UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.20-1468

FIREFIGHTER BRAD SPEAKMAN, RET.; SENIOR FIREFIGHTER TERRANCE TATE, RET.; LIEUTENANT JOHN CAWTHRAY; KELLI ANN STARR-LEACH 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 ARDAVIA LEE,

Plaintiffs / Appellants,

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 / Appellees.

BRIEF OF APPELLANTS

On Appeal from the
United States District Court for the
District of Delaware
(Civil Action No. 18-1252-MN)

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Dated: May 11, 2020

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 20-1468

Speakman

v.

Williams

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, (see attached)
makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: n/a

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

n/a

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

n/a

Stephen J. Neuberger
(Signature of Counsel or Party)

Dated: 3/7/20

Attachment to Corporate Disclosure Statement & Statement of Financial Interest

Appellants: Firefighter Brad Speakman, Ret.; Senior Firefighter Terrance Tate, Ret., Lieutenant John Cawthray; Kelli Ann Starr-Leach 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 Ardavia Lee,

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Constitutions, Statutes and Rules

Other Authorities

STATEMENT OF JURISDICTION

The District Court had federal question jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3) and (4), 28 U.S.C. §§ 2201 and 2202, the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983. Per the Court's Order dated April 24, 2020, the issue of appellate jurisdiction is addressed in Argument **V.** below.

STATEMENT OF THE ISSUES

1. Did the District Court err when it held that plaintiffs had failed to state a claim and allege a plausible violation of Fourteenth Amendment substantive due process across the three counts of the Complaint as follows: (1) Count I - state-created danger; (2) Count II - shocks the conscience; and (3) Count III - municipal liability?

2. Did the District Court err in holding that Counts I and II were factually barred by prong one of the qualified immunity analysis?

3. Did the District Court err in holding the family member plaintiffs lack standing to bring derivative damages claims under the forum state borrowing provisions of 42 U.S.C. § 1988(a) arising out of the deaths of their firefighter loved one?

STATEMENT OF THE CASE

The 75-page, 515-paragraph, 20,916-word Complaint was filed on August

16, 2018. (D.I. 1; JA115). In response to five defense motions to dismiss, the District Court issued three decisions (D.I. 84,87,89; JA 41,60,90) which, cumulatively, granted them, the last of which was issued on February 21, 2020. (D.I. 89; JA90). The Court gave plaintiffs 21 days to amend. (D.I. 85,88,90; JA58,88,113). Plaintiffs declined to do so and instead stood on their Complaint. (D.I. 93). The Notice of Appeal was timely filed on March 3, 2020. (D.I. 91; JA1).

This is the Brief of Appellants and Joint Appendix.

STATEMENT OF FACTS

A. The Parties. In the early morning hours of September 24, 2016, the late Lt. Christopher Leach, the late Sr.Ffr. Jerry Fickes, the late Sr.Ffr. Ardythe Hope, as well as plaintiffs Ffr. Brad Speakman, Sr.Ffr. Terrance Tate and Lt. John Cawthray all were members of the Wilmington Fire Fighters Association, International Association of Fire Fighters, Local 1590 ("Union") and were working a 24-hour fire suppression shift of the Wilmington Fire Department ("WFD") that was scheduled to end later that morning. (Compl., D.I. 1, ¶¶ 1-3, 5-25, 31-32, 340, 344, 347-48, 367, 375, 384, 388-414; JA115-21, 163-64, 166-68, 170-74). The remaining plaintiffs are the estates, eight children and one spouse of the three deceased firefighters. (¶¶ 8-25; JA118-20).

Defendant Dennis P. Williams was the Mayor of the City of Wilmington, Delaware, from January 2013 until January 2017. His predecessor was defendant

James M. Baker, who served from January 2001 until January 2013. Both are sued in their individual capacities. (¶¶ 26-27; JA120).

Defendant Anthony S. Goode was Chief of Fire of the WFD from January 2013 until January 2017. His predecessor was defendant William Patrick, Jr. who served from July 2007 until January 2013. Both are sued in their individual capacities. (¶¶ 28-29; JA120-21).

Defendant City of Wilmington is a municipal corporation which operates the WFD as one of its departments. (¶ 30; JA121).

B. The Status Quo Before Defendants – a "Manageably Dangerous" Occupation. Prior to defendants, and under the management of former Chief James Ford and his predecessors, the WFD was a different workplace than it became under his successors, Chiefs Patrick and Goode. (¶ 72; JA128).

1. City Council Required and Fully Funded 172 Firefighters. The City Charter has long required that the fire "department shall train, equip, maintain, supervise and discipline an adequate number of firefighters." (Wilmington City Charter § 5-300(d), ¶ 57; JA125, 304).

Each year the Wilmington City Council defines what is "adequate" when it determines the number of firefighters the City can afford as part of its yearly budget process. Since at least fiscal year 2013, the allocated adequate workforce of the WFD, as set forth in the position allocation list attached to the annual

operating budget ordinance, was 177, which consists of 172 uniformed firefighters and 5 civilians. Each of these positions are fully-funded by City Council and passed into law as part of the enacted budget ordinance each year. (¶¶ 58-61; JA125-26).

2. The Union Contract. The collective bargaining agreement ("CBA" or "Union contract") between the City and the Union in effect on September 24, 2016 was substantively identical to all prior Union contracts and had been approved by City Council and defendant Williams. (¶¶ 33-35; JA121-22). By its plain terms, the City contractually agreed and bound itself as follows:

- to staff every fire truck with a minimum of four firefighters, (¶ 36; JA122);
- to operate a four-shift system on the fire suppression side of 24 hours on-duty, followed by 72 hours off-duty, (¶ 38; JA122);
- to "not discriminate against any Union member because of Union activities or affiliations," (¶ 40; JA123);
- to limit its "inherent managerial rights" and abide by "a fixed and established past practice of the parties that has been unequivocally accepted by both parties over a reasonable period of time but has not been reduced to writing in this Agreement," (¶ 37; JA122) (emphasis added);
- to maintain "all conditions of employment ... at not less than the highest standards in effect at the time of the signing of this Agreement," (¶ 41; JA123); and
- "if ordinances or statutes relating to the members of the [WFD] provide or set forth benefits or terms in excess of or more

> advantageous than the benefits or terms of this Agreement, the provisions of such ordinances or statutes shall prevail." (¶ 39; JA122).

3. NFPA 1710 Workplace Safety Standards. One such "fixed and established past practice" which has long been "unequivocally accepted by both parties over a reasonable period of time" (¶ 37; JA122), and thus voluntarily and contractually agreed to by the City (¶ 48; JA124), is its adoption of the National Fire Protection Association's Standard for the Organization and Deployment of Fire Suppression Operations, Emergency Medical Operations, and Special Operations to the Public by Career Fire Departments (hereinafter "NFPA 1710"), which sets the minimum health and safety standards for career fire departments, like the WFD. (¶¶ 42-43; JA123).

> Since the time NFPA 1710 was issued in 2001, every Chief of Fire for the WFD has consistently, uniformly, and repeatedly testified to City Council, publicly stated or otherwise admitted that it sets the health and safety standards that the WFD must follow and does follow.

(¶ 45; JA124). This includes admissions from defendants Patrick and Goode.

> For example, during their tenures as Chief of Fire for the WFD, encompassing the time frame of approximately July 2007 until January 2017, and covering two separate Mayoral administrations, defendant Patrick and defendant Goode each repeatedly and publicly stated, admitted or testified that the WFD follows the workplace health and safety standards set forth in NFPA 1710.

(¶ 46; JA124). Their predecessor, Chief Ford, did as well. The WFD's adoption of these standards is well known throughout the department. Adherence to NFPA

1710 became such "a fixed and established practice in the WFD." (¶¶ 47-50; JA124).

Briefly, NFPA 1710 "is built upon the fact that fire growth and behavior are scientifically measurable, as are the specific resource requirements to control fires and prevent deaths." (¶ 44; JA124). As to staffing, rescue and fighting fires in homes with adjoining buildings, these standards dictate that:

- "[t]he number of on-duty fire suppression members shall be sufficient to perform the necessary fire-fighting operations given the expected fire-fighting conditions;"
- "[t]hese numbers shall be determined through task analyses that take the following factors into consideration: ... Provision[ ] of safe and effective fire-fighting performance conditions for the fire fighters;"
- "[f]ire company staffing requirements shall be based on minimum levels necessary for safe, effective, and efficient emergency operations;"
- "a sufficient number of members are assigned, on duty, and available to safely and effectively respond with each company;"
- when a fire department responds to fires in single family homes with adjoining structures or basements, it is mandatory that additional fire trucks be dispatched above and beyond the regular dispatch; and
- a designated Rapid Intervention Crew ("RIC") shall be established at every active fire scene with the sole duty and responsibility of rescuing firefighters who become lost, injured or trapped while fighting the fire.

(¶¶ 51-56; JA124-25) (emphasis added).

4. Staffing and Working Conditions. Before defendants, the WFD

also was fully staffed and operated within and met the staffing parameters set for it by City Council. When vacancies arose, they were filled within a reasonable period of time. The WFD maintained an adequate number of firefighters, sufficient to safely and securely extinguish all fires within the City and allow for the WFD's safe, effective and efficient operation, including safe and effective working conditions. The WFD complied with the requirements of NFPA 1710, including those regarding staffing and working conditions. (¶¶ 73-78, 63-71; JA126-28).

5. Free from Political Meddling. Under the management of Chief Ford and his predecessors, morale was high and the Chief did not allow politicians to interfere with the WFD's safe, effective and efficient operations. The WFD operated within the budget parameters set for it by, and was open and honest in its representations to, City Council. (¶¶ 83-87; JA129).

6. "Manageably Dangerous." As a result of the above, although firefighting is a dangerous job, it is considered to be "manageably dangerous." (¶ 79; JA128). This is because, regardless of the cause of a fire, fire growth and behavior are scientifically measurable, as are the specific resource requirements needed to control fires and prevent deaths as evidenced in NFPA 1710. Although issues or problems may arise while fighting a "manageably dangerous" fire, because the physics of fire growth and behavior do not change, application of the specific resource requirements needed to control a fire will inevitably extinguish

it. Only when these resource requirements are withheld, does what would have been a "manageably dangerous" fire become an unmanageably dangerous one. (¶¶ 79-82, see ¶¶ 180, 182; JA128-29,140-41).

C. Defendants Change the Status Quo and the WFD Becomes an "Unmanageably Dangerous" Workplace.

1. Baker Defendants. As noted above, defendant Baker became Mayor in January 2001. Chief Ford served as his Fire Chief from approximately January 2002 to July 2007. (¶¶ 88-89; JA129).

a. Baker Orders Rolling Bypass. During his tenure as Mayor, defendant Baker ordered Chief Ford to impose a new policy on the WFD called rolling bypass. (¶¶ 90, 104; JA129,131).

(1). What is Rolling Bypass? Rolling bypass is a policy by which a fire truck 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. The idea is that rather than paying off-duty firefighters to come in and work an overtime shift, the department instead will shut down a fire truck for that shift, which reduces: (1) the number of fire trucks in service on the shift; and (2) the need to spend any money on overtime to staff the closed truck. So, at its core, the idea is that it is supposedly more cost effective to shut down a truck, not pay any overtime and make the rest of the trucks on-duty

cover the shuttered truck's geographic areas of responsibility, than it is to pay overtime. (¶¶ 91-94; JA129-30).

Although the terminology varies, rolling bypass is otherwise substantively identical to policies known as "brownouts," "rolling brownouts" and "conditional company closures." These terms are used interchangeably, both locally and around the country, including by defendant Goode when he was Chief. (¶¶ 95-98; JA130).

