IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

SAUNDRA M. FLOYD; CANDYSS C. WHITE; STEVEN R. FLOYD, JR.; CHYVANTE E. FLOYD; RACHEL ANN POWELL as Personal Representative of the Estate of LIEUTENANT STEVEN R. FLOYD, SR.; CORRECTIONAL OFFICER WINSLOW H. SMITH; CORRECTIONAL OFFICER JOSHUA WILKINSON; CORPORAL JUSTIN TUXWARD; CORPORAL MATTHEW MACCALL; and CORPORAL OWEN HAMMOND, Plaintiffs, v. JACK MARKELL, individually; RUTH ANN MINNER, individually; STANLEY W. TAYLOR, JR., individually; THE HONORABLE CARL C. DANBERG, individually; ROBERT COUPE, individually; ANN VISALLI, individually; BRIAN MAXWELL, individually; PERRY PHELPS, in his official capacity; MICHAEL S. JACKSON, in his official capacity; and DEPARTMENT OF CORRECTION, STATE OF DELAWARE, Defendants.	)	C.A. No. 1:17-cv-00431-RGA

THE DOC DEFENDANTS' OPENING BRIEF
IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

"The defendants did not kill or injure the [correctional officers];
the prisoners did, and this makes all the difference." [1]

With those sad but indisputably true words, one circuit court succinctly described the flaw in the Plaintiffs' theory that State officials have violated the United States Constitution by failing to prevent the uprising at the James T. Vaughn Correctional Center ("JTVCC") on February 1 and 2, 2017. During this uprising, inmates in Building C took several correctional officers hostage for approximately 15 hours, assaulted the abducted officers and murdered Lt. Steven Floyd. A criminal investigation is ongoing, but the State has filed no charges as of the date of this brief.

Lt. Floyd's estate, his family and five correctional officers seek to hold the Department of Correction and nine current and former state officials liable for alleged violations of their constitutional right to life and liberty. In their 426 paragraph Complaint, the Plaintiffs assert three short counts all premised on violations of substantive due process and all arguing variations of the same theme – that policy decisions regarding staffing caused the Plaintiffs' injuries. But while the Complaint is prolix in its description of the background of the case and the conditions that Plaintiffs feel could have been improved, it contains relatively few allegations related to specific actions taken by the Defendants. Nevertheless, the Plaintiffs seek to hold the Department of Correction and its current and former commissioners directly liable for the inmates' kidnapping, assaults and murder.

Being a correctional officer is a dangerous job – exceedingly so. Correctional officers are faced with the unenviable task of dealing with society's most depraved and violent individuals. To be sure, correctional officers' lives are put at risk every day. However, no

[1] *Walker v. Rowe*, 791 F.2d 507, 509 (7th Cir. 1986)

matter how tragic the event or sympathetic the cause, the remedy for violence by inmates against correctional officers does not lie in the Fourteenth Amendment or any other constitutional provision. This action should be dismissed.

NATURE AND STAGE OF THE PROCEEDINGS

On April 18, 2017, the estate of Lt. Steven R. Floyd, several members of Lt. Floyd's family, and five correctional officers (the "Plaintiffs") filed their Complaint against the Department of Correction for the State of Delaware ("DOC"), current DOC Commissioner Perry Phelps, three former DOC Commissioners: Stanley W. Taylor, The Honorable Carl C. Danberg, and Robert Coupe (the "Individual DOC Defendants," and collectively with the "DOC," the "DOC Defendants"), two former Governors: Jack Markell and Ruth Ann Minner, two former Directors of the Office of Management and Budget: Ann Visalli and Brian Maxwell, and the current Director of the Office of Management and Budget Michael S. Jackson. (D.I. 1). The Complaint seeks relief under 42 U.S.C. § 1983 and alleges three violations of Plaintiffs' federal constitutional substantive due process rights to life and liberty: (i) consciously disregarding a substantive and great risk of serious harm which shocks the conscience (Count I); (ii) creating a risk of foreseeable harm which increased the risk of harm to Plaintiffs (Count II); and (iii) failing to provide training and safety measures to prevent harm to Plaintiffs (Count III). *Id*.

This is the DOC Defendants' Opening Brief in Support of their Motion to Dismiss. Pursuant to the schedule stipulated by the parties and ordered by the Court, Plaintiffs' Answering Brief is due to be filed 60 days after Defendants' Motion to Dismiss is filed, and Defendants' Reply is due 30 days after Plaintiffs' opposition. (D.I. 3).

SUMMARY OF THE ARGUMENT

1. Both the Supreme Court and the Third Circuit have held – squarely – that a government employer owes no *constitutional* obligation to provide its employees with certain minimum levels of safety and security in the workplace. *See Collins v. City of Harker Heights*, 503 U.S. 115 (1992); *Kaucher v. Cnty. of Bucks*, 455 F.3d 418 (3d Cir. 2006). Rather, the appropriate redress for a state employee injured in the course of duty lies in state law. And even if the Court were to undertake a traditional substantive due process analysis in this case (which it should not), the Plaintiffs have failed to state a claim.

2. Even if a constitutional claim could be asserted, there is a long history of cases in this and other circuits belying any argument that the constitutional right at issue was "clearly established" at the time of its alleged violation. The Individual DOC Defendants are therefore entitled to the protections of qualified immunity as a matter of law. In addition, the DOC and Defendant Phelps, who is sued in his official capacity only, are rendered immune from suit by the Eleventh Amendment to the United States Constitution.

3. Plaintiffs' claims against the Individual DOC Defendants must also be dismissed because the Complaint fails to allege any facts demonstrating any of the Individual DOC Defendants had personal involvement in causing the injuries suffered by the Plaintiffs. It was a series of criminal actions that injured the Plaintiffs, none of which were perpetrated by any of the DOC Defendants. Absent such allegations of "personal involvement," the claims against the DOC Defendants must fail.

