CASE NOS. 16-2171 and 16-2172

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DON KARNS,
Plaintiff-Appellant,
v.
KATHLEEN SHANAHAN, SANDRA McKEON CROWE, NEW JERSEY TRANSIT, and JOHN DOE SUPERVISORS 1 TO 50,
Defendants-Appellees.

ROBERT PARKER,
Plaintiff-Appellant,
v.
KATHLEEN SHANAHAN, SANDRA McKEON CROWE, NEW JERSEY TRANSIT, and JOHN DOE SUPERVISORS 1 TO 50,
Defendants-Appellees.

Appeal from the United States District Court for the District of New Jersey

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BRIEF OF THE APPELLANTS

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TABLE OF CONTENTS

APPENDIX VOL. I

PAGE

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Constitutional Provisions

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over these action under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(A)(3), as they are actions arising under the Constitution of the United States and seek to redress the deprivation, under color of state law, of rights secured by the Constitution of the United States. This Court has jurisdiction over the appeal from the District Court's final judgments pursuant to 28 U.S.C. § 1291. The District Court entered a final judgment disposing of all the claims in each of the cases consolidated herein on April 1, 2016 (App. 3-4, 27, 33)[1], and the Appellants timely filed notices of appeal from the final judgments on April 28, 2016 (App. 1-2, 28, 33).

ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in refusing to follow a decision of this Court holding that New Jersey Transit is not an "arm of the state" protected by Eleventh Amendment immunity? (Issue raised in Plaintiffs' Amended Brief in Opposition to Defendants' Motion for Summary Judgement (Doc. # 25). Issue resolved in District Court's Memorandum Opinion, App. 12).

2. Did the District Court err in granting the Defendants'-Appellees' motion for summary judgment on the Plaintiffs'-Appellants' claims that they were deprived of

[1] "App." references are to the page of the Appendix filed in conjunction with this Brief.

their rights under the First and Fourteenth Amendments to the United States Constitution by a discriminatory enforcement of a permit requirement and by retaliation against the Plaintiffs-Appellants for exercising their right to record an encounter with police in public? (Issue raised in Plaintiffs' Amended Brief in Opposition to Defendants' Motion for Summary Judgement (Doc. # 25). Issue resolved in District Court's Memorandum Opinion, App. 19).

3. Did the District Court err in ruling that the individual Defendants-Appellees were protected by qualified immunity and entitled to summary judgment on the Plaintiffs'-Appellants' claims that they were arrested without probable cause in violation of their rights under the Fourth Amendment to the United States Constitution? (Issue raised in Plaintiffs' Amended Brief in Opposition to Defendants' Motion for Summary Judgement (Doc. # 25). Issue resolved in District Court's Memorandum Opinion, App. 20).

4. Is there evidence in the record that a policy or custom of Defendant-Appellee New Jersey Transit caused a deprivation of the Plaintiffs-Appellants' Fourth Amendment rights such that New Jersey Transit may be held liable for that deprivation under 42 U.S.C. § 1983? (Issue raised in Plaintiffs' Amended Brief in Opposition to Defendants' Motion for Summary Judgement (Doc. # 25). Issue not resolved by the District Court).

STATEMENT OF RELATED CASES

This case has not been before this Court previously. The Appellants are aware of one related case, *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655 (3d Cir.) (*en banc*), *cert. denied*, 493 U.S. 850 (1989), involving Defendant-Appellee New Jersey Transit, that was previously presented to and decided by this Court.

STATEMENT OF THE CASE

Procedural History: This is a consolidated appeal of final judgments entered in two separate actions filed by Plaintiffs-Appellants Don Karns and Robert Parker (hereinafter "Karns and Parker"). Each action arose out of the same facts and each sought relief against each of the Defendants-Appellees under 42 U.S.C. § 1983 for violations of Karns' and Parker's rights under U.S. Const. amend. I, U.S. Const. amend. IV, and U.S. Const. amend. XIV (App. 49, 58). The Defendants-Appellees filed Answers to the Complaints generally denying liability and the parties then proceeded to discovery. On July 27, 2015, the Defendants-Appellants filed a motion and supporting brief for summary judgment under Fed. R. Civ. P. 56 as to all claims in each of the cases (App. 113). Karns and Parker filed a brief in opposition to the motion, and the Defendants-Appellants filed a reply brief. On

April 1, 2016, the District Court entered an Order and Judgment and supporting Memorandum Opinion granting the Defendants-Appellants motion for summary judgment as to all of Karns' and Parker's claims against all of the Defendants-Appellees (App. 3-5). Karns and Parker timely filed notices of appeal from the final judgment entered by the District Court (App. 1-2).

Statement of Facts:[2] Karns and Parker are evangelical Christian ministers who regularly go out into the public to preach the Christian gospel (App. 50, 59). On the morning of June 26, 2012, Karns and Parker arrived at Princeton Junction Station, a railway station owned and operated by Defendant-Appellee New Jersey Transit (hereinafter "NJT") (App. 121, 251). Karns and Parker stood on the railway platform and began preaching to passengers (App. 121, 251-252). The pair also carried signs with Bible verses written on them (App. 685).

Defendants-Appellees Sergeant Kathleen Shanahan (hereinafter "Shanahan") and Officer Sandra Crowe (hereinafter "Crowe") are enforcement officers employed by NJT (App. 250-251). While on patrol the morning of June 26, 2012, the officers received a radio call indicating that individuals were preaching loudly on the platform of the Princeton Junction Station and went there to investigate

[2] Because the District Court disposed of Karns' and Parker's claims on summary judgment, the Statement of Facts herein is presented in a light most favorable to and with inferences drawn in favor of Karns and Parker. *Haybarger v. Lawrence Cty. Adult Prob. & Parole*, 551 F.3d 193, 197 (3d Cir. 2008).

(App. 251). When the officers arrived at the station, the heard loud voices coming from the platform (App. 251). The officers entered the station and confronted Karns and Parker. Parker took out his cell phone in order to record their encounter with the officers, but Shanahan ordered that the cell phone be put away and Parker complied immediately (App. 737-738). The officers then asked Karns and Parker if they had a permit to speak at the station, and they told the officers they did not have a permit. Shanahan stated that they needed a permit to speak at the station, but Parker responded that they did not need a permit and pointed out that he had been coming to the station for years to preach and was not required by police to have a permit (App. 254-255, 740).

Shanahan then asked Karns and Parker to provide identification. Parker produced an expired college identification card (App. 255), but Karns refused to provide identification (App. 255-256). Believing that Karns and Parker interfered with her investigation by failing to produce sufficient identification, Shanahan and Crowe arrested Karns and Parker for and charged them with Obstruction of Justice in violation of N.J. Stat. Ann. § 2C:29-1(a), and Prevention of a Public Servant under N.J. Stat. Ann. § 2C:29-1(b). The officers also believed that by preaching on the platform without a permit, Karns and Parker had committed the offense of trespassing and arrested and charged them with Defiant Trespass under N.J. Stat. Ann. § 2C:13-3(b) (App. 257-259). Prior to arresting Karns and Parker, the

officers did not demand that the preachers cease engaging in noncommercial speech (App. 315), and Karns and Parker did not engage in noncommercial speech between the time the officers approached them and when they were arrested (App. 425). Moreover, at no time did the officers ever demand that Karns and Parker leave the station (App. 330, 495-496).

NJT has a regulation providing that members of the public wishing to engage in non-commercial speech on NJT property are required to obtain a permit. *N.J.A.C.* 16:83-1.4(a). However, this regulation or some other notice warning persons that a permit is required to engage in non-commercial speech on NJT property is not posted at the Princeton Junction Station or at other NJT stations (App. 294). And in the past, Parker had been allowed by NJT officers to preach at the Princeton Junction Station and told that he was not doing anything wrong (App. 692-693).

Additionally, the evidence in the record indicates that the requirement for a non-commercial speech permit is unequally enforced. In a deposition, NJT employee Rose Marques, who prepares non-commercial speech permits, testified as follows:

Q. But you were told that political candidates do not need a permit?
A. It's not required.
Q. It's not required?
A. That's true.

(App. 559). And NJT employee Allen Kratz, who signs the permits prepared by Marques, testified as follows:

> **Q.** Do political candidates have to obtain Certificates of Registration to campaign?
> **A.** No, they don't.
> **Q.** Why are they given special treatment?
> **A.** I don't know.

(App. 628). Crowe also testified that the non-commercial permit regulation was promulgated to be used against "preachers" and as a response to complaints about them (App. 470).

