No. 24-

IN THE

Supreme Court of the United States

VANESSA ENOCH,

Petitioner,

v.

HAMILTON COUNTY, OHIO SHERIFF'S OFFICE, DEPUTY SHERIFF BRIAN HOGAN, DEPUTY SHERIFF GENE NOBLES AND JIM NEIL, HAMILTON COUNTY SHERIFF,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

At all relevant times, Petitioner Vanessa Enoch was working as a member of the media and collecting information for a study regarding the removal of African American female jurists from the bench in Ohio. In performing those functions, Petitioner was gathering information regarding the criminal prosecution of a local female African American jurist. She was doing this by using her iPad to record related public events in the hallway outside of the courtroom after proceedings had recessed. While she was attempting to record these events of public import, Deputies with the Hamilton County, Ohio, Sheriff, following the Sheriff's custom, practice and training, confiscated Petitioner's iPad and arrested her precisely because she was recording such events in the courthouse hallways. It is undisputed that Petitioner was, at the time, in full compliance with the time, place and manner restrictions imposed by the local courts and otherwise in full compliance with Ohio law when the confiscation and arrest occurred.

The questions presented are:

(1) Whether the Sheriff's unilateral custom, practice and policy of banning all news gathering recording activities in the public hallways of a courthouse, where the local judges' time place and manner rules have allowed such activities, violates Petitioner Enoch's rights guaranteed by the First Amendment to the United States Constitution by delegating to the Sheriff unbridled discretion in deciding when and who may engage in such First Amendment activities.

(2) Whether the Sixth Circuit's decision to allow the Sheriff unbridled discretion to override the local court's time, place and manner restriction regarding the recording of newsworthy events conflicts with decisions of its sister circuits relating to the delegation of unfettered discretion to a local official, thus resulting in restriction of the lawful exercise of rights protected by the First Amendment.

PARTIES TO THE PROCEEDINGS

Petitioner Vanessa Enoch was the appellant below. Respondent Hamilton County, Ohio Sheriff's Department and the Hamilton County, Ohio Sheriff in his official capacity were the appellees below.

STATEMENT OF RELATED PROCEEDINGS

The Magistrate Judge denied Defendants' motion for judgment on the pleadings based on qualified immunity. *Enoch v. Hamilton Cnty. Sheriff's Off.*, No. 1:16-CV-661, 2017 WL 2210515 (S.D. Ohio May 18, 2017). A Panel of the Sixth Circuit Court of Appeals affirmed the denial of qualified immunity *sub nom. Enoch v. Hogan*, 728 F. App'x 448 (6th Cir. 2018). The Magistrate Judge denied Defendants' motion for summary judgment motion, which was based, *inter alia*, on qualified immunity. *Enoch v. Hamilton Cnty. Sheriff's Off.*, No. 1:16-CV-661, 2019 WL 1755966 (S.D. Ohio Apr. 19, 2019). A new Panel of the Sixth Circuit reversed, finding the claims were barred by qualified immunity, and remanded the *Monell* First Amendment claims against the Sheriff in his official capacity to the District Court for resolution. *Enoch v. Hamilton Cnty. Sheriff's Off.,* 818 F. App'x 398 (6th Cir. 2020). The District Court denied the Sheriff's second motion for summary judgment and set the case for a jury trial. *Enoch v. Hamilton Cnty. Sheriff's Off.*, No. 1:16-CV-661, 2021 WL 2223894 (S.D. Ohio June 2, 2021). The District Court entered judgment on a jury verdict in favor of Petitioner Vanessa Enoch as to the *Monell* claims and denied Hamilton County Sheriff's motion for judgment notwithstanding the verdict. *Enoch v. Hamilton Cnty. Sheriff*, No. 1:16-CV-661, 2022 WL 2073292 (S.D. Ohio June 9, 2022). The Panel of the Sixth Circuit reversed the jury verdict in favor of Vanessa Enoch and directed judgment for the County Sheriff. *Enoch v. Hamilton Cnty. Sheriff's Off.*, No. 22-3946, 2024 WL 3597026 (6th Cir. July 31, 2024). It is this last decision that is the subject of this Petition for Writ of Certiorari.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Vanessa Enoch respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on July 31, 2024.

OPINIONS BELOW

The Magistrate Judge[1] denied Defendants' motion for judgment on the pleadings based on qualified immunity. *Enoch v. Hamilton Cnty. Sheriff's Off.*, No. 1:16-CV-661, 2017 WL 2210515 (S.D. Ohio May 18, 2017). A Panel of the Sixth Circuit Court of Appeals affirmed the denial of qualified immunity *sub nom. Enoch v. Hogan*, 728 F. App'x 448 (6th Cir. 2018). The Magistrate Judge denied Defendants' motion for summary judgment motion, which was based, *inter alia*, on qualified immunity. *Enoch v. Hamilton Cnty. Sheriff's Off.*, No. 1:16-CV-661, 2019 WL 1755966 (S.D. Ohio Apr. 19, 2019). A new Panel of the Sixth Circuit reversed, finding the claims were barred by qualified immunity, and remanded the *Monell* claims against the Sheriff in his official capacity to the District Court for resolution. *Enoch v. Hamilton Cnty. Sheriff's Off.*, 818 F. App'x 398 (6th Cir. 2020). The District Court denied the Sheriff 's second motion for summary judgment and set the case for a jury trial. *Enoch v. Hamilton Cnty. Sheriff's Off.*, No. 1:16-CV-661, 2021 WL 2223894 (S.D. Ohio June 2, 2021). The District Court entered judgment on a jury verdict in favor of Vanessa Enoch as to the

1. Pursuant to 28 U.S.C. §635(c) and consent of the parties this case was referred to the Magistrate Judge to render rulings on all matters including entry of judgment. R. 17. PAGE ID# 100.

Monell claims and denied Hamilton County Sheriff's motion for judgment notwithstanding the verdict. *Enoch v. Hamilton Cnty. Sheriff*, No. 1:16-CV-661, 2022 WL 2073292 (S.D. Ohio June 9, 2022). The Panel of the Sixth Circuit reversed the jury verdict in favor of Vanessa Enoch. *Enoch v. Hamilton Cnty. Sheriff's Off.*, No. 22-3946, 2024 WL 3597026 (6th Cir. July 31, 2024). It is this last decision that is the subject of this Petition for Writ of Certiorari.

JURISDICTIONAL STATEMENT

The decision of the Court of Appeals became final on October 8, 2024 with the Court of Appeals denial of a petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves rights secured by the First Amendment to the United States Constitution which provides in relevant part "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press." That Amendment is made applicable to the states by operation of the Fourteenth Amendment to the United States Constitution. *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964). More particularly, this case addresses the "time, place and manner" restrictions that apply to limited public forums and whether a Sheriff, acting with unfettered discretion, may unilaterally impose additional restrictions and, thus, eliminate First

Amendment rights members of the minority media would otherwise enjoy as endorsed by this Court in *Richmond Newspapers v. Virginia*, 448 U.S. 555, 586 (1980).

STATEMENT OF THE CASE

The evidence presented to the jury in this case demonstrated the following facts that are not in dispute: (1) that, on June 25, 2014, Vanessa Enoch, using her iPad recording and picture functions, was attempting to gather information regarding the criminal prosecution of a local African American female jurist (Judge Tracie Hunter), as part of her doctoral dissertation relating to the removal of African American females from the bench in Ohio; (2) Enoch was also gathering the information relating to this prosecution for a local minority newspaper; (3) Enoch was attempting to gather this newsworthy information in the hall of the Hamilton County Courthouse after a hearing on a motion in that prosecution had concluded; (4) while attempting to record events in the hall, Deputies with Hamilton County, Ohio Sheriff 's Department, confiscated and attempted to search Enoch's iPad and arrested her expressly because she was recording events in the courthouse halls with her iPad; (5) at the time of the confiscation and arrest the Sheriff 's Deputies agreed that Enoch had violated no law, rule or order of any Court; and (6) the Deputies were following the Sheriff 's custom, policy and practice at the time of the confiscation and arrest.

The original Panel that heard the first appeal in this case regarding qualified immunity held that, "[t]he Deputies could not constitutionally prevent Enoch . . . from or punish [her] for gathering news about matters of public

importance when [her] actions violated neither rules nor laws." *Enoch v. Hogan*, 728 F. App'x 448, 456 (6th Cir. 2018) (Hereafter, *Enoch I*).[2] Following an interim qualified immunity appeal,[3] the case was ultimately submitted to the jury on Dr. Enoch's First Amendment claim against the Hamiton County Sheriff in his official capacity.

The evidence at trial, consisting largely of the testimony of the deputies and Sheriff 's Department officials, confirmed that the Hamilton County Sheriff 's custom, practice or policy of banning all recordings in the courthouse hallway, even in cases where the local judge had not ordered such a ban under its local rule, violated Enoch's rights protected by the First Amendment. Specifically, that evidence confirmed that the Hamilton County Courts of Common Pleas had adopted a time, place and manner restriction regarding the use of recording devices in the Courthouse (Local Rule 33(D)(6)). That rule allowed Enoch and others to use their recording devices in the hallways unless a presiding judge had put on an order or otherwise designated the hallways to come within the

2. *Enoch I* affirmed the denial of Defendants' motion for judgment on the pleadings as to all claims against both the individual defendants and the *Monell* official capacity claims against the Sheriff.

3. A second Panel, composed of three new members of the Sixth Circuit who were not involved in the *Enoch I* ruling, upholding Plaintiff 's First Amendment rights under *Richmond Newspapers,* held that the deputies were entitled to qualified immunity and dismissed all claims against Defendants in their individual capacities. The Court remanded to the District Court for resolution of the First Amendment official capacity claim against the Hamilton County Sheriff. *Enoch v. Hamilton Cnty. Sheriff 's Off.,* 818 F. App'x 398 (6th Cir. 2020) (*Enoch II*).

ban on use of such devices. It is undisputed that no such order or designation existed here. Thus, Enoch was in full compliance with that time, place and manner restriction imposed by the local court at the time of her arrest. The Deputies testified they nevertheless confiscated Enoch's iPad and arrested her precisely because she was recording events surrounding the prosecution of Judge Hunter.