4. Defendant Stanley Taylor retired from his position as Commissioner of the DOC in 2007. The Honorable Carl Danberg followed Taylor as Commissioner, and left that post in 2013. Not a single action after their respective tenures is alleged to have been taken by either

Defendant. The claims against these defendants in this action – which was filed in 2017 – run afoul of the two year statute of limitations governing constitutional claims. All claims against Danberg and Taylor must be dismissed as untimely.

5. Plaintiffs' claims are not justiciable under the political question doctrine because they attack the legislative and penological decisions that the DOC Defendants made in the course of operating the prison system in Delaware. To resolve these issues, the Court would have to second-guess the actions of the General Assembly (none of the members of which are named in this lawsuit) and the DOC Defendants in determining the appropriate methods that would best accomplish the daily functioning of the State's prison system. Under settled precedent, these claims should be deemed political questions, the resolution of which is best kept within the Executive and Legislative branches of government.

6. Plaintiffs Saundra R. Floyd, Candyss C. White, Steven R. Floyd, Jr., and Chyvante Floyd cannot establish the requisite Article III standing to assert a substantive due process claim under the facts asserted in the Complaint. Their husband's and father's rights are currently being pressed by his estate, the standing of which is not challenged here.

STATEMENT OF FACTS

For purposes of this motion only, the DOC Defendants assume the facts alleged in the Complaint are accepted as true.

A. The DOC Defendants

The DOC is responsible for the "maintenance, supervision and administration of the adult detention and correctional services and facilities" in Delaware. 11 *Del. C.* § 6502. The DOC manages approximately 6,500 to 7,000 inmates within its correctional facilities and

approximately 17,000 probationers throughout the State.[2] The mission of the DOC is to "protect the public by supervising adult offenders through safe and humane services, programs and facilities." *Id.* The DOC is the second largest executive branch agency in the State with over 2,500 employees, including correctional officers and other staff. *Id.* As an agency of the State, the DOC receives its operating funds from the Budget Appropriation Bill.[3]

The Commissioner of the DOC is appointed by the Governor and serves at the Governor's pleasure. 29 *Del. C.* § 8902 (a). The Commissioner is the Chief Executive Officer of the DOC and is tasked with the "full and active charge of the [DOC]." 11 *Del. C.* § 6516. The Delaware Code describes the duties and responsibilities of the Commissioner. 11 *Del. C.* § 6517. "The Commissioner is responsible for the administration and operation of the DOC, including maintaining prison facilities to allow for their effective and efficient operation, providing for the allocation of security personnel within prison facilities, making and entering into contracts and agreements and preparing and implementing the orders and policies of the Governor to the extent they involve the DOC." (Compl. ¶ 23).

B. The Individual DOC Defendants.

Defendant Taylor was appointed Commissioner of the DOC in 1995 and retired from that role ten years ago, in 2007. (Compl. ¶ 23). The Complaint contains generalized allegations against Defendant Taylor, defines him as among the "Minner Defendants" (Compl. ¶ 62) and complains that he implemented unsafe policies at Governor Minner's direction. (Compl. ¶ 68). There is no allegation of wrongdoing by Defendant Taylor in the Complaint, and indeed there are only two specific allegations against him: (1) that he allegedly "admitted in 2004 that inmates

[2] Department of Correction homepage, http://www.doc.delaware.gov (last visited June 30, 2017).

[3] The Budget Appropriation Bill is a legislative bill, approved by Delaware's General Assembly and signed by the Governor, that authorizes and dictates the expenditure of State funds. *See e.g.* 29 *Del. C.* § 6400 *et seq.*

regularly hide weapons on their bodies and the DOC is unable to stop them," (Compl. ¶ 92); and (2) that in 2004, he "assured the public and stated that . . . 'our secure facilities are pretty secure.'" (Compl. ¶ 110). The Complaint does not allege any act after 2004 attributed to Defendant Taylor.

Defendant Danberg was the Commissioner of the DOC after Defendant Taylor, from 2007 to 2013. (Compl. ¶ 24). As with Defendant Taylor, the Complaint is devoid of any specific allegation of wrongdoing by Defendant Danberg. *See generally* Compl. Instead, the Complaint includes Defendant Danberg among both the "Minner Defendants" and the "Markell Defendants" and generally complains that they "implemented and participated in implementing" allegedly unsafe policies and ignored "grave warning[s]" of potential violence. (Compl. ¶¶ 136, 163, 166. 185-91). There are no allegations of any specific acts or wrongdoing against Defendant Danberg. Nor is there any allegation that Defendant Danberg had any involvement with the operation of the DOC following his departure in 2013.

Defendant Coupe succeeded Defendant Danberg and was the Commissioner of the DOC from 2013 until January 2017. (Compl. ¶ 25). The Complaint generally alleges that Defendant Coupe, as a "Markell Defendant," wrongfully "implemented and participated in implementing" allegedly unsafe policies and ignored "grave warning[s]" of potential violence. (Compl. ¶¶ 136, 163, 166. 185-91). It also alleges that Defendant Coupe admitted there was an inverse correlation between staffing levels and risk in the prison system. (Compl. ¶¶ 142-47). Aside from these general allegations, the Complaint does not identify any specific action taken by Defendant Coupe that led to the Plaintiffs' alleged injuries.

The current Commissioner of the DOC is Defendant Phelps, who was confirmed by the Senate to the position on January 18, 2017. There are no specific allegations of wrongdoing

against Defendant Phelps. *See generally* Compl. Defendant Phelps is named only in his official capacity. (Compl. ¶ 28).

