IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

FIREFIGHTER BRAD SPEAKMAN, RET.; SENIOR FIREFIGHTER TERRANCE TATE, RET.; LIEUTENANT JOHN CAWTHRAY; KELLI ZULLO as Administratrix of the Estate of LIEUTENANT CHRISTOPHER M. LEACH and as guardian ad litem of A.L. and M.L.; BRENDAN LEACH; LAURA FICKES, individually and as Executrix of the Estate of SENIOR FIREFIGHTER JERRY W. FICKES, JR.; BENJAMIN FICKES; JOSHUA FICKES; SIMONE CUMMINGS as Administratrix of the Estate of SENIOR FIREFIGHTER ARDYTHE D. HOPE; ARYELLE HOPE; ALEXIS LEE; and DAVID LEE, as guardian ad litem of A.L., Plaintiffs, v. DENNIS P. WILLIAMS, individually; JAMES M. BAKER, individually; ANTHONY S. GOODE, individually; WILLIAM PATRICK, JR., individually; and THE CITY OF WILMINGTON, a municipal corporation, Defendants.	C.A. No. 1:18-cv-01252-MN

DENNIS P. WILLIAMS' OPENING BRIEF
IN SUPPORT OF HIS MOTION TO DISMISS

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Date: October 15, 2018

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

NATURE AND STAGE OF THE PROCEEDINGS 2

SUMMARY OF THE ARGUMENT 3

STATEMENT OF FACTS 4

A. Dennis P. Williams is Elected Mayor and Appoints Anthony Goode as Chief of the Wilmington Fire Department. 4

B. Rolling Bypass and Conditional Company Closures. 5

C. Allegations that are not made in the Complaint. 6

ARGUMENT 6

I. PLAINTIFFS HAVE NO SUBSTANTIVE DUE PROCESS CLAIM. 7

A. Plaintiffs Do Not Allege a Valid Claim Under the State-Created Danger Doctrine. 9

B. Plaintiffs Cannot Allege Behavior that Shocks the Conscience. 13

C. Plaintiffs Cannot Establish a Constitutional Right Was Violated to Sustain a Substantive Due Process Claim Based on Policies, Practices or Customs. 15

II. MAYOR WILLIAMS IS ENTITLED TO QUALIFIED IMMUNITY. 15

III. MAYOR WILLIAMS HAD NO PERSONAL INVOLVEMENT IN CAUSING THE INJURIES SUFFERED BY PLAINTIFFS. 17

IV. THE POLITICAL QUESTION DOCTRINE REQUIRES DISMISSAL OF THE COMPLAINT. 18

V. THE FAMILY PLAINTIFFS LACK STANDING TO SUE. 20

CONCLUSION 20

TABLE OF AUTHORITIES

Page

A.M. ex rel J.M.K. v. Luzerne Cnty. Jur. Det. Ctr.,
372 F.3d. 572 (3d Cir. 2004).....15

Anderson v. Creighton,
483 U.S. 635 (1987).....15

Ashcroft v. al-Kidd,
563 U.S. 731 (2011).....15

Baker v. Carr,
369 U.S. 186 (1962).....18

Bd. of Cnty. Comm'rs of Bryan County, Okla. v. Brown,
520 U.S. 397 (1997).....15

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....6

Bright v. Westmoreland Cnty.,
443 F.3d 276 (3d Cir. 2006).....10

Cannon v. Delaware,
2012 WL 1657127 (D. Del. May 9, 2012).....6

Collins v. City of Harker Heights,
503 U.S. 115 (1992)..... passim

DeShaney v. Winnebago,
489 U.S. 189 (1989).....9

Dubrow v. Philadelphia,
2008 WL 4055844 (E.D. PA 2008) 12

Estate of Phillips v. D.C.,
455 F.3d 397 (D.C. Cir. 2006).....8

Estep v. Mackey,
639 F. App'x 870 (3d Cir. 2016) 16

Fowler v. UPMC Shadyside,
578 F.3d 203 (3d Cir. 2009).....6

Fraternal Order of Police Dep't of Corr. Labor Comm. v. Williams
375 F.3d 1141 (D.C. Cir. 2004).....14

Gilligan v. Morgan,
413 U.S. 1 (1973).....19

Henry v. City of Erie,
728 F.3d 275 (3d Cir. 2013).....10, 11

Hyson v. Correctional Medical Services, Inc.,
2003 WL 292085 (D.Del. Feb. 6, 2003).....17

