No. _____

In The
Supreme Court of the United States

JOHN LOSCOMBE,

Petitioner,

v.

CITY OF SCRANTON; CITY OF SCRANTON, FIRE PENSION COMMISSION; FIREMEN'S RELIEF AND PENSION FUND COMMISSION; CITY OF SCRANTON COMPOSITE PENSION BOARD; and MAYOR CHRIS DOUGHERTY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a disabled retiree who holds political office can be stripped of his disability pension for simply serving the public in that capacity.

2. Whether the City of Scranton Section 99-80, which suspends a disabled retiree's pension, is unconstitutional since it violates a citizen's First Amendment right to participate in government by holding public office and violates the Equal Protection Clause since it restricts participation in city government for firefighters and police officers while allowing participation by non-uniformed city employees without stripping their pension benefits.

3. Whether the City of Scranton had to provide notice and an opportunity to be heard before, or at least after ceasing Petitioner's disability pension, as the decisions of the Fourth, Eighth, Ninth, and Tenth Circuits have held contrary to the Third Circuit decision in this matter.

4. Whether the City of Scranton violated Petitioner's substantive due process rights since it did not have a compelling reason to interfere with his right to participate in democracy and hold a political position.

PARTIES TO THE PROCEEDING

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The opinion of the Third Circuit, App., *infra*, App. 1-12, is available at *Loscombe v. City of Scranton*, 2015 U.S. App. LEXIS 1327. The District Court's memoranda and orders denying dismissal and granting summary judgment are unreported. App., *infra*, App. 13-33, App. 34-63, App. 64-92.

JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit affirming the District Court's order granting summary judgment finding section 88-90 constitutional was entered on January 28, 2015. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and the right of the people * * * to petition the Government for a redress of grievances.

The Fourteenth Amendment to the Constitution of the United States provides that

> All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

After 18 years of service, Petitioner, a former Fire Captain for the City of Scranton, was forced into disability retirement based on injuries sustained from a work-related incident when the truck ladder bucket he was operating hit a 12,000 volt power line, which melted the truck's tires. Petitioner received his disability pension benefits until the City of Scranton stripped it from him starting in or around February 2010, after he accepted the political position of Scranton City Councilman.

The Government did not show through evidence the purpose of Section 99-80. The City's 30(b)6 witness testified as follows:

> Q. Okay. So you've never spoken with any Scranton official on Section 99-80 in connection with why it was proposed?
>
> A. No, no. . . . .
>
> Q. Why did the City put that provision in there [99-80], do you know?

> A. **I – I – I cannot answer.** These where laws that were made many years ago. No that's the best I could do to tell you.

Section 99-80 a/k/a Section 24 of File of Council No. 14 of 1964 ("the Ordinance") provides as follows:

> When any fireman is pensioned and thereafter enters the service of the City in any capacity with compensation the pension of such person shall be suspended during his term of service. Upon termination of such compensated service the pension payments shall be resumed on request of the pensioner.

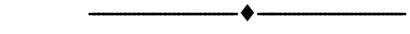
Scranton, Pa., Code of the City of Scranton Ch. 99, art. V, § 99-80.

Petitioner was receiving $22,000 a year in disability pension benefits when he was appointed to a seat on Scranton City Council on January 10, 2010. Shortly after assuming this position, the City of Scranton ceased payment of Petitioner's disability pension. Petitioner was not provided notice and an opportunity to be heard before his disability pension was stripped and the City of Scranton admits he had no right of appeal and provided no post-deprivation process.

Petitioner served as a City Councilman following his re-election to the position in November 2011, for which he received a yearly sum of $12,500. Unlike Petitioner, other retirees (non-uniform) are allowed to collect their pensions and serve public office. Only

police officers and firefighters (uniform) are precluded from holding public office and collecting a pension.

Petitioner filed a Complaint challenging the constitutionality of the enforcement of the Ordinance on several grounds, including that it violated his First Amendment right to access public office. On August 10, 2013, the District Court denied Respondents' motion to dismiss. On May 20, 2013, the District Court denied Petitioner's motion for partial summary judgment. On October 30, 2013, the District Court granted Respondents' motions for summary judgment on all remaining claims. Petitioner appealed the District Court's rulings to the Third Circuit, which affirmed the District Court. This appeal followed.



REASONS FOR GRANTING THE PETITION

I. This Petition meets the Court's standard of compelling reasons for review on a Writ of Certiorari

Petitioner respectfully requests that this Court accept review of his petition for writ of certiorari to the Third Circuit Court of Appeals. The holding of the District Court, which was affirmed by the Third Circuit, is contrary to this Court's precedent that finds participating in democracy by holding public office is a recognized right protected by the Constitution. Moreover, based on the lower court's opinion, there is a split among Circuits as to whether the right

of democracy includes running for public office. *United States v. Tonry*, 605 F.2d 144, 150 (5th Cir. 1979). Additionally, there is a split in the Circuits as to whether due process protections must be provided when a disability pension benefit is stopped with no right to recoup the lost monies. *Mallette v. Arlington County Emples. Supplemental Retirement Sys. II*, 91 F.3d 630 (4th Cir. 1996); *Johnson v. Mathews*, 539 F.2d 1111 (8th Cir. 1976); *Knudsom v. Ellensburg*, 832 F.2d 1142 (9th Cir. 1987); *Ryan v. Shea*, 525 F.2d 268 (10th Cir. 1975).

II. A fundamental right to participate in democracy by holding a political office exists

"There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: *They can run for office themselves . . .* " *McCutcheon v. Federal Elections Comm.*, 134 S. Ct. 1434 (2014) (emphasis added); *United States v. Tonry*, 605 F.2d 144, 150 (5th Cir. 1979) (noting "[t]here is no question that candidacy for office and participating in political activities are forms of expression protected by the first amendment."). Petitioner has a federally protected right to engage in political activity, including the right to run for public office. *Lippitt v. Cipollone*, 404 U.S. 1032, 1033 (1972). As such, Petitioner's ability to campaign and hold public office in the City of Scranton is a First Amendment right that is protected from government interference.

III. A disabled retiree should not be penalized with the stripping of his disability pension in order to hold political office

"The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office. . . . Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United v. Federal Elections Comm.*, 558 U.S. 310 (2010) (original citations omitted); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011). Here, Petitioner was stripped of his disability pension simply because he held a public office. He was not an employee of the City of Scranton nor did he receive any employee benefits. All that Petitioner received was a yearly stipend for holding public office.

"[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United v. Federal Elections Comm.*, 558 U.S. 310, 339 (2010). "Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others." *Id.*

IV. There is no legitimate interest in Section 99-80 when the government allows non-uniformed retirees to hold a political office and receive a pension while concluding city firefighters and police cannot

"Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. . . . Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.* (original citations omitted). Here, while the Petitioner cannot hold public office and continue to receive his disability pension, other former city retirees (who are not firemen or police officers) are allowed to collect their pension and hold public office. "The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each." *Id.* at 341. "Under-inclusiveness raises serious doubts about whether the government is in fact pursuing its interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2740 (2011).

Respondents did not prove any rationale for Section 99-80. Even if Respondents were able to claim "double dipping" was its purpose, it cannot legitimately be considered to outweigh the interests of both the public in having all qualified members of the

community have access to the political system, and that of disabled public safety pensioners, like Petitioner, in serving in a political role. *United States v. National Treasure Employees Union*, 513 U.S. 454, 468 (1995). Respondents failed to show that the prevention of "double dipping" is in and of itself a compelling governmental interest. In fact, the phrase "double dipping" (utilized by Respondents because of the negative connotation that those who "dip" into the public finances more than once are somehow cheating the system) contains no substance. This loaded phrase suggests, inaccurately, that Petitioner was seeking to be compensated twice for the same activity. In reality, Petitioner was only seeking to continue to receive his disability pension benefits while he held public office and receive the yearly stipend from being a City Councilman. The City would be paying the yearly stipend to whoever filled the position anyway even if Petitioner were replaced by a Councilman that did not have a City pension to forego.

Petitioner's disability pension is almost twice what he earned as a Councilman. For many in the Petitioner's position, if they are reliant on their disability pension payments, as Petitioner was, they will likely choose not to serve on the Council. If that occurs, and the position then goes to an individual who is not a disabled former public safety pensioner, the City is paying the same amount of money as it would have had it permitted the Petitioner to maintain both his pension and his Councilman stipend. Thus, the only meaningful difference that results

from the alleged prohibition on "double dipping" is that disabled former public safety pensioners are strongly discouraged from participating in local politics. Even nonpublic safety pensioners can "double dip" with impunity.

Respondents have interpreted Section 99-80 to mandate that Petitioner's disability pension payments cease during his term as Councilman. It in effect imposes a penalty only on people like the Petitioner, a disabled person and former public safety officer, requiring that he give his property to the City in exchange for the right to participate in local politics. Non-public safety pensioners are free to participate without this burden. As this Court ruled in *Citizens United v. Federal Elections Comm.,* government entities may not bar speech based on the identity of the speaker. *Citizens United v. Federal Elections Comm.,* 558 U.S. 310 (2010) (stating "Prohibited . . . are restrictions distinguishing among different speakers, allowing speech by some but not others . . . Speech restrictions based on the identity of the speaker are all too often simply a means to control content."). *Id.* at 340.

V. Narrowly tailored legislation did not require the stripping of Petitioner's pension, but rather could have been achieved by allowing Petitioner to choose between his disability pension or the yearly stipend for holding a political office

In *National Treasure Employees Union*, this Court addressed a challenge to a Congressional statute that prohibited federal employees from accepting any sort of compensation for speeches or articles regardless of whether or not such speech related to his or her official duties. *United States v. National Treasury Employees Union*, 513 U.S. 454, 457 (1995). This Court was particularly concerned with the fact that the compensation ban affected a wide range of individuals and chilled speech before it even occurred. *National Treasure Employees Union*, 513 U.S. at 468. As such, this Court held that the government's interest must outweigh the interests of both the speakers in question and the potential audience. *National Treasure Employees Union*, 513 U.S. at 468.

This Court continued its analysis by noting that the statute "neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their messages," but nonetheless concluded that it "imposes a significant burden on expressive activity." *Id.* This Court recognized that compensation "provides a significant incentive toward more expression," thus resulting in the conclusion that the statute forced federal employees to "curtail their expression if

they wish to continue working for the Government." *Id.* at 469.

This Court also recognized that the disincentive created by the compensation ban "also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said." *Id.* at 470. Because of the risk that the public could be deprived of significant speech, the Supreme Court held that the ban "imposes the kind of burden that abridges speech under the First Amendment." *Id.*

This Court even explained why the aforementioned Hatch Act differed from the current statute that was being analyzed. *Id.* at 470-71. The Hatch Act actually served to protect speech by ensuring that federal employees could perform their jobs without being forced to participate in a potentially corrupt political machine. *Id.* at 471. As such, this Court recognized that the Hatch Act actually protected the right to free expression more than it restricted the right. *Id.* In the end, this Court concluded that the ban on compensation significantly burdened the right to free expression. *Id.* Because an adequate interest had not been set forth to outweigh this lofty interest, the statute was struck down as a violation of the First Amendment. *Id.*

The facts of this case are highly similar to those in *National Treasure Employees Union*. Respondents contend that Section 99-80 applies to Petitioner and all other pensioned disabled public safety workers.

Consequently, those former disabled public safety workers are given the choice either to abstain from holding public office or to do so and forego their disability pensions during that service. Petitioner and other disabled pensioned former public safety officers are faced with the same dilemma as the petitioners in *National Treasure Employees Union*. Former disabled public safety officers who have worked a significant amount of years in service of the City of Scranton and who have contributed funds in one way or another to the pension plan are left with the decision of whether or not to forego this compensation in order to pursue a political office. The disincentive associated with losing a significant source of income burdens both Petitioner's right to hold office and the public's right to seek a representative voice on City Council from an entire class of citizens, the City's public safety officers. *Id.* at 469-70; *Tonry*, 605 F.2d at 150.

Unlike the Hatch Act, City of Scranton Code Section 99-80 does nothing to protect speech; rather it simply burdens the expression of a protected right. *Id.* at 471. The only justification for the ordinance set forth by the Respondents was the unproven claim of "double dipping." It is difficult to see how such alleged interests (which had not been proven) possibly could outweigh the fundamental right to participate in government and hold public office and the fundamental right of the people to be represented by an individual of their choosing. *Id.* at 468.

Here, Petitioner forfeits his disability pension and does not receive $22,000 because of the fact that

he holds a public office. Petitioner receives payment for holding the Councilman position in the amount of $12,500. Even if looking at his disability pension payment alone, Petitioner, who held political office, endures a loss of $9,500 yearly to hold public office. Consequently, the section of the ordinance penalizes Petitioner's speech in the tune of $9,500 each year he holds political office. Ultimately, City Code Section 99-80 serves to chill significant speech. *Id.* at 468. As such, the government's interest cannot outweigh the rights to this speech, and summary judgment should have been entered for the Petitioner.

Even if Section 99-80 is considered content-neutral, the unproven "double dipping" rationale fails to satisfy the lesser standard of intermediate scrutiny, where content-neutral regulation will be sustained if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2726 (2010). Assuming that the unproven interest in avoiding "double dipping" is a legitimate way to save the City money, it goes too far in its demand that people like the Petitioner sacrifice their disability pension, rather than the lesser of two "compensations." As mentioned above, the current paradigm is more akin to the City imposing a fee on Petitioner for the right to hold office.

"A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil'

it seeks to remedy," *Frisby v. Schultz*, 487 U.S. 474, 485 (1988), and "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Furthermore, this conclusion actually conflicts with the district court itself, which had previously suggested the exact opposite conclusion in its August 10, 2012 ruling, denying the Pension Board's motion to dismiss Petitioner's First Amendment claim on this very point. There, the very same court wrote:

> [t]o the extent the Pension Board Defendants' represent that the aim of the Ordinance is to prevent retired employees from "double dipping" by receiving two simultaneous income streams from the city, this rationale does not appear to be narrowly tailored. Specifically, as Loscombe avers that he is currently receiving less than he would be had he decided not to serve on the City Council, this would exceed the City's interest in preventing double dipping. And, such a "prohibition on compensation unquestionably imposes a significant burden on expressive activity." *United States v. Nat'l Treasury Employees Union,* 513 U.S. 454, 468 (1995). As such, Plaintiff's First Amendment claim freedom of association claim will be allowed to go forward.

Loscombe v. City of Scranton, 902 F.Supp.2d 532, 545 (M.D. Pa. 2012).

Assuming *arguendo* that the prohibition on "receiving two simultaneous payments from the City" is a significant governmental interest, the Ordinance here is plainly not narrowly tailored because its enforcement stops a retired fireman's disability pension regardless of the fact that payment for serving on City Council is relatively minimal. Here, Petitioner was not even given the opportunity to forego the smaller income stream (his Councilman's stipend) in favor of maintaining his larger disability pension benefit income, an option which would have served the City's interest in prohibiting "double dipping" equally well while not penalizing Petitioner for holding a public office by cutting his income almost in half, an obvious disincentive for similarly situated retirees considering exercising their First Amendment right to hold public office. In other words, because the application of the Ordinance in this instance resulted in Petitioner's income being reduced by almost half, rather than him simply forgoing the smaller payment due for holding a political office as Councilman, the effect of the Ordinance on Petitioner's First Amendment rights is clearly "substantially broader than necessary" to effectuate the goal of preventing "double dipping." *See Ward*, 491 U.S. 781, 800.

As this Court succinctly explained in *Ward*, the "essence of narrow tailoring" is legislation that is focused on the elimination of a legitimate evil "without at the same time banning or significantly restricting a substantial quantity of speech that does not

create the same evils." *Ward v. Rock against Racism*, 491 U.S. 781, 800 (1989). In addition to ensuring that a piece of legislation does not restrict speech unnecessarily, the First Amendment requires a content-neutral statute to "leave[ ] open ample alternative channels of communication." *Frisby v. Schultz*, 487 U.S. 474, 482 (1988). On this point, "it makes no difference whether the governmental action absolutely prohibits a certain category of speech or simply restricts it by imposing additional burdens on those who wish to engage in it." *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1127 n.16 (D.C. Cir. 1978).

In regard to the imposition of costs on the ability to run for office, courts traditionally have been hostile to any such limitations. *See, e.g., Bullock v. Carter*, 405 U.S. 134, 144 (1972) (noting court closely scrutinized election fees because of their impact on the right to vote). This Court in *Lubin* provided a perfect example of how such legislation fails to leave open ample alternative channels of communication. *Lubin v. Panish*, 415 U.S. 709 (1974). In *Lubin*, this Court addressed a statute that required an election filing fee in an effort to maintain manageable ballots that weeded out non-serious candidates. *Id.* at 710-713. As this Court noted, "the payment of a fee is an absolute, not an alternative, condition, and failure to meet it is a disqualification from running for office." *Id.* at 718. As such, the Court concluded that "California has chosen to achieve the important and legitimate interest of maintaining the integrity of elections by

means which can operate to exclude some potentially serious candidates from the ballot without providing them with any alternative means of coming before the voters." *Id.* at 718.