A jury hearing the largely uncontested facts rendered a verdict in Plaintiff 's favor as to her First Amendment claim against the County Sheriff, finding that his unilateral custom, practice or policy of banning all such recordings, where the local judge had not barred such recordings, violated her First Amendment rights. The Sheriff appealed and a panel of the Sixth Circuit (with a composition different than the Panel rendering the First Amendment ruling in *Enoch* I) rendered a holding that significantly restricts *Richmond Newspapers* and allows the Sheriff, with unfettered discretion, to unilaterally impose his own (unpublished) time, place and manner restrictions. In a stark restriction of rights afforded to the media under *Richmond Newspapers,* the Sixth Circuit in *Enoch III* held:

> Enoch has not shown that her recording was protected under the First Amendment. The precedent she cites establishes no more than a general right to attend trials and gather newsworthy information. While our prior decisions in this case have recognized that right, Enoch did not meet her burden of showing that those decisions demonstrate that she engaged in protected activity here.

Opinion p. 11 (App. A, p. 11); *Enoch v. Hamilton Cnty. Sheriff's Off.*, No. 22-3946, 2024 WL 3597026, at *6 (6th Cir. July 31, 2024) (*Enoch III*). The Sixth Circuit rendered this holding despite finding that, "[Enoch] presented evidence that [deputies] Hogan and Nobles acted pursuant to a custom of prohibiting any recording absent authorization from a judge when they arrested her, and that their misunderstanding of the Rule was so widespread as to constitute Sheriff 's Department policy." Opinion p. 12-13 (App. A pp. 12-13); *Enoch III,* 2024 WL 3597026, at *6. Despite that ruling that Enoch met her underlying First Amendment burden, it nevertheless deferred to the custom and practice of local Sheriff to ban such news gathering even where a media member has complied with the local court's time, place and manner restrictions.

Because the holding renders First Amendment news gathering protections recognized by this Court in *Richmond Newspapers v. Virginia*, 448 U.S. 555, 586 (1980) impotent, extends unbridled discretion to the Sheriff in deciding who gets to exercise First Amendment rights recognized in *Richmond Newspapers,* and conflicts with rulings in other Circuits, Enoch seeks review by this Court.

REASONS FOR ALLOWING THE WRIT

The Sixth Circuit's holding in *Enoch III* effectively vitiates the First Amendment protections defined in *Richmond Newspapers* and will apply to all courthouse news gathering settings that are subject to "reasonable

time, place and manner restrictions."[4] It accomplishes this by ceding to a Sheriff unfettered discretion in expanding such otherwise reasonable restrictions as he or she sees fit. In this case, that unbridled discretion was exercised in a manner that eliminated First Amendment rights to record and gather news of compelling public interest that unquestionably come within the ambit of such rights recognized by this Court in *Richmond Newspapers.* The holding necessarily implicates fundamental principles of free expression and open and fair public trials, that are surely worthy of review by this Court.

Moreover, the Sixth Circuit's endorsement of the Sheriff 's exercise of such absolute discretion in the First Amendment context conflicts with multiple rulings from other Circuits. Indeed, as demonstrated below, *Enoch III* stands alone among the other circuits in its surrender to a county sheriff, or any other public official, the ability to control the right of the media to gather and record (i.e., to shed light upon) matters of grave public importance.

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4. Although the decision was not published, such should not be a vehicle for escaping review by this Court. The Sixth Circuit's ruling in this case is the only one recognizing the authority of a Sheriff to unilaterally expand time, place and manner restrictions set by a local court, with the intended effect of eliminating previously recognized First Amendment rights. As such, it will likely bind the district courts throughout the Circuit unless and until the Sixth Circuit revisits the issue and overrules its holding in *Enoch III. Smith v. Astrue*, 639 F. Supp. 2d 836, 842 (W.D. Mich. 2009); *accord, Dedvukaj v. Equilon Enters., LLC,* 301 F.Supp.2d 664, 669 (E.D.Mich.2004) (unpublished decision was considered "***especially persuasive*** in light of this case's identical PMPA issue.") (Emphasis added).

I. REVIEW IS REQUIRED BECAUSE *ENOCH III* ELIMINATES FIRST AMENDMENT RIGHTS RECOGNIZED IN *RICHMOND NEWSPAPERS* BY CEDING UNFETTERED DISCRETION TO A COUNTY SHERIFF THE POWER TO EXPAND REASONABLE TIME, PLACE AND MANNER LIMITS IMPLEMENTED BY THE LOCAL COURTS AND TO THEREBY EXTINGUISH FIRST AMENDMENT RIGHTS EXPLICITLY RECOGNIZED BY THE SUPREME COURT IN *RICHMOND NEWSPAPERS*.

In the first appeal in this case regarding qualified immunity the original Panel of the Sixth Circuit held, "[t]he Deputies could not constitutionally prevent Enoch . . . from or punish [her] for gathering news about matters of public importance when [her] actions violated neither rules nor laws." *Enoch v. Hogan*, 728 F. App'x 448, 456 (6th Cir. 2018) (Hereafter, *Enoch I*) (App. E).[5] At trial, Plaintiff offered an abundance of testimony from Hamilton County Sheriff's deputies themselves, among other evidence, that this is exactly what occurred here. Indeed, Deputy Nobles conceded that his actions in preventing Plaintiff from continuing to record events in the hallway, in confiscating and searching her iPad, and in arresting her, all occurred (pursuant to the Sheriff's custom and policy) precisely because she was attempting to record events occurring in the hallway relating directly to the Judge Hunter prosecution. Nobles'

5. *Enoch I* affirmed the denial of Defendants' motion for judgment on the pleadings based on qualified immunity as to all claims against both the individual Defendants and the *Monell* official capacity claims against the Sheriff.

testimony included the concession that Dr. Enoch had violated no rule or law.[6]

In rendering the holding quoted above, the original Panel in *Enoch I* applied the First Amendment mandate of *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980):

> It is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a right of access, or ***a right to gather information, for we have recognized that without some protection for seeking out the news, freedom of the press could be eviscerated***.

Id. at 576. (Internal quotes, citations and footnote omitted). (Emphasis added). This was applied in *Enoch I* where the original Panel unanimously affirmed the denial of the County's motion for judgment on the pleadings based on qualified immunity. *Enoch I,* 728 F. App'x at 456.

A. Jury Determination

At trial, the jury was presented with evidence from which it concluded that the deputies, following the custom, practice or policy of the Hamilton County Sheriff, did indeed prevent Dr. Enoch from, or effectively punished her, for engaging in such First Amendment protected activity. The jury reached its conclusion based on undisputed evidence that Deputy Nobles confiscated Dr. Enoch's iPad and arrested her specifically because she

6. Nobles, Trial Transcript. PageID# 3412-13, 3432-38, 3446.

was recording events in the courthouse hallway. As noted above, this evidence included the arresting officer's own admissions that Enoch violated no order, Rule or law at the time he confiscated Enoch's iPad and arrested her. When the iPad was confiscated and Plaintiff arrested, Enoch was pursuing her investigation into the removal of African American female jurists from judicial positions in Ohio.[7]

Prior to *Enoch III,* there was no doubt that this was activity that was protected by the First Amendment, under *Richmond Newspapers*. Applying the trial court's instructions regarding the applicable First Amendment law as announced in that decision, the jury answered the following interrogatories:

> As to Plaintiff Vanessa Enoch, we, the members of the jury, find the following by a preponderance of the evidence:
>
> 1. Did employee(s) of the Hamilton County Sheriff violate Plaintiff Vanessa Enoch's First Amendment rights? **(mark one)**
>
> Yes: _X_ or No: ____
>
> If you answered "Yes" to question number 1, proceed to question number 2.
>
> 2. Were the employee(s) acting pursuant to a County policy, practice or custom when they violated Plaintiff Vanessa Enoch's First Amendment rights? **(mark one)**
>
> Yes: _X_ or No: ____

7. Tr., RE 191 Page ID# 3102-3111.

(R. 155, Page ID# 2361). The trial court's instructions, not criticized by the Sixth Circuit in reversing the jury verdict and judgment for Plaintiff, applied the holding in *Enoch I* quoted above, that relied on this Court's holding in *Richmond Newspapers*.[8]

After the decision in *Enoch I,* the composition of the Panel that heard two subsequent appeals in this case changed, culminating in the Sixth Circuit's most recent decision in *Enoch III* reversing the jury's verdicts in favor of Dr. Enoch and directing the District Court to enter judgment for the Hamilton County Sheriff.[9] In its ruling the Sixth Circuit assumed the role of the weigher and finder of facts by concluding the following:

> Enoch has not shown that her recording [of events in the hallways] was protected under the First Amendment. The precedent she cites establishes no more than a ***general right*** to attend trials and ***gather newsworthy information***. While our prior decisions in this case have recognized that right, Enoch did not meet her burden of showing that those decisions demonstrate that she engaged in protected activity here.

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8. See First Amendment Instructions at RE 195, Tr. Page ID# 3783-3784, which incorporated *Enoch I's* First Amendment holding.

9. *Enoch III* notes that, as a subsequent Panel in the same case, it is bound by the holdings of the previous Panel (2024 WL 3597026, at *5). Nevertheless, as demonstrated herein, there is simply no way to reconcile the original Panel's holding in *Enoch I* as quoted at page 5 above, with the holding of the current Panel in *Enoch III*.

