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File Name: 25a0219p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

IESHA MITCHELL, guardian and next friend of A.M. et al.,

Plaintiffs-Appellants,

v.

CITY OF BENTON HARBOR, MICHIGAN; MARCUS MUHAMMAD; MICHAEL O'MALLEY; DARWIN WATSON; LIESL CLARK; ERIC OSWALD; ERNEST SARKIPATO; BRANDON ONAN; ELHORN ENGINEERING COMPANY,

Defendants-Appellees.

No. 23-1970

On Petition for Rehearing En Banc
United States District Court for the Western District of Michigan at Grand Rapids.
No. 1:22-cv-00475—Hala Y. Jarbou, District Judge.

Argued: October 29, 2024

Decided and Filed: August 12, 2025

Before: MOORE, COLE, and LARSEN, Circuit Judges.

COUNSEL

ON PETITION FOR REHEARING EN BANC: Thomas J. Rheaume, Jr., Alexandra C. Markel, Walter G. Pelton, BODMAN PLC, Detroit, Michigan, for City of Benton Harbor Appellees. **ON RESPONSE:** Melanie Daly, Corey Stern, LEVY KONIGSBERG LLP, New York, New York, for Appellants.

The court delivered an ORDER denying the petition for rehearing en banc. MOORE, J. (pp. 3–9), delivered a separate opinion concurring in the denial of the petition for rehearing en banc. LARSEN, J. (pp. 10–16), delivered a separate opinion dissenting from the denial of the petition for rehearing en banc, in which KETHLEDGE, THAPAR, BUSH, NALBANDIAN, READLER, and MURPHY, JJ., concurred. READLER, J. (pp. 17–23), delivered a separate opinion dissenting from the denial of the petition for rehearing en banc, in which BUSH, J., concurred.

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision.

The petition was then circulated to the full court.[*] Less than a majority of the judges voted in favor of rehearing en banc.

Therefore, the petition is denied.

[*]Hon. Whitney D. Hermandorfer did not participate in this decision.

CONCURRENCE

KAREN NELSON MOORE, Circuit Judge, concurring in the denial of rehearing en banc. There is a rising trend in our circuit of publishing separate statements when rehearing is denied after a poll of the en banc court. I have serious concerns about this practice. In this case, the opinions of the majority and the dissent have already been fully and carefully explained. Drafting CliffsNotes versions of our views is not only unnecessary, but it is also offensive to our system of panel adjudication. "The trust implicit in delegating authority to three-judge panels to resolve cases as they see them would not mean much if the delegation lasted only as long as they resolved those cases correctly as others see them." *Issa v. Bradshaw*, 910 F.3d 872, 877–78 (6th Cir. 2018) (Sutton, J., concurring in the denial of rehearing en banc). By accumulating votes for or against the positions articulated in the panel opinions, we cast doubt on circuit precedent, erode our faith in the panel system, and give rise to our own "shadow docket." But when, as here, the dissenting judge accuses the panel majority of "brazenly def[ying] Supreme Court precedent," Principal Dissental at 10, I cannot allow that accusation to go unanswered.[1] *See United States v. New York, New Haven & Hartford R.R.*, 276 F.2d 525, 553–54 (2d Cir. 1960) (statement of Friendly, J.), *overruled in part*, *Chappell & Co. v. Frankel*, 367 F.2d 197 (2d Cir. 1966). So, I write in response to *re-explain* the panel majority's reasoning.

This case concerns a lead-water crisis in Benton Harbor, Michigan, which played out in the wake of the highly publicized water crisis in Flint, Michigan. In October 2018, routine water testing revealed that Benton Harbor's municipal water supply was tainted with dangerous quantities of lead. *See Mitchell v. City of Benton Harbor*, 137 F.4th 420, 425 (6th Cir. 2025). As is well known, lead is a toxic metal that is particularly hazardous to children. *Id.* Even low-level exposure can cause lifelong consequences. *Id.* Despite these serious risks, and with the situation

[1]As the astute reader can discern, this concurrence in the denial of rehearing en banc was necessitated by the panel dissenter now dissenting from the denial of rehearing en banc. Absent this dissental, there would have been no reason to write defending the denial of rehearing en banc. Yet this simple paragraph of explanation has now produced a new dissental from another judge actually proving my point: nothing of substance regarding the merits is gained by this series of dissentals other than reiterating the points made in the original panel opinions. For further proof, please see the panel opinions in *Mitchell v. City of Benton Harbor*, 137 F.4th 420 (6th Cir. 2025).

in Flint barely in the rearview mirror, Plaintiffs allege that Benton Harbor City officials encouraged residents to drink water that they knew was contaminated with lead, leading hundreds of children to be exposed to lead and suffer symptoms of lead poisoning. *See id.* at 428–29, 437–38. Because this would clearly violate those individuals' constitutional right to bodily integrity, the panel majority allowed the case against the City officials to proceed in the district court past a motion to dismiss. I concur in the court's decision to deny rehearing en banc.

I.

The Fourteenth Amendment prohibits state and local officials from "depriv[ing] any person of life, liberty, or property, without due process of law." *Mitchell*, 137 F.4th at 430 (quoting U.S. Const. amend. XIV, § 1). Certain rights are so fundamental that their deprivation is prohibited "regardless of the fairness of the procedures used to implement them." *Id.* (quoting *Guertin v. Michigan*, 912 F.3d 907, 918 (6th Cir. 2019) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)), *reh'g en banc denied*, 924 F.3d 309 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 933 (2020)). Among these is the right to bodily integrity: "to be free from forcible intrusions on their bodies against their will, absent a compelling state interest." *Id.* (quoting *Guertin*, 912 F.3d at 919) (quoting *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 506 (6th Cir. 2012))). "Involuntarily subjecting nonconsenting individuals to foreign substances with no known therapeutic value . . . is a classic example of invading the core of the bodily integrity protection." *Id.* (quoting *Guertin*, 912 F.3d at 920–21). To establish a violation of this right, a plaintiff must demonstrate that her bodily integrity was infringed by the conscience-shocking actions of a government official. *Id.* (citing *Lillard v. Shelby Cnty. Bd. of Educ.*, 76 F.3d 716, 725 (6th Cir. 1996)).