With such a measure providing two options, pay a fee or do not run for office, this Court held that the statute "is not reasonably necessary to the accomplishment of the State's legitimate election interests." *Id*. at 718. Accordingly, this Court held that "in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay." *Id*. at 718.

The disability pension suspension provides a textbook example of a section of an ordinance, or its application, that has "significantly restrict[ed] a substantial quantity of speech" that does not create the evils that are seeking to be eliminated by virtue of the ordinance. *Ward*, 491 U.S. at 800. While the claimed interest of the ordinance seeks to eliminate a double dipping, it simply is not achieving this goal when it suspends the pension of individuals who do not wish to receive any payment for their political service and are disabled.

In this case, Petitioner was entitled to a disability pension of $22,000 annually. By contrast, Petitioner was entitled to receive $12,500 annually while on the City of Scranton Council. In essence, in order to be a member of the Scranton City Council, the section of the ordinance in question requires Mr.

Loscombe to forfeit his entire disability pension and in fact, he now has a deficiency of $9,500 on a yearly basis. Such a requirement is nothing short of a fee to hold office that should be held to the same standard as the statute in *Lubin*.

Ultimately, the section of the ordinance fails both means of establishing narrow tailoring. First, it burdens speech that in no way relates to the alleged goal of eliminating double dipping into City funds. Second, it does not provide an alternative channel of communication for those who cannot afford to forfeit their disability pensions. As such, there should be no question that the ordinance, as written and/or applied, unconstitutionally burdens the freedom of association of Petitioner and all other similarly situated disabled individuals. Instead of burdening more speech than was necessary, the Government could have allowed Petitioner to accept either his disability pension or the yearly stipend for serving the public. Consequently, summary judgment should have been granted to the Petitioner.

VI. Due process is required before a disabled retiree's pension is ceased with no possibility of recovering pension funds and no appeal rights since Petitioner has a property interest in his disability pension

The district court erroneously concluded that Petitioner did not have a property interest in his disability pension benefits, thereby dismissing his

substantive and procedural due process claims. This Court has held otherwise. *Goldberg v. Kelly*, 397 U.S. 254 (1970). In *Goldberg*, this Court emphasized, "[t]he fundamental requisite of due process of law is the opportunity to be heard. The [23] hearing must be at a meaningful time and in a meaningful manner. In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases." *Goldberg v. Kelly*, 397 U.S. 254 (1970) (original citations omitted). "When a state agency has finally ruled that an individual qualifies to receive a benefit, the benefit may not be terminated without due process." *Roberson v. Pinnacol Assurance*, 98 Fed. Appx. 778 (10th Cir. 2004).

There is no doubt under state law disability retirement pensions are protected. Petitioner's disability retirement pension and the payments of that pension are his property. *See Hickey v. Pension Bd. of City of Pittsburgh*, 378 Pa. 300, 304 (Pa. 1954); *Olsen v. State Emps.' Ret. Bd.,* 688 A.2d 255, 257 (Pa. Commw. 1997) (holding that the State Employees' Retirement Board "must understand that the retirement benefits it administers are property rights");

Cherillo v. Ret. Bd. of Allegheny Cnty., 796 A.2d 420, 421 (Pa. Commw. 2002) (determining that the County Code granting a retiree disability retirement benefits "establishes a property right entitling [plaintiff] to a hearing"). Petitioner will never be able to recover the lost disability pension benefits since Respondents will only allow Petitioner to "restart" his disability pension benefits when he no longer serves on City Council.

In Pennsylvania, courts recognize that pension benefits paid because of the pensioner's disability are of a fundamentally different character than pension benefits paid upon the pensioner reaching a predetermined retirement age. *Ciliberti v. Ciliberti*, 542 A.2d 580 (Pa. Super. 1988). In *Ciliberti*, the Superior Court determined that unlike "retirement pension benefits," "true disability benefits" paid from a public pension plan are not marital property subject to equitable distribution in a divorce proceeding. *Ciliberti*, 542 A.2d at 582. The *Ciliberti* court observed that the purpose of disability benefits is different from that of retirement benefits:

> . . . Disability benefits may also serve to compensate the disabled person for personal suffering caused by the disability. Finally, disability benefits may serve to replace a retirement pension by providing support for the disabled worker and his family after he leaves the job. . . . We decline to hold that true disability payments are marital property subject to equitable distribution. Such benefits are intended to compensate the employee spouse for lost earning capacity. They

> are paid in lieu of the earnings which would have been paid to the employee if he or she had been able to work. They replace the future salary or wages which the employee, because of physical or *mental disability*, will not be able to earn. They are comparable to Workmen's Compensation disability payments. Post-divorce payments intended to compensate for an inability to work are not marital property.

Id.

Contrary to the holding of the Third Circuit in this case, other Circuits have found that disability benefits are a protected property interest. *Mallette v. Arlington County Emples. Supplemental Retirement Sys. II*, 91 F.3d 630 (4th Cir. 1996); *Knudsom v. Ellensburg*, 832 F.2d 1142 (9th Cir. 1987); *Johnson v. Mathews*, 539 F.2d 1111 (8th Cir. 1976); *Ryan v. Shea*, 525 F.2d 268 (10th Cir. 1975). As the *Mallette* Court reasoned:

> [t]he statutory claim of entitlement in this case is bolstered by the nature of the benefit at state. The right to payment of disability retirement benefits arises by virtue of past labor services and past contributions to a disability fund. Member employees, who contribute their earnings to the system, reasonably expect that accrued benefits will be waiting if they need them and qualify for them. As a member of the class of persons the Retirement System was intended to protect and benefit, Mallette has more than an

> abstract desire for the benefits. If she can make a prima facie case for eligibility, she has a property interest in those benefits and an accompanying right to be heard.

Mallette, 91 F.3d at 635.

Here, Petitioner received his disability pension payments until February 2010, when he accepted a political position on City Council. Since Loscombe was receiving his disability pension benefits, there is no doubt that he was legally entitled to his disability pension benefits. Consequently, Petitioner had stated a claim for due process since his disability pension benefits were his property; and the lower courts erred in concluding otherwise.

The district court held that " . . . Loscombe was denied due process because he was not afforded notice or opportunity to be heard before his pension was suspended, I do not find that such process was required." Petitioner had no state appeal options, which Respondents admit. Moreover, Petitioner disputed that the City interpreted Section 99-80 correctly since at the time when his disability pension benefits were stripped from him he was not an active fireman as defined by the Fire Pension Plan, which would have disqualified him from the City's application of Section 99-80. Therefore, a pre-deprivation hearing would have provided Loscombe with an opportunity to point out the fact that Petitioner did not re-enter employment with the City since he was fulfilling a political position and not a "fireman" as defined by

the Ordinance. Consequently, since Petitioner was not provided any due process, pre or post, he stated a claim for a procedural due process claim and the lower courts erred when it determined that Petitioner was not entitled to pre and post due process concerning the stripping of his disability pension benefits, which he could never recoup and admittedly could not appeal.

VII. Petitioner stated a substantive due process claim since Respondents' stripping of his disability pension benefits interfered with his fundamental right to participate in government by holding political office

This Court has held that, " . . . the *Fourteenth Amendment* 'forbids the government to infringe . . . "fundamental" liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'" *Wash. v. Glucksberg*, 521 U.S. 702 (1997). "The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.* Here, Petitioner had a fundamental right to participate in democracy by holding a public office, and the Respondents penalized him with the stripping of his disability pension benefit when he chose to hold public office for no compelling state interest. Regardless of who held the position as Councilman, Respondents would have to pay that individual the sum of $12,500. Consequently,

the lower courts erred in concluding that Petitioner had no fundamental right to participate in democracy and hold public office.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for oral argument or, in the alternative, the petition for a writ of certiorari should be granted, the decision below vacated, and the case remanded for proceedings consistent with a per curiam opinion holding that a fundamental right to participate in democracy by holding a political office exists and there is no legitimate government interest in suspending a disabled retiree's pension since other non-disabled, non-uniform former employees are allowed to participate in government without restriction and due process must be provided in connection with the stripping of Petitioner's disability pension.

Respectfully submitted,

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April 2015

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-4579

JOHN LOSCOMBE,

Appellant

v.

CITY OF SCRANTON; CITY OF SCRANTON, FIRE PENSION COMMISSION; FIREMEN'S RELIEF AND PENSION FUND COMMISSION; CITY OF SCRANTON COMPOSITE PENSION BOARD; MAYOR CHRIS DOUGHERTY

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 3-10-cv-01182)
District Judge: Honorable A. Richard Caputo

Submitted Pursuant to Third Circuit LAR 34.1(a)
December 9, 2014

BEFORE: VANASKIE, COWEN AND
VAN ANTWERPEN, Circuit Judges

(Filed: January 28, 2015)

OPINION*

COWEN, Circuit Judge.

The plaintiff-appellant, John Loscombe ("Appellant"), appeals the District Court's orders dismissing several of his claims and granting summary judgment on his remaining claims. We will affirm.

I.

Because we write solely for the parties, we will only set forth the facts necessary to inform our analysis.

Defendants-Appellees in this case fall into two categories. First, the City of Scranton (the "City") and Mayor Chris Doherty (together, the "City Defendants") and second, the City of Scranton Firemen's Pension Commission, the Firemen's Relief and Pension Fund Commission, and the City of Scranton Composite Pension Board (collectively, the "Pension Board Defendants" and together with the City Defendants ("Appellees")).

Appellant was a Fire Captain for the City of Scranton (the "City") until he was forced to retire due

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

to injuries he sustained in a work-related accident. For his service, he received a disability retirement pension from the City's Fire Department. Following his retirement from the City's Fire Department, Appellant accepted an offer to serve as a member of the Scranton City Council. Because Appellant was serving as a City Council member, the City Defendants directed the Pension Board Defendants to suspend his pension, which they did. Although not explicit in Appellant's third amended complaint, all parties appear to agree that his pension was suspended pursuant to a city ordinance, Section 99-80 a/k/a Section 24 of File of Council No. 14 of 1964 (the "Ordinance"). The Ordinance provides that:

> When any fireman is pensioned and thereafter enters the service of the City in any capacity with compensation the pension of such person shall be suspended during his term of service. Upon termination of such compensated service the pension payments shall be resumed on request of the pensioner.

Scranton, Pa., Code of the City of Scranton, ch. 99, art. V, § 99-80 (1997).

Appellant raised a series of constitutional claims challenging the Ordinance and the suspension of his pension benefits. In orders dated August 10, 2012 and May 20, 2013, the District Court dismissed several of these claims, while allowing others to proceed. In a subsequent order of October 20, 2013, the District Court granted summary judgment to Appellees on all

of the remaining claims. Appellant now seeks review of these orders.

II.

We have jurisdiction under 28 U.S.C. § 1291. "We review district court decisions regarding both summary judgment and dismissal for failure to state a claim under the same de novo standard of review." *Barefoot Architect, Inc. v. Bunge,* 632 F.3d 822, 826 (3d Cir. 2011). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (internal quotation marks omitted). Summary judgment is proper where, viewing the evidence in the light most favorable to the nonmoving party and drawing all inferences in favor of that party, there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Kaucher v. Cnty. of Bucks,* 455 F.3d 418, 422-23 (3d Cir. 2006). We may affirm on any basis supported by the record. *Fairview Twp. v. EPA,* 773 F.2d 517, 525 n.15 (3d Cir. 1985).

A. Fourteenth Amendment Equal Protection Claim

At the outset, we find Appellant's argument that the Ordinance does not apply to him to be wholly without merit. There is no exception in the Ordinance for individuals who hold political positions. Nor is it relevant whether Appellant is an employee of the

City. The Ordinance merely requires that an individual be a "fireman [who] is pensioned" and that he "thereafter enters the service of the City in any capacity." Scranton, Pa., Code of the City of Scranton, ch. 99, art. V, § 99-80 (1997). Neither fact can seriously be disputed.

Appellant argues that the Ordinance is nonetheless invalid under the Fourteenth Amendment's Equal Protection Clause. He claims that the Ordinance should be subject to heightened scrutiny because it impermissibly interferes both with his right to run for office and with the voters' rights. However, "[t]he right to run for office has not been deemed a fundamental right," *Biener v. Calio,* 361 F.3d 206, 215 (3d Cir. 2004) (citing *Bullock v. Carter,* 405 U.S. 134, 142-43 (1972)), and Appellant "cannot establish an infringement on the fundamental right to vote, because voter's rights are not infringed where a candidate chooses not to run because he is unwilling to comply with reasonable state requirements." *Id.* (internal quotation marks and citation omitted).

Rather, economic legislation, such as the Ordinance, will be upheld it if bears a rational relation to a legitimate state objective. *Schweiker v. Wilson*, 450 U.S. 221, 238 (1981). Here, the Ordinance furthers the legitimate public purpose of preventing "double dipping" by suspending the pension benefits of retired City firemen who are also receiving active employment benefits from the City. *See Connolly v. McCall,* 254 F.3d 36, 42-43 (2d Cir. 2001) (concluding that the disparity of treatment in New York State's pension

law was a reflection of the state's legitimate interest in protecting the public fisc and "saving money by barring pension practices that have the character of 'double-dipping'" and therefore did not violate the equal protection clause). The Ordinance, therefore, does not violate the Equal Protection Clause.

B. First Amendment Claims

Appellant also asserts that the Ordinance violates his First Amendment rights. To the extent Appellant's argument is based on a fundamental right to run for office, we have already rejected that premise. But Appellant additionally argues that by limiting his ability to run for office, the Ordinance impermissibly infringes on his First Amendment freedom of association.

As an initial matter, the District Court properly concluded that the Ordinance is content neutral. "When determining whether a statute is content neutral, a principal consideration is whether the government has adopted a regulation of speech because of disagreement with the message it conveys, or instead, adopted that regulation for some other purpose collateral to the protected speech." *Free Speech Coal., Inc. v. Attorney Gen. of U.S.,* 677 F.3d 519, 533 (3d Cir. 2012) (internal quotation marks and citation omitted). "In other words, the government's purpose is the controlling consideration, and a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental

effect on some speakers or messages but not others." *Id.* (internal quotation marks and citation omitted). Notwithstanding Appellant's arguments to the contrary, as the District Court correctly noted, there is "no suggestion in the Ordinance itself or in the [amended complaint] that this law was in any way crafted with an eye towards suppressing speech or association." *Loscombe*, 902 F. Supp. 2d at 544.

Despite being content neutral, Appellant asserts that the Ordinance should be found to violate his First Amendment rights. More specifically, he argues that the Ordinance does not advance any significant state interest and that, even if it does, it is not narrowly tailored to serve that interest. To be narrowly tailored, a regulation "'need not be the least restrictive or least intrusive means of' furthering the identified interest." *Johnson v. City and Cnty. of Phila.*, 665 F.3d 486, 491 (3d Cir. 2011) (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 798 (1989)). Rather, it must simply "'promote[ ] a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* (quoting *Ward*, 491 U.S. at 799).

The Ordinance meets this standard. The Supreme Court has suggested that states retain an important interest in protecting the public fisc. *See Brock v. Pierce County.*, 476 U.S. 253, 262 (1986) (noting that state has an interest in protecting the public fisc and that its "protection . . . is a matter that is of interest to every citizen"); *see also C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 429 (1994) (Souter, J., dissenting) (disagreeing with the

majority's invalidation of a state ordinance on the grounds that it violated the Commerce Clause, in part, because "[p]rotection of the public fisc is a legitimate local benefit directly advanced by the ordinance and quite unlike the generalized advantage to local businesses that we have condemned as protectionist in the past."). And, as the District Court concluded, the aim of preventing "double dipping" would be less effectively achieved in the absence of the Ordinance because individuals like Appellant would be able to simultaneously collect a pension from the City as well as a salary.

Persevering, Appellant argues that the Ordinance is unconstitutionally underinclusive and overinclusive. He argues that the Ordinance is underinclusive because it singles out disabled public safety pensioners. But as Appellant concedes in discussing why the Ordinance is overinclusive, the Ordinance does not distinguish between those receiving disability benefits from those receiving any other kind of public pension.

Nor is the Ordinance overinclusive. Appellant argues that the Ordinance is constitutionally infirm because it does not distinguish between those receiving traditional retirement benefits and those receiving disability benefits. But the statute's aim of guarding against double dipping is achieved by including all pensioned firemen, regardless of the type of pension a particular fireman may be receiving. *Cf. Doe v. Pa. Bd. of Probation and Parole,* 513 F.3d 95, 117-18 (3d Cir. 2008) (quoting *Vance v. Bradley,* 440

U.S. 93, 108 (1979)) ("'[E]ven if the classification involved . . . is to some extent both underinclusive and overinclusive, and hence the line drawn by [the legislature] imperfect, it is nevertheless the rule that . . . perfection is by no means required.'") (all alterations but the first in original). The District Court's orders will therefore be affirmed in this regard.