Enoch III, 2024 WL 3597026, at *6. (Emphasis added). The Sixth Circuit fails to explain what evidence of First Amendment deprivation is missing—a critical oversight given the overwhelming evidence that Dr. Enoch was engaging in "a ***general right*** to attend trials and *gather newsworthy information*." Yet, the real danger in the holding below is that, at its core, it gives the local Sheriff unfettered discretion to expand reasonable time, place and manner restrictions set by the local court and thus eliminate the exercise of First Amendment rights previously recognized by this Court in *Richmond Newspapers.* This holding thus contradicts otherwise settled law "that even content-neutral time, place, and manner regulations ***may not confer unbridled discretion on the licensing authority***, so as to stifle free expression." *Southern Oregon Barter Fair v. Jackson Cnty., Oregon*, 372 F.3d 1128, 1138 (9th Cir. 2004) (Emphasis added), citing *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002) ("Of course even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content.")

B. Ceding Unbridled Discretion to Sheriff

The decision below does grave damage to rights previously recognized in *Richmond Newspapers* as evidenced by the Sixth Circuit's concession regarding Enoch's evidence.

> "[Dr. Enoch] presented evidence that Hogan and Nobles acted pursuant to a custom of

> prohibiting any recording absent authorization from a judge[10] when they arrested her, and that their ***misunderstanding of the Rule was so widespread as to constitute Sheriff's Department policy.***"

Id. at *6. (Emphasis added). In fact, the deputies testified not that they misunderstood the Rule, but that they were *trained by the Sheriff's Office* to go beyond the Rule and ban all recordings in the halls of the courthouse unless a judge expressly authorized it. That uncontradicted testimony fully supports the jury's factual finding of a "custom, policy or practice." Thus, the Sixth Circuit has effectively recognized the authority of the Sheriff to expand the time, place and manner restrictions in courthouse hallway settings beyond what is imposed by the local courts themselves. The Sheriff accomplished this by training the deputies to ban all recordings in the courthouse including those that occur in areas where the local judge has otherwise permitted it, as he did here.[11]

The Court below did acknowledge that the Hamilton County courthouse hallways were considered a limited public forum where certain First Amendment rights attached. In a limited public forum, the government's restrictions on speech "must not discriminate against speech on the basis of viewpoint," and "must be reasonable

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10. At the time of events in this case it is undisputed that no court rule, ordinance or statute required an affirmative authorization of a judge or other official to permit the media or public from recording events of public interest.

11. RE 193, Nobles, Tr. PageID# 3446; RE 192, Hogan, Tr. PageID# 3365).

in light of the purpose served by the forum." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001) (quotation omitted).

Dr. Enoch proved to the jury's satisfaction that it was Defendant's policy *and practice* to prevent recording of newsworthy events in the courthouse hallways despite the absence of an order or designation from a judge that would have proscribed such recordings.[12] There is no reasonable dispute in the trial record that it was the Sheriff 's custom, policy and practice that resulted in Dr. Enoch being "prevented from or punished for gathering news about matters of public importance when [her] actions violated neither rules nor laws," thus meeting her burden under *Richmond Newspapers.* In *Enoch III*, however, the Sixth Circuit took that verdict away from Plaintiff and directed a judgment for Defendant precisely because of the *Sheriff 's practice to ban hallway recordings* even where authorized by the local court's time, place and manner restrictions.

The holding eviscerates the constitutional protections previously afforded to members of the media in *Richmond Newspapers.* It delegates to the local County Sheriff the authority to expand any "time, place and manner restrictions" set out by the local court, with the result that the Sheriff and not the local court decides the limits of First Amendment protections in the limited public forum of a courthouse.

The stretch *Enoch III* had to make to reach this dangerous ruling is evident in the internal contradictions in its opinion. That decision (*Enoch III*) at once recognizes the "general right to attend trials and *gather newsworthy*

12. Tr. PageID# 3365-3366.

information," yet finds that Plaintiff's activity in doing just that fails to meet her First Amendment burden. *Id.* at *6, *and see*, *Id.* at *7 ("she failed to establish that her conduct was entitled to First Amendment protection"). That is, *Enoch III* found that Plaintiff's efforts to investigate and gather information regarding the removal of African American female judges from the judicial positions in Ohio for a minority media publication, while acting in full compliance with all orders, rules and laws, were not worthy of any First Amendment protection.

Critically, for this Court's purposes, it was not the time, place and manner restrictions incorporated in the local rule of the Court of Common Pleas that the Sixth Circuit relied on, but the Sheriff's discretionary expansion of those restrictions. Consequently, *Enoch III's* holding circumscribes what the Supreme Court in *Richmond Newspapers* ruled to be legitimate exercise of rights protected by the First Amendment to gather and record events of public import. Indeed, the right is rendered meaningless by the Sixth Circuit's unquestioned deference to the County Sheriff. While *Enoch III* concedes, as it must, that the Plaintiff did not violate the local court's time place and manner restriction, nonetheless, it holds,

> Regardless of whether the application of the [Local] Rule [33(D)(6)] to the hallway was express or implied, Enoch failed to show that her arrest resulted from anything other than a ***violation of a reasonable, content-neutral restriction on speech***.

Enoch III, 2024 WL 3597026, at *5. (Emphasis added). The Panel reached the dangerous conclusion that Dr. Enoch

had not shown that she engaged in any activity warranting First Amendment protection despite its concession that, "[w]e previously deemed the courthouse hallway a limited public forum, where her right to gather news about matters of public importance could be restricted by regulations that are viewpoint neutral and reasonable in the light of the purpose to be served by the forum." *Enoch III,* 2024 WL 3597026, at *5. (Internal quotes omitted). Of course, the so-called "violation" the Sixth Circuit refers to above, is not the time place and manner restriction contained in the Common Pleas Court's local rules. It is the Sheriff 's arbitrary expansion of the rule to ban *all* recordings despite the absence of a local judge's order banning such recordings.

As the parties agreed at trial, that local rule would limit or bar the media and others from recording newsworthy events associated with the Hunter prosecution in the hallways of the courthouse ***only if*** the presiding judge put on an order or otherwise designated the halls as off limits for recording. Not to put too fine a point on it, that issue was resolved by a formal ***stipulation*** of the parties presented to the jury at trial confirming the parties' agreement: "[the presiding judge] at the Hunter proceedings, never entered an order defining the hallways as ancillary areas under Rule 33, in which recording was prohibited." (Stipulations, R. 191, PageID# 3077.) In short, it was clearly not the application of the time, place and manner restriction contained in the local rule that deprived Dr. Enoch of her First Amendment rights otherwise endorsed in *Richmond Newspapers.* Rather, it was the Sheriff 's unfettered discretionary expansion that led the Sixth Circuit to hold that Plaintiff was entitled to no First Amendment protections in this case. *Enoch*

III thus delegates to the Sheriff unfettered discretion to reinterpret and expand the limited restrictions contained in the local court's time, place and manner regulation. Indeed, the Sheriff is now free to exercise such expansive discretion in any other limited public forum, without any regard for published time, place and manner already in place.

The decision of *Enoch III* begs this critical constitutional question: what interest of a state or county is advanced by preventing a media member from gathering information in courthouse hallways, regarding a controversial prosecution of a local judge, where the media member has fully complied with local time, place and manner restrictions. The decision effectively delegates to the local police, or in this case the local sheriff, the decision to interpret the scope of the First Amendment protections involved in news gathering in the courthouse setting however he or she decides. Such a holding allows the Sheriff to contract constitutional rights beyond that which is set out in the "time, place and manner" regulation published and implemented by the local court or other governing authority. Ceding such authority over such a fundamental constitutional right demands review by this Court.

II. THE SIXTH CIRCUIT'S HOLDING DIRECTLY CONFLICTS WITH HOLDINGS IN OTHER CIRCUITS.

As noted above, the Sixth Circuit's ruling in *Enoch III* creates a conflict with the holdings in sister circuits. As the Fifth Circuit recently made clear, "Among our sister circuits, however, 'there is broad agreement that, even

in limited and nonpublic forums, investing governmental officials with boundless discretion over access to the forum violates the First Amendment.'" *Freedom From Religion Found. v. Abbott*, 955 F.3d 417, 427 (5th Cir. 2020), *quoting*, *Child Evangelism Fellowship of MD, Inc. v. Montgomery Cnty. Pub. Sch.*, 457 F.3d 376, 386 (4th Cir. 2006). The Fifth Circuit in *Abbott* cites a string of other Circuit decisions adopting that same First Amendment principle eschewing unbridled discretion over access to public forums and limited forums. *Id.* 955 F.3d at 427-428, citing, *inter alia, Amidon v. Student Assoc. of the State Univ. of NY at Albany,* 508 F.3d 94, 102–05 (2d. Cir. 2007); *Southworth v. Bd. of Regents*, 307 F.3d 566, 575–80 (7th Cir. 2002); *Roach v. Stouffer*, 560 F.3d 860, 869–70 (8th Cir. 2009). The Fifth Circuit in *Abbott* concluded its review of decisions from other Circuits with this salient warning: "Indeed, the dangers associated with unbridled discretion are no less present in limited public forums, and [Defendants] do not argue to the contrary." *Abbott,* 955 F.3d at 428.

In conformity with these holdings, the Eleventh Circuit has held: "Even a facially content-neutral time, place, and manner regulation may not vest public officials with unbridled discretion over permitting decisions." *Burk v. Augusta–Richmond County,* 365 F.3d 1247, 1256 (11th Cir. 2004). The Ninth Circuit has followed suit.

> It is well-settled, of course, that even content-neutral time, place, and manner regulations may not confer unbridled discretion on the licensing authority, so as to stifle free expression. [Citations omitted] Time, place, and manner restrictions must "contain adequate standards to guide the official's discretion and render it

> subject to effective judicial review." *Thomas*, 534 U.S. at 323, 122 S.Ct. 775 (citation omitted). In other words, the regulation must provide objective standards that remove the permitting decision from the whim of the official; the absence of such standards enables the official to favor some speakers and suppress others.