When does government action shock the conscience? It depends. Although our case law demonstrates that unjustifiable and intentionally injurious actions usually shock the conscience, and merely negligent actions do not, official conduct often defies neat classification. *See id.* at 430–31. When government action "falls somewhere between these bookends—in the neighborhood of recklessness or gross negligence—we evaluate the conduct *in context* to determine if the official was deliberately indifferent to a known risk of harm." *Id.* (emphasis added) (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998)). Contextual clues

include "the time for deliberation, the nature of the relationship between the government and the plaintiff, and whether a legitimate government purpose motivated the official's act." *Id.* at 431 (quoting *Guertin*, 912 F.3d at 924).

Our court has applied these principles to lawsuits arising from the well-known lead-water crisis in Flint. There, it was alleged that City and state officials switched the City's water supply from Lake Huron to the Flint River for cost-cutting reasons, even though they knew that the combination of river water and aging pipes would cause lead to leach into the drinking water. *Guertin*, 912 F.3d at 915; *In re Flint Water Cases*, 960 F.3d 303, 312–14 (6th Cir. 2020). Carefully applying substantive-due-process principles, we allowed the case to proceed against officials who knowingly caused residents to drink lead-contaminated water, but granted qualified immunity to those who were merely negligent and failed to blow the whistle. *Guertin*, 912 F.3d at 926–32.

II.

In this case, the panel was tasked with deciding whether Plaintiffs plausibly alleged that officials in Benton Harbor engaged in similarly conscience-shocking conduct. As in *Guertin*, the majority carefully separated out those officials who might have been merely negligent from those plausibly alleged to have been deliberately indifferent to a known risk of poisoning their constituents with lead.

The panel majority began with the state officials, who parachuted in to help when the elevated lead levels were discovered. Plaintiffs alleged that the state officials encouraged the City to use a corrosion-control chemical that was not sufficiently studied, failed to take vigorous action to correct issues with the water supply, and made too little effort to correct City officials' misstatements. *Mitchell*, 137 F.4th at 432–36. These allegations came up short of deliberate indifference because they suggested, at most, "negligence and poor policy choices." *Id.* A post-hoc critique of arguably lackluster efforts to clean up Benton Harbor's water supply did not amount to a plausible constitutional violation.

The allegations against the City officials were different. Unlike the allegations concerning the state officials, the complaint contained plausible allegations that City officials, including Mayor Marcus Muhammad, knowingly misled the public about Benton Harbor's lead-water

contamination, encouraging residents unwittingly to drink the toxic water. Notably, at a press conference following the lead-water discovery, Mayor Muhammad told the public that a notice about elevated lead levels was "not being . . . delivered as a high alert, emergency 911, panic frenzy" but just as an "FYI." *Id.* at 437 (quoting R. 1 (Compl. ¶ 174) (Page ID #55)). We considered this statement in the context in which it was made. Mayor Muhammed made this remark at a press conference at which another City official, Darwin Watson, allegedly lied about the presence of lead in the City's water lines, characterizing issues as confined to individual homes when he knew that they were systemic. *Id.* Both these statements were followed by letters from the City of Benton Harbor, of which Muhammad was the mayor, indicating the water was safe to drink. *Id.* These statements were reinforced by repeated assurances by the City's drinking water superintendent, Michael O'Malley, that the water was safe and the problem was getting under control when it was not. *Id.* And they came amid months of inaction by the City in addressing the lead-water crisis. *Id.* at 437–38. Read fairly and as a whole, these statements—attributable to each City defendant—lend plausibility to Plaintiffs' general allegations that the City officials knowingly misled the public about the safety of the water, falsely assuring them of its safety, and causing people to unknowingly ingest lead. *Id.* Considering that these statements were made with the benefit of time to deliberate and to an audience of individuals involuntarily connected to the public water supply, they give rise to a plausible inference of deliberate indifference. *Id.* at 436–38.

The panel majority's conclusion is consistent with our court's decision in *Guertin*. In *Guertin*, we considered whether liability could be imposed on a communications professional, Bradley Wurfel, who declared the water safe to drink and belittled efforts to challenge that assertion. 912 F.3d at 928. We decided that liability could be imposed, even though Wurfel did not "cause the contamination," Principal Dissental at 13, because his affirmative misrepresentations plausibly caused residents to ingest lead-contaminated water, *Guertin*, 912 F.3d at 928–29; *accord In re Flint Water Cases*, 960 F.3d at 329–30 (rejecting Wurfel's argument that "'mere' public statements cannot violate a person's right to bodily integrity"). We reasoned in *Guertin* that "[m]isleading Flint's residents as to the water's safety . . . is no different than the forced, involuntary invasions of bodily integrity that the Supreme Court has deemed unconstitutional." *Guertin*, 912 F.3d at 926 (citations omitted). So too here. Because it was

plausibly alleged that certain City officials knowingly misled the public about the dangers of the lead-water contamination, the panel majority allowed the claims to proceed past the motion-to-dismiss stage.

The principal dissental reaches the opposite conclusion by improperly drawing inferences in favor of the City officials. The dissental recharacterizes the record as a series of well-meaning efforts to publicize the lead-water discovery to the City's residents, and interprets Mayor Muhammad's remark at the press conference as merely "alerting the public to a possible danger while urging them not to panic." Principal Dissental at 12–13. This is not the proper role of the court at the motion-to-dismiss stage. At this juncture of the case, we must accept the factual allegations as true and draw all reasonable inferences in favor of the Plaintiffs. After all, "a well-pleaded complaint may proceed *even if* it strikes a savvy judge that . . . recovery is very remote and unlikely." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (emphasis added) (citation omitted). The dissental's reliance on *Lombardi v. Whitman*, 485 F.3d 73 (2d Cir. 2007), is misplaced. That case, which we distinguished in *Guertin*, 912 F.3d at 929, involved the *sui generis* events of the immediate aftermath of the September 11, 2001, terrorist attacks. The officials in Benton Harbor were not faced with comparable risks of "mass displacement" and "civil disorder" that the Second Circuit viewed as sufficient to outweigh the imposition of liability for disseminating false and damaging information affecting public health. *Lombardi*, 485 F.3d at 85. Of course, the panel majority left the City officials free to renew their arguments on a factual record at summary judgment.