C. Fourteenth Amendment Due Process Claims

Appellant raises both substantive and procedural due process claims. Although, as an initial matter, we will assume, *arguendo,* that Appellant has a property right in his disability pension benefits, the District Court correctly dismissed both of these claims.

As to the substantive due process claim, we note that different standards govern depending on whether an individual challenges a legislative act or a non-legislative state action. *Compare Am. Express Travel Related Services, Inc. v. Sidamon-Eristoff,* 669 F.3d 359, 366 (3d Cir. 2012) ("In a case challenging a legislative act . . . the act must withstand rational basis review."), *with Evans v. Sec'y Pa. Dep't of Corr.,* 645 F.3d 650, 660-62 (3d Cir. 2011) (applying a "shock the contemporary conscience" test because the challenged conduct was non-legislative action).

In dismissing the claim, the District Court appropriately concluded that Appellant's claim involved non-legislative action and found it "not patently shocking that a city would suspend a worker's pension while they are receiving another stream of income from that

city." *Loscombe v. City of Scranton*, 902 F. Supp. 2d 532, 542 (M.D. Pa. 2012). Nonetheless, even if we were to assume that Appellant's claim challenged a legislative act, for the reason expressed by the District Court, it would likewise fail rational basis review.

Nor can Appellant establish that his procedural due process rights have been violated because he was not provided with a pre-suspension hearing. We have concluded on prior occasions that "a pre-termination hearing was not required when there was no underlying factual dispute to be hashed out in the hearing." *Alvin v. Suzuki,* 227 F.3d 107, 121 (3d Cir. 2000) (citing *Codd v. Velger,* 429 U.S. 624, 627-28 (1977)). Given that the suspension of Appellant's pension was based on the Appellees' statutory reading and there was no factual dispute to resolve, Appellant cannot demonstrate a violation of his procedural due process rights due to a lack of a hearing.[1] Moreover, to the extent Appellant argues that he was not afforded any post-suspension process, this claim is belied by the record. (*See* App. 526-27 (noting that Appellant could have appeared before the Composite Board to argue

[1] On appeal, Appellant attempts to raise factual issues regarding the applicability of the Ordinance to him that he argues necessitated a hearing. However, Appellant's own opening brief more appropriately characterizes these "facts" as disagreements with the City's interpretation of the statute. Thus, the District Court, relying on Appellant's amended complaint, properly concluded that "additional factfinding was not needed to determine that [Appellant] fell within [the Ordinance's] purview." *Loscombe,* 902 F. Supp. 2d at 543.

that there had been a substantial change or for reconsideration of his suspension).) We accordingly conclude that the District Court properly dismissed the due process claims.

D. Fifth Amendment Claims

We are not persuaded by Appellant's assertion that the Ordinance is unconstitutionally vague. Although it does not define the term "service," that term has a "plain and ordinary meaning that does not need further technical explanation." *United States v. Tykarsky,* 446 F.3d 458, 473 (3d Cir. 2006). Moreover, the Ordinance specifies that it is service to the City "in any capacity," which we conclude provides a person of ordinary intelligence with adequate notice of the conduct at issue. Accordingly, the District Court correctly dismissed this claim.

Appellant's "takings claim" meets a similar fate. The Fifth Amendment Takings Clause "proscribes the taking of private property for public use, without just compensation." U.S. Const. amend. V; *see also Cowell v. Palmer Twp.,* 263 F.3d 286, 290 (3d Cir. 2001). However, notwithstanding that Appellant's third amended complaint alleged that Appellees seized his disability pension, used it for their own purposes, and did so without just compensation, as the District Court noted, he adduced no evidence and provided no substantive explanation for these allegations. We therefore conclude, as did the District Court, that summary judgment on this claim was appropriate.

III.

In light of the foregoing, the orders of the District Court entered on August 10, 2012, May 20, 2013, and October 30, 2013, will be affirmed.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN LOSCOMBE, Plaintiffs, v. CITY OF SCRANTON, et al., Defendants.	CIVIL ACTION NO. 3:10-CV-1182 (JUDGE CAPUTO)

MEMORANDUM

(Filed Oct. 30, 2013)

Presently before the Court are Motions for Summary Judgment on behalf of Defendant City of Scranton (Doc. 130) and Defendants City of Scranton Firemen's Pension Commission, Firemen's Relief and Pension Fund Commission, and City of Scranton Composite Pension Board (collectively, "Pension Board Defendants") (Doc. 135). Because there are no genuine issues of material fact in this case and both Defendants are entitled to judgment as a matter of law on each of the remaining claims, the Court will grant both Defendants' Motions for Summary Judgment.

FACTUAL BACKGROUND

This case arises out of suspension of the pension benefits of retired fireman John Loscombe ("Plaintiff"). Plaintiff's date of retirement was May 10, 2011,

and he began receiving his bi-monthly pension check on August 15, 2011. (Doc. 65, Ex. 4.) At the time he retired, Plaintiff was a Fire Captain. *Id.* Plaintiff's pension was calculated based on 50% of his total salary, amounting to payments of $887.73 every two weeks. *Id.* The classification of the "type of benefit" Plaintiff received was "service disability." *Id.* Plaintiff was appointed to the City Council of Scranton on January 12, 2010. (Doc. 65, Ex. 5.) At the time of his appointment, Plaintiff was still receiving his bi-monthly pension. *Id.* Plaintiff receives $12,500 annually in compensation from the City of Scranton as a City Councilperson. (Loscombe Tr. 60:10-12, Mar. 6, 2012, Doc. 107, Ex. 5.) On January 27, 2010, the Fireman's Pension Commission voted in favor of suspending Plaintiff's pension because he received compensation in his appointment to City Council. (Doc. 65, Ex. 8.) This was in accordance with § 99-80 of the City Code of Scranton ("the Ordinance"), which in relevant part, provides:

> When any fireman is pensioned and thereafter enters the service of the City in any capacity with compensation the pension of such person shall be suspended during his term of service. Upon termination of such compensated service the pension payments shall be resumed on request of the pensioner.

Scranton, Pa., Code of the City of Scranton ch. 99, art. V, § 99-80 (1997). On February 2, 2010, Brian Scott, Secretary of the Firemen's Pension Commission, wrote a letter to Plaintiff advising him that his

pension had been suspended and requesting a refund of the January 28, 2010 pension payment which already been direct deposited. (Doc. 65, Ex. 10.) When Plaintiff's appointed term as City Councilperson expired, he ran for City Councilperson in the May 2011 primary and the November 2011 general election. (Loscombe Tr. 16:12-25, Mar. 6, 2012, Doc. 107, Ex. 5.) Plaintiff was elected for and is currently serving a four-year term as City Councilperson. *Id.* Like Plaintiff, the pension of retired fireman Thomas Davis, who was appointed to Superintendent of Fire of the Scranton Fire Department, remains frozen until he no longer serves in this position. (Doc. 65, Ex. 12.)

PROCEDURAL HISTORY

Plaintiff filed his initial Complaint (Doc. 1) on June 3, 2010 against Defendant City of Scranton. On February 17, 2012 the Court granted Plaintiff's Motion for Leave to File Second Amended Complaint (Doc. 21). Plaintiff filed his Second Amended Complaint (Doc. 29) on February 17, 2012, adding the City of Scranton Firemen's Pension Commission, Firemen's Relief and Pension Fund Commission, and Composite Pension Board, ("Pension Board Defendants") and Mayor Chris Doherty in his official and individual capacity as Defendants. On August 10, 2012, the Court issued a Memorandum and Order (Doc. 95) addressing Motions to Dismiss Plaintiff's Second Amended Complaint (Doc. 29) filed by Defendants City of Scranton and Mayor Chris Doherty

(Doc. 34) and the Pension Board Defendants (Doc. 39). The Court dismissed all claims against Defendant Doherty as well as Plaintiff's First Amendment retaliation claim (Count I) and unlawful seizure and taking claim (Count IV) without prejudice, but granted Plaintiff leave to amend those claims. It also dismissed Plaintiff's substantive and procedural due process claims (Count II), First Amendment free speech (Count III), and Fifth Amendment vagueness claims (Count III) with prejudice. His First Amendment claims for freedom of association and overbreadth, Fifth Amendment takings claim, and Fourteenth Amendment Equal Protection claims were allowed to proceed. *Loscombe v. City of Scranton,* 902 F.Supp.2d 532, 548 (M.D.Pa.2012). Plaintiff filed his Third Amended Complaint in this § 1983 action on August 29, 2012. (Doc. 97.) On September 14, 2012, Defendants City of Scranton and Mayor Chris Doherty filed a Motion to Dismiss (Doc. 99), and the Pension Board Defendants did likewise on September 17, 2012 (Doc. 102). Plaintiff moved for partial summary judgment on September 19, 2012. (Doc. 105.) In its May 20, 2013 Memorandum and Order, the Court granted in part and denied in part Defendants City of Scranton and Mayor Chris Doherty's Motion to Dismiss (Doc. 99) and the Pension Board Defendants Motion to Dismiss (Doc. 102). Defendant Doherty was dismissed from the action in his individual and official capacities. Court I, the First Amendment retaliation claim, and Count IV, the unlawful seizure and taking claim of Plaintiff's Third Amended Complaint were dismissed with prejudice. Plaintiff's

Motion for Partial Summary Judgment (Doc. 105) was denied. *Loscombe v. City of Scranton,* No. 3:10-CV-1182, 2013 WL 2177768, at *13 (M.D. Pa. May 20, 2013). The City of Scranton and Pension Board Defendants have moved for summary judgment on the remaining claims in the action: Plaintiff's First Amendment freedom of association and overbreadth claims, Fourteenth Amendment Equal Protection claim, and Fifth Amendment takings clause claim. These motions have been fully briefed and are thus ripe for review.

LEGAL STANDARD

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Wright v. Corning,* 679 F.3d 101, 103 (3d Cir. 2012) (quoting *Orsatti v. N.J. State Police,* 71 F.3d 480, 482 (3d Cir. 1995)). A fact is material if proof of its existence or nonexistence might affect the outcome of the suit under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

Where there is no material fact in dispute, the moving party need only establish that it is entitled to judgment as a matter of law. *See Edelman v. Comm'r of Soc. Sec.,* 83 F.3d 68, 70 (3d Cir. 1996). However, where there is a disputed issue of material fact, summary judgment is appropriate only if the factual dispute is not a genuine one. *Anderson,* 477 U.S. at 248. An issue of material fact is genuine if "a reasonable jury could return a verdict for the nonmoving party." *Id.* Where there is a material fact in dispute, the moving party has the initial burden of proving that: (1) there is no genuine issue of material fact and (2) the moving party is entitled to judgment as a matter of law. *See* 2D Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2727 (2d ed.1983). The moving party may present its own evidence or, where the nonmoving party has the burden of proof, simply point out to the court that "the non-moving party has failed to make a sufficient showing on an essential element of her case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

"When considering whether there exist genuine issues of material fact, the court is required to examine the evidence of record in the light most favorable to the party opposing summary judgment, and resolve all reasonable inferences in that party's favor." *Wishkin v. Potter,* 476 F.3d 180, 184 (3d Cir. 2007). Once the moving party has satisfied its initial burden, the burden shifts to the non-moving party to either present affirmative evidence supporting its version of the material facts or to refute the moving

party's contention that the facts entitle it to judgment as a matter of law. *Anderson,* 477 U.S. at 256-57. The Court need not accept mere conclusory allegations, whether they are made in the complaint or a sworn statement. *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 888 (1990).

"To prevail on a motion for summary judgment, the non-moving party must show specific facts such that a reasonable jury could find in that party's favor, thereby establishing a genuine issue of fact for trial." *Galli v. N.J. Meadowlands Comm'n,* 490 F.3d 265, 270 (3d Cir. 2007) (citing Fed. R. Civ. P. 56(e)). "While the evidence that the non-moving party presents may be either direct or circumstantial, and need not be as great as a preponderance, the evidence must be more than a scintilla." *Id.* (quoting *Hugh v. Butler Cnty. Family YMCA,* 418 F.3d 265, 267 (3d Cir. 2005)). In deciding a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson,* 477 U.S. at 249.

ANALYSIS

As an initial matter, Defendant City of Scranton argues that "Plaintiff has not identified any unconstitutional action by the City of Scranton in this case" or that the "City of Scranton itself committed any alleged deprivation under color of state law as required to sustain a cause of action under § 1983." (Doc. 140,

15.) Pension Board Defendants make a similar argument that to the extent Plaintiff's claims rest on the constitutionality of the Ordinance, Plaintiff "neglects the very important fact that the Pension Boards had no involvement in the proposal or enactment of this ordinance." (Doc. 143, 7.) Despite these contentions, assuming that both the City of Scranton and the Pension Board Defendants are properly before the Court in this action, summary judgment will be granted in their favor on each of the claims remaining in this case, analyzed below.

I. Freedom of Association Claim (Count III)[1]

Plaintiff's Third Amended Complaint avers that "every retired public safety officer . . . has a constitutional right to hold a political office. . . ." (Doc. 97 at ¶ 1.) None of the parties contest that Plaintiff and other retired firemen have a right to associate with and serve as members of the City Council. Expressive association "recognize[s] a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion."

[1] Pension Board Defendants allege that this claim is not applicable to them, as they are "not responsible for the contents or procedural enactment" of the Ordinance and that "they are simply bound to adhere to [it]" once it was made law. (Doc. 143, 7.) The Court agrees with this contention but continues to address the merits of Plaintiff's freedom of association claim below, and will grant summary judgment in favor of both Defendants on this issue.

Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984). As such, "[a] social group is not protected unless it engages in expressive activity such as taking a stance on an issue of public, political, social, or cultural importance." *Schultz v. Wilson,* 304 F. App'x 116, 120 (3d Cir. 2008) (internal citations omitted).

As the Court has previously explained, "[a]s in the area of freedom of expression, an individual's right of association may be limited by valid, content-neutral time, place and manner restrictions enacted by the state." *Tacynec v. City of Phila.,* 687 F.2d 793, 799 (3d Cir. 1982) (citation omitted); *Grace United Methodist Church v. City Of Cheyenne,* 451 F.3d 643, 658 (10th Cir. 2006) (applying same standard for content-neutral speech to association); *Emergency Coal. To Defend Educ. Travel v. U.S. Dept. of Treasury,* 498 F. Supp. 2d 150, 161 (D.D.C. 2007), *aff'd,* 545 F.3d 4 (D.C. Cir. 2008) (same). "Under the Fourteenth Amendment, city ordinances are within the scope of [the First Amendment's] limitation on governmental authority." *Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 792 n.2 (1984).

The Court previously determined that the Ordinance at issue here is content-neutral. *Loscombe v. City of Scranton,* 902 F. Supp. 2d 532, 544 (M.D. Pa. 2012). As such, the Court concluded that the Ordinance does "not offend the First Amendment as long as the restrictions (1) are narrowly tailored to serve a significant governmental interest; and (2) leave open ample alternative channels for communication of the information." *Johnson v. City and Cnty. of Phila.,* 665

F.3d 486, 491 (3d Cir. 2011) (internal quotations omitted). Applied to the right of association, this requires that the Ordinance does not "burden any more speech or associational rights than necessary" in furthering the City's substantial interest. *Grace United,* 451 F.3d at 658. To be narrowly tailored, "a regulation 'need not be the least restrictive or least intrusive means of' furthering the identified interest. 'Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'' " *Johnson,* 665 F.3d at 492 (internal citations omitted).

As the Court previously noted, both the City of Scranton and the Pension Board Defendants represent that the aim of the Ordinance, which was enacted in 1964, is to prevent retired City firemen who subsequently become compensated City employees from receiving two simultaneous income streams from the City. (Doc. 43, 4-5; Doc. 104, 12.) The Court found that preventing retired City firemen from "double dipping" and conserving City pension funds is a significant governmental interest. *See Loscombe,* 2013 WL 2177768, at *11. Although Plaintiff argues that "there is no way summary judgment could be granted [for Defendants] since the Defendant[s have] not shown evidence (and not lawyer argument) that the purpose of Section 99-88 was 'double dipping,' " (Doc. 145, 4; Doc. 148, 4), the Court disagrees. As the Supreme Court has stated, "[t]he First Amendment does not require a city, before enacting such an ordinance, to

conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 51-52, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986). The Court maintains its holding that the Ordinance serves a substantial government interest.

The Court also found that the Ordinance was narrowly tailored to the promotion of this interest and does not burden more speech or associational rights than necessary. *Id.* The Supreme Court has explained that "a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial government interest." *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 435, 438, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002) (internal citations omitted). Without the Ordinance, retired public safety officers serving the City in a compensated position, such as Plaintiff, would receive two streams of income from the City. Therefore, the Ordinance is narrowly tailored to the substantial government interest in preventing compensated retired public safety officers from receiving two simultaneous payments from the City, since without the Ordinance, this objective would be achieved less effectively.