Southern Oregon Barter Fair v. Jackson Cnty., Oregon, 372 F.3d 1128, 1138 (9th Cir. 2004).

The concern expressed in each of these decisions is present here. The local courts set a time, place and manner restriction on recording in areas of the courthouse that were ancillary to the presiding judge's courtrooms. In this case, the presiding judge presumably took into account the interests of the court and the public in the orderly conduct of trials and hearings in his courtroom. Yet, it is undisputed that the judge did not extend to the adjacent hallways the limitation on recording events that took place there after a hearing in the Hunter case had concluded. That is, Plaintiff was in full compliance with the local court's time, place and manner restriction. Indeed, as noted above, such compliance was stipulated by the Defendants at the trial of the case. Despite this uncontroverted record, the Sixth Circuit allowed the County Sheriff, without any limitation on the exercise of his discretion, to decide to ban all recordings, including those where the presiding judge had decided not to do so. Such a holding is a clear departure from the rulings on the same issue by the other Circuits discussed above.

Given the fundamental importance of the First Amendment rights at stake, as long ago recognized by

this Court in *Richmond Newspapers,* this Court should grant the Petition for Writ of Certiorari in this matter to reconcile the Sixth Circuit's holding with the First Amendment jurisprudence of its sister Circuits.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED OCTOBER 8, 2024

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 22-3946/3959

VANESSA ENOCH; AVERY CORBIN,

Plaintiffs-Appellees (22-3946)/
Cross-Appellants (22-3959)

v.

HAMILTON COUNTY SHERIFF'S OFFICE;
BRIAN HOGAN AND GENE NOBLES,
BADGE NO. 1266, DEPUTY SHERIFFS,

Defendants-Appellees (22-3959),

CHARMAINE MCGUFFEY, HAMILTON COUNTY SHERRIFF,

Defendant-Appellant (22-3946)/
Cross-Appellee (22-3959)

ORDER

BEFORE: SUHRHEINRICH, BUSH, and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were

fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

APPENDIX B — PETITION FOR REHEARING EN BANC IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED SEPTEMBER 12, 2024

Case Nos. 22-3946; 22-3959

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VANESSA ENOCH

Plaintiff-Appellee-Cross-Appellant

V.

HAMILTON COUNTY, OH SHERIFF'S OFFICE;
DEPUTY SHERIFF BRIAN HOGAN;
DEPUTY SHERIFF GENE NOBLES, JIM NEIL,
HAMILTON COUNTY SHERIFF

Defendant-Appellant-Cross Appellees

On Appeal from the United States District Court
for the Southern District of Ohio Western Division
District Court No. 1:16-cv-661

PETITION FOR REHEARING EN BANC ON BEHALF OF PLAINTIFF-APELLEE/ CROSS APPELLANT VANESSA ENOCH

Appendix B

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[1] STATEMENT OF REASONS FOR *EN BANC* REVIEW

Appellant Vanessa Enoch, through counsel and pursuant to FRAP 35, 6 Cir. R. 35 and 6 Cir. I.O.P. 35, submits this Petition for En Banc Rehearing for this Court's consideration. As grounds for this Petition, Appellant states as follows:

1. The Panel decision at issue in this case conflicts with the U.S. Supreme Court holding in *Richmond Newspapers, Inc. v. Commonwealth of Virginia*, 448 U.S. 555, 576 (1980), which secures for the public and the media the First Amendment right to seek and gather news of public import. It effectively eliminates that right to gather news in a courthouse setting by allowing the County Sheriff to expand the "time, place and manner restriction" beyond that which was implemented by the Hamilton County Court of Common Pleas in its Local Rules. It further directly conflicts with, and has the effect of overruling *sub silencio*, a ruling rendered by a previous Panel in this same case, which held that the Sheriff's "Deputies could not constitutionally prevent Enoch. . . . from or punish [her] for gathering news about matters of public importance when [her] actions violated neither rules nor laws." *Enoch v. Hogan*, 728 F. App'x 448, 456 (6th Cir. 2018). Consideration by the full Court is therefore necessary to secure and maintain the integrity and uniformity of the Court's prior decisions and the holdings of the Supreme Court; and

2. The Panel decision for which we seek review involves questions of exceptional importance regarding the First Amendment rights of media [2] representatives covering local trials to be free of unlawful interference by law enforcement officials, including arrest and the confiscation of personal property and recording devices, even though they are complying with all published time, place and manner rules of the local court.

I. INTRODUCTION

Vanessa Enoch was arrested by a Hamilton County Sheriff's Deputy, who searched and confiscated her iPad, specifically because she was attempting to record newsworthy events in the Hamiliton County courthouse hallway after the conclusion of a hearing on a motion in the prosecution of a Hamilton County judge, Tracie Hunter. The evidence demonstrated that the deputy acted pursuant to the custom, practice or policy of the Hamilton County Sheriff. At the time of this event, Enoch was conducting an investigation into the removal of African American women from judicial positions in Ohio for a doctorate dissertation she was completing. As part of this endeavor, Plaintiff published articles relating to the prosecution for the *Cincinnati Herald*.

Prior to the Panel decision in this case, the hallways of the Hamilton County Courthouse had historically been used by media and public alike to observe and record events associated with criminal prosecutions as well as civil cases involving high profile defendants like Judge Hunter. As such, this Court has recognized the Courthouse hallway

as a limited public forum, where individuals retain First [3] Amendment protection subject only to reasonable time, place and manner restrictions. *Enoch v. Hamilton Cnty. Sheriff's Off.*, No. 22-3946, 2024 WL 3597026, at *5 (6th Cir. July 31, 2024) (hereafter *Enoch III*). ("We previously deemed the courthouse hallway a limited public forum, where her right to gather news about matters of public importance could be restricted by regulations that are viewpoint neutral and reasonable in the light of the purpose to be served by the forum.") (Internal quotes omitted). In this case, the Hamilton Common Pleas Court had previously implemented a "time, place and manner" restriction on recording events in the courthouse through the adoption of its Local Rule 33(D)(6). That Rule permitted recording in ancillary areas outside of the courtrooms (including hallways) ***unless*** the local judge had expressly designated that area as off limits for use of recording devices.[1] It is undisputed that no judge had designated the hallway as coming within a recording ban at the time of the deputies' actions in this case.

It is further undisputed that, in attempting to record events surrounding this high-profile prosecution, Dr. Enoch violated no rule or order of the court, nor had she violated any other law or regulation. At the conclusion of a one-week trial, the jury returned a verdict in Plaintiff's favor for $35,000.00 in compensatory damages. [4] A Panel of this Court (on Defendant' s third appeal in this case) vacated that award and directed a verdict for Defendant.[2]

1. (R. 84-8, PageID# 1232).

2. In the second appeal, the Panel reversed the District Court's denial of qualified immunity for the individual defendants

Appendix B

I. ARGUMENT

A. THE PANEL'S DECISION ELIMINATES FIRST AMENDMENT RIGHTS EXPLICITLY RECOGNIZED BY THE SUPREME COURT IN *RICHMOND NEWSPAPERS* AND BY THE DECISION OF A PREVIOUS PANEL IN THIS CASE.

The original Panel that heard the first appeal in this case held that,

> The Deputies could not constitutionally prevent Enoch. . . . from or punish [her] for gathering news about matters of public importance when [her] actions violated neither rules nor laws.

Enoch v. Hogan, 728 F. App'x 448, 456 (6th Cir. 2018) (Hereafter, *Enoch I*).[3] At trial, Plaintiff offered an abundance of testimony from Hamilton County Sheriff's deputies themselves, among other evidence, that this is exactly what occurred here. Indeed, Deputy Nobles conceded that his actions in preventing Plaintiff from continuing to record events in the hallway, in confiscating

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and remanded for proceedings on the *Monell* claim. *Enoch v. Hamilton Cnty. Sheriff's Off.*, 818 F. App'x 398, 403 (6th Cir. 2020). (*Enoch II*). The *Enoch II* decision is not the subject of this petition.

3. *Enoch I* affirmed the denial of Defendants' motion for judgment on the pleadings as to all claims against both the individual defendants and the *Monell* official capacity claims against the Sheriff.

and searching her iPad, and in arresting her, all occurred (pursuant to the Sheriff's policy) precisely because she was attempting to record events occurring in the hallway associated with the [5] Hunter prosecution. Nobles' testimony included the concession that Dr. Enoch had violated no rule or law.[4]

In rendering the holding quoted above, the original Panel in *Enoch I* applied the First Amendment mandate of *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980):

> It is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a right of access, or ***a right to gather information, for we have recognized that without some protection for seeking out the news, freedom of the press could be eviscerated***.

Id. at 576. (Internal quotes, citations and footnote omitted). This was applied in *Enoch I*, 728 F. App'x at 456, where the original Panel unanimously affirmed the denial of the County's motion for judgment on the pleadings.

