No. 17-1144

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MELISSA MAYS, individually and as next friend of three minor children, *et al.*,

Plaintiffs-Appellants,

v.

RICK SNYDER, Governor, in his official capacity, *et al.*,

Defendants-Appellees.

On Appeal from the U.S. District Court for the Eastern District of Michigan,
No. 5:15-cv-14002, Honorable John Corbett O'Meara

PROPOSED BRIEF OF AMICI CURIAE NATURAL RESOURCES DEFENSE COUNCIL, INC. AND AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN IN SUPPORT OF PLAINTIFFS-APPELLANTS AND SUPPORTING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, proposed amici curiae Natural Resources Defense Council, Inc. (NRDC) and American Civil Liberties Union of Michigan (ACLU) state that they are nonprofit corporations with no parent corporations and no outstanding stock shares or other securities in the hands of the public. Neither NRDC nor ACLU has any parent, subsidiary, or affiliate that has issued stock shares or other securities to the public. No publicly held corporation owns any stock in NRDC or ACLU.

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INTEREST OF AMICI CURIAE AND SOURCE OF AUTHORITY TO FILE

The Natural Resources Defense Council (NRDC) and the American Civil Liberties Union of Michigan (ACLU) submit this proposed brief as amici curiae in support of Plaintiffs-Appellants (Plaintiffs), residents of Flint, Michigan, who allege that they have been harmed by contamination of their tap water as a result of city and state officials' constitutional violations.[1]

ACLU is the Michigan affiliate of a nationwide, nonpartisan organization with over one million members dedicated to protecting the rights guaranteed by the U.S. Constitution. ACLU has long been committed to litigation that seeks to protect the constitutional rights of Michigan citizens, including the rights to due process and equal protection under the law. For example, ACLU has sued to challenge a state constitutional amendment that prohibited affirmative action in public university admissions, *Coal. to Defend Affirmative Action v. Univ. of Mich.*, 701 F.3d 466 (6th Cir. 2012) (en banc), *rev'd sub nom. Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014); defend the due process rights of individuals whose food assistance benefits were terminated based on "criminal justice disqualifications," *Barry v. Lyon*, 834 F.3d 706, 719 (6th Cir. 2016); and

[1] NRDC and ACLU state that no counsel for a party authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and that no person other than amici curiae, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

defend the equal protection rights of prisoners to be free from discrimination based on sexual orientation, *Davis v. Prison Health Servs.*, 679 F.3d 433 (6th Cir. 2012).

NRDC is a nonprofit public health and environmental advocacy organization with hundreds of thousands of members, including more than 9,400 in Michigan. NRDC engages in policy and legislative advocacy, litigation, and scientific research to help communities threatened by polluted air, water, and soil. NRDC's work includes efforts to reduce exposure to toxic chemicals and prevent health harms arising from violations of environmental laws. NRDC is also committed to advancing environmental justice. Through its advocacy, NRDC seeks to break down the pattern of disproportionate environmental burdens borne by people of color and others who face social or economic inequities.

To further these aims, NRDC routinely litigates under the citizen-suit provisions of federal environmental statutes, including the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, and Safe Drinking Water Act. For instance, NRDC has sued to prevent urban stormwater runoff from polluting California rivers and bays, *Nat. Res. Def. Council, Inc. v. Cty. of Los Angeles*, 725 F.3d 1194 (9th Cir. 2013); to clean up mercury pollution endangering lobster fisheries in Maine, *Me. People's All. v. Mallinckrodt, Inc.*, 471 F.3d 277 (1st Cir. 2006); and to abate a Tennessee landfill's dangerous contamination of drinking water wells, where the government had failed to warn black residents

about the toxic water, *Nat. Res. Def. Council, Inc. v. Cty. of Dickson*, No. 08-229 (M.D. Tenn. filed Mar. 4, 2008). Through these citizen suits, NRDC acts as a private attorney general, stepping in to enforce environmental laws when the government is unwilling or unable to do so.

In January 2016, NRDC and ACLU, alongside co-plaintiffs Concerned Pastors for Social Action and Melissa Mays, sued the City of Flint and Michigan state officials under the citizen-suit provision of the Safe Drinking Water Act (SDWA) in response to widespread lead contamination in Flint's drinking water. *Concerned Pastors for Soc. Action v. Khouri*, 194 F. Supp. 3d 589, 595 (E.D. Mich. 2016).[2] In March 2017, the district court approved a settlement agreement resolving the case and retained jurisdiction to enforce the agreement. *See* Order Approving Settlement Agmt., *Concerned Pastors for Soc. Action v. Khouri*, No. 16-10277 (E.D. Mich. Mar. 28, 2017), ECF No. 152. The agreement requires the City and State to conduct extensive monitoring of Flint's tap water for lead, regularly visit homes to provide filter installation and education, and replace thousands of lead and galvanized steel water pipes. This relief is designed to protect public health, enforce SDWA's requirements for reducing lead in drinking water, and prevent future violations of SDWA.

While NRDC and ACLU's citizen suit aimed to achieve some justice for

[2] Ms. Mays is a plaintiff in both this case and NRDC and ACLU's Safe Drinking Water Act citizen suit.

Flint residents, it could not fully redress the constitutional violations Plaintiffs here allege they suffered relating to Flint's water crisis. Federal environmental citizen suits are generally limited to addressing ongoing or recurring violations of environmental laws: the citizen-suit provisions do not provide for compensation to individuals for wholly past harms to their health and property from environmental contamination.[3] As organizations committed to advocating for just outcomes, NRDC and ACLU have an interest in ensuring that individuals harmed by environmental contamination can pursue the full scope of relief to which they may be entitled, including damages for past harms. *See* Principles of Environmental Justice, adopted at the First National People of Color Environmental Leadership Summit (1991), http://www.ejnet.org/ej/principles.pdf (last visited Apr. 7, 2017). This compensation is especially important in low-income communities and communities of color, like Flint. Those communities disproportionately bear the burdens of environmental harms, yet often lack the resources that other communities have to redress those harms.

A decision by this Court affirming the district court's ruling that SDWA precludes all claims under 42 U.S.C. § 1983 relating to drinking water safety

[3] Some environmental statutes allow civil penalties to be assessed against violators in a citizen suit, but such penalties are remitted to the U.S. Treasury, not to citizen-plaintiffs. *See* 33 U.S.C. § 1365(a) (Clean Water Act); 42 U.S.C. § 7604 (Clean Air Act); 42 U.S.C. § 6972 (Resource Conservation and Recovery Act). No such penalties are available in SDWA citizen suits. *See* 42 U.S.C. § 300j-8.

would eliminate the remedies available for constitutional violations that occur in the provision of drinking water. Such a holding would hinder NRDC's and ACLU's interests in advancing environmental justice and ensuring that people are compensated for harms caused by environmental contamination.

SUMMARY OF ARGUMENT

This case involves claims by Flint residents under section 1983 that state and local officials (collectively, Defendants) violated their constitutional rights to equal protection and due process by creating and perpetuating the Flint water crisis. Plaintiffs seek, among other relief, a declaration that Defendants' conduct violated the Constitution and an award of damages to compensate them for harms to their health and property. First Am. Compl. 57, R. 111, Page ID # 1700. The district court dismissed Plaintiffs' section 1983 claims, holding that the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*, precludes all constitutional claims relating to "the safety of public water systems." Op. & Order, R. 196, Page ID # 6916.

The district court erred. SDWA's text and legislative history show that Congress created SDWA's citizen-suit provision to encourage citizen participation in enforcement of the statute's requirements. But there is no evidence that Congress intended the relief available in citizen suits to be the exclusive remedy for all harms that arise in the context of drinking water contamination, including harms that result from constitutional (as distinct from statutory) violations.

By equating constitutional claims with claims alleging violations of SDWA, the district court ignored controlling precedent and applied the wrong standard for determining whether Congress intended to preclude Plaintiffs' claims. The district court's approach, if endorsed by this Court, would prevent individuals from vindicating their constitutional rights under section 1983 simply because those rights were violated in a way that involved environmental contamination.

This Court should reverse the district court's dismissal of Plaintiffs' claims.

ARGUMENT

I. The Safe Drinking Water Act does not preclude section 1983 claims based on constitutional violations

A. The district court applied the wrong standard to determine whether the Safe Drinking Water Act precludes Plaintiffs' constitutional claims

The district court applied the wrong legal standard to conclude that SDWA precludes Plaintiffs' section 1983 claims based on constitutional violations. When evaluating whether a statute precludes remedies otherwise available under section 1983, "[t]he crucial consideration is what Congress intended." *Smith v. Robinson*, 468 U.S. 992, 1012 (1984). Because courts "should 'not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy'" for constitutional violations, *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 252 (2009) (quoting *Smith*, 468 U.S. at 1012), Congress's "intent to do so must be clear."

Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 459 F.3d 676, 686 (6th Cir. 2006).

To determine Congress's intent, this Court considers (1) whether the remedies provided in the statute "indicate that Congress intended to preclude reliance on § 1983," and (2) whether the statutory and constitutional claims are "virtually identical." *Id.* at 685 (internal quotation marks omitted). Both factors must be satisfied for the Court to conclude that the statute precludes plaintiffs from using section 1983 as a remedy for constitutional violations. *Id.* (citing *Smith*, 468 U.S. at 1009).

The district court failed to apply this clear precedent. It instead looked to SDWA's enforcement scheme to conclude that the Act precluded all section 1983 claims relating to drinking water contamination. *See* R. 196, Page ID # 6917. To be sure, a statute's "creation of a comprehensive enforcement scheme" can sometimes indicate that Congress intended to preclude section 1983 claims "based on a statutory right." *Fitzgerald*, 555 U.S. at 252 (citing *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005)). In *Middlesex County Sewerage Authority v. National Sea Clammers Association*, for example, the Supreme Court found that the Clean Water Act's "comprehensive" remedial devices showed that Congress intended to preclude plaintiffs from using section 1983 to seek relief for violations *of that statute*. 453 U.S. 1, 20 (1981).

National Sea Clammers does not, however, "stand for the proposition that a federal statutory scheme can preempt independently existing constitutional rights." *Lillard v. Shelby Cty. Bd. of Educ.*, 76 F.3d 716, 723 (6th Cir. 1996). "For the preclusion of *constitutional* claims, . . . more is required than a comprehensive statutory scheme." *Levin v. Madigan*, 692 F.3d 607, 619 (7th Cir. 2012) (emphasis in original). The district court ignored this "essential distinction" between the claims in *National Sea Clammers* and the claims here: the *Mays* plaintiffs seek to enforce constitutional rights that are "wholly independent, and totally distinct" from the rights created under SDWA. *Lillard*, 76 F.3d at 723.

The district court's reliance on *Mattoon v. City of Pittsfield*, 980 F.2d 1, 6 (1st Cir. 1992), is therefore misguided. That case too makes a "comprehensive remedial scheme" dispositive as to preclusion of constitutional claims. But after the Supreme Court's instruction in *Fitzgerald* that courts consider factors beyond the comprehensiveness of a statutory enforcement scheme when preclusion of constitutional claims is at issue, *see* 555 U.S. at 257, *Mattoon*'s analysis is no longer good law.

B. Congress intended citizen suits under the Safe Drinking Water Act to promote enforcement of that statute, not prevent enforcement of constitutional rights

To properly assess whether Congress intended SDWA to preclude section 1983 constitutional claims, a court must first consider the statute's text and

legislative history. *See Cmtys. for Equity*, 459 F.3d at 682.

1. The Safe Drinking Water Act's text shows that Congress intended to preserve remedies for constitutional violations under section 1983

SDWA's text makes clear that the statute preserves Plaintiffs' section 1983 constitutional claims. SDWA's savings clause expressly preserves additional remedies not available under the citizen-suit provision: "Nothing in this section shall restrict any right which any person . . . may have *under any statute or common law* to seek enforcement of any requirement prescribed by [SDWA] *or to seek any other relief*." 42 U.S.C. § 300j-8(e) (emphases added); *see also* S. Rep. No. 93-231, at 17 (1973). This provision covers Plaintiffs' claims. Section 1983 is a "statute" through which Plaintiffs seek "other relief," *i.e.*, damages for constitutional torts. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) (internal quotation marks omitted).

The scope of the savings clause, moreover, is not limited to state-law claims. *See, e.g.*, *Her Majesty The Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 343 (6th Cir. 1989) (Clean Water Act savings clause preserves state-law claims); *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 691-92 (6th Cir. 2015) (same for Clean Air Act savings clause). The language of the provision, including the phrases "any statute" and "any other relief,"

"sweep[] broadly," and does not suggest a distinction between federal versus state law. *See Merrick*, 805 F.3d at 690.[4] In short, the remedies available through a SDWA citizen enforcement suit "coexist with an alternative remedy available in a § 1983 action" to enforce constitutional rights. *Rancho Palos Verdes*, 544 U.S. at 121.

National Sea Clammers, relied on by the district court here, does not change this analysis. "[T]hat case speaks only to whether federal statutory rights can be enforced both through the statute itself *and* through section 1983." *Lillard*, 76 F.3d at 723. The plaintiffs in *National Sea Clammers* sought to use section 1983 to seek damages for violations of statutory rights, "[e]ven though the statutes that created the very rights that they were asserting did not authorize monetary damages." *Cmtys. for Equity*, 459 F.3d at 684. The Supreme Court, interpreting a savings clause analogous to SDWA's, held that Congress intended to preserve claims to enforce rights "arising under *other* statutes or state common law," but not a right created by the very statutory scheme at issue. *Nat'l Sea Clammers*, 453 U.S. at 20 n.31. For example, if Plaintiffs sought damages through a section 1983 claim alleging that Defendants failed to test their tap water for lead as required under

[4] Indeed, other statutes, such as the Employee Retirement Income Security Act, show that Congress knows how to limit savings clauses to preserve only state-law claims when it intends to do so. *See* 29 U.S.C. § 1144(b)(2)(A) (preserving obligations under "any law *of any State* which regulates insurance, banking, or securities" (emphasis added)).

SDWA, such a claim would be precluded under *National Sea Clammers*. But that is not the case here. Plaintiffs seek to vindicate not rights created under SDWA, but "independently existing constitutional rights." *Lillard*, 76 F.3d at 723; *see also infra* pp. 14-16.

Moreover, SDWA does not purport to provide a remedy for constitutional violations. SDWA's aim is to ensure that drinking water "meet[s] minimum national standards for protection of public health." H.R. Rep. No. 93-1185 (1974), *as reprinted in* U.S.C.C.A.N. 6454, 6454. While Congress crafted a remedial scheme to enforce the new statutory rights it created through SDWA, *see* 42 U.S.C. § 300j-8, nothing in the statute suggests that Congress intended either to implicitly repeal section 1983 as a remedy or to provide a cause of action to vindicate constitutional rights. This makes SDWA unlike the statutes in the only cases in which the Supreme Court has found preemption of constitutional claims: those statutes "were specifically designed to address constitutional issues." *Levin*, 692 F.3d at 618; *see Smith*, 468 U.S. at 1010 (finding preemption where the Education of the Handicapped Act was a "comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children"); *Preiser v. Rodriguez*, 411 U.S. 475, 483 (1973) (holding that a habeas corpus statute was an exclusive remedy, where it specifically provided a remedy for prisoners "in custody in violation of the

Constitution" (quoting 28 U.S.C. § 2241(c))).

2. Legislative history confirms that Congress intended citizen-suit provisions to ensure robust enforcement of environmental laws, not restrict the availability of other remedies

Citizen-suit provisions in federal environmental statutes "reflect[] a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the [laws] would be implemented and enforced." *Nat. Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974) (discussing the Clean Air Act). Indeed, the Nixon Administration had successfully urged Congress to include a citizen-suit provision in SDWA because the "possibility of a citizen suit provides a strong additional incentive to [drinking water] suppliers to maintain compliance with the standards." H. R. Rep. No. 93-1185 (1974), *as reprinted in* U.S.C.C.A.N. 6454, 6499. Congress modeled SDWA's citizen-suit provision on the analogous and nearly identical provisions in the Clean Air Act and Clean Water Act. *See* S. Rep. No. 93-231, at 17; *compare* 42 U.S.C. § 7604 (Clean Air Act), *and* 33 U.S.C. § 1365 (Clean Water Act), *with* 42 U.S.C. § 300j-8 (SDWA). This Court should thus interpret the provisions similarly. *See United States v. Stauffer Chem. Co.*, 684 F.2d 1174, 1188 (6th Cir. 1982).

The Clean Air Act's legislative history shows that Congress intended to promote "citizen participation in the enforcement of standards and regulations established under th[e] Act," S. Rep. No. 91-1196, at 36-39 (1970), *not* exhaust the

remedies available to plaintiffs to redress harms from air pollution. Citizen participation was needed to supplement "restrained" and "notoriously laggard" enforcement of pollution standards by federal agencies and motivate enforcement by those agencies. *Id.* at 36, 37; *see Baughman v. Bradford Coal Co.*, 592 F.2d 215, 218 (3d Cir. 1979) (discussing "extensive legislative history"). Congress also anticipated that the number and degree of violations would be "far beyond the capacity" of government agencies to monitor and respond to, even assuming robust enforcement efforts. Cong. Research Servs., A Legislative History of the Clean Air Act Amendments of 1970, at 355-57 (comments of Sen. Hart, Sept. 22, 1970); *see id.* at 280 (comments of Sen. Muskie, Sept. 21, 1970). Citizens, often adept at "detecting violations and bringing them to the attention of the enforcement agencies and courts," could provide added enforcement capacity. *Train*, 510 F.2d at 700 (quoting comments of Sen. Muskie).

In this way, the "central purpose" of citizen-suit provisions is to allow "citizens to abate pollution when the government cannot or will not command compliance," *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62 (1987), not to restrict the availability of other remedies. Plaintiffs suing under these provisions "seek relief not on their own behalf but on behalf of society as a whole." *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 477 (6th Cir. 2004).

* * *

Because no "express provision or other specific evidence from the statute itself" indicates that Congress intended to foreclose section 1983 claims alleging constitutional violations, *Charvat v. E. Ohio Reg'l Wastewater Auth.*, 246 F.3d 607, 615 (6th Cir. 2001), this Court should conclude that no such preclusion was intended by Congress.

C. The rights and protections of the Safe Drinking Water Act are not "virtually identical" to those existing under the Constitution

To further assess congressional intent, *Communities for Equity* instructs courts to compare the rights and protections available under the Constitution and the statute at issue. 459 F.3d at 685. The rights and protections guaranteed by the statute and constitutional provisions must be "virtually identical" for a court to conclude that Congress intended to preclude section 1983 as a remedy for constitutional violations. *Id.* A significant divergence between the statutory and constitutional rights indicates that "it is not likely that Congress intended to displace § 1983 suits enforcing constitutional rights." *Fitzgerald*, 555 U.S. at 252-53. This comparison of rights involves examining the nature of the protections, the scope of activities and parties regulated, and the standards for showing liability. *Id.* at 257.

Here, the statutory and constitutional protections diverge significantly. *See* Appellants' Opening Br. 25-33, ECF No. 53. SDWA protects individuals from drinking water that fails to meet safety standards for a limited number of

contaminants. The law requires water system owners and operators to disinfect and filter water to kill bacteria, ensure that levels of certain harmful contaminants do not exceed specified standards, treat water with chemicals to prevent corrosion of lead pipes, and monitor drinking water for certain contaminants. *See generally* 42 U.S.C. § 300g-1; 40 C.F.R. pt. 141.[5]

To establish liability for SDWA violations, citizen-plaintiffs must prove that defendants violated a requirement of the statute or its implementing regulations, and that the violation persisted or was likely to recur as of the date the complaint was filed. *See* 42 U.S.C. § 300j-8(a)(1); *cf. Chesapeake Bay Found., Inc. v. Gwaltney*, 844 F.2d 170, 171-72 (4th Cir. 1988) (discussing Clean Water Act citizen suit). A SDWA claim can succeed regardless of whether an owner or operator intentionally discriminated against a plaintiff based on race or another protected class or failed to provide the plaintiff with due process.

The Fourteenth Amendment rights to equal protection and due process are markedly different. These rights help ensure that government conduct is consistent

[5] While EPA has set standards for dozens of contaminants in tap water, *see* U.S. EPA, National Primary Drinking Water Regulations, https://www.epa.gov/ground-water-and-drinking-water/national-primary-drinking-water-regulations (last visited Apr. 10, 2017), the majority of the thousands of dangerous contaminants that occur in drinking water sources remain wholly unregulated under SDWA, *see generally* Nat'l Acad. of Sciences et al., Identifying Future Drinking Water Contaminants, (Nat'l Acad. Press 1999), *available at* https://www.nap.edu/download/9595. The statute provides no redress for harms caused by water rendered unsafe due to the presence of these unregulated contaminants.

with the Constitution's basic guarantees. They protect Plaintiffs from intentional discrimination by state officials based on race, *see Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977), and from deliberate state action that "directly increases the vulnerability of citizens to danger," *Ewolski v. City of Brunswick*, 287 F.3d 492, 509 (6th Cir. 2002). Although Plaintiffs allege that Defendants violated these rights in the course of providing drinking water to Flint residents and communicating with residents about the safety of their tap water, *see* R. 111 ¶¶ 134-35, 154-63, Page ID # 1682, 1686-88, their constitutional claims can succeed regardless of whether Defendants provided water to Flint residents that violated SDWA's standards.

The divergence between these constitutional and statutory rights shows that Congress did not intend SDWA to be the exclusive means of remedying harms that result from drinking water contamination. *See Cmtys. for Equity*, 459 F.3d at 685; *see also Fitzgerald*, 555 U.S. at 252. Allowing Plaintiffs to pursue their section 1983 constitutional claims thus would not be "inconsistent with Congress's carefully tailored scheme" for citizen enforcement of SDWA's separate drinking water standards. *See Charvat*, 246 F.3d at 615 (internal quotation marks omitted). Such concurrent claims would instead vindicate the full scope of rights afforded by federal law.

II. Vindication of constitutional rights through section 1983 is critical to ensuring government actors comply with constitutional mandates

A constitutional right without a remedy ceases to be a right at all. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (observing that the United States cannot be called "a government of laws, and not of men . . . if the laws furnish no remedy for the violation of a vested right"). The availability of damages and other retrospective relief is a "vital component of any scheme for vindicating cherished constitutional guarantees," and "serve[s] as a deterrent against future constitutional deprivations." *Owen v. City of Independence*, 445 U.S. 622, 651 (1980). As the primary means by which individuals may seek damages for past constitutional violations, section 1983 is "one of the most important vehicles for the vindication of constitutional" rights. *Harrison v. Ash*, 539 F.3d 510, 523 (6th Cir. 2008). The statute's importance "is only accentuated when"—as here—"the wrongdoer[s]" are the government officials who are entrusted "to protect the very rights" that have been transgressed. *Owen*, 445 U.S. at 651. The district court's decision, if upheld, would deprive Plaintiffs of any remedy for their constitutional claims, negating the existence of their constitutional rights in the process.

The injustice of upholding the district court's decision could affect any community that faces harmful pollution as a result of government officials' actions. But it will hit hardest in low-income communities and communities of color. These communities face disproportionate exposure to polluted air, water,

and soil. *See, e.g.*, Mary B. Collins et al., *Linking 'Toxic Outliers' to Environmental Justice Communities*, 11 Envtl. Res. Letters 015004, at 2 (2016). While hazardous waste facilities are more likely to be sited in minority neighborhoods, regulators enforce environmental laws more quickly, seek higher penalties from polluters, and obtain more stringent remedies in white neighborhoods. *See* Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, Nat'l L.J. Sept. 1992, at S2. These systemic disparities extend to drinking water quality as well. *See generally* Carolina L. Balazas & Isha Ray, *The Drinking Water Disparities Framework: On the Origins and Persistence of Inequities in Exposure*, 104 Am. J. Pub. Health 4, 603 (2014).

In some cases, these disparities may result from unconstitutional discrimination based on race. *See, e.g.*, *Ammons v. Dade City*, 594 F. Supp. 1274, 1303 (M.D. Fla. 1984), *aff'd*, 783 F.2d 982 (11th Cir. 1986); *Dowdell v. City of Apopka*, 511 F. Supp. 1375, 1383-84 (M.D. Fla. 1981), *aff'd in relevant part*, 698 F.2d 1181 (11th Cir. 1983). Plaintiffs allege that such unlawful discrimination occurred in Flint. *See, e.g.*, R. 111 ¶¶ 150-65, Page ID # 1685-89. Enforcement of environmental laws—whether by regulators or citizens—can address in part the disproportionate environmental burdens on these communities. But when environmental contamination is caused by unconstitutional government action, enforcement of environmental laws is no replacement for vindication of

constitutional rights. *See supra* pp. 14-16. Even if the illegal pollution ceases, communities may still be owed remedies to address the costly legacy effects of discrimination: home values and economic development are depressed; a cohort of children have an increased risk of cancer and other diseases as a result of past exposure; and families suffer the enduring psychological toll of deliberate mistreatment by their government.

To the extent these harmful effects of environmental contamination stem from unconstitutional government action, section 1983 provides a remedy. A statute allowing citizens to compel environmental compliance and address harms caused by ongoing and recurring violations does not repeal the availability of this remedy (and in effect, negate the right). Yet the district court held otherwise. "[T]he injustice of such a result should not be tolerated." *Owen*, 445 U.S. at 651.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's dismissal of Plaintiffs' claims.

Dated: April 10, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i) because it contains 4,422 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 and 14-point Times New Roman font.

Dated: April 10, 2017

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