With respect to the second part of the test, whether the Ordinance leaves open ample alternative channels for communication of the information, the Court previously stated that Plaintiff had failed to

shown that the Ordinance "does not leave open ample channels" for communication. *Loscombe,* 2013 WL 2177768, at *11. In evaluating whether an ordinance satisfies this test, "a speaker is not entitled to his or her favored or most cost-effective mode of communication. . . . He or she must simply be afforded the opportunity to 'reach the 'intended audience.'" *Johnson,* 665 F.3d at 494. Plaintiff has not presented any evidence to suggest that he has been prevented from engaging in communication that reaches his intended audience, or that alternative channels for communicating with others have been hampered. Therefore, the Ordinance appears to leave open alternative channels for communicating the information. Since the Ordinance satisfies both parts of the test, summary judgment will be granted for Defendants on Plaintiff's First Amendment freedom of association claim.

II. Overbreadth Claim (Count III)[2]

As the Court noted earlier, the First Amendment overbreadth doctrine provides that:

> A regulation of speech may be struck down on its face if its prohibitions are sufficiently

[2] Pension Board Defendants allege that this claim is not applicable to them. *See* n. 2. As with Plaintiff's freedom of association claim, the Court agrees with this contention but continues to address the merits of Plaintiff's overbreadth claim below and will grant summary judgment in favor of both Defendants on this issue.

> overbroad – that is, if it reaches too much expression that is protected by the Constitution. [A] policy can be found unconstitutionally overbroad if "there is a 'likelihood that the statute's very existence will inhibit free expression'" to a substantial extent.

Sypniewski v. Warren Hills Reg'l Bd. Of Educ., 307 F.3d 243, 258 (3d Cir. 2002)). "[C]ourts will not strike down a regulation as overbroad unless the overbreadth is 'substantial in relation to the [regulation]'s plainly legitimate sweep.'" *Id.* at 259 (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973)). In addition, courts have "vigorously enforced the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep" in an attempt to "strike a balance between competing social costs." *United States v. Williams,* 553 U.S. 285, 292 (2008). "On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech. . . . On the other hand, invalidating a law that in some of its applications is perfectly constitutional . . . has obvious harmful effects." *Id.* Furthermore, "the overbreadth doctrine is not casually employed. Because of the wide-reaching effects of striking down a statute on its face . . . [courts] have recognized that the overbreadth doctrine is strong medicine and have employed it with hesitation, and then only as a last resort." *Los Angeles Police Dep't v. United Reporting Publ'g Corp.,* 528 U.S. 32, 39 (1999) (internal quotation marks omitted).

In analyzing whether a given statute or ordinance is overbroad, "[t]he first step . . . is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Williams,* 553 U.S. at 293. The next step is to determine whether the statute, as construed, penalizes "a substantial amount of protected expressive activity." *Id.* at 297. However, "[b]efore striking down a policy as overbroad, we must determine whether there is any reasonable limiting construction . . . that would render [it] constitutional." *McCauley v. Univ. of the V.I.,* 618 F.3d 232, 242 (3d Cir. 2010) (internal quotations omitted). "Every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Sypniewski,* 307 F.3d at 259 (internal quotations omitted).

As the Court has already noted, by the terms of the Ordinance at issue here, a pensioned City fireman who obtains any compensated position with the City will have his pension suspended for as long as he remains in the new position. The applicability of the Ordinance is not limited to certain City positions or departments.

Having completed the first step of the inquiry, the Court determined that Plaintiff had failed to show that the Ordinance penalizes a substantial amount of protected expressive activity. *Loscombe,* 2013 WL 2177768 at *10. Plaintiff argues in opposition to Defendants' Motions for Summary Judgment that the ordinance "has a chilling effect on all disabled

firemen and police who have been pensioned" and that if upheld, "all disabled pensioned firemen and police would be discouraged from seeking public office with the City." (Doc. 145, 6; Doc. 148, 7.) However, Plaintiff offers no support for these assertions. Although Plaintiff's particular compensation from the City in his position as councilperson was lower than his pension payments, nothing in the record indicates that this would be the case for a substantial number of retired firemen receiving pensions who subsequently seek to serve in compensated positions with the City. Further, as Plaintiff himself demonstrates, despite the fact that the amount of compensation he received from the City was lower than what he received for his bi-monthly pension payments as of January 2010, he still ran for City Council in the May 2011 primary and the November 2011 general election. Therefore, it does not appear as though he was deterred from engaging in expressive activity, and nothing on the record suggests that the Ordinance inhibits a substantial amount of protected activity. To the contrary, the record indicates that at least one other retired fireman, Thomas Davis, who was subject also subject to the Ordinance, was not discouraged from serving as Superintendent of Fire in the Scranton Fire Department despite having his fireman's pension suspended. Because there is no indication that the Ordinance inhibits a substantial amount of protected activity, summary judgement will be granted for Defendants on this issue.

III. Equal Protection Claim (Count III)

Plaintiff asserts that the Ordinance violates the Equal Protection clause of the Fourteenth Amendment by causing "disabled pensioned public safety employees to lack the same access to the political system that others have."[3] (Doc. 145, 17; Doc. 148, 18.)

The Equal Protection Clause of the Fourteenth Amendment directs that all similarly situated individuals be treated alike. *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). Plaintiff's Equal Protection claim does not identify a classification employed by the Ordinance that would trigger heightened scrutiny,[4] nor does it identify a fundamental right upon

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[3] Plaintiff also states for the first time in his Briefs in Opposition to Defendants' Motions for Summary Judgment that "even under the class of one doctrine, Plaintiff is protected since this is not an employment matter but rather a disabled citizen who was once a firefighter but not currently." (Doc. 145, 17; Doc. 148, 18.) To bring a claim under the "class of one doctrine," Plaintiff must allege that he "has been treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech,* 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000). Plaintiff has not alleged any of these required elements. Furthermore, no facts on the record would support such contentions, if made. Therefore, Plaintiff's Equal Protection claim will not be analyzed according to the "class of one" doctrine.

[4] Plaintiff appears to argue that the Ordinance should be subject to heightened scrutiny since he was receiving a disability pension. However, statutes that discriminate on the basis of disability do not receive heightened scrutiny. *See, e.g. Sullivan v.*

(Continued on following page)

which this statute infringes.[5] As the Court has previously stated, "[u]nless a statute employs a classification that is inherently invidious or that impinges on fundamental rights, . . . the Court exercises only a limited review power over the representative body through which the public makes democratic choices among alternative solutions to social and economic problems." *Slavsky,* 967 F. Supp. at 119. Economic legislation, such as the Ordinance, "is entitled to a strong presumption of constitutionality, and will be upheld [against an Equal Protection challenge] so long as it bears any rational relation to a legitimate

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City of New York, No. 08-CV-7294, 2011 WL 1239755, at *4 (S.D.N.Y., March 25, 2011) (citing *City of Clerburne,* 473 U.S. at 442, 446) ("Legislative classifications based on race, alienage, nationality, sex, and illegitimacy received heightened scrutiny under the Equal Protection Clause. Classifications based on disability, however, do not.")

[5] Plaintiff argues that the Ordinance should be evaluated under strict scrutiny because it is "imposing a city-imposed qualification that undermines the right of the people to have whomever they wish and their public leader." (Doc. 145, 19; Doc. 148, 20.) In support of this argument, Plaintiff relies on *Mancuso v. Taft,* which applied strict scrutiny to a city Ordinance prohibiting city employees from continuing to work for the city after becoming candidates for nomination or election to any public office. 476 F.2d 187, 189 (1st Cir.1973). In *Mancuso,* the First Circuit evaluated the Ordinance under strict scrutiny because there was evidence that the pool of candidates "was directly and substantially limited" and the people affected by the rule were "deterred from seeking office in a very effective manner." *Id.* at 193-94. Nothing in the record suggests that either of these two factors in favor of analyzing the Ordinance under strict scrutiny are present in this case.

state objective." *Id.* (citing *Schweiker v. Wilson,* 450 U.S. 221, 238 (1981); *Mathews v. De Castro,* 429 U.S. 181, 184 (1976)). "Where rational basis scrutiny applies, the Government has no obligation to produce evidence, or empirical data to sustain the rationality of a statutory classification, but rather, can base its statutes on rational speculation. Indeed, any reasonably conceivable state of facts will suffice to satisfy rational basis scrutiny and the burden falls to the party attacking the statute as unconstitutional to negate every conceivable basis which might support it." *Sullivan v. City of New York,* 2011 WL 1239755, at *4 (internal citations omitted).

Therefore, Plaintiff has the burden of showing that there is no rational basis for the Ordinance such that "the classifications it draws are wholly irrelevant to the achievement of the City's legitimate objectives." *Slavsky,* 967 F. Supp. at 119 (citing *Schweiker,* 450 U.S. at 234; *Dandridge v. Williams,* 397 U.S. 471, 485 (1970); *Western & S. Life Ins. Co. v. State Bd. Of Equalization,* 451 U.S. 648, 668 (1981); *McGowan v. Maryland,* 366 U.S. 420, 425 (1961)). "Economic legislation 'does not violate the Equal Protection Clause merely because classifications made by its laws are imperfect.'" *Id.* (quoting *Dandridge,* 397 U.S. at 485). The Supreme Court has "consistently refused to invalidate on equal protection grounds legislation which it simply deemed unwise or unartfully drawn." *United States R.R. Retirement Bd. v. Fritz,* 449 U.S. 166, 175 (1980). "The deference to the legislature embodied by the rational basis standard

is 'true to the principle that the Fourteenth Amendment gives federal courts no power to impose upon the states their views of what constitutes wise economic or social policy.'" *Slavsky,* 967 F.Supp. at 119 (quoting *Dandridge,* 397 U.S. at 486).

Defendant City of Scranton contends that the Ordinance is meant "to prevent a situation where a retired City employee returns to work for the City and is paid both a City pension payment and a City wage" and "ensure that only 'retired' workers are provided a pension." (Doc. 104 at 12.) In other words, the Court has concluded that the Ordinance furthers the legitimate public purpose of preventing "double dipping" by "suspending the pension benefits of retired City firemen who are also receiving active employment benefits from the City." *Loscombe,* 2013 WL 2177768, at *12. Plaintiff has not provided the Court with any basis to conclude that there is a complete and utter lack of "rational relationship between the disparity of treatment and some legitimate governmental purpose." *See Heller v. Doe,* 509 U.S. 312, 320 (1993). Because Plaintiff has failed to negate "any reasonably conceivable state of facts that could provide a rational basis for the [challenged] classification," *Bd. of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 367 (2001), the Court will grant summary judgment in favor of the Defendants with respect to Plaintiff's Equal Protection claim.

III. Takings Clause Claim (Count III)

The Fifth Amendment Takings Clause "proscribes the taking of private property for public use, without just compensation." U.S. Const. amend. V; *see also Cowell v. Palmer Twp.,* 263 F.3d 286, 290 (3d Cir. 2001). As the Court has previously noted, it is well-settled that this prohibition applies to state and local governments under the Fourteenth Amendment. *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago,* 166 U.S. 226, 239 (1897); *Cowell,* 263 F.3d at 290. The Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960). Where the government acts to secure a benefit for the public, a taking thus arises. *Id.*

In Count III of his Third Amended Complaint, Plaintiff alleges that the Ordinance is unconstitutional on its face and as applied to him because it violates the Takings Clause. (Doc. 97 at ¶¶ 32-33.) In opposition to Defendants Motions for Summary Judgement, Plaintiff argues that his "disability pension and the payments of that pension, are his private property." (Doc. 148, 30.) Without further substantive explanation, Plaintiff asserts that while Defendants "claim that the disability benefits that would otherwise be paid to Plaintiff have not been taken for public use, and that he is receiving 'just compensation,' this contention is clearly belied by the record." (Doc. 145, 32; Doc. 148, 32.) The Court

previously found that "Loscombe, through this cursory argument, has not shown that there are no material facts in dispute and that he is entitled to judgment as a matter of law on this claim." *Loscombe,* 2013 WL 2177768, at *13. Summary judgment will be granted for Defendants on this claim because Plaintiff has failed to identify any facts suggesting that Defendants took his property for public use without just compensation.

CONCLUSION

The Motions for Summary Judgment filed by the Defendant City of Scranton (Doc. 130) and the Pension Board Defendants (Doc. 135) will be granted.

An appropriate Order follows.

October 30, 2013
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN LOSCOMBE, Plaintiffs, v. CITY OF SCRANTON, *et al.* Defendants.	CIVIL ACTION NO. 3:10-CV-1182 (JUDGE CAPUTO)

MEMORANDUM

(Filed May 20, 2013)

Presently before the Court are: a Motion to Dismiss filed by Defendants City of Scranton ("the City") and Mayor Chris Doherty (collectively, "the City Defendants") (Doc. 99); a Motion to Dismiss filed by Defendants City of Scranton Firemen's Pension Commission, Firemen's Relief and Pension Fund Commission, and City of Scranton Composite Pension Board (collectively, "the Pension Board Defendants") (Doc. 102); and a Motion for Partial Summary Judgment filed by Plaintiff John Loscombe (Doc. 105). Pursuant to a City Ordinance, Loscombe's pension payments were suspended when he took a paid position on the City Council after retiring from the City's Fire Department. Because of this suspension, he claims that this Ordinance has violated his First Amendment right of freedom of association, amounts to First Amendment retaliation, has effected a Fifth Amendment taking, is a violation of Equal Protection, and is overbroad. For the reasons below, the Defendants'

Motions to Dismiss will be granted in part and denied in part and Loscombe's Motion for Partial Summary Judgment will be denied.

BACKGROUND

Loscombe alleges the following in his Third Amended Complaint. (Doc. 97.) Loscombe was a Fire Captain for the City until his retirement. (*Id.* at ¶ 2.) The City forced him into disability retirement based on injuries he sustained in a work-related accident. (*Id.* at ¶ 13.) For his service, he received a disability retirement pension from the City's Fire Department "until it was stripped away from him in retaliation for him exercising his First Amendment right to hold political office." (*Id.* at ¶ 2.) Specifically, the City Defendants directed the Pension Board Defendants to suspend Loscombe's pension soon after he joined the City Council based on a letter authored by a City business administrator requesting them to do so. (*Id.* at ¶¶ 21, 23.) Mayor Doherty was "intimately involved" in this decision, as he approved it based on the letter. (*Id.* at ¶ 24.) Both the City Defendants and the Pension Board Defendants suspended Loscombe's pension for "accepting an offer to hold the political position of Scranton City Council member on or about February 3, 2010 and continuing." (Doc. 97 at ¶ 17.) This was an act of retaliation aimed at financially crippling Loscombe and compelling him to resign his position

on City Council,[1] (*Id.* at ¶¶ 19-20), and the City Defendants acted in conspiracy with the Pension Board Defendants to violate his constitutional rights (*Id.* at ¶ 24).

Although not explicitly clear, Loscombe's Third Amended Complaint suggests that this pension suspension was done pursuant to "Section 99-80 a/k/a Section 24 of File of Council No. 14 of 1964." This City Ordinance ("Ordinance") provides that:

> When any fireman[2] is pensioned and thereafter enters the service of the City in any capacity with compensation the pension of such person shall be suspended during his term of service. Upon termination of such compensated service the pension payments shall be resumed on request of the pensioner.

Scranton, Pa., Code of the City of Scranton ch. 99, art. V, § 99-80 (1997). Loscombe claims that this Ordinance is unconstitutionally overbroad and violates the Fifth Amendment's Takings Clause and the First Amendment's right of freedom of association. (Doc. 97 at ¶¶ 32-33.) He further asserts that the pension suspension was done in retaliation for exercising his First Amendment right to hold political office (*Id.* at

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[1] Loscombe received $21,000 per year in pension benefits and currently receives $12,500 per year from the City for serving on City Council. (Doc. 106 at ¶¶ 3-4.)

[2] A "fireman . . . includes the Fire Chief, any officer or engineer, and any regularly appointed fireman who has satisfactorily passed the probationary period." Scranton, Pa., Code of the City of Scranton ch. 99, art. V, § 99-59(B) (1997).

¶ 20) and amounted to an unlawful seizure and taking (*Id.* at ¶ 35).

Loscombe filed his Third Amended Complaint[3] in this § 1983 action on August 29, 2012. (Doc. 97.) On September 14, 2012, the City Defendants filed a Motion to Dismiss (Doc. 99), and the Pension Board Defendants did likewise on September 17, 2012 (Doc. 102).[4] Loscombe moved for partial summary judgment on September 19, 2012. (Doc. 105.) The motions have been fully briefed and are ripe for disposition.