Kaucher v. Cnty. of Bucks,
455 F.3d 418 (3d Cir. 2006).....3, 7, 12, 13

Kneipp v. Tedder,
95 F.3d 1199 (3d Cir. 1996).....10

Lord v. Town of Lincolnville,
1997 WL 205292 (1st Cir. Apr. 25, 1997).....14

Miller v. Philadelphia,
174 F.3d 368 (3d Cir. 1999).....13

Morrow v. Balaski,
719 F.3d 160 (3d Cir. 2013).....9

Pennsylvania v. Porter,
659 F.2d 306 (3d Cir. 1981).....17

Ramos-Pinero v. Puerto Rico,
453 F.3d 48 (1st Cir. 2006).....11

Reichle v. Howards,
566 U.S. 658 (2012).....15

Rodriquez v. City of Philadelphia,
350 F. App'x 710 (3d Cir. 2009).....8, 12

Rutherford v. City of Newport News,
919 F. Supp. 885 (E.D. Va 1996) *aff'd*, 107 F.3d 867 (4th Cir. 1997).....8, 14

Sample v. Diecks,
885 F.2d 1099 (3d Cir. 1989).....17

Schieber v. City of Philadelphia,
320 F.3d 409 (3d Cir. 2003).....13, 14

Schlesinger v. Reservists Comm. to Stop the War,
418 U.S. 208 (1974).....18

Schroder v. City of Fort Thomas,
412 F.3d 724 (6th Cir. 2005) 13

Slaughter v. Mayor & City Council of Baltimore,
682 F.3d 317 (4th Cir. 2012) 16

Uhlrig v. Harder,
64 F.3d 567 (10th Cir. 1995) 13

Walker v. Rowe,
791 F.2d 507 (7th Cir. 1986) 13, 16

Washington v. Dist. Of Columbia,
802 F.2d 1478 (D.C. Cir. 1986).....8, 9, 14

Waybright v. Frederick Cnty,
528 F.3d 199 (4th Cir. 2008) 13

White v. Lemacks,
183 F.3d 1253 (11th Cir. 1999) 9, 13

FEDERAL STATUTES

42 U.S.C. § 1983..... *passim*

STATE STATUTES

10 *Del C.* § 4001, *et seq.* 9

RULES

Fed. R. Civ. P. 12(b)(6).....6

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XI 9

U.S.Const. amend. XIV 2, 7

INTRODUCTION

The events of September 24, 2016 were both a tragedy and a crime. On that day, three Wilmington firefighters were killed and three more injured in the line of duty while battling a house fire that was admittedly intentionally set by a resident of the home named Beatriz Fana-Ruiz. Ms. Fana-Ruiz has been indicted by a grand jury for multiple counts of Murder in the First Degree, multiple counts of Assault in the First Degree, and Arson in the First Degree, among other things, all in connection with her alleged role in starting the fire.

The families and estates of the deceased firefighters, and the three firefighters who were injured, have brought this action alleging that their federal constitutional rights were violated. Plaintiffs allege that these rights were violated not by the individual who set the fire, but by certain former elected and appointed officials of the City of Wilmington (and the City itself) who, they allege, set in place policies and procedures that proximately caused their injuries. In short, Plaintiffs allege that if there had been more firefighters on duty that night, more resources could have been dispatched to the fire in a more prompt manner – a result which (they allege) would have prevented the deaths and injuries. And they believe that the policies and procedures of the City of Wilmington and its former Mayors and Fire Chiefs led to this shortage.

Former Mayor Dennis P. Williams is one of the defendants who is alleged to have violated Plaintiffs' federal constitutional rights. But while the Complaint recites at length many allegations regarding the operation of fire companies, the history of certain policies and procedures that are alleged to have been implemented in the City, and the tragic events of September 24, it contains very few specific allegations of fact as to what Mayor Williams did to commit such a *constitutional* violation. Indeed, beyond his election, an alleged "policy" of allowing the WFD not to fill vacant firefighter positions, and his alleged approval of a

conditional company closure policy, Mayor Williams is not alleged to have had any substantive involvement in staffing the fire companies, responding to the fire, and, most importantly, in causing the fire that resulted in the deaths and injuries at issue.

