, 786 F.3d 400, 412 (5th Cir. 2015) (same); *Rogers v. City of New York*, 359 Fed. Appx. 201, 204 (2d Cir. 2009) (same); *Lancaster Community Hospital v. Antelope Valley Hospital District*, 940 F.2d 397, 404 (9th Cir. 1991) (holding that a state entity was "incapable of forming a malicious intent" for RICO purposes).

Plaintiffs appear to acknowledge this by excluding the State, MDHHS, MDEQ, and the City of Flint from the list of defendants under Count II, instead calling them "RICO enterprise actors." (Second Am. Compl, ¶ 545, Pg. ID # 586.) At the same time, Plaintiffs allege that several of the individual defendants that are current or former employees of the State are sued both in their "individual *and* official

capacities." (Second Am. Compl. ¶¶ 62, 67, 85, 89, 92, 95, 99, 103, 109, 112, 115, Pg. ID ## 499, 501–504.)

Plaintiffs ostensibly fail to understand that suing individual State Defendants in their "official" capacities is the same as suing the State itself. *Caudill v. Hollan*, 431 F.3d 900 (6th Cir. 2005). Because the State cannot be held liable under RICO, *County of Oakland*, 784 F. Supp. at 1283, neither can Plaintiffs maintain a suit against its employees in their "official capacity" as a back-door means of suing of the State. Therefore, any RICO claims against the State—however styled—must fail.

D. Plaintiffs have not stated a claim for race-based discrimination under the Equal Protection Clause.

Plaintiffs also assert that Defendants (except the State of Michigan, MDEQ, and MDHHS) violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Plaintiffs claim Defendants did so by requiring Flint to switch its water source to the Flint River while other Genesee County municipalities were permitted to remain on DWSD water. This claim lacks merit.

The Equal Protection Clause prevents States from making distinctions that (1) burden a fundamental right; (2) target a suspect class; or (3) intentionally treat one individual differently from others similarly situated without any rational basis. *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 312 (6th Cir. 2005); U.S. Const. amend. XIV, § 1. A law that neither implicates a fundamental right nor targets a suspect class is accorded rational basis review. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973). Thus, the law need only be "rationally related to legitimate government interests," *Doe v. Mich. Dep't of State Police*, 490 F.3d 491, 501 (6th Cir. 2007), and "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

1. Plaintiffs have not established that any individual State Defendant had authority to require the Genesee County municipalities to switch their water source.

A fundamental problem with Plaintiffs' claim is that they have not alleged any facts to support their assertion that individual State Defendants had authority to change the water source of the Genesee

County municipalities they identify. Because they did not, the individual State Defendants cannot be held to have discriminated based on a choice that was not theirs to make.

Indeed, Plaintiffs allege no facts supporting a claim that any individual State Defendant effectuated the change in Flint from DWSD water to the Flint River. Rather, Plaintiffs rely on Governor Snyder's appointment of an emergency manager under the authority of P.A. 436 as creating an extension of State government. But federal law disagrees. As the Sixth Circuit recently held, emergency management under 2011 P.A. 4 or 2012 P.A. 436 is another form of *local* government the State is authorized to create, not an extension of State governance. *Bellant v. Snyder,* __ F.3d __, 2016 WL4728026 *8. (6th Cir. 2016).

Michigan law likewise rejects the claim that an act of an emergency manager is an act of the Governor. *Kincaid v. City of Flint*, 874 N.W.2d 193, 201 (Mich. App. 2015) (noting that "we also reject [the City of Flint's] argument that an act of the EM is an act of the governor . . . ."). By law, an emergency manager "exercise[s] power *for and on behalf of the local government*"—not on behalf of individual State Defendants. Mich. Comp. Laws § 141.1552(2) (emphasis added).

But even assuming *arguendo* that the individual State Defendants could make a decision for Flint, there is no basis for Plaintiffs' claim that individual State Defendants either did make or could make a choice for the remaining municipalities. Generally, Michigan municipalities are permitted home rule, enabling them to govern their own local affairs. *See* Mich. Comp. Laws § 117.1, *et seq*. And the provision of drinking water to residents is among the issues local governments are authorized to address. *See, e.g.,* Mich. Comp. Laws § 124.251, *et seq*. Thus, the Genesee municipalities provided water under a separate management structure and for separate water systems than the one at issue in Flint. Therefore, Plaintiffs' incorrect assumption that the individual State Defendants possessed power to make a choice for these municipalities is fatal to their claim.

2. Because none of the Genesee County municipalities were under emergency management, they are not similarly situated.

Plaintiffs' equal protection claim also fails because the allegedly "similarly situated" municipalities were not under emergency management and not similar in all material respects.

The Equal Protection Clause "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill*, 521 U.S. 793, 799 (1997). Thus, a successful equal-protection claim requires that "the government treated the plaintiff disparately as compared to similarly situated persons." *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011). "To satisfy this threshold inquiry, [a plaintiff] must allege that it and other individuals who were treated differently were similarly situated in all material respects." *TriHealth, Inc. v. Bd. of Comm'rs*, 430 F.3d 783, 790 (6th Cir. 2005).

Here, Plaintiffs are residents of the City of Flint, a local unit of government that was under the administration of an emergency manager during the relevant time period. Plaintiffs allege they were disparately treated compared to the other residents of Genesee County municipalities that were *not* under emergency management and were not part of the Flint water system. The two are not similarly situated.

Flint underwent a rigorous evaluation to determine whether it was in a state of financial emergency. Mich. Comp. Laws § 141.1444; 1445. None of the other Genesee County municipalities did. Further,

Flint's financial condition is relevant to the City's decision to switch water sources. Therefore, cities without such an emergency are not an adequate point of comparison.

Accordingly, Plaintiffs fail to make the threshold showing that they were treated differently than individuals similarly situated in all material respects—that is all citizens of the City of Flint whatever their race or ethnic background. *TriHealth, Inc.*, 430 F.3d at 790.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Defendants State of Michigan, Governor Snyder, Dennis Muchmore, Andy Dillon, R. Kevin Clinton, MDEQ, MDHHS, Nick Lyon, Eden Wills, and Linda Dykema respectfully request that this Court dismiss Plaintiffs' claims against them for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1) and failure to state a claim under Rule 12(b)(6).

Respectfully submitted,

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Dated: October 6, 2016

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2016 I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

Respectfully submitted,

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