At trial, the jury was presented with evidence from which it concluded that the deputies, following the custom, practice or policy of the County Sheriff, did indeed prevent Dr. Enoch from, or effectively punished her for, engaging

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4. (Nobles, Trial Transcript. PageID# 3412-13, 3432-38, 3446).

in such First Amendment protected activity. The jury reached its conclusion based on undisputed evidence that Deputy Nobles confiscated Dr. Enoch's iPad and arrested her specifically because she was recording events in the courthouse hallway. As noted above, this evidence included the arresting officer's own admissions that Enoch violated no order, Rule or law. At the time, Plaintiff was pursuing her [6] investigation into the removal of African American female jurists from judicial positions in Ohio.[5] Prior to *Enoch III*, there was no doubt that this was protected by the First Amendment. Specifically, the jury answered the following interrogatories:

> As to Plaintiff Vanessa Enoch, we, the members of the jury, find the following by a preponderance of the evidence:
>
> > 1. Did employee(s) of the Hamilton County Sheriff violate Plaintiff Vanessa Enoch's First Amendment rights? **(mark one)**
> >
> > Yes: X or No: __
> >
> > If you answered "Yes" to question number 1, proceed to question number 2.
> >
> > 2. Were the employee(s) acting pursuant to a County policy, practice or custom when they violated Plaintiff Vanessa Enoch's First Amendment rights? **(mark one)**
> >
> > Yes: X or No: __

5. Tr., RE 191 PageID# 3102-3111.

(R. 155, Page ID# 2361). The jury did so by following the trial court's instructions as to Plaintiff's burden to prove a violation of her First Amendment rights. Those instructions, not criticized by the current Panel, applied the holding in *Enoch I* quoted above.[6]

After the decision in *Enoch I*, the composition of the Panel that heard two subsequent appeals in this case changed, culminating in the current Panel decision, [7] reversing the jury's verdicts in favor of Dr. Enoch and directing the District Court to enter judgment for the Hamilton County Sheriff.[7] In so doing, *Enoch III* effectively reversed the holding of *Enoch I* and contradicted the jury's findings. The *Enoch III* Panel assumed the role of the weigher and finder of facts by concluding the following:

> Enoch has not shown that her recording [of events in the hallways] was protected under the First Amendment. The precedent she cites establishes no more than a ***general right*** to attend trials and ***gather newsworthy information***. While our prior decisions in this case have recognized that right, Enoch did

6. See First Amendment Instructions at RE 195, Tr. Page ID# 3783-3784, which incorporated *Enoch I's* First Amendment holding.

7. *Enoch III* notes that, as a subsequent Panel in the same case, it is bound by the holdings of the previous Panel (2024 WL 3597026, at *5). Nevertheless, as demonstrated herein, there is simply no way to reconcile the original Panel's holding in *Enoch I* as quoted at page 5 above, with the holding of the current Panel in *Enoch III*.

> not meet her burden of showing that those decisions demonstrate that she engaged in protected activity here.

Enoch III, 2024 WL 3597026, at *6. (Emphasis added). The Panel fails to explain what evidence of First Amendment deprivation is missing – a critical oversight given the overwhelming evidence that Dr. Enoch was engaging in her "a ***general right*** to attend trials and *gather newsworthy information*." In contradiction to its holding, this point appears conceded by the Panel: "[Dr. Enoch] presented evidence that Hogan and Nobles ***acted pursuant to a custom of prohibiting any recording absent authorization from a judge***[8] ***when they arrested her, and that their*** [8] ***misunderstanding of the Rule was so widespread as to constitute Sheriff's Department policy.***" *Id.* at *6. (Emphasis added). In fact, the deputies testified not that they misunderstood the Rule, but that they were trained by the Sheriff's Office to go beyond the Rule and ban all recordings in the halls of the courthouse unless a judge expressly authorized it – resulting in the jury's factual finding of a "custom, policy or practice." The Deputies were not trained to ban only those recordings in the halls where, as the Rule required, the judge had expressly designated the halls as off limits to use of recording devices.[9] Accordingly, Dr. Enoch proved to

8. At the time of events in this case it is undisputed that no court rule, ordinance or statute required an affirmative authorization of a judge or other official to permit the media or public from recording events of public interest.

9. (RE 193, Nobles, Tr. PageID# 3446; RE 192, Hogan, Tr. PageID# 3365).

the jury's satisfaction that it was Defendant's policy *and practice* to prevent recording of newsworthy events in the courthouse hallways despite the absence of an order or designation from a judge proscribing such recordings.[10] There is no reasonable dispute in the trial record that it was the Sheriff's custom, policy and practice that resulted in Dr. Enoch being "prevented from or punished for gathering news about matters of public importance when [her] actions violated neither rules nor laws," thus meeting her burden under *Enoch I*. Nevertheless, the current Panel took that verdict away from Plaintiff and directed a judgment for Defendant. It is difficult to imagine a ruling of one Panel of this Court that would so directly contradict a prior holding of another Panel in the same litigation. Such violates this Court's own [9] holding that a prior panel's holding in the same litigation becomes binding as the law of the case. *Caldwell v. City of Louisville*, 200 F. App'x 430, 432-433 (6th Cir. 2006). Such a rule is critical to assure the continued vitality and integrity of panel decisions.

Not only does this ruling contradict the holding recounted at page 5 above in *Enoch I*, but it also eviscerates the constitutional protections previously afforded members of the media in both *Enoch I* and *Richmond Newspapers*. It delegates to the local County Sheriff the authority to expand the "time, place and manner restrictions" set out by the local court, with the result that the Sheriff and not the local court decides the limits of First Amendment protections in the limited public forum of a courthouse.

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10. Tr. PageID# 3365-3366.

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The stretch *Enoch III* had to make to reach the result it does is evident in the internal contradictions in its opinion. That decision (*Enoch III*) at once recognizes the "general right to attend trials and *gather newsworthy information*," yet finds that Plaintiff's activity in doing just that fails to meet her First Amendment burden. *Id.* at *6, *and see*, *Id.* at *7 ("she failed to establish that her conduct was entitled to First Amendment protection"). That is, *Enoch III* found that Plaintiff's efforts in investigating the removal of African American female judges from the judicial positions in Ohio for a minority media publication, while attempting to record events in the hall after the close of proceedings in the criminal prosecution of one such [10] judge, and while acting in full compliance with all rules and laws, were not worthy of any First Amendment protection.

Enoch III's holding circumscribes what the Supreme Court in Richmond Newspapers and this Court found in *Enoch I* to be legitimate exercise of rights protected by the First Amendment to gather and record events of public import. Indeed, the right is rendered meaningless by it unquestioned deference to the County Sheriff. *Enoch III* accomplished this under the guise of "a time, place and manner" restriction contained in Local Rule 33(D)(6) while conceding that the Plaintiff did not violate that restriction. As the Panel confusingly holds,

> If [Rule 33] does not [apply] then the deputies' application of the Rule did not transform her recording into activity deserving of First Amendment

> protection. Regardless of whether the application of the [Local] Rule [33(D)(6)] to the hallway was express or implied, Enoch failed to show that her arrest resulted from anything other than a ***violation of a reasonable, content-neutral restriction on speech***.

Enoch III, 2024 WL 3597026, at *5. It thus ignores the undisputed evidence, including Deputy Nobles admissions, that Plaintiff did not violate Rule 33(D)(6) – the only "time, place and manner restriction" at issue here. The Panel reached the dangerous conclusion that Dr. Enoch had not shown that she engaged in any activity protected by the First Amendment despite its concession that, "[w]e previously deemed the courthouse hallway a limited public forum, where her right to gather news about matters of public importance could be restricted by regulations that are [11] viewpoint neutral and reasonable in the light of the purpose to be served by the forum." *Enoch III*, 2024 WL 3597026, at *5. (Internal quotes omitted).

As noted, the only "time, place and manner" restriction or regulation at issue here was Dr. Enoch's compliance with Local Rule 33(D)(6). The Panel's holding quoted here is confusing because, as the record at trial confirmed, everyone concedes that Ms. Enoch did not violate any provision of the "time, place and manner restriction" contained in that Rule. As the parties stipulated at trial, that Rule would limit or bar the media and others from recording newsworthy events associated with the Hunter prosecution in the hallways of the courthouse ***only if*** the presiding judge put on an order or otherwise designated the halls as off limits for recording. Not to put too fine a

point on it, that issue was resolved by a formal ***stipulation*** of the parties presented to the jury at trial confirming the parties' agreement: "[the presiding judge] at the Hunter proceedings, never entered an order defining the hallways as ancillary areas under Rule 33, in which recording was prohibited." (Stipulations, R. 191, PageID# 3077.) While the *Enoch III* Panel mentions the stipulation as factual background (*Id.* at *1), it completely ignores the stipulation in its holding quoted above.

The Panel concludes that Rule 33 is a reasonable, viewpoint-neutral restriction – a point not in dispute. Yet without any basis in law or fact, *Enoch III* extends its reach to the courthouse hallways instead of its explicit limited application under the [12] facts of this case to the courtroom itself and any other ancillary area ***designated by the judge***. The current Panel then concludes that Enoch failed to satisfy her burden of proof that she was engaged in protected conduct – despite the undisputed fact that Enoch did not violate Rule 33 when she was prevented from and arrested expressly for recording events of indisputable newsworthy import. *Enoch III* thus delegates to the Sheriff unfettered discretion to reinterpret and expand the limited restrictions contained in the local court's time, place and manner regulation.

The decision of the *Enoch III* begs this critical constitutional question: what interest of the State or Hamilton County is advanced by preventing a media member from gathering information in courthouse hallways, regarding a controversial prosecution of a local judge, where Enoch has fully complied with local

court rules, orders and the law of Ohio. *Enoch III* simply removes the right to gather such newsworthy material whenever the local Sheriff decides to expand the reach of the "time, place, and manner" rule or regulation in place. The individual's compliance with such restrictions embedded in local court rules was irrelevant to the Panel. The decision effectively delegates to the police, or in this case the Sheriff, the decision to interpret the scope of the First Amendment protections involved in news gathering in the courthouse setting however he or she decides. Such a holding contravenes both *Enoch I* and *Richmond Newspapers* and allows the Sheriff to contract [13] constitutional rights beyond that which is set out in the "time, place and manner" regulation implemented by the local court.