Karns' charges were tried before the West Windsor Municipal Court and he was acquitted on all of the charges (App. 51, 259). Parker's charges also were tried before the West Windsor Municipal Court and the charges of Obstruction of Justice, N.J. Stat. Ann. § 2C:29-1(a), and of Prevention of a Public Servant, N.J. Stat. Ann. § 2C:29-1(b), were dismissed by the court, but Parker was convicted of Defiant Trespass, N.J. Stat. Ann. § 2C:13-3(b). However, Parker appealed the trespass conviction and it was reversed on *de novo* review by the Superior Court (App. 60-61, 259-261).

Karns and Parker filed complaints alleging that Shanahan, Crowe and NJT had deprived them of their rights under the First, Fourth and Fourteenth Amendments and seeking damages and other relief under 42 U.S.C. § 1983 (App. 49, 58). The claim for deprivations of their First Amendment rights alleged that

they were stopped from preaching and arrested "[o]n account of the religious content of their speech[.]" The complaints further alleged that "in practice New Jersey Transit officials have only enforced its permit scheme when its official have encountered speech they find subjectively objectionable," that "but for the religious nature of the speech of [the Plaintiffs], they would have never even been approached by the defendants on the day in question" (App. 52, 61), and that they were arrested "on account of the religious content of their speech" and "for having attempted to create a record by recording the actions of the arresting officers[.]" (App. 53, 62-63).

Karns' and Parker's Fourth and Fourteenth Amendment claims alleged that their arrest by Shanahan a Crowe was made without probable cause that they had committed any crime and so was an unreasonable search and seizure in violation of the constitution (App. 55, 64-65).

On a Fed. R. Civ. P. 56 motion for summary judgment filed by NJT, Shanahan and Crowe, the District Court granted judgment to each of the Defendants on every claim asserted by Karns and Parker. In its Memorandum Opinion supporting the judgment, the District Court initially ruled that NJT was entitled to immunity under U.S. Const. amend. XI from all of the claims. Although recognizing that this Court had held in *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655 (3d Cir.) (*en banc*), *cert. denied*, 493 U.S. 850

(1989), that NJT is not an "arm of the state" entitled to claim Eleventh Amendment immunity under the three-factor test for such immunity (App. 10), the District Court agreed with NJT that the decision in *Benn v. First Judicial Dist. of Pa.*, 426 F.3d 233 (3d Cir. 2005), required a different result than in *Fitchik* (App. 11). The District Court ruled that even though the first *Fitchik* factor, *i.e.*, that money to pay any judgment against NJT would not come from the state treasure, favored denying Eleventh Amendment immunity, because two of the *Fitchik* factors, the status of NJT under state law and NJT's degree of autonomy, bore in favor of granting immunity, NJT was entitled to immunity from the claims (App. 16). The District Court summarily ruled that nonmutual collateral estoppel arising from this Court's decision in *Fitchik*, did not bar NJT's claim to Eleventh Amendment immunity (App. 15).

The District Court went on to grant the individual officers judgment on Karns' and Parkers' claims that the officers deprived Karns and Parker of their First, Fourth and Fourteenth Amendment rights. "The record indicates that the law was unclear as to whether Plaintiffs had an absolute constitutional right to preach on the train platform," the District Court wrote. "Accordingly, the Court finds that each Officer is entitled to qualified immunity in her individual capacity with respect to Plaintiffs' First Amendment and Fourteenth Amendment claims." (App. 19).

The District Court also ruled that the individual officers had an objectively reasonable basis for arresting Karns and Parker because it was admitted that they did not have a permit at the time and they interfered with the officers' investigation by failing to produce valid identification and attempting to record the encounter with the officers with a cellphone. "Accordingly," the court wrote, "the Court finds that the Officers' belief that the Plaintiffs were trespassing in violation of N.J. Stat. Ann. § 2C:18-3(b) was objectively reasonable, and therefore each Officer is entitled to qualified immunity in her individual capacity on Plaintiffs' Fourth Amendment claims." (App. 20).

SUMMARY OF THE ARGUMENT

The District Court's ruling that NJT is entitled to Eleventh Amendment immunity contradicts this Court's ruling in *Fitchik* that NJT is not an "arm of the state" and must be reversed. Subsequent decisions of this Court have not overruled *Fitchik* and it is binding, either as a matter of collateral estoppel or under the settled principle that an *en banc* ruling of this Court may not be overruled by a subsequent panel decision. Moreover, notwithstanding intervening decisions adjusting the manner in which Eleventh Amendment immunity is determined, the balancing of factors made by the *Fitchik* Court with respect to NJT still require a finding that it is not an arm of the state immune from a civil rights lawsuit.

The District Court erred in granting NJT and the individual officers summary judgment on Karns' and Parkers' First Amendment claims because it failed to appreciate the nature and basis of those claims. The complaints alleged that the constitutional deprivation was the result of (a) discriminatory enforcement against persons engaging in religious speech of NJT's permit requirement for engaging in non-commercial speech on NJT property and (b) retaliation by Shanahan and Crowe after Karns and Parker attempted to record the encounter with their cell phones. But the District Court did not address these claims, instead ruling Shanahan and Crowe were entitled to qualified immunity on the First Amendment claims because the right to preach on train platforms was not clearly established. Qualified immunity was not proper here because it is clearly established that (a) a law may not be unequally enforced against persons because of the content or viewpoint of their expression, and (b) officials may not retaliate against persons because of their exercise of First Amendment rights. Because there is evidence in the record showing a policy and custom existed at NJT to discriminatorily enforce the permit requirement and showing Shanahan and Crowe retaliated against Karns and Parker, the judgment granting summary judgment on the First and Fourteenth Amendment claims must be reversed.

Summary judgment also should not have been granted on Karns' and Parkers' Fourth Amendment claims because they were arrested without probable

cause and a reasonable officer would have known that offenses had not been committed. Shanahan and Crowe did not have cause to arrest the Plaintiffs for Defiant Trespass because Karns and Parker were never on notice that they could not preach at the Princeton Junction Station and were never ordered to leave the station by the officers. Nor were the Plaintiffs' arrests for Obstruction of Justice or Prevention of a Public Servant supportable because state law was clear at the time of the arrests that a failure to provide identification is not a violation of these statutes. Additionally, NJT is liable for the Fourth Amendment deprivations because it had a policy directing and encouraging NJT officers to arrest persons for failing to have a required permit even though such failure is not a criminal offense.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO FOLLOW A PREVIOUS DECISION OF THIS COURT HOLDING THAT NJT IS NOT AN "ARM OF THE STATE" FOR PURPOSES OF ELEVENTH AMENDMENT IMMUNITY

Standard of Review: This Court reviews decisions granting motions for summary judgment *de novo*. The Court applies the same test required of the district court and views inferences to be drawn from the underlying facts in the light most favorable to the nonmoving party. The Court's review of a Defendants' entitlement to Eleventh Amendment immunity is plenary. *Haybarger v. Lawrence Cty. Adult Prob. & Parole*, 551 F.3d 193, 197 (3d Cir. 2008).

Discussion of the Issue: In *Fitchik v. New Jersey Transit Rail Operations, Inc*., 873 F.2d 655 (3d Cir.) (*en banc*), *cert. denied*, 493 U.S. 850 (1989), this Court, sitting *en banc*, held that NJT is not the alter ego or "arm of" the state and is not entitled to claim liability from lawsuits in federal court under the Eleventh Amendment. The *Fitchik* decision explained that the Eleventh Amendment "is intended to provide a partial solution to 'the problems of federalism inherent in making one sovereign appear against its will in the courts of the other,'" *id.* at 664 (quoting *Employees of the Department of Public Health and Welfare v. Missouri*, 411 U.S. 279, 294 (1973) (Marshall, J., concurring)), and the court effectuated the amendment's purpose by analyzing the structure and operation of a state entity in light of three factors:

> (1) Whether the money that would pay the judgment would come from the state . . .;
> (2) The status of the agency under state law . . .; and
> (3) What degree of autonomy the agency has.

Id. at 659. After an exhaustive analysis of NJT's funding, legal status, and governance structure, the *Fitchik* court concluded "that NJT is not the alter ego of New Jersey, [and] is not entitled to eleventh amendment immunity." *Id.* at 664.

Despite this controlling decision, one which was made *en banc* and unsuccessfully challenged by a petition to the U.S. Supreme Court, the District Court below concluded that NJT is entitled to Eleventh Amendment immunity and dismissed all of Karns' and Parkers' claims against NJT. A lower court may not so

cavalierly reject the binding, on-point precedent of a superior court and the District Court's decision in this respect is error for a number of reasons.