In Wilmington, defendant Baker decided that rolling bypass would be imposed and an engine truck closed (instead of a ladder truck)[1] whenever two overtime slots had to be filled each shift. (¶ 99; JA130). So, if an engine is otherwise the "first due" engine to a fire scene, its closure will:

- increase the time it takes to get water to the scene to extinguish the fire;
- remove 500-750 gallons of immediately available water from the scene;
- require another engine to respond from a different, more distant station and so travel a greater distance to reach the fire, which all the while increases in intensity; and
- cause a cascade effect as what would normally be the second due engine becomes the first due, the third due engine becomes the second due, and so forth.

[1] The specifics of Fire Trucks 101 are addressed at length in the Complaint. (¶¶ 99-103, 159-60, 351-57, 360-62, 368; JA130-31,138,165-67). But briefly, engine trucks can extinguish a fire because they carry water and hoses. Ladder trucks lack this capability.

(¶ 102; JA131).

(2). Chief Ford Refuses Baker's Order. Chief Ford refused to comply with Baker's order because he believed it to be illegal. Ford explained that: rolling bypass is unnecessarily dangerous; its implementation would result in the needless, uncalled for, avoidable and preventable deaths of firefighters and civilians; and he would quit and retire as Chief rather than implement it. Due to Ford's stature, reputation and experience, Baker eventually backed down. However, Chief Ford retired in July 2007. (¶¶ 104-11; JA131-32).

b. Patrick Becomes Chief and Imposes the New Policy. Defendant Patrick then was promoted to Chief and agreed to implement the new rolling bypass policy, effective July 1, 2009. (¶¶ 112-114, 125; JA132-34).[2]

2. Williams Defendants. Throughout the Williams Administration, the policies and actions of defendants Williams and Goode continued to make, and by themselves independently made, the WFD an unmanageably dangerous workplace, and an even more dangerous place than it previously had been under the Baker defendants. (¶ 180; JA140).

a. Defendants' New Policy to Further Understaff the WFD.

[2] The widespread public outcry over the unacceptable dangers of this policy are addressed in section **G.** of the Facts below, while the multifaceted legislative response is addressed in sections **F.** and **D.**

The Williams defendants decided to enact a new policy requiring that vacant firefighter positions be left open for as long as possible. Rather than fill these fully-funded vacant positions, they instead would rely on overtime and rolling bypass. (¶¶ 197-99, 317; JA142,160).

b. Rolling Bypass is Renamed Conditional Company Closures. To overcome a legislative and public outcry of opposition, defendants then changed the name of the rolling bypass policy, but secretly kept its substance, and it became known as conditional company closures. **(**¶¶ 200-06, 317; JA143, 160).

c. Goode Strips the Fire Trucks and Doubles the Number of Firefighters Assigned to Desk Jobs. Historically, WFD Chiefs have had 16 or 17 firefighters in administrative positions in desk jobs instead of staffing fire trucks. (¶¶ 244-47, 438; JA149,177).

However, in late 2015 or early 2016, defendant Goode increased by 16 the number of uniformed firefighters assigned to administrative positions. Now there were 33 firefighters working in desk jobs. The effects were as follows:

- As noted above, the WFD operates on four, 24 hour shifts.
- By transferring 16 firefighters out of the fire suppression side of the department and into the administrative desk side, each of these four shifts were deprived of four firefighters.
- Pursuant to the CBA between the City and the Union, each fire truck

requires four firefighters to operate and staff it.

- Thus, each of the four shifts were deprived of the personnel necessary to staff one fire truck.

- So, each shift started already down four firefighters, even before vacation time, sick time, Union time and other types of authorized leave were considered.

(¶¶ 248-56, 263, 317, 423, 438, 494, 513, 2; JA149-51,160,175,177,185-86,188, 116). As current Chief Donohue (who served as Deputy Chief under Goode) admitted to the news media,"four firefighters are needed to operate an engine. With the loss of 16 positions, the city would experience rolling bypass 'more often than not.'" (¶¶ 257-58; JA150-51).

d. Goode's Numerous Admissions of Malice and Ill-Will Towards the Firefighters Under His Command. During a meeting at WFD headquarters with the entire on-duty shift, defendant Goode was directly questioned by several firefighters who pointed out that his newly instituted policies were going to cause the deaths of firefighters in the City.

Goode responded to them, and stated, "I don't care if you die in a fire." Stunned, several firefighters spoke up and expressed that such a response was inappropriate in every way and every sense. In reply, Goode repeated and amplified his sentiment, this time stating:

- "I don't give a fuck if you die;" and

- "I don't give a fuck about you or your families."

In other meetings with smaller groups, as well as in meetings with individual firefighters, Goode also stated, among many other things:

- "I hate all of you motherfuckers;"
- "My wife hates you too;"
- "You are a bunch of bitches, I wouldn't kick dirt on your graves;"
- "I only answer to and take my direction from Dennis P. Williams;" and
- "I don't care about you and your family, I'm gonna get mine."

He often alluded to powerful friends who would protect him no matter what he did as Chief and bragged he did not care how many complaints were lodged or lawsuits were filed against him because, "it's not my fucking money" that will be used to settle them. Goode regularly repeated all of these statements, and made ones expressing similar sentiments in: visits to fire stations throughout the City; meetings with Union officials; meetings with individual concerned firefighters; and shift-wide meetings with on-duty firefighters. (¶¶ 266-75; JA152-53).

(1). His Motive for Doing So – Anger Over Union Criticism of His Dangerous Policies. As specifically pled and detailed at length factually in the Complaint, defendant Goode regularly expressed that he was going to "war" with the Union because he was angry at it for exposing that his newly

enacted policies had increased the risk to the lives of firefighters and citizens throughout the City.[3] From at least late summer of 2014 until January 2017, Goode:

> regularly verbally expressed, wrote in intra-departmental e-mails, publicly posted as part of his prolific online social media presence, as well as visibly demonstrated, his anger, antagonism and hostility towards the Union and its elected officers for their opposition to his policies.

(¶¶ 276-88; JA153-55).

(2). His Policy of Collective Punishment. Goode also had a well-known command policy of collective punishment whereby he would punish a larger group of firefighters if he was unhappy with something an individual firefighter had done. (¶¶ 285-88; JA154-55).

(3). His Threat That Things Would Change in 2016. In early 2016, Goode stated to several firefighters and Union officials that "in 2016, I'm all bite, no bark." In light of his numerous threats and statements, this was interpreted as that he was done expressing himself through words and now was going to take actions to hurt the firefighters in the WFD as a whole. (¶¶ 289-90; JA155).

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[3] This included threats that he would see to it that all overtime and paid details would be taken away from the Union membership. (¶ 280; JA154). As noted above, the use of rolling bypass eliminates overtime slots that would otherwise need to be filled by firefighter Union members. (See, e.g., ¶¶ 2, 91-93, 99, 125, 129-31, 194-96, 259-60, 449-50; JA116,129-30,133-34,142,151,179).

e. A "Staffing Crisis" Results. The combined effect of these policies created a "staffing crisis" in the WFD (¶ 256; JA150), as its adequate staffing level of 172 was ignored.

D. The Rationale for the Policy – to Cut Overtime Costs. As noted above, the rationale offered by defendants for rolling bypass always was that it would cut overtime costs, up to $1 million a year. (¶¶ 91-94, 126-28, 223, 450, see 199; JA129-30,134,146,179,142).

1. But this Rationale Was Contradicted.

a. 2009-13 – Baker Defendants – Overtime Costs "Increased Significantly." Despite the long-term and near daily use of rolling bypass by the Baker defendants, overtime costs did not decrease as promised but instead "increased significantly." This major increase in the use of overtime directly contradicted and undermined the rationale given by these defendants for the use and adoption of rolling bypass. (¶¶ 167-71; JA139).

(1). City Council Criticizes This and Accuses Them of Deception. This fact was not lost on City Council, which repeatedly criticized the Baker defendants, accused them of being dishonest in their budget numbers and rationale and observed it was impossible to get a straight and honest answer out of them. (¶¶172-74; JA139-40).

b. 2013-16 – Williams Defendants – Overtime Costs

Skyrocket. As time went by it became clear that the impact of rolling bypass on overtime spending was actually worse under the Williams defendants than it had been under their predecessors. (¶ 217; JA145).

In late 2014, Goode admitted that "we are using astronomical amounts of overtime right now." In that fiscal year, the allocated WFD overtime budget was $297,500 but the actual overtime bill and expenditure was $1.37 million, more than 4 ½ times the budgeted allocation. He later also begrudgingly admitted that the overtime figures had been "driven pretty high" during his tenure. (¶¶ 218-20, 223; JA145-46).

(1). Overtime Problems Got Worse When the Desk Jobs Were Doubled. As a result of defendant Goode stripping the fire engines of 16 uniformed firefighters to double the number assigned to desk jobs, the overtime problem in the WFD got worse, the use of rolling bypass increased and, as Chief Donohue admitted, it was used "more often than not." (¶¶ 258-60; JA150-51).

(2). City Council Questions the Rationality of This Approach. Once again, City Council pointedly questioned the rationality of all of this. Members repeatedly expressed frustration and sometimes anger at the number of unfilled yet fully-funded vacancies in the WFD as well as the unexplained and unbudgeted overtime spending which was causing a "huge hit" on the City budget.

For example, the Chief of Staff to City Council harshly criticized and explained that the WFD's overtime numbers under the Williams defendants had "increased by almost two-fold" over that of the previous Baker defendants. (¶¶ 221-22, 224-25; JA145-46).

The fact that stripping fire engines of firefighters to double the number of desk jobs would drastically increase the need for firefighter overtime was not lost on City Council either, which harshly criticized Goode for this. Among other things, City Council members:

- pointedly said to Goode, you are taking firefighters from fire suppression duties "and basically putting them on desk jobs, which also become day jobs, so right there that should have been the ringing of the bells that this just was not going to work, especially when it came to overtime;"
- called Goode's budgeting "nonsense;"
- described his attempts to explain as "a whole lot of excuses;" and
- told him that he "uses a lot of words," but says nothing.

(¶¶ 262-64; JA151)**.**

2. The Only Way This Policy Would Work. Both sets of defendants made numerous record admissions regarding the actions necessary for their policies to have worked at reducing overtime.

a. Baker Defendants - Vacant Positions Must Be Filled. The Baker defendants repeatedly and contemporaneously admitted that:

- having vacancies filled would have a significant effect on the use of rolling bypass because there would be less need for overtime and thus less use of rolling bypass;

- when the WFD is fully staffed with no vacant positions, there is little need for overtime and thus no reason to have rolling bypass; and

- the key underlying factor in protecting the health and safety of firefighters and citizens throughout the City is for the WFD to be fully staffed, with all of the positions allocated by City Council to be filled.

(¶¶ 130-31,129,115; JA134,132)

b. Williams Defendants – Filling Vacant Positions is Key. In the same way, Goode also admitted that "filling vacancies was key to reducing the amount of overtime and thus lessening the use of rolling bypass or eliminating it entirely," sometimes succinctly stating, "less bodies, more overtime." Chief Donohue also has admitted that filling vacancies was the key to stopping the "exorbitant" amount of overtime. (¶¶ 194-96; JA142).

(1). The Necessity of Full Staffing. Goode repeatedly admitted, in numerous venues and contexts, that maintaining the status quo of 172 fully-filled positions "was key and the crucial factor in allowing Wilmington firefighters to safely perform their jobs." For example:

- in early 2013 he admitted that we need all "172 firefighters of the WFD. I say 172 because ... we're trying to maintain that number as much as we possibly can" because "we need the bodies on scene to make things happen."

- he also repeatedly admitted that without this number of firefighters, the WFD could not safely execute its duties.

- throughout this time frame, Goode admitted that any vacancies which arose in the WFD's authorized strength needed to be filled.