That is the fundamental flaw in the Complaint. There is no doubt in the Defendants' mind that a crime occurred, and that the six firefighters identified in the Complaint were injured or killed in the performance of their inherently dangerous duties. But there is also no doubt that the United States Supreme Court and the Third Circuit have held that the Fourteenth Amendment to the United States Constitution – which is where Plaintiffs' seek to find their theory of liability – does not provide them with the relief sought here. The Complaint should be dismissed.

NATURE AND STAGE OF THE PROCEEDINGS

On August 16, 2018, the three firefighters injured in the September 24, 2016 fire, along with the family members and estates of the firefighters who lost their lives (collectively, the "Plaintiffs"), initiated this action. Defendants include the City of Wilmington (the "City") and two sets of former mayors and their respective Chiefs of the Wilmington Fire Department ("WFD"): (i) former Mayor James Baker and former Chief William Patrick, Jr.; and (ii) former Mayor Dennis P. Williams and former Chief Anthony S. Goode.

The Complaint seeks relief under 42 U.S.C. § 1983 ("Section 1983") and alleges three violations of Plaintiffs' federal constitutional substantive due process rights to life and liberty: (i) 14th Amendment – Substantive Due Process – State Created Danger; (ii) 14th Amendment – Substantive Due Process – Shocks the Conscience; and (iii) 14th Amendment – Substantive Due Process – Maintenance of Policies and Procedures. Compl. ¶¶ 481-515.

This is Defendant Dennis P. Williams' Motion to Dismiss. Pursuant to the schedule stipulated by the parties and ordered by the Court, Plaintiffs' Answering Brief is due to be filed

on January 7, 2019, and Defendants' Replies are due on February 4, 2019. (D.I. 33).

SUMMARY OF THE ARGUMENT

1. A government employer owes no constitutional obligation to provide its employees with certain minimum levels of safety and security in the workplace. This principle has been confirmed by both the United States Supreme Court and the Third Circuit. *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 government employee injured in the course of duty lies in state law.

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 in this case was "clearly established" at the time of its alleged violation. Mayor Williams is therefore entitled to the protections of qualified immunity as a matter of law.

3. Plaintiffs' claims against Mayor Williams must also be dismissed because the Complaint fails to allege any facts demonstrating his personal involvement in causing the injuries suffered by the Plaintiffs. A third party to this litigation injured the Plaintiffs during the commission of a crime, not Mayor Williams.

4. Plaintiffs' claims challenger the decisions made by executive and legislative personnel of the City, including Mayor Williams, which are non-justifiable political questions.

5. The Family Plaintiffs lack standing to sue Defendants because they do not assert any facts that Mayor Williams or any other Defendants harmed their substantive due process rights.

STATEMENT OF FACTS

For purposes of this Motion only, Mayor Williams concedes that the Court must treat the well-pleaded and non-conclusory allegations of the Complaint as true. Moreover, in an attempt to streamline the briefing in this matter and avoid repetition, Mayor Williams refers to and incorporates by reference the Statement of Facts set forth in the City of Wilmington's Opening Brief.[1] The following recitation of facts relates only to the allegations of the Complaint that are concerned specifically with Mayor Williams.

A. Dennis P. Williams is Elected Mayor and Appoints Anthony Goode as Chief of the Wilmington Fire Department.

Defendant Dennis P. Williams was elected by Wilmington voters and assumed the office of Mayor of the City of Wilmington in January 2013. Compl. ¶ 26. He served in his capacity as Mayor for the following four years, until current Mayor Michael S. Purzycki took the oath of office in January 2017. *Id.* Plaintiffs allege that as Mayor, Williams was the "chief executive officer of the City, exclusively vested with power over and responsibility for all executive and administrative authority of the City, … including the [WFD]." *Id.* He was serving as Mayor when the tragic events of September 24, 2016 took place.

Shortly after taking office, in January 2013, Mayor Williams appointed Michael S. Goode to be Chief of Fire for the WFD. Compl. ¶ 28. Plaintiffs allege that the Chief of Fire is appointed by the Mayor, serves at his pleasure, and is generally responsible for the administration and operation of the WFD. *Id.*

[1] *See* Defendant the City of Wilmington's Opening Brief in Support of Its Motion to Dismiss ("City's Op. Br.") at part IV.

