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.

REVISED[1] CONSOLIDATED REPLY BRIEF OF APPELLANTS

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

---

[1] Revised in accord with the Court's Order dated July 22, 2020.

THE NEUBERGER FIRM, P.A.
STEPHEN J. NEUBERGER, ESQ. (Del. #4440)
THOMAS S. NEUBERGER, ESQ. (Del. #243)
17 Harlech Drive, P.O. Box 4481
Wilmington, DE 19807
(302) 655-0582
SJN@NeubergerLaw.com
TSN@NeubergerLaw.com

JACOBS & CRUMPLAR, P.A.
THOMAS C. CRUMPLAR, ESQ. (Del. #942)
RAEANN WARNER, ESQ. (Del. # 4931)
750 Shipyard Drive
Wilmington, DE 19801
(302) 656-5445
Tom@JCDELaw.com
Raeann@JCDELaw.com

Attorneys for Appellants

Dated: July 28, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Constitutions, Statutes and Rules

Other Authorities

ARGUMENT

I. COUNT II - SHOCKS THE CONSCIENCE.

A. Introduction. More than 45,000 words of defense briefing have failed to answer the simple question presented in plaintiffs' foundational Summary of the Argument – "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?" (A.D.I.[2] 42 at 32). Stated another way, what happens when the usual separation of powers and federalism objections to finding government misconduct to be constitutionally arbitrary melt away and, instead, those same foundational principles move to the other side of the scale and weigh against those same defendants in the same substantive due process analysis? (Id. at 31-32). The sole defense response is to claim that such issues were not raised below and were waived. They are mistaken.

B. Separation of Powers Principles Have Always Been In This Case. The separation of powers overlay to the substantive due process legal theories has always been in this case. Factually, the central feature of the Complaint and briefing below is and always has been the defiance by the City's executive branch defendants of laws duly enacted by the City's own legislative branch. A

[2] A.D.I. refers to Appellate Docket Items.

representative sampling from plaintiffs' 198 pages of briefing below follows:

- "Separation of powers principles are of no aid to the defendants in our present case ... Responsibility lies squarely with the executive branch's failure to faithfully execute and comply with the laws duly enacted (and funded) by the legislative branch." (Pls.' Mtn. to Dis. Ans. Brf. - D.I. 46 at 61 n.37).

- "from a separation of powers perspective, plaintiffs were remarkably successful in their effort to invoke the democratic process ... as City Council enacted a statute intended to put an end to the practice of not filling vacant positions, which would have ended the problem of rolling bypass had defendants not acted illegally and flatly disregarded it and refused to comply with their legal duties to faithfully execute the law." (Id. at 62).

- "More importantly, as pled extensively in the Complaint, defendants hindered and outright obstructed the efforts of City Council to remedy the situation by ... refusing to hire to fill mandatory, yet vacant, positions in violation of the duly enacted budget ordinance, and by defying the various statutory mandates enacted by City Council in 2014 that were specifically intended to address these very problems." (Id. at 62).

- "As described in the Facts above, and detailed at greater length in the Complaint, this case involves defendants in the executive branch who, over a lengthy period of many years ... defied and refused to comply with numerous laws duly enacted by the legislative branch" and "were repeatedly accused by their co-equals in the legislative branch of ... open defiance of numerous duly enacted statutory requirements addressing budgeting and staffing." (Id. at 71).

- "This is not a case where a plaintiff challenges the tough decisions made by the duly elected legislative representatives of the people in determining the level of fire protection the City could afford. Instead, this case is about defendants' refusal to provide the level of fire protection which the legislature had already determined was affordable. Not only did City Council determine affordability, it went several steps further and set the actual number of firefighters, each

year it legislatively budgeted the funds and eventually enacted yet another statute removing any purported ambiguity and required that these positions be filled." (Id. at 71-72).

- "The effect of defendants' refusal to comply with the law and their statutory defiance already has been discussed extensively and, as set forth in Argument III.C. above, is one of the situations Congress intended § 1983 to address and remedy." (Id. at 78).

- "The refusal by the executive branch defendants in our case to faithfully execute the law and abide by their statutory and contractual obligations also are prime examples of the abdication of essential job functions which the Third Circuit has found to qualify as an affirmative misuse of state authority." (Id. at 85).

- "Fundamental separation of powers principles are key to understanding our case." (Pls.' 3rd Obj. (Patrick) to the Report & Recommendation ("R&R") - D.I. 64 at 5).

- Quoting and citing separation of powers precedent from the U.S. Supreme Court, the Third Circuit, Delaware Supreme Court and Delaware Superior Court going back as far as 1825. (Id. at 5).

- "The R&R Misperceived the Facts Which Related to Key Separation of Powers Principles." (Id. at 5).

- Noting the "key separation of powers issue." (Id. at 6).

- "Plaintiffs respectfully submit that it is impossible to read the plain text of the 75-page Complaint in this case as challenging resource allocation decisions made by City Council in any way, shape or form. Instead, the Complaint details that this is a case about executive branch officials who intentionally and repeatedly defied numerous laws and resource allocation decisions that had already been made by the legislative branch. No factual inferences need be drawn from the Complaint to reach this conclusion. This is simply what the words used in the Complaint actually say." (Id.).

- "responsibility lies squarely with the executive branch defendants'

failure to faithfully execute and comply with the laws duly enacted (and fully funded) by the legislative branch." (Id. at 6).

- "This lawsuit focuses on the executive branch's conscience shocking defiance of and refusal to comply with these laws," and giving a bullet-point list. (Id. at 7-8).

- Explaining the affirmative acts include "[1] defying City Council's statutory mandate, abdicating an essential job function and refusing to hire firefighters to fill the fully-funded 172 positions ... [2] on nine separate occasions, refusing to comply with their statutory duty to submit quarterly reports to City Council of the actual manpower levels ... [3] refusing to comply with their statutory duty to notify City Council when the 95% threshold was crossed ... [and, 4] violating the requirements of the Union contract." (Pls.' 5th Obj. (Goode) to the R&R - D.I. 66 at 6).

- "the rest of the discussion below solely addresses ... the decision by Mayor Williams and Chief Goode to defy laws enacted by City Council." (Pls.' Resp. to City's Obj. - D.I. 79 at 1).

- "As explained in greater detail in their 3rd Objection (D.I. 64 at 4-6), and as the Complaint plainly reveals, plaintiffs do not challenge the decisions of City Council in setting the uniformed strength of the WFD at 172 ... Instead, this case challenges, *inter alia*, Mayor Williams and Chief Goode's executive branch policy of refusing to hire firefighters to fill these fully-funded positions." (Id. at 1-2).

- "Here, the reason the individual defendants refused to comply with the several staffing and notification statutes was specifically pled - the highest level officer of the executive branch, the Mayor, ordered it and the Fire Chief complied." (Id. at 2).

- discussing defendants' "duty to execute and enforce the law." (Id. at 5).