First, NJT's Eleventh Amendment defense is barred by collateral estoppel because NJT fully and fairly litigated this issue previously and the District Court should not have revisited it. This Court has held that "'prerequisites for the application of issue preclusion are satisfied when: '(1) the issue sought to be precluded [is] the same as that involved in the prior action, (2) that issue [was] actually litigated; (3) it [was] determined by a final and valid judgment; and (4) the determination [was] essential to the prior judgment.'" *Nat'l R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n*, 288 F.3d 519, 525 (3d Cir. 2002)(quoting *Burlington Northern Railway v. Hyundai Merchant Marine*, 63 F.3d 1227, 1231-32 (3d Cir.1995)). Although issue preclusion plainly applies in cases where parties to the present litigation were the same as in the earlier litigation, such mutuality is not essential. *Nat'l R.R. Passenger Corp.*, 288 F.3d at 525. Under the doctrine of nonmutual collateral estoppel, a party which had a full and fair opportunity to litigate an issue against one party may be barred from relitigating that same issue against a different party. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Benjamin v. Coughlin*, 907 F.2d 571, 575-76 (2d Cir. 1990).

In *Fitchik*, NJT fully litigated its entitlement to Eleventh Amendment immunity, going so far as to seek review from the U.S. Supreme Court. The

rejection of that claim by an *en banc* Third Circuit precludes NJT from now revisiting that issue in this litigation. The District Court gave no reason for refusing to apply collateral estoppel, other than to cite another district court decision ruling that NJT is an "arm of the state." *GEOD Corp. v. N.J. Transit Corp.*, 678 F. Supp. 2d 276, 287-88 (D.N.J. 2009). But the *GEOD Corp.* decision did not even address collateral estoppel, much less make a convincing case why that doctrine should not apply to bar a claim by NJT to Eleventh Amendment immunity. Thus, all the elements for collateral estoppel pertain to this case and required rejection of NJT's immunity claim.

Second, the District Court erroneously relied upon the ruling in *Benn v. First Judicial Dist. of Pa.*, 426 F.3d 233 (3d Cir. 2005), to negate the ruling in *Fitchik* that NJT is not an arm of the state. *Benn* is a panel decision from this circuit which held that a Pennsylvania judicial district was protected by Eleventh Amendment immunity. But the *Benn* decision neither purported to overrule the decision in *Fitchik* that NJT is not similarly protected nor could that panel have done so. As 3d Cir. I.O.P. 9.1, provides: "It is the tradition of this court that the holding of a panel in a precedential opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a precedential opinion of a previous panel. Court en banc consideration is required to do so." *See also United States v. Currington*, 88 Fed. Appx. 549 (3d Cir. 2004)(a panel of the court may not

overrule a prior decision of the court; only an *en banc* decision of the court may overrule a prior decision). NJT asks this court to recognize that a panel decision overruled the *en banc* decision in *Fitchik*, which is plainly improper and must be rejected.

Even to the extent the *Benn* decision would allow a reconsideration of the Eleventh Amendment ruling in *Fitchik*, it still does not justify a decision here at odds with the ruling in *Fitchik* that NJT is not an "arm of the state". As noted above, *Benn* did not overrule *Fitchik* and did not change the three factors that a court should consider in determining whether an entity is an arm of the state, although Benn does indicate that the first factor is not given presumptive extra weight. Even more significantly, *Benn* did not question the ruling in *Fitchik*, 873 F.2d at 664, that the ultimate determination involves a "balancing" of the factors, which means that there must be a consideration of how strong each factor is under the circumstances. Even the sole dissenting judge in *Fitchik* agreed that it is the "balance" of the factors that matters. *Id.* at 670 (Rosenn, J., dissenting). Thus, the court in *Fitchik* took pains to analyze NJT vis-à-vis the three factors and determined whether a particular factor "strongly", *id.* at 662, or "slightly", *id.* at 663, favored granting NJT immunity.

Post-Benn cases continue to recognize that the decision on whether an entity is an arm of the state requires a balancing of the three *Fitchik* factors. *See Cooper*

v. Southeastern Pa. Transp. Author., 548 F.3d 296, 310 (3d Cir. 2008)(in determining an entity's entitlement to Eleventh Amendment immunity, the three factors must be "weigh[ed] and balance[d]"). Even after *Benn*, it is not, as the District Court ruled, simply a matter of counting how many factors favor immunity, however slightly, and if it is two then the Eleventh Amendment applies. Instead, the Eleventh Amendment immunity decision is still based on an assessment the strength of each factor and requires a weighing and balancing in light of how strong each factor is.

When correctly applied, the balancing test, even under the *Benn* decision, still requires that Eleventh Amendment immunity be denied NJT. In *Fitchik*, this Court summarized its balancing of the factors as follows: the first factor--"whether the judgment would be paid by state funds—*provides extremely strong indication that NJT is not the alter ego of New Jersey*. The other factors—NJT's treatment under state law, and its degree of autonomy—*provide only weak support for the conclusion that NJT is New Jersey's alter ego*." *Fitchik*, 873 F.2d at 664 (emphasis added). Indeed, the court pointed out that the factors involving NJT's status under state law and autonomy provided only "slight" support for recognizing immunity. *Id.* at 663, 664. On the other hand, "the funding factor here weighs strongly against NJT's claim that it is entitled to immunity from suit in federal court." *Id.* at 662. Thus, the balance still weighs against NJT's Eleventh Amendment claim in

light of the strength of the factor against the claim and the weakness of the two factors favoring it.

Because the ruling in *Fitchik* is still controlling precedent and the balance struck in that case is still valid and correct, the District Court erred in this case in finding that NJT is an "arm of the state" and immune under the Eleventh Amendment from Karns' and Parker's claims. The judgment dismissing NJT should be reversed.

II. THE DISTRICT COURT ERRED IN FAILING TO RECOGNIZE THAT THE PLAINTIFFS' FIRST AMENDMENT CLAIMS ARE BASED ON DISCRIMINATORY ENFORCEMENT OF NJT'S PERMIT REQUIREMENT, AND EVIDENCE OF SUCH DISCRIMINATION PRECLUDED SUMMARY JUDGMENT ON THESE CLAIMS

Standard of Review: This Court exercises plenary review over a District Court's grant of summary judgment. Summary judgment is appropriate only if there is no genuine issue of material fact and if, viewing the facts in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law. The judge's function at the summary judgment stage is solely to determine whether there is a genuine issue of material fact for trial. *Watson v. Rozum*, 2016 WL 4435624, at *2 (3d Cir. Aug. 23, 2016).

Discussion of the Issue: The District Court's decision granting summary judgment on Karns' and Parker's First Amendment claims indicates that it wholly

failed to understand the basis for those claims. It wrote that because it found that it was "unclear . . . whether Plaintiffs had an absolute right to preach on the train platform," Shanahan and Crowe were entitled to qualified immunity on those claims (App. 19).

But Karns and Parker did not claim an "absolute right" to preach on the train platform, but instead challenged the manner in which NJT and its officers enforced the requirement that a permit be obtained in order to engage in non-commercial speech. The Plaintiffs' First Amendment claims here have two aspects: first, that the Defendants selectively enforced the NJT permit requirement against religious speech; second, that the Defendant officers retaliated against them because they protested the officers' demands that they cease preaching and attempted to make a video recording of the officers' conduct while questioning and arresting the Plaintiffs.

The Plaintiffs' First Amendment claims relating to enforcement of the permit requirement are that "in practice New Jersey Transit officials have only enforced its permit scheme when its official have encountered speech they find subjectively objectionable." (App. 52, 61). The complaints further allege that "but for the religious nature of the speech of [the Plaintiffs], they would have never even been approached by the defendants on the day in question." (App. 52, 61). Thus, "[o]n account of the religious content of their speech [the Plaintiffs] were

arrested without probabl[e] cause and prevented from engaging in further communication with the public." (App. 53, 62). These allegations are supported by direct evidence that enforcement activities were initiated and targeted against "preachers" because of complaints by patrons concerning the content of their speech. In her deposition, Officer Crowe testified as follows: "I can't remember who the supervisors were. We had a standing order, I believe from, at the time Acting Chief Kelly, about *how to deal with the preachers* at the stations to cover our Title 16 for NJ Transit Rules and Regulations." (App. 470-471**).**

The Plaintiffs' First Amendment claims are that the permit requirement has been discriminatorily enforced based on the viewpoint or content of the speaker's expression, and it is clearly-established for qualified immunity purposes that selective enforcement of the law by a state officer is a violation of the constitution. *Children First Foundation v. Legreide*, 373 Fed. Appx. 156, 162 (3d Cir. 2010). The enforcement of laws may not be deliberately based upon an unjustifiable standard such as race, religion, or the exercise of protected statutory and constitutional rights. *Wayte v. United States*, 470 U.S. 598, 608 (1985). The law is settled that the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, on the basis of the content or viewpoint of the individual's expression. *Hartman v. Moore*, 547 U.S. 250, 256 (2006). *See also Menotti v. City of Seattle*, 409 F.3d 1113, 1147 (9th

Cir. 2005)(discriminatory enforcement of a speech restriction amounts to viewpoint discrimination in violation of the First Amendment).