B. Rolling Bypass and Conditional Company Closures.

Plaintiffs allege that prior to Mayor Williams' election, a policy of "rolling bypass" was instituted in the City during the tenure of Defendant Mayor Baker. Compl. ¶ 90. Plaintiffs define rolling bypass as "a policy by which a fire apparatus of some kind is shut down and taken out of service for the rest of a shift if a certain number of vacancies on that shift require the use of overtime to fully staff the shift." Compl. ¶ 91. Plaintiffs describe the policy as a cost-saving measure designed to avoid excess overtime costs, which was implemented to help address tight City budgets. Compl. ¶¶ 90-99. The policy was enacted on July 1, 2009. Compl. ¶ 125.

While the policy was in place during the Baker Administration, the matter of rolling bypasses – including their effect on safety, security and response times – was taken up by City Council on a number of occasions. Compl. ¶¶ 120, 149, 173. No changes to the policy are alleged to have been ordered by City Council as a result of those hearings.

Plaintiffs allege that after Mayor Williams took office, he and Chief Goode "made a decision not to fill fully funded vacant positions in the WFD and instead to rely on overtime and rolling bypass." Compl. ¶ 197. Mayor Williams and Chief Goode did so through a "conditional company closure" policy that is alleged to be similar, but not identical to, the rolling bypass policy of the previous administration. Compl. ¶¶ 201, 204. Plaintiffs also allege that the net result of the conditional company closure policy was the same as rolling bypass as to safety concerns, and use the two terms interchangeably.

Notwithstanding the alleged cost-saving measures, Plaintiffs suggest that the City's financial problems continued, with overtime costs in particular rising significantly. Compl. ¶¶ 220, 222; *see also* Compl. ¶ 259 (alleging that as a result of a deployment plan formulated by Chief Goode in late 2015 or early 2016, "the overtime problem in the WFD got worse."). City Council members were aware of the financial difficulties, the deployment plan and the

conditional company closure policy, and discussed them at City Council meetings, Compl. ¶¶262-64, but there is no allegation that City Council instituted any action with respect to the rolling bypass or conditional company closure policies at this (or any other) time.

C. Allegations that are not made in the Complaint.

The Complaint alleges – albeit in conclusory fashion – that as Mayor, Dennis Williams instituted a "policy" of not filling open and funded positions with the Wilmington Fire Department, though no copy of any such policy is appended to the Complaint. What the Complaint does not allege – because it cannot – is that Mayor Williams took any action that proximately caused the fire or injuries at issue. Rather, the fire and injuries were caused by Ms. Fana-Ruiz, who (as described in more detail in the City's Opening Brief) has admitted that she intentionally started the fire and has been indicted for her involvement.[2]

ARGUMENT

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).

[2] *See* City's Op. Br. at part IV(d) & Exhibits A-B.

I. PLAINTIFFS HAVE NO SUBSTANTIVE DUE PROCESS CLAIM.

Section 1983, in and of itself, does not create substantive rights. Rather, "[t]o 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 the United States." *Kaucher*, 455 F.3d at 423. 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.*

The gravamen of Plaintiffs' claim is that the substantive due process provisions of the Fourteenth Amendment provide a right of relief in circumstances such as those present here. But that is not the case. Federal courts in general (including the U.S. Supreme Court and the Third Circuit) 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.").

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 risks of serious 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.*, *Rodriquez 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) *Estate of Phillips v. D.C.*, 455 F.3d 397, 407 (D.C. Cir. 2006) (dismissing substantive due process claim brought by firefighter's estate, and holding that "deliberate indifference may have increased the Firefighters' exposure to risk, but the risk itself – injury or death suffered in a fire – is inherent in their profession. . . . [T]he District is not constitutionally obliged by the Due Process Clause to protect public employees from inherent job-related risks"); *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 . . . .") *aff'd*, 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' actual claims (in

addition to workers' compensation protections) must lie in negligence or state tort law. *See Washington v. Dist. Of Columbia*, 802 F.2d 1478, 1481 (D.C. Cir. 1986) ("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 v. Lemacks*, 183 F.3d 1253, 1258 (11th Cir. 1999) (prison employees' substantive due process claims were "analogous to a fairly typical state-law claim").[3] 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.").

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

Plaintiffs allege that the Defendants had an affirmative duty to protect Plaintiffs because the Defendants created the danger that caused their injuries. 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). Here, the fire at issue was the result of an admitted arson. *See* Exhibits 1-3 to the City's Opening Brief in Support of its Motion to Dismiss. On this fact alone, Plaintiffs' state-created danger count should be dismissed. Nonetheless, Plaintiffs attempt to invoke an exception to

[3] Defendant Williams expressly reserves, and does 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.