- "Plaintiffs do not challenge the allocation of resources by the legislative branch, but instead challenge the executive branch's refusal to faithfully execute and comply with the laws duly enacted by

the legislature." (Id. at 7-8).

- "This case instead centers on the executive branch's refusal to faithfully comply with their obligations under these laws. Thus Collins is no bar under fundamental separation of powers principles." (Id. at 8).

- "this was not a situation where the legislative branch had to make a tough call about how much fire protection the City could afford. City Council did the analysis and mandated that a level of 172 be provided. This is a case where the Executive branch defendants simply refused to provide such staffing." (Id. at 8-9).

- "That is the environment within which plaintiffs had to fight the Canby Park fire - without the staffing and equipment mandated by the City's own legislative body. Such risks are not inherent." (Id. at 9).

- "As also thoroughly addressed in plaintiffs' 3rd Objection (D.I. 64), defendants have repeatedly mischaracterized plaintiffs' case. As review of the Complaint makes clear, this case does not challenge resource allocation decisions by the City Council, nor does it seek to have the federal courts affirmatively establish minimal levels of workplace safety. Instead, this case is about executive branch defendants who refused to execute the law and instead defied resource allocation and workplace safety requirements that had already been duly enacted into law by the legislative branch." (Pls.' Resp. to Williams & Baker's Obj. - D.I. 82 at 5).

- "Why did defendants defy the various statutory staffing and hiring mandates duly enacted into law by City Council? Why did defendants violate the health, safety and staffing mandates of the Union contract that had been approved and made legally binding by City Council?" (Id. at 4).

This sampling of the briefing makes clear that the claim of waiver is without merit.

Throughout this case,[3] plaintiffs have uniformly and consistently argued that the factors favoring defendants in the typical substantive due process case – including separation of powers – instead favor plaintiffs in our present, atypical case.

C. Reliance on Such Principles is Proper and Has Been Encouraged by the Supreme Court. The problem with the defense claim that plaintiffs cannot rely upon fundamental separation of powers principles in order to prove a substantive due process violation is it runs directly afoul of Supreme Court precedent to the contrary which specifically encourages such reliance and finds it to be vital to protecting the individual liberty at the core of the social compact between the government and the governed. In Bond v. U.S., 564 U.S. 211 (2011), the Court examined the question of whether an individual may rely upon fundamental principles of separation of powers or federalism in support of an otherwise valid constitutional claim and unanimously answered this question in the affirmative. Id. at 220-24.[4]

---

[3] The two-page summary list in ¶ 494 (JA185-86) of the Complaint also specifically identifies numerous examples from the preceding 493 paragraphs.

[4] In so holding, Bond disposes of defense reliance upon Carfer v. Caldwell, 200 U.S. 293 (1906). (A.D.I. 51 at 44). Carfer stands for the simple proposition that when there is no asserted violation of any federal right or law, it is irrelevant that there also are state law separation of powers concerns. Id. at 297. Conversely, in our present case, there is independent federal question jurisdiction arising from the Fourteenth Amendment substantive due process violations and the separation of powers violations here are being used in support of these independent federal

> [I]ndividuals, too, are protected by the operations of separation of powers and checks and balances; and they are not disabled from relying on those principles in otherwise justiciable cases and controversies.

Id. at 223 (emphasis added); see id. at 222 ("The structural principles secured by the separation of powers protect the individual as well."). "If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object." Id. at 223.[5] So the question then becomes have plaintiffs raised justiciable claims? And for the reasons set forth in the Brief of Appellants, plaintiffs have done so under Counts I-III of the Complaint, all of which invoke the substantive due process protections of the Fourteenth Amendment.

D. This Case Is Not Governed By Collins. The defense briefing reveals that the secondary overall, and primary merits defense, is built upon Collins v. City of Harker Heights, 503 U.S. 115 (1992).

1. There Has Been No Waiver. Preliminarily, for the reasons set forth in Argument **I.A.-C.** above, plaintiffs need not have earlier discussed Collins claims which the habeas petition in Carfer lacked.

[5] That such principles protect the liberty interests of individuals was addressed in the Brief of Appellants. (A.D.I. 42 at 44). The Supreme Court's decision in Bond explains the same for principles of federalism, see Bond, 564 U.S. at 221-22, and looks to and finds support for these holdings in separation of powers principles and precedent. Id. at 222-24.

because this case is not governed by Collins. Our facts reveal that this is not, and has never been, a case which:

- challenges difficult resource allocation decisions made by the legislative branch, which controls the purse strings, in weighing competing obligations from different municipal departments over a scramble for limited financial resources;

- challenges legislative branch action in refusing to allocate more staffing or monetary resources towards the WFD;

- challenges legislative branch refusal to enact minimal standards of workplace safety or staffing for WFD employees; or

- asks the federal courts to impose by judicial fiat minimal standards of workplace safety which the municipality's own legislative body itself has declined to impose.

In the same way, our case does not sue executive branch officials:

- for trying their best to operate within the confines of what the legislative branch has provided in terms of money, staffing, resources and workplace safety laws;

- for doing their duty and executing the laws duly enacted by the legislative branch; or

- because their co-equals in the legislative branch have refused to spend money or enact laws.

Collins disposes of all such 'typical' substantive due process cases on federalism and/or separation of powers grounds which, given such facts, weigh heavily on the government defendant's side of the scales in such cases. (See A.D.I. 42 at 31-32).

Yet, as explained in the Summary of the Argument, "[o]ur present case

presents a novel factual scenario which flips the typical fact patterns on their head." (A.D.I. 42 at 32). As explained above, atypically, it is the defiance by the defendant municipality's executive branch and refusal to faithfully execute and comply with numerous laws (addressing, *inter alia*, staffing, training and workplace safety) which were duly enacted and fully-funded by that same municipality's own legislative branch, that gives rise to the substantive due process claims. Such principles here weigh in favor of plaintiffs since it is the executive branch City defendants who are defying statutory and other enactments by their own legislative branch City Council and because plaintiffs are not asking the federal courts to impose any workplace safety standards which the municipality's own legislative body has not already seen fit to impose upon itself. It is neither unfair nor improper to point out that factors which favor a government defendant in a typical case instead favor plaintiffs in our present atypical case.

2. The City's Claim Demonstrates a Fundamental Misunderstanding of Separation of Powers. Contrary to defense claims (A.D.I. 51 at 44), that the municipality in Collins was acting in violation of a state law implicates no separation of powers principles. Instead, this claim demonstrates a fundamental misunderstanding of what separation of powers is.

Our present case involves a horizontal separation of powers conflict between branches of a single sovereign. The sovereign is the City of Wilmington.

The branches in conflict are its own executive branch, the Mayor and Chief, in conflict with and in open defiance of laws duly enacted by the legislative branch, City Council.