1. The Special Constitutional Importance of Reviewing This Unpublished Decision

Although "unpublished," *Enoch III* is the only decision from this Court that delineates the scope of protections afforded members of the media to gather news in the courthouse setting where proceedings of immense local interest are occurring on almost a daily basis. Being the only decision rendered by this Court regarding such an important First Amendment principle applied to courthouses, it will be considered persuasive authority in district courts throughout the Circuit. "Non-binding decisions can have great utility when binding decisions on the contested issue are scarce." *Smith v. Astrue*, 639 F. Supp. 2d 836, 842 (W.D. Mich. 2009); *accord,*

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Dedvukaj v. Equilon Enters., LLC, 301 F.Supp.2d 664, 669 (E.D.Mich.2004) (unpublished decision was considered "***especially persuasive*** in light of this case's identical PMPA issue." (Emphasis added))

Thus, *Enoch III* cries out for review by the full Court in light of the "persuasive" impact *Enoch III* will necessarily have on the outcome of all similar cases to be considered by the district courts in this Circuit in the future. The First Amendment protections to gather news surrounding local trials recognized in *Enoch I* will necessarily suffer a profound setback if the decision is *Enoch III* goes unreviewed by the entire Court. Absent *en banc* review, district courts will feel [14] compelled to follow *Enoch III's* holding – a holding that allows local Sheriffs or Police Chiefs to set their own "time, place and manner restrictions," beyond that which the local courts impose, regarding access to important events surrounding local trials.

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CONCLUSION

For the sake of First Amendment rights to "seek and gather news" surrounding local trials recognized in *Richmond Newspapers* and *Enoch I*, and to remove discretion *Enoch III* necessarily confers on Sheriffs and Police in the context of news gathering activity surrounding trials in local courthouses, we urge this Court to grant review.

Respectfully submitted,

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[15] CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 35 (b)(2)(A), the undersigned counsel certifies that this brief complied with the type-volume limitations of Fed. R. App. P. 35 as well as the page limitation in the Rule. The brief contains 3337 words exclusive of the Table of Contents and Authorities, using the Microsoft Word word-count program. The brief was prepared in Microsoft Word using Times New Roman 14 pt. font.

/s/ Michael J. O'Hara
Michael J. O'Hara

CERTIFICATE OF SERVICE

[I hereby certify that the foregoing was served electronically via the CM/ECF electronic filing system, and a copy will be electronically served upon all attorneys of record, on this 12th day of September, 2024.

/s/ Michael J. O'Hara
Michael J. O'Hara

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED JULY 31, 2024

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-3946

VANESSA ENOCH; AVERY CORBIN,

Plaintiffs-Appellees (22-3946)/
Cross-Appellants (22-3959),

v.

HAMILTON COUNTY SHERIFF'S OFFICE; BRIAN HOGAN AND GENE NOBLES, BADGE NO. 1266, DEPUTY SHERIFFS,

Defendants-Appellees (22-3959),

CHARMAINE MCGUFFEY, HAMILTON COUNTY SHERIFF,

Defendant-Appellant (22-3946)/
Cross-Appellee (22-3959).

July 31, 2024, Filed

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Appendix C

OPINION

Before: SUHRHEINRICH, BUSH, and MURPHY, Circuit Judges.

JOHN K. BUSH, Circuit Judge. Vanessa Enoch and Avery Corbin were arrested for recording in the hallway of a courthouse in Hamilton County, Ohio. They filed this action under 42 U.S.C. § 1983, asserting violations of their rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution, as well as various state-law claims. We previously granted qualified immunity to the defendants on the plaintiffs' federal-law claims, and dismissed their appeal with respect to any official capacity claims for lack of jurisdiction. On remand, the district court dismissed all but one of the remaining claims, but held that the plaintiffs' speech-based retaliation claims could proceed to trial. Ultimately, a jury awarded judgment in favor of Enoch. The defendants appeal several of the district court's rulings at trial and its award of attorney's fees to Enoch's counsel. Because the defendants are entitled to judgment as a matter of law, we reverse.

I.

A. Factual Background

Enoch and Corbin visited the Hamilton County courthouse on June 25, 2014 to attend a pretrial hearing in the criminal prosecution of Hamilton County Juvenile Judge Tracie Hunter. Enoch attended the hearing to

gather information for an article she was writing about Judge Hunter's trial. Corbin had worked with Judge Hunter for several years, including as her bailiff during her tenure as a judge, and he served as a witness at the criminal proceeding. Corbin exited the courtroom after the hearing and followed courthouse reporter Kimball Perry, taking pictures of Perry with an iPad. Enoch entered the courtroom hallway around the same time and trailed behind Corbin and Perry. She started taking pictures of Hunter, Hunter's attorney, and "everybody just coming out of the courtroom and standing outside the door" with her iPad. Enoch Test., R. 191, PageID 3112.

Sheriff's Deputy Brian Hogan approached Enoch and told her to stop taking pictures. Hogan told Deputy Gene Nobles that Enoch was using her iPad in the hallway, and Nobles asked Enoch to open the iPad to show him any recordings. Enoch initially refused, but she did as Nobles asked after he told her that she would be arrested if she did not comply. But when Nobles asked Enoch to provide her name and photo identification, she again refused to cooperate.

Hogan informed Enoch and Corbin that they were prohibited from using recording devices in the hallway under Hamilton County Local Rule 33. Under the then-existing Rule 33, parties could not record "in any courtroom or hearing room, jury room, judge's chambers or ancillary area (to be determined in the sole discretion of the Court) without the express permission of the Court." Hamilton Cnty. Common Pleas Ct. R. 33(D)(6). "Judge Nadel, who presided at the Hunter proceedings,

never entered an order defining the hallways as ancillary areas under Rule 33, in which recording was prohibited." Stipulations, R. 191, PageID 3077. Although no formal order was in place, Hogan and Nobles testified that they believed their actions were consistent with the policy of the Sheriff's Department. According to Hogan's understanding of Local Rule 33, individuals "who did not have express permission of a judge were not permitted to film or record anywhere in the courthouse." Hogan Test., R. 192, PageID 3366.

Enoch was arrested for using her iPad, and she was held in custody for approximately ninety minutes. She and Corbin were charged with disorderly conduct under Ohio Rev. Code Ann. § 2917.11, and Enoch was charged with failing to identify herself to law enforcement under Ohio Rev. Code Ann. § 2921.29. Their charges were subsequently dismissed.

Enoch and Corbin filed this action in 2016, asserting claims against Hogan, Nobles, and Sheriff Jim Neil in their individual and official capacities, as well as against Hamilton County.[1] They alleged that the defendants violated their rights under the First and Fourth Amendment, as incorporated by the Fourteenth Amendment. Specifically, they claimed that their arrest violated their rights to free speech (Count 1); that it was an unreasonable search and seizure (Count II) and unlawful detention (Count III); that Hogan and Nobles used

1. Following her election as Hamilton County Sheriff, Charmaine McGuffey was substituted for Jim Neil pursuant to Federal Rule of Civil Procedure 25(d).

excessive force when arresting them (Count IV); that they were subjected to a malicious prosecution (Count V); and that the defendants' actions violated state law. They also claimed that the County "expressly or tacitly approved, endorsed and ratified" Hogan and Nobles's conduct within the meaning of *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), by failing to properly investigate or discipline the deputies. Amended Compl., R. 38, PageID 180.

B. *Enoch I*

The district court granted the defendants' motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) with respect to the plaintiffs' excessive force claim (Count IV), but denied the motion as to their remaining federal-law claims. This court affirmed. *Enoch v. Hogan*, 728 F. App'x 448, 449 (6th Cir. 2018) (*Enoch I*). We held that Hogan and Nobles were not entitled to qualified immunity based on the allegations in the pleadings because, although the deputies claimed their actions were justified under Rule 33, the text of the Rule does not expressly state that recording is prohibited in courtroom hallways. *Id.* at 454. After "accept[ing] Enoch and Corbin's allegation that they had violated no rule or law," the panel held that the plaintiffs had alleged that the deputies' actions violated their clearly established rights under the First Amendment by "punish[ing] them for gathering news about matters of public importance." *Id.* at 456.

C. *Enoch II*

On remand and following discovery, the parties filed cross-motions for summary judgment. In relevant part, the district court denied the defendants' motion in full, and granted summary judgment to the plaintiffs on their First Amendment, Fourth Amendment wrongful-arrest, and Fourth Amendment malicious-prosecution claims. The district court also denied summary judgment to the defendants on the official capacity claim, explaining that "[t]here are genuine issues of fact as to the existence of a County policy that allegedly led to the arrests of plaintiffs for using their electronic recording devices in the Courthouse hallways." Order on Mots. for Summ. J., R. 101, PageID 1954.

We affirmed the district court's ruling in part, and reversed in part. *Enoch v. Hamilton Cnty. Sheriff's Off.*, 818 F. App'x 398, 407 (6th Cir. 2020) (*Enoch II*). We held that Hogan and Nobles were entitled to qualified immunity on the plaintiffs' Fourth Amendment claims because Enoch and Corbin's arrests were supported by probable cause. *Id.* at 404. Hogan and Nobles could not have "knowingly violate[d] the law" when they arrested Enoch and Corbin because the deputies reasonably believed that the plaintiffs violated Rule 33. *Id.* (citing *Barton v. Martin*, 949 F.3d 938, 947 (6th Cir. 2020)). And even if the text of Local Rule 33 did not expressly define courtroom hallways as ancillary areas where recording was prohibited, "the unrebutted evidence shows that the common practice in the Hamilton County courthouse was to treat" hallways as ancillary areas. *Id.*

We also found that the defendants were entitled to qualified immunity on the plaintiffs' First Amendment claim. We recognized that Rule 33 was itself a reasonable, viewpoint neutral regulation that did not violate the First Amendment. *Id.* at 405 ("No one denies that Rule 33(D)(6) is a reasonable restriction on speech."). As for the plaintiffs' claim that they were singled out for arrest because of their speech, we held that at the time of the arrest, "it was not clearly established that an arrest supported by probable cause . . . could violate the First Amendment." *Id.* at 406 (quoting *Reichle v. Howards*, 566 U.S. 658, 663, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012)). We noted that under *Nieves v. Bartlett*, 587 U.S. 391, 139 S. Ct. 1715, 204 L. Ed. 2d 1 (2019), a plaintiff could show retaliation with "objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Id.* (quoting *Nieves*, 587 U.S. at 407). However, because *Nieves* was decided after Enoch and Corbin's arrest, its exception to the probable cause requirement was not clearly established for qualified immunity purposes. *Id.*

We lastly held that we lacked jurisdiction over any official capacity claims because resolution of those claims was not "inextricably intertwined" with our qualified immunity analysis. *Id.* at 407. We accordingly dismissed the Sheriff-Appellants' "interlocutory appeal as it pertains to claims against them in their official capacities," and we remanded the case to the district court. *Id.* at 407.