In light of this case law, any reasonable officer would know that it is a violation of both the First and Fourteenth Amendment to selectively enforce laws restricting speech on the basis of the content or viewpoint of the speaker's expression. *Menotti*, 509 F.3d at 1147 (citing *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998). Shanahan and Crowe are not immune from the Plaintiffs' claims that enforcement of the permit requirement was discrimination in violation of their constitutional rights Crowe's deposition testimony that there was a standing order on dealing with "preachers" is sufficient evidence of discriminatory enforcement to require the claim be submitted to a jury and not be resolved on summary judgment as the District Court did here. Additionally, the deposition testimony of Marques (App. 559) and Kratz (App. 628), that the permit requirement was not enforced against politicians is further evidence of discrimination in the application of the law. Because there is evidence supporting Karns' and Parker's First and Fourteenth Amendment claims, granting summary judgment on these claims was error.

Karns and Parker also claim that the law enforcement actions against them constituted retaliation for the Plaintiffs' exercise of their First Amendment rights. Again, it cannot be doubted that it is clearly established that the kind of retaliation

at issue here violates the First Amendment. "Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right,' *Crawford–El v. Britton*, 523 U.S. 574, 588, n. 10 (1998), and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out, *id.*, at 592[.]" *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

The elements of a First Amendment retaliation claim are "(1) constitutionally protected conduct, (2) retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link between the constitutionally protected conduct and the retaliatory action." *Thomas v. Independence Twp.*, 463 F.3d 285, 296 (3d Cir. 2006). There is no doubt that the Plaintiffs' advocacy of their right to free expression to the Defendant officers is constitutionally protected conduct. "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston, Tex. v. Hill*, 482 U.S. 451, 462-63 (1987). And while the Defendants take great pains to argue that it is not "clearly established" that police officers may not prevent citizens from recording the officers' actions in a public place, there is no doubt that such activity is protected First Amendment activity, particularly

when it is a part of a citizen's political or social activism. *Pomykacz v. Borough of Wildwood*, 438 F. Supp. 2d 504, 513 n. 14 (D.N.J. 2006).

Viewed in the light most favorable to the Plaintiffs, the record in this case is sufficient to require a trial on the issues related to their First Amendment retaliation claim against the Defendants. When an arrest follows immediately after the exercise of First Amendment rights, the temporal proximity is itself enough to at a minimum create a question of fact as to whether there is a causal link between the constitutionally-protected activity and the retaliation. *Mclaughlin v. Fisher*, 277 F. App'x 207, 219 (3d Cir. 2008)(citing *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 178 (3d Cir.1997)(temporal proximity provides an evidentiary basis from which an inference of retaliatory motive can be drawn). Therefore, the District Court erred in granting Shanahan and Crowe summary judgment on the Plaintiffs' First and Fourteenth Amendment claims.

Because, as discussed *supra*, NJT is not protected by Eleventh Amendment immunity, NJT also should be denied summary judgment on Karns' and Parker's First and Fourteenth Amendment claims. While NJT does not have *respondeat superior* liability for the actions of Shanahan and Crowe, "'when 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, inflicts the injury that the government as an entity is responsible under § 1983.'" *Jiminez v. All Am.*

Rathskeller, Inc., 503 F.3d 247, 249 (3d Cir. 2007)(quoting *Monell v. N.Y. City Dept. of Soc. Servs.*, 439 U.S. 658, 694 (1978)). There are various ways in which a governmental policy or custom may be shown allowing for the imposition of liability on the entity. Where the appropriate officer or entity promulgates a generally applicable statement of policy and the subsequent act complained of is simply an implementation of that policy, *Monell* liability may attach. Additionally, the evidence may establish that a course of conduct constitutes a "custom" when, though not authorized by law, such practices of state officials [are] so permanent and well settled that they operate as law. *Jiminez*, 503 F.3d at 250.

Here, there is evidence of both a policy and custom at NJT to discriminatorily enforce the non-commercial speech permit requirement. Marques and Kratz, NJT officials responsible for administering the permit program, both testified that the permit requirement was not even-handedly enforced and that political candidates are given "special treatment." And Crowe testified that there was a standing order to target preachers because of complaints about their speech. This evidence of the existence of a custom of discriminatory enforcement requires that NJT also be denied summary judgment on Karns' and Parker's First and Fourteenth Amendment claims. *See Bielevicz v. Dubinon*, 915 F.2d 845 (3d Cir. 1990)(where evidence on existence of municipal policy to illegally arrest persons for intoxication was conflicting, the issue should be left to a jury).

III. THE DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY ON THE PLAINTIFFS' FOURTH AMENDMENT CLAIMS BECAUSE THEY DID NOT HAVE AN OBJECTIVELY REASONABLE BASIS FOR ARRESTING KARNS AND PARKER

Standard of Review: This Court exercises plenary review over a District Court's grant of summary judgment. Summary judgment is appropriate only if there is no genuine issue of material fact and if, viewing the facts in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law. The judge's function at the summary judgment stage is solely to determine whether there is a genuine issue of material fact for trial. *Watson v. Rozum*, 2016 WL 4435624, at *2 (3d Cir. Aug. 23, 2016).

Discussion of the Issue: The District Court found that Shanahan and Crowe had an "objectively reasonable" basis for arresting Karns and Parker because (1) the preachers were engaging in non-commercial speech without a permit and (2) they interfered with the officers' investigation by (a) failing to produce identification and (b) attempting to record the incident with their cellphones. It wrote that the officers' belief that Karns and Parker were guilty of trespassing was reasonable and so they were entitled to qualified immunity from Karns' and Parker's claims that the officers violated the Fourth Amendment by arresting them without probable cause (App. 20).

Summary judgment was granted to Shanahan and Crowe solely on the basis of qualified immunity. Qualified immunity protects officers from liability for damages under 42 U.S.C. § 1983 if their conduct did not violate a constitutional right of the plaintiff that was "clearly established" at the time of the conduct. *Ashcroft v. al–Kidd*, 563 U.S. 731, 735 (2011). A 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). Qualified immunity is an affirmative defense and the officer claiming the defense has the burden of establishing entitlement to the defense on a motion for summary judgment. *Halsey v. Pfeiffer*, 750 F.3d 273, 288 (3d Cir. 2014). Thus, § 1983 defendants have to show either that there was no genuine dispute of material fact to refute their contention that they did not violate the Plaintiffs' constitutional rights as alleged, or show that reasonable officers could not have known that their conduct constituted such a violation when they engaged in it. *Id.*

In determining whether a right is clearly established, it is not necessary that the exact set of factual circumstances has been considered previously. For a constitutional right to be "clearly established" it is not necessary that "the very action in question has previously been held unlawful," and "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 739, 741 (2002). As long as the

law gave the defendant officer "fair warning" that his conduct was unconstitutional, the office is not entitled to the protection of qualified immunity. *See Kopec v. Tate*, 361 F.3d 772, 778 (3d Cir.2004).

It is certainly clearly established that police must have probable cause that a crime was committed in order to make an arrest. *George v. Rehiel*, 738 F.3d 562, 583 (3d Cir. 2013). In this case, the Plaintiffs were arrested for and charged with three crimes: Defiant Trespass, N.J. Stat.Ann. § 2C:18-3b, Obstruction of Justice, N.J. Stat. Ann. § 2C:29-1a, and Prevention of a Public Servant, N.J. Stat. Ann. § 2C:29-1b. In order for the arrests and prosecutions of the Plaintiff's to comply with the Fourth Amendment, Shanahan and Crowe must have had probable cause that each of the elements of these offenses existed.

With respect to Defiant Trespass, New Jersey law defines the offense as follows:

> A person commits a petty disorderly persons offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by:
>
> (1) Actual communication to the actor; or
>
> (2) Posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or
>
> (3) Fencing or other enclosure manifestly designed to exclude intruders.

N.J. Stat. Ann. § 2C:18-3(b). In this case, the evidence is undisputed that there was no notice posted forbidding the Plaintiffs from being at the West Windsor Station nor was there any fence or enclosure restricting their access (App. 294). Additionally, before the Plaintiffs were arrested, neither Defendant Shanahan nor Crowe demanded that the Plaintiffs leave the station (App. 330, 495-496). As a result of this total failure of some posted or explicit demand that the Plaintiffs leave the property, the state courts dismissed the Defiant Trespass charges against them.