Although the sole defendant in Collins was a city, 503 U.S. at 117, the similarities to our present case end there. The Collins plaintiff challenged resource allocation decisions made by the "locally elected representatives" of the people and asked the federal judiciary to independently impose workplace safety standards that the city had not imposed upon itself, which the Court declined to do. Id. at 128-29. There was no claim that the city was violating its own laws so there was no separation of powers component to the decision. Instead, the only law claimed to be violated was a Texas statute. Looking to its earlier holding declining to second guess resource allocation decisions made by the elected representatives of the people and refusing to judicially impose new workplace safety standards, the Court found even less reason to find the violation of the state level statute to be constitutionally arbitrary. Id. at 129-30. For the reasons already addressed above, none of this is our case.

Additionally, although a city violating a state law raises a host of interesting legal issues, horizontal separation of powers is not one of them. No separation of powers concerns arise from such a separate sovereigns scenario – meaning the city as one sovereign violating the laws of another independent sovereign, the state.

Collins involved defendant 'Government A', violating a law enacted by an entirely different level of government, non-defendant 'Government B'. It did not involve the executive branch of defendant 'Government A' violating the very laws enacted by the legislative branch of the very same defendant 'Government A'. The former does not implicate the separation of powers. But the latter does.

Accordingly, the most that Collins, arguably, stands for is that there is no separation of powers lift to an alleged substantive due process violation when a municipality violates a law enacted by a sovereign different from itself.

But that is not our case. So the problem with defense reliance on Collins is plaintiffs are not relying on a state law enacted by a non-defendant sovereign but instead are relying upon numerous laws and other legislative enactments by the City defendant itself which the executive branch defendants of the same City are openly defying. Defendants have offered no reasoned response on this key legal issue and have abandoned the field here.

E. The Magistrate's Conclusion. Although the U.S. Magistrate below disregarded all separation of powers principles and incorrectly concluded that ours was a case challenging resource allocation decisions (D.I. 57 at 33; JA35), importantly she nevertheless concluded that the actions of defendants Williams and Goode were so far beyond the pale that they still met the traditional test and shocked the judicial conscience. (Id. at 22-23; JA24-25; see A.D.I. 42 at 35-36).

For the reasons set forth in the Brief of Appellants at pages 35-49 (A.D.I. 42), plaintiffs agree.

F. Arbitrary Action. As explained in greater detail in the earlier brief at pages 36-37, substantive due process exists to protect the lives and liberty of the citizenry from arbitrary government action. Cnty. of Sacramento v. Lewis, 523 U.S. 833 (1998), is the most recent statement of substantive due process law from the Supreme Court and all of the authority cited at pages 36-37 of the earlier brief post-dates Lewis and is the governing law.

It is important not to lose the forest for the trees here. There is nothing more arbitrary in a constitutional sense than violating the foundational separation of powers principles that underlie our constitutional order. The very purpose of the executive branch is to execute the laws duly enacted by the legislative branch. This is woven into the very fabric of our social compact. Yet the facts of our case reveal considered, deliberate deviations from this fundamental principle that are not founded upon reason, logic or fact, but instead upon irrationality, prejudice and malice. This is "the exercise of power without any reasonable justification" or the use of power "as an instrument of oppression" that the Supreme Court speaks of in Lewis, id. at 846, or the "ill-conceived or malicious" use of authority that this Court identified in Nicini v. Morra, 212 F.3d 798, 810 (3d Cir. 2000) (en banc).

The core of plaintiffs' merits case is set forth at pages 47-49 of their earlier

brief. (A.D.I. 42). It is arbitrary and malicious for, and there is no legitimate government end served by, a Fire Chief who intentionally and maliciously pursues known and dangerous policies (id. at 10-12; see id. at 26-30) 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 light of public scrutiny. (Id. at 12-14). That is the fairly stated motivation and crux of the shocks the conscience analysis against Chief Goode, who admits the only person he took direction from was Mayor Williams. (Id. at 13). That their actions directly contravene fundamental separation of powers principles in defiance of numerous legislative mandates (id. at 22-26, 3-6), and were actually known to cost more money and be more expensive than complying with these same legislative requirements (id. at 15-18), is compelling additional evidence of the constitutionally arbitrary nature of their misconduct.

G. Trailing Issues.

1. Inherent Dangers. As addressed in their earlier brief (A.D.I. 42 at 3-15, 22-26, 49-50, 52), the factual status quo within the WFD, and the changes defendants made, are key to determining what is, and is not, an inherent danger in the WFD workplace in light of the statutory mandates enacted into law by the City's own legislative body. Dangers which result from violation of numerous legislatively mandated staffing, training, hiring, workplace safety and other laws

governing employees in a profession are not inherent dangers of that profession.

That other particular municipalities have not seen fit to enact similar laws, see, e.g. Estate of Phillips v. D.C., 455 F.3d 397 (D.C. Cir. 2006), and the impact that the lack of such statutes has on separation of powers analysis in substantive due process cases, does not negatively affect the strength of this argument in those municipalities, like Wilmington, where the legislative bodies have made the deferential policy decision to enact such laws. Such is the beauty of federalism that states can chose to do things at least 50 different ways, and if, like Delaware, they allow their subdivisions to do so, those numbers increase exponentially.

a. The WFD is Paramilitary. The defense states there is "no factual support" for the factual statement that the WFD is a "paramilitary" organization and that, therefore, there can be no compulsion in its absence. (A.D.I. 49 at 24-25). This ignores the facts expressly pled in the 75-page, 515-paragraph, 20,916-word Complaint. First, it explicitly states that the WFD is a "paramilitary organization." (D.I. 1 at ¶ 513; JA188). Second, references to its hierarchical paramilitary rank structure are littered throughout 118 separate paragraphs, including numerous references to the ascending ranks of Firefighter, Senior Firefighter, Lieutenant, Captain, Battalion Chief, Deputy Chief and Fire Chief. Either independently or in conjunction with the factual standard of review, this evidence is more than sufficient to expose this empty defense claim.

b. Our Circuit Rejects Defendants' Approach. Defendants also claim that increasing exposure to danger is constitutionally insufficient to meet the shocks the conscience legal standard in circumstances where the defendants have many months and even years to think about and deliberate on their challenged decisions. The problem with such a claim is our en banc Circuit has rejected it.

In D.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364 (3d Cir. 1992) (en banc), this Court held that liability "is predicated upon [a defendant's] affirmative acts which work to plaintiffs' detriments in terms of exposure to danger." Id. at 1374. And in cases where a 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; or
- "increase[d] their risks of harm, or act[ed] to render them more vulnerable to" the danger. Id. at 1374.

Indeed, our Model Civil Jury Instruction for such claims states the same.[6] So again, these defense claims are without merit.

2. Union Contract. Briefly, as explained in the earlier brief (A.D.I.

[6] See Third Circuit Model Civil Jury Instructions for Civil Rights Claims Under Section 1983, Model Instruction 4.14 (the "Due Process Clause does prohibit state officials from engaging in conduct that renders an individual more vulnerable to such harms.").