C. Correctional Officers at DOC and the COAD

Plaintiffs Lt. Floyd, Correctional Officer Smith, Correctional Officer Wilkinson, Cpl. Tuxward, Cpl. McCall and Cpl. Hammond (the "Employee Plaintiffs") accepted employment as correctional officers with the DOC. (Compl. ¶¶ 5, 16-20). The Employee Plaintiffs understood that they were accepting "one of the most dangerous jobs in the State of Delaware" and were "tasked with the responsibility of keeping the public safe from extremely violent inmates." (Compl. ¶¶ 33-34). Some of their daily tasks required "dealing with many people who have a history of sudden outbursts of temper, low levels of understanding of personal relations, little respect for authority and often, mental illness." (Compl. ¶ 44).

The Employee Plaintiffs were members of Correctional Officers Association of Delaware ("COAD"), the bargaining unit responsible for negotiating and evaluating (and, where appropriate, grieving) their salary, benefits, training and safety as correctional officers. (Compl. ¶¶ 31-32). The COAD negotiates the DOC's correctional officer's employment contracts and advocates for correctional officers' rights. (Compl. ¶¶ 31-42). The Complaint alleges that multiple times from 2004 to 2017, the COAD and the correctional officers were aware of the alleged unsafe policy changes and publicly voiced concerns about these changes and the understaffing present within the DOC. (Compl. ¶¶ 79, 91, 98, 101, 103-108).

D. The February 1 and 2 Incident

On February 1, 2017, Lt. Floyd, Correctional Officer Smith, and Correctional Officer Wilkinson were attacked by several inmates in Building C at JTVCC. (Compl. ¶¶ 202-204). These correctional officers were taken hostage, beaten, and Lt. Floyd was murdered by the

inmates. (Compl. ¶¶ 205, 212, 218, 225, 231, 238, 242, 247, 360). During the uprising, Sgt. Hammond, Sgt. McCall, and Sgt. Tuxward were trapped in the basement of Building C. (Compl. ¶¶ 240-274). Fortunately, these latter three officers were not physically injured. (Compl. ¶ ¶ 357-359).

ARGUMENT[4]

When considering a Motion to Dismiss under Fed. R. Civ. P. 12(b)(6), the Court must accept the complaint's well-pleaded facts as true, but disregard any legal conclusions. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009). The Court's ultimate determination is whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief." *Id*. at 211. In other words, "the complaint must do more than allege [Plaintiffs'] entitlement to relief; rather it must 'show' such an entitlement with its facts." *Cannon v. Delaware*, 2012 WL 1657127, at *5 (D. Del. May 9, 2012). "When the allegations in the complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007).

I. PLAINTIFFS HAVE NO SUBSTANTIVE DUE PROCESS CLAIM.

Plaintiffs assert each of their three counts under the Fourteenth Amendment's substantive due process provision. All fail for the same reasons.

Section 1983 does not create substantive rights. It instead provides remedies for deprivations of rights already established through the Constitution or federal law. *Kaucher*, 455 F.3d at 423. "To state a Section 1983 claim, a plaintiff must demonstrate the defendant, acting under color of state law, deprived him or her of a right secured by the Constitution or the laws of

[4] The DOC Defendants adopt and incorporate the arguments advanced by co-defendants Jackson, Markell, Minner, Maxwell, and Visalli.

the United States." *Id*. The first step in a Section 1983 analysis is to identify the precise Constitutional or federal right said to have been violated and determine whether the plaintiff has alleged a deprivation of a right at all. *Id*.

Despite decisions by both the Supreme Court and the Third Circuit directly on point and rejecting the theories advanced by Plaintiffs here, Plaintiffs argue that the Defendants violated their Fourteenth Amendment right to life and liberty by: consciously disregarding a substantive and a great risk of serious harm which shocks the conscience (Count I); creating a risk of foreseeable harm which increased the risk of harm to Plaintiffs (Count II); and failing to provide training and safety measures to prevent harm to Plaintiffs (Count III).

Federal courts have denied these and similar arguments for at least the last 20 years. *See Collins*, 503 U.S. at 129 (holding that the Due Process Clause does not guarantee government employees "a workplace that is free of unreasonable risks of harm"); *Kaucher*, 455 F.3d at 423-24 ("[T]he Due Process Clause does not guarantee certain minimal levels of workplace safety and security, nor does it impose federal duties analogous to those imposed by state tort law."); *White v. Lemacks*, 183 F.3d 1253, 1258 (11th Cir. 1999) ("[W]hen someone not in custody is harmed because too few resources were devoted to their safety and protection, that harm will seldom, if ever, be cognizable under the Due Process Clause.").

In *Collins v. City of Harker Heights*, the plaintiff worked for the city's sanitation department and died of asphyxia after entering a manhole to unclog a sewer line. 503 U.S. 115. The plaintiff's estate asserted a substantive due process violation premised on the City's purported failure to provide appropriate training and safety warnings. *Id*. at 117. In rejecting plaintiff's argument, the Supreme Court described the importance of judicial restraint when faced with a request to expand substantive due process rights and refused to extend that

constitutional provision to protect state workers who voluntarily accepted an offer of employment for a job that came with serious risks of harm. *Id.* at 125-26. In so holding, the Supreme Court was clear: "Neither the text nor history of the Due Process Clause support petitioner's claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause." *Id*. at 126.

A number of circuit courts, including the Third Circuit, have implemented the Supreme Court's holding in *Collins* and rejected substantive due process claims brought by public employees who suffered workplace injuries allegedly caused by their employers' creation of unsafe conditions, failure to train or other negligent conduct. Federal courts have consistently rejected substantive due process claims, including cases filed by law enforcement officers against their employers. *See, e.g., Rodriguez v. City of Philadelphia*, 350 F. App'x 710 (3d Cir. 2009) (affirming judgment on a substantive due process claim arising from assault of a prison officer allegedly caused by the prison's inadequate security measures); *Wallace v. Adkins*, 115 F.3d 427 (7th Cir. 1997) (affirming dismissal of correctional officer's claim that prison officials should have prevented an inmate from stabbing him 13 times in violation of the plaintiff's substantive due process rights); *Washington v. District of Columbia*, 802 F.2d 1478 (D.C. Cir. 1986) (dismissing correctional officer's claim that prison officials' failure to remedy safety conditions gave rise to a substantive due process claim); *Rutherford v. City of Newport News*, 919 F. Supp. 885, 898 (E.D. Va 1996) (dismissing substantive due process claim that city's conduct caused the death of a police officer, noting that the plaintiff's theory "could elevate to a constitutional status hundreds, if not thousands, of decisions taken by governments at all levels regarding the allocation of resources to those employed by the state in dangerous occupations . . . . [including] . . . prison guards") *aff'd mem.*, 107 F.3d 867 (4th Cir. 1997).

In holding that government employees have no *constitutional* guarantee of a safe workplace, courts have overwhelmingly concluded that these plaintiffs' true claims (in addition to workers' compensation protections) must lie in negligence or state tort law. *See Washington*, 802 F.2d at 1481 ("We have found no cases holding that an employee's right to a safe workplace is secured by anything other than the state law of tort."); *see also White*, 183 F.3d at 1258 (holding that prison employees' substantive due process claims were "analogous to a fairly typical state-law claim").[5] To this end, courts have acknowledged that judicial restraint requires them to think twice before expanding substantive due process to a concept neither supported by the text nor the history of the Due Process Clause. *See Collins*, 503 U.S. at 125; *Washington*, 802 F.2d at 1480 ("We must approach [expansion of substantive due process] with extreme caution.").

Indeed, the Supreme Court has warned that Section 1983 cannot be used to duplicate state tort law on the federal level:

> Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles.

Baker v. McCollan, 443 U.S. 137, 146 (1979). Rather, state tort claims are best left litigated in state courts or addressed by the General Assembly. *See Walker*, 791 F.2d at 510 ("Governments regularly sacrifice safety for other things . . . . the level of safety to be provided by the police to the people – like the level of safety to be provided to the police and [correctional officers] – is determined by political and economic forces, not by juries implementing the due process clause."). In discussing this same subject, the Third Circuit has acknowledged "the presumption

[5] The DOC Defendants expressly reserve, and do not waive, any and all 11th Amendment, sovereign immunity, and tort claims defenses (whether under 10 *Del C*. § 4001, *et seq.* or otherwise) that may apply.

that the administration of government programs is based on a rational decisionmaking process that takes account of competing social, political and economic forces." *Kaucher*, 455 F.3d at 425; s*ee also Wallace*, 115 F.3d at 429 ("[G]overnments must always make choices about how much to spend on worthy public causes and courts are ill-equipped to second-guess those choices.").

Because Plaintiffs do not have a *constitutional* right to a safe and secure workplace, all three of their claims fail. *Washington*, 802 F.2d at 1481 (reasoning that an employer may have a duty to provide its employees with a workplace free from unreasonable risks of harm, but "such tort-law rights and duties . . . are quite distinct from those secured by the Constitution").

A. Plaintiffs Cannot Allege Behavior that Shocks the Conscience.

Even if such a constitutional right did exist, Plaintiffs still fail to state a claim because the conduct they complain about could not, as a matter of law, "shock the conscience." To prevail on a substantive due process claim against an executive branch official, a plaintiff must set forth sufficient evidence to prove that the state conduct at issue is so arbitrary that it "shocks the conscience." *See Rochin v. California*, 342 U.S. 165, 172-73 (1952). When a decision maker has time to deliberate, "deliberate indifference may be sufficient to shock the conscience" in order for him to be found liable. *Id*. This standard requires that a person "consciously disregard 'a substantial risk of serious harm.'" *Id*. at 427 (citing *Ziccardi v. Philadelphia*, 288 F.3d 57, 66 (3d Cir. 2002)). What shocks the conscience depends on the circumstances at the time of the decision. *Kaucher*, 455 F.3d at 426 (citing *Miller v. Philadelphia*, 174 F.3d 368, 375 (3d Cir. 1999)); *see also Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995) ("[The court] must be careful not to second guess Defendants' decisions based on the benefit of hindsight, especially where their decision stemmed from a balancing of 'competing social, political, and economic

forces.'"). This subjective test must be applied to the situation as it existed at the time of the alleged actions. *Nicini v. Morra*, 212 F.3d 798, 814 (3d Cir. 2000).

Plaintiffs complain here about understaffing, inmate overcrowding, limited training and lack of resources – issues that nearly every state prison system faces. Plaintiffs appear to claim that the DOC Defendants violated due process by engaging in the State's budgeting process, reviewing the annual budget, and implementing policies and procedures based on the funds allocated to the DOC by the General Assembly. Nothing more is alleged, and these allegations cannot form the basis of a substantive due process claim. *See Fraternal Order of Police Dep't of Corr. Labor Comm. v. Williams* 375 F.3d 1141, 1145 (D.C. Cir. 2004) (concluding that "large-scale personnel and program decisions [such] as relocation of inmates and reallocation of correctional officers. . ." cannot rise to meet the constitutional conscience shocking threshold); *Collins*, 503 U.S. at 128-30 (holding that the defendant's failure to train its employees about the dangers of working in sewer lines and manholes could not be characterized as arbitrary, or conscience shocking, in a constitutional sense); *see also Washington*, 802 F.2d 1478; *Rutherford*, 919 F. Supp. 885.