The Obstruction of Justice charge against the Plaintiffs is defined as follows:

> A person commits an offense if he purposely obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from lawfully performing an official function *by means of flight, intimidation, force, violence, or physical interference or obstacle, or by means of any independently unlawful act.* This section does not apply to failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

N.J. Stat. Ann. § 2C:29-1(a) (emphasis added). This charge was grounded upon the purported failure of the Plaintiffs to provide the officers with suitable identification. Yet the statute specifically requires that interference must consist of "intimidation, force, violence, or physical interference or obstacle," and neither Plaintiff had engaged in any physical resistance of the officers as required by the statute. Indeed, it was established at the time of the Plaintiffs arrest by court

decision that a failure to provide identification does not constitute a violation of N.J.S.A. § 2C:29-1(a). *State v. Camillo*, 382 N.J. Super. 113, 121, 887 A.2d 1151, 1155 (App. Div. 2005). Again, because of a total failure of an element of the offense, the state court dismissed the charges against the Plaintiffs.

Although the District Court indicated that the Plaintiffs attempt to record the incident with their cell phones was another act constituting interference, again this action does not amount to "flight, intimidation, force, violence, or physical interference or obstacle, or by means of any independently unlawful act" as required by N.J. Stat. Ann. § 2C:29-1(a). Moreover, the evidence of record supports the conclusion that Karns and Parker affirmatively cooperated with the officers by immediately stopping their recording when ordered to by the officers (App. 737-738). Thus, any use of their cell phones was no basis for arresting them for Obstruction of Justice.

The third charge consists of the same elements as N.J.S.A. § 2C:29-1(a), except that "[a]n offense under this section is a crime of the fourth degree if the actor obstructs the detection or investigation of a crime or the prosecution of a person for a crime." N.J. Stat. Ann. § 2C:29-1(b). Not only were Defendants Shanahan and Crowe not investigating a crime,[3] but these charges failed for the

[3] As noted *infra*, engaging in noncommercial speech on NJT property without a permit is not a criminal offense. *See* N.J. Stat. Ann. § 27:25-5.16 (any violation of the regulations promulgated by the NJT is a civil offense).

same reason the § 2C:29-1(a) charges failed—the Plaintiffs engaged in no physical resistance to the officers.

Thus, as to each of the charges that could have been the basis for the Plaintiffs' arrests and for which they were prosecuted, there was a complete absence of evidence supporting an essential element of the offense and the arrests were without probable cause in violation of the Fourth Amendment. If police officers lacked evidence of an essential element, by definition they lacked probable cause, a question which in any event is a factual one that should not be resolved on summary judgment. *Montgomery v. DiSimone*, 159 F.3d 120, 125-26 (3d Cir. 1998); *Ciambrone v. Smith*, 2008 WL 4378405, at *10 (D.N.J. Sept. 19, 2008).

Nor are Defendants Shanahan and Crowe entitled to summary judgment on the Fourth Amendment claims on qualified immunity grounds. The Defendants stress that qualified immunity protects them if they "mistakenly" believed the probable cause existed to arrest, detain and initiate the criminal proceedings. But this is not a case where the officers were reasonably mistaken as to what had occurred, such as whether the person arrested committed the acts at issue or whether the facts supported an affirmative defense for the arrestee. *See, e.g.*, *Ciambrone*, 2008 WL 4378405, at *10. Here, Defendants arrested and initiated the prosecution of the Plaintiffs even though an essential element of the charged crimes was wholly lacking.

Thus, where the law is well-established and clear that if particular conduct is not a crime, a police officer who makes an arrest for that conduct is not entitled to qualified immunity. In *Halpin v. City of Camden*, 310 Fed. Appx. 532 (3d Cir. 2009), the court rejected a police officer's claim that he was entitled to qualified immunity from a claim that he arrested the plaintiff without probable cause under a statute prohibiting offensive language, pointing out that case law establishing that the statute did not extend to the mere use of foul language existed for many years and it was unreasonable for the police officer to believe the law did extend to the plaintiff's conduct. Similarly, in *Islam v. City of Bridgeton*, 804 F. Supp. 2d 190, 198 (D.N.J. 2011), the court held that a police officer was not entitled to summary judgment based on qualified immunity in the plaintiff's § 1983 lawsuit claiming that she was falsely arrested for defiant trespass. The court pointed out that the evidence supported a finding that the plaintiff had not refused a demand to leave the public building at issue, and so "a reasonable jury could find that no reasonable officer could have thought Defendant had probable cause to arrest Plaintiff for defiant trespass." *Id.*

The same reasoning applies here and demonstrates that the District Court's decision to grant Shanahan and Crowe summary judgment on qualified immunity grounds was erroneous. The law here was similarly well-settled that (a) there must be a demand that a person leave property before they can be guilty of Defiant

trespass, *id.*, and (b) mere lack of cooperation with a police officer is not obstruction for purposes of N.J. Stat. Ann. § 2C:29-1(a) and (b). *Camillo*, 382 N.J. Super. at 121, 887 A.2d at 1155. A jury could certainly conclude that Shanahan and Crowe acted unreasonably in believing they had probable cause to arrest and charge the Plaintiffs, so the officers are not entitled to claim an entitlement to qualified immunity.

In seeking qualified immunity, the Defendants make much of the fact that the Plaintiffs were engaging in non-commercial speech without a permit and that this justified their arrest. But as discussed *infra*, preaching without a permit is not a criminal offense, nor were the Plaintiffs charged with engaging in expression without a permit. And to the extent the Defendant claim that the lack of a permit rendered the Plaintiff's trespassers, this also is meritless because it is undisputed that the Plaintiffs never refused an order to leave the West Windsor Station, which is an essential element of the trespass offense. Indeed, the Plaintiffs stopped preaching after they were approached by Shanahan and Crowe, and so it cannot be claimed that they were trespassers by engaging in noncommercial expression at the station after being told they could not.

In sum, Shanahan and Crowe (1) arrested the Plaintiffs without probable cause in violation of the Plaintiffs' Fourth Amendment rights and (2) violated clearly established law in doing so because it was clear that the Plaintiffs conduct

did not constitute either obstruction of justice or trespassing. The District Court's summary judgment dismissing Plaintiffs' Fourth Amendment claims constitutes error and requires reversal of the judgment.

IV. NJT IS LIABLE FOR THE FOURTH AMENDMENT DEPRIVATIONS SUFFERED BY THE PLAINTIFFS BECAUSE THOSE DEPRIVATIONS WERE CAUSED BY AN NJT POLICY

Standard of Review: This Court exercises plenary review over a District Court's grant of summary judgment. Summary judgment is appropriate only if there is no genuine issue of material fact and if, viewing the facts in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law. The judge's function at the summary judgment stage is solely to determine whether there is a genuine issue of material fact for trial. *Watson*, *supra*.

Discussion of the Issue: As discussed, *supra*, when 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, causes the deprivation of a plaintiff's constitutional rights, the governmental entity is responsible under § 1983. *Jiminez*, 503 F.3d at 249. With respect to Karns' and Parker's Fourth Amendment claims, such a policy exists which subjects NJT to liability under § 1983 for the illegal arrests of the Plaintiffs.

NJT has promulgated a regulation that authorizes, directs and encourages NJT officers to arrest persons for failing to have a required permit even though such failure is not a criminal offense. Thus, N.J.A.C. § 16:83-1.6 provides that "[i]f NJ TRANSIT determines that any person's conduct violates any of these rules, that person shall be subject to such sanctions as deemed appropriate including ejection from the premises, arrest, fine and/or imprisonment pursuant to the applicable laws and/or ordinances." The rules referred to include the regulations on non-commercial expression in N.J.A.C. § 16:83-1.4, and so § 16:83-1.6 authorizes NJT officers to arrest persons for engaging in non-commercial speech without a permit.

However, nothing in the regulations or statutes make engaging in non-commercial speech without a permit in NJT facilities a criminal offense which would authorize an arrest. To the contrary, N.J. Stat. Ann. § 27:25-5.16, provides that any violation of the regulations promulgated by the NJT is a *civil* offense enforced by a civil fine of up to $100. In order for an arrest to be lawful, the arresting officer must have probable cause to believe that the arrestee committed a crime. *State v. Mpetas*, 79 N.J. Super. 202, 206, 191 A.2d 186, 188 (App. Div. 1963). Thus, NJT has an explicit policy authorizing and encouraging its officers to arrest individuals for conduct that is not a criminal offense and so there is certainly sufficient evidence here that this policy caused the seizures of the Plaintiffs.

Because the resulting seizure was not made upon probable cause that a crime had been committed as required by the Fourth Amendment, the deprivation of Plaintiffs' constitutional rights is traceable to a policy of NJT and it is liable under 42 U.S.C. § 1983.

