

OEA/Ser.L/V/II
Doc. 305
1 November 2022
Original: English

REPORT No. 300/22
PETITION 2173 -17
REPORT ON INADMISSIBILITY

BERNADEL JEFFERSON ET AL.
UNITED STATES OF AMERICA

Approved by the Commission electronically on November 1, 2022.

Cite as: IACHR, Report No. 300/22, Petition 2173-17. Inadmissibility. Bernadel Jefferson et al.
United States of America. November 1, 2022.

I. INFORMATION ABOUT THE PETITION

Petitioners:	Claire McClinton, Jeanne Woods, John C. Phillips, and John C. Philo
Alleged victims:	Citizens of Flint Michigan - Bemadel Jefferson, Melissa Mays, Claudia Perkins-Milton, Lee Ann Walters, Joyce McNeal, Gina Luster, Laura Sullivan, Ben Pauli, Anthony Paciorek, Doris Patrick, Nakiya Wakes, Christina Murphy, and Victoria Marx
Respondent State:	United States of America ¹
Rights invoked:	Articles I (Right to life, liberty and personal security); II (Right to equality before law); VI (Right to a family and to protection thereof); XI (Right to the preservation of health and to well-being); and XX (Right to vote and to participate in government) of the American Declaration of the Rights and Duties of Man ²

II. PROCEEDINGS BEFORE THE IACHR³

Filing of the petition:	December 4, 2017
Notification of the petition to the State:	April 29, 2020
State's first response:	October 26, 2020
Notification of the possible archiving of the petition:	July 19, 2022
Petitioner's response to the notification regarding the possible archiving of the petition:	July 26, 2022

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Declaration (ratification of the OAS Charter on June 19, 1951)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible	None
Exhaustion of domestic remedies or applicability of an exception to the rule:	Not applicable
Timeliness of the petition:	Not applicable

¹ Hereinafter "the United States", "the U.S." or "the State".

² Hereinafter "Declaration" or "American Declaration".

³ The observations submitted by each party were duly transmitted to the opposing party.

V. ALLEGED FACTS

1. The petition alleges violations of the right to participate in government as well as consequential violations of other rights, particularly the right to preservation of health and well-being. The petition contends that these violations result from the appointment of an emergency manager for the city of Flint, Michigan, in place of elected officials, and a unilateral decision by the emergency manager to Flint's water supply from a safe source to a contaminated source. The petition indicates that these alleged violations caused harm to the citizens of the city of Flint, including the alleged victims specifically named in the petition.

2. By way of background, the petition indicates that Michigan has a legal regime that authorizes the Governor to appoint "*Emergency Managers*" to run a municipality where the finances of such a municipality are in jeopardy. In November 2011, following a declaration of financial emergency, the Governor appointed an Emergency Manager for the city of Flint pursuant to a law known as Public Act 4 ("PA 4"). According to the petition, PA 4 was enacted in 2011 and replaced an earlier law known as Public Act 72. Under this previous law, officials known as "*Emergency Financial Managers*" could be appointed for a municipality where a state of financial emergency was declared. Under this regime, Emergency Financial Managers had control over the finances of the municipality but elected officials would retain control over policy and administrative matters. Under PA 4, Emergency Financial Managers were converted into "*Emergency Managers*" and given broader powers to run municipalities. Under this regime, local elected officials were prohibited from exercising their powers unless the Emergency Manager specifically authorized them to do so in writing, and that authorization was subject to change at any time.

3. In November 2012, there was a referendum that successfully repealed PA 4. However, in response, the petitioners indicate that the Governor and legislature of Michigan then passed Public Act 436, which is functionally identical to PA 4. The new Public Act 436 ("PA 436") provided once again for the appointment of an Emergency Manager to "*act for and in the place and stead of the governing body and the office of chief administrative officer of the local government*".

4. According to the petitioners, the city of Flint had traditionally obtained its water supply from the Detroit Water and Sewer Department. However, in March 2013, the Flint City Council voted to contract with the Karegnondi Water Authority ("KWA") to supply the city with water, from Lake Huron, after completion of a pipeline. This pipeline was expected to be completed by 2016. The Emergency Manager supported the decision to contract the KWA, but in June 2013, he unilaterally decided to use the Flint River as an interim source of water. This decision took effect in April 2014.