D. Post-*Enoch II* Proceedings

The defendants moved for summary judgment on remand. They argued that the plaintiffs' remaining official capacity claim—the ratification claim—failed because the *Enoch II* court held that Enoch and Corbin did not suffer any constitutional injury. They also argued that any official capacity claims failed because the plaintiffs did not satisfy the *Nieves* exception. The district court disagreed, holding that "[t]here are genuine issues of fact as to whether [the] plaintiffs can establish that the *Nieves* exception applies in this case," and whether the deputies acted pursuant to a County policy, custom, or practice. Order on Mot. for Summ. J., R. 120, PageID 2061. The court held that the plaintiffs "can proceed under the theory that the deputies were enforcing an official policy or custom of the County when they arrested plaintiffs for recording events in the hallway of the Hamilton County Courthouse while other similarly situated individuals were not arrested." *Id.*, PageID 2063.

E. Trial

At trial, the defendants moved for judgment as a matter of law at the close of the plaintiffs' case, and they renewed their motion at the close of evidence. They argued that the plaintiffs did not show that Hogan or Nobles acted with a retaliatory motive, and that under *Nieves*, no evidence showed that similarly situated individuals not engaged in the same sort of speech were not arrested. Instead, the defendants posited that Enoch was arrested

because she harassed Perry while following him down the hallway—conduct that is not protected under the First Amendment. As to the plaintiffs' *Monell* theory, the defendants argued that insufficient evidence showed "that there was any policy of the sheriff, separate from Local Rule 33, that govern[s] recording," and that the failure-to-train claim lacked evidentiary support. Mot. for J. as a Matter of Law, R. 193, PageID 3479.

The district court denied the defendants' motions. The court held that Enoch demonstrated that she was engaged in protected speech when she recorded for her case study, that others in the hallway who were engaged in the same protected activity were not arrested, and that the protected activity was a motivating factor leading to her arrest. The court also found that sufficient evidence supported the *Monell* claim because Hogan and Nobles testified that her arrest was in accordance with Sheriff's Department policy and training.

The jury found in Enoch's favor and awarded her $35,000 in damages. On Enoch's motion, the district court awarded an additional $546,621.29 in attorney's fees and costs under 42 U.S.C. § 1988.

II.

The defendants challenge several of the district court's rulings on appeal. They contend that the court erred by (1) permitting the plaintiffs to proceed to trial on theories of *Monell* liability that were not properly pleaded in the Complaint; (2) instructing the jury that the *Nieves*

exception applies to the speech-based retaliation claim; (3) excluding testimony interpreting Rule 33; (4) denying their motion for judgment as a matter of law; and (5) failing to reduce the attorney's fees award to Enoch's counsel. Because we conclude that the district court erred in denying the defendants' motion for judgment as a matter of law, we do not reach their remaining arguments.

A. Judgment as a Matter of Law

We review a district court's denial of judgment as a matter of law de novo. *Szekeres v. CSX Transp., Inc.*, 731 F.3d 592, 597 (6th Cir. 2013); *Kusens v. Pascal Co., Inc.*, 448 F.3d 349, 358 n.10 (6th Cir. 2006). Judgment as a matter of law is appropriate when "a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1); *K&T Enters., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 176 (6th Cir. 1996). In reviewing a Rule 50(a) motion, we view the evidence "in the light most favorable to the party against whom the motion is made" and give that party "the benefit of all reasonable inferences." *K&T Enters.*, 97 F.3d at 176.

Enoch proceeded to trial on the theory that her arrest for recording in the hallway violated her right to free speech under the First Amendment. To prevail on her speech-based retaliation claim, Enoch was required to show that (1) she was engaged in protected conduct, (2) the deputies took an adverse action causing her "'to suffer an injury that would likely chill a person of ordinary firmness'

from continuing that activity," and (3) the officers' actions were motivated, in part, by the exercise of her First Amendment rights. *Novak v. City of Parma*, 932 F.3d 421, 427 (6th Cir. 2019) (quoting *Paige v. Coyner*, 614 F.3d 273, 277 (6th Cir. 2010)). Because only her official capacity claim survived summary judgment, Enoch also needed to show "that the alleged federal violation occurred because of a municipal policy or custom." *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)).

We begin by determining whether Enoch was engaged in protected conduct. "Absent protected conduct, [Enoch] cannot establish a constitutional violation." *Thaddeus-X v. Blatter*, 175 F.3d 378, 395 (6th Cir. 1999) (en banc) (plurality opinion). Throughout the trial, Enoch claimed that she was arrested for (1) recording in the courthouse hallway, or (2) talking back to Hogan and Nobles when confronted over her use of the iPad. We consider each claim in turn.

Recording. Enoch primarily claimed that she was arrested because she was recording in the courthouse hallway. She argues on appeal that her recording activities are "unquestionably protected by the First Amendment under *Richmond Newspapers* and *Enoch I*." Second Br. at 55 (citing *Richmond Newspapers v. Virginia*, 448 U.S. 555, 586, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980); *Enoch I*, 728 F. App'x at 456). In *Richmond Newspapers*, the Supreme Court held that the public's general right to attend criminal trials is "implicit in the guarantees

of the First Amendment." 448 U.S. at 580. The Court emphasized that attending a trial is necessary to protect the public's ability to collect and communicate information about that trial, as "without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 576 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972)). However, neither the Supreme Court nor our circuit has held that the right to attend judicial proceedings encompasses an unqualified right to record those proceedings or the happenings in courthouse hallways.

In a nonpublic forum like a courthouse, "the First Amendment rights of everyone . . . are at their constitutional nadir." *Mezibov v. Allen*, 411 F.3d 712, 718 (6th Cir. 2005); *see also Conway v. United States*, 852 F.2d 187, 188-89 (6th Cir. 1988) (holding that the First Amendment does not guarantee the right to record judicial proceedings) (per curiam); *United States v. Hastings*, 695 F.2d 1278, 1280 (11th Cir. 1983) (noting that the "right of access to observe criminal trials" does not extend to "the right to televise, record, and broadcast trials"). Enoch's recording took place in the hallway outside the courtroom, rather than in the courtroom itself. We previously deemed the courthouse hallway a limited public forum, where her right to gather news about matters of public importance could be restricted by regulations that are "viewpoint neutral and 'reasonable in the light of the purpose to be served by the forum.'" *Enoch II*, 818 F. App'x at 405 (quoting *Hartman v. Thompson*, 931 F.3d 471, 479 (6th Cir. 2019)); *Richmond Newspapers*, 448 U.S. at 577-78. We further held in *Enoch II* that Rule 33 was such a reasonable,

viewpoint-neutral restriction—a holding that Enoch does not dispute on appeal. 818 F. App'x at 405. And even if she did, she has not presented any change in the law or facts that would justify reconsidering that conclusion. 818 F. App'x at 405; *see United States v. Clark*, 225 F. App'x 376, 379 (6th Cir. 2007) ("Because [a prior panel of] this Court has already decided this exact issue, it has become law-of-the-case and is binding upon the district court after remand and upon us in this appeal.").

At trial, Enoch claimed that the deputies' enforcement of the Rule, and not the Rule itself, was retaliatory. She argued that by applying the Rule in the courthouse hallway, an area that was not listed as a place where recording was expressly banned and that had not been deemed an ancillary area, Hogan and Nobles arrested her for lawful conduct that was entitled to First Amendment protection. For their part, the defendants argued that the Rule could have applied to the hallway as an "ancillary area," even if a judge did not enter an order to that effect. But even if Rule 33 did not extend to the courthouse hallway, that fact does not require the conclusion that Enoch's conduct was protected under the First Amendment.

In other words, our conclusion that Enoch failed to establish that she engaged in protected activity does not hinge on whether Rule 33 applies to the courthouse hallway. If the rule does apply, then Enoch was arrested for violating a content-neutral restriction on her speech in a limited public forum. If it does not, the deputies' application of the Rule did not transform her recording into an activity deserving First Amendment protection.

Regardless of whether the application of the Rule to the hallway was express or implied, Enoch failed to show that her arrest resulted from anything other than a violation of a reasonable, content-neutral restriction on speech.

The district court found that Enoch engaged in protected activity because of our statement in *Enoch I* that "the First Amendment protects the rights of both the media and the general public to attend and share information about the conduct of trials." R. 193, PageID 3505. But *Enoch I* did not recognize a First Amendment right to record in a courthouse hallway. Rather, in ruling on the defendants' motion for judgment on the pleadings, we found that the plaintiffs had alleged a violation of their First Amendment rights after accepting the plaintiffs' allegation in the Complaint that they had not violated any courthouse rules. *Enoch I*, 728 F. App'x at 456.

Our holding in *Enoch II* similarly does not establish that Enoch was engaged in protected activity. In discussing the plaintiffs' speech-based retaliation claim, we held that the deputies were entitled to qualified immunity because no clearly established law held that an officer could be liable for retaliating against someone whose arrest was supported by probable cause. *Enoch II*, 818 F. App'x at 405-06. Because we resolved the claim by holding that law enforcement's arrest was supported by probable cause, we had no occasion to hold that Enoch's conduct was protected. Enoch cannot rely on either of our prior decisions to satisfy the first prong of her retaliation claim.