42 at 4-6, 45-47), defense attacks on the legislatively approved workplace safety standards contained within the Union contract also fail. These standards were negotiated by defendants themselves and then explicitly approved and made binding upon the City itself by its own legislative body. For separation of powers purposes, they are the functional equivalent of the staffing, training and hiring statutes discussed at length above and so, under Bond, 564 U.S. at 223, are additional cumulative evidence demonstrating defendants' constitutionally arbitrary misconduct.

As also previously noted in the earlier brief (A.D.I. 42 at 46-47), it is black-letter constitutional law that the Contract Clause similarly bars defendants from disregarding the plain terms of a validly executed government contract and later then seeking to avoid its obligations as a 'mere' matter of state law.[7] There is a constitutional dimension to such misconduct, which further demonstrates constitutional arbitrariness.

3. The Foreign Circuit Case. Defendants and the District Court extensively cite Estate of Phillips, 455 F.3d 397 (D.C. Cir. 2006) (D.I. 89 at 13-18; JA104-09) and the Court relied upon it in support of finding that separation of

[7] See, e.g. Mabey Bridge & Shore, Inc. v. Schoch, 666 F.3d 862, 874 (3d Cir. 2012); U.S. Tr. Co. of N.Y. v. N.J., 431 U.S. 1, 17 (1977); N.J. v. Yard, 95 U.S. 104, 114 (1877).

powers violations do not matter. (Id. at 16; JA107 - irrelevant that dangers arose "from violation of legislative mandates or standards of practice.").[8] Like the rest, this is yet another factually and legally inapplicable precedent.

First, Phillips is the direct progeny of Collins and so suffers from all the same factual and legal flaws – ours is not an allocation of resource, competing obligations or inherent dangers case. Second, there was no separation of powers overlay to the constitutional violation in Phillips as there is in our present case.

Finally, the D.C. Circuit's Phillips decision violates our own Circuit's more recent precedent in Kedra v. Schroeter, 876 F.3d 424 (3d Cir. 2017). Phillips held that the breach, by an executive branch agency, of a standard operating procedure enacted by that same executive branch, does not shock the conscience. 455 F.3d at 404-08.[9] To the contrary, Kedra held that the violation of a similar executive branch safety protocol enacted by that same executive branch is conscience shocking separate and apart from all separation of powers concerns and so violates substantive due process. See Kedra, 876 F.3d at 450 (finding the defendant

[8] This was the legally erroneous holding challenged as one of the multiple errors of law in the earlier brief (A.D.I. 42 at 51), the existence of which the City denies. (See A.D.I. 51 at 43).

[9] The D.C. Circuit also suggested that the result may have been different if intentional misconduct was at issue, which it was not under the facts of that case. Id. at 405. But as noted in plaintiffs' earlier brief, our case has such intentional, and malicious, misconduct that was absent in Phillips. (A.D.I. 42 at 12-14,42,49).

"contraven[ed] each and every firearm safety protocol by skipping over both required safety checks, treating the firearm as if it were unloaded, pointing the firearm directly at Kedra, and pulling the trigger"). So, in the Third Circuit, if violation of a mere executive branch created safety protocol can shock the conscience, *a fortiori*, violation of numerous statutes created by the legislative branch (which implicate separation of powers principles) does so as well.

II. COUNT I - STATE CREATED DANGER.

A. Foreseeable & Fairly Direct.

1. Proximate Cause. Defendants mistakenly assert that this prong does not address proximate cause. (See, e.g. A.D.I. 48 at 10). It is firmly established that "§ 1983 creates a species of tort liability." Heck v. Humphrey, 512 U.S. 477, 483 (1994).

> Over the centuries the common law of torts has developed a set of rules ... defining the elements of damages and the prerequisites for their recovery, [which] provide the appropriate starting point for the inquiry under § 1983 as well.

Id. Accordingly, § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Malley v. Briggs, 475 U.S. 335, 344 n.7 (1986). As this Court has noted in the state created danger context, "a Section 1983 plaintiff must demonstrate that the defendant's actions were the proximate cause of the violation of his federally

protected right." Rivas v. City of Passaic, 365 F.3d 181, 193 (3d Cir. 2004). This is neither new nor novel.

2. Reasonably Foreseeable. One key proximate cause question is whether it was reasonably foreseeable that a fire (whatever its origin) would occur in the City and that Wilmington firefighters, such as plaintiffs, would have to rush to extinguish it.

Defense denial here betrays an historical ignorance of why professional, municipal fire departments exist today. From the Great Fire of Rome in 64 A.D., set by the infamous arsonist Emperor Nero, which destroyed two thirds of that city; to the Great London Fires of 1135, 1212 and 1666, the latter of which destroyed more than 85% of its homes; and from the utter destruction wrought by the Great Chicago Fire of 1871 which left more than 100,000 residents homeless; to the Great San Francisco Fire of 1906, which helped destroy more than 80% of that city; municipalities the world over learned harsh lessons about the deadly dangers fire poses to closely packed cities, which is one of the reasons that municipal fire departments like the WFD exist today. No matter the cause – be it an earthquake, a baker burning a loaf of bread, a cow kicking over a lamp, or an arsonist like Nero fiddling while Rome burned – fire can and will quickly destroy a great city and kill its residents. This is why, as a matter of public policy, cities do not care about the cause of a fire, be it arson or accident, but instead bear the cost

and put them out to prevent the even greater loss of life and property that would result from doing nothing. That a fire would occur in the City of Wilmington was reasonably foreseeable. The very existence of the WFD speaks to that.[10]

3. Third-Party Tortfeasor. Contrary to defense claims, a third-party arsonist is not a superseding cause breaking the causal chain because it was reasonably foreseeable that such a fire would occur. Plaintiffs cited a long line of unrebutted Third Circuit decisions recognizing that state actors violate substantive due process when they create conditions that allow a third-party to commit a foreseeable criminal act. (A.D.I. 42 at 55 n.16, 64).

4. Henry. All defendants except Goode rely on Henry v. City of Erie, 728 F.3d 275, 276-78 (3d Cir. 2013), which involved the nationwide federal Section 8 housing program, which is administered by local authorities in accord with federal guidelines. Erie approved an apartment for inclusion in the program even though its owners failed to comply with the guidelines, including lack of smoke detectors and fire escapes. Id. at 278-79. A fire subsequently killed the tenant. Id. at 279.

The Court held foreseeability was clear but there were too many links in the causal chain so the harm was not fairly direct, basing this on the interplay of seven

[10] The precise harm that occurred was reasonably foreseen and actually predicted by many, including defendant Goode. (A.D.I. 42 at 26-30,22).

factors. Id. at 283-86.

a. Martinez v. California, 444 U.S. 277 (1980), arose from the actions of a third-party parolee who murdered a child after being released on parole. The child's family sued the parole board. The Court found the board's actions in granting parole were only an "indirect[ ]" cause and not the legal or proximate cause. Id. at 281. There was no awareness of "any special danger" to the victim that was not shared by every member of "the public at large" so her death was "too remote a consequence." Id. at 285.

In our case, as explained in Argument **II.C.** below, plaintiffs were not random members of the public but instead, as firefighters, were the very class of persons directly subjected to the unique risk of harm created by defendants' new staffing policies and defendants were repeatedly warned about these risks. Additionally, the factual connection between staffing and firefighter health and safety is "unambiguous," "powerful," "direct and significant." City of Allentown v. Int'l Ass'n of Fire Fighters, Local 302, 157 A.3d 899, 913-14 (Pa. 2017).[11]

b. Henry discussed this Court's foundational decision in Morse v. Lower Merion Sch. Dist., 132 F.3d 902 (3d Cir. 1997),[12] and its

[11] The legal issue in City of Allentown was not substantive due process but the underlying factual inquiry is identical. (A.D.I. 42 at 56-58).

[12] Morse was cited in the Brief of Appellants at page 59. (A.D.I. 42).

requirement that causation not be "too attenuated" and looked to various dictionary definitions of some of the words used in Morse - that the defendants' action must have "precipitated" or been the "catalyst" for the injury suffered. Henry, 728 F.3d at 284-85.

Here defendants' actions in depriving each shift of firefighters, resulting in the closure of Engine 6, thus delaying the arrival of water to the fire scene, allowed the Canby Park fire to grow exponentially in both size and strength,[13] and so satisfies the definitions of precipitate,[14] catalyst[15] and the requirements of Morse.[16] This is why there is an "unambiguous and powerful link between shift staffing and firefighter health and safety." City of Allentown, 157 A.3d at 913.

c. The Henry court found "instructive" foreign circuit case law dealing with "improper licensure," finding that it "will often be too far removed

---

[13] (See, e.g. ¶ 483; JA183 - "For each minute a fire is allowed to burn, its intensity increases many times.").

[14] See, e.g. www.dictionary.com/browse/precipitate ("to hasten the occurrence of; bring about prematurely, hastily, or suddenly") (last visited on June 20, 2020); Merriam Webster's Collegiate Dictionary, 917 (10th ed. 1996) ("a product, result, or outcome of some process or action").

[15] See, e.g. Merriam Webster's Collegiate Dictionary, 179 (10th ed. 1996) ("an agent that provokes or speeds significant change or action").

[16] Plaintiffs acknowledge the Supreme Court's admonition that "the dictionary is not the source definitively to resolve legal questions." Pembaur v. City of Cincinnati, 475 U.S. 469, 481 n.9 (1986).

from the ultimate harm to permit liability under § 1983." 728 F.3d at 284-85. Ours is not a licensing case, nor is it akin to one, so this distinction is not present.

d. The Henry court also noted that Erie had neither "caused the fire [n]or increased the apartment's susceptibility to fire." Id. at 285. As noted in Argument **I.G.1.b.** above, and as explained in plaintiffs' earlier brief (A.D.I. 42 at 65-69), here defendants' new policies and actions increased the fire dangers to which plaintiffs were exposed by delaying the water and staffing necessary to extinguish it.

e. The Henry panel also found it vital that it was not Erie's responsibility to provide the missing safety features but instead responsibility lay with the landlord owner of the apartment to provide them. Id. at 285. But in our present case responsibility lay squarely with the executive branch defendants for failure to execute the various laws duly enacted by the legislative branch in order to ensure there were a sufficient number of firefighters on-duty to staff the shift.

f. The Henry panel explained that "[f]urther attenuating the connection between defendants' actions and the ultimate harm is the fact that [the tenant] remained in the apartment and received rent subsidies despite having actual notice that the apartment failed to meet" the federal HUD standards. Id. The Court found it important that it was not "allege[d] that defendants did anything to hinder" other parties trying to remedy the situation. Id. (emphasis added).

Contrast this with our present case where, as pled extensively in the Complaint and addressed in the earlier brief, defendants hindered and outright obstructed the efforts of City Council to remedy the situation by actively lying to them about the consequences of their policies, refusing to hire to fill mandatory, yet vacant, positions in violation of the duly enacted budget ordinance, and by defying the various statutory mandates enacted by City Council in 2014 that were specifically intended to address these very problems. Defendants also hindered the efforts of the Union to inform the public and achieve a democratic solution by, again, lying to the public and to Council about the dire health and safety consequences of their policies. (See A.D.I. 42 at 19-26). So again this factor is no bar.

Additionally, plaintiffs did not sit idly on their hands. Instead, through their Union, they actively fought to remedy the situation. They informed the public and City Council of the grave dangers created by defendants' policies, dangers that defendants were affirmatively hiding from both the public and Council. Indeed, from a separation of powers perspective, plaintiffs were remarkably successful in their effort to invoke the democratic process in this regard as City Council enacted a statute intended to put an end to the practice of not filling vacant positions, which would have ended the problem of rolling bypass had defendants not refused to comply with their legal duties to faithfully execute the law.

g. Given the sum total of these seven factors, the Henry panel concluded "[u]nder the circumstances, we cannot find that defendants created the danger faced by decedents - there were too many links in the causal chain after defendants acted and before tragedy struck." Id. at 286.

As the extensive recitation above reveals, ours is not the attenuated Henry case, relied upon by most defendants, where numerous factors supported a finding that a fairly direct connection was lacking. Several of the Henry factors are simply not present in our case while others have been satisfied.

5. Multiple Causes. As the District Court also concluded, the Baker defendants claim there is no liability because of all of the subsequent actions and changes made by their successors. Yet the Williams defendants claim the same because they continued the existing system created by their predecessors. But defendants cannot have it both ways. This is why the Supreme Court has recognized that there can be more than one proximate cause of an injury and it is for the jury to sort out subsidiary factual conflicts on causation. (See A.D.I. 42 at 56,58-59).

B. Shocks the Conscience. This issue is addressed in Argument **I.** above and plaintiffs' earlier brief.

C. Foreseeable Victims.

1. Employment Relationship. The defense asserts the same long

discredited, categorical claim that the employment relationship can never be subjected to substantive due process liability. (A.D.I. 51 at 36). First, Justice Alito rejected this precise claim in 2001. See Eddy v. V.I. Water & Power Auth., 256 F.3d 204, 212-13 (3d Cir. 2001) (explicitly rejecting a claim that Collins dictates a "[p]laintiff simply cannot raise the 'shocks the conscience' test in an employment relationship context").

Second, this Court again rejected such a claim in 2017, finding –

> We are unconvinced by [defendant's] argument that no state-created danger claim is cognizable where, as here, the alleged violation is based on a state actor's endangerment of a fellow government employee. While the Due Process Clause does not guarantee state employees "certain minimal levels of safety and security" in the workplace, Collins[], 503 U.S. [at] 126, we have long held that a government employee may bring a substantive due process claim against his employer if the state compelled the employee to be exposed to a risk of harm not inherent in the workplace, see Kaucher v. Cty. of Bucks, 455 F.3d 418, 430–31 (3d Cir. 2006); Eddy[], 256 F.3d [at] 212–13.

Kedra, 876 F.3d at 436 n.6 (emphasis added).

Finally, the single decision upon which the defense relies, Stella v. Del. Dept. of Educ., 2018 WL 3546187 (D.Del. July 24, 2018), was thoroughly discredited in the briefing below after its briefing was obtained and entered into our record, revealing that this prong, and others, were never briefed or challenged (see D.I. 46 at 99 n.73; D.I. 46-3 at A183-202), making Stella a forbidden advisory opinion on unbriefed, uncontested legal issues in direct contravention of Article

III justiciability prohibitions.[17]

2. Frequency & Proximity. Continuing, defendants also claim that frequency and proximity to danger are insufficient to meet the test in this case.

The defense cites no case in support of this frequency assertion other than the District Court's decision below, finding that this prong cannot be met by the employment relationship. But the only support cited by the District Court is generally to Collins and its progeny. (D.I. 87 at 15-16; JA75-76). Yet, as explained above, abundant Third Circuit precedent demonstrates that this is a faulty reading of Collins.

As to proximity, the defense cites one reported Third Circuit decision, and an unreported one as well,[18] which stand for the proposition that geographical proximity to a danger (such as living near a mental hospital) is, standing alone, insufficient to meet this prong in the absence of any evidence to establish that the person is a foreseeable victim. See Commw. Bank & Tr. Co. v. Russell, 825 F.2d 12, 16 (3d Cir. 1987) ("They cannot reasonably be characterized as individuals

---

[17] See Westport Ins. Corp. v. Bayer, 284 F.3d 489, 499 (3d Cir. 2002); Hamilton v. Bromley, 862 F.3d 329, 337 (3d Cir. 2017); Coffin v. Malvery Fed. Sav. Bank, 90 F.3d 851, 853 (3d Cir. 1996).

[18] Given the frequency with which the defense relies upon unpublished decisions, plaintiffs note these are not binding precedent here. See, e.g. Fallon Elec. Co. v. Cincinnati Ins. Co., 121 F.3d 125, 128 n.1 (3d Cir. 1997); U.S. v. Goldberg, 67 F.3d 1092, 1102 (3d Cir. 1995).

who defendants knew 'faced any special danger.'"). Given that the test for this prong requires evidence that the person was a foreseeable victim, such a holding is not surprising. But plaintiffs have not made arguments based upon geographic proximity alone. Instead, as explained in greater detail in their earlier brief, plaintiffs have consistently argued that they were foreseeable victims of defendants' challenged policies – that 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. (See A.D.I. 42 at 60-63). This more than satisfies the low bar set by this prong of the test. See Mann v. Palmerton Area Sch. Dist., 872 F.3d 165, 172 (3d Cir. 2017) ("The bar for proving this element is not terribly high.").

D. Affirmative Acts. Separation of powers principles impact significantly here because, in the same way that an executive branch defendant "skipp[ing] over required safety checks" as mandated by executive branch safety protocols was found to be an "indisputably affirmative act[ ]" in Kedra, 876 F.3d at 436 n.7, so also an executive branch defendant's refusal to execute the law and abide by his statutorily required duties as mandated by the legislative branch are such indisputably affirmative actions. The executive branch exists to execute the laws

made by the legislative branch. Not performing such "an integral part of the state actor's job functions ... are an affirmative misuse of state authority." L.R. v. Sch. Dist. of Phila., 836 F.3d 235, 244 (3d Cir. 2016). Otherwise, this issue was adequately addressed by the lengthy factual list of bullet-pointed affirmative acts and legal analysis in plaintiffs' earlier brief. (A.D.I. 42 at 63-69).

III. THE FAMILY PLAINTIFFS.

Defendants never address if the family plaintiffs have valid claims for damages arising out of the deaths of their firefighter loved ones under the borrowing provisions of 42 U.S.C. § 1988(a). (See A.D.I. 51 at 54-55; A.D.I. 52 at 32; A.D.I. 50 at 44). Indeed, this key federal law is not discussed, nor are its principles challenged, by any defendant.

The sole issue plaintiffs appealed is the next step of the District Court's ruling here – that only the estates of the dead firefighters could pursue these claims for damages on behalf of the surviving family plaintiffs rather than the family plaintiffs pursuing these same claims themselves. (D.I. 89 at 20-21; JA111-12). The defense does not address this but instead argues that the case law bars family plaintiffs from pursuing constitutional claims arising out of the death of their loved ones. (See A.D.I. 51 at 54). But this was not the basis of the ruling below and the defense did not appeal the lower court's declining to reach this issue.

As revealed by the cases on which the defense relies, the legal effect of this argument is that the claims of the family plaintiffs cannot be pursued at all – not by the estate on their behalf (as the lower court ruled), nor by them individually (as plaintiffs assert). But because this argument would reduce the legal exposure to damages they face, it is waived for failure to file a cross-appeal. See Stevens v. Santander Holdings USA Inc., 799 F.3d 290, 301 (3d Cir. 2015) ("Absent a cross-appeal, an appellee ... may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary") (internal punctuation omitted).

IV. COUNT III - MUNICIPAL LIABILITY.

The District Court below devoted a single footnote in its final opinion to the issue of municipal liability, holding that because Count III was "based on the same conduct that underlies Counts I and II, failure to adequately plead a constitutional violation for Counts I and II dooms Count III." (D.I. 89 at 8 n.9; JA99).

Accordingly, plaintiffs appealed this issue and squarely met the substance of the District Court's reasoning and proved constitutional violations. (See A.D.I. 42 at 35-69). This was all that was required under the circumstances. There was no waiver.

Nevertheless, the City continues and makes a merits argument on the municipal liability issues above and beyond the grounds given by the District

Court for its limited decision below. But, under the circumstances of our present case where there was no merits analysis below whatsoever, this issue was waived by not filing a cross-appeal.

However, plaintiffs note on the merits, first, most of these claims already are addressed in Arguments I-II above. Second, putting to the side the binding judicial admissions of both defendants Williams and the City in this regard (D.I. 38 at 19; D.I. 44 at 26 n.28), at the Rule 12(b)(6) stage, a plaintiff need not even "identify a responsible decisionmaker in his pleadings." Estate of Roman v. City of Newark, 914 F.3d 789, 798 (3d Cir. 2019). Finally, this Court has long rejected the claim that a policy, practice or custom that violates a city law cannot give rise to municipal liability.[19]

V. QUALIFIED IMMUNITY.

A. Introduction. The District Court briefly held that "Plaintiffs have not adequately alleged a violation of a constitutional right." (D.I. 89 at 21 n.15; D.I. 87 at 21; D.I. 84 at 13; JA112, 81, 54). Plaintiffs appealed and met the substance of this reasoning and proved constitutional violations. (See A.D.I. 42 at 35-69). There was no waiver.

---

[19] See Estate of Roman, 914 F.3d at 798 (3d Cir. 2019); Hill v. Borough of Kutztown, 455 F.3d 225, 246 (3d Cir. 2006); Sample v. Decks, 885 F.2d 1099, 1116 (3d Cir. 1999); City of St. Louis v. Praprotnik, 485 U.S. 112, 127, 131 (1988); Adela v. City of Wildwood, 790 F.2d 1063, 1065-67 (3d Cir. 1986).

Defendants now continue and make a new merits argument on the clearly established prong. But, under the circumstances of our present case where there was no merits analysis below whatsoever here, this issue was waived by not filing a cross-appeal.

B. Discretionary Functions. Qualified immunity only applies to discretionary functions. Ziglar v. Abbasi, 137 S.Ct. 1843, 1866 (2017). For the reasons addressed at length above and in plaintiffs' earlier brief (A.D.I. 42 at 44-47), under fundamental separation of powers principles, the Contract Clause and Delaware contract law, executive branch defendants Williams and Goode had no discretion to defy laws duly enacted by the legislative branch.

As explained in the Brief of Appellants (id. at 23-24), § 2-233 of the Wilmington City Code (JA305) created detailed, specific, mandatory, ministerial duties, requiring the exercise of no discretion. It specified "the precise action that the official must take in each instance" and so satisfies this Court's test, Eddy, 256 F.3d at 210-11, and disqualifies these defendants from qualified immunity.[20]

C. Clearly Established. Plaintiffs here rely upon cases from our own jurisdiction, Walker v. Coffey, 905 F.3d 138, 144 (3d Cir. 2018), making defense

[20] Analogous case law under the Federal Tort Claims Act's discretionary function exception also supports this result. See Berkovitz v. U.S., 486 U.S. 531, 536 (1988); Bryan v. U.S., 913 F.3d 356, 364 n.37 (3d Cir. 2019); Merando v. U.S., 517 F.3d 160, 165 (3d Cir. 2008).

citation of foreign-circuit precedent irrelevant.

Briefly, as already cited and quoted in Argument **II.C.1.** above and incorporated by reference here, our Circuit has long held that substantive due process liability attaches when a public employee is exposed to dangers not inherent in the workplace, as occurred in our case.

In Eddy, 256 F.3d at 207, 211-13, a 2001 decision from then Judge Alito, involving an electrical lineman being electrocuted while working on electrical lines without the proper safety equipment, this Court held that the law here had been clearly established since 1994.

In Kaucher, 455 F.3d at 425-35, involving a prison guard working in a prison, this Court recognized in 2006 that a government employer will be held accountable if the underlying facts meet this legal test.

In Kedra, 876 F.3d at 448-52, already quoted in Argument **II.C.1.** above, involving a police officer being accidentally shot by another officer at the firing range, the Court recognized the law here was clearly established in 2014.

Finally, in Arnold v. Minner, 2005 WL 1501514, *5-6 (D.Del. June 24, 2005), the District of Delaware recognized and held in a substantively identical case that the Governor of Delaware and the cabinet secretary in charge of the entire statewide prison system, could be held responsible for violating Fourteenth Amendment substantive due process protections for their actions in creating

certain types of unsafe working conditions for correctional employees caused by severe understaffing.[21]

D. Separation of Powers. Additionally, the core of this case is defense violations of fundamental principles underlying the very structure of government in our American experiment.[22] This is the type of "easiest" case that does not require a closely identical prior decision. See U.S. v. Lanier, 520 U.S. 259, 271 (1997); Schneyder v. Smith, 653 F.3d 313, 330 (3d Cir. 2011); Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 377 (2009).

This is not an unusual principle. Just last year this Court recognized a similar principle of relevance of state law violations, to an underlying and independently viable federal constitutional analysis, which overlapped with the same conduct challenged by the federal claim. The case of E. D. v. Sharkey, 928 F.3d 299 (3d Cir. 2019), involved the same Fourteenth Amendment liberty interest in bodily integrity underlying our present case. It arose out of a sexual assault of a

---

[21] A more detailed analysis of Arnold is in the record below (see D.I. 82 at 9-10; D.I. 46 at 43-44, 100), where pleadings from that case were entered into our own motion to dismiss record. (D.I. 46-3 at A1-182). See Commw. of Pa. v. Brown, 373 F.2d 771, 777 (3d Cir. 1967) ("It is settled ... that matters pertinent to an issue before a court and which were clearly presented to it, by brief or appendix thereto, are to be taken as covered by the court's decision though not mentioned in the opinion.").

[22] It has long been held that a municipal "[c]orporation cannot abridge its own legislative power." Goszler v. Corp. of Georgetown, 19 U.S. 593, 598 (1821).

pretrial detainee by a government immigration employee. On the clearly established prong, this Court explained –

> Initially, the District Court fittingly recognized that Sharkey's conduct was illegal in the state in which it occurred. He committed institutional sexual assault in violation of Pennsylvania Statute 18 Pa.C.S. § 3124.2, which forbids an employee of a "residential facility serving children and youth" from having sexual intercourse with a "detainee," regardless of whether the detainee gave consent. See 18 Pa.C.S. § 3124.2 (a). That Sharkey's conduct was illegal renders E.D.'s right to be free from sexual assault "so 'obvious' that it could be deemed clearly established even without materially similar cases."

E. D., 928 F.3d at 308 (emphasis added). In other words, because the factual conduct was so obviously illegal under state law, and because that same factual conduct formed the core of the Fourteenth Amendment substantive due process violation, the state law violation was properly considered as part of the clearly established analysis.

For these reasons, defendants' repeated violation of underlying separation of powers principles is properly considered and demonstrates an "obvious" violation of plaintiffs' Fourteenth Amendment rights such that it can be considered clearly established even in the absence of materially similar cases.

VI. JURISDICTION.

A. Introduction. On March 19th, all defendants repeatedly admitted that jurisdiction was proper and there was a final decision under 28 U.S.C. § 1291 (A.D.I. 37-1). 113 days later, two defendants changed their mind on this same

issue. (A.D.I. 49 at 2-3; A.D.I. 50 at 1, 11-17). But judicial estoppel bars this flip-flop. Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 358 (3d Cir. 1996).[23]

B. Merits. First, Fed.R.App.P. 4(a)(1)(A) requires that the notice of appeal be filed within 30 days after "entry of the ... order appealed from." The last Order appealed from was filed on February 21, 2020. (D.I. 90; JA113). Plaintiffs filed their appeal eleven days later, on March 3rd. (D.I. 91; JA1). This appeal is timely.[24]

Second, this appeal is timely under Fed.R.App.P. 4(a)(2). Part one of the rule is satisfied by filing their appeal within 11 days of the last decision issued on March 3rd. (D.I. 89; JA90). Part two requires a "judgment or order." Section 1291 then requires a "final decision." And here, the February 21st Order (D.I. 90; JA113) eventually became such a final decision after the deadline for amendment passed, on March 13th.

A final decision does two things: (1) fully resolves all claims; and (2) leaves nothing else for the court to do. Aluminum Co., 124 F.3d at 557. The February 21st

---

[23] Defendant Patrick's concession that he could have filed a timely motion to dismiss this appeal 5½ months ago also implicates laches. (A.D.I. 50 at 15 n.4). Such timely motion practice presents itself in the Court's case law on these issues. See Aluminum Co. of Am. v. Beazer East, Inc., 124 F.3d 551, 557 (3d Cir. 1997).

[24] Any condition subsequent as a bar to finality and appellate jurisdiction was satisfied when plaintiffs declined to amend (D.I. 93) and stood on their complaint. Borelli v. City of Reading, 532 F.2d 950, 952 (3d Cir. 1976).

Order (id.) satisfies both requirements because it fully resolved and dismissed the last of the legal claims against the last of the defendants, leaving nothing for the court to do. Plaintiffs never triggered the condition subsequent by filing an amended complaint by March 13th but instead timely filed their appeal, on March 3rd. (D.I. 91; JA1). And to resolve all doubt, plaintiffs filed their letter standing on their complaint and declining to amend on March 5, 2020. (D.I. 93). Upon the filing of that letter, the earlier Order (D.I. 90; JA113) became final on that date, thus satisfying Rule 4(a)(2).

FirsTier Mortg. Co. v. Investors Mortg. Ins. Co., 498 U.S. 269 (1991), is not to the contrary. There, the Supreme Court held that an oral bench ruling was a final decision from which a plaintiff could file a timely appeal under Rule 4(a)(2), even when the trial judge explicitly stated that he later was going to reduce his ruling and legal rationale to writing, and even when the notice of appeal was filed before that occurred. Id. at 270.[25] The Supreme Court held, "we conclude that Rule 4(a)(2) permits a notice of appeal filed from certain nonfinal decisions to serve as an effective notice from a subsequently entered final judgment." Id. at 274.[26] A

[25] If filing an appeal from an oral bench ruling before it even is reduced to writing is considered a final decision under § 1291, *a fortiori*, so is an appeal from a 21-page written decision and two page written Order, as in our case.

[26] Although FirsTier addressed a judgment, as explained above, Rule 4(a)(2) is satisfied by either a "judgment or order."

case such as ours "presents precisely the situation contemplated by Rule 4(a)(2)'s drafters." Id. at 277.

FirsTier also recognizes that Rule 4(a)(2) is intended for situations when there is no prejudice to the appellee and so a simple "technical defect of prematurity" will not "extinguish an otherwise proper appeal." Id. at 273. Defendants do not claim prejudice here and have suffered none. They were on notice of plaintiffs' intent to appeal from, among other things: (1) the content of the Notice of Appeal (A.D.I. 1; JA1); (2) the Concise Summary of the Case which, *inter alia*, noted judgment had not yet been issued by the lower court but which plaintiffs would appeal from upon issuance (A.D.I. 11 at 1); and (3) from the undersigned's March 5, 2020 e-mail to defense counsel. (Tab A attached). There is no prejudice.

Additionally and/or alternately, the rule of Cape May Greene, Inc. v. Warren, 698 F.2d 179 (3d Cir. 1983), "permits the ripening of a notice of appeal from a decision that is not immediately appealable but that becomes appealable before we take action on the appeal." Marshall v. Comm. Pa. Dept. of Corr., 840 F.3d 92, 96 (3d Cir. 2016). Here, even though plaintiffs filed their notice of appeal before the deadline to file an amended complaint had expired – upon either the expiration of that deadline or the filing of plaintiffs' letter standing on their complaint – the appeal then ripened and any jurisdictional defect was resolved.

Defendants' claim regarding Cape May Greene's inapplicability here errs since ours was not a clearly interlocutory decision. In this Court's words, "[w]e take pains in emphasizing that none of the cases following Cape May Greene ... involved discovery or similar interlocutory orders." Adapt of Phila. v. Phila. Hous. Auth., 433 F.3d 353, 364 (3d Cir. 2006). Ours was neither a discovery, evidentiary nor a sanctions ruling. Instead, ours was the fourth and final ruling in 104 pages of legal opinions, in response to 270 pages and approximately 90,000 words of defense briefing asking for one thing – that plaintiffs' case be dismissed, with prejudice, in its entirety. There is no unfair surprise or prejudice.

CONCLUSION

It is the unusual case for a 515-paragraph Complaint built upon numerous reliable public legislative and media sources to be found so factually insufficient that it cannot withstand Rule 12(b)(6) plausibility standards.

The touchstone of substantive due process is protection of the individual against arbitrary government action. This includes the irrational exercise of state power without any reasonable justification as well as the use of such power as an instrument of oppression. Factual review of the 20,916-word Complaint reveals state action founded, not on reason, logic or fact, but instead upon irrationality, prejudice and malice. Such misconduct is constitutionally arbitrary.

The District Court erred in concluding that this case challenged resource

allocation decisions and improperly asked the federal judiciary to independently create and impose workplace safety standards. To the contrary, the 75-page Complaint makes clear that ours is a case involving executive branch defiance of and refusal to execute resource allocation and workplace safety laws already made, full-funded and duly enacted by the legislative branch. Plaintiffs were killed and gravely injured as a result. It is neither unfair nor improper to hold government to account for such constitutionally irrational and arbitrary misconduct.

The lower court should be reversed and this case sent to discovery and its eventual jury trial.

Respectfully Submitted,

THE NEUBERGER FIRM, P.A.

/s/ Stephen J. Neuberger
STEPHEN J. NEUBERGER, ESQ. (Del. #4440)
THOMAS S. NEUBERGER, ESQ. (Del. #243)
17 Harlech Drive, P.O. Box 4481
Wilmington, DE 19807
(302) 655-0582
SJN@NeubergerLaw.com
TSN@NeubergerLaw.com

THOMAS C. CRUMPLAR, ESQ. (Del. #942)
RAEANN WARNER, ESQ. (Del. # 4931)
JACOBS & CRUMPLAR, P.A.
750 Shipyard Drive
Wilmington, DE 19801
(302) 656-5445

Tom@JCDELaw.com
Raeann@JCDELaw.com

Dated: July 28, 2020 Attorneys for Appellants

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.

/s/ Stephen J. Neuberger
STEPHEN J. NEUBERGER, ESQ.

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 per the Court's Order dated July 22, 2020, contains no more than 10,000 words, to wit, no more than 9,991 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.

/s/ Stephen J. Neuberger
STEPHEN J. NEUBERGER, ESQ.

CERTIFICATE OF SERVICE

I, Stephen J. Neuberger, being a member of the Bar of this Court, do hereby certify that on July 28, 2020, I caused this **Brief** to be served electronically via CM/ECF on **All Counsel**.

/s/ Stephen J. Neuberger
STEPHEN J. NEUBERGER, ESQ.