5. Following the switch to Flint River as a source of water, the petitioners claim that there were multiple complaints from residents of Flint about the poor quality of the water, in terms of discoloration, foul odor, and bad taste. Further, the petitioners indicate that some residents began to suffer from various ailments because of the poor quality of the water, including skin rashes, pneumonia, bacterial infections (like Legionnaires Disease) and neurological problems (like seizures and memory loss). According to tests conducted by various agencies or authorities, the water was found to contain various pathogens such as lead⁴, fecal coliform bacteria⁵ and legionella (bacteria).

6. The petitioners provide specific information on some of the alleged victims regarding the ailments said to be caused by a contaminated water supply:

⁴ The petitioners indicate (among other things) that in September 2015, A research team led by Dr. Mona Hanna-Attisha, a pediatrician from the Hurley Medical Center, released a study revealing that the number of children with elevated lead levels in their blood nearly doubled after the city of Flint switched its water source. The petitioners also indicate that in February 2015, the Environmental Protection Agency advised the Michigan Department of Environmental Quality that it has detected dangerous levels of lead in the water at the home of Flint resident Lee-Ann Walter (also one of the alleged victims).

⁵ According to the petitioners, in August 2014 and September 2014 –the city of Flint issued Boil Water Advisories, after finding that fecal coliform bacterium has been detected in the water supply, The city also indicated that it would boost the amount of chlorine in the water and flush the water system.

Doris Patrick

7. According to petitioners, Doris Patrick has been a lifelong resident of Flint. She suffered no major illnesses until Flint changed its water source in 2014. In 2014, Doris Patrick was diagnosed with various bacterial infections and ailments caused by waterborne micro-organisms, such as *Klebsiella Pnemoniae* and *Proteus Mirabilis*. The infections are said to be resistant to medical treatment. Consequently, Doris Patrick suffers from various disorders of her urinary system, including cystitis and incontinence, as well as other ailments such as stenosis and osteoporosis.

Nakiya Wakes

8. In July/August 2014, the petitioners state that Nakiya Wakes began to notice behavioral changes in her son, Jaylen. In this regard, the petitioners indicate that he had started to throw temper tantrums and gotten suspended from school. Additionally, the petitioners alleged that Jaylen had started to complain of chest and leg pains. Further, Nakiya Wakes together with her daughter, Nashuana, started to experience skin rashes and hair loss.

Gina Luster

9. According to the petitioners, in July 2014 Gina Luster began to suffer various ailments which, among other things, caused: hair loss; weight loss (67 pounds in three months); and memory loss. She also suffered from a bacterial infection to her breast (mastitis). Gina Luster later collapsed at work, and subsequently lost her job because of her illness. The petitioners also indicate that Gina Luster was forced to have a hysterectomy as a result of her ailments. The petitioners also alleges that Gina Luster's 5-year-old daughter, Kennedy, was diagnosed with vitamin D deficiency and claims of constantly "*hurting bones*." Further that her teeth also "*crumbled*".

Lee Anne Walters

10. The petitioners state that in February 2015, all four of Lee Anne Walters' children became ill, including a son who developed rashes over his entire body. The petitioners indicate that the water supply to the home of Lee Anne Walters was subsequently tested by the city of Flint and the Environmental Protection Agency; and that these tests revealed dangerously high levels of lead.

Victoria Marx

11. The petitioners state that in April 2015 Victoria Marx began to experience neurological disorders including tremors in her hand and loss of balance. In August 2015, she was diagnosed with Parkinson's Disease. She was put on anti-depressants. The petitioners further state that in August of 2015 Victoria Marx was diagnosed with Parkinson's disease. Further that her home was found to have high levels of lead. These high levels of lead reduced the value of Victoria Marx's home by half and made it impossible for her to sell it.

Joyce McNeal

12. According to the petitioners, in October 2015 Joyce McNeal's son, Joseph Pounds, began to suffer various ailments because of contaminated water. These ailments include sores, rashes, loss of flesh, bacterial infections, and pneumonia. The petitioners state that he is initially hospitalized in Flint, and then subsequently airlifted to a hospital in Ann Arbor, Michigan. Joyce McNeal's son died on October 18, 2015.

13. The petitioners state that on March 23, 2015, the Flint City Council voted to stop using the Flint River as a source of municipal water and to reconnect with the Detroit Water and Sewer Department. However, according to the petitioners, the Emergency Manager for Flint overruled the vote calling it "*incomprehensible*" because costs would skyrocket and "*water from Detroit is no safer than water from Flint*."

However, the petitioners indicate that, in October 2015, the Governor of Michigan announced that the city of Flint would be allowed to stop using the Flint River and reconnect with the Detroit Water and Sewer Department. According to the petitioners, this reconnection took effect on October 16, 2015. The petitioners further assert that residents of Flint were cautioned that it would take weeks for the water system to be properly flushed out and that there may be lingering issues.