What the Complaint lacks entirely – and what Plaintiffs cannot allege – are the type of egregious facts and specific actions by the DOC Defendants that could possibly violate due process. *See Pickle v. McConnell*, 592 F. App'x 493, 494 (6th Cir. 2015) ("Even granting [plaintiff's] allegations that [defendant] failed to adhere to prison security procedures, these errors are likely mere negligence and gross negligence at worst."). The Seventh Circuit in *Walker v. Rowe* said it best:

> Our question is whether acts and omissions of this character, which arguably increased the danger to which the [correctional officers] were exposed, violate the constitution . . . . We assume that [defendants] knew that these acts and omissions increased the risk

> of injury facing the [correctional officers] and after full deliberations decided to do nothing. We may assume that the decisions to accept these risks was negligent, meaning that the costs of reducing the risks were less than the benefits (the harms avoided, discounted by the probability that there would be a riot). We may even assume that the decision to accept these risks was grossly negligent (meaning that the costs were substantially less than the anticipated benefits). ***The answer to the question is no, under any of these assumptions***.

791 F.2d at 509 (emphasis added). The DOC Defendants' actions do not shock the conscience, and the Due Process Clause does not guarantee a safe work environment under these circumstances. Accordingly, Count I should be dismissed.

B. Plaintiffs Do Not Allege a Valid Claim Under the State-Created Danger Doctrine.

In a second attempt to assert a constitutional claim where none exists, Plaintiffs allege that the DOC Defendants had an affirmative duty to protect Plaintiffs because the Defendants created the danger. But in *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court reaffirmed the general rule that the Due Process Clause does not protect an individual from private violence. 489 U.S. 189, 197 (1989) ("As a general matter, ... a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."). The Third Circuit has identified two exceptions to the general rule of *DeShaney*: (1) when the state has a custodial relationship to the plaintiff (*i.e.*, where there is some special relationship between the State actor and the private individual), or (2) when the state's own actions create the very danger that the causes the plaintiff's injury. *Morrow v. Balaski*, 719 F.3d 160, 167 (3d Cir. 2013).

A special relationship is only recognized when the state has some custodial relationship with the individual and holds him there against his will. *DeShaney*, 489 U.S. at 197. *See Rutherford*, 919 F.Supp. at 891 ("In other words, the state cannot incarcerate a person and then

shun responsibility for his well-being."). A special relationship can exist if the state's discrete, grossly reckless affirmative act places a member of the public in a position of danger distinct from that facing the public at large. *Id*. *Cf. Kaucher*, 455 F.3d at 434 (holding that employment as a correctional officer was a "far cry" from the custodial relationship that normally gives rise to state duty); *Wallace*, 115 F.3d at 430 (dismissing the plaintiff's claim that a correctional officer had a special relationship with the state actors because he had a duty to remain at his post and was threatened with termination if he left); *see also Pickle*, 592 F. App'x at 494. Put simply: employment is not a "special relationship" giving rise to an affirmative duty to protect.[6]

Even if such a duty existed, the state must also take direct steps that create or enhance the risk of danger to the plaintiff. *Kneipp v. Tedder*, 95 F.3d 1199, 1208 (3d Cir. 1996). To assert such a claim, the plaintiff must allege that:

> (1) the harm ultimately caused was foreseeable and fairly direct;
>
> (2) the state actor acted with a degree of culpability that shocks the conscience;
>
> (3) the relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and
>
> (4) the state actor affirmatively used his or her authority in a way that created danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

Bright v. Westmoreland Cnty., 443 F.3d 276, 281 (3d Cir. 2006). As outlined in Section I(A), *supra*, the DOC Defendants' conduct cannot be said to "shock the conscience" sufficient to violate the Plaintiffs' substantive due process rights. For that reason alone, Plaintiffs' state-created danger claim fails under the second element of this test. Plaintiffs' state-created danger

[6] Nor is a relationship alleged between the DOC Defendants and the "Family Plaintiffs" (as defined herein).

claim also fails under the fourth element of this test – Plaintiffs cannot allege that the DOC Defendants acted affirmatively to create a risk of danger that would otherwise not exist – and because Plaintiffs do not allege that the DOC Defendants personally caused them harm.

The fourth element of this test focuses on whether the state actor affirmatively exercised his authority to create a foreseeably dangerous situation. "There must be a direct causal relationship between the affirmative act of the state and plaintiff's harm. Only then will the affirmative act render the plaintiff 'more vulnerable to danger than had the state not acted at all.'" *Kaucher*, 455 F.3d at 432. The Third Circuit has rejected attempts to "recharacterize [a state actor's] failures as affirmative actions" and has consistently held that a plaintiff has to show more than a "failure to prevent" an injury in order to prevail on a state created danger claim. *Id*. at 433; *see also Dubrow v. Philadelphia*, 2008 WL 4055844 (E.D. PA 2008); *Rodriquez*, 350 F. App'x at 713 ("Rodriquez's claim turns on whether his contention that the City could have done more to prevent dangerous circumstances from arising . . . or that the City was negligent in enforcing certain security measures that would have enhanced officer safety. ***Such contentions are insufficient as a matter of law*** to establish that the City's affirmative exercise of authority created the danger to which Rodriguez was exposed.") (emphasis added).

Like the plaintiffs in *Kaucher, Dubrow,* and *Rodriguez*, Plaintiffs only complain here generally that the DOC's practices and policies were unsafe. That is not enough. Plaintiffs must allege what policies were unsafe and how those policies directly increased the risk of Plaintiffs' injury. They have not and cannot do so, and Count II should be dismissed.

C. Plaintiffs Have Not Stated A Constitutional Claim for Failure to Train.

Plaintiffs' third and final claim – alleging a failure to train and insufficient policies, practices and customs – is evaluated under the same deliberate indifference standard used to

evaluate whether conduct "shocks the conscience." *A.M. ex rel J.M.K. v. Luzerne Cnty. Juvenile Detention Ctr.*, 372 F.3d 572, 580-81 (3d Cir. 2004) (citing *City of Canton v. Harris,* 489 U.S. 378, 389-90 (1989) (holding that failure to train may only be actionable when "in light of the duties assigned to specific officers or employees, the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to that need")). Importantly, the deficiency in training or policies must be the direct cause of plaintiff's ultimate injuries. *Id*.; *see also Bd. of Cnty. Comm'rs of Bryan County, Okla. v. Brown,* 520 U.S. 397, 409-10 (1997).

Plaintiffs rely on the same facts for this argument as they do to support their shocks the conscience claim, and it fails for the same reasons. The DOC Defendants are faced with the difficult task of running a prison (which is filled with "murderers, rapists, and others with no respect for the law") while managing various social, political and budgetary pressures. *Walker,* 791 F.2d at 509. Nor did the DOC Defendants kidnap, injure or murder the Plaintiffs – inmates did. In the correctional officer context, courts have noted that the harm inflicted by those inmates are "risk[s] incident to his service as an employee."[7] *Kaucher,* 455 F.3d at 431; *see also Walker,* 791 F.2d at 509 ("The defendants did not kill or injure the [correctional officers]; the prisoners did, and this makes all the difference."). For these reasons, Plaintiffs' Count III must fail.

[7] For this reason, certain correctional officers employed by DOC receive "Hazardous Duty A" pay. This type of specialized pay is defined in the State of Delaware's Merit Rules. "Hazardous Duty A" pay is defined as payment for continued exposure to "uncontrollable circumstances that involve an unusual risk of serious physical injury, impairment to health or death . . ." where dealing with the hazardous condition is a function of the employee's assigned duties. *See* 29 *Del. C.* § 5916 (e)(1); 19 *Del. Admin. C.* § 3001-2.

II. THE DOC DEFENDANTS ARE ENTITLED TO IMMUNITY.

The absence of any constitutionally-protected right defeats each of Plaintiffs' claims. But, even if there was a viable claim, the Individual DOC Defendants are entitled to qualified immunity because the constitutional right asserted here is not clearly established. DOC and Defendant Phelps, named in his official capacity of Commissioner of DOC, are also entitled to Eleventh Amendment Immunity and are immune from suit.

A. Qualified Immunity Protects the Individual DOC Defendants from Plaintiffs' Claims.

The Individual DOC Defendants are immune from suit under Section 1983 because (a) no constitutional violation occurred and (b) assuming a constitutional violation did occur – which it did not – the constitutional right in question was not clearly established. *Pearson v. Callahan*, 555 U.S. 223, 236-44 (2009).

Claims against government employees "can entail substantial social costs, including the risk that fear of personal monetary liability or harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). The Supreme Court has therefore granted government officials shelter from liability if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Reichle v. Howards*, 566 U.S. 658 (2012). A right is "clearly established" for qualified immunity purposes only where the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates the right and in light of pre-existing law, the unlawfulness of the act was apparent. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions."). This inquiry requires the "firmly settled state of the law, established by a ***forceful body of persuasive precedent***, would place a reasonable

official on notice that his actions obviously violated a clearly established constitutional right." *Estep v. Mackey*, 639 F. App'x 870, 873-74 (3d Cir. 2016) (emphasis added).

As outlined in greater detail above in Argument Section I, Plaintiffs cannot establish that the Individual DOC Defendants violated Plaintiffs' substantive due process rights by failing to provide a safe working environment at JTVCC. In fact, quite the opposite is true – federal courts, including the Third Circuit, have consistently denied the precise arguments advanced in this case. *See, e.g., Walker*, 791 F.2d 507 (granting judgment in favor of the defendants where the plaintiffs alleged the defendants violated their substantive due process rights because the jail was unsafe due to lack of correctional officers, gangs in the prison, overcrowding, spots in the prison hidden from guard towers, and lack of training and supervision); *de Jesus Benavides v. Santos*, 883 F.2d 385 (5th Cir. 1989) (dismissing estate of deceased correctional officer's substantive due process claims despite allegations that the defendants were aware of persistent problems with contraband in the prison, were warned that a "jailbreak was imminent," were callous and had no regard for the security or safety of the correctional officers, and knew the jail was operating with insufficient funds); *Kaucher*, 455 F.3d 418 (granting summary judgment for defendants after the plaintiff alleged unsanitary and unsafe work conditions at the county jail violated his substantive due process rights); *Pickle*, 592 F. App'x 493 (granting summary judgment for defendants after a correctional officer was seriously injured while transferring a violent inmate within the prison). Plaintiffs cannot argue that a reasonable state official was on notice that the substantive provisions of the Due Process Clause require him or her to do even more than they already have to prevent their correctional officers from the inherent danger of dealing daily with dangerous and unpredictable criminals.

The purported "right" Plaintiffs assert in this action was not clearly established at the time of the Individual DOC Defendants' actions. Nor is it now, and the Individual DOC Defendants are entitled to qualified immunity as a matter of law.

B. Defendants DOC and Phelps in his Official Capacity are Entitled to Sovereign Immunity Under the Eleventh Amendment.

The Eleventh Amendment to the United States Constitution bars federal courts from presiding over lawsuits brought against a state and state officials.[8] *U.S. Const.* Amend. XI. Suits against the state may only proceed if the state waived its immunity or if Congress abrogated the state's immunity. *Lavia v. Comm. of Pennsylvania*, 224 F.3d 190, 195 (3d Cir. 2000). Neither of these conditions are met in the instant case – the State has not expressly waived its immunity nor has Congress abrogated a state's immunity for actions pursuant to Section 1983. *See Quern v. Jordan*, 440 U.S. 332, 342 (1979).