CONCLUSION

For the reasons set forth above, the District Court's grant of summary judgment to NJT, Shanahan, and Crowe was erroneous in all respects. Karns and Parker respectfully request that this Court reverse the District Court's judgment and remand the case for a trial on their claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Date: October 11, 2016

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CERTIFICATION OF ADMISSION

The undersigned certifies that he is a member of the Bar of the United States Court of Appeals for the Third Circuit having been duly admitted on January 2, 1996.

s/ F. Michael Daily
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on October 11, 2016, I caused one copy of the foregoing Brief of the Appellants' with attached Appendix Vol. I to be served upon counsel of record for the Appellees by delivering said copy to a third-party commercial carrier for delivery within three days, addressed to the following:

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APPENDIX VOL. I

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DON KARNS, **Plaintiff,** **vs.** **KATHLEEN SHANAHAN, SANDRA MCKEON CROWE, NEW JERSEY TRANSIT AND JOHN DOE SUPERVISORS #1 TO 50,** **Defendants.**	**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY** **VICINAGE OF TRENTON** **HON. MARY L. COOPER, U.S.D.J.** **CIVIL ACTION NO. 3:14-cv-04104** **NOTICE OF APPEAL**

The Plaintiff, Don Karns herewith appeals to the United States Court of Appeals for the Third Circuit the order and judgment [District Court Document #29] entered in this matter on April 1, 2016, by the United States District Court for the District of New Jersey, granting the defendants' motion for summary judgment and dismissing with prejudice the complaint of the Plaintiff.

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By: s/F. Michael Daily, Jr.
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Dated: April 28, 2016

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ROBERT PARKER, **Plaintiff,** **vs.** **KATHLEEN SHANAHAN, SANDRA MCKEON CROWE, NEW JERSEY TRANSIT AND JOHN DOE SUPERVISORS #1 TO 50,** **Defendants.**	**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY VICINAGE OF TRENTON** **HON. MARY L. COOPER, U.S.D.J.** **CIVIL ACTION NO. 3:14-cv-04429 Civil Action** **NOTICE OF APPEAL**

The Plaintiff, Robert Parker herewith appeals to the United States Court of Appeals for the Third Circuit the order and judgment [District Court Document #16] entered in this matter on April 1, 2016, by the United States District Court for the District of New Jersey, granting the defendants' motion for summary judgment and dismissing with prejudice the complaint of the Plaintiff.

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Dated: April 28, 2016

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DON KARNS, Plaintiff, v. KATHLEEN SHANAHAN, et al., Defendants.	CIVIL ACTION NO. 14-4104 (MLC)
ROBERT PARKER, Plaintiff, v. KATHLEEN SHANAHAN, et al., Defendants.	CIVIL ACTION NO. 14-4429 (MLC)

ORDER & JUDGMENT

For the reasons stated in the Court's Memorandum Opinion, dated March 31, 2016, **IT IS** on this 31st day of March, 2016, **ORDERED** that the defendants' motion for summary judgment in their favor and against the plaintiffs **(filed under Civil Action No. 14-4104, dkt. 20)** is **GRANTED;** and it is further

ADJUDGED that **JUDGMENT IS ENTERED** in favor of the defendants and against the plaintiff Don Karns under **CIVIL ACTION NO. 14-4104 (MLC)**; and it is further

ADJUDGED that **JUDGMENT IS ENTERED** in favor of the defendants and against the plaintiff Robert Parker under **CIVIL ACTION NO. 14-4429 (MLC)**; and it is further

ORDERED that the Clerk of the Court designate both of these actions as **CLOSED.**

s/ Mary L. Cooper
MARY L. COOPER
United States District Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DON KARNS, Plaintiff, v. KATHLEEN SHANAHAN, et al., Defendants.	:	CIVIL ACTION NO. 14-4104 (MLC)
ROBERT PARKER, Plaintiff, v. KATHLEEN SHANAHAN, et al., Defendants.	:	CIVIL ACTION NO. 14-4429 (MLC)

MEMORANDUM OPINION

COOPER, District Judge

Defendants – New Jersey Transit Corporation ("NJTC"); Sergeant Kathleen Shanahan ("Sergeant Shanahan"), who is an NJTC police officer named in her official capacity and individual capacity; and Officer Sandra McKeon Crowe ("Officer Crowe"), who is an NJTC police officer named in her official capacity and individual capacity – move for summary judgment in their favor under Federal Rule of Civil Procedure

("Rule") 56(a). (Dkt. 20.)[1] Plaintiffs, Don Karns ("Karns") and Robert Parker ("Parker"), oppose that motion. (Dkt. 24; dkt. 25.) The Court, for the reasons that follow, will grant Defendants' motion for summary judgment.

BACKGROUND

I. FACTUAL BACKGROUND

Members of the public who wish to engage in non-commercial and non-political speech on property owned by NJTC are required to obtain a non-commercial certificate of registration. (Dkt. 24-1 at 2–3.) See also N.J.A.C. 16:83-1.4(a) (permitting NJTC to set "limitations on the times, places and manner of non-commercial expression in or on [NJTC property] … to ensure … the orderly and safe flow of people and vehicles …"); N.J.S.A. 27:25-5(e) (permitting NJTC to adopt regulations "which shall have the force and effect of law"). Permits are issued on a "first-come first-serve" basis, and NJTC records all permits issued in a log. (Dkt. 24-1 at 3.)

Princeton Junction Station is a railroad station that services trains on the northeast corridor, and is owned and operated by NJTC. (Id. at 13.) Plaintiffs "are evangelical ministers who regularly preach the Christian gospel." (Id. at 6.) Sergeant Shanahan and Officer Crowe (collectively, "the Officers") are employees of NJTC. (Id. at 12; see also dkt. 1 at 2.) The Officers patrol Princeton Junction Station. (Dkt. 24-1 at 12.)

[1] The Court will cite to the documents filed on the Electronic Case Filing System ("ECF") under Civil Action No. 14-4104 (MLC) by referring to the docket entry numbers by the designation of "dkt.", unless otherwise indicated. Pincites reference ECF pagination. Although filed under Civil Action No. 14-4104 (MLC) alone, the motion for summary judgment also pertains to Civil Action No. 14-4429 (MLC).

Plaintiffs arrived at Princeton Junction Station around 6:00 a.m. on June 26, 2012, and began preaching "loudly" on the narrow train platform. (Id. at 12–14.) The Officers approached Plaintiffs and requested identification. (Id. at 12–14, 17.) Parker produced an expired identification card, and Karns refused to produce identification. (Id. at 17–18.) Plaintiffs told the Officers they did not need a permit to preach at Princeton Junction Station. (Id. at 17.) Parker also attempted to record his discussion with the Officers on his cellular telephone. (Id. at 18.) He later complied with the Officers' request to place the cellular telephone in his pocket. (Id.)

Sergeant Shanahan determined that Parker interfered with the Officers' investigation by failing to produce an identification card and by attempting to record their discussion via cellular telephone. (Id. at 19.) The Officers subsequently arrested Plaintiffs for charges related to "trespass and … obstruction." (Id. at 20.)

Karns was charged under N.J.S.A. 2C:18-3(b), N.J.S.A. 2C:29-1(a), and N.J.S.A. 2C:29-1(b). (Id.)[2] The charge under N.J.S.A. 2C:29-1(b) was later downgraded, and Karns was acquitted of charges under N.J.S.A. 2C:18-3(b) and 2C:29-1(a). (Id. at 21.)

---

[2] N.J.S.A. 2C:18-3(b) describes the criminal violation of "Criminal trespass" as follows:

> Defiant trespasser. A person commits a petty disorderly persons offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by:
>
> (1) Actual communication to the actor; or
> (2) Posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or
> (3) Fencing or other enclosure manifestly designed to exclude intruders.

N.J.S.A. 2C:29-1(a)–(b) describe the criminal violation of "Obstructing administration of law or other governmental function" in relevant part as follows:

Parker was charged under N.J.S.A. 2C:18-3(b), N.J.S.A. 2C:29-1(a), and N.J.S.A. 2C:29-1(b). (Id.) The charge under N.J.S.A. 2C:29-1(b) was later downgraded, and Parker was acquitted of the charge under N.J.S.A. 2C:29-1(a). (Id. at 21–22.) Parker was convicted by the West Windsor Township Municipal Court under N.J.S.A. 2C:18-3(b). (Id. at 22; see also dkt. 21-3 at 9–14.) Parker appealed from that conviction to New Jersey Superior Court, and the conviction was reversed on appeal. (Dkt. 20-2 at 48.)

II. PROCEDURAL BACKGROUND

Plaintiffs bring their claims under 42 U.S.C. § 1983, asserting violations of their constitutional rights under the First, Fourth, and Fourteenth Amendments. (Dkt. 1; dkt. 6; No. 14-4429, dkt. 1.) Defendants now move for summary judgment. (Dkt. 20.) Plaintiffs oppose the motion. (Dkt. 24; dkt. 25.)