14. The petitioners affirm that the water crisis in Flint led to a declaration of state of emergency by the Mayor of Flint in December 2015; a declaration of state of emergency in January 2016 by the Governor of Michigan for the county of Genesee (where Flint is located); and a declaration of federal emergency in relation to Flint in January 2016 by the President of the United States.

15. Broadly, the petitioners attribute the water crisis in Flint largely to the introduction of the Emergency Manager system. For the petitioners, this system served to remove power from elected representatives and to place it in the hands of unelected officials. In the case of Flint, the petitioners argue that this system allowed the Emergency Manager to make unilateral decisions regarding Flint's water supply, which in turn, had harmful consequences for the residents of Flint, including the alleged victims. The petitioners argue that the Emergency Manager system effectively disenfranchised the residents of Flint and constitutes a violation of the "*right to democracy*". Secondly, the petitioners contend that the harmful consequences of the decisions of the Emergency Manager violate other rights including the right to preservation of health. The petitioners invoke various international instruments and jurisprudence in support of their arguments. These instruments and jurisprudence include: ICCPR, General Comments of HRC, Inter American Democratic Charter.

16. Regarding exhaustion of domestic remedies, the petitioners refer to litigation initiated on March 27, 2013, before the United States District Court for the Eastern District of Michigan ("the District Court"). This litigation was initiated by a group of approximately twenty individuals living in municipalities run by Emergency Managers (including Flint, Detroit, Pontiac, Benton Harbor and Redford). This case was initiated against the Governor and Treasurer of Michigan (Richard Snyder and Andrew Dillon respectively) and sought to challenge the constitutionality of the Emergency Manager Law (PA 436). The case was known as Catherine Phillips et al v. Snyder et al. According to the documentation provided by the petitioners, none of the alleged victims were plaintiffs/parties to this litigation, apart from Bernadel Jefferson. The District Court dismissed the plaintiffs' claims finding that there was no fundamental right to elect local legislators; and that States were constitutionally permitted to allocate local government power to elected or unelected officials. A subsequent appeal to the U.S Court of Appeals for the Sixth Circuit ("the Six Circuit") was dismissed on September 12, 2016. The plaintiffs applied for a rehearing by the Sixth Circuit (*en banc*), but this was denied on November 1, 2016. The plaintiffs subsequently filed a petition in the U.S. Supreme Court for a writ of *certiorari* on March 30, 2017, but this request was denied on October 2, 2017. The petitioners submit that this dismissal by the U.S. Supreme Court signified the exhaustion of domestic remedies.

17. The United States of America rejects the petition as inadmissible for several reasons. Firstly, the State considers that the petition contains claims that are beyond the jurisdiction of the Commission *ratione personae* and *ratione materiae*. Secondly, the State contends that the petitioners have failed to demonstrate that domestic remedies have been pursued and exhausted. Thirdly, the State asserts that the claims in the petition fail to state facts to state facts that tend to establish violations of rights set forth in the American Declaration; and that the claims are otherwise manifestly groundless. Fourthly, the State argues that consideration of the petition would run afoul of the so-called "*Fourth Instance*" doctrine.

18. Regarding the issue of *ratione materiae*, the State contends, firstly, that the petition contains claims that are based on instruments beyond the American Declaration. In this regard, the State notes that while the petitioners anchor their claims in specific provisions of the American Declaration, they attempt to expand the competence of the Commission by invoking an array of other international instruments to substantiate claims that international legal obligations have been violated. These instruments include the OAS Charter, the Inter-American Democratic Charter, and the International Covenant on Civil and Political Rights. According to the State, claims based on such international instruments and purported authorities beyond the

American Declaration are beyond the competence *ratione materiae* of the Commission and must be rejected as inadmissible.

19. Secondly, the State argues that Article 20 of the Commission's Statute contains provisions of the American Declaration over which the Commission is empowered "to pay particular attention" vis-à-vis States not party to the American Convention. Article 20(a) enumerates these as "the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration." Accordingly, the State contends that the petitioners' principal claim based on Article XX of the Declaration falls beyond the *ratione materiae* competence of the Commission and must be dismissed pursuant to Article 20 of the Commission's Statute. Further, that the petitioners' subsidiary claims under Articles VI and XI of Declaration also fall beyond the *ratione materiae* competence of the Commission and must be dismissed pursuant to Article 20 of the Commission's Statute.