DeShaney, that a Due Process claim may lie when the state's own actions create the very danger that causes the plaintiff's injury. *Morrow v. Balaski*, 719 F.3d 160, 167 (3d Cir. 2013).

But if such a claim is to be pled, it must include adequate allegations that the government actor took direct steps that created or enhanced the risk of danger to the plaintiff. *Kneipp v. Tedder*, 95 F.3d 1199, 1208 (3d Cir. 1996). To state such a claim, Plaintiffs here 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). Plaintiffs do not satisfy this test.

First, the harm ultimately caused was not "fairly direct" from Mayor Williams' and Chief Goode's "conditional company closure" policy. In order to satisfy the "fairly direct" prong, the acts complained of must cause the harm "to happen or come to crisis suddenly, unexpectedly or too soon . . ." and must be "close in time and succession to the ultimate harm" not "separated from the . . . harm by a lengthy period of time and intervening forces and actions." *Henry v. City of Erie*, 728 F.3d 275, 285 (3d Cir. 2013). The fire that caused this tragedy was set by an arsonist – a clear and direct intervening force that separates the long-standing policy that Mayor Williams

is alleged to have enacted or continued from the ultimate harm that befell Plaintiffs.[4] Moreover, that the employee Plaintiffs were on notice of the risks inherent in their positions, along with the perceived risks associated with rolling bypass and understaffing, further undermines any assertion that the "conditional company closure" policy was a "fairly direct" cause of the harm alleged in this case. *See Henry*, 728 F.3d at 285 ("further attenuating" the defendant's actions from the ultimate harm was the fact that the tenant remained in her apartment despite actual notice that the apartment was not up to code).

Second, as outlined in Section I(B), *infra*, the Defendants' conduct cannot be said to "shock the conscience" sufficient to violate the Plaintiffs' substantive due process rights. As articulated in *Collins*, the allocation of public funds and the discretionary decisions made by executives and legislators cannot "shock the conscience" such that the Constitution is violated by those acts. That Mayor Williams allegedly campaigned for an end to the rolling bypass policy and then retooled it as "conditional company closures" allegedly knowing it to be unsafe does not save Plaintiffs' claim under the state-created danger doctrine. The City, and Mayor Williams, have authority to make budgetary and policy making decisions without federal courts reviewing those decisions with the benefit of hindsight. *See Ramos-Pinero v. Puerto Rico*, 453 F.3d 48, 54 (1st Cir. 2006) ("Even where the government is aware of specific dangers, . . . it must perform a triage among competing demands . . . . Government actors must also determine, as a policy matter, how to make these decisions and what resources to devote to assessing the various competing needs. Such questions are best answered by locally elected representatives and their appointees 'rather than by federal judges interpreting the basic charter of Government for the

[4] Plaintiffs allege that "rolling bypass," in some form, had been practiced in the City since 2009. Compl. ¶ 125.

entire country.'"). Those budgetary and policy-making decisions cannot, as a matter of law, "shock the conscience."

Finally, Plaintiffs' state-created danger claim also fails the fourth element of the test – Plaintiffs cannot allege that the Defendants acted affirmatively to create a risk of danger that would otherwise not exist – and Plaintiffs do not allege that any Defendant 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 Rodriquez was exposed.") (emphasis added). Like the plaintiffs in *Kaucher*, *Dubrow*, and *Rodriquez*, Plaintiffs here allege generally that Defendants failed to prevent a dangerous condition, in this case, failed to provide adequate staffing levels and fire suppression equipment. Compl. ¶¶ 197-98, 204, 209-211. Plaintiffs are simply characterizing alleged failures as "affirmative acts" in an attempt to create a substantive due process claim. This is insufficient under *Collins*.

Plaintiffs fail to state a substantive due process claim under the state-created danger doctrine, and therefore, Count I should be dismissed.