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[3] On August 10, 2012, the Court issued a Memorandum and Order (Doc. 95) addressing motions to dismiss Loscombe's Second Amended Complaint (Doc. 29) filed by the City Defendants (Doc. 34) and the Pension Board Defendants (Doc. 39). The Court dismissed all claims against Defendant Doherty as well as Loscombe's First Amendment retaliation claim (Count I) and unlawful seizure and taking claim (Count IV) without prejudice, but granted Loscombe leave to amend those claims. It also dismissed Loscombe's substantive and procedural due process claims (Count II), First Amendment free speech (Count III), and Fifth Amendment vagueness claims (Count III) with prejudice. His First Amendment claims for freedom of association and overbreadth, Fifth Amendment takings claim, and Fourteenth Amendment Equal Protection claims were allowed to proceed. (Doc. 95 at 22.)

[4] Although the City Defendants and Pension Board Defendants raise arguments in support of their present motions that were not raised in their prior motions to dismiss, the Court will not address arguments that were previously available but were not raised. *See Rittenhouse Entm't, Inc. v. City of Wilkes-Barre,* No. 11-CV-617, 2012 WL 3562030, at *6 n.2 (M.D. Pa. Aug. 16, 2012); *see also* Fed. R. Civ. P. 12(g)(2) ("[A] party that makes a motion under [Rule 12] must not make another motion under this rule raising a defense or objection that was available . . . but omitted from its earlier motion.").

LEGAL STANDARDS

I. Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). When considering a Rule 12(b)(6) motion, the Court's role is limited to determining if a plaintiff is entitled to offer evidence in support of their claims. *See Semerenko v. Cendant Corp.,* 223 F.3d 165, 173 (3d Cir. 2000). The Court does not consider whether a plaintiff will ultimately prevail. *See id.* A defendant bears the burden of establishing that a plaintiff's complaint fails to state a claim. *See Gould Elecs. v. United States,* 220 F.3d 169, 178 (3d Cir. 2000).

"A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The statement required by Rule 8(a)(2) must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus,* 551 U.S. 89, 93 (2007) (per curiam) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007)). Detailed factual allegations are not required. *Twombly,* 550 U.S. at 555. However, mere conclusory statements will not do; "a complaint must do more than allege the plaintiff's entitlement to relief." *Fowler v. UPMC Shadyside,* 578 F.3d 203, 210 (3d Cir. 2009). Instead, a complaint must "show" this entitlement by alleging sufficient facts. *Id.* "While legal

conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft v. Iqbal,* 556 U.S. 662 (2009). As such, "[t]he touchstone of the pleading standard is plausability." *Bistrian v. Levi,* 696 F.3d 352, 365 (3d Cir. 2012).

The inquiry at the motion to dismiss stage is "normally broken into three parts: (1) identifying the elements of the claim, (2) reviewing the complaint to strike conclusory allegations, and then (3) looking at the well-pleaded components of the complaint and evaluating whether all of the elements identified in part one of the inquiry are sufficiently alleged." *Malleus v. George,* 641 F.3d 560, 563 (3d Cir. 2011).

Dismissal is appropriate only if, accepting as true all the facts alleged in the complaint, a plaintiff has not pleaded "enough facts to state a claim to relief that is plausible on its face," *Twombly,* 550 U.S. at 570, meaning enough factual allegations "'to raise a reasonable expectation that discovery will reveal evidence of'" each necessary element. *Phillips v. Cnty. of Allegheny,* 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Twombly,* 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal,* 556 U.S. at 677. "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679.

In deciding a motion to dismiss, the Court should consider the allegations in the complaint, exhibits attached to the complaint, and matters of public record. *See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.,* 998 F.2d 1192, 1196 (3d Cir. 1993). The Court may also consider "undisputedly authentic" documents when the plaintiff's claims are based on the documents and the defendant has attached copies of the documents to the motion to dismiss. *Id.* The Court need not assume the plaintiff can prove facts that were not alleged in the complaint, *see City of Pittsburgh v. W. Penn Power Co.,* 147 F.3d 256, 263 & n.13 (3d Cir. 1998), or credit a complaint's "'bald assertions'" or "'legal conclusions.'" *Morse v. Lower Merion Sch. Dist.,* 132 F.3d 902, 906 (3d Cir. 1997) (quoting *In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1429-30 (3d Cir. 1997)).

II. Motion for Summary Judgment

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Wright v. Corning,* 679 F.3d 101, 103 (3d Cir. 2012) (quoting *Orsatti v. N.J. State Police,* 71 F.3d 480, 482 (3d Cir. 1995)). A fact is

material if proof of its existence or nonexistence might affect the outcome of the suit under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

Where there is no material fact in dispute, the moving party need only establish that it is entitled to judgment as a matter of law. *See Edelman v. Comm'r of Soc. Sec.,* 83 F.3d 68, 70 (3d Cir. 1996). However, where there is a disputed issue of material fact, summary judgment is appropriate only if the factual dispute is not a genuine one. *Anderson,* 477 U.S. at 248. An issue of material fact is genuine if "a reasonable jury could return a verdict for the nonmoving party." *Id.* Where there is a material fact in dispute, the moving party has the initial burden of proving that: (1) there is no genuine issue of material fact and (2) the moving party is entitled to judgment as a matter of law. *See* 2D Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2727 (2d ed. 1983). The moving party may present its own evidence or, where the non-moving party has the burden of proof, simply point out to the court that "the nonmoving party has failed to make a sufficient showing on an essential element of her case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

"When considering whether there exist genuine issues of material fact, the court is required to examine the evidence of record in the light most favorable to the party opposing summary judgment, and resolve all reasonable inferences in that party's favor." *Wishkin v. Potter,* 476 F.3d 180, 184 (3d Cir. 2007).

Once the moving party has satisfied its initial burden, the burden shifts to the non-moving party to either present affirmative evidence supporting its version of the material facts or to refute the moving party's contention that the facts entitle it to judgment as a matter of law. *Anderson,* 477 U.S. at 256-57. The Court need not accept mere conclusory allegations, whether they are made in the complaint or a sworn statement. *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 888 (1990).

"To prevail on a motion for summary judgment, the non-moving party must show specific facts such that a reasonable jury could find in that party's favor, thereby establishing a genuine issue of fact for trial." *Galli v. N.J. Meadowlands Comm'n,* 490 F.3d 265, 270 (3d Cir. 2007) (citing Fed. R. Civ. P. 56(e)). "While the evidence that the non-moving party presents may be either direct or circumstantial, and need not be as great as a preponderance, the evidence must be more than a scintilla." *Id.* (quoting *Hugh v. Butler Cnty. Family YMCA,* 418 F.3d 265, 267 (3d Cir. 2005)). In deciding a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson,* 477 U.S. at 249.

ANALYSIS

I. The City Defendants' (Doc. 99) and Pension Board Defendants' (Doc. 102) Motions to Dismiss[5]

The City Defendants admit that Loscombe's pension was suspended because he accepted a paid position on the Scranton City Council. (Doc. 40 at 10.) They argue, however, that because the pension is "under the separate care, control and supervision of the entirely distinct Fireman's Relief and Pension Fund Commission," any adverse action taken with respect to Loscombe is not attributable to Mayor Doherty or the City. (*Id.*) The Pension Board Defendants, however, contend that they have no role in making the decision to either grant or suspend a pension or enacting the Ordinance. (Doc. 109 at 5.) They argue that their role is only to manage the aggregated assets of the Police Pension Fund, Fire Pension Fund, and Non-Uniform Pension Fund in accordance with Pennsylvania law and City ordinances. (*Id.* at 6.)

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[5] The City Defendants and Pension Board Defendants move to dismiss Loscombe's First Amendment freedom of association claim, and the City Defendants contend that Loscombe has not alleged a custom or practice on the part of the City. As the Court has previously addressed and rejected these arguments in its August 10, 2012 Memorandum and Order (Doc. 95), it will not entertain them again due to the law of the case doctrine. *See Pub. Interest Research Grp. of N.J. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 116 (3d. Cir. 1997) ("The law of the case doctrine directs courts from re-deciding issues that were resolved earlier in litigation.").

A. First Amendment Retaliation Claim (Count I)

In its August 10, 2012 Memorandum and Order, the Court dismissed Loscombe's First Amendment retaliation claim in his Second Amended Complaint, but granted him leave to amend. (Doc. 95 at 9.) In his Third Amended Complaint, Loscombe again alleges that his pension was suspended "as a retaliatory move to financially cripple [him] into resigning from political office." (Doc. 97 at ¶ 20.) To plead a First Amendment retaliation claim, he must allege that: "(1) he engaged in constitutionally protected conduct, (2) he was subjected to adverse actions by a state actor, and (3) the protected activity was a substantial motivating factor in the state actor's decision to take the adverse action." *Brightwell v. Lehman,* 637 F.3d 187, 194 (3d Cir. 2011) (internal citations omitted).

Loscombe alleges that he engaged in constitutionally protected activity by running for and winning elected office on the Scranton City Council. (Doc. 97 at ¶ 16.) He also states that the City Defendants directed the Pension Board Defendants to suspend his pension after obtaining a letter from a City business administrator requesting them to do so. (*Id.* at ¶¶ 20-21, 24-26.) In addition, he alleges that his pension was suspended soon after he joined the City Council and because he accepted the position. (*Id.* at ¶¶ 17, 23.) However, the Third Amended Complaint, like Loscombe's previous complaints, does not evince that the protected activity was a substantial motivating factor – *i.e.,* that Defendants would not have suspended

Loscombe's pension had he engaged in City employment that was not constitutionally protected. As such, Loscombe's First Amendment retaliation claim against the City Defendants and the Pension Board Defendants will be dismissed. In light of Loscombe's repeated failure to cure this deficiency by amendments previously allowed by the Court, he will not be given leave to amend this claim. *See Foman v. Davis,* 371 U.S. 178, 182 (1962).

B. Seizure and Taking Claim (Count IV)

In its August 10, 2012 Memorandum and Order, the Court dismissed Loscombe's "unlawful seizure and taking" claim in his Second Amended Complaint but granted him leave to amend. (Doc. 95 at 20.) The Court stated that to the extent that the "unlawful seizure and taking" claim is one "for an unlawful taking under the Fifth Amendment, such a claim has been pleaded . . . in Count III. To the extent [Count IV] pleads something more, it fails to specify any particular legal foundation or to offer any specified allegations to support such a claim, constitutional or otherwise." (*Id.*)

Loscombe raises a "unlawful seizure and taking" claim once more in Count IV of his Third Amended Complaint. (Doc. 97 at 10-11.) Its allegations are nearly identical to those in Count IV of the Second Amended Complaint, save for a new paragraph averring that "Defendants have used [Loscombe's] disability monies for their own purposes since he has not received his

disability pensions, which Defendants have claimed is a lawful use of the monies." (*Id.* at ¶ 36.) To the extent that Count IV of the Third Amended Complaint pleads something more than an unlawful taking under the Fifth Amendment, which is pleaded in Count III, it has again failed to specify any particular legal foundation or offer any specified allegations to support such a claim. Accordingly, Loscombe's "unlawful seizure and taking" claim against the City Defendants and the Pension Board Defendants will be dismissed. Given his repeated failure to cure this deficiency by amendments previously allowed by the Court, Loscombe will not be given leave to amend this claim. *See Foman v. Davis,* 371 U.S. 178, 182 (1962).

C. Mayor Doherty

1. Personal Capacity and Official Capacity

In suits against municipal employees who act in a supervisory capacity, the Supreme Court has differentiated between claims against those individuals in their personal or individual capacities and their official capacities. *See Kentucky v. Graham,* 473 U.S. 159, 165-66 (1985). Personal capacity suits seek to impose liability on government officials for acts performed under color of law. *Id.* Official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Id.* (quoting *Monell v. Dep't of Soc. Serv. of the City of New York,* 436 U.S. 658, 690 n.55 (1978)).

Here, Loscombe is suing Mayor Doherty in both his personal and official capacities.

An official sued under § 1983 in a personal capacity action can be held liable if he acted under color of law to deprive a person of a federal right. *See Hafer v. Melo,* 502 U.S. 21, 27 (1991); *Graham,* 473 U.S. at 166. The Third Circuit has expressly applied the standards for municipal liability for § 1983 violations to cases alleging individual liability. *See Brown v. Muhlenberg Twp.,* 269 F.3d 205, 215 (3d Cir. 2001); *Sample v. Diecks,* 885 F.2d 1099, 1118 (3d Cir. 1989).

There are two theories of supervisory liability under which a plaintiff can sue a municipal defendant in a personal capacity action. *See A.M. v. Luzerne Cnty. Juvenile Det. Ctr.,* 372 F.3d 572, 2578 (3d Cir. 2004). Under the first theory, defendants can be sued as policymakers "if it is shown that defendants, 'with deliberate indifference to the consequences, established and maintained a policy, custom, or practice which directly caused [the] constitutional harm.'" *Id.* (quoting *Stoneking v. Bradford Area Sch. Dist.,* 882 F.2d 720, 725 (3d Cir. 1989)). The second theory provides for personal liability if the plaintiff can show that a supervisor "participated in violating [his] rights, or that he directed others to violate them, or that he . . . had knowledge of and acquiesced in his subordinates' violations." *Baker v. Monroe Twp.,* 50 F.3d 1186, 1190-91 (3d Cir. 1995) (citing *Andrews v. City of Phila.,* 895 F.2d 1469, 1478 (3d Cir. 1990)). There is no liability for personal capacity actions based only on a theory of respondeat superior. *Rode v.*

Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988); *Monell*, 436 U.S. at 693.

Here, Loscombe has alleged facts that, taken as true, show that Mayor Doherty personally participated in violating Loscombe's rights, directed others to violate those rights, or knew of and acquiesced in the violations of his subordinates. Specifically, he alleges that Mayor Doherty "as the highest official of the City was intimately involved with the stripping of [Loscombe's pension] benefits since he approved the same" and directed the Pension Board Defendants to suspend those pension benefits (*Id.* at ¶¶ 9, 21, 24). Accordingly, Loscombe's claims against Mayor Doherty in his individual capacity will not be dismissed for failure to allege personal involvement.

The Supreme Court has held that official capacity suits cannot be maintained against state officers acting in their official capacity on behalf of the state. *See Hafer,* 502 U.S. at 27 (state officers sued for damages in their individual capacity are not "persons" for purposes of the suit because they assume the identity of the government that employs them). "[C]ourts sitting in the Third Circuit have dismissed defendants sued in their official capacity when the same claims are made against the municipality." *Dubas v. Olyphant Police Dep't,* No. 3:11-CV-1402, 2012 WL 1378694, at *4 (M.D. Pa. Apr. 20, 2012) (citing *Whaumbush v. City of Phila.,* 747 F. Supp. 2d 505, 510 n.2 (E.D. Pa. 2010) (dismissing claims against defendants in their official capacity as duplicative of the civil rights claim against the municipality);

Strickland v. Mahoning Twp., 649 F. Supp. 2d 422, 428 (M.D. Pa. 2009) (stating that an official capacity suit is "generally merely another way of pleading an action against an entity of which an officer is an agent.")). As such, Loscombe's claims against Mayor Doherty in his official capacity[6] will be dismissed as duplicative of the claims against the City.

2. Qualified Immunity

A defendant may raise the issue of qualified immunity on a motion to dismiss where the defense is "based on facts appearing on the face of the complaint." *Mims v. City of Phila.,* No. 09-CV-4288, 2010 WL 2077140, at *13 n.14 (E.D. Pa. May 19, 2010) (internal citations omitted). It is well-settled that "[t]he doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Schneyder v. Smith,* 653 F.3d 313, 318 (3d Cir. 2011) (quoting *Pearson v. Callahan,* 555 U.S. 223 (2009)). The United States Supreme Court has established a two-part analysis that governs whether an official is entitled to qualified immunity: "(1) whether the facts alleged by the

[6] As to his official capacity, the Third Amended Complaint avers that Mayor Doherty "is the enforcer of the ordinances of the City" as well as "the highest official of the City" and that Loscombe is "required to sue him to declare a provision of an Ordinance unconstitutional." (Doc. 97 at ¶¶ 9, 24.)

plaintiff show the violation of a constitutional right; and (2) whether the right at issue was clearly established at the time of the alleged misconduct." *Kelly v. Borough of Carlisle,* 622 F.3d 248, 253 (3d Cir. 2010) (citing *Saucier v. Katz,* 533 U.S. 194, 201 (2001)). Courts may address these two prongs in any order, at their discretion. *Pearson,* 555 U.S. at 236.

A legal right is clearly established if "its contours [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.* (citations omitted). This prong "of the qualified immunity analysis therefore 'turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.'" *Montanez v. Thompson,* 603 F.3d 243, 251 (3d Cir. 2010) (quoting *Pearson,* 555 U.S. at 243).