DISCUSSION

I. LEGAL STANDARD AND APPLICABLE LAW

Rule 56 governs motions for summary judgment. See Fed.R.Civ.P. 56(a). Pursuant to Rule 56(a), a federal district court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is

---

a. A person commits an offense if he purposely obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from lawfully performing an official function by means of flight, intimidation, force, violence, or physical interference or obstacle, or by means of any independently unlawful act ….

b. An offense under this section is a crime of the fourth degree if the actor obstructs the detection or investigation of a crime or the prosecution of a person for a crime, otherwise it is a disorderly persons offense.

entitled to judgment as a matter of law." Id. The movant has the initial burden of proving the absence of a genuinely-disputed material fact regarding the claims at issue. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 331 (1986). The nonmoving party, in response, must "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." Id. at 324 (internal citation and quotation omitted). Material facts are those "that could affect the outcome" of the proceeding, and "a dispute about a material fact is genuine if the evidence is sufficient to permit a reasonable jury to return a verdict for the non-moving party." Lamont v. New Jersey, 637 F.3d 177, 181 (3d Cir. 2011) (internal citation and quotation omitted). Summary judgment is "proper if, viewing the record in the light most favorable to the non-moving party and drawing all inferences in that party's favor, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." United States ex rel. Kosenske v. Carlisle HMA, Inc., 554 F.3d 88, 94 (3d Cir. 2009).

II. APPLICATION OF LEGAL STANDARD

A. Eleventh Amendment Immunity

The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

A federal district court may bar a suit under the Eleventh Amendment even when "a state is not named a party to the action, as long as the state is the real party in interest." Fitchik v. N.J. Transit Rail Operations, Inc., 873 F.2d 655, 659 (3d Cir. 1989) (en banc).[3] Thus, Eleventh Amendment immunity extends to state departments and agencies that are "arms of the state." Bowers v. Nat'l Collegiate Athletic Ass'n, 475 F.3d 524, 545 (3d Cir. 2007) (internal citation omitted).

A federal district court, in order to determine whether a state department or agency is an arm of the state, considers the following three factors (collectively, "Fitchik Factors"):

> (1) Whether the money that would pay the judgment would come from the state [treasury] …;
>
> (2) The status of the agency under state law (this includes four factors—how state law treats the agency generally, whether the entity is separately incorporated, whether the agency can sue or be sued in its own right, and whether it is immune from state taxation); and
>
> (3) What degree of autonomy the agency has.

Fitchik, 873 F.2d at 659.[4]

A federal district court must weigh the Fitchik Factors equally to conduct "a holistic analysis of the [agency's] relationship with the state …." Benn v. First Judicial Dist. of Pa., 426 F.3d 233, 241 (3d Cir. 2005) (internal citation and quotation omitted);

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[3] Cert. denied, 493 U.S. 850 (1989).

[4] The Court will reference these factors as the First Fitchik Factor, Second Fitchik Factor, and Third Fitchik Factor, respectively.

see also Regents of Univ. of Cal. v. Doe, 519 U.S. 425, 429 (1997). Thus, upon reviewing the Fitchik Factors, the district court is mindful that "none of the three factors alone is dispositive." Benn, 426 F.3d at 239. Rather, the Fitchik Factors are guideposts to determine whether an agency is an arm of the State, and each factor indicates "the relationship between the State and the entity at issue." Id. at 240. The Court addresses the parties' arguments related to Eleventh Amendment immunity and the Fitchik Factors below.

1. Defendants' Arguments

Defendants argue that NJTC "is an arm-of-the-state entitled to Eleventh Amendment immunity." (Dkt. 20-2 at 12.) Defendants, in support of that argument, point out that the United States Court of Appeals for the Third Circuit ("Third Circuit") previously held that the Second Fitchik Factor and Third Fitchik Factor weigh in favor of granting NJTC Eleventh Amendment immunity. (Id. at 15.) With respect to the First Fitchik Factor, Defendants argue that more recent decisions of the United States Supreme Court and the Third Circuit instruct federal district courts to weigh evenly the Fitchik Factors, and therefore the First Fitchik Factor is no longer dispositive. (Id. at 16.) Specifically, Defendants cite Benn, 426 F.3d at 239, wherein the Third Circuit held "we can no longer ascribe primacy to the" First Fitchik Factor in the Eleventh Amendment immunity analysis. (Id. at 13, 16–17.)

Referring to the uniform balancing of the Fitchik Factors, Defendants argue that each factor weighs in their favor. (Id. at 18–32.) Defendants also assert that the Officers

– as NJTC employees – are entitled to Eleventh Amendment immunity for actions taken in an official capacity. (Id. at 18–32.) The Court summarizes those arguments below.

a. State Treasury: First Fitchik Factor

Defendants concede that the Third Circuit in Fitchik held that the First Fitchik Factor – which primarily concerns "whether the monies to pay a judgment would come from the state treasury" – weighed against granting NJTC Eleventh Amendment immunity. (Id. at 25–26.) However, Defendants contend that "subsequent Supreme Court jurisprudence has altered the analysis such that [NJTC's] unique [legislative] history and structure militates in favor of a finding that [the First Fitchik Factor] now supports immunity." (Id. at 26.) Defendants, in support of that contention, argue that NJTC "serves an essential state function, and has a unique historical context which confirms its role as the State of New Jersey's primary mass transportation provider." (Id.)

Defendants link the "practical implications of a judgment against" NJTC to "the historical [and legislative] context in which [NJTC] was created." (Id. at 27.) According to Defendants, the New Jersey legislature created the NJTC under the Public Transportation Act of 1979 to ensure "that its citizens would be guaranteed reliable [State subsidized] public transportation." (Id. at 28–31.) Defendants also argue that the New Jersey "legislature continues to this day to appropriate substantial funds … annually so as to help cover [NJTC's] substantial operating deficit, which has exceeded $1.4 billion for the years from 2008 to 2014." (Id. at 28–29.) With respect to Eleventh Amendment immunity, Defendants argue that "the State of New Jersey is critical in [NJTC's] ability

to meet its operating shortfall, as was anticipated by the legislature from the beginning, and this factor should weigh in favor" of granting NJTC Eleventh Amendment immunity under the First Fitchik Factor. (Id. at 29.)

b. Status of the Agency: Second Fitchik Factor

Defendants argue that NJTC is a New Jersey State agency under New Jersey law and therefore "is an instrumentality of the State exercising essential governmental functions." (Id. at 18–22.) For example, Defendants argue that NJTC is established within the New Jersey Department of Transportation ("NJDOT") pursuant to the New Jersey Constitution. (Id. at 19–20.) Defendants further explain that the NJDOT "is a principal department within the executive branch of the State of New Jersey, under the supervision of the governor." (Id. at 20.)[5]

Defendants also argue that the Second Fitchik Factor weighs in their favor, on the ground that: (1) "New Jersey state law treats [NJTC] as a state agency"; (2) NJTC "is considered to be the property of the State for tax purposes and is exempt from all state taxation"; and (3) NJTC "is statutorily authorized to adjudicate contested cases and render final agency decisions …." (Id. at 20–21.) Finally, Defendants also point out that NJTC has the power of eminent domain, which Defendants construe as a "hallmark of state sovereignty[.]" (Id. at 21 (internal citation omitted).)

[5] All references to "the governor" in this memorandum opinion are to the New Jersey State governor.

c. Degree of Autonomy: Third Fitchik Factor

Defendants argue that NJTC exercises minimal autonomy from the State of New Jersey, and that fact also weighs in favor of granting Eleventh Amendment immunity under the Third Fitchik Factor. (Id. at 22.) Defendants, in support of that argument, contend that NJTC "lacks independence from the state because the governor appoints the entire governing board." (Id. at 23.) Defendants further explain that the seven-member NJTC board is composed of the New Jersey Commissioner of Transportation, the New Jersey State Treasurer, a member of the executive branch selected by the governor, and four public members appointed by the governor with the consent of the New Jersey Senate. (Id.)[6]

Defendants also note that "the Board is subject to operational constraints and has responsibilities to the state." (Id. at 24.) For example, the Board proposes its annual budget to the governor and New Jersey legislature. (Id.) Defendants also point out that NJTC is subject to New Jersey State auditing. (Id.)

2. Plaintiffs' Arguments

Plaintiffs argue that the Third Circuit decision in Fitchik "is binding and requires rejection of the Defendants' [Eleventh Amendment] immunity defense." (Dkt. 25 at 8.) Plaintiffs also contend that the doctrine of nonmutual collateral estoppel precludes Defendants from revisiting the issue of whether Eleventh Amendment immunity extends

[6] The governor also appoints an eighth, non-voting member to the NJTC board, at the recommendation of "the labor organization representing the plurality of [NJTC] employees." (Dkt. 20-2 at 23 n.2.)

to NJTC. (Id. at 8–10.) Moreover, Plaintiffs submit that "the Benn decision neither purported to overrule the decision in Fitchik that [NJTC] is not similarly protected" and therefore did not overrule the Third Circuit's decision in Fitchik. (Id. at 9–11.)

3. Analysis

The Court finds that the doctrine of nonmutual collateral estoppel does not bar Defendants' motion for summary judgment. See GEOD Corp. v. N.J. Transit Corp., 678 F.Supp.2d 276, 287–88 (D.N.J. 2009) (determining that NJTC is an arm of the State of New Jersey when applying the Fitchik Factors co-equally). Accordingly, the Court will consider the Fitchik Factors below, and apply each factor co-equally to determine whether NJTC is an arm of the State of New Jersey. Benn, 426 F.3d at 239–40.

a. Funding: First Fitchik Factor

Defendants concede that the State of New Jersey has "nominally disclaimed liability" for NJTC because "the practical consequences of every adverse judgment in federal court contribute to [NJTC's] operating deficit …." (Dkt. 20-2 at 30.) The Court is not persuaded that the legislative history of NJTC, discussed supra DISCUSSION, Section II.A.1.a, outweighs the central consideration of the First Fitchik Factor concerning whether the judgment would come directly from the New Jersey State treasury. Accordingly, the Court finds that the First Fitchik Factor weighs against granting Eleventh Amendment immunity to NJTC. Fitchik, 873 F.2d at 659–62.

b. Status under State Law: Second Fitchik Factor

Defendants cite, as discussed supra DISCUSSION, Section II.A.1.b, to several bodies of New Jersey law, which indicate that NJTC is an arm of the State. Plaintiffs

provide no arguments to the contrary. (See generally dkt. 25.) Accordingly, the Court finds that the Second Fitchik Factor weighs in favor of granting NJTC Eleventh Amendment immunity. GEOD Corp., 678 F.Supp.2d at 287–88.

c. Autonomy: Third Fitchik Factor

Defendants provide sufficient evidence to persuade the Court that NJTC lacks independence from the State of New Jersey. As discussed supra DISCUSSION, Section II.A.1.c, the governor appoints the entire NJTC board and has veto power over board decisions. Accordingly, the Court finds sufficient evidence to demonstrate that the Third Fitchik Factor weighs in favor of granting NJTC Eleventh Amendment immunity. GEOD Corp., 678 F.Supp.2d at 287–88.

d. Balancing the Fitchik Factors

The Court finds, after reviewing the evidence and weighing the Fitchik Factors, that both the Second Fitchik Factor and Third Fitchik Factor weigh in favor of granting NJTC Eleventh Amendment immunity. Cooper v. SEPTA, 548 F.3d 296, 310–11 (3d Cir. 2008). Accordingly, the Court will grant summary judgment in favor of NJTC and in favor of each Officer in her official capacity. Accord GEOD Corp., 678 F. Supp.2d at 287–88. The Court notes that its analysis here is in accord with other recent case law. See Joseph v. N.J. Transit Rail Operations, Inc., No. 12-1600, 2013 WL 5676690, at *14 (D.N.J. Oct. 17, 2013), aff'd on other grounds, 586 Fed.Appx. 890 (3d Cir. 2014); [7]

[7] This particular issue was abandoned on appeal. See 3d Cir. No. 13-4430, 4-3-14 App. Br. at ECF 34.

Mancini v. N.J. Transit Corp., No. 12-5753, 2013 WL 2460342, at *2 (D.N.J. June 5, 2013).

Eleventh Amendment immunity does not apply, however, to the Officers in their individual capacities. Hafer v. Melo, 502 U.S. 21, 31 (1991).

B. Qualified Immunity

"The 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." Pearson v. Callahan, 555 U.S. 223, 231 (2009) (internal citation and quotation omitted). Qualified immunity grants immunity from suit, and applies even when a government official committed an error based upon "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." Id. (internal citation and quotation omitted). A federal district court, in order to determine whether qualified immunity applies, must decide whether: (1) "the facts … alleged … or shown … make out a violation of a constitutional right"; and (2) "the right at issue was clearly established at the time of defendant's alleged misconduct." Id. at 232 (internal citation and quotation omitted).

Qualified immunity is an affirmative defense. Halsey v. Pfeiffer, 750 F.3d 273, 288 (3d Cir. 2014). Accordingly, a defendant bears the burden of establishing entitlement to a qualified immunity defense on a motion for summary judgment. Id. With respect to the Fourth Amendment, a police officer "who reasonably but mistakenly concludes that [his] conduct comports with the requirements of the Fourth Amendment [is] entitled to immunity." Palma v. Atl. Cty., 53 F.Supp.2d 743, 769 (D.N.J. 1999).

Courts must analyze the "totality of the circumstances" and adopt a "common sense" approach to the issue of probable cause. United States v. Glasser, 750 F.2d 1197, 1205 (3d Cir. 1984).

1. Defendants' Arguments

Defendants argue that the Officers are entitled to qualified immunity because Plaintiffs fail to establish that the Officers committed a constitutional violation. (Dkt. 20-2 at 41–42.) Defendants also argue that Plaintiffs' Fourteenth Amendment due process claims are barred. (Id. at 41 ("To the extent which Plaintiffs' claims are brought under the Fourteenth Amendment pursuant to § 1983, these claims are barred. See Albright, 510 U.S. at 273 ("Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.")).)

As to Plaintiffs' First Amendment claims, Defendants contend that "Plaintiffs did not have an absolute right to preach on the train platform, and their alleged right to record police during an investigatory detention was not clearly established." (Id. at 42.) Finally, Defendants contend that Plaintiffs' Fourth Amendment claims fail, because Defendants had ample probable cause to arrest Plaintiffs. (Id.)

2. Plaintiffs' Arguments

Plaintiffs argue that the Officers violated the Fourteenth Amendment by selectively enforcing the permit requirement. (Dkt. 25 at 23.) Similarly, with respect to the First Amendment claims, Plaintiffs argue that Defendants: (1) "selectively enforced

the [NJTC] permit requirement against religious speech"; and (2) "retaliated against them because they protested the [O]fficers' demands that they cease preaching and attempted to make a video recording of the officers' conduct while questioning and arresting the Plaintiffs." (Id. at 22.) As to the Fourth Amendment, Plaintiffs argue that the Officers lacked probable cause to support Plaintiffs' arrests. (Id. at 26–32.)

3. Analysis

a. Fourteenth Amendment and First Amendment Claims

The Court, having drawn all reasonable inferences in favor of Plaintiffs, finds that Plaintiffs fail to present evidence in rebuttal to Defendants' showing that there was no Fourteenth Amendment violation or First Amendment violation. Carlisle HMA, Inc., 554 F.3d at 94; Kelly v. Bor. of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010). The record indicates that the law was unclear as to whether Plaintiffs had an absolute constitutional right to preach on the train platform. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 683 (1992). Thus, the Court finds that the Officers would have no basis to determine that Plaintiffs had an absolute right to preach loudly or record them on the date of the arrest. Accordingly, the Court finds that each Officer is entitled to qualified immunity in her individual capacity with respect to Plaintiffs' First Amendment and Fourteenth Amendment claims. Rappa v. Hollins, 991 F.Supp. 367, 374 (D. Del. 1997) ("[T]he qualified immunity issue revolves around whether the alleged act causing the chill[ed First Amendment protection] was clearly established as being unlawful."), aff'd, 178 F.3d 1280 (3d Cir. 1999).

b. Fourth Amendment Claims

The Court finds that the Officers had an objectively reasonable belief in the existence of probable cause to justify Plaintiffs' arrests. See supra BACKGROUND, Section I. Plaintiffs admit that they were engaging in non-commercial speech without a permit on the date of arrest. Id. Moreover, Plaintiffs interfered with the Officers' investigation by failing to produce a valid identification or permit, and attempting to record their discussion with the Officers via cellular device. Id. Accordingly, the Court finds that the Officers' belief that the Plaintiffs were trespassing in violation of N.J.S.A. 2C:18-3(b) was objectively reasonable, and therefore each Officer is entitled to qualified immunity in her individual capacity on Plaintiffs' Fourth Amendment claims. State v. Moran, 997 A.2d 210, 216 (N.J. 2010).[8]

CONCLUSION

The Court, for the reasons stated above, will grant Defendants' motion for summary judgment in their favor. The Court will issue an appropriate order and judgment.

s/ Mary L. Cooper
MARY L. COOPER
United States District Judge

Dated: March 31, 2016

[8] The Court's analysis in this memorandum opinion is limited to Eleventh Amendment immunity and qualified immunity. Accordingly, the Court need not address other arguments raised by the parties here.