Enoch has not shown that her recording was protected under the First Amendment. The precedent she cites establishes no more than a general right to attend trials and gather newsworthy information. While our prior decisions in this case have recognized that right, Enoch did not meet her burden of showing that those decisions demonstrate that she engaged in protected activity here. Because she failed to show that her recording was protected, her first theory of speech-based retaliation fails as a matter of law.[2]

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2. The *Nieves* exception does not apply to Enoch's claim that she was arrested in retaliation for recording. At trial, the district court instructed the jury that for Enoch to prevail on her retaliation claim, she was required to present "objective evidence that she was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech were not arrested." Jury Instr., R. 153, PageID 2402. But that exception applies in cases plagued by the "problem of causation," or when an official who states that he is motivated by lawful considerations is actually acting out of retaliatory animus. *Nieves*, 587 U.S. at 400 (citation omitted); *see also Gonzalez v. Trevino*, 144 S. Ct. 1663, 219 L. Ed. 2d 332, 2024 WL 3056010, at *2 (Sup. Ct. 2024) (recognizing that the *Nieves* exception applies where an arrest occurs in circumstances where "officers have probable cause to make arrests, but typically exercise their discretion not to do so") (quoting *Nieves*, 587 U.S. at 406) (per curiam). No such causal complexity is involved here: Enoch contends that she was arrested because she was recording, and the defendants do not claim otherwise. Indeed, Nobles testified that he arrested Enoch for taking pictures with her iPad at trial. *See* Nobles Test., R. 193, PageID 3413. *Nieves* therefore does not apply to Enoch's retaliation claim.

Confronting Deputies. Enoch also argued that she was arrested because she refused to comply with the deputies' demands. *See* R. 194, PageID 3678 (counsel for the plaintiffs explaining that Enoch and Corbin were targeted for arrest because "[t]hey were the only two people challenging the deputies on this . . . practice of preventing" recording in the hallway). Although counsel for Enoch disclaimed this theory at oral argument, we nonetheless consider whether she presented sufficient evidence for the jury to consider her claim that she was arrested in retaliation for arguing with Hogan and Nobles. *See* Argument Audio at 19:01-:10.

Even if Enoch could establish retaliation under this theory, she failed to show that the deputies' conduct is attributable to the County. "A plaintiff can make a showing of an illegal policy or custom by demonstrating one of the following: (1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations." *Burgess*, 735 F.3d at 478. Enoch argued at trial that the County should be held liable under the first and third theories; namely, that its official policy or custom of enforcing Rule 33 violated Enoch's constitutional rights, and that its training related to the Rule was constitutionally inadequate.

Enoch failed to prove either claim. She presented evidence that Hogan and Nobles acted pursuant to a custom of prohibiting any recording absent authorization

from a judge when they arrested her, and that their misunderstanding of the Rule was so widespread as to constitute Sheriff's Department policy. But their testimony confirmed that they believed they could arrest someone for recording in violation of Rule 33, not for disagreeing with their enforcement of the Rule. Indeed, Nobles testified that he arrested Enoch to conduct an investigation "relating to her use of her iPad," not because she declined to comply with his request for identification. Nobles Test., R. 193, PageID 3413. And even if Nobles arrested her in retaliation for that speech, there is no evidence suggesting that any County policy or practice motivated his actions. Similarly, the evidence supporting Enoch's failure-to-train claim suggested that officers were trained to prohibit recording in the hallway, where Enoch claims it should have been permitted. No evidence indicated that the deputies were improperly trained on how to respond to citizens who disagreed with their orders.

Enoch did not demonstrate that she was arrested in retaliation for protected conduct, or that her arrest was caused by the County's policy, practice, or its failure to adequately train its employees. We therefore reverse the jury verdict and the judgment of the district court in Enoch's favor. Because we hold that the defendants are entitled to judgment as a matter of law, we do not address the defendants' remaining arguments on appeal.[3]

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3. On cross-appeal, Enoch claims that she was entitled to a jury instruction alleging that the County's policies or practices violated her First Amendment rights, independent of her speech-based retaliation claim. Second Br. at 61-65. But as just discussed,

Additionally, seeing as Enoch is no longer a prevailing party, we reverse and vacate the district court's award of attorney's fees to her counsel under 42 U.S.C. § 1988. *See Miller v. Caudill*, 936 F.3d 442, 447 (6th Cir. 2019) (recognizing that "[w]hether plaintiffs may obtain attorney's fees [under § 1988] . . . hinges on whether they prevailed").

III.

For the foregoing reasons, we reverse the judgment of the district court and vacate its order awarding attorney's fees and costs to counsel for Enoch.

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she failed to establish that her conduct was entitled to First Amendment protection. As such, even if she had pleaded a First Amendment claim, it would fail as a matter of law and was properly not considered at trial.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION, FILED JUNE 9, 2022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 1:16-cv-661

VANESSA ENOCH, *et al.*,

Plaintiffs,

v.

HAMILTON COUNTY SHERIFF,

Defendant.

Filed June 9, 2022

ORDER

KAREN L. LITKOVITZ, Magistrate Judge.

Plaintiffs initiated this civil rights action challenging their arrests and the confiscation of their recording devices in the Hamilton County Courthouse. Following a five-day trial, a jury awarded $35,000 in compensatory damages on plaintiff Vanessa Enoch's claim but found in defendant's favor on plaintiff Avery Corbin's claim.

Appendix D

This matter is before the Court on plaintiff Corbin's motion for judgment notwithstanding the verdict (Doc. 158) and defendant's motion for judgment as a matter of law (Doc. 163). Appropriate response and reply memoranda have been filed (Docs. 164, 170, 171, 172). In addition, plaintiff Vanessa Enoch filed a motion for attorney fees (Docs. 160, 162) on which the Court stayed briefing pending resolution of the instant motions. (Doc. 169).

I. Background

The Sixth Circuit summarized the factual background of this case as follows:

> In 2014, Enoch and Corbin visited the county courthouse in Hamilton County, Ohio to attend a pretrial hearing in the criminal prosecution of Tracie Hunter, a local juvenile court judge. Corbin was a bailiff for Judge Hunter before she was removed from the bench. Enoch was in court that day conducting a case study of the prosecution of Judge Hunter. At the conclusion of the day's proceedings, Enoch and Corbin exited the courtroom and, using their iPads, began taking videos and photos in the hallway.
>
> Enoch and Corbin stood with others congregated outside the courtroom. When Kimball Perry, a reporter for the *Cincinnati Enquirer*, exited the courtroom, Corbin pointed the iPad towards Perry. As Perry walked down the

hallway and turned down a different hallway, Corbin followed, taking pictures of and video recording the reporter. Perry then called out to the Deputies—here, acting as court security officers—that Corbin was taking pictures in the hallway. All the while, Enoch was also taking pictures on her iPad. The Deputies responded to the commotion. Deputy Hogan ordered Corbin and Enoch to stop recording and to turn off their devices, insisting that a local court rule prohibited photography or video recording anywhere in the courthouse. The Deputies also demanded that Corbin and Enoch provide photo identification. After Corbin did so, he argued with the Deputies that he was permitted to take pictures and record videos in the hallway because the judge only prohibited photography *inside* the courtroom, not in the hallways.

While the Deputies were discussing Corbin's conduct that had led to the commotion, Corbin took out his iPad again to take a picture of the courtroom door. On the door was posted a notice stating that "use of cell phones, pagers, cameras, electronic devices are prohibited without permission of the Court." R. 84-11 at PageID 1236.

Local Rule 33(D)(6) prohibits recording "in any courtroom or hearing room, jury room, judge's chambers or ancillary area (to be determined in the sole discretion of the Court) without the

express permission of the Court." Hamilton Cty. Common Pleas Court R. 33(D)(6). Judge Nadel, who presided at the Hunter trial, gave an instruction in his courtroom pursuant to Rule 33(D)(6), but did not reference "hallways" in those instructions. However, when deposed in this case, Judge Nadel testified that he understood that "the hallway" was an "adjacent area[ ]" that was "ancillary to the courtroom" and that he thought that this understanding was implicit in his order. Neither Hogan nor Nobles had seen an order from Judge Nadel defining "ancillary areas" to include the hallways of the courthouse.

The Deputies charged both Corbin and Enoch for disorderly conduct under Ohio Rev. Code § 2917.11. Enoch also was charged with failure to disclose information under Ohio Rev. Code § 2921.29, on the basis that she had refused to identify herself. The Deputies later testified that they arrested the pair for taking photographs in violation of Local Rule 33(D)(6). All charges were subsequently dismissed.

Enoch and Corbin filed this suit under 42 U.S.C. § 1983 alleging First and Fourth Amendment claims and pendent state-law claims against Deputies Hogan and Nobles, the Hamilton County Sheriff 's Office, and County Sheriff Jim Neil, along with four other employees of the Sheriff 's Office who have since been dismissed.

> As part of their claims, Enoch and Corbin maintained that they were singled out and arrested because they were African American. Although several other individuals—most of them white—were using cameras and other recording devices in the hallways, they were not prohibited from doing so by the Deputies, and none of them were arrested.

Enoch v. Hamilton County Sheriff's Office, 818 F. App'x 398, 400-01 (6th Cir. 2020) (footnote omitted).

II. Procedural Background

This case has a long and complicated procedural history, including two appeals to the United States Court of Appeals for the Sixth Circuit and a post-remand Order from this Court granting in part and denying in part defendant's motion to dismiss or for summary judgment. (Doc. 120). The result is that only one claim remained for trial—plaintiffs' official capacity claim against the Hamilton County Sheriff[1] for speech-based retaliation in violation of the First Amendment.

A jury trial commenced on March 7, 2022. Late in the day on March 11, 2022, the jury returned its verdicts: a plaintiff's verdict in the amount of $35,000 on Vanessa Enoch's claim, and a defense verdict on Avery Corbin's

1. All references to the Hamilton County Sheriff are in an official capacity only. The official capacity claim is a claim against Hamilton County, the "entity of which an officer is