A clearly established right does not require that "there be binding precedent from this circuit" when "the unlawfulness of the defendant's conduct would have been apparent to a reasonable official based on the current state of the law." *Brown,* 269 F.3d at 211-12 n.4. Thus, "'the absence of a previous decision from our court on the constitutionality of the conduct at issue is not dispositive' in determining whether the particular constitutional right at issue was clearly

established at a particular time. . . ." *Pro v. Donatucci,* 81 F.3d 1283, 1292 (3d Cir. 1996) (quoting *Bieregu v. Reno,* 59 F.3d 1445, 1459 (3d Cir. 1995)). In that regard, the Third Circuit "routinely considers decisions by other Courts of Appeals as part of [the] 'clearly established' analysis when we have not yet addressed the right asserted by the plaintiff." *Williams v. Bitner,* 455 F.3d 186, 192-93 (3d. Cir. 2006) (citing *Kopec v. Tate,* 361 F.3d 772, 777-78 n.6 (3d Cir. 2004); *Brown,* 269 F.3d at 211-12 n.4). Although they "cannot establish the law of the circuit," district court decisions from within the Third Circuit may also be relevant, *Bitner,* 455 F.3d at 193, and "do play a role in the qualified immunity analysis." *Doe v. Delite,* 257 F.3d 309, 321 n.10 (3d Cir. 2001) (citing *Donatucci,* 81 F.3d at 1292).

As the Court has dismissed Loscombe's First Amendment retaliation claim (Count I) and his "unlawful seizure and taking" claim (Count IV), the remaining claims in this case (Count III) concern Loscombe's facial and as-applied challenges to the Ordinance's constitutionality. To the extent that Loscombe's as-applied challenge implicates Mayor Doherty's alleged personal involvement (*i.e.,* that he allegedly directed the Pension Board Defendants to suspend Loscombe's pension benefits because of the Ordinance), Loscombe has alleged that Mayor Doherty violated his First and Fifth Amendment rights. However, the facts stated by Loscombe, even when viewed in the light most favorable to him, do not show that Mayor Doherty violated clearly established constitutional rights. Loscombe has not

alleged that Mayor Doherty knew or should have known at the time of the alleged misconduct that he was carrying out an unconstitutional law or carrying out a valid law in an unconstitutional fashion. The claimed unlawfulness of an Ordinance that suspends retired City firemen's pension benefits for the duration of any subsequent compensated employment with the City was not clearly established as of 2010, nor has it been clearly established since. *See infra* Part II. Therefore, Mayor Doherty is entitled to qualified immunity and all remaining claims against him in his individual capacity, including those for punitive damages, will be dismissed with prejudice from the case.

II. Loscombe's Motion for Partial Summary Judgment (Doc. 105)[7]

A. Overbreadth Claim (Count III)

The First Amendment overbreadth doctrine states that:

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[7] Loscombe contends that his motion for partial summary judgment must be granted because the City Defendants filed their brief in opposition beyond the twenty-one day period proscribed by Local Rule 7.6 and the Pension Board Defendants have not filed a brief in opposition. (Doc. 123 at 1-2.) However, the Court will decline to do so. *See Anchorage Assocs. v. V.I. Bd. of Tax Review,* 922 F.2d 168, 174 (3d Cir. 1990) (holding that a motion for summary judgment may not be granted simply because it is unopposed); *see also Player v. Motiva Enters.,* No. 02-CV-3216, 2006 WL 166452, at *3 (D.N.J. Jan. 20, 2006) (considering untimely filing because court should not grant a motion for summary judgment without examining the merits).

> A regulation of speech may be struck down on its face if its prohibitions are sufficiently overbroad – that is, if it reaches too much expression that is protected by the Constitution. [A] policy can be found unconstitutionally overbroad if "there is a 'likelihood that the statute's very existence will inhibit free expression'" to a substantial extent.

Sypniewski v. Warren Hills Reg'l Bd. Of Educ., 307 F.3d 243, 258 (3d Cir. 2002)). "[C]ourts will not strike down a regulation as overbroad unless the overbreadth is 'substantial in relation to the [regulation]'s plainly legitimate sweep.'" *Id.* at 259 (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973)). Courts "vigorously enforce[ ] the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep" in an attempt to "strike a balance between competing social costs": "On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech. . . . On the other hand, invalidating a law that in some of its applications is perfectly constitutional . . . has obvious harmful effects." *United States v. Williams*, 553 U.S. 285, 292 (2008). "[T]he overbreadth doctrine is not casually employed. Because of the wide-reaching effects of striking down a statute on its face . . . [courts] have recognized that the overbreadth doctrine is strong medicine and have employed it with hesitation, and then only as a last resort." *Los Angeles Police Dep't v. United Reporting*

Publ'g Corp., 528 U.S. 32, 39 (1999) (internal quotation marks omitted).

"The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Williams,* 553 U.S. at 293. The next step is to determine whether the statute, as construed, penalizes "a substantial amount of protected expressive activity." *Id.* at 297. "Before striking down a policy as overbroad, we must determine whether there is any reasonable limiting construction . . . that would render [it] constitutional." *McCauley v. Univ. of the V.I.,* 618 F.3d 232, 242 (3d Cir. 2010) (internal quotations omitted). "Every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Sypniewski,* 307 F.3d at 259 (internal quotations omitted).

The Ordinance at issue in this matter provides that:

> When any fireman is pensioned and thereafter enters the service of the City in any capacity with compensation the pension of such person shall be suspended during his term of service. Upon termination of such compensated service the pension payments shall be resumed on request of the pensioner.

Scranton, Pa., Code of the City of Scranton ch. 99, art. V, § 99-80 (1997). By the terms of the Ordinance, a pensioned City fireman who obtains any compensated

position with the City will have his pension suspended for as long as he remains in the new position. The applicability of the Ordinance is not limited to certain City positions or departments. Having completed the first step of the inquiry, the Court must now determine whether the Ordinance penalizes a substantial amount of protected expressive activity.

Loscombe argues that the Ordinance is overbroad because it infringes on his right to hold public office by suspending his pension benefits if he holds public office with the City. (Doc. 107 at 3.) He further contends that it discourages the City's pensioned police officers and firemen from seeking public office with the City, as they will likely receive less compensation from the City for holding elected office than they would from their City pension. (*Id.*) Although the Ordinance undoubtedly impacts some protected expressive activity (*e.g.,* running for public office), the Court finds that Loscombe has not shown that the Ordinance penalizes "a substantial amount of protected expressive activity" and requires the Court to employ the "strong medicine" of striking it down as unconstitutionally overbroad. Accordingly, because Loscombe has failed to show that he is entitled to judgment as a matter of law, the Court will not grant summary judgment in his favor with respect to his overbreadth claim.

B. Freedom of Association Claim (Count III)

Loscombe's Third Amended Complaint avers that "every retired public safety officer . . . has a constitutional right to hold a political office. . . ." (Doc. 97 at ¶ 1.) No party contests that Loscombe and other retired firemen have a right to associate with and as members of the City Council. Such expressive association "recognize[s] a right to associate for the purpose of engaging in those activities protected by the First Amendment-speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. U.S. Jaycees,* 468 U.S. 609, 618 (1984). As such, "[a] social group is not protected unless it engages in expressive activity such as taking a stance on an issue of public, political, social, or cultural importance." *Schultz v. Wilson,* 304 F. App'x 116, 120 (3d Cir. 2008) (internal citations omitted).

"As in the area of freedom of expression, an individual's right of association may be limited by valid, content-neutral time, place and manner restrictions enacted by the state." *Tacynec v. City of Phila.,* 687 F.2d 793, 799 (3d Cir. 1982) (citation omitted); *Grace United Methodist Church v. City Of Cheyenne,* 451 F.3d 643, 658 (10th Cir. 2006) (applying same standard for content-neutral speech to association); *Emergency Coal. To Defend Educ. Travel v. U.S. Dept. of Treasury,* 498 F. Supp. 2d 150, 161 (D.D.C. 2007), *aff'd,* 545 F.3d 4 (D.C. Cir. 2008) (same). "Under the Fourteenth Amendment, city ordinances are within the scope of [the First Amendment's] limitation on

governmental authority." *Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 792 n.2 (1984). The Court has previously determined that the Ordinance is content-neutral. (Doc. 95 at 16.) Therefore, the Ordinance does "not offend the First Amendment as long as the restrictions (1) are narrowly tailored to serve a significant governmental interest; and (2) leave open ample alternative channels for communication of the information." *Johnson v. City and Cnty. of Phila.,* 665 F.3d 486, 491 (3d Cir. 2011) (internal quotations omitted). Applied to the right of association, this requires that the Ordinance does not "burden any more speech or associational rights than necessary" in furthering the City's substantial interest. *Grace United,* 451 F.3d at 658.

Both the City Defendants and the Pension Board Defendants represent that the aim of the Ordinance, which was enacted in 1964, is to prevent retired City firemen who subsequently become compensated City employees from receiving two simultaneous income streams from the City. (Doc. 43 at 4-5; Doc. 104 at 12.) The Court finds that preventing retired City firemen from "double dipping" and conserving City pension funds is a significant governmental interest. *See Slavsky v. New York City Police Dep't,* 967 F. Supp. 117, 118-119 (S.D.N.Y. 1997), *aff'd,* 159 F.3d 1348 (2d Cir. 1998). The Court also finds that because the Ordinance promotes this interest, which would be achieved less effectively were it not for the Ordinance, it is narrowly tailored and does not burden more speech or associational rights than

necessary.[8] *See Ward v. Rock Against Racism,* 491 U.S. 781, 798-99 (1989); *see also Grace United,* 451 F.3d at 658. In addition, Loscombe has not shown that the Ordinance "does not leave open ample channels" for communication. *See Galena v. Leone,* 638 F.3d 186, 203 (3d Cir. 2011) ("The Supreme Court has required that an alternative means of communication provide only a 'reasonable opportunity' for communication. . . .") (citing *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 54 (1986)). Therefore, because Loscombe has failed to show that he is entitled to judgment as a matter of law, the Court will not grant summary judgment in his favor on his First Amendment freedom of association claim.

C. Equal Protection Claim (Count III)

Loscombe claims that the distinction made by the Ordinance between retired City firemen who subsequently obtain employment with the City and those who do not violates retired City firemen's rights to

[8] In its August 10, 2012 Memorandum and Order, the Court, in addressing a motion to dismiss, opined that the Ordinance did not appear to be narrowly tailored. (Doc. 95 at 19-20.) Specifically, the Court noted that Loscombe's reduced financial standing as a result of joining City Council exceeded the City's interest in preventing "double dipping." (*Id.* at 20.) However, upon re-examination and considering Loscombe's motion for summary judgment on this claim, the Court is of the opinion that his reduced compensation is insufficient to render the Ordinance not narrowly tailored.

equal protection of the laws, as guaranteed by the Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment directs that all similarly situated individuals be treated alike. *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439 (1985). Loscombe's Equal Protection claim does not identify a classification employed by the Ordinance that would trigger heightened scrutiny, nor does it identify a fundamental right upon which this statute infringes. "Unless a statute employs a classification that is inherently invidious or that impinges on fundamental rights, . . . the Court exercises only a limited review power over the representative body through which the public makes democratic choices among alternative solutions to social and economic problems." *Slavsky,* 967 F. Supp. at 119. Economic legislation, such as the Ordinance, "is entitled to a strong presumption of constitutionality, and will be upheld [against an Equal Protection challenge] so long as it bears any rational relation to a legitimate state objective." *Id.* (citing *Schweiker v. Wilson,* 450 U.S. 221, 238 (1981); *Mathews v. De Castro,* 429 U.S. 181, 184 (1976)). "Where rational basis scrutiny applies, the Government has no obligation to produce evidence, or empirical data to sustain the rationality of a statutory classification, but rather, can base its statutes on rational speculation. Indeed, any reasonably conceivable state of facts will suffice to satisfy rational basis scrutiny and the burden falls to the party attacking the statute as unconstitutional to negate every conceivable basis which

might support it." *Sullivan v. City of New York,* No. 08-CV-7294, 2011 WL 1239755, at *4 (S.D.N.Y. Mar. 25, 2011) (internal citations omitted).

Loscombe thus has the burden of showing that the Ordinance has no rational basis, *i.e.,* "that the classifications it draws are wholly irrelevant to the achievement of the City's legitimate objectives." *Slavsky,* 967 F.Supp. at 119 (citing *Schweiker,* 450 U.S. at 234; *Dandridge v. Williams,* 397 U.S. 471, 485 (1970); *Western & S. Life Ins. Co. v. State Bd. Of Equalization,* 451 U.S. 648, 668 (1981); *McGowan v. Maryland,* 366 U.S. 420, 425 (1961)). "Economic legislation 'does not violate the Equal Protection Clause merely because classifications made by its laws are imperfect.'" *Id.* (quoting *Dandridge,* 397 U.S. at 485). The Supreme Court has "consistently refused to invalidate on equal protection grounds legislation which it simply deemed unwise or unartfully drawn." *United States R.R. Retirement Bd. v. Fritz,* 449 U.S. 166, 175 (1980). "The deference to the legislature embodied by the rational basis standard is 'true to the principle that the Fourteenth Amendment gives federal courts no power to impose upon the states their views of what constitutes wise economic or social policy.'" *Slavsky,* 967 F. Supp. at 119 (quoting *Dandridge,* 397 U.S. at 486).

The City Defendants contend that the Ordinance is meant "to prevent a situation where a retired City employee returns to work for the City and is paid both a City pension payment and a City wage" and "ensure that only 'retired' workers are provided a

pension." (Doc. 104 at 12.) In other words, the Ordinance furthers the legitimate public purpose of preventing "double dipping" by suspending the pension benefits of retired City firemen who are also receiving active employment benefits from the City. Loscombe has not provided the Court with a basis to conclude that there is a complete and utter lack of "rational relationship between the disparity of treatment and some legitimate governmental purpose." *See Heller v. Doe,* 509 U.S. 312, 320 (1993). As Loscombe has failed to negate "any reasonably conceivable state of facts that could provide a rational basis for the [challenged] classification," *Bd. of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 367 (2001), he has not shown that he is entitled to judgment as a matter of law. Therefore, the Court will not grant summary judgment in his favor with respect to his Equal Protection claim.

D. Takings Clause Claim (Count III)

The Fifth Amendment Takings Clause "proscribes the taking of private property for public use, without just compensation." U.S. Const. amend. V; *see also Cowell v. Palmer Twp.,* 263 F.3d 286, 290 (3d Cir. 2001). It is well-settled that this prohibition applies to state and local governments under the Fourteenth Amendment. *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago,* 166 U.S. 226, 239 (1897); *Cowell,* 263 F.3d at 290. The Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice,

should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960). Where the government acts to secure a benefit for the public, a taking thus arises. *Id.*

In Count III of his Third Amended Complaint, Loscombe alleges that the Ordinance is unconstitutional on its face and as applied to him because it violates the Takings Clause. (Doc. 97 at ¶¶ 32-33.) The entirety of Loscombe's argument for summary judgment on this claim is that his "disability pension, and the payments of that pension, are his private property. Therefore, Defendants' taking of [his] pension was unlawful." (Doc. 107 at 20.) Loscombe, through this cursory argument, has not shown that there are no material facts in dispute and that he is entitled to judgment as a matter of law on this claim. Accordingly, Loscombe's motion for summary judgment will be denied with respect to his Fifth Amendment Takings Clause claim.

CONCLUSION

The motions to dismiss filed by the City Defendants (Doc. 99) and the Pension Board Defendants (Doc. 102) will be granted in part and denied in part. Loscombe's First Amendment retaliation claim (Count I) and "unlawful seizure and taking" claim (Count IV) will be dismissed with prejudice, as will all claims against Mayor Doherty in both his personal and official capacities. In addition, Loscombe's Motion for Partial Summary Judgment (Doc. 105) will be

denied. Therefore, Loscombe's First Amendment right of association and overbreadth claims, Fifth Amendment takings claims, and Fourteenth Amendment Equal Protection claims against the City Defendants and Pension Board Defendants will remain in the case. An appropriate Order follows.

May 20, 2013	/s/ A. Richard Caputo
Date	A. Richard Caputo
	United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA**

JOHN LOSCOMBE, Plaintiffs, v. CITY OF SCRANTON, et al. Defendants.	CIVIL ACTION NO. 3:10-CV-1182 (JUDGE CAPUTO)

MEMORANDUM

(Filed Aug. 10, 2012)

Presently before me are two separate motions to dismiss by two separate groups of Defendants. (Docs. 34 and 39.) Pursuant to a Scranton City Ordinance, Plaintiff John Loscombe's pension payments were suspended when he took a political position on the Scranton City Council. Because of this suspension, Loscombe argues that this Ordinance has violated his First Amendment rights of freedom of association, amounts to First Amendment retaliation, has effected a Fifth Amendment taking, has bypassed the substantive and procedural protections of the Fourteenth Amendment, is a violation of Equal Protection, and is vague and overbroad. Collectively, the Defendants have all moved to dismiss all of these allegations.