The doctrine of *Ex Parte Young* provides a narrow exception to Eleventh Amendment Immunity where the claim seeks prospective relief against a state official in his or her official capacity to remedy ongoing violations of federal law. 209 U.S. 123 (1908). For this exception to be met, a plaintiff must: (1) seek prospective injunctive relief; and (2) identify an ongoing violation of federal law that the injunctive relief will remedy. *See Pa. Fed'n. of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 324 (3d Cir. 2002).

Plaintiffs seek two types of prospective injunctive relief: (a) "a reparative injunction directing that each of the individual capacity defendants write letters of apology"; and (b) "a

[8] The Complaint is clear that the claims against Defendant Phelps are brought solely in his official capacity. (Compl. ¶ 28). The claims against him are therefore evaluated as if they were brought directly against the State for purposes of the Eleventh Amendment immunity analysis. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989).

mandatory injunction that Sgt. Floyd's autopsy report be released."[9] (Compl. Prayer for Relief). Neither is an appropriate use of the Court's power to issue an injunction, nor would the grant of either cure the alleged constitutional wrong. *See Burkes v. Tranquilli,* 2008 WL 2682606, at *4 (W.D.Pa. July 2, 2008) ("To the extent that Plaintiff's requested relief regarding an apology can be construed as a request for injunctive relief against the Defendants, such a claim for injunctive relief fails to state a claim as a matter of law"). Accordingly, DOC and Defendant Phelps are entitled to Eleventh Amendment Immunity and should be dismissed.

III. THE DOC DEFENDANTS HAD NO PERSONAL INVOLVEMENT IN CAUSING ANY INJURY SUFFERED BY PLAINTIFFS.

All claims against the DOC Defendants should be dismissed because Plaintiffs cannot allege the DOC Defendants had personal involvement in any action that directly caused their injuries. A Section 1983 claim requires personal involvement because *respondeat superior* liability is insufficient. *Hyson v. Correctional Medical Services, Inc.*, 2003 WL 292085, at *3 (D.Del. 2003). "It is not enough for a plaintiff to argue that the constitutionally cognizable injury would not have occurred if the superior had done more than he or she did." *Sample v. Diecks*, 885 F.2d 1099, 1118 (3d Cir. 1989). A plaintiff must allege that a named defendant "played an affirmative role in the deprivation of plaintiff's rights" through personal involvement or actual knowledge. *Pennsylvania v. Porter*, 659 F.2d 306, 336 (3d Cir. 1981).

In *Walker v. Rowe,* the Seventh Circuit faced circumstances nearly identical to the instant case. 791 F.2d 507. In *Walker*, the plaintiffs (injured and deceased correctional officers) sought to hold the Illinois Department of Corrections and an assistant warden liable for injuries incurred

[9] DOC does not control, nor has the ability to control, the release of Lt. Floyd's autopsy – that authority is vested with Delaware's Medical Examiner's officer. Furthermore, Lt. Floyd's autopsy cannot be released while a criminal case is being prepared. 29 *Del. C.* § 4707(e) ("Upon written request the next of kin of the deceased shall receive a copy of the postmortem examination report, the autopsy report and the laboratory reports, unless there shall be a criminal prosecution pending in which case no such reports shall be released until the criminal prosecution shall have been finally concluded.").

during a prison uprising by asserting that the prison had "dead spots" hidden from guard towers, was overcrowded and understaffed, was overrun by prison gangs and had old, ineffective safety procedures. *Id*. at 508-09. The court held, in denying plaintiffs' substantive due process claim, that "[t]hese and similar complaints have to do with the prison system as a whole," and do not demonstrate any affirmative role or individual responsibility. *Id*. at 509.

Here, the Plaintiffs' seek to hold the DOC Defendants accountable on nearly identical grounds. Plaintiffs generally complain that the JVTCC was understaffed and unsafe and the DOC took an "'I don't care' attitude." (Compl. ¶ 162). The Complaint alleges several generalized actions by the Individual DOC Defendants, including that they: (1) removed vacant job postings at Defendant Minner's request (Compl. ¶¶ 67-68); (2) eliminated trainings for correctional officers; (Compl. ¶ 94); (3) ignored the recommendations of an Executive Task Force (Compl. ¶ 124); (4) increased the overtime budget (Compl. 135); (5) eliminated security sweeps (Compl ¶167); and (6) ignored warnings from the COAD and correctional officers (Compl. ¶¶ 185-91). Plaintiffs fail to plead, because they do not exist, affirmative actions that any Individual DOC Defendant took that caused Plaintiffs' injuries. Because the Plaintiffs cannot allege any personal involvement on the part of any DOC Defendant, this Court must dismiss Plaintiffs' claims.

IV. PLAINTIFFS' CLAIMS AGAINST DEFENDANTS TAYLOR AND DANBERG ARE TIME-BARRED.

Plaintiffs' claims against Defendants Taylor and Danberg are time-barred as they were brought outside the applicable statute of limitations. A complaint should be dismissed as untimely if the untimeliness of the complaint is apparent on its face. *See , e.g., Stephens v. Clash*, 796 F.3d 281, 288 (3d Cir. 2015). Although 42 U.S.C. § 1983 does not set forth a limitations period, "federal courts must look to the statute of limitations governing analogous

state causes of action." *Urrutia v. Harrisburg Cnty. Police Dep't*, 91 F.3d 451, 457 n. 9 (3d Cir. 1996). The statute of limitations to be applied to Section 1983 claims is the two year limitation period set forth in 10 *Del C.* § 8119. *McDowell v. Delaware State Police*, 88 F.3d 188, 190 (3d Cir. 1996). Allegations of constitutional torts are likewise limited by Section 8119. *Pagano v. Hadley*, 553 F. Supp. 171, 175 (D. Del. 1982).