(¶¶ 182-84, 193; JA141-42).

E. Defendants Deliberately Lied to and Deceived the Legislature.

1. Baker Defendants. In response to the flood of media attention, defendants repeatedly assured City Council and the public about the safety, necessity and fiscal responsibility of their new policy, despite knowing their assurances were false. (¶¶ 149-50; JA137). These false claims included, for example, that:

- "safety has not been compromised" and there was no increased risk to firefighters caused by the rolling bypass policy.

- "response times" are "critical" and there would be "no change or compromise" when it comes to "[r]esponse times and safety."

- response times had actually decreased with rolling bypass, even though there were fewer engines in service with those engines being located in stations farther away, and

- response times still fell within the mandatory NFPA 1710 health and safety standards.

(¶¶ 151-54, 157, 119-24; JA137-38,133). "Numerous persons and parties, however, repeatedly debunked defendants' claims as deceptive, misleading and false." (¶ 158; JA138).

a. Goode Even Admitted that the Baker Defendants Lied. In an on-the-record media interview in 2014, then Chief Goode admitted that -

> defendants Baker and Patrick's rolling bypass policy had increased response times and that this fact had been intentionally hidden from the public and City Council.

He explained "it did increase our response times" and "when it happened, it was something that we didn't want to go out and tell people necessarily. But we can't sit back idly and just tell people that it's not happening, it is happening." Later in 2015, he also admitted that under the Baker defendants, the WFD lacked "the capability of providing even minimum service safely." (¶¶ 164-66; JA139).

b. Patrick's Admission. Patrick was forced in a media interview to concede the illogical nature of his claim of decreased response times when he begrudgingly admitted "some engine trucks have had to travel farther to some fires since the rolling bypasses began." (¶¶ 155-56; JA137-38).

c. Captain Lamb Admitted This. When WFD Captain Richard Lamb publicly broke ranks and testified (see Facts at **G.2.** below), he explained that defendants failed to disclose that it often was a Battalion Chief driving a Chevy Tahoe, equipped with a clipboard and pen, who was arriving on scene in the response time cited, and not a fire engine equipped with hoses and water with the ability to extinguish the fire, which is what the mandatory NFPA standard actually requires. (¶ 159; JA138).

d. The Union Explained the Same. The Union President also repeatedly explained that the figures cited by defendants were false for similar reasons. (¶ 160; JA138).

e. The Conclusion of the Fire Chiefs Association. The President of the New Castle County ("NCC") Fire Chiefs Association explained to the media that the response times cited by the Baker defendants simply "don't tell the full story." (¶ 161; JA138).

f. Others Reach the Same Conclusion. As one fire expert contemporaneously observed in reference to the rolling bypass policy, "the current administration has been misleading the citizens of Wilmington when it comes to fire-rescue protection." (¶ 163; JA138).

g. City Council Accuses Defendants of Dishonesty. In light of this, as already noted above, City Council strongly criticized the Baker defendants for their dishonesty. (¶¶ 172-74, 162; JA138-40).

2. Williams Defendants.

a. Change the Name but Keep the Policy. As noted above, the Williams defendants made a similar conscious decision to deceive City Council and the public by keeping the rolling bypass policy but changing the name. Defendants repeatedly assured City Council that: "no new dangers" would

be created by this policy; there would be "no increased risk to firefighters or citizens;" and "response times would not increase." (¶¶ 200-06; JA143).

(1). The Dangers of Rolling Bypass. Yet Williams himself has repeatedly admitted that rolling bypass was an "unsafe and unreasonably dangerous policy that improperly gambled with the lives of firefighters and city residents and increased the risk to all of them to unsafe levels." (¶ 176; JA140). Goode made numerous detailed admissions to the same effect, detailed in full in the Complaint, regarding the "coverage gaps," "increased response times" and "increase[d] risk" caused by rolling bypass. (¶¶ 187-92, 338; JA141-42,163).

(2). Goode Predicts the "Devastating" Impact of His Own Policies. Defendant Goode also admitted that "the combination of rolling bypass together with the WFD operating with fewer than 172 firefighters would have a 'devastating effect' on firefighting in Wilmington." (¶¶ 185-86, 339; JA141,163).

F. The Legislative Branch Responded With Public Safety Legislation. In light of the widespread public attention to the "staffing crisis" and "direct threat to public safety" caused by defendants' policies (¶¶ 256, 230, 296; JA150,147,156), the duly elected representatives of the people responded strongly.

1. City Council Enacted a New Statute to Restore Workplace

Safety. By July 2014, City Council was fed up with the "astronomical" amounts of unbudgeted taxpayer funds being spent on overtime because of defendants' policies in refusing to fill fully-funded vacant firefighter positions. As a result, a decision was made to enact legislation which would bring City Council actively into the process in its oversight role to enable it to more closely monitor and resolve the out of control understaffing and overtime situation in the WFD and place limits on defendants' ability to defy legislative mandates on staffing levels. (¶¶ 226-28; JA146). In the words of City Council, this statute was intended to:

- "maintain the legislatively mandated manpower levels and ensure that the many longstanding vacancies were filled;"
- ensure "we will not be put behind the eight ball" on vacancies;
- ensure "accountability" of the WFD in keeping Council informed about why numerous vacancies were not being filled; and
- allow City Council to actively monitor a specific City department where the spending of taxpayer dollars was out of control.

(¶¶ 229-32; JA146-47). Now codified at Wilmington City Code § 2-233 (JA305), this new statute (¶¶ 231, 62; JA147,126):

- made clear that the budgeted number of 172 firefighters is "required," (id. § 2-233(b); see § 2-233(a));
- made clear that the budgeted number is a "minimum number," a floor, not a maximum ceiling, (id. § 2-233(b));
- required that the "city fire department shall maintain a level of manpower of no fewer than that number of firefighters which is set

forth in the position allocation list attached to the annual operating budget ordinance for the applicable fiscal year," (id. § 2-233(a));

- required quarterly reports to the Public Safety Committee of City Council on the manpower levels of the WFD, (id. § 2-233(c));
- made clear that the statute does not "prohibit or preclude" the Chief from hiring from the longstanding "current list of qualified applicants before the manpower level falls below 95%," (id. § 2-233(b));
- required the Chief to formally notify City Council if the actual manpower levels fall below 95% of the budgeted number, (id.); and
- required the mandatory start of a fire academy class if this occurs. (Id.).

2. But Defendants Defied the Law and Refused to Comply With the Duly Enacted City Statute. As extensively detailed in the Complaint, from the time of its 2014 enactment until the deadly fire giving rise to this case, the Williams defendants were unhappy with this law and so adopted a new executive policy of refusing to comply. For example, they:

- refused to submit the mandatory quarterly reports on WFD manpower levels to the Public Safety Committee; and
- refused to notify City Council when the manpower levels fell below 95% of the budgeted number.

(¶¶ 236, 238, 240, 319-337, 342, 432-34, 456-57, 494; JA148,160-63,176-77,180, 185-86).

By August 3, 2016 at the latest,[4] the number of vacant positions in the WFD triggered the statutory mandate to notify City Council and immediately begin a hiring process. However, in accord with defendants' new executive policy, Goode refused to comply with his mandatory statutory duties. As he had for the two prior years, Goode:

- refused to notify City Council that the 95% trigger line had been crossed;
- refused to begin the hiring process to fill these many vacancies;[5]
- refused to follow the longstanding practice of hiring firefighters from the certified list; and
- refused to begin an Academy class, even though they were long past the emergency floor and statutory trigger mandating one.

Defendant Williams was aware of this.[6] Together, the Williams defendants ignored

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[4] Because of Goode's admission that the WFD's official vacant position numbers do not accurately reflect the true number of firefighters available for duty, the actual trigger date was even earlier. (¶¶ 323, 432-34, 342, 457; JA161,176-77,163,180).

[5] In the fall of 2017, Chief Donohue admitted that, despite these statutory requirements to the contrary, Goode's policy was to illegally refuse to hire until the WFD was 20 firefighters down. (¶¶ 456-57; JA180). That is, Goode refused to hire replacement firefighters until the WFD was 11.6% down, not the 5% down mandated in the law enacted by City Council.

[6] Chief Donohue has testified and admitted that in August 2016: he was aware the statutory line had been crossed; the WFD was required by law to hire firefighters to fill these vacancies; and he notified his superiors to do so but they refused. The only superiors above him in the chain of command at the time were defendants Goode, the Chief, and Williams, the Mayor. (¶¶ 333-36). The Union

their statutory duties and continued to abide by their pre-statute policy of refusing to fill vacant firefighter positions. (¶¶ 322-32, 494, 509; JA161-62,185-87).

a. This Was Done to Deceive City Council. Defendants did this "in order to deceive City Council and hide from it the serious problems caused by their policies." (¶¶ 233-35, see ¶¶ 237, 239, 242; JA147-48).

G. Widespread Notice of the Life-Threatening Dangers of Defendants' Policies.

1. Union Warnings. Throughout the relevant time frame, the Union regularly met with and warned defendants, the legislature and the public that the rolling bypass policy "significantly increased hazards and dangers" they had to face. (¶¶ 133-41, 210-16, 312-13; JA134-36,144-46,159-60).

a. Pre-Enactment. Upon learning of the Baker defendants' plans, the Union President publicly warned that, *inter alia*, it would have "catastrophic results" and "significantly increase the risk of serious injury or death to citizens and firefighters, above and beyond what the danger had been previously." (¶¶ 116-18; JA132-33).

b. Post-Enactment. After analyzing the effects of the new policy for six months, the Union President then wrote a letter to those defendants

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also notified defendants of the same. (¶ 337).

warning that:

- "since the inception of rolling bypass, firefighter injuries have increased, ... response times have increased;"
- "firefighters and residents are less safe now than they were before July 1, [2009,] when the rolling bypasses began;"
- "Things are ... more dangerous now;" and
- there has been a "significant reduction" in the level of fire protection in the city.

(¶¶ 132-33; see also ¶¶ 134-41; JA134-36). In December 2010, the Union President warned:

- "I'm tired of all the spin being put on this by the Mayor's office ... we're going to get somebody killed, whether it's a citizen of this city or a firefighter, somebody's going to get killed;" and
- "this rolling bypass ... threatens the citizens ... and the firefighters of this city."

(¶ 142; JA136).

c. Post-Name Change. The Union President quickly saw through the name-change ruse by the Williams defendants, publicly stating, "[w]hatever you want to call it this week, rolling bypass or conditional company closures, it is all the same thing ... What it does is it puts a district in the City of Wilmington without a fire engine." (¶¶ 207-09; JA143-44). He explained that the newly renamed policy:

- "just ups the ante on us and the citizens of Wilmington;"

- endangers the lives of residents and firefighters;
- increases the risk to firefighters above and beyond what they signed up to do; and
- is like playing "Russian Roulette" because "one day, somebody is gonna get hurt."

(¶¶ 212, 215; JA144). In one letter to the Williams defendants, the Union President pleaded that:

- this policy is "gambling with the lives of firefighters and all that live, work and recreate in the City of Wilmington;" and
- the "use of this deployment strategy doesn't save money and its continued use is nothing but a disaster ready to happen."

(¶ 216; JA144-45).

2. A High-Ranking Firefighter Broke Ranks and Spoke Out. In December 2010, Captain Lamb broke ranks and publicly warned the Baker defendants that:

- "we're rolling the dice" by using rolling bypass and "[i]t's starting to catch up to us" as he noted numerous fires in the City where the closest engine was closed because of the policy;
- the changes they were making would leave the WFD with an insufficient number of firefighters on a fire scene to fulfill its health and safety requirements under NFPA 1710 to have a dedicated RIC team of firefighters whose sole job is to be able to move at a moment's notice to rescue firefighters who become injured, lost or trapped in the fire they are fighting; and
- "who's going to rescue us if I'm in a jam or if our guys are in a jam"

at a fire? "We see it all the time."