III.

Next, the panel majority considered whether the City officials were entitled to qualified immunity at this early stage of the litigation because the alleged constitutional violations were not clearly established at the time they occurred. In concluding that the alleged substantive-due-process violation was clearly established, the panel majority looked to *Guertin*. *Guertin* held that the plaintiffs plausibly alleged a substantive-due-process violation by Wurfel, who allegedly lied about the lead-water contamination, resulting in the consumption of lead-tainted water by the residents of Flint—and that this conduct violated clearly established law. *See Guertin*, 912 F.3d at 927–29, 932–35. *Guertin* recognized that this due-process violation was *already* clearly

established at the time that Wurfel's statements were made in 2015. As the *Guertin* panel explained, the Flint "plaintiffs' bodily integrity claim implicates a clearly established right that 'may be inferred from [the Supreme Court's] prior decisions.'" 912 F.3d at 934; *see id.* at 933–35 (relying on *Washington v. Harper*, 494 U.S. 210 (1990); and *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261 (1990)). It followed, then, that the *same* right, violated in the *same* way in this case, was already clearly established by the time that the events in this case took place. As in *Guertin*, affirmatively misleading the public about lead-water contamination and encouraging them to drink lead-tainted water was a clearly established constitutional violation at the time the events in this case occurred. *Mitchell*, 137 F.4th at 440–41.

The principal dissental misconstrues the panel majority's opinion to rely on *Guertin* as the originating source of clearly established law, even though *Guertin* was decided after much of the conduct alleged in Benton Harbor. Principal Dissental at 14. But that was not the panel majority's analysis. Instead, as explained above, the panel majority relied on *Guertin*'s precedential analysis of *prior* caselaw, which recognized a right that was already clearly established. *Mitchell*, 137 F.4th at 440–41. To avoid this conclusion, the dissental also misreads *Guertin* as resting on the obviousness of the violation there, which is arguably more egregious than the facts alleged here. Principal Dissental at 11. True, *Guertin* cites *Hope v. Pelzer*, 536 U.S. 730 (2002), but the point in *Guertin* was that the constitutional violation was *also* obvious. *Guertin*, 912 F.3d at 933. Principally, *Guertin* rested on the guidance of prior caselaw. And again, the panel majority left the City officials free to renew their qualified-immunity arguments at summary judgment. *Mitchell*, 137 F.4th at 441; *see Wesley v. Campbell*, 779 F.3d 421, 433–34 (6th Cir. 2015) ("[I]t is generally inappropriate for a [] court to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity.").

IV.

In closing, I must address the principal dissental's alarmist premonition about the consequences of the panel majority's decision for "officials who inform the public of an environmental danger [and] must now sound the alarm in the constitutionally required perfect pitch." Principal Dissental at 15. Respectfully, the position advocated in the dissental poses a grave risk for the individuals affected by these public-health disasters. *Guertin* and its progeny

encourage public officials to investigate and communicate what they know about public-health crises. And they discourage such officials from engaging in unjustified public-health experiments and affirmative misrepresentations of public-health risks. The dissental encourages the opposite. It advises public officials that they can be liable only in those rare cases when they actively poison the water supply and tells officials that they will benefit from inferences in their favor, even at the earliest stage of the litigation. Such a position contravenes the principles articulated in *Guertin* and undermines the public's interest in holding their officials accountable for violations of their constitutional rights. For these reasons, I concur in the court's decision to deny en banc rehearing in this case.[2]

[2]For interested readers, I offer judicial perspectives and academic literature critiquing the practice of issuing dissentals after the denial of rehearing en banc. Dissents from the denial of rehearing en banc are undoubtedly on the rise. *See* Allison Orr Larsen & Neal E. Devins, *The Judicial Voice on the Courts of Appeals*, 111 Iowa L. Rev. __ (forthcoming 2026) (manuscript at 46–47), https://perma.cc/B6UF-SFDX; Jeremy D. Horowitz, *Not Taking "No" for an Answer: An Empirical Assessment of Dissents from Denial of Rehearing En Banc*, 102 Geo. L.J. 59, 69–70 (2013). The practice of writing dissentals has been criticized by many well-respected scholars and jurists. Although these thinkers recognize the value of reasoned debate within the judicial process, they have argued that the issuance of statements respecting the grant or denial of rehearing en banc has serious drawbacks. *See Doe v. Fairfax Cnty. Sch. Bd.*, 10 F.4th 406, 407–08 (4th Cir. 2021) (order) (Wynn, J., concurring in the denial of rehearing en banc). As many have noted, dissentals often read like "press release[s]," David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 Geo. J. Legal Ethics 509, 576 (2001), and serve as "thinly disguised invitations to certiorari," Judge Patricia M. Wald, *D.C. Circuit: Here and Now*, 55 Geo. Wash. L. Rev. 718, 719 (May & Aug. 1987). Unlike "[p]anel dissents and concurrences[,] [which] improve internal decision-making processes . . . , dissents from the denial of en banc are often thinly (or not so thinly) veiled entreaties to the Supreme Court. They are, essentially, judicial petitions for certiorari." Judge Marsha S. Berzon, *Dissent, Dissentals, and Decision Making*, 100 Calif. L. Rev. 1479, 1491 (2012); *see Indep. Ins. Agents of Am., Inc. v. Clarke*, 965 F.2d 1077, 1080 (D.C. Cir. 1992) (order) (statement of Randolph, J.) (finding it "inappropriate" for a judge to "step[] out of the robe and into the role of an advocate, urging the Supreme Court to take the case on certiorari and correct the panel's judgment."). Judges and commenters have also recognized that dissentals are, as a structural matter, "not respectful of legitimate authorities, precedent, or judicial tradition." Judge William Pryor Jr., *The Perspective of a Junior Circuit Judge on Judicial Modesty*, 60 Fla. L. Rev. 1007, 1022 (2008). Judge Pryor argues that is so because the dissental respects neither "the decision of the original panel, which now represents the binding precedent for the circuit" nor the "considered decision of the full court not to rehear the appeal." *Id.*; *see* Horowitz, *supra*, at 88 ("If a court cannot respect the finality of its own judgments, one cannot expect the public to respect it either. As a result, the value of precedent decreases, the law appears less fixed, and the courts become merely another arena for political debate, rather than a site where disputes receive a conclusive resolution."). These thinkers have expressed particular concern about statements from dissenters who were not members of the initial panel, but merely sit as a "scholar-in-residence provid[ing] academic criticism of the court." Pryor, *supra*, at 1021. Having failed to engage fully with the case through the deliberative panel process, such statements "often reflect incorrect or incomplete understandings of the record or the legal arguments at issue." Berzon, *supra*, at 1491. Finally, it has been observed that such statements, frequently filled with rhetorical language, challenge the collegiality of the court. *See* Pryor, *supra*, at 1023.

DISSENT

LARSEN, Circuit Judge, dissenting from the denial of rehearing en banc. The court concludes that several City of Benton Harbor officials plausibly violated city residents' clearly established substantive due process right to bodily integrity. How? Each official is alleged to have engaged in slightly different conduct.[1] But to take one, consider the case of Mayor Marcus Muhammad. At a press conference, he informed residents that the water in some city homes had dangerous levels of lead, and he advised them that they could work with the City to test their water. He also urged them not to panic; and that, according to the court, crossed a clearly established constitutional line because it "undermined" the rest of the message. *Mitchell v. City of Benton Harbor*, 137 F.4th 420, 437 (6th Cir. 2025). In other words, the court strips Muhammad of qualified immunity for not delivering the warning with the (now) constitutionally required tone of alarm.

Muhammad's failure to speak with sufficient alarm is in no way "conscience shocking" behavior that violates the Constitution. And until today, no case has come close to holding that it is. Accordingly, Muhammad is entitled to qualified immunity.[2]

The court's conclusion to the contrary brazenly defies Supreme Court precedent, which alone merits en banc review. And the importance of the question at issue—the constitutional liability of government officials responding to naturally occurring environmental crises—deepens

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[1]City Manager Darwin Watson allegedly violated the right by misstating that the City had no lead lines (a statement he corrected within one month) and telling homeowners they were responsible for replacing service lines running from sidewalks to homes. Drinking Water Superintendent Mike O'Malley allegedly violated the same right by telling one unidentified resident that the water was safe to drink, publicly overstating the progress of the corrosion control treatment, and attempting to obscure lead testing results.

[2]The majority opinion also denies qualified immunity to Watson and O'Malley. *See Mitchell*, 137 F.4th at 437–38, 440–41. My partial dissent from the panel opinion explains why I disagree with respect to Watson. *See id.* at 447–52 (Larsen, J., concurring in part, concurring in the judgment in part, and dissenting in part). I concurred in the judgment with respect to O'Malley because this court, in *Braziel v. Whitmer*, No. 23-1954, 2024 WL 3966238 (6th Cir. Aug. 28, 2024), had already denied him qualified immunity based on identical allegations. *See Mitchell*, 137 F.4th at 443 (Larsen, J., concurring in part, concurring in the judgment in part, and dissenting in part). But, as noted there, I question *Braziel*'s holding as to O'Malley for the reasons articulated in Judge Nalbandian's partial dissent in *Braziel*. *See* 2024 WL 3966238, at *11–13 (Nalbandian, J., concurring in part and dissenting in part).

the need for the full court's consideration of this case. I thus respectfully dissent from the denial of rehearing en banc.

I.

In *Guertin v. Michigan*, this court considered government actors' constitutional liability stemming from the Flint Water Crisis, an "infamous *government-created* environmental disaster" involving lead contamination in the water. 912 F.3d 907, 915 (6th Cir. 2019) (emphasis added). In that context, *Guertin* held that "a government actor violates individuals' right to bodily integrity by knowingly and intentionally *introducing* life-threatening substances into individuals without their consent, especially when such substances have zero therapeutic benefit." *Id.* at 921 (emphasis added). And it denied qualified immunity to the officials responsible because the "obvious cruelty" in "taking affirmative steps to systematically contaminate a community through its public water supply," while "assuring the public in the meantime that it was safe," put officials on notice that their actions were unconstitutional. *Id.* at 933 (quoting *Hope v. Pelzer*, 536 U.S. 730, 745 (2002)). *Guertin* made clear, however, that "the Constitution does not guarantee a right to live in a contaminant-free, healthy environment." *Id.* at 921–22.

Several members of our court thought that the en banc court should take another look at the *Guertin* decision. *See Guertin v. Michigan*, 924 F.3d 309, 315–17 (6th Cir. 2019) (order) (Kethledge, J., dissenting from the denial of rehearing en banc). But whatever one thought of *Guertin*, this case breaks new ground. Here, the lead contamination occurred *naturally*, and the officials *alerted* the community to the presence of potentially toxic lead levels. That places this case well below the constitutional threshold set out in *Guertin*. Yet the court deems the plaintiffs to have plausibly alleged a violation of their clearly established constitutional rights. And it does so even though the actions alleged here took place *before* this court decided *Guertin*, and without even suggesting that this is the "obvious" case. *See District of Columbia v. Wesby*, 583 U.S. 48, 65 (2018) (noting that a "body of relevant case law is not needed" when the constitutional violation was "obvious" (quotation marks and citation omitted)). At each step, then, the majority opinion contravenes binding authority to let Plaintiffs' insufficient claims proceed.

A.

In October 2018, the City of Benton Harbor discovered elevated lead levels in parts of its drinking water. Not every home was contaminated; at the time, the City knew that roughly a quarter of tested homes (eight out of thirty) had elevated lead levels. And no one disputes that natural corrosion of the City's old lead pipes was the cause.