Defendant Taylor left the employ of the DOC in 2007. Defendant Danberg did so in 2013. The Complaint contains no allegations – nor could it – that would suggest that Defendants Danberg or Taylor were able to influence the policies or operations of the DOC in their capacities as private citizens. Any constitutional claim against these defendants based on their activities as Commissioners of the DOC would have had to be brought *at the latest* in 2009 (for Taylor) or 2015 (for Danberg). This untimeliness requires dismissal of the claims against Defendants Taylor and Danberg in their entirety.

V. PLAINTIFFS' CLAIMS ARE NON-JUSTICIABLE UNDER THE POLITICAL QUESTION DOCTRINE.

Plaintiffs' claims should also be dismissed under the political question doctrine. The Supreme Court has characterized the political question doctrine as an aspect of "the concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement" of Article III of the Constitution. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974). In *Baker v. Carr*, the Supreme Court enumerated the below six factors that would render a case a nonjusticiable political question:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made;

> or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217 (1962). Dismissal is required even if only one of the six factors is satisfied. *Id*. This case satisfies at least three of the *Baker* factors.

Plaintiffs' claims concern the legislative and executive decisions the DOC Defendants made in the course of operating the prison system in Delaware. Adjudicating these claims will necessarily require the Court to evaluate the reasonableness of the Individual DOC Defendants' decisions in staffing and promoting safety in Delaware's prisons. Moreover, there are no judicially discoverable or manageable standards for adjudication of Plaintiffs' claim. To adjudicate Plaintiffs' claims would be impossible without deference to the legislative and executive branches that are tasked with approving the DOC's budget and overseeing the operations of the prisons.

The Supreme Court evaluated a similar claim in *Gilligan v. Morgan* where students at Kent State sued to restrain the Governor of Ohio from ordering the National Guard troops to intervene in civil disorders. 413 U.S. 1 (1973). The Court rejected the plaintiffs' claims by reasoning that their request was not for an injunction to restrain specific unlawful action, but was rather a request for a "judicial evaluation of the appropriateness of the training, weaponry and orders of the Ohio National Guard." *Id*. at 5-6. The Court reasoned that that type of intervention would inappropriately evaluate critical areas of responsibility vested to the Legislative and Executive branches. *Id*. at 7.

This same framework applies in the instant case. Title 11 of the Delaware Code provides that the DOC, through its Commissioner, "shall carry out and provide for: . . . the administration, supervision, operation, management and control of the state correction institutions, farms or any other institution or facility under the jurisdiction of the Department." 11 *Del. C.* § 6517 (5). The

Commissioner must exercise his or her authority to enact comprehensive policies and procedures to maintain the operation of Delaware's prison system. This structure places the responsibility for the training and equipping of correctional officers squarely with the Commissioner. Although the placement of responsibility does not eliminate judicial scrutiny, it does significantly limit that scrutiny, especially where there is an absence of legislation clearly authorizing judicial intervention. *Gilligan*, 413 U.S. at 10 ("[I]t is difficult to conceive an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches."). To resolve Plaintiffs' claims, this Court would be forced to make judgment calls about how many correctional officers is enough, how much and what type of training is sufficient, and how the DOC should balance the competing social, political and economic pressures in the face of the funding decisions made by the General Assembly. Respectfully, these decisions are not within the province of this Court.

VI. THE FAMILY PLAINTIFFS LACK STANDING TO SUE.

Plaintiffs Saundra M. Floyd, Candyss C. White, Steven R. Floyd, Jr., and Rachel Ann Powell (the "Family Plaintiffs") lack the requisite Article III standing to bring this lawsuit. Each Plaintiff must possess standing to challenge the action sought to be adjudicated. *Hein v. Freedom from Religion Found, Inc.*, 551 U.S. 587, 598 (2007). Standing under Article III of the Constitution requires a plaintiff, at an "irreducible constitutional minimum," to establish that he or she personally suffered an injury-in-fact that will be redressed by a favorable decision." *Nichols v. City of Rehoboth Beach*, 836 F.3d 275, 279-80 (3d Cir. 2016). Related to the constitutional requirement that a plaintiff must suffer a "personal" injury to establish standing is

the prudential requirement that a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

The Family Plaintiffs do not assert any facts to show that any of their own substantive due process rights were harmed. Instead, it appears that the Family Plaintiffs assert rights of Lt. Floyd. Lt. Floyd's estate, however, already asserts whatever substantive due process claims exist against the Defendants. Thus, the Court should dismiss the Family Plaintiffs. *See Hughes v. City of Cedar Rapids, Iowa*, 840 F.3d 987, 992 (8th Cir. 2016) (holding that a husband does not have standing to assert his wife's constitutional claims); *see also Smith v. Hogan*, 794 F.3d 249, 255 (2d Cir. 2015) (denying a daughter standing to bring a First Amendment claim on behalf of her father because her father could have brought the claim on his own behalf).

CONCLUSION

The events that took place at JTVCC on February 1 and 2, 2017 were a tragedy. No defendant denies this. And the Plaintiffs have undoubtedly suffered and will continue to suffer the effects of those fateful days. Of that there can be no dispute. The DOC and each of the Individual DOC Defendants take very seriously their obligations to all staff at the agency, and the current employees and officers of the DOC are working hard to ensure that the risks of a similar event happening in the future are minimized.

But this tragedy cannot expand the *constitutional* remedies available to correctional officers who are injured or killed in the course of performing their challenging jobs. Those officers must instead use the valid remedies available to them – including workers' compensation and, where appropriate, applicable tort law theories – to obtain any available

redress. For the foregoing reasons, the DOC Defendants request that this Court dismiss Plaintiffs' Complaint in its entirety.

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