BACKGROUND

Plaintiff John Loscombe alleges the following in his Second Amended Complaint. (Doc. 29.) Loscombe was a Fire Captain for the City of Scranton until his retirement. For his service, he received a retirement pension from the Scranton Fire Department "until it was stripped away from him in retaliation for him exercising his First Amendment right to hold political office and in violation of his due process rights." (*Id.* at ¶ 2.) Specifically, the Defendants suspended Loscombe's pension without notice of hearing for "accepting an offer to hold the political position of Scranton City Council member on or about February 3, 2010 and continuing." (*Id.* at ¶ 15.) This was an act of retaliation aimed at compelling Loscombe to resign as council member.

Although not explicitly clear, Loscombe's Second Amended Complaint suggests that this pension suspension was done pursuant to "Section 99-80 a/k/a Section 24 of File of Council No. 14 of 1964." This Scranton City Ordinance provides that:

> When any fireman is pensioned and thereafter enters the service of the City in any capacity with compensation the pension of such person shall be suspended during his term of service. Upon termination of such compensated service the pension payments shall be resumed on request of the pensioner.

Scranton, Pa., Code of the City of Scranton ch. 99, art. V, § 99-80 (1997). Loscombe asserts that this

Ordinance is unconstitutionally vague and overbroad and in violation of the First Amendment's protections of free speech and association, the Due Process Clause of the Fourteenth Amendment, and the Takings Clause of the Fifth Amendment (Count III). Loscombe further maintains that this pension suspension was done in retaliation for exercising his First Amendment right to hold political office (Count I); that the suspension was in violation of both substantive and procedural due process under the Fourteenth Amendment (Count II); and that the pension suspension amounted to an unlawful seizure and taking (Count IV).

Although no specific involvement or particularized actions are plead, Loscombe asserts all four counts against all Defendants: the City of Scranton; the City's Firemen's Pension Commission; the City's Composite Pension Board; the Firemen's Relief and Pension Fund Commission; and Mayor Chris Doherty in his official and personal capacity.

On March 5, 2012, the City of Scranton and Mayor Chris Doherty (the "City Defendants") filed a motion to dismiss. (Doc. 34.) On March 9, 2011, the City's Firemen's Pension Commission, the City's Composite Pension Board, and the Firemen's Relief and Pension Fund Commission (the "Pension Defendants") also filed a motion to dismiss. (Doc. 39.) These Motions are now ripe for the Court's review.

DISCUSSION

I. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, for failure to state a claim upon which relief can be granted. When considering a Rule 12(b)(6) motion, the Court's role is limited to determining if a plaintiff is entitled to offer evidence in support of their claims. *See Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). The Court does not consider whether a plaintiff will ultimately prevail. *See id.* A defendant bears the burden of establishing that a plaintiff's complaint fails to state a claim. *See Gould Elecs. v. United States,* 220 F.3d 169, 178 (3d Cir. 2000).

"A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The statement required by Rule 8(a)(2) must give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus,* 551 U.S. 89, 93 (2007) (per curiam) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007)). Detailed factual allegations are not required. *Twombly,* 550 U.S. at 555. However, mere conclusory statements will not do; "a complaint must do more than allege the plaintiff's entitlement to relief." *Fowler v. UPMC Shadyside,* 578 F.3d 203, 211 (3d Cir. 2009). Instead, a complaint must "show" this entitlement by alleging sufficient facts. *Id.*

As such, the inquiry at the motion to dismiss stage is "normally broken into three parts: (1) identifying the elements of the claim, (2) reviewing the complaint to strike conclusory allegations, and then (3) looking at the well-pleaded components of the complaint and evaluating whether all of the elements identified in part one of the inquiry are sufficiently alleged." *Malleus v. George,* 641 F.3d 560, 563 (3d Cir. 2011).

Dismissal is appropriate only if, accepting as true all the facts alleged in the complaint, a plaintiff has not pleaded "enough facts to state a claim to relief that is plausible on its face," *Twombly,* 550 U.S. at 570, meaning enough factual allegations "'to raise a reasonable expectation that discovery will reveal evidence of'" each necessary element, *Phillips v. County of Allegheny,* 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Twombly,* 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (citing *Twombly,* 550 U.S. at 556). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679.

In deciding a motion to dismiss, the Court should consider the allegations in the complaint, exhibits attached to the complaint, and matters of public record. *See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.,* 998 F.2d 1192, 1196 (3d Cir.

1993). The Court may also consider "undisputedly authentic" documents when the plaintiff's claims are based on the documents and the defendant has attached copies of the documents to the motion to dismiss. *Id.* The Court need not assume the plaintiff can prove facts that were not alleged in the complaint, *see City of Pittsburgh v. W. Penn Power Co.,* 147 F.3d 256, 263 & n.13 (3d Cir. 1998), or credit a complaint's "'bald assertions'" or "'legal conclusions,'" *Morse v. Lower Merion Sch. Dist.,* 132 F.3d 902, 906 (3d Cir. 1997) (quoting *In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1429-30 (3d Cir. 1997)).

II. Analysis

A. The Mayor and The City

The City Defendants admit that Loscombe's pension was suspended because of his acceptance of a paid position on the Scranton City Council. (City Defs.' Br. at 10, Doc. 40.) They argue, however, that since Loscombe's pension is "under the separate care, control and supervision of the entirely distinct Fireman's Relief and Pension Fund Commission," that any adverse action taken with respect to Loscombe is not attributable to the Mayor or the City. (*Id.*) In fact, the Amended Complaint wholly fails to allege any particularized, personal involvement of either of these two entities.

1. The City of Scranton

Local governing bodies are deemed to be "persons" within the meaning of 42 U.S.C. § 1983 and can be sued directly under that act for monetary, declaratory, or injunctive relief. *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 690 (1978).

Loscombe's claim against the City of Scranton sounds under *Monell,* which provides that "[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell,* 436 U.S. at 690 (1978); *Bright v. Westmoreland County,* 380 F.3d 729, 736 n.2 (3d Cir. 2004) (same). While such liability does not attach for injury "inflicted solely by its employees or agents," governmental liability may attach for the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Id.* at 694; *Langford v. City of Atlantic City,* 235 F.3d 845, 847 (3d Cir. 2000). To establish such causation, a plaintiff must allege a "plausible nexus" or "affirmative link" between the violation and the municipality's custom or practice. *Id.* Causation exists where the connection between the policy and injury is so strong that it would be a plainly obvious consequence. *Bd. of County Comm'rs of Bryan Cnty., Okl. v. Brown,* 520 U.S. 397, 411 (1997).

Here, it is plainly obvious that the Ordinance's direct application was the source of Loscombe's alleged injury. Therefore, the City of Scranton will not be dismissed from this matter for failure to allege a custom or practice insofar as there remain allegations that the Ordinance was unconstitutional.

2. Mayor Chris Doherty

Loscombe has also included the Mayor of Scranton, Chris Doherty, in both his personal and official capacity. As to his official capacity, the Second Amended Complaint avers that Loscombe is "required to sue him to declare a provision of an Ordinance unconstitutional." (Second Am. Compl. at ¶ 8, Doc. 29.) Loscombe, however, does not renew this argument in his brief in opposition, but instead argues that Mayor Doherty is liable as a policy-maker where "the City of Scranton took a deliberate official action of stripping Plaintiff's disability pension." (Pl.'s Br. at 17, Doc. 46.)

A supervisor[1] may be liable under § 1983 for the violation of a plaintiff's civil rights where he "directed others to violate them, or, as the person in charge,

[1] Based on the Supreme Court's decision in *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), the Third Circuit has "expressed uncertainty as to the viability and scope of supervisory liability." *Argueta v. U.S. Immigration & Customs Enforcement,* 643 F.3d 60, 70 (3d Cir.2011) (internal citations omitted). For the purposes of this opinion, however, the continued validity of imposing liability on a supervisor will be assumed.

had knowledge of and acquiesced in his subordinates' violations." *A.M. v. Luzerne Cnty. Juvenile Det. Ctr.,* 372 F.3d 572, 586 (3d Cir.2004). A supervisor may also be liable under § 1983 "if he or she implements a policy or practice that creates an unreasonable risk of a constitutional violation on the part of the subordinate and the supervisor's failure to change the policy or employ corrective practices is a cause of this unconstitutional conduct." *Argueta v. U.S. Immigration & Customs Enforcement,* 643 F.3d 60, 72 (3d Cir.2011) (citing *Brown v. Muhlenberg Twp.,* 269 F.3d 205, 216 (3d Cir.2001)). Of course, a supervisor cannot be held liable solely on a theory of *respondeat superior. Rode v. Dellarciprete,* 845 F.2d 1195, 1207 (3d Cir. 1988).

Loscombe represents that he is predicating Mayor Doherty's liability on his policymaking position. (Pl.'s Br. at 16, Doc. 46.) This approach requires considering: (1) "whether, as a matter of state law, the official is responsible for making policy in the particular area of municipal business in question"; and (2) "whether the official's authority to make policy in that area is final and unreviewable." *Hill v. Borough of Kutztown,* 455 F.3d 225, 245 (3d Cir. 2006) (citations omitted). The Second Amended Complaint fails to allege either element as it contains no allegation that the Mayor was responsible for making policy in regards to the Ordinance at issue, or that any such authority would be final or unreviewable. The claim against Mayor Doherty in his official capacity therefore fails.

Further, to the extent Mayor Doherty is named in his personal capacity, this claim must also fail. Under § 1983, a defendant "must have personal involvement in the alleged wrongs to be liable," *Sutton v. Rasheed,* 323 F.3d 236, 249 (3d Cir.2003), and "cannot be held responsible for a constitutional violation which he or she neither participated in nor approved," *C.H. ex rel. Z.H. v. Oliva,* 226 F.3d 198, 201 (3d Cir.2000). No such personal involvement is pleaded in the instant action.

Instead, Loscombe attempts in his brief to reverse-engineer this personal involvement on the supposition that Mayor Doherty is "the enforcer of the ordinances of the City." (Second Am. Compl. at ¶ 8, Doc. 29; citing Scranton, Pa., Code of the City of Scranton ch. 99, art. III, § 6-5 (1997).) While it is true that the Code requires the Mayor to "enforce the Charter and ordinances of the City and all general laws applicable thereto," that does not suggest that the Mayor actually had any involvement in the case at bar.

Therefore, the Mayor will be dismissed in both his personal and official capacity. However, because there is no indication that more particularized pleadings would be futile, Loscombe will be granted leave to amend to assert claims against Mayor Doherty.

B. First Amendment Retaliation Claim (Count I)

In his Second Amended Complaint, Plaintiff Loscombe alleges that his pension was suspended "as a retaliatory move to financially cripple [him] into resigning from political office." (Second Am. Compl. at ¶ 18, Doc. 29.) To plead a First Amendment retaliation claim, a plaintiff must allege: "(1) he engaged in constitutionally protected conduct, (2) he was subjected to adverse actions by a state actor, and (3) the protected activity was a substantial motivating factor in the state actor's decision to take the adverse action." *Brightwell v. Lehman,* 637 F.3d 187, 194 (3d Cir. 2011) (citation omitted).

Loscombe provides no particularized allegations in support of his conclusion that the application of this Ordinance was retaliatory, and I find it lacking in plausibility as plead. In other words, there are no factual assertions in the Complaint that would "allow[ ] the court to draw the reasonable inference that the defendant[s] [are] liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (citing *Twombly,* 550 U.S. at 556). Of course, "without some factual allegation in the complaint, a claimant cannot satisfy the requirement that he or she provide not only 'fair notice,' but also the 'grounds' on which the claim rests." *Phillips v. County of Allegheny,* 515 F.3d 224, 232 (3d Cir. 2008) (citing *Twombly,* 550 U.S. at 555 n. 3). Even assuming that Loscombe has properly pleaded constitutionally-protected conduct and adverse actions by a state actor, the Second

Amended Complaint is most notably infirm in its failure to evince that the protected activity was a substantial motivating factor: that the Defendants would not have suspended Loscombe's pension had he engaged in city employment that did was not constitutionally protected. As such, this retaliation claim will be dismissed from this action, but leave to amend will be granted.

C. Violation of Substantive and Procedural Due Process (Count II)

The Due Process Clause of the Fourteenth Amendment prohibits states from depriving "any person of life, liberty, or property without due process of the law." U.S. Const. amend. XIV. As the Due Process Clause is comprised of both substantive and procedural components, *Evans v. Sec'y Pa. Dep't of Corr.,* 645 F.3d 650, 658 (3d Cir. 2011), each will be addressed in turn.

1. Substantive Due Process

As the Third Circuit has recognized, the Substantive Due Process component of the Fourteenth Amendment is comprised of "two very different threads." *Nicholas v. Pennsylvania State Univ.,* 227 F.3d 133, 139 (3d Cir. 2000). The first concerns the validity of a legislative act itself. The second, concerned with non-legislative state action, protects against the deprivation of a property interest that is "arbitrary, irrational, or tainted by improper motive."

Id. (quoting *Woodwind Estates, Ltd. v. Gretkowski,* 205 F.3d 118, 123 (3d Cir. 2000)). Since this is a protection against irrational conduct by the government, "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Chainey v. Street,* 523 F.3d 200, 219 (3d Cir. 2008) (quoting *County of Sacramento v. Lewis,* 523 U.S. 833, 846 (1998)). Specifically, to establish a substantive due process violation, a plaintiff must prove: (1) the deprivation of an interest protected by the substantive due process clause; and (2) that the government's deprivation of that protected interest shocks the conscience. *Chambers ex rel. Chambers v. Sch. Dist. of Phila. Bd. of Educ.,* 587 F.3d 176, 190 (3d Cir.2009) (citing *Chainey,* 523 F.3d at 219).

I have previously determined that a pension benefit is not a fundamental right entitled to substantive due process protection. *See Kegolis v. Borough of Shenandoah,* No. 03-0602, 2006 WL 3814311, at *3 (M.D. Pa. Dec. 27, 2006). There, I specifically held "that a pension benefit, whether vested or unvested, does not constitute property entitled to substantive due process protection in the Third Circuit." *Id.*; *see also Walker v. City of Waterbury,* 601 F. Supp. 2d 420, 425 (D. Conn. 2009) ("Plaintiffs do not have a fundamental right to their vested pension benefits that is protected by the substantive component of the due process clause of the Constitution"); *McGovern v. City of Jersey City,* No. 98-5186, 2006 WL 42236, at *13 (D.N.J. Jan. 6, 2006) (finding that

pension benefits were not afforded substantive due process protection).

However, even assuming that Loscombe had a sufficient property interest in his pension as to trigger substantive due process protections, there is also no alleged conduct by any Defendant that shocks the conscience. While the standard for conscience shocking is subjective and contextual, "it is governmental conduct intended to injure that is most likely to rise to the conscience-shocking level." *Evans v. Sec'y Pa. Dep't of Corr.,* 645 F.3d 650, 660 (3d Cir.2011) (internal quotations omitted) (citing *Cnty. of Sacramento v. Lewis,* 523 U.S. 833, 847 (1998)). Such behavior can be found through "allegations of corruption, self-dealing, [or] bias against an ethnic group." *Chainey,* 523 F.3d at 220 (3d Cir.2008). Here, while there are no such allegations, I especially find it not patently shocking that a city would suspend a worker's pension while they are receiving another stream of income from that city. Finally, as the alleged conduct in this case was in direct conformity with the Ordinance,[2] these actions were not at all arbitrary. Therefore, Loscombe's substantive due process claim fails and will be dismissed with prejudice.

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[2] To the extent that Loscombe argues that the Ordinance does not apply to him, I reject this argument. *See* Section II(C)(2), *infra.*

2. Procedural Due Process

A violation of procedural due process requires a deprivation of a "protected property interest" and "that the state procedure for challenging the deprivation does not satisfy the requirements of procedural due process." *DeBlasio v. Zoning Bd. of Adjustment for Twp. of W. Amwell,* 53 F.3d 592, 597 (3d Cir. 1995) *abrogated on other ground by United Artists Theatre Circuit, Inc. v. Twp. of Warrington, PA,* 316 F.3d 392 (3d Cir. 2003). In appraising the procedures used, a court will consider: "(1) the private interest affected by the official action; (2) the risk that the plaintiff will suffer an erroneous deprivation through the procedure used and the probable value if any of additional procedural safeguards; and (3) the government's interest." *Reichley v. Pennsylvania Dept. of Agric.,* 427 F.3d 236, 246 (3d Cir. 2005) (citation omitted).

In regard to procedural due process, property "is merely a label applied to a benefit when an individual possesses a 'legitimate entitlement' to it under 'existing rules or understandings.'" *Pappas v. City of Lebanon,* 331 F. Supp. 2d 311, 316 (M.D. Pa. 2004) (quoting *Bd. of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972)). These notions are derived "from sources independent of the Constitution, usually state statutes and common law." *Id.* And, there are cases from the Pennsylvania courts which have found that retirement benefits cannot be terminated without some additional procedures. *See e.g. Olsen v. State Emps.' Ret. Bd.,* 688 A.2d 255, 257 (Pa. Cmwlth. Ct.