That month, city officials held a press conference to notify residents. Mayor Marcus Muhammad told residents that there was lead in some of the City's water but that the announcement was not being "delivered as a high alert, emergency 911, panic frenzy. This is FYI, and you can work with our city staff to find out ways to get tested." R. 1, Compl., PageID 55.

Following this press conference, the City took further steps to inform residents and resolve the crisis. The City routinely distributed lead advisories to residents. The advisories warned of possible lead contamination and informed residents how to minimize exposure. Though not all households received the notices, most did, and Plaintiffs don't allege that the City deliberately omitted households from the mailings. At the same time, the City worked to mitigate the contamination, implementing a corrosion control treatment within months of the discovery. This timeline was quicker than state regulations required, and Plaintiffs acknowledge that the corrosion control was meant to "prevent or minimize corrosion of lead pipes." *Id.* at 48.

B.

Muhammad's conduct at the October 2018 press conference did not plausibly violate Plaintiffs' constitutional right to bodily integrity. In evaluating intrusions upon bodily integrity under the Due Process Clause, we apply the shocks-the-conscience test. *Guertin*, 912 F.3d at 922. Mere negligence is not enough. *Id.* at 923. Rather, an official's actions must have evinced at least "deliberate indifference" that "violates the decencies of civilized conduct." *Id.* at 918, 923 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)). *Guertin* found conscience-shocking deliberate indifference where government officials knowingly contaminated the water supply—thereby "caus[ing] Flint residents to consume a toxin with no known benefit"—"did so without telling [residents], and made affirmative representations that the water was safe to drink." *Id.* at 934.

Mayor Muhammad did none of those things. He did not cause the contamination, he warned residents of it, and he advised them on how to test their water's safety. Plaintiffs nevertheless allege, and the court accepts, that Muhammad violated the Constitution because, by casting his statement as an "FYI" and disclaiming a "high alert" emergency, he "diminished the effect" of the water-contamination notice. *Mitchell*, 137 F.4th at 437, 439. With respect, alerting the public to a possible danger while urging them not to panic is in no way "shocking to the universal sense of justice"—the "sort of egregious behavior" that violates due process. *Guertin*, 912 F.3d at 923 (citations omitted).

In finding Muhammad plausibly liable, the court dilutes the robust constitutional deliberate-indifference standard to the weakest of tea. Deliberate indifference requires finding both that the defendant had "a subjective awareness of substantial risk of serious injury" and that he "did not act in furtherance of a countervailing governmental purpose that justified taking that risk." *Id.* at 924 (citation omitted). At least one circuit has correctly identified that when it comes to managing a crisis, officials fulfill an "essential government function" when they "avoid panic" and "keep order." *Lombardi v. Whitman*, 485 F.3d 73, 83 (2d Cir. 2007). Muhammad's disclaimer of a "high alert, emergency 911, panic frenzy" served those very functions. R. 1, Compl., PageID 55. The majority nonetheless deems Muhammad's disclaimer clearly unconstitutional because it "undermined" other parts of the message—that lead was in some of the water and was dangerous. *Mitchell*, 137 F.4th at 437. The Constitution, however, does not insist that public officials perfectly balance competing government interests. Neither "imprudence" nor "poor execution" shocks the conscience, *Ewolski v. City of Brunswick*, 287 F.3d 492, 516 (6th Cir. 2002); only actions taken with "callous disregard or intent to injure" do, *Guertin*, 912 F.3d at 924 (citation omitted).

Finding constitutional liability here does the very thing the shocks-the-conscience test guards against: it turns what is at most a "run-of-the-mill tort claim[]" into a constitutional violation. *Id.* at 923. The majority opinion—and now this circuit's caselaw—drains the test of its essence and abnegates our responsibility to "preserv[e] the constitutional proportions of substantive due process." *Lewis*, 523 U.S. at 850.

C.

The majority opinion's clearly established analysis only makes matters worse. To overcome qualified immunity, a plaintiff must show that government actors ran afoul of specific legal precedents that clearly outlawed their actions "*at the time* of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 741 (2011) (emphasis added). Plaintiffs pointed to *Guertin* and *In re Flint Water Cases*, 960 F.3d 303 (6th Cir. 2020), as having clearly established the law. But those cases were published in 2019 and 2020, respectively, *after* Muhammad made his statement at the October 2018 press conference.[3] To defeat qualified immunity, then, Plaintiffs needed to show that this is the "rare 'obvious case'" with facts so egregious that the unconstitutionality of Muhammad's actions was "beyond debate." *Wesby*, 583 U.S. at 64 (citations omitted).

The panel opinion doesn't even attempt to cast this as the obvious case. Instead, it says that "a long line of due-process case law clearly establish[ed]" a right to bodily integrity, which is "sacred, founded upon informed consent, and may be invaded only upon a showing of a government interest." *Mitchell*, 137 F.4th at 441 (citation omitted). But "sweeping statements about constitutional rights do not provide officials with the requisite notice." *Guertin*, 912 F.3d at 934. And the Supreme Court has "repeatedly" admonished lower courts for "defin[ing] clearly established law at too high a level of generality." *City of Tahlequah v. Bond*, 595 U.S. 9, 12 (2021) (per curiam). To deprive an officer of qualified immunity, the "rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Id.* (citation omitted). Yet the "clearly established" law that the panel majority identifies—a "sacred" right to "bodily integrity" that is "founded upon informed consent"—is as hazy as it gets. *Mitchell*, 137 F.4th at 441 (citation omitted).

[3]In my partial dissent, I explain why, even if *Guertin* and *In re Flint Water* had been clearly established at the time, they would not have put the defendants on notice that their actions violated the Constitution. *See Mitchell*, 137 F.4th at 451–52 (Larsen, J., concurring in part, concurring in the judgment in part, and dissenting in part).

Muhammad's only specifically alleged action here, conveying that a burgeoning crisis was "cause for concern" but not for panic, did not violate the Constitution—much less *obviously* so. R. 92-14, State Defs.' Ex. 13, PageID 1010. The majority's conclusion that he nevertheless violated a "clearly established" right to bodily integrity defies Supreme Court precedent. *See Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (explaining that, for a legal rule "cast at a high level of generality" to have clearly established the law, the constitutional violation must have been "obvious").

II.

Creating constitutional liability in this context will have consequences. Crises that call for prompt government action, and criticisms thereof, pepper the news cycle. In our circuit, officials who inform the public of an environmental danger must now sound the alarm in the constitutionally required perfect pitch. If not, their failure to strike the right tone will be deemed an affront to the Constitution.

This change will come at a cost to both government actors and their communities. When dealing with public crises, government officials often act on imperfect information and confront competing obligations. *See Lombardi*, 485 F.3d at 83. Facing constitutional liability for "the disclosure of incomplete, confusingly comprehensive, or mistakenly inaccurate information, officials might default to silence in the face of the public's urgent need for information." *Id.* at 84. After all, absent a special relationship, "a government official's failure to warn of a known danger, without more, does not violate substantive due process." *Id.*; *see also Guertin*, 912 F.3d at 930 (dismissing claims against government actors who "failed to protect and notify the public" because "the Due Process Clause is a limitation only on government action" (quotation marks omitted)). Alternatively, officials may overreact to avoid blame for not doing enough, thereby needlessly fostering panic in the present and minimizing the efficacy of alerts in the long run.

In short, imposing constitutional liability for public statements like Muhammad's risks harm for local governments and communities alike. The results will not be inevitable byproducts of the Constitution, but rather avoidable byproducts of our misguided caselaw.

* * *

I respectfully dissent from the order denying rehearing en banc.

DISSENT

READLER, Circuit Judge, dissenting from the denial of rehearing en banc. I join fully in Judge Larsen's dissent. Our concurring colleague's broader concern over separate writings at the en banc stage, Concurring Op. 3, ironically enough, prompts me to add one more writing to the mix.

Our colleague has "serious concerns" over what she sees as the "rising trend in our circuit of publishing separate statements when rehearing is denied" by the en banc court. *Id.* If past practice is any indicator, our colleague's distaste for separate writings, dissents from the denial of rehearing en banc in particular, appears to be a very recent phenomenon. *See, e.g.*, *United States v. Esteras*, 95 F.4th 454, 454 (6th Cir. 2024) (order) (Moore, J., dissenting from denial of rehearing en banc); *United States v. Esteras*, 88 F.4th 1170, 1170 (6th Cir. 2023) (order) (Moore, J., dissenting from denial of rehearing en banc); *Doster v. Kendall*, 65 F.4th 792, 794 (6th Cir. 2023) (order) (Moore, J., dissenting from the denial of rehearing en banc); *Bristol Reg'l Women's Ctr., P.C. v. Slatery*, 993 F.3d 489, 489 (6th Cir. 2021) (order) (Moore, J., dissenting from the grant of initial hearing en banc); *Martinez v. Larose*, 980 F.3d 551, 555 (6th Cir. 2020) (order) (Moore, J., dissenting from the denial of rehearing en banc); *see also United States v. Carpenter*, 80 F.4th 790, 790, 795 (6th Cir. 2023) (order) (Moore, J., joining opinion dissenting from the denial of rehearing en banc); *Robinson v. Long*, 966 F.3d 521, 521 (6th Cir. 2020) (order) (Moore, J., joining opinion dissenting from denial of rehearing en banc); *cf. Boone Cnty. Republican Party Exec. Comm. v. Wallace*, 140 F.4th 797, 797 (6th Cir. 2025) (order) (Moore, J., concurring in the denial of rehearing en banc); *Fenner v. Gen. Motors, LLC*, 121 F.4th 1117 (6th Cir. 2024) (order) (Moore, J., concurring in the denial of rehearing en banc); *Snyder-Hill v. Ohio State Univ.*, 54 F.4th 963, 964 (6th Cir. 2022) (order) (Moore, J., concurring in the denial of rehearing en banc); *In re MCP No. 165*, 20 F.4th 264, 267 (6th Cir. 2021) (order) (Moore, J., concurring in the denial of initial hearing en banc); *Davenport v. MacLaren*, 975 F.3d 537, 537–38 (6th Cir. 2020) (order) (Moore, J., joining separate opinion concurring in the denial of rehearing en banc). It is also difficult to reconcile with the current arc of legal discourse.

Debate over weighty issues is the heart and soul of the legal profession. In nearly all respects, we encourage the exchange of ideas. For lawyers and litigants, their efforts benefit from legal analysis by peers and judges alike, all of which helps shape legal practice and strategy going forward. *See Georgia v. Public.Resource.Org., Inc.*, 590 U.S. 255, 288 (2020) (Thomas, J., dissenting) (explaining that the existence of multiple opinions helps readers "understand[] the reasoning that animates the rule" and thus "provides pivotal insight into how the law will likely be applied in future judicial opinions"). The same is true for judges, whose "legal analysis" is likewise "elevate[d]" by "healthy and respectful discussion about important ideas." *United States v. Boler*, 115 F.4th 316, 333 (4th Cir. 2024) (Quattlebaum, J., dissenting). After all, in ultimately resolving the difficult legal questions put before us, we customarily are aided by more thought and inspection, not less.

That is what separate writings—concurrences, dissents, concurrals, dissentals, and the like—aim to achieve. They flesh out legal issues beyond what prior opinions have done, either reinforcing earlier conclusions or raising questions over them. These writings thus "serve an important function and," for that reason, "are taken seriously by courts, the public, the academy, and the legal profession." Alex Kozinski & James Burnham, *I Say Dissental, You Say Concurral*, 121 Yale. L.J. Online 601, 607 (2012). Indeed, contrary to our colleague's concern about "erod[ing] faith in the panel system," Concurring Op. 1, the practice of writing at the en banc stage in fact increases our Court's legitimacy: "It does honor to the law, promotes justice, and serves the interests of an informed public when citizens learn that appellate judges have given difficult and important cases exacting scrutiny—not just one judge or even the three-judge panel, but an entire court of appeals." Kozinski & Burnham, *supra*, at 612. Few jurists would understand all of this better than our concurring colleague, who has contributed as much to the legal discourse in our Circuit as has anyone over the last three decades.

True, in some instances an en banc–stage writing may reiterate points in an underlying panel opinion. *See* Concurring Op. 1 (critiquing separate writings that are "CliffNotes versions" of panel opinions). *But see Martinez*, 980 F.3d at 556 (Moore, J., dissenting from the denial of rehearing en banc) (reiterating panel dissent's reasoning); *Fenner*, 121 F.4th at 1118 (Moore, J., concurring in the denial of rehearing en banc) (reiterating panel opinion's reasoning); *Snyder-*

Hill, 54 F.4th at 964 (Moore, J., concurring in the denial of rehearing en banc) (same). Yet even then, the writing serves an important function: it allows other judges apart from those randomly assigned to the panel to join in the effort, which further informs issues in the current case, to say nothing of the next one. *See* Kozinski & Burnham, *supra*, at 604 (defending the legitimacy of "off-panel judge[s]" writing at the en banc stage). The esteemed Judge J. Harvie Wilkinson summed up the en banc process exactly this way. "Judges vote on th[e] [en banc] poll, and judges are entitled to explain their reasons for that vote. Giving reasons is what we do. Reasoning adds to judicial transparency; it does not detract from it. And debate on issues of legal and public importance is to be welcomed, not disapproved." *Doe v. Fairfax Cnty. Sch. Bd.*, 10 F.4th 406, 414 (4th Cir. 2021) (order) (Wilkinson, J., dissenting from denial of en banc rehearing).

Members of the Supreme Court understandably hew to this same practice. At the certiorari stage, justices will sometimes craft separate opinions expressing their views on why a case should (or should not) have been accepted for review, views that often inform related cases going forward. *E.g.*, *MacRae v. Mattos*, 145 S. Ct. 2617, 2617 (2025) (mem.) (Thomas, J., statement respecting the denial of certiorari); *Snope v. Brown*, 145 S. Ct. 1534, 151534 (2025) (mem.) (Kavanaugh, J., statement respecting the denial of certiorari); *Rimlawi v. United States*, 145 S. Ct. 518, 518 (2025) (mem.) (Gorsuch, J., dissenting from the denial of certiorari); *Nicholson v. W.L. York, Inc.*, 145 S. Ct. 1528, 1528–29 (2025) (mem.) (Jackson, J., dissenting from the denial of certiorari); *Shockley v. Vandergriff*, 145 S. Ct. 894, 894 (2025) (mem.) (Sotomayor, J., dissenting from the denial of certiorari); *see also* Eugene Gressman et al., *Supreme Court Practice* § 5.5, at 330–31 (9th ed. 2007) (noting, nearly two decades ago, the rise in "the practice of publicly recording dissents from the denial of certiorari" and cataloguing the "[m]any different purposes" these writings serve, including providing "signals to the bar" or "to the litigants").

But there is one more reason why these writings are valued: The Supreme Court relies on them in overseeing our legal system. The Supreme Court faces a daunting task. Among all of the cases in the federal courts, it must select the most deserving for review. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons."). To do so, it relies on the development of legal opinions across the "inferior courts." U.S. CONST., art. III, § 1. As cases "percolate[]" in those courts, jurists add their "independent evaluation" of the issues

presented, meaning that when the Supreme Court eventually is asked to review those issues, it "has the benefit of the experience of those lower courts." *See* Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 716 (1984). And that percolation process, it is well understood, informs the Supreme Court's decisionmaking, both which cases to decide, and how to decide them. *See, e.g.*, *United States v. Mendoza*, 464 U.S. 154, 160 (1984) ("[T]his Court . . . benefit[s] . . . from permitting several courts of appeals to explore a difficult question before this Court grants certiorari."); *Calvert v. Texas*, 141 S. Ct. 1605, 1606 (2021) (mem.) (Sotomayor, J., statement respecting the denial of certiorari) ("The legal question Calvert presents is complex and would benefit from further percolation in the lower courts prior to this Court granting review.").

Separate writings in the courts of appeals, including at the en banc stage, are critical pieces to this puzzle. In case after case, the Supreme Court has cited those writings and explained how they informed the Supreme Court's review process. Examples from just the last two Supreme Court terms abound. *See, e.g.*, *Medina v. Planned Parenthood S. Atl.*, 145 S. Ct. 2219, 2228 (2025) (citing *N.Y. State Citizens' Coal. for Children v. Poole*, 935 F.3d 56, 60 (2d Cir. 2019) (mem.) (Livingston, J., dissenting from the denial of rehearing en banc)); *Fuld v. Palestine Liberation Org.*, 145 S. Ct. 2090, 2109 (2025) (citing 101 F.4th 190, 208 (2d Cir. 2024) (mem.) (Menashi, J., dissenting from the denial of rehearing en banc)); *Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n*, 145 S. Ct. 1583, 1597 (2025) (Thomas, J., concurring) (citing *McRaney v. N. Am. Mission Bd. S. Baptist Convention*, 980 F.3d 1066, 1076–78 (5th Cir. 2020) (per curiam) (Oldham, J., dissenting from the denial of rehearing en banc)); *Hittle v. City of Stockton*, 145 S. Ct. 759, 764 (2025) (mem.) (Thomas, J., dissenting from the denial of certiorari) (citing 101 F.4th 1000, 1022 (9th Cir. 2024) (order) (VanDyke, J., dissenting from the denial of rehearing en banc)); *Davis v. Smith*, 145 S. Ct. 93, 97 (2025) (mem.) (Thomas, J., dissenting from the denial of certiorari) (citing *Cassano v. Shoop*, 10 F.4th 695, 696–97 (6th Cir. 2021) (order) (Griffin, J., dissenting)); *Kennedy v. Benson*, --- S. Ct. ---, 2024 WL 4607563, at *1 (Oct. 29, 2024) (mem.) (Gorsuch, J., dissenting) (first citing 119 F.4th 464, 471 (6th Cir. 2024) (order) (Thapar, J., dissenting from the denial of rehearing en banc); then citing *id.* at 476 (Readler, J., dissenting from the denial of rehearing en banc); and then citing *id.* at 486 (McKeague, J., statement respecting the

denial of rehearing en banc)); *Moody v. Netchoice, LLC*, 144 S. Ct. 2383, 2408 (2024) (citing *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 432 (D.C. Cir. 2017) (per curiam) (order) (Kavanaugh, J., dissenting from the denial of rehearing en banc)); *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2214 (2024) (citing, *inter alia*, 72 F.4th 868, 925 (9th Cir. 2023) (order) (O'Scannlain, J., statement respecting the denial of rehearing en banc)); *Erlinger v. United States*, 144 S. Ct. 1840, 1856 n.4 (2024) (citing *United States v. Brown*, 77 F.4th 301, 303 (4th Cir. 2023) (order) (Wynn, J., dissenting from the denial of rehearing en banc)); *Moore v. United States*, 144 S. Ct. 1680, 1703 (2024) (Barrett, J., concurring in the judgment) (citing 53 F.4th 507, 508 (9th Cir. 2022) (order) (Bumatay, J., dissenting from the denial of rehearing en banc)); *Rudisill v. United States*, 144 S. Ct. 945, 960 (2024) (Kavanaugh, J., concurring) (citing *Kisor v. McDonough*, 995 F.3d 1347, 1350 (Fed. Cir. 2021) (per curiam) (order) (Prost, C.J., concurring in the denial of the petition for rehearing en banc)); *see also* Kozinski & Burnham, *supra*, at 607 nn.40–42 (cataloging additional citations as well as further uses in oral argument).

In so doing, the Supreme Court often highlights the number of judges who joined the writing, which I take to reflect the weight justices place upon these efforts in the appeals courts. *E.g.*, *Dep't of State v. Munoz*, 144 S. Ct. 1812, 1820 (2024) ("The Ninth Circuit denied en banc review over the dissent of 10 judges . . . ."); *Thornell v. Jones*, 144 S. Ct. 1302, 1309 (2024) ("Ten judges dissented from the denial of en banc review. Judge Ikuta, joined by two other judges, argued that the panel should have deferred to the state postconviction review court on the Strickland prejudice inquiry. Judge Bennett, joined by eight others, assumed without deciding that the panel could consider the new evidence."); *A. J. T. ex rel. A. T. v. Osseo Area Sch., Indep. Sch. Dist. No. 279*, 145 S. Ct. 1647, 1654 (2025) ("A. J. T.'s petition for rehearing en banc was denied, with three judges dissenting."); *Doe ex rel. Roe v. Snap, Inc.*, 144 S. Ct. 2493, 2493 (2024) (mem.) (Thomas, J., dissenting from the denial of certiorari) ("The Court of Appeals denied rehearing en banc over the dissent of Judge Elrod, joined by six other judges."); *Johnson v. Prentice*, 144 S. Ct. 11, 14 (2023) (mem.) (Jackson, J., dissenting from the denial of certiorari) ("With five judges dissenting, the entire Court of Appeals subsequently denied Johnson's petition for rehearing en banc . . . ."). A notable example on this front is the Supreme Court's recent opinion in *Grants*

Pass, which lays out in detail how the Supreme Court views separate writings at an appeals court's en banc stage:

> The city sought rehearing en banc, which the court denied over the objection of 17 judges who joined five separate opinions. Judge O'Scannlain, joined by 14 judges, criticized *Martin*'s "jurisprudential experiment" as "egregiously flawed and deeply damaging—at war with constitutional text, history, and tradition." Judge Bress, joined by 11 judges, contended that *Martin* has "add[ed] enormous and unjustified complication to an already extremely complicated set of circumstances." And Judge Smith, joined by several others, described in painstaking detail the ways in which, in his view, *Martin* had thwarted good-faith attempts by cities across the West, from Phoenix to Sacramento, to address homelessness.

144 S. Ct. at 2214 (citations omitted). In particular, the separate en banc–stage writings of our colleagues on the Ninth Circuit highlighted both the repeat-player legal doctrines commonly at issue in that circuit and the damaging practical consequences flowing from those doctrines, all of which likely informed the Supreme Court's ultimate resolution of the case. As this and other cases reflect, "the jurisprudential benefits that come with" writing separately at the en banc stage "more than merit a continuing and vibrant community of dissental writing." Diarmuid F. O'Scannlain, *A Decade of Reversal: The Ninth Circuit's Record in the Supreme Court Through October Term 2010*, 87 Notre Dame L. Rev. 2165, 2178 (2012).

Much more could be said on the topic, but the point seems easy enough to understand. Most of us welcome, indeed encourage, the exchange of ideas, the Supreme Court included. Perhaps one who does not want a panel opinion placed in the spotlight might bristle at colleagues adding their dissenting voices, as a collection of judges, led by Judge Larsen, have done here. *See* Jonathan H. Adler, *Are There Too Many Dissents from Denial of En Banc Petitions?*, Volokh Conspiracy (Aug. 31, 2021), https://perma.cc/228V-E5TX ("I get that judges do not like to be criticized, and they like even less to be overruled. And if a judge's overall judicial philosophy is out-of-step with that of the Supreme Court, such reversals may be more common. Yet if such reversals are a problem, it seems the better course would be for circuit courts to decide cases in accord with prevailing legal principles than to complain about dissents from denial of en banc review."); *see also* Kozinski & Burnham, *supra*, at 604 (describing the practice of limiting non-panel participation at the en banc stage as "the judicial equivalent of the fox guarding the henhouse"). Happily, that sentiment appears to be a minority one in our Circuit.

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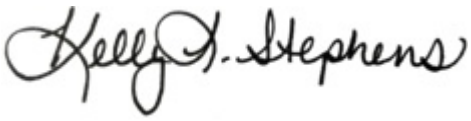

Kelly L. Stephens, Clerk