20. Regarding the issue of *ratione personae*, the State contends that the petition filed on behalf of thirteen named individuals but contains claims that go beyond those that are identifiable in relation to these named individuals. The State argues that, to the extent that the petition contains generalized claims of violations of the American Declaration (beyond those identifiable in relation to named individuals) such claims fall in the category of an *actio popularis*, which is beyond the competence of the Commission. The State emphasizes that the Commission only has competence to review particularized claims relating to the individuals named in the petition.

21. Regarding the question of exhaustion of domestic remedies, the State argues that the petition does not show that any available domestic remedies have been pursued and exhausted regarding the subsidiary claims (claims other than the principal claim under Article XX, such as the alleged violations of the rights to life, establish a family, or the preservation of health). To the extent that petitioners have not pursued remedies relevant to the particularized violations they allege, the State contends that these claims are inadmissible.

22. The State contends that the petition fails to state facts that tend to establish a violation of the American Declaration and presents manifestly groundless claims (pursuant to Article 34 of the Commission's Rule of Procedure). In relation to the principal claim (violation of Article XX by virtue of enactment of PA 436), the State argues that the right to participate in government necessarily means that each local official must be elected. Further, the State asserts that nothing in Article XX of the American Declaration suggests that democratically elected state representatives may not, by operation of law enacted by democratically elected representatives, appoint local officials. According to the State, this conclusion is consistent with rulings of U.S. courts that considered this matter. The State also notes that public officials appointed pursuant to PA 436 remain subsidiary to democratically elected state officials. Additionally, the State submits that the petitioners are effectively inviting the Commission to intervene in domestic policy matters and substitute its policy judgment for that of national authorities with the legal competence to address the claims, and authority to apply appropriate remedies. This approach must be rejected because it is not supported by the provisions of the American Declaration on which petitioners rely or by the facts in the record. Given the foregoing, the State reaffirms that the petitioners' claim under Article XX of the American Declaration is inadmissible under Article 34 of the Commission's Rules of Procedure.

23. In relation to the other (subsidiary) claims of the petitioners, the State notes that these claims resulted from the violation of Article XX of the American Declaration. In this regard, the State submits that the petitioners' "*attempt to bootstrap these subsidiary claims to their Article XX claim*" must also be rejected as inadmissible under Article 34 of the Commission's Rules of Procedure. In relation to the claims under Articles I (right to life), II (right to equality), and VI (right to establish a family) of the American Declaration, the State argues that even if the petitioners could even if any of the named individuals could establish violations of these provisions, such violations did not result (and as a matter of logic could not have resulted) from an alleged violation of the right to political participation under Article XX of the Declaration.

24. The State considers that the petitioners claim under Article XI (Right to Preservation of Health) is also inadmissible pursuant to Article 34 of the Commission's Rules of Procedure. In this respect, the State argues firstly that Article XI of the American Declaration articulates the "*right to the preservation of health*" through specific means: "*sanitary and social measures*" relating to "*food, clothing, housing and medical care.*" The right to the preservation of health through such measures under Article XI is further qualified "*to the extent permitted by public and community resources*". Secondly, the State argues that Article XI not only allows, but in fact requires, the balancing of the considerations enumerated therein, including scientific and technical resources and economic and social impacts. Accordingly, even if the petitioners had successfully articulated a claim with respect to sanitary and social measures relating to food, clothing, housing, and medical care –which they have not– such claim must further be weighed against the resource limitations expressly contemplated by Article XI itself. According to the State, the evaluation and balancing required by Article XI rests with the regulatory regime of the State and must be accorded great deference. The State contends that the petitioners have failed to articulate any violation of the right to the preservation of health in the context of "*sanitary and social measures*" relating to "*food, clothing, housing and medical care.;*" and that instead, the petition attempts to expand the scope of Article XI by relying on inapposite jurisprudence/international instruments. Further the State submits that the claim under Article XI falls beyond the preservation of health through sanitary and social measures relating to food, clothing, housing, and medical care. Given the foregoing the State reaffirms that this claim is inadmissible pursuant to Article 34 of the Commission's Rules of Procedure.

25. Finally, the United States of America contends that any consideration of the petition would violate the Commission's fourth instance doctrine. According to the State, the petition plainly constitutes an effort by the petitioners to use the Commission as a "*fourth instance*" body to review claims already heard and rejected by U.S. courts. In this regard, the State argues that the petition invites the Commission to evaluate the legality of a provision of state law already found to be consistent with a right to political participation under U.S. law. The State submits that is not the Commission's place to sit in judgment as another layer of appeal, second-guessing the considered decisions of a State's domestic courts in weighing evidence and applying domestic law. Accordingly, the State contends that the fourth instance doctrine bars the Commission from reviewing the claims of the petitioners.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

26. The petition under consideration claims firstly a violation of the right to participate in government ("the principal claim"). The petition claims that this alleged violation led to or caused violation of other rights ("subsidiary claims"), such as the right to life and the right to preservation of health, consequent on the alleged exposure to a contaminated water supply.