1997) (opining that the State Employees' Retirement Board "must understand that the retirement benefits it administers are property rights"); *Cherillo v. Ret. Bd. of Allegheny Cnty.,* 796 A.2d 420, 421 (Pa. Cmwlth. Ct. 2002) (determining that a retiree was entitled to due process prior to the termination of his disability retirement benefits). However, more analogous to the instant case is my denial of a procedural due process claim in *Brace v. County of Luzerne,* ___ F. Supp. 2d ___, 2012 WL 2121173 (M.D. Pa. June 12, 2012). As the plaintiff in *Brace* had been convicted of a federal crime, the relevant Retirement Board was without discretion in discontinuing his pension benefits since the operative statute required that "benefits shall be forfeited upon entry of a plea of guilty." *Id.* at *12. Noting that this forfeiture was automatic, I found that there was "simply no factual dispute that a pre-deprivation notice or hearing could have addressed," *Id.* (quoting *Alvin v. Suzuki,* 227 F.3d 107, 121 (3d Cir.2000)), and that additional procedural safeguards were therefore unwarranted.

The instant case dictates the same result. While the Second Amended Complaint asserts that Loscombe was denied procedural due process because he was not afforded notice or opportunity to be heard before his pension was suspended, I do not find that such process was required. Specifically, as in *Brace,* additional procedural safeguards would not have precluded an erroneous deprivation as the matter *sub judice* required only the same simple, straightforward application of a statute.

In particular, the Ordinance at issue provides that "[w]hen any fireman is pensioned and thereafter enters the service of the City in any capacity with compensation the pension of such person shall be suspended during his term of service." Scranton, Pa., Code of the City of Scranton ch. 99, art. V, § 99-80 (1997). The Second Amended Complaint avers that "John Loscombe was a Fire Captain for the City of Scranton Fire Department and receiving his retirement fire pension." (Second Am. Compl. at ¶ 2, Doc. 29.) Thus, the first qualification of the Ordinance is satisfied.[3] The Complaint also explains that Loscombe had "accept[ed] an offer to hold the political position of Scranton City Council member" (*Id.* at ¶ 15), therefore falling within the second qualification of "enter[ing] the service of the City in any capacity." Finally, although not clear from the face of the Second Amended Complaint, Loscombe's brief explains that the position on City Council resulted in compensation. (Pl.'s Br. at 11, Doc. 46.) Thus, while the Ordinance itself may be excessively broad or otherwise infirm, additional factfinding was not needed to determine that Loscombe fell within its purview.

Loscombe raises two unconvincing arguments in response to the above analysis. First, he appears to

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[3] As the Plaintiff points out, for the purposes of this Ordinance a "fireman . . . includes the Fire Chief, any officer or engineer, and any regularly appointed fireman who has satisfactorily passed the probationary period." Scranton, Pa., Code of the City of Scranton ch. 99, art. V, § 99-59(B) (1997).

suggest that in order to be subject to the Ordinance, one must *return* to service as firefighter. The plain meaning of the Ordinance, however, is an individual *pensioned* as a firefighter is subject to pension suspension for "entering the service of the City in *any capacity.*" Secondly, Loscombe argues that "an elected or appointed leader is not an 'employee' of the City of Scranton." (Pl.'s Br. at 10, Doc. 46.) This suggestion is unhelpful as the Ordinance says nothing about "employees" and extends broadly to anyone in "the service of the city."

Therefore, Loscombe's procedural due process claim will also be dismissed with prejudice.

D. The Ordinance is Unconstitutional on its Face and As Applied (Count III)

Count III alleges that the Ordinance is unconstitutional on its face and as applied under the First, Fifth, and Fourteenth Amendments. Each constitutional amendment will be considered separately below.

1. First Amendment Issues

Loscombe argues that the Ordinance works an impermissible restriction on his political speech by having the power to coerce his non-participation on the City Council. In pertinent part, the First Amendment Protects against laws "abridging the freedom of speech . . . or the right of the people peaceably to

assemble." U.S. Const. amend. I. These freedoms of speech and association have been applied to state actors through the Fourteenth Amendment.

a. Free Speech

Although the Second Amended Complaint pleads a claim for violation of free speech both as applied and on the face of the Ordinance, there are no allegations contained therein suggesting that the Ordinance at all hindered Loscombe's free speech or in any way had the potential to. As there is no suggestion in any of the filings before the Court that this was the case, this free speech claim will be dismissed with prejudice both on the face and as applied.

b. Freedom of Association

Loscombe's Second Amended Complaint avers that "[e]very retired public safety officer . . . has a constitutional right to hold a political office." (Second Am. Compl. at ¶ 1, Doc. 29.) And, no party contests that Loscombe and other retired firefighters have a right to associate with and as members of the City Council. Such expressive association, "recognize[s] a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. U.S. Jaycees,* 468 U.S. 609, 618 (1984). As such, "[a] social group is not protected unless it engages in expressive activity such as taking a stance on an issue of public, political,

social, or cultural importance." *Schultz v. Wilson,* 304 F. App'x 116, 120 (3d Cir. 2008) (citing *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh,* 229 F.3d 435, 444 (3d Cir. 2000)).

"As in the area of freedom of expression, an individual's right of association may be limited by valid, content-neutral time, place and manner restrictions enacted by the state." *Tacynec v. City of Phila.,* 687 F.2d 793, 799 (3d Cir. 1982) (citation omitted); *Grace United Methodist Church v. City Of Cheyenne,* 451 F.3d 643, 658 (10th Cir. 2006) (applying same standard for content-neutral speech to association); *Emergency Coal. To Defend Educ. Travel v. U.S. Dept. of Treasury,* 498 F. Supp. 2d 150, 161 (D.D.C. 2007) *aff'd* 545 F.3d 4 (D.C. Cir. 2008) (same). Therefore, in analogizing to the speech domain, the first step in assessing this claim is to determine whether the Ordinance is content-neutral or content-based in order to ascertain the necessary amount of scrutiny to apply to it. *Johnson v. City & Cnty. of Phila.,* 665 F.3d 486, 491 (3d Cir. 2011). Statutes are content-neutral "where they were intended to serve purposes unrelated to the content of the regulated speech, despite their incidental effects on some speakers but not others." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.,* 502 U.S. 105, 122 (1991). In other words, "[w]hen determining whether a statute is content neutral, a principal consideration is 'whether the government has adopted a regulation of speech because of disagreement with the message it conveys,' or instead,

adopted that regulation for some other purpose collateral to the protected speech." *Free Speech Coal., Inc. v. Attorney Gen. of U.S.,* 677 F.3d 519, 533 (3d Cir. 2012) (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989)). Here, there is no suggestion in the Ordinance itself or in the Second Amended Complaint that this law was in any way crafted with an eye towards suppressing speech or association, but rather that its infringement of the First Amendment is incidental to its application. Therefore, the Ordinance at issue is a content-neutral one.

As a content-neutral Ordinance, § 99-80 does "not offend the First Amendment as long as the restrictions (1) 'are narrowly tailored to serve a significant governmental interest'; and (2) 'leave open ample alternative channels for communication of the information.'" *Johnson,* 665 F.3d at 491 (quoting *Rappa v. New Castle Cnty.,* 18 F.3d 1043, 1054 (3d Cir. 1994)). Applied to the right of association, this requires that the City's Ordinance "do[es] not burden any more speech or associational rights than necessary" in furthering the City's substantial interest. *Grace United,* 451 F.3d at 658.

At this stage, there is no evidence before the Court as to the state interest underlying the Ordinance and whether it is sufficiently tailored to address that interest. However, to the extent the Pension Board Defendants' represent that the aim of the Ordinance is to prevent retired employees from "double dipping" by receiving two simultaneous income streams from the city, this rationale does not

appear to be narrowly tailored. (Pension Defs.' Br. at 4-5, Doc. 43.) Specifically, as Loscombe avers that he is currently receiving less than he would be had he decided not to serve on the City Council (Pl.'s Br. at 11, Doc. 46), this would exceed the City's interest in preventing double dipping. And, such a "prohibition on compensation unquestionably imposes a significant burden on expressive activity." *United States v. Nat'l Treasury Employees Union,* 513 U.S. 454, 468 (1995). As such, Plaintiff's First Amendment claim freedom of association claim will be allowed to go forward.[4]

2. Fifth Amendment Rights

a. Vagueness[5]

"A fundamental principle in our legal system is that laws which regulate persons or entities must

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[4] The Defendants do not argue as to the breadth of the statute and the Plaintiff's claim that it is overbroad will therefore also be allowed to proceed. Under the First Amendment:

> A regulation of speech may be struck down on its face if its prohibitions are sufficiently overbroad-that is, if it reaches too much expression that is protected by the Constitution. [A] policy can be found unconstitutionally overbroad if "there is a 'likelihood that the statute's very existence will inhibit free expression' " to a substantial extent.

McCauley v. Univ. of the Virgin Islands, 618 F.3d 232, 241 (3d Cir. 2010) (quoting *Sypniewski v. Warren Hills Reg'l Bd. of Educ.,* 307 F.3d 243, 258 (3d Cir. 2002)).

[5] "Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." *United States v. Williams,* 553 U.S. 285, 304 (2008).

give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.,* 132 S. Ct. 2307, 2317 (2012). Such vagueness is found where "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.* (quoting *Connally v. Gen. Const. Co.,* 269 U.S. 385, 391 (1926)). Thus, the "doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* Though this doctrine grew up within the criminal context, the vagueness principle has been extended to the civil litigation context. *San Filippo v. Bongiovanni,* 961 F.2d 1125, 1135 (3d Cir. 1992) (citations omitted). However, the civil context requires less specificity because the consequences are not as severe. *Id.*

While a plaintiff whose conduct is clearly proscribed generally may not argue vagueness, in the First Amendment context, a plaintiff may "argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech." *Williams,* 553 U.S. at 304 (citations omitted). However, as noted above, there has been no plausible assertion that this Ordinance regulates any speech. Moreover, as applied to the facts of this case, it is clear that Loscombe's conduct as a pensioned fire officer receiving compensation as a city council falls within the Ordinance's purview as "enter[ing] the

service of the City in any capacity with compensation."

Even if this were not the case, a facial challenge to vagueness will only be upheld where "the enactment is impermissibly vague in all of its applications." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 495 (1982). In the public employment context, "broad public employee dismissal standards" have passed muster since "standards are not void for vagueness as long as ordinary persons using ordinary common sense would be notified that certain conduct will put them at risk of discharge." *San Filippo,* 961 F.2d at 1136 (citing *Arnett v. Kennedy,* 416 U.S. 134, 159 (1974)). For example, discharge of a teacher was permissible under a regulation allowing such "only for 'conduct unbecoming a teacher . . . or other good cause.'" *Id.* at 1137 (citing to *Wishart v. McDonald,* 500 F.2d 1110, 1111 (1st Cir. 1974)). As such, *San Filippo* found that a university regulation permitting dismissal for lacking "standards of sound scholarship and competent teaching" was not unconstitutionally vague. *Id.* The Third Circuit rejected the district court's narrow construction of the provision and upheld it as a broad "standard which encompasses a wide range of conduct." *Id.*

In the instant case, the Ordinance is no so vague as to confound a man of ordinary intelligence. In stating that a pensioned fireman's pension shall be suspended during the term of service "of the City in any capacity with compensation," the meaning is very clear: effort on behalf of the city where compensation

is garnered will result in the loss of a fireman's pension. Loscombe merely argues that this phrase provides no definition, but such is not necessary when the terms are so plain. *See Forum for Academic & Institutional Rights, Inc. v. Rumsfeld,* 291 F. Supp. 2d 269, 318 (D.N.J. 2003) *aff'd* 446 F.3d 1317 (3d Cir. 2006) ("the mere absence of definitions does not necessarily render the statute vague, particularly where, as here, the terms are subject to interpretation according to their commonly understood meaning."). Thus, like *San Filippo,* this is a broad regulation that reaches a large swath of compensable conduct. This expansive reach, however, does not render it without guidance and persons of ordinary common sense would be notified that money received from any public service in Scranton would put their firemen's pension in jeopardy. Moreover, such an encompassing definition is inherently resistant to arbitrary enforcement.

Therefore, the Ordinance is not void for vagueness and this claim will be dismissed with prejudice.

b. Fifth Amendment Taking

The Fifth Amendment prohibits the taking of private property for public use without just compensation. U.S. Const. amend. V. No Defendant has argued that this claim cannot succeed and this claim will therefore be allowed to proceed.

3. Due Process Rights

In Count III, Loscombe appears to renew the Due Process claims he raised in Count II. However, as noted, Loscombe's particular as-applied claims of substantive and procedural due process will be dismissed. Therefore, because Loscombe makes no representations as to how the statute is facially devoid of due process, these due process claims will also be dismissed from Count III with prejudice.

4. Equal Protection

Defendants also fail to respond to any of Plaintiff's equal protection claims. Therefore, Plaintiff's equal protection claim will survive these motions to dismiss.

E. Pension Suspension was an Unlawful Seizure and Taking (Count IV)

Count IV of the Second Amended Complaint is for "an unlawful seizure and taking." To any extent this is a claim for an unlawful taking under the Fifth Amendment, such a claim has been pleaded and addressed above in Count III. To the extent this Count pleads something more, it fails to specify any particular legal foundation or to offer any specified allegations to support such a claim, constitutional or otherwise. As such, this Count will be stricken from the Second Amended Complaint, although leave to amend will be granted.

F. Motion to Strike

The City Defendants have moved to strike paragraph twelve of the Second Amended Complaint insofar as it "pertains to impertinent matters and characterizations regarding the Plaintiff's retirement that are irrelevant to this matter." (City Defs.' Br. at 39, Doc. 40.)

"The court may strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "The purpose of a motion to strike is to clean up the pleadings, streamline litigation, and avoid unnecessary forays into immaterial matters." *McInerney v. Moyer Lumber & Hardware, Inc.,* 244 F. Supp. 2d 393, 402 (E.D.Pa.2002). Because a motion to strike is not favored, a court will generally not grant such a motion unless the material to be stricken bears no possible relationship to the controversy and may cause prejudice to one of the parties. *See Hanover Ins. Co. v. Ryan,* 619 F. Supp. 2d 127, 133 (E.D. Pa. 2007). While a trial court has considerable discretion in whether to grant or deny such a motion, they are "highly disfavored" and should only be granted "when 'the allegations have no possible relation to the controversy and may cause prejudice to one of the parties, or if the allegations confuse the issues.'" *Medevac MidAtlantic, LLC v. Keystone Mercy Health Plan,* 817 F. Supp. 2d 515, 520 (E.D. Pa. 2011) (quoting *N. Penn Transfer, Inc. v. Victaulic Co. of Am.,* 859 F. Supp. 154, 158 (E.D. Pa. 1994)).

Without much elaboration, the City Defendants seek to strike the Second Amended Complaint's explanation that Loscombe was "a former Fire Captain who the City of Scranton forced into retirement based on injuries stemming from a work-related incident when the truck ladder bucket he was in hit a 12,000 volt power line, which melted the truck's tires." (Am. Compl. at ¶ 12, Doc. 29.) While the details behind the vesting of Plaintiff's pension do appear to be irrelevant to the instant action, I do not see such a great potential for prejudice that would warrant excising these allegations. Of course, the admissibility of such evidence at trial is a wholly different matter. Today, however, the potential for prejudice or confusion is not sufficiently high as to warrant the striking of this allegation. Therefore, the motion to strike will be denied.

CONCLUSION

Plaintiff John Loscombe's claims against Mayor Doherty will be dismissed for failing to plead particularized allegations, but Plaintiff will be given leave to amend for an opportunity to revise these pleadings as against the Mayor. Plaintiffs claims for substantive and procedural due process are dismissed with prejudice, as are his claims for free speech under the First Amendment and vagueness under the Fifth Amendment. Plaintiff's First Amendment retaliation claim is also dismissed, but leave to amend will be granted as to that claim. Finally, Count IV will be stricken from the Second Amended Complaint for failing to

state a proper claim, but leave to amend will be granted so that the Plaintiff may clarify and properly plead this claim for "unlawful seizure and taking."

As such, the Second Amended Complaint will be allowed to proceed solely on its First Amendment claims for freedom of association and overbreadth, the Fifth Amendment takings claim, and the Fourteenth Amendment Equal Protection claim.

There are three (3) pending motions for summary judgment in this matter. Should Plaintiff elect submit a Third Amended Complaint, these three motions will be deemed moot and may be later re-filed in light of the amended pleadings. If Plaintiff does not amend the Second Amended Complaint, these three motions will be ruled on as filed and in light of this Memorandum and Order.

An appropriate Order follows.

August 10, 2012
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge