No. 17-

In the Supreme Court of the United States

CITY OF FLINT, ET AL.,
Petitioners,

v.

BEATRICE BOLER, ET AL.,
Respondents.

CITY OF FLINT, ET AL.,
Petitioners,

v.

MELISSA MAYS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Date: December 20, 2017

QUESTIONS PRESENTED

This Court has repeatedly held, most recently in *Fitzgerald* v. *Barnstable School Committee*, 555 U. S. 246 (2009), that Congressional intent to preclude claims under 42 U.S.C. § 1983 can be inferred from the existence of a comprehensive statutory remedial scheme. Congress enacted the Safe Drinking Water Act ("SDWA") to "assure that the public is provided with safe drinking water." Toward that end, the SDWA includes extensive remedial provisions, including allowing "citizen suits" to remedy violations. Further, pursuant to Congressional mandate in the SDWA, the EPA has adopted exhaustive regulations, known as the "Lead and Copper Rule," to protect the public from the dangers of lead in drinking water.

Plaintiffs, residents and businesses in Flint, Michigan, claim that their constitutional rights were violated by the provision of drinking water with excessive lead levels. They seek relief under 42 USC § 1983. The district court, following a holding from the First Circuit Court of Appeals, concluded that § 1983 claims were precluded by the SDWA's remedial scheme. The court of appeals disagreed. The heart of this disagreement concerned the proper interpretation of *Fitzgerald, supra*¸ which case has also led to circuit splits with respect to the preclusive effect of other statutes.

The questions presented are:

(1) Did Congress, when it enacted the SDWA to protect the safety of drinking water and directed the issuance of regulations to protect against the danger of lead, intend to allow Plaintiffs to disregard the SDWA's carefully structured and

comprehensive remedial scheme and instead allow for recovery under § 1983?

(2) Under *Fitzgerald*, is the purpose of the statute and nature of the remedial scheme a sufficient basis to infer congressional intent to preempt § 1983 claims based on alleged constitutional violations?

PARTIES TO THE PROCEEDING

This Petition relates to two cases consolidated for appeal before the Sixth Circuit: *Boler* v. *Earley*, No. 16-1684, and *Mays* v. *Snyder*, No. 17-1144.

Boler v. *Earley*

Petitioners are Defendants City of Flint, Darnell Earley, Gerald Ambrose and Dayne Walling. The City is a Michigan municipality. At all times relevant to this case, the City was governed by State-appointed emergency financial managers ("EMs"). Messrs. Earley and Ambrose are former EMs who held office sequentially during much of the time at issue. Mr. Walling is the former Mayor of Flint.

Respondents are Plaintiffs Beatrice Boler, Edwin Anderson, Allina Anderson, and Epco Sales, LLC.

Other Defendants are: Governor Rick Snyder, the State of Michigan, the State of Michigan's Department of Environmental Quality (MDEQ), and the State of Michigan's Department of Health and Human Services (MDHHS).

Mays v. *Snyder*

Petitioners are Defendants City of Flint, Darnell Earley, Gerald Ambrose, Dayne Walling, Howard Croft, Michael Glasgow, and Daugherty Johnson. Messrs. Croft, Glasgow, and Johnson are former City employees involved in the City's water plant operations.

Respondents are Plaintiffs Melissa Mays, Michael Mays, Jacqueline Pemberton, Keith John Pemberton, Elnora Carthan, and Rhonda Kelso.

Other Defendants are: Governor Rick Snyder, the State of Michigan, Daniel Wyant, Liane Shekter Smith, Adam Rosenthal, Stephen Busch, Patrick Cook, Michael Prysby, Bradley Wurfel, Nick Lyon, Andy Dillon, Ed Kurtz, and Jeff Wright.

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PETITION FOR A WRIT OF CERTIORARI

The City of Flint, Darnell Earley, Gerald Ambrose, Dayne Walling, Howard Croft, Michael Glasgow, and Daugherty Johnson petition for a writ of certiorari to review the judgment of the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion reversing the district court is reported at *Boler* v. *Early*, 865 F. 3d 391 (CA6 2017) (Pets.' Appx. 5a–51a.).

The district court opinions dismissing Plaintiffs' § 1983 claims are unreported, but the *Boler* opinion is available at 2016 WL 157327 (E.D. Mich. 2016) and the *Mays* opinion is available at 2017 WL 445637 (E.D. Mich. 2017). Both Opinions are also reproduced in the Appendix (*Boler*: Pets.' Appx. 52a–58a; *Mays*: Pets' Appx 59a-65a).

JURISDICTION

The Sixth Circuit issued its decision on July 28, 2017. The Sixth Circuit denied Petitioners' timely request for rehearing and rehearing *en banc* on September 21, 2017. This Court has jurisdiction to grant a writ of certiorari under 28 U. S. C. § 1254(1).

STATUTES INVOLVED

This case involves the remedial provisions of the federal Safe Drinking Water Act, 88 Stat. 1660 (1974), 42 U. S. C. § 300j–8 ("SDWA"), and Revised Statute § 1979, 42 U. S. C. § 1983.[1] Pertinent portions are reproduced in the Appendix. (SDWA: Pets.' Appx. 66a–78a; §1983 93a).

[1] Plaintiffs also asserted conspiracy claims under 42 U.S.C. § 1985. If the predicate § 1983 claims are precluded, so too are the § 1985 claims. *Boler*, 865 F.3d at 409. Therefore, this petition addresses only Plaintiffs' § 1983 claims.

INTRODUCTION

These cases arise out of the events commonly known as the "Flint water crisis". For decades, the City had purchased treated drinking water from an outside supplier. In 2011, the Governor of Michigan, exercising his authority under State law, declared the City to be in a financial emergency and placed it under the control of a series of state-appointed emergency managers ("EMs") to rectify the financial situation. In undertaking that task, one of the EMs decided to switch the City to a new water supplier. The new supplier could not supply water immediately, so during the interim period the EM could either continue purchasing treated water from its old supplier or use water from the Flint River. The EM, with the approval of the State of Michigan and the Michigan Department of Environmental Quality ("MDEQ"), the primary regulatory authority under the Safe Drinking Water Act, decided to begin treating and distributing Flint River water. Much of the City's water infrastructure dated back to the early 20th, or even 19th, century, similar to a vast number of older municipalities. This meant that the infrastructure contained many lead service lines and other lead containing materials that have been banned for many years. Plaintiffs allege that failure to properly treat the Flint River water caused lead to leach into the water as it traveled through the City's water service lines into homes and businesses. Plaintiffs seek compensation and other relief for their resulting injuries.[2]

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[2] This case remains at the pleading stage. Petitioners do not admit the accuracy or completeness of Plaintiffs' factual allegations or the factual background recited in the Sixth Circuit's decision, *Boler*, 865 F. 3d at 396–399 (Pet's Appx. 8a-13a), but accept the well-pled allegations as true for present purposes, as the Court must.

Petitioners argued that the comprehensive remedial provisions of the Safe Drinking Water Act ("SDWA") demonstrated Congressional intent to preclude § 1983 remedies when the alleged constitutional deprivation arises out of the supply of unsafe drinking water. The district court agreed. The Sixth Circuit consolidated these two cases *sub nom Boler* v. *Earley* and reversed, holding that the SDWA does not preclude § 1983 remedies.

This decision created a circuit split. In *Mattoon* v. *Pittsfield*, 980 F. 2d 1 (CA1 1992), the First Circuit held that the SDWA precluded § 1983 claims, regardless of whether those claims asserted violations of the SDWA or the Constitution.

Mattoon and *Boler* are currently the only appellate cases to address SDWA preclusion of § 1983 claims, but many other cases have addressed this same preclusion question in relation to other federal statutes with similarly comprehensive remedial schemes, such as the Age Discrimination in Employment Act of 1967. 81 Stat. 602 ("ADEA"). The Third, Fourth and the Tenth Circuits hold that the ADEA precludes § 1983 claims, while the Seventh and Ninth Circuits hold to the contrary.

The source of this recurring circuit split is differing interpretations of this Court's decision in *Fitzgerald* v. *Barnstable School Committee*, 555 U. S. 246 (2009), which tried to define the standard for determining when a statute precludes constitutional § 1983 claims. All relevant case law agrees that preclusion is a question of congressional intent. Prior to *Fitzgerald,* this Court had held in a trilogy of cases -- *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U. S. 1 (1981); *Smith* v. *Robinson*, 468 U. S. 992 (1984); and *City of Rancho Palos Verdes* v. *Abrams*, 544 U. S. 113 (2005) – that,

with some oversimplification, preclusion of a § 1983 remedy could be inferred from a statute's "comprehensive remedial scheme." Following *Fitzgerald*, appellate courts have struggled with the related questions of: (1) whether *Fitzgerald* modified the application of the "comprehensive remedial scheme" inquiry; and (2) whether *Fitzgerald* created a new, superseding requirement for preclusion, namely that preclusion is improper if "the contours of [the statutory and constitutional] rights and protections diverge in significant ways." *Fitzgerald* at 252–253.

Clearly, *Fitzgerald* has not resolved the uncertainty and disharmony among the circuits as to when a federal statute precludes parallel constitutional claims under § 1983. This petition presents the Court with a fresh opportunity to clarify the standard lower courts should use to decide when a statute's remedial scheme precludes § 1983 claims based on alleged constitutional violations.

Besides the opportunity to resolve a circuit split, this Petition raises a question of exceptional public importance. That reference to the "Flint water crisis" requires little or no explanation speaks to the place it holds in the public consciousness. The Flint water crisis has triggered an enormous response from each branch of government at the federal, state, and local levels, including:

- Congress has appropriated $100 million to fund remediation efforts.[3]
- The EPA issued an "Emergency Administrative

[3] Section 2201(d)(1) of the Water Infrastructure Improvements for the Nation Act of 2016, 130 Stat. 1628; Section 196 of the Further Continuing and Security Assistance Appropriations Act of 2017, 130 Stat. 1005.

Order"[4] and has taken substantial control over the City's water source, water-treatment processes, water plant management, and water-quality reporting.

- The Eastern District of Michigan entered an order in *Concerned Pastors for Social Action* v. *Khori*, No. 16-10277, a case brought under the SDWA's "citizen suit" provision, committing $97 million for the City to replace lead service lines[5] in about 18,000 Flint homes by 2019. At this time, over 6,200 lead service lines have been replaced by the City.[6]
- The Michigan Legislature appropriated an additional $294.8 million for remediation and relief efforts.[7]
- Various state executive departments have distributed bottled water, water filters and

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[4] EPA Emerg. Admin. Order (Jan. 21, 2016) (available at https://www.epa.gov/sites/production/files/2016-01/documents /1_21_sdwa_1431_emergency_admin_order_012116.pdf

[5] A water "service line" refers to the portion of the water distribution system connecting the water main to the interior plumbing of a house or other structure. Typically the government owns and is responsible for the water main, while the property owner owns and is responsible for the service line and interior plumbing. *See generally*, LSLR Collaborative "Introduction to Lead and Lead Service Line Replacement" (https://www.lslr-collaborative.org/intro-to-lsl-replacement.html).

[6] *See* Over 6,200 Flint water service lines replaced in past two years, Oona Goodin-Smith, Flint News, December 12, 2017. Available at http://www.mlive.com/news/flint/index. ssf/2017/12/flint_pushes_ahead_of_schedule.html (Last Accessed December 13, 2017).

[7] State of Michigan, *Flint Water Emergency: Expenditure Dashboard* (2017) (available at http://www.michigan.gov/flintwater/0,6092,7-345-73947_78591---,00.html).

cartridges, and testing kits, and implemented residential and school water testing.[8]

- Michigan state courts are presiding over thousands of individual and putative class actions.

Moreover, these suits are the harbinger of what is to come. The *Mays* and *Boler* lawsuits are among roughly 70 lawsuits (10 of which are putative class actions) involving thousands of named plaintiffs and untold numbers of potential putative class members, all seeking relief under § 1983, in the United States District Court for the Eastern District of Michigan. But the challenge of dealing with the consequences of aging water infrastructure extends far beyond Flint. Flint is one of many cities, many of them suffering from "neglect, decline, or poverty," that must deal with aging, lead-laden water infrastructure.[9]

The massive remediation effort in Flint and the looming remediation needs in many other cities highlight the importance of the narrow legal question of whether the SDWA preempts constitutional § 1983 claims. The creation of a federal constitutional tort under § 1983 disrespects the legislative judgment of Congress and the executive authority of state and federal enforcement agencies that implement and enforce that Congressional judgment, and the ability of the politically accountable branches to flexibly and

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[8] Michigan Dep't of Env. Quality, *Summ. of Flint Resp. Activities* (Jun. 23, 2016) (available at https://www.michigan.gov/documents/flintwater/DEQ_and_Partner_Response_to_Flint_Water_Crisis_062316_527365_7.pdf).

[9] "Flint's Water Crisis Should Raise Alarms for America's Aging Cities." Fortune Magazine, January 25, 2016, fortune.com/2016/01/25/flint-water-crisis-america-aging-cities-lead-pipes/?utm_source=fortune.com&utm_medium=social&utm_campaign=copy-link-sharing (visited December 13, 2017).

creatively supplement the SDWA's remedies as and if needed.

STATEMENT OF THE CASE

1. The Statutory Framework: The SDWA and the Lead and Copper Rule

Congress enacted the SDWA to "assure that the public is provided with safe drinking water." 88 Stat. 1660 (1974). The SDWA allows the EPA to set "maximum contaminant levels" for various contaminants, including lead and copper, 42 U. S. C. §§ 300g-1(b)(1)–(b)(3) (Pets' Appx. 67a) and 300g-3(c) (Pets' Appx. 70a-71a). In 1986, Congress amended the SDWA to, *inter alia*, require that the EPA develop maximum contaminant level goals and promulgate national primary drinking water regulations for lead. 100 Stat. 643, § 101(b).

The EPA complied with this congressional mandate by promulgating the "Lead and Copper Rule," 40 C. F. R. §§ 141.80–141.91, (Pets.' Appx. 79a-89a), which exhaustively regulates a water system's responsibilities for controlling, testing, and remediating lead levels in a water supply. In the broadest terms, the Rule requires water systems to use "optimal corrosion control" techniques; periodically test lead levels in a sample of homes, using a testing methodology prescribed by the state enforcement agency; and take an escalating series of remedial actions if more than 10% of the tested sample sites exceed the lead "action level". *See generally, Harding-Wright* v. *District of Columbia Water,* 2016 WL 4211773, at **1-2 (D.D.C., 2016).

Congress also authorized a private right of action by which any person "on his own behalf" may seek redress for SDWA violations, subject to the Eleventh

Amendment.[10] 42 U. S. C. § 300j-8(a) (Pets' Appx. 75a-76a). Moreover, a person intending to sue must give 60 days' notice. 42 U. S. C. § 300j-8(b). Finally, private parties have no right to recover monetary damages. *Mays* v. *City of Flint, Mich.*, 871 F. 3d 437, 450 (CA6 2017).

The SDWA contemplates that the states will have primary responsibility for enforcement of the Act under a state "primacy" rule. 42 U. S. C. § 300g-2(a) (Pets' Appx. 68a-70a). This primacy structure is part of an overall policy of "cooperative federalism." *Wyoming* v. *Zinke*, 871 F. 3d 1133, 1140 (CA10 2017). Accordingly, Michigan has adopted its own Safe Drinking Water Act ("MI-SDWA"). Mich. Comp. Laws §§ 325.1001–325.1023. It gives the Michigan Department of Environmental Quality ("MDEQ") "power and control over public water supplies and suppliers," Mich. Comp. Laws § 325.1003, mandates the adoption of "State drinking water standards," Mich. Comp. Laws § 325.1005(1)(c), and authorizes MDEQ to require water suppliers to meet those standards, Mich. Comp. Laws § 325.1015(1), imposes criminal and civil penalties for violations, Mich. Comp. Laws §§ 325.1021(1)-(3), and authorizes the Michigan Attorney General to bring an injunctive or other appropriate action to enforce the MI-SDWA and

[10] The SDWA's remedial scheme is not limited to private actions. Violations can result in both civil and criminal penalties. *See* 42 U. S. C. § 300i-1 (criminal and civil penalties for tampering with public water systems); 42 U. S. C. § 300h-2(b) (criminal and civil penalties for willful violations of underground injection control programs); 42 U. S. C. § 300g-3 (EPA civil enforcement of drinking water regulations); 42 U. S. C. § 300i(2) (civil penalties for violating emergency orders); 42 U. S. C. §300j-4(c) (civil penalties for recordkeeping violations); and 42 U. S. C. § 300j-7 (providing for judicial review of agency orders and regulation).

rules promulgated thereunder, Mich. Comp. Laws § 325.1022.

The MI-SDWA also incorporates the EPA's maximum contaminant levels for lead. Mich. Comp. Laws § 325.1006. In addition, it mandates the testing procedure by which compliance will be measured, Mich. Comp. Laws § 325.1007(1), and the chemicals that may be used to address contaminant issues, Mich. Comp. Laws § 325.1013.

2. Plaintiffs' Claims

Boler and *Mays* are putative class actions. The *Boler* Plaintiffs allege from the very first paragraph of their Complaint that Defendants deprived them of "safe, potable drinking water . . . [by] failing to address . . . lead leaching from corroded pipes into the water supply, as required by the Michigan Safe Drinking Water Act.[11] Plaintiffs asserted six § 1983 claims arising from the provision of unsafe water: (1) impairment of the right to contract for potable water; (2) deprivation of procedural due process in the impairment of that contractual right; (3) breach of the duty to protect against a state-created danger, in violation of substantive due process; (4) deprivation of equal protection; (5) deprivation of a property interest by way of diminished property values without due process or just compensation, and (6) a conspiracy to deprive Plaintiffs of these constitutional rights.[12]

The *Mays* Plaintiffs similarly complain that Defendants "expos[ed] Plaintiffs to contaminated

[11] *Boler* Complaint, Dkt.#1, ¶1. Indeed, the *Boler* Complaint states that they were deprived of "safe, potable water" no less than 45 times. Further, each of their constitutional claims are expressly premised on the provision of unsafe water. Id. ¶ 50 (Count I); ¶ 54 (Count II); ¶¶ 59-60 (Count III); ¶65 (Count IV); ¶ 71 (Count V); and ¶ 76 (Count VI).

[12] *Boler* Complaint, 16-cv-10323, Dkt. #1.

water"[13] and, based on that exposure, assert five federal claims: (1) breach of the duty to protect against a state-created danger, in violation of substantive due process; (2) a deprivation of the right to bodily integrity, also in violation of substantive due process; (3) race-based deprivation of equal protection because the City is a minority-majority municipality; (4) wealth-based deprivation of equal protection because the City's residents are poor; and (5) a conspiracy to deprive Plaintiffs of these constitutional interests because of invidious racial animus.

Both cases plead one or more state law claims, none of which are pertinent to this Petition.

3. District Court Proceedings

***Boler*.** The district court dismissed the federal *Boler* claims for lack of subject-matter jurisdiction and declined to exercise supplemental jurisdiction over the state law claims. (Pets.' Appx. 52a.) It recognized that "the crux of each of Plaintiffs' constitutional claims is that they have been deprived of 'safe and potable water,'" (*id.* at 57a), and found that the SDWA's remedial scheme was "sufficiently comprehensive . . . to preclude the remed[ies] under §1983," (*id.* at 54a) (quoting *Sea Clammers*, 453 U. S. at 20). The court therefore ruled that their "*federal* remedy is under the SDWA, regardless of how [they framed their legal theories] in the complaint." (Pets.' Appx. 57a) (Emphasis in original.) It also ruled that state remedies were unaffected, *id.*, consistent with the Act's commitment to environmental federalism. In short, the district court followed the First Circuit's decision in *Mattoon* v. *Pittsfield*, 980 F. 2d 1 (CA1 1992), which was squarely on point. (*Id.* at 54a-56a)

[13] *Mays* First Amended Complaint, Dkt # 111, ¶ 1.

Mays. The district court likewise dismissed the federal *Mays* claims for the same reasons, based on essentially the same legal authority. (Pets.' Appx. 59a). The main difference was that the district court also considered this Court's decisions in *Fitzgerald* v. *Barnstable School Committee*, 555 U. S. 246 (2009), which held that Title IX did not preclude § 1983 constitutional claims. Plaintiffs argued that under *Fitzgerald*'s analysis, the SDWA did not preclude their claims. The district court disagreed, explaining:

> Title IX's remedies . . . stand in stark contrast to the 'unusually elaborate,' 'carefully tailored,' and 'restrictive' enforcement schemes of the statutes at issue in *Sea Clammers*, *Smith*, and *Rancho Palos Verdes*. Like those statutes, and unlike Title IX, the SDWA establishes an elaborate enforcement scheme with respect to safe drinking water. Allowing parallel § 1983 claims to proceed would circumvent the SDWA's procedures and would be inconsistent with Congress' carefully tailored scheme.

(Pets.' Appx. 64a).

4. The Sixth Circuit's Decision

The Sixth Circuit reversed, holding that the Defendants did not meet their burden of proving preclusion. The Sixth Circuit focused on the four cases in which this Court addressed the statutory preclusion of § 1983 claims: *Sea Clammers, Smith, Rancho Palos Verdes*, and *Fitzgerald*. The Sixth Circuit recognized that, in each of these cases, this Court held that preclusion was a question of congressional intent. *Boler*, 865 F. 3d at 401–403 (Pet. Appx. 17a-21a).

In *Sea Clammers*, plaintiffs sought a § 1983 remedy for violations of the Water Pollution Control

Act, 33 U.S.C. § 1251, and the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1401. This Court held that those statutes contained "unusually elaborate enforcement mechanisms" and that "[w]hen the remedial devices provided in the particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Id.* at 401 (Pets' Appx. 18a) (quoting *Sea Clammers* at 20.)[14]

In *Smith*, this Court held that the statutory remedial scheme of the Education of Handicapped Act precluded a constitutional § 1983 remedy of attorney's fees under 42 U. S. C. § 1988. The Sixth Circuit read *Smith* as finding preclusion based on "the language of the statute, its legislative history, and the comprehensive nature of its procedures and remedies." *Id.* at 402. (Pets' Appx. 19a)

Rancho Palos Verde also found that the statute (there, the Telecommunications Act) precluded § 1983 remedies because "the detailed and restrictive remedies in the Act 'were deliberate' and indicated Congress's intent that the statutory remedies were 'not to be evaded through §1983.'" *Id.* (quoting *Rancho Palos Verde*, 544 U. S. at 124).

The Sixth Circuit then turned to *Fitzgerald*, which arose out of Title IX. As in *Smith*, *Fitzgerald* addressed preclusion of constitutional § 1983 remedies. But, unlike the statutes at issue in the

[14] The remedial schemes of these statutes are virtually identical to those of the SDWA, including allowing private actions for injunctive relief, subject to mandatory notice and other limitations. *Compare* Section 505 of the Water Pollution Control Act, 86 Stat. 888–889, 33 U. S. C. § 1365 *and* §105 of the Marine Protection, Research, and Sanctuaries Act, 86 Stat. 1057–1058, 33 U.S.C. § 1415(g) *with* Section 1449 of the SDWA, 88 Stat. 1690, 42 U.S.C. § 300j-8.

prior three cases, Title IX provided no express private remedy, let alone a comprehensive remedial scheme. *Id.* at 402 (Pets Appx. 20a) (citing *Fitzgerald*, 555 U. S. at 256–258). *Fitzgerald* also identified an additional factor (in addition to those discussed in *Sea Clammers*, *Smith*, and *Rancho Palos Verde*) relevant to congressional intent in the case of constitutional § 1983 remedies: whether "the contours of such rights and protections diverge in significant ways." *Id.* (quoting *Fitzgerald*, 555 U. S. at 252–253).

The Sixth Circuit then summarized the above cases as establishing a three-factor test for assessing Congressional intent in constitutional § 1983 claims: (1) the language and legislative history of the statute, (2) the comprehensive nature of remedial scheme, and (3) whether the constitutional § 1983 claim was "virtually identical" to the statutory claim. *Id.* The Sixth Circuit determined that the first factor did not support preclusion because it did not support a "clear inference from either the text of the statute or its legislative history that Congress intended for the SDWA's remedial scheme to displace §1983 suits enforcing constitutional rights." *Id.* at 405 (Pets' Appx. 25a). The court then concluded that the SDWA's remedial scheme was not sufficiently comprehensive, principally based on the SDWA's "savings clause," notwithstanding that the SDWA's remedial scheme, including its savings clause, was substantially the same as that at issue in *Sea Clammers*. *Id.* at 406 (Pets' Appx. 26a-27a). Finally, it found that it could hypothesize conduct that would be remediable under the SDWA, but not § 1983, and *vice versa*, thus showing divergences between the scope and coverage of the two statutes. Accordingly, it concluded that Congress did not intend the SDWA to preempt any § 1983 claims, *Id.* at 408-409. (Pets' Appx. 29a-33a)

REASONS TO GRANT THE PETITION

1. The First and Sixth Circuit are split on whether the SDWA precludes constitutional claims under § 1983.

In holding that the SDWA does not preclude Plaintiffs' constitutional claims under § 1983, the Sixth Circuit expressly disagreed with the First Circuit's decision in *Mattoon*, finding that it was not "dispositive," *id.,* for two reasons. First, the Sixth Circuit opined that plaintiffs in *Mattoon* alleged a violation of a "constitutional right to safe drinking water," not "violations of specific constitutional provisions including the Contract Clause, Equal Protection Clause, and Due Process Clause." *Id.* at 406 (Pets. Appx 27a). Second, it noted that *Mattoon* predated *Fitzgerald*. *Id.*

Mattoon cannot be so easily dismissed. Logically, however labeled, the claimed constitutional right to safe drinking water in *Mattoon* must have been based on substantive due process. And nothing in *Fitzgerald* conflicts with *Mattoon*'s methodology or holding.

The *Mattoon* plaintiffs were sickened by contaminated water when the City of Pittsfield switched its raw water source without properly treating it. They sued for equitable relief under the SDWA and for damages under § 1983 for statutory and constitutional violations and under the federal common law of nuisance. The district court held that the SDWA pre-empted the federal damage claims, principally based on the comprehensiveness of the SDWA's remedial scheme. The First Circuit affirmed.

Regarding the constitutional claim under § 1983, the First Circuit explained:

> [E]ven assuming a fundamental constitutional right to safe public drinking water, it would not

> alter the present analysis. Comprehensive federal statutory schemes, such as the SDWA, preclude rights of action under section 1983 for alleged deprivations of constitutional rights in the field occupied by the federal statutory scheme.

Id. at 6. In addition to *Sea Clammers* and *Smith*, the First Circuit based its constitutional holding on *Brown* v. *General Services Administration,* 425 U. S. 820, 824-25 (1976) which, as summarized in *Mattoon*, held that "§ 717 of the Civil Rights Act of 1964 . . . provides [the] exclusive remedy for challenging racial discrimination in federal employment even though [the] alleged discrimination 'clearly violated . . . the Constitution.'" *Mattoon*, 980 F. 2d at 6.

The First Circuit also rejected the argument that the SDWA did not preclude the federal common-law claim because the EPA did not (at that time) regulate the contaminant that sickened the plaintiffs:

> [T]he comprehensiveness inquiry . . . turns on whether the field has been occupied, not whether it has been occupied in a particular manner . . . [O]nce Congress has addressed a national concern, . . . the separation of powers precludes the courts from scrutinizing the sufficiency of the congressional solution . . . [I]t is within the province of the agency, not the courts, to determine which contaminants will be regulated. The comprehensiveness of the legislative grant is not diminished, nor is the congressional intent to occupy the field rendered unclear, merely by reason of the regulatory agency's discretionary decision to exercise less than the total spectrum of regulatory power with which it was invested.

Id. at 5.

As noted earlier, the Sixth Circuit tried to distinguish *Mattoon* because it involved an alleged violation of a "constitutional right to safe drinking water," not "violations of specific constitutional provisions including the Contract Clause, Equal Protection Clause, and Due Process Clause." *Boler*, 865 F. 3d at 406 (Pets. Appx. 27a). This distinction cannot withstand scrutiny.

Although the *Mattoon* court did not use the label "due process," plainly a constitutional right to safe drinking water—if it exists at all—is a substantive due process right. The constitutional claim in *Mattoon* was no less rooted in a "specific constitutional provision[]," than the constitutional claims here, which are each centered on the provision of *unsafe* drinking water. If the Plaintiffs here were deprived of due process, equal protection, or the benefit of their contract, then it is because they were allegedly provided with unsafe drinking water.

The Sixth Circuit's second reason for disregarding *Mattoon* was that it predated *Fitzgerald*. While true, this does not mean that *Mattoon* conflicts with *Fitzgerald*. After all, *Fitzgerald* reaffirmed that the central holdings in *Sea Clammers*, *Smith,* and *Rancho Palos Verde*, apply fully to constitutional claims under § 1983:

- "In determining whether a subsequent statute precludes enforcement of a federal right under § 1983 we have placed primary emphasis on the nature and extent of that statute's remedial scheme." *Fitzgerald,* 555 U. S. at 253.
- "[T]he statutes at issue [in *Sea Clammers, Smith* and *Rancho Palos Verde*] required plaintiffs to comply with particular procedures and/or to

> exhaust . . . administrative remedies prior to filing suit . . . Offering plaintiffs a direct route to court via § 1983 would have circumvented these procedures and given plaintiffs access to tangible benefits—such as damages, attorney's fees, and costs—that were unavailable under the statutes. Allowing a plaintiff to circumvent the statute[. . .] in this way would have been "inconsistent with Congress' carefully tailored scheme." *Id.* at 254.

- "When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude [remedies] under § 1983." *Id.* at 253 (quoting *Sea Clammers,* 453 U.S. at 20).

Relying on these principles, the court held that there was "no basis" for finding that Title IX precluded § 1983 claims. *Fitzgerald*, 555 U. S. at 256.

Title IX contained virtually no remedial scheme; it provided only a very limited administrative remedy, supplemented by an *implied* private right of action. This "[stood] in stark contrast to the 'unusually elaborate,' 'carefully tailored,' and 'restrictive' enforcement schemes in *Sea Clammers, Smith* and *Rancho Palos Verdes*." *Id.* at 255-56. The court had also "never held that an implied right of action had the effect of precluding suit under § 1983." *Id.* at 256. Finally, the lack of robust remedial scheme meant that "§ 1983 claims [would not] circumvent required procedures [or] allow access to new remedies." *Id.* at 255-56.

Only after reaching this conclusion did this Court consider an additional factor, namely, the differences in the "substantive rights and protections guaranteed under Title IX and under the Equal Protection Clause." *Id.* at 256. It concluded that this comparison

"*lends further support*" for the conclusion that Title IX did not preclude § 1983 claims. *Id.* (emphasis added).

Petitioners submit that three basic principles emerge from *Fitzgerald*, all of which are consistent with *Mattoon* and inconsistent with the Sixth Circuit's premise that *Fitzgerald* implicitly overruled *Mattoon*. First, that the principles applied in *Sea Clammers*, *Smith,* and *Ran*cho Palos Verdes, remain valid. Second, that the core teaching of those cases is that a comprehensive remedial scheme is, by itself, sufficient to establish congressional intent to preclude § 1983 claims, including constitutional claims. Finally, comparing the "contours" of a statute and § 1983 may "further support" the traditional analysis, but it does not supplant it and is not a necessary condition to finding that a constitutional claim under § 1983 is precluded.

Accordingly, Petitioners submit that there is a true split between the Sixth and First Circuits regarding the preclusion of constitutional § 1983 claims which should be resolved by this Court. This Court's direction is needed, not just to provide guidance in resolving the issue as it relates to the Flint water crisis, but to guide all of the lower courts in addressing an issue that will become increasingly relevant across the country.

2. The *Mattoon–Boler* split highlights recurring circuit splits on how to apply *Fitzgerald* to questions of statutory preclusion of constitutional claims under § 1983.

There is an even broader split of authority on whether other statutes, particularly the ADEA, preclude constitutional claims under § 1983. As noted earlier, the Third, Fourth and Tenth Circuits hold that the ADEA precludes such claims, *Hildebrand* v.

Allegheny Cty., 757 F. 3d 99 (CA3 2014); *Zombro* v. *Baltimore City Police Dep't*, 868 F. 2d 1364 (CA4 1989); *Migneault* v. *Peck,* 158 F. 3d 1131, 1140 (CA10 1998); *abrogated on other grounds by Kimel* v. *Florida Bd. of Regents,* 528 U. S. 62 (2000),[15] while the Seventh and Ninth Circuits have held it does not. *Levin* v. *Madigan*, 692 F. 3d 607, 619 (CA7 2012); *Stillwell* v. *City of Williams*, 831 F. 3d 1234, 1251–52 (CA9 2016).

The Third Circuit was the first appellate court to address the preclusion issue after *Fitzgerald.* It held that federal statutes with sufficiently comprehensive remedial schemes preclude both statutory and constitutional claims under § 1983: "*Fitzgerald* reaffirmed the principle that, where a statute imposes procedural requirements or provides for administrative remedies, permitting a plaintiff to proceed directly to court via § 1983 would be inconsistent with Congress' carefully tailored scheme." *Hildebrand*, 757 F. 3d at 109. The Third Circuit concluded that this Court had "consistently indicated that the comprehensiveness of a statute's remedial scheme is the *primary* factor in determining congressional intent." *Id.* at 108 (emphasis added). According to *Hildebrand*, *Fitzgerald* reaffirmed "the basic principle that, absent indications to the contrary, [courts] may infer that Congress intended to preclude § 1983 claims when it provides a sufficiently comprehensive remedial scheme for the vindication of a federal constitutional right." *Id.* at 108-09. Because the ADEA required a plaintiff to give the EEOC 60

[15] Although *Zombro* and *Migneault* preceded *Fitzgerald*, the district courts in the Fourth and Tenth Circuits continue to follow them as good law after *Fitzgerald*. *Gholson* v. *Benham*, 2015 WL 2403594, *6 (ED Va. 2015); *Lawrence* v. *School Dist. No. 1*, 2013 WL 1685715, *6 (D Colo. 2013).

days' notice before filing suit, the Third Circuit held that it precluded the plaintiff from filing an equal-protection claim under § 1983.

In contrast, the Seventh Circuit has held that there must be "some additional indication of congressional intent" before a federal statute precludes constitutional claims under § 1983: "*Fitzgerald* directs us to compare the rights and protections afforded by the statute and the Constitution" to determine if a § 1983 claim is precluded. *Levin* v. *Madigan*, 692 F. 3d 607, 619, 621 (CA7 2012). Although it acknowledged "that the ADEA sets forth a rather comprehensive remedial scheme," the Seventh Circuit drew a sharp distinction between *statutory* claims under § 1983 (which it concluded were precluded by the ADEA) and *constitutional* claims under § 1983—which it held are not precluded "without some additional indication of congressional intent." *Id*. at 618–619.

Finally, in *Stillwell*, 831 F. 3d at 1251–52, the Ninth Circuit followed *Levin* and found that the ADEA did not preclude a First Amendment claim under § 1983 because the ADEA remedy was narrower than its First Amendment counterpart. *Id*.

These ADEA cases illustrate that there is conflict and uncertainty in the courts of appeal regarding whether, following *Fitzgerald*, the purpose of the statute and nature of the remedial scheme is a sufficient basis to infer congressional intent to preempt § 1983 claims based on alleged constitutional violations. Resolution of this split, by this Court, is needed not just to address the question of whether the SDWA precludes parallel constitutional claims under § 1983, but also to provide direction to all of the lower courts on how to correctly analyze this issue.

CONCLUSION

Petitioners request that this Court grant their petition for a writ of certiorari, because this Petition presents this Court with the opportunity to (1) resolve a circuit split on whether the SDWA precludes constitutional claims under § 1983; (2) resolve the recurring circuit split on how to properly apply *Fitzgerald* to questions of statutory preclusion of constitutional claims under § 1983; and (3) to provide guidance to litigants in hundreds of filed and thousands of purportedly forthcoming cases regarding an issue that will be of emerging importance across the nation.

Respectfully Submitted,

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