27. In relation to the principal and subsidiary claims, the parties diverge on the issue of domestic remedies. The State contends that domestic remedies were not exhausted, whereas the petitioners claim that domestic remedies were exhausted.

28. According to the petition, domestic remedies were invoked and exhausted by federal litigation known as Catherine Phillips et al v. Snyder et al. This litigation was initiated by a group of plaintiffs who resided in municipalities run by Emergency Managers, including the city of Flint According to the record this litigation was initiated in 2013 to challenge the constitutionality of the Emergency Manager Law (PA 436). Following dismissals by first instance and appellate courts, on October 2, 2017, the U.S. Supreme Court declined an application by the plaintiffs for writ of certiorari. Following this dismissal, a petition was submitted to the Commission on December 4, 2017.

29. In analyzing the issue of exhaustion of domestic remedies, the Commission notes firstly that the petition refers to thirteen alleged victims. However, a review of the record shows that except for Bernadel Jefferson, the plaintiffs in the case of Catherine Phillips et al v. Snyder et al, did not include any of these alleged victims. Secondly, the record shows that this case was about complaints relating to the principal claim and did not incorporate or deal with complaints the about subsidiary claims. Accordingly, in relation to the

twelve alleged victims who were not part of the domestic litigation, the Commission cannot verify that they have invoked and exhausted the available domestic remedies with respect to either the principal or subsidiary claims. Further, the Commission is unable to verify whether there is a situation in which an exception to the exhaustion of domestic remedies could apply. Based on the foregoing, the Commission concludes that this petition is inadmissible with respect to these twelve alleged victims for failure to exhaust domestic remedies pursuant to Article 31(1) of the Commission's Rules of Procedure.

30. Given that Bernadel Jefferson was one of the plaintiffs in the domestic litigation, the Commission considers that the dismissal of this litigation on October 2, 2017, represents exhaustion of domestic remedies solely regarding the principal claim. Given that the petition was filed on December 4, 2017, the Commission considers that it was filed in timely manner (regarding the principal complaint as it relates to Bernadel Jefferson). However, regarding the subsidiary claims, the Commission considers that that Bernadel Jefferson is in the same position as the other twelve alleged victims, and accordingly, her complaints in this regard are inadmissible for failure to exhaust domestic remedies pursuant to Article 31 (1) of the Commission's Rules of Procedure.

VII. ANALYSIS OF COLORABLE CLAIM

31. Based on the Commission's foregoing analysis of exhaustion of domestic remedies, any consideration of colorable claims is now confined to the alleged violation of Bernadel Jefferson's right to participate in government (pursuant to Article XX of the American Declaration). In this regard, the Commission notes that this issue was litigated extensively in the domestic courts resulting in decisions that were unfavorable to Bernadel Jefferson (and her co-plaintiffs). Based on the record, it appears that the petitioners are dissatisfied with the result of the domestic proceedings and now seek a reassessment of these proceedings by the Commission.

32. The Commission has observed that the interpretation of the law, the relevant proceeding, and the weighing of evidence, is among others, a function to be exercised by the domestic jurisdiction, which cannot be replaced by the IACHR. In this regard, it should be recalled that the Commission does not have authority to review judgements handed down by domestic courts acting within their competence and applying all due judicial guarantees unless it finds that a violation of one of the rights protected by the American Declaration has been committed. Thus, after thorough analysis of the available information, the Commission considers that Bernadel Jefferson was accorded all due judicial guarantees, and that she has not provided sufficient evidence to indicate, *prima facie*, any violation of her rights as guaranteed by the American Declaration, including the right to participate in government (under Article XX).

33. Accordingly, the Commission finds that the facts alleged in this petition do not tend to establish a violation of Article XX and that the petition is therefore inadmissible in this regard, pursuant article 34.a) of its Rules of Procedure.

VIII. DECISION

1. To find the instant petition inadmissible; and
2. To notify the parties of this decision; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 1st day of the month of November, 2022. (Signed:) Julissa Mantilla Falcón, President; Margarete May Macaulay, Second Vice President; Joel Hernández, and Roberta Clarke, Commissioners.