(¶¶ 143-45; JA136)

3. The Fire Chiefs Association. The NCC Fire Chiefs Association also warned defendants that their actions "jeopardize the City and the County." (¶ 146; JA136).

4. January 2016 – Two City Children Die When the Closest Engine is Closed. As had been repeatedly warned of and predicted by the Union and others above, in January 2016 the rolling bypass policy caused the fire deaths of two young children in the City. (¶¶ 291-94; JA155).

5. February 2016 – Actual Notice That the Policy Had Failed Across the Country. By early 2016, the Williams defendants had actual knowledge that it had become widely known and accepted across the country that rolling bypass:

- was a direct threat to public safety and was a fiscal and operational failure; and
- caused major fiscal problems in cities where it was joined with longstanding problems in filling, or refusing to fill, vacant firefighter positions. In these situations, rather than saving money, it caused overtime costs to increase significantly.

(¶¶ 295-99; JA155-56).

a. The Rolling Bypass Disaster in Philadelphia. Space

considerations prevent discussion of the devastating, detailed analysis and Report by the City Controller in February 2016 into the Philadelphia Fire Department's use of rolling bypass. (See ¶¶ 300-311; JA156-59).

Union officials repeatedly raised to the Williams defendants the lessons learned and conclusions drawn from the PFD Report and explained how it directly paralleled the WFD experience and reinforced the Union's longtime warnings about the increased dangers and fiscal irresponsibility caused by their policies. (¶¶ 312-13; JA159-60). They were ignored.

6. Widespread Media Attention. Everything set forth above – rolling bypass, understaffing, fire deaths, the endangering of public safety and increased risk to firefighters – received widespread media attention throughout Delaware. (¶¶ 147-49, 265, 482, 120, 161, 164, 214, 241, 422, 424; JA136-37,151-52,183,133,138-39,144,148,175).

H. The Predicted Event Occurs. As predicted, on the morning of September 24, 2016, a fire occurred in a row house just down the street from Station 6, where its only water carrying fire engine, Engine 6, had been closed that shift because of rolling bypass. (¶¶ 3, 345, 348, 358, 364, 367-68, 375, 382; JA116, 164-69). In addition to the facts set forth above, the Complaint additionally details at length how defendants' policies, orders and other actions (¶¶ 2-3, 494, 504-13; JA116,185-88), caused there to be an insufficient number of on-duty

firefighters working in fire suppression resulting in:

- the closure of the closest water carrying fire engine;
- failure to dispatch additional engines on the initial alarm as required for fires in row houses;
- failure to have a dedicated RIC team on standby and ready to act at a moment's notice and rescue several trapped firefighters; and
- a gap in fire coverage requiring other engines to travel longer distances to reach the fire scene and cover for the closed engine, thus increasing the response time and delaying the time it took to put water on the fire to extinguish it.

The Complaint details how this unnecessarily caused the fire to grow in strength and intensity, turn deadly, trap and kill three firefighters and severely injure three more. (¶¶ 346, 340-42, 349-85, 401, 409-10, 460-63, 483, 491-97, 501, 514; JA164-70,172-74,181,183-88).

RELATED CASES AND PROCEEDINGS

None.

SUMMARY OF THE ARGUMENT

The typical substantive due process case in the employment context does one of two things: (1) challenges executive branch action in executing difficult statutory resource allocation laws made by the legislative branch in our democratic form of government; or (2) asks the federal judiciary to create and impose minimal standards for workplace safety that have not already been adopted and duly

enacted into law by the legislative branch. Such cases are typically dismissed on separation of powers and/or federalism grounds.

Our present case presents a novel factual scenario which flips the typical fact patterns on their head. It asks the question, what happens when the executive branch refuses to execute and abide by statutory resource allocation and workplace safety decisions already made, fully-funded and duly enacted into law by the legislative branch? Appellants are firefighters who were killed or gravely injured as a result of such executive branch defiance of legislative branch resource allocation and workplace safety laws. This presents no federalism or separation of powers bar to their case. Instead, and atypically, it is the misconduct by Appellees which violates separation of powers principles. As a result, Appellees' actions are constitutionally arbitrary and conscience shocking for purposes of Fourteenth Amendment substantive due process.

ARGUMENT

I. STANDARD OF REVIEW.

A. The Plausibility Test. Appellate review of a motion to dismiss under Fed.R.Civ.P. 12(b)(6) is plenary. Connelly v. Lane Constr. Corp., 809 F.3d 780, 786 n.2 (3d Cir. 2016). A "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Id. at 786.

B. Historical Fact Allegations Are Highly Favored. A "complaint's

allegations of historical fact continue to enjoy a highly favorable standard of review at the motion-to-dismiss stage of proceedings." Id. at 790. The Court "must still ... assume all remaining factual allegations to be true, construe those truths in the light most favorable to the plaintiff, and then draw all reasonable inferences from them." Id.

1. Insider Accounts and Official Government Reports Strongly Support Plausibility. This Court has explained that the existence of a "detailed insider account," although not necessary for a complaint, "strongly supported [ ] plausibility." Schuchardt v. President of the U.S., 839 F.3d 336, 348 (3d Cir. 2016). Here, no one is more a WFD insider than the Chief, while no one is more a City insider than the Mayor. The Facts above reveal a record replete with key admissions made by persons serving in both positions which are consistent with the allegations of the Complaint.

Additionally, because it so closely and factually tracks the WFD's own experience with rolling bypass, the devastating City of Philadelphia Auditor Report (Facts at **G.5.a.** above) is a parallel official government report which strongly supports the plausibility of the Complaint. It "covers the same type of conduct" that plaintiffs alleged, Estate of Roman v. City of Newark, 914 F.3d 789, 799 (3d Cir. 2019) (finding the contents of a federal consent decree lend plausibility to a plaintiff's allegations), and demonstrates that the experience of the

WFD with rolling bypass causing staffing, response time and financial problems was not an "isolated" one. Id. at 800.

Finally, the official government report on the fire from the National Institute for Occupational Safety and Health ("NIOSH") (JA200-98), which was in the motion to dismiss record below (D.I. 46-3), also "echoes" and "fortifies," id. at 799, many of the causal factors discussed above and outlined in the Complaint, thus strongly supporting its plausibility. This includes that:

- as long warned of by the Union, there were only 13 firefighters on the fire scene in the first 8 minutes in violation of the mandatory NFPA 1710 and other national standards which required 20 at such a moderate risk row house fire. (JA251-54).

- as long warned by Captain Lamb and others, and again also in violation of NFPA 1710, there was no dedicated RIC team on site ready to move at a moment's notice and rescue the several trapped or injured firefighters. (JA201,235,228,254,265-67); and

- as long warned of by the Union and many others, significant and inexcusable delays in getting enough firefighters to the scene and water onto the heart of the fire in the rear were catastrophic. (JA218-19,228,230,240,242,246,250-51).

2. Statements by Union Presidents Strongly Support Plausibility.

This Court also has noted that factual statements made by a union head are entitled to great weight in a motion to dismiss analysis. See Roman, 914 F.3d at 800 ("Stewart is not some unreliable, rogue officer – he is the head of the police union," as it weighed and found credible his factual statements about the City's

policies affecting his membership). Herein much of the factual evidence presented regarding dangers, notice and foreseeability comes directly from the Union President.

3. Media Reports and Legislative Proceedings Strongly Support Plausibility. This Court also has repeatedly encouraged plaintiffs to rely upon "media reports and other publicly-available information." Schuchardt, 839 F.3d at 348; see Roman, 914 F.3d at 799-800 (finding the contents of a newspaper article lend plausibility). Again, many specific factual allegations in this case are taken from media reports and open legislative proceedings, all of which are consistent with the facts alleged by plaintiffs.

II. DEFENDANTS' DELIBERATE INDIFFERENCE SHOCKS THE CONSCIENCE UNDER COUNT II.

A. Standard of Review. See Argument **I.A.** above.

B. Introduction. The veteran U.S. Magistrate devoted eight pages to a factual analysis which the District Court never addressed. (D.I. 57 at 2-10; JA4-12). But even that abbreviated factual statement led the Magistrate to conclude that the misconduct of defendants Williams and Goode was so "brutal and offensive" that it did not comport with "traditional ideas of fair play and decency." (Id. at 21; JA23). The Magistrate found that -

> Plaintiffs in the instant matter properly allege that Defendants' conduct demonstrated deliberate indifference. Rolling bypass existed for years prior

> to Mayor Williams' election and Chief Goode's appointment. Mayor Williams campaigned on promises to address the dangers of rolling bypass. When elected, he and Chief Goode were aware of media coverage that rolling bypass was a failed or failing program. Mayor Williams and Chief Goode understood that, with firehouses closed, overtime, the main impetus for rolling bypass policy, substantially increased during both the Goode and Williams administrations. Union Officials routinely warned Mayor Williams and Chief Goode of the dangers associated with the continued use of rolling bypass. Despite repeated, emphatic warnings and concerns expressed by Union officials, firefighters, City Council, the public, and the media, Mayor Williams and Chief Goode maintained the rolling bypass policy. Accordingly, Plaintiffs adequately state facts which support conduct that shocks the consci[ence] against Mayor Williams and Chief Goode.

(Id. at 22-23; JA24-25) (emphasis added). The District Court disagreed.

C. Substantive Due Process Protects Against Arbitrary Government Action. The "touchstone of due process is protection of the individual against arbitrary action of government." Cnty. of Sacramento v. Lewis, 523 U.S. 833, 845 (1998). The "substantive component of the Due Process Clause is violated by executive action only when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." Id. at 847 (internal punctuation omitted). There is abundant helpful and explanatory case law in this regard.

1. Exercise of Power Lacking Any Reasonable Justification. As the Supreme Court in Lewis explained, it seeks to prevent "the exercise of power without any reasonable justification in the service of a legitimate governmental objective." Id. at 846; see id. at 849 ("conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to

rise to the conscience-shocking level."). It was "intended to prevent government officials from abusing their power, or employing it as an instrument of oppression." Id. at 846 (internal punctuation omitted).

2. Ill-Conceived or Malicious Actions. "Under Lewis, substantive due process liability attaches only to executive action that is so ill-conceived or malicious that it shocks the conscience." Nicini v. Morra, 212 F.3d 798, 810 (3d Cir. 2000) (*en banc*) (internal punctuation omitted) (emphasis added); accord Mulholland v. Gov't Cnty. of Berks, 706 F.3d 227, 241 (3d Cir. 2013).

3. Irrational or Bad Faith Actions. "[N]on-legislative state action violates substantive due process if arbitrary, irrational, or tainted by improper motive, or if so egregious that it 'shocks the conscience." Cnty. Concrete Corp. v. Twp. of Roxbury, 442 F.3d 159, 169 (3d Cir. 2006) (internal punctuation omitted) (emphasis added); see Doby v. DeCrescenzo, 171 F.3d 858, 871 n.4 (3d Cir. 1999) ("if the government's actions were not rationally related to a legitimate government interest or were in fact motivated by bias, bad faith or improper motive"); accord Sameric Corp. v. City of Phila., 142 F.3d 582, 590 (3d Cir. 1998).

D. Defendants' Actions Shock the Conscience.

1. The Test Depends Upon Whether the State Actor Must Act Under Pressure. Although there are "three [ ] tests to identify conscience-

shocking behavior," Sanford v. Stiles, 456 F.3d 298, 310 n.15 (3d Cir. 2006), the test or "level of culpability required to shock the conscience will depend upon the extent to which a state actor is required to act under pressure." Id. at 301.

2. Here the Time to Deliberate and Make Unhurried Judgments Requires Only a Deliberate Indifference Test. As the Magistrate below correctly recognized (D.I. 57 at 18, 22; JA20,24), this is not a case involving decisions made in a hyperpressurized environment or decisions which must be made in a matter of minutes or hours. Instead, because defendants had many years to contemplate and formulate their policies under review, such "unhurried judgments" are judged under a "deliberate indifference" standard. Nicini, 212 F.3d at 811.

The Supreme Court in Lewis explained that the deliberate indifference standard arose out of -

> the luxury enjoyed by [public] officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations. **When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking**.

523 U.S. at 853 (double emphasis added); accord Schieber v. City of Phila., 320 F.3d 409, 419 (3d Cir. 2003); see Nicini, 212 F.3d at 810; Kaucher v. Cnty. of Bucks, 455 F.3d 418, 426 n.3 (3d Cir. 2006). Over 15 years of "extended opportunities to do better" teamed with "protracted failure even to care" – a truer,

more apt description of defendants' actions in our present case could not be written.

a. Deliberate Indifference Defined. Deliberate indifference can be defined alternately as: (1) "willful disregard demonstrated by actions that evince a willingness to ignore a foreseeable danger or risk;" or (2) "conscious disregard of a substantial risk of serious harm." Kedra v. Schroeter, 876 F.3d 424, 437 (3d Cir. 2017) (internal punctuation omitted).

(1). The Gravity of the Risk Here Was "Substantial."

In considering whether behavior shocks the conscience, the "apparent gravity of the risk" is a relevant factor. Sanford, 456 F.3d at 311. Here, defendants were repeatedly and specifically warned that their policies:

- were "unnecessarily dangerous" and "would result in the needless and avoidable deaths of firefighters," (D.I. 1 ¶ 106; JA131);
- would have "catastrophic results," (¶ 117; JA132);
- "would significantly increase the risk of serious injury or death ... above and beyond what the danger had been previously," (¶ 118; JA132-33);
- are "going to get somebody killed," (¶ 142; JA136);
- were "unsafe and unreasonably dangerous," "gambled with the lives of firefighters" and "increased risk to ... unsafe levels," (¶ 176; see ¶ 216; JA140,144-45);
- would have a "devastating effect," (¶ 185; JA141); and

- are a "disaster ready to happen." (¶ 216; JA144-45).

(2). The Obvious Risk Here Was "Foreseeable."

Another factor is whether that foreseeable or substantial risk was "disregarded" or properly addressed. Sanford, 456 F.3d at 311. In Kaucher, this Court found it significant that, after full discovery, there was "no evidence that at the time defendants made their decisions ... they were aware, or should have been aware, that their remedial and preventative measures were inadequate." 455 F.3d at 428. Contrast that with our case of abundant evidence of contemporaneous awareness of life endangering risks (Facts at **G.**), coupled with refusal to act, affirmative lies and hiding risks from those with the power to fix the problems. (Facts at **E.**, **F.2.a.**).

(3). And, Statutory Health and Safety Standards Were Knowingly Violated. In Kaucher, the facility at issue was found to be "substantially in compliance with state standards ... giving defendants reason to believe the measures were adequate." 455 F.3d at 428. Importantly, the opposite exists here. Our defendants were repeatedly warned that their policies had increased response times and caused the WFD not to be in compliance with NFPA 1710's national firefighting standards made binding by the legislatively approved Union contract (Facts at **E.1.c.-d.**, **G.2.**), including those addressing: (1) response

times to fires; (2) safe, effective and efficient working conditions; (3) the number of firefighters on-duty; and (4) having a dedicated RIC team on scene to rescue trapped or injured firefighters. (Facts at **B.2.-3.**).

Additionally, nor were defendants even in compliance with the City's own legal standards and statutory mandates including those addressing the 172 required number of firefighters and filling vacancies. (Facts at **B.1.**, **F.1.-2.**). Similarly, in Kaucher this Court also noted the "defendants had in place policies and procedures to ensure sanitary conditions in the jail." 455 F.3d at 428. Contrast that with our opposite facts where defendants had actual notice that their illegal policies violated binding statutory and contractual requirements and were life-endangering and inadequate. Yet they made no effort to alleviate the risk caused by their actions because, in defendant Goode's own words, "I don't care if you die in a fire." (Facts at **C.2.d.**).

(4). A Jury Finding of Gross Negligence or Recklessness is Sufficient. Although "[m]ere negligence is never sufficient for substantive due process liability," Nicini, 212 F.3d at 810, both the Supreme Court and our Circuit have repeatedly held that gross negligence or recklessness are.[7]

[7] See, e.g., Lewis, 523 U.S. at 849 ("we have expressly recognized" that some government actions "such as recklessness or gross negligence ... may be actionable under the Fourteenth Amendment."); Nicini, 212 F.3d at 810 ("conduct falling within a middle range of culpability – that is, involving more than

Thus, if defendants were merely grossly negligent in creating the conditions which led to plaintiffs' injuries, they can be held liable. As our facts make clear, defendants were above and beyond grossly negligent. Instead they were at a minimum reckless and a fair reading of the historical facts recounted in the Complaint shows conscious deception, intent and even malice by defendant Goode. (See ¶¶ 176, 182-95, 197, 201, 205-06, 235-242, 266-290, 319-21, 119-122, 149-66; JA140-43,148,152-55,160-61,133,137-39).

3. The Supreme Court's Instructive Explanation of What is Sufficient to "Plausibly" Plead "Deliberate Indifference" Requires Reversal.

The Supreme Court has specifically addressed the factual allegations necessary to "plausibly" plead "deliberate indifference" and overcome a Rule 12(b)(6) motion to dismiss. In Ziglar v. Abbasi, the Court held sufficient a factual allegation that a defendant had actual knowledge of a condition by way of, *inter alia*, (1) "staff complaints" and that he (2) "ignored other direct evidence" which "plausibly show the [defendant's] deliberate indifference" under the standards of Iqbal and Twombly. 137 S.Ct. 1843, 1864 (2017) (internal punctuation omitted).

Although space considerations prevent detailed factual analysis here, review

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negligence but less than intentional conduct – can be shocking in the constitutional sense."); Ye v. U.S., 484 F.3d 634, 638 n.2 (3d Cir. 2007) ("where a state actor has the time to act deliberately and is not under pressure to make split-second decisions, gross negligence may be sufficient.").

of the Facts above reveals abundant evidence of actual knowledge by defendants of the dangers caused by their policies (Facts at **G.**, **C.1.a.(2).**), knowledge that they ignored and affirmatively hid from both the legislative branch and the public for many years. (Facts at **E.**, **F.2.a.**).

4. This is an Unprecedented Separation of Powers Case. While the extensive discussion above independently establishes that defendants' actions shock the conscience under this Court's legal standards, as noted earlier, our present case also contains additional factual and legal components not present in any of the substantive due process cases cited or discussed in the opinions and defense briefing below – a conscience shocking violation by defendants of the separation of powers.

a. The Basics.[8] Chief Justice Marshall long ago said it simply yet said it best, "the legislature makes, the executive executes, and the judiciary construes the law." Wayman v. Southard, 23 U.S. 1, 46 (1825).[9] This separation of

[8] The Charter of the City of Wilmington contains the traditional delegation of executive and legislative power, with the former to the Mayor and the latter to City Council. See City Charter §§ 1-102, 103 (JA299-300). (See also ¶ 26; JA120).

[9] This continues to be the law today, both at the federal and state levels. See, e.g., Patchak v. Zinke, 138 S.Ct. 897, 904 (2018); NLRB v. New Vista Nursing & Rehab., 719 F.3d 203, 242 (3d Cir. 2013); State v. Sturgis, 947 A.2d 1087, 1090 (Del. 2008); Blanco v. Kent Gen. Hosp., 190 A.2d 277, 284 (Del.Super. 1963).

powers serves to "safeguard individual liberty," NLRB v. Noel Canning, 573 U.S. 513, 525 (2014), and stands "as a bulwark against tyranny." U.S. v. Brown, 381 U.S. 437, 443 (1965). In words James Madison borrowed from Montesquieu, "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." Bowsher v. Synar, 478 U.S. 714, 721-22 (1986) (quoting The Federalist No. 47, p. 325 (James Madison) (J. Cooke ed. 1961)); see also Patchak, 138 S.Ct. at 905 (this "pose[s] an inherent threat to liberty") (internal punctuation omitted).

It is a fundamental pillar of our system of government that the executive branch is not free to disregard laws duly enacted by the legislative branch. The "power of executing the laws ... does not include a power to revise clear statutory terms." Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 327 (2014). This is true even if the words of the law "turn out not to work in practice." Id. As this Court has long held, if the legislature "chooses to specify a great number of details concerning how it wants the executive to proceed ... the legislature is entirely free to take that course." Ameron, Inc. v. U.S. Army Corps of Eng'rs, 809 F.2d 979, 993 (3d Cir. 1986). And the executive "must always give effect to the unambiguously expressed intent of" the legislative. Khazin v. TD Ameritrade Holding Corp., 773 F.3d 488, 495 (3d Cir. 2014).

b. The Violation of the Staffing Statutes by the Williams

Defendants. Each year relevant to this case, City Council enacted legislation which required and fully-funded 172 uniformed firefighters. (Facts at **B.1.**). The Williams defendants enacted a policy of defying this legislation and refusing to hire these desperately needed firefighters. (Facts at **C.2.a.**). This defiance violates the separation of powers and is constitutionally arbitrary under substantive due process principles.

To remove any conceivable doubt about their intent, in 2014, City Council responded to this executive branch defiance and enacted a new statute with numerous detailed staffing, hiring and reporting requirements. (Facts at **F.1.**). But again, the Williams defendants did not like this statute and so enacted a new policy of refusing to comply with these statutory requirements. (Facts at **F.2.**). This defiance also violates the separation of powers and is constitutionally arbitrary.

c. The Additional Violation of the Legislatively Approved Workplace Safety Provisions of the Union Contract By All Individual Defendants. City Council negotiated and explicitly approved a Union contract which ensured that the number of on-duty firefighters working in fire suppression would be sufficient to provide safe, effective and efficient working conditions for the firefighters. (Facts at **B.2.-3.**). But defendants violated and refused to abide by

these legislatively approved contract provisions when they changed the status quo and created unmanageably dangerous working conditions. (Facts at **C.**).

Although not required to do so under state law,[10] City Council chose to approve a Union contract with certain workplace safety provisions. It is hornbook contract law that the executive branch, and indeed the entire City itself, is bound by these legislatively approved provisions,[11] all the more so when it is a union contract which holds a rarified status under Delaware law.[12] The City

> signed away its discretion when it bound itself to this agreement. It is, therefore, bound to pursue every step within its power to see that the [negotiated item] is provided. The time for discretionary 'trade-offs' is before and during the bargaining, not after a solemn agreement has been made.

Local 1726, 298 A.2d at 368; accord Del. State Troopers Lodge F.O.P. Lodge #6 v. State, 1984 WL 8217, *3 (Del.Ch. June 13, 1984). Yet defendants' defiance and

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[10] See 19 Del.C. § 1305 (a "public employer is not required to engage in collective bargaining on matters of inherent managerial policy, which include ... its standards of services ... and staffing levels.").

[11] See Hearn Bros., Inc. v. City of Newark, 261 A.2d 532, 534 (Del.Super. 1969) ("where the City Council adopts an ordinance and resolution clearly indicating its approval of certain contractual obligations ... the terms of the contract become binding upon all the parties thereto, including the City."). The Contract Clause dictates the same. See U.S. Const. Art. I, § 10, cl.1.

[12] See State v. Am. Fed'n of State, Cnty. & Mun. Emps., Local 1726, 298 A.2d 362, 367 (Del.Ch. 1972) ("[c]ollective bargaining agreements are not ordinary contracts ... this is especially true in the case of those entered into by public employees ... the legislature certainly could not have intended that agencies of the State should enter into these agreements and not be bound thereby.").

refusal to comply with the legislatively approved contract is, again, constitutionally arbitrary and violates the Contract Clause of Art. I, § 10.

d. The Long Term and Active Deception of the Legislative Branch By All Individual Defendants. Finally, over an extended period of time, our executive branch defendants deliberately lied to and deceived the legislative branch about the safety, necessity, financial rationale and fiscal responsibility of their policies and other actions. (Facts at **E. 1.**, **E.2.a.**, **F.2.a.**, and **D.**). This deception is attested to by many witnesses (Facts at **E.1.c.-.f.**, **G.**), admitted by three of the four individual executive branch defendants themselves (Facts at **D.2.**, **E.1.a.**, **E.1.b.**, **E.2.a.(1).**, **E.2.a.(2).**), while their co-equal in the legislative branch repeatedly accused them of the same. (Facts at **E.1.g.**, **E.2.**, **D.1.a.(1).**, **D.1.b.(2).**). Such misconduct similarly undermines separation of powers principles and, together with the other factors, is constitutionally arbitrary under substantive due process.

E. Conclusion. For the following reasons, as well as those set forth above, defendants' actions are constitutionally arbitrary and shock the judicial conscience. It is irrational and ill-conceived to pursue a policy:

- on cost-savings grounds even after that policy has been proven to cost more money than not pursuing it at all;
- that endangers public safety when there is no cost-savings benefit;

- when it is widely known and accepted, both locally and nationally, that the policy costs more money and endangers public safety.

It is irrational, ill-conceived and arbitrary for the executive branch to take actions:

- that violate staffing, hiring and training statutes duly enacted into law and fully-funded by the legislative branch;
- that violate such statutes when those actions are more expensive than complying with these same statutes;
- that violate detailed mandatory reporting requirements duly enacted into law by the legislative branch;
- that violate workplace safety laws and collective bargaining agreements duly adopted and enacted into law by the legislative branch;
- which affirmatively lies to, actively deceives and interferes with the oversight function of the legislative branch;
- which violate the separation of powers.

It is irrational, ill-conceived and arbitrary:

- not to hire firefighters to fill legislatively required and fully-funded positions in the midst of a public safety crisis caused by lack of firefighters;
- to do this when there is no cost-savings from such a course of action;
- to strip desperately needed firefighters from fire trucks in order to double the number of firefighters assigned to desk jobs in the midst of a public safety crisis.

It is arbitrary and malicious for, and there is no legitimate government end served by:

- an executive branch head of a paramilitary department who intentionally and maliciously pursues known and dangerous policies with the purpose of killing one or more of his subordinates because he wants to send a message to and retaliate against their Union for exposing his improper actions to the bright disinfecting light of legislative and public scrutiny in a democracy (Facts at **C.2.d.**);

- such actions when they violate numerous statutory mandates and workplace safety requirements duly enacted into law by the legislative branch.

Indeed, it is to prevent such tyranny, oppression and abuse of power that substantive due process, and the separation of powers, exist in the first place. See Lewis, 523 U.S. at 846; Nicini, 212 F.3d at 810; The Federalist No. 47, p.325.[13]

F. The Multiple Errors of Law Below.

1. There is No Factual Basis for the "Inherent Dangers" Holding.

The Magistrate's ruling below had a Factual Background (D.I. 57 at 2-10; JA4-12) that provided facts on which her legal rulings were built. The District Court later completely adopted those facts in all three Opinions, which had no independent factual recitation. The rulings made in the first two Opinions – essentially a lack of proximate cause as to the Baker defendants – relied upon the Magistrate's facts which had supported similar legal rulings. But the ruling in the third Opinion

[13] "[F]or wherever the power, that is put in any hands for the government of the people ... is applied to other ends, and made use of to impoverish, harass, or subdue them to the arbitrary and irregular commands of those that have it; there it presently becomes tyranny." Two Treatises of Government & A Letter Concerning Toleration, p. 142 (John Locke) (William Popple ed., Adansonia Publishing 2018).

pivoted and decided the case as to the remaining defendants on an entirely new factual "inherent dangers" ground. (D.I. 89 at 9-18; JA100-09). However, there are no facts or record in the Factual Background section addressing this since it was not one of the grounds on which the Magistrate had relied.

This was legal error because there are at least 99 detailed paragraphs spread over at least 19 pages of the Complaint that address the historical status quo within the WFD and what are, and are not, inherent dangers of employment there in light of the staffing, workplace safety and other statutory mandates enacted into law by the legislative branch.[14] Consideration of those facts (Facts at **B.**), demonstrates that there is no factual record support for the Court's holding because these were not inherent dangers of employment in the WFD.

2. This Case Involves Executive Branch Defiance of the Legislative Branch. Factually, this is simply not a case challenging difficult resource allocation decisions made by the legislative branch, nor does it ask the federal judiciary to create and impose by judicial fiat minimal standards for workplace safety. Quite the opposite, this case is about executive branch defiance of statutory mandates by the legislative branch regarding both of these things. For the reasons set forth above, the holding below to the contrary is legal error. (D.I.

[14] (See, e.g., ¶¶ 31-87, 228-232, 244-258, 318-337, 438, 2; JA121-29,146-47,149-51,160-63,177,116).

89 at 16-18; JA107-09).

3. The Holding Violates Separation of Powers Principles. The lower court held that executive branch defiance of laws duly enacted by the legislature is the legal equivalent of executive branch violation of a standard operating procedure enacted by that same executive branch. (D.I. 89 at 12-18; JA103-09). For the reasons set forth above in the separation of powers discussion, this again is legal error.

4. The Required Showing of Elevated Risk Violates Circuit Precedent. The District Court again erred in imposing a new, additional legal requirement that the risk plaintiffs faced be "so extremely elevated that employees will almost certainly and immediately be injured if they carried out their work." (D.I. 89 at 15; JA106) (emphasis added). Yet this holding is directly contrary to this Court's precedents which hold that when -

> officials in unhurried situations consciously disregard the risk of harm to persons relying on them for safety, even if the officials did not know with certainty that their actions would lead to serious or lethal harm, the victims—or at least their survivors—are entitled to recompense.

Kedra, 876 F.3d at 448 (emphasis added).

5. This Case Falls Squarely Within Our Circuit's Precedents on What is an "Inherent Danger." The lower court erred in its overbroad holding that there is no substantive due process remedy if the danger or injury which

harmed the plaintiff was within the contemplation of their job. (D.I. 89 at 12, 11; JA102-03). Such reasoning is contrary to Eddy v. V.I. Water and Power Auth., 256 F.3d 204 (3d Cir. 2001) (electrical lineman electrocuted while working on electrical lines); Kedra, 876 F.3d 424 (police officer accidentally shot by another officer while on duty); and Kaucher, 455 F.3d 418 (correctional officer exposed to sickness while working in prison). Instead, the surrounding circumstances matter and often are determinative. Such key circumstances from our Circuit's case law include: false representations, id. at 435, (Facts at **E.**); failure to comply with required safety procedures, Kedra, 876 F.3d at 452, (Facts at **B.3.-4., F.1.**); and failure to provide proper safety equipment. Eddy, 256 F.3d at 207. (Facts at id.)

6. There is No "Compelled" Requirement. Finally, the District Court erred in imposing an additional compulsion requirement (D.I. 89 at 16, 15, 11; JA106-07,102), contrary to this Court's precedents. Plaintiffs serve in a paramilitary organization. They were as compelled to go where commanded as the police officer in Kedra, who also simply could have quit. The electrical lineman in Eddy similarly could have said no, and quit. If anything, the facts supporting plaintiffs here are stronger because of fundamental separation of powers principles – there were numerous legislative enactments which made plaintiffs' actions reasonable while making defendants' actions illegal.

III. DEFENDANTS VIOLATED THE STATE CREATED DANGER DOCTRINE UNDER COUNT I.

A. Standard of Review. See Argument **I.A.** above.

B. The Four-Part Test. The elements of the state created danger doctrine are as follows:

> (1) the harm ultimately caused was foreseeable and fairly direct;
>
> (2) a state actor acted with a degree of culpability that shocks the conscience;
>
> (3) a 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) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

L.R. v. Sch. Dist. of Phila., 836 F.3d 235, 242 (3d Cir. 2016).

As explained below, the District Court made multiple errors of law and understanding regarding fundamental causation principles – including proximate cause, but for cause, foreseeable intervening cause and unforeseeable superseding cause – which permeate the analysis of prongs one and four of this Court's four-part test.

1. The Harm Caused Was Foreseeable and Fairly Direct. As is evident from the familiar terminology and revealed by the case law, this prong

deals with proximate cause.[15] Proximate cause "refers to the basic requirements that there must be some direct relation between the injury asserted and the injurious conduct alleged." Paroline v. U.S., 572 U.S. 434, 444 (2014) (internal punctuation omitted); accord Cnty. of Los Angeles v. Mendez, 137 S.Ct. 1539, 1548-49 (2017) (§ 1983 context). It is "often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct." Paroline, 572 U.S. at 445; accord Mendez, 137 S.Ct. at 1548-49.

This prong of the test "requires a plaintiff to allege an awareness on the part of the state actors that rises to the level of actual knowledge or an awareness of risk that is sufficiently concrete to put the actors on notice of the harm." Mann v. Palmerton Area Sch. Dist., 872 F.3d 165, 171 (3d Cir. 2017) (internal punctuation omitted).

a. Foreseeable Harm. The District Court concluded that the harm here was foreseeable. (D.I. 87 at 6-7; D.I. 84 at 6; D.I. 57 at 17; JA66-67, 47,19). Appellants agree. (See Facts at **G.** and Argument **II.D.2.(a).(1).-(2).** above).

b. Fairly Direct Harm.

[15] "It is axiomatic that a § 1983 action, like its state tort analogs, employs the principle of proximate causation." Hedges v. Musco, 204 F.3d 109, 121 (3d Cir. 2000) (internal punctuation omitted).

(1). The Inconsistent Rulings Below. In response to extensive briefing, the lower court appeared to reject the defense claim, as it must,[16] that the actions of a third-party arsonist tortfeasor completely and factually severs the causal chain in a substantive due process proximate cause analysis. (D.I. 84 at 8; D.I. 87 at 9; JA49,69). Nevertheless, the Court held in its first two decisions that there were still too many links in the causal chain to hold the Baker defendants responsible. (D.I. 84 at 7-9; D.I. 87 at 8-9; JA48-50,68-69). And, although the word "intervening" was used repeatedly, review of the lower court's detailed rationale here reveals a *sub silentio* holding that the actions of the Williams defendants were instead a 'superseding cause' of the harm to plaintiffs, breaking the causal chain for the Baker defendants.[17] But the lower court never

[16] See Walter v. Pike Cnty, 544 F.3d 182, 192 (3d Cir. 2008); Rranci v. Att'y Gen. of the U.S., 540 F.3d 165, 171 (3d Cir. 2008); Kamara v. Att'y Gen. of the U.S., 420 F.3d 202, 216 (3d Cir. 2005); Mark v. Borough of Hatboro, 51 F.3d 1137, 1151 (3d Cir. 1995); D.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364, 1374 (3d Cir. 1992) (*en banc*); Commw. Bank & Tr. Co. v. Russell, 825 F.2d 12, 16 (3d Cir. 1987); Davidson v. O'Lone, 752 F.2d 817, 822 (3d Cir. 1984) (*en banc*), aff'd sub nom. Davidson v. Cannon, 474 U.S. 344 (1986); see also FTC v. Wyndham Worldwide Corp., 799 F.3d 236, 246 (3d Cir. 2015) (recognizing the same proximate cause principle outside the § 1983 context).

[17] An intervening cause does not break the causal chain going back to the original wrongdoer unless it was unforeseeable, in which case it becomes a superseding cause. See Johnson v. City of Phila., 837 F.3d 343, 351-52 (3d Cir. 2016); Staub v. Proctor Hosp., 562 U.S. 411, 420 (2011); Duphily v. Del. Elec. Coop., Inc., 662 A.2d 821, 829-31 (Del. 1995).

explicitly ruled upon this causation issue linking the Williams defendants in its third and final decision addressing their own liability. Rather than explicitly holding they were the proximate cause of three deaths, the Court instead dismissed the case on other grounds.

(2). Williams Defendants. Plaintiffs agree, in part, with this *sub silentio* holding that the Williams defendants were 'a' proximate cause of the harm plaintiffs suffered.[18] Briefly, each and every one of the many assorted and statutorily illegal actions taken by these defendants (Facts at **C.2.**, **F.2.**, **E.2.**), negatively impacted staffing levels in the WFD. There is a direct relation here because the resulting harm that eventually occurred from this lack of staff in defiance of legislative mandates (Facts at **H.**), was precisely the harm that was reasonably foreseen and actually predicted by many, including defendant Goode himself. (Facts at **G.**, **E.2.a.**).

Helpfully, the Supreme Court of Pennsylvania recently addressed the direct factual and causal connection between staffing levels and firefighter safety. In City of Allentown v. Int'l Ass'n of Fire Fighters Local 302, 157 A.3d 899 (Pa. 2017), the Court looked at an evidentiary record, id. at 912-13, including testimony about

[18] Questions of proximate, intervening and superseding cause are for the jury. See, e.g., Rivas v. City of Passaic, 365 F.3d 181, 193 (3d Cir. 2004); Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 840-41 (1996); Duphily, 662 A.2d at 830.

"fire propagation – that is the relationship of time and temperature in a fire – and the impact on public and firefighter safety of a quick response and adequate personnel," id. at 912, and how not having a sufficient number of firefighters at a fire scene allows the fire to grow and places the remaining firefighters "in an extreme amount of danger." Id.

The Pennsylvania Supreme Court concluded that "there is a direct and significant relationship between the number of individuals available to respond to a call at a station ... and the safety of the City's firefighters." Id. at 913 (emphasis added). Stated another way, there is "a direct and significant relationship between shift staffing and firefighter safety." Id. at 914 (emphasis added). It found that the evidence "clearly establishes an unambiguous and powerful link between shift staffing and firefighter health and safety." Id. at 913 (emphasis added).

City of Allentown explicitly recognizes and "clearly establishes" the "direct," "significant," "unambiguous" and "powerful" factual link between shift staffing and firefighter safety. Id. at 913-14. Thus, it is clear that the factual "fairly direct" proximate cause factor is satisfied in our case.

Factually, it was pled at length in the Complaint (see, e.g., ¶¶ 338-387, 483, 494, 505-513, 2-3; JA163-70,183,185-88,116), that the failure to place timely water on the fire in this case was due to lack of available firefighters and how this together with related and resultant delayed engine response caused the fire to go

from manageably dangerous to unmanageably dangerous. Similarly, the Complaint also details the science behind fire growth and behavior, and how this science directly led to the development of NFPA 1710 and its staffing and timing requirements necessary to control fires and prevent deaths. (¶¶ 42, 44, 80-81, 357, 347, 192, 483; JA123-24,128-29,164-65,142,183). The science behind firefighting is summed up, and specifically pled, by way of the "firefighting maxim" of "you put water on a fire, the problems go away." This maxim is "scientifically proven." (¶¶ 347, 357; JA164-65). The same direct, significant, unambiguous and powerful factual and causal link between shift staffing and firefighter safety recognized by the Pennsylvania Supreme Court is present here and satisfies this "fairly direct" prong of the test.

(3). Baker Defendants. As the Supreme Court has observed, "it is common for injuries to have multiple proximate causes." Staub, 562 U.S. at 420. Here, the Baker defendants are another proximate cause of the harm plaintiffs suffered albeit, and admittedly, one further removed.

Factually, they created and implemented the rolling bypass policy (Facts at **C.1.**) and all the while actively deceived City Council about numerous aspects of it thus preventing the truth about its many flaws from becoming known. (Facts at **E.1.**, **D.1.a.(1).**). As a matter of proximate cause law, the only escape for the Baker defendants is if the actions of their successors were an 'unforeseeable superseding

cause' rather than a 'foreseeable intervening one.' And here, the Baker defendants cannot claim that their successors actions were unforeseeable because many of those actions were "substantively identical" (¶ 95; see ¶¶ 96-98, 202, 207-09, 260, 450) to the ones taken by the Baker defendants themselves. Accordingly, because both the policy itself and deception of the legislative branch was continued by their successors, the causal chain is not broken since the Williams defendants were a mere foreseeable intervening cause, not an unforeseeable superseding one, and the ultimate proximate cause question must be determined by a jury which could hold both sets of defendants liable. See Staub, 562 U.S. at 420 (there can be more than one proximate cause of an injury).

Finally, this is not a case where the risk of harm created by the defense misconduct is different from the one that eventually injured plaintiffs.[19] Instead, the risk of harm created – that firefighters would be seriously injured or killed in a

[19] Cf. D.R., 972 F.2d at 1374 (explaining that failure to properly supervise a student teacher creates a "foreseeable risk" of a poor education and perhaps even student roughhousing but not sexual assault); Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 910 (3d Cir. 1997) (because it was unforeseeable that leaving the back door to a school propped open in order to run power cables for ongoing interior construction would result in the murder of a random teacher by a previously unknown mentally deranged person, such actions cannot "be said to have directly caused the attack"). This is simply a recognition of well established proximate cause principles. See, e.g., U.S. v. Ohio Barge Lines, Inc., 607 F.2d 624, 632 (3d Cir. 1979) ("It is established law that where the harm which in fact results is caused by factors or forces which form no part of the recognizable risks involved in the actor's conduct, the actor is not liable.").

fire because of insufficient staff – is precisely the same harm that befell plaintiffs (Facts at **H.**), and of which the Baker defendants were specifically warned. (Facts at **G.**). As a result, proximate cause is established. See Paroline, 572 U.S. at 444 ("there must be some direct relation between the injury asserted and the injurious conduct alleged") (internal punctuation omitted); Mann, 872 F.3d at 171 ("an awareness of risk that is sufficiently concrete to put the actors on notice of the harm").

2. Defendants' Actions Shock the Conscience. For the reasons set forth in Argument **II** above, plaintiffs satisfy this prong.

3. Plaintiffs Were Foreseeable Victims of Defendants' Acts.

a. The District Court's Erroneous Conclusions. The lower court's first clear error was in its initial decision requiring a custodial relationship to meet this requirement. (D.I. 84 at 9; D.I. 57 at 20; JA50,22). Third Circuit law is clearly and unequivocally to the contrary and requires no such custodial relationship,[20] as the District Court itself later recognized in its second and third decisions which relied upon these same precedents. (D.I. 87 at 10 n.8; D.I. 89 at 21 n.15; JA70,112).

[20] See Kneipp v. Tedder, 95 F.3d 1199, 1209 n.22 (3d Cir. 1996); Brown v. Pa. Dep't of Health Emergency Med. Servs. Training Inst., 318 F.3d 473, 479 (3d Cir. 2003).

The Court's second error was in holding that plaintiffs were not subjected to danger any different than that faced by the general public. (D.I. 87 at 12-16; D.I. 89 at 21 n.15; JA72-76,112).

b. Plaintiffs Satisfy This Requirement. "The bar for proving this element is not terribly high." Mann, 872 F.3d at 172.

> The relationship that must be established between the state and the plaintiff can be 'merely' that the plaintiff was a foreseeable victim, individually or as a member of a distinct class. Such a relationship may exist where the plaintiff was a member of a discrete class of persons subjected to the potential harm brought about by the state's actions.

Phillips v. Cnty. of Allegheny, 515 F.3d 224, 242 (3d Cir. 2008); see Mann, 872 F.3d at 172 ("member of a group"). There is "no principled distinction between a discrete plaintiff and a discrete class of plaintiffs. The ultimate test is one of foreseeability." Morse, 132 F.3d at 914.

Simply stated, members of the general public run out of burning buildings. The discrete and clearly identifiable class of persons to which plaintiffs belong run into burning buildings to extinguish them.[21] As a result, plaintiffs were not random

[21] This discrete class can be alternately identified as: (1) all members of the Union; (2) all 172 uniformed WFD firefighters; or even (3) the smaller subset of that 172 assigned to the operations side of the WFD rather than the administrative side that work in desk jobs. (See ¶¶ 2, 28, 38, 51, 63, 77, 196, 244-46, 249-56, 263, 333, 420, 438, 449, 494, 513; JA116,120-22,124-26,128,142,149-51,162,175, 177, 179,185-86,188 – collectively, describing the two internal divisions of the WFD - operations and administration).

individuals or random members of the public who happened upon these dangers.[22] Instead, as firefighters plaintiffs were part of a clearly identifiable class of persons most directly affected by defendants' decisions and subjected to the risk of harm created by their new policies of understaffing, rolling bypass and the rest. By reducing the number of firefighters, which reduced the number and proximity of water carrying engines available to respond to a fire, it was reasonably foreseeable that those same firefighters who remained would face a greater risk of harm from having to fight a fire with insufficient resources to do so. Not only was this risk to the remaining firefighters foreseeable, as even the District Court elsewhere conceded (see D.I. 87 at 6-7; D.I. 84 at 6; D.I. 57 at 17; JA66-67,47,19), it was actually foreseen and explicitly predicted. (Facts at **G.** above). Numerous provisions of the Union contract, and its predecessor contracts, approved by City Council and made binding under decades of Delaware collective bargaining law, contained obligations requiring on-duty staffing levels to be sufficient to provide safe, effective and efficient firefighting conditions for the firefighters (Facts at **B.2.-3.**), all of which were well within staffing numbers provided, authorized, budgeted, fully-funded and eventually explicitly mandated by City Council.

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[22] Cf. Phillips, 515 F.3d at 239 ("a distinction exists between harm that occurs to an identifiable or discrete individual under the circumstances and harm that occurs to a 'random' individual with no connection to the harm-causing party.").

(Facts at **F.1.**, **B.1.**). Defendants' failure to live up to their statutory and contractual obligations would place, and did place, plaintiffs in grave danger. So as members of the class of firefighters in the WFD, plaintiffs clearly were foreseeable victims of defendants' actions and so satisfy this element of the test.

4. Defendants' Many Affirmative Acts that Created, Increased or Made Plaintiffs More Vulnerable to Danger.

a. The Multiple Legal Errors Below. Citing no law, the Magistrate held that the actions of a third-party tortfeasor arsonist always are a complete and total bar to the 'but for' cause needed for a viable affirmative act. (D.I. 57 at 21, 18; JA23,20). The lower court adopted this incorrect holding, wrongly claimed that plaintiffs did not object to this legal error (D.I. 84 at 9-10; D.I. 87 at 16; D.I. 89 at 21 n.15; JA50-51,76,112) and, while admitting that plaintiffs did object to this on 'proximate cause' grounds, held that such an objection did not address "but-for" causation. (D.I. 84 at 9 n.8; JA50).

The lower court's holding here demonstrates a critical misunderstanding of what causation is. It is beyond debate that 'proximate cause' is a subset of 'but for' cause.[23] So given that plaintiffs repeatedly objected to and exhaustively addressed

[23] See, e.g., Paroline, 572 U.S. at 444-46 (discussing the well-established difference between "actual cause or cause in fact" on the one hand and "proximate" or legal cause on the other); CSX Transp., Inc. v. McBride, 564 U.S. 685, 692 (2011) ("The term 'proximate cause' is shorthand for a concept: Injuries

'proximate cause' issues,[24] they did address 'but for' cause.

Continuing, the Magistrate's holding, adopted by the lower court, also is legal error that the existence of a third-party tortfeasor completely prevents the existence of 'but for' cause. First, the lower court itself conceded this elsewhere. (See D.I. 84 at 8 and D.I. 87 at 9; JA49,69 - "the actions of a third party may in some circumstances be insufficient to sever a causal chain"). Additionally, as set forth in footnote 16 above, our Circuit's cases are legion holding that this is legally incorrect. For example -

> even where a plaintiff suffers harm at the hands of a non-governmental actor, the government may be liable because the government has a constitutional duty to protect a person against injuries inflicted by a third-party when it affirmatively places the person in a position of danger the person would not otherwise have faced.

Walter, 544 F.3d at 192 (internal punctuation omitted). The proper issue is whether there are affirmative acts by defendants. As noted immediately below, here there are many. The necessary causal connection of these acts to the harm suffered by plaintiffs already has been proven under prong one of the test. (See

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have countless causes, and not all should give rise to legal liability."); see also Van Buskirk v. Carey Canadian Mines, Ltd., 760 F.2d 481, 492 (3d Cir. 1985) ("Although there can be more than one proximate cause, all factual (but for) causes are not necessarily proximate causes.") (discussing state law).

[24] (See D.I. 65 at 1-9; D.I. 66 at 4-6, 9; D.I. 81 at 3-6; see also D.I. 46 at 43-65, 83-88).

Argument **III.B.1.** above).

b. Defendants' Many Affirmative Acts. As this Court sitting *en banc* has explained, defense liability "is predicated upon the[ir ...] affirmative acts which work to plaintiffs' detriment in terms of exposure to danger." D.R., 972 F.2d at 1374. In situations where the plaintiff's injuries are inflicted by a third party, this Court looks to whether the state actor:

- "creat[ed] or exacerbat[ed] the danger," id. at 1376;
- "increase[d] their risks of harm, or act[ed] to render them more vulnerable to" the danger, id. at 1374;
- "exercised his or her authority to create a foreseeably dangerous situation," Kaucher, 455 F.3d at 432; or
- "used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur." Bright v. Westmoreland Cnty., 443 F.3d 276, 283 (3d Cir. 2006).

Defendants' affirmative acts are set forth in the Facts at sections **C.**, **E.**, and **F.2.** above, have been repeatedly addressed throughout the preceding Argument, and finally, many were summarily listed in paragraphs 2 and 494 of the Complaint. (JA116,185-86). For the Baker defendants, they include:

- creation and implementation of rolling bypass; and
- repeated false statements and deception of City Council which hindered and discouraged it from taking its own remedial actions by falsely claiming: (1) there would be no increase in the risk to firefighters or the public caused by this new policy: (2) response times would not increase; (3) that the WFD was still in compliance

with the NFPA health and safety standards; and (4) the policy would decrease the use of overtime.

As to the Williams defendants, their affirmative acts include:

- creating a new policy to leave 20 or more vacant firefighter positions open as long as possible and not fill them;
- the deception of City Council and the public in rebranding rolling bypass as conditional company closures;
- repeated false statements and deception of City Council which hindered and discouraged remedial actions, in the same ways noted directly above under the Baker defendants;
- defying City Council's statutory mandate, abdicating essential job function and refusing to hire firefighters to fill the fully-funded 172 positions;
- doubling the number of uniformed firefighters assigned to desk jobs by stripping fire trucks of the firefighters needed to operate them;
- on nine separate occasions, refusing to comply with their statutory duty to submit quarterly reports to City Council of the actual manpower levels;
- refusing to comply with their statutory duty to notify City Council when the 95% threshold was crossed; and
- violating the requirements of the legislatively approved Union contract and NFPA 1710.

Each of these actions, viewed both individually and *in toto*, increased the risk of harm and rendered plaintiffs more vulnerable to the dangers and risks they faced in their jobs as firefighters.

(1). Abdication of Essential Job Functions and Not

Doing Something "Required." The refusal by our executive branch defendants to faithfully execute the law and abide by their legislatively mandated statutory and contractual obligations qualify as affirmative acts that misuse state authority. See L.R., 836 F.3d at 244 (when "the particular responsibilities that were relinquished ... [a]re an integral part of the state actor's job functions ... [s]uch actions are an affirmative misuse of state authority."); Kedra, 876 F.3d at 436 n.7 (a defendant who "skipped over required safety checks" committed an "indisputably affirmative act[].").

(2). False Statements Which Discourage Remedial Actions. In Kaucher, following a lengthy analysis, 435 F.3d at 429-35, this Court recognized that giving false or misleading statements can qualify as affirmative acts when they discourage others from taking remedial actions because, by doing so, they create a risk of harm that would not have otherwise existed.[25]

[25] See id. at 430 (discussing case law where "deliberate misrepresentations formed the basis of substantive due process violations"); id. at 433-34 (explaining that issuing a memo can be considered an affirmative act); id. at 435 (concluding that had the memo made false safety representations, the plaintiffs "might have a claim that [the defendant] effectively discouraged corrections officers from taking safety precautions and thereby created a risk of harm that would not otherwise have existed"). Ultimately however, the Court in Kaucher found the memo at issue was not misleading. Id. at 429 (a "reasonable jury could not conclude the memorandum was intended to mislead."); id. at 435 ("we have already concluded the memorandum did not constitute a misrepresentation"); id. at 434 (discussing how the contents of the memo were "appropriate.").

Such analysis is instructive here. Because of defendants' falsehoods and intentional deceptions of City Council and the public, the staffing, overtime and rolling bypass problems were not addressed and remedied. Defendants' knowingly false statements prevented this from occurring.

c. Defendants Changed the Status Quo. Finally, in L.R., this Court found that -

> Rather than approach this inquiry as a choice between an act and an omission, we find it useful to first [1] evaluate the setting or the 'status quo' of the environment before the alleged act or omission occurred, and then [2] to ask whether the state actor's exercise of authority resulted in a departure from that status quo.

L.R., 836 F.3d at 243 (enumeration added). "[D]eparture from th[e] status quo" is key. Id.

(1). The Status Quo in the WFD. As already discussed in Argument **II.F.1.** above, the historical status quo in the WFD was detailed at length in the Complaint. (Facts at **B.**). Briefly, the combination of many explicitly defined statutory and related factors made the status quo of the WFD a "manageably dangerous" place. (Facts at **B.6.**).

(2). Defendants' Actions Caused a Departure from the Status Quo. All defendants' many affirmative actions changed this status quo (Facts at **C.**, **E.**, **F.2.**), and turned the WFD into an "unmanageably dangerous"

place. (¶¶ 82, 180; JA129,140). Due to space considerations, only one factual example here is presented.

> Throughout his tenure as Chief, defendant Goode repeatedly admitted, in numerous venues and contexts, that maintaining the status quo of 172 fully filled positions was key and the crucial factor in allowing Wilmington firefighters to safely perform their jobs.

(¶ 182; JA141). As to the Williams defendants, these admissions demonstrate that many of their actions, such as the policy of not beginning the hiring process until they were 20 down, in violation of the statutory mandate to the contrary, also changed the status quo.

For all the reasons set forth above, all four prongs of the test are satisfied and defendants violated the state created danger doctrine.[26]

IV. THE FAMILY PLAINTIFFS HAVE STANDING.

A. Standard of Review. See Argument **I.A.** above.

B. The Ruling Below. The ruling below is somewhat unclear but a fair reading is the lower court appears to have properly held, pursuant to the borrowing provisions of 42 U.S.C. § 1988(a), which incorporates wrongful death principles

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[26] Also for the reasons set forth above, Appellants have plausibly demonstrated constitutional violations against the individual defendants under Counts I and II. Since the lower court's rulings on qualified immunity and municipal liability were solely based on the absence of such claims (D.I. 84 at 13; D.I. 87 at 21; D.I. 89 at 21 n.15; id. at 8 n.9; JA54,81,112,99), these rulings too must fail. Qualified immunity is not a bar, for the reasons given by the Magistrate. (D.I. 57 at 29-30; JA31-32).

of the underlying jurisdiction, that the derivative § 1983 wrongful death claims of the family plaintiffs for damages arising out of the deaths of their firefighter loved ones are claims properly in this case. But the Court held that only the estate has standing to assert these derivative damages claims for the family members, not the family members themselves. Stated another way, it was held that the family member plaintiffs lack standing to assert these derivative family member claims that the court already held are properly in the case. (D.I. 89 at 18-21).

C. Standing. The lower court erred in the final part of its standing analysis. Once the Court recognized, properly, that the conclusion of the § 1988(a) borrowing analysis is that underlying State of Delaware wrongful death principles dictate that the family plaintiffs have derivative damages claims, that conclusion gives them more than sufficient "personal stake" in the litigation because the Delaware wrongful death statute[27] has created a "concrete and particularized," "legally protected interest" and they have suffered "actual" injury because of defendants' violation of their deceased firefighter loved ones' rights which caused their deaths, which can be redressed by a "favorable decision." Taliaferro v. Darby Twp. Zoning Bd., 458 F.3d 181, 188 (3d Cir. 2006) (addressing the elements of constitutional standing).

[27] See 10 Del.C. § 3724(d) (listing the areas of damages recoverable to grieving spouses and children in wrongful death actions).

D. Conclusion. The family plaintiffs have individual standing to assert derivative damages claims arising out of the deaths of their loved ones that entirely rise or fall on whether or not the circumstances of their loved ones deaths violate substantive due process.

V. THIS COURT HAS JURISDICTION.

As detailed in the Statement of the Case above, this Court has appellate jurisdiction under 28 U.S.C. § 1291 because plaintiffs declined to amend and instead "declare[d their] intention to stand on [their] complaint," and so the District Court's rulings below "bec[a]me final and appealable." Borelli v. City of Reading, 532 F.2d 950, 952 (3d Cir. 1976).

CONCLUSION

Respect for and enforcement of the law are essential to a well-ordered society and a society can be well-ordered only if laws are respected and apply with equal force to the government as well as the governed. Our Executive branch defendants' disrespect for and defiance of laws duly enacted by the Legislative branch violates fundamental separation of powers principles that undergird our constitutional order. The very reason substantive due process exists is to protect the governed from arbitrary and conscience shocking government actions such as these, when those actions harm them.

Respectfully Submitted,

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Dated: May 11, 2020

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CERTIFICATE OF BAR MEMBERSHIP

I certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(c), I certify, based on the word-counting function of my word processing system (Word Perfect X4), that this brief complies with the type-volume limitations of Rule 32(a)(7)(B), in that the brief is prepared in a 14-point, proportional format (Times New Roman) and contains fewer than 16,500 words, to wit, no more than 16,495 words.

Per the Notice from the Court dated March 17, 2020, there are no paper copies of either the brief or Joint Appendix since that requirement is presently suspended. As a result, the certification pursuant to Local Rule 31.1(c), that the text of the electronic brief is identical to the text of the paper copies, cannot presently be made. However, I certify that a virus detection program, specifically Symantec Antivirus has been run on this file and that no virus was detected.

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CERTIFICATE OF SERVICE

I, Stephen J. Neuberger, being a member of the Bar of this Court, do hereby certify that on May 11, 2020, I caused this **Brief** to be served electronically via CM/ECF on **All Counsel**.

/s/ Stephen J. Neuberger
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