B. Plaintiffs Cannot Allege Behavior that Shocks the Conscience.

Even if 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," therefore, Count II should be dismissed. Policy-making decisions that involve the allocation of public resources cannot be "arbitrary in a constitutional sense." *See Collins*, 503 U.S. at 128 What shocks the conscience depends on the circumstances at the time of the decision, and can range from intent to harm to deliberate indifference.[5] *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.'"). A higher degree of culpability than deliberate indifference applies when the competing considerations regarding the allocation of public resources is involved. *See, e.g.*, *Schieber v. City of Philadelphia*, 320 F.3d 409, 421, 423 (3d Cir. 2003); id. at 419 ("[M]ore culpability is required to shock the conscience to the extent that . . . the responsibilities of the state actors require a judgment between competing, legitimate interests."). Courts exercise extreme judicial restraint when determining whether a particular decision "shocks the conscience" in a constitutional sense. *See Uhlrig*, 64 F.3d at 576 (resource allocation decisions do not amount to a substantive due process violation); *Schroder v. City of Fort Thomas*, 412 F.3d 724, 729-30 (6th Cir. 2005) (governmental policy choices do not

[5] As set forth in more detail in the City's Opening Brief, in Section V(D)(2), a higher standard than deliberate indifference applies to the decisions alleged to have caused harm in this case. Mayor Williams adopts this section of the City's Opening Brief by reference.

constitute a constitutional tort); *Walker v. Rowe*, 791 F.2d 791 F.2d 507, 510 (7th Cir. 1986) (same); *Waybright v. Frederick Cnty*, 528 F.3d 199, 208 (4th Cir. 2008) (same); *White*, 183 F.3d at 1258 (same); *Lord v. Town of Lincolnville*, 1997 WL 205292, at *1 (1st Cir. Apr. 25, 1997) (TABLE) (same). In some cases where public officials faced competing considerations, the Third Circuit has held that the applicable degree of culpability requires a plaintiff to show that the defendants "subjectively appreciated and consciously ignored a great, *i.e.*, more than substantial, risk" of harm. *See, e.g.*, *Schieber*, 320 F.3d at 423.

Plaintiffs claim that Defendants violated due process by understaffing the fire department and enacting unsafe policies in an attempt to save overtime hours and overall spend by the City. Compl. at ¶¶ 127-28, 133-36. These allegations cannot form the basis of a substantive due process claim – they are issues inherent in running every fire department in every city. *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.

Simply put, none of the Defendants' actions shocks the conscience – certainly not Mayor Williams' – and the Due Process Clause does not guarantee a safe work environment under these circumstances. Accordingly, Count II should be dismissed.

C. Plaintiffs Cannot Establish a Constitutional Right Was Violated to Sustain a Substantive Due Process Claim Based on Policies, Practices or Customs.

Lastly, Plaintiffs claim that policies and procedures of the City (and carried out by the Mayor and Chief of Fire) violate § 1983. Count III must be dismissed for the same reasons as Counts I and II – it does not adequately allege an underlying constitutional violation, the acts alleged do not "shock the conscience" and the policies, practice and customs alleged were not the direct cause of harm asserted in this matter. Importantly, the deficiency in training or policies must be the direct cause of plaintiff's ultimate injuries. *A.M. ex rel J.M.K. v. Luzerne Cnty. Jur. Det. Ctr.*, 372 F.3d. 572, 580-81 (3d Cir. 2004); *see also Bd. of Cnty. Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 409-10 (1997). Plaintiffs allege that Defendants implemented and maintained dangerous policies in violation of their substantive due process rights, yet fail to demonstrate a clear constitutional right, as discussed above. Moreover, the alleged deficiencies in the policies did not cause Plaintiffs' injuries, the arsonist who set the blaze did. In the absence of a constitutional right, all substantive due process claims must fail.

II. MAYOR WILLIAMS IS ENTITLED TO QUALIFIED IMMUNITY.

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).

The argument outlined above – along with that put forth in the City's opening brief at parts V(B)-(D) – explains why Plaintiffs cannot establish that Mayor Williams violated Plaintiffs' substantive due process rights in connection with the fire, and any policy or administrative decisions he made leading up to it. 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); *Slaughter v. Mayor & City Council of Baltimore*, 682 F.3d 317, 319 (4th Cir. 2012) (dismissing complaint because it "does not purport to allege that the Fire Department [acted] *with the purpose of causing harm to [plaintiff] or to any other recruit,* it falls short of alleging a substantive due process violation in the context of the facts alleged, even though it might well allege causes of action under state law."). Plaintiffs cannot argue that the substantive provisions of the Due Process Clause required Mayor Williams to ensure that his administrative decisions regarding the application and use of limited City funds resulted in anything more than already was being done to protect City firefighters from the danger that they admit is inherent in their chosen occupations. In short, the constitutional "right" that Plaintiffs assert in this action was not clearly established as of

September 2016, nor is it now. Mayor Williams is entitled to qualified immunity on these grounds.

III. MAYOR WILLIAMS HAD NO PERSONAL INVOLVEMENT IN CAUSING THE INJURIES SUFFERED BY PLAINTIFFS.

As with all actions arising under Section 1983, to state a claim, Plaintiffs must adequately plead the personal involvement of Mayor Williams – *respondeat superior* is insufficient grounds on which to premise liability. *Hyson v. Correctional Medical Services, Inc.*, 2003 WL 292085, at *3 (D.Del. 2003). As the Third Circuit has made clear, "[i]t 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).

Here, the Plaintiffs seek to hold Mayor Williams accountable based on a number of oft-repeated, but substantively few in number, claims. They also notably exclude the true cause of the fire – arson – in their Complaint. Primary among Plaintiffs' claims is their assertion that there was a "policy" whereby the WFD would not fill positions as they became open, which resulted in (Plaintiffs allege) official staffing numbers of 158 uniformed firefighters on the night of the fire, or just under 92% of the "authorized strength" of 172 uniformed firefighters, triggering the "conditional company closure" policy. Compl. ¶ 341. Plaintiffs assert that if there were higher staffing levels, *i.e.*, if Mayor Williams had done more than he did, they would not have suffered harm. These are the exact types of allegations that fell short in *Sample*. Moreover, Plaintiffs fail to allege a constitutional right that Mayor Williams could have violated through any affirmative act. The Complaint fails to support any relief under § 1983 liability.

IV. THE POLITICAL QUESTION DOCTRINE REQUIRES DISMISSAL OF THE COMPLAINT.

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 pose a non-justiciable political question:

- a textually demonstrable constitutional commitment of the issue to a coordinate political department;
- a lack of judicially manageable standards for resolving it;
- the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
- the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
- 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 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 Defendants made in the course of operating the WFD. Adjudicating these claims will necessarily require the Court to evaluate the reasonableness of the Individual Defendants' decisions in staffing, overtime expenditures and safety related to the rolling bypass and conditional company closure policies of the WFD. Moreover, there are no judicially discoverable or manageable standards for

adjudication of Plaintiffs' claims. To adjudicate Plaintiffs' claims would be impossible without deference to the legislative and executive branches that are tasked with creating, reviewing and approving the City's and WFD's budget and overseeing the WFD's operations.

Here, the City's budget is prepared by a combination of executive officials and City Council. Wilm. City Charter, Art. II, Sec. 2-300. Ultimately, the Mayor proposes a final budget for City Council vote. As Chief Executive Officer of the City, each Department Head, including the Fire Chief, reports to the Mayor. The Fire Chief exercises his or her authority to enact comprehensive policies and procedures to maintain the operation of WFD. This structure places the responsibility for the staffing of firefighters and use of firefighting equipment squarely with the Fire Chief. Although this does not eliminate judicial scrutiny, it does significantly limit that scrutiny, especially where there is an absence of legislation clearly authorizing judicial intervention. *Gilligan v. Morgan*, 413 U.S. 1,10 (1973) ("[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."). In fact, here, City Council enacted legislative oversight of the Fire Department, but not judicial intervention. *Compl.* ¶¶ 227-28. To resolve Plaintiffs' claims, this Court would be forced to make judgment calls about how many firefighters is enough, how much and what type of equipment and training is sufficient, and how the City and WFD should balance the competing social, political and economic pressures in the face of the funding decisions made by the City Council. Respectfully, these decisions are not within the province of this Court and the Complaint should be dismissed under the Political Question Doctrine.

V. THE FAMILY PLAINTIFFS LACK STANDING TO SUE.

As set forth in more detail in the City's Opening Brief, the Family Plaintiffs do not assert any facts to show that any of their own substantive due process rights were harmed. Mayor Williams incorporates Part V(F) of the City's Opening Brief by reference.

CONCLUSION

No one can dispute the heroic actions of those injured and tragically killed in responding to this fire. Few can understand the dangers to which these firefighters voluntarily subjected themselves in the service of others, and Mayor Williams joins with those who have expressed their gratitude for that service and their sympathy for the pain suffered by the Plaintiffs. Their understandable anger, though, is misdirected. Mayor Williams did not start the fire; an arsonist did. And no amount of second-guessing about past decisions will either change the events of that tragic night or give rise to a cognizable *constitutional* violation. The Plaintiffs' claims should be dismissed as to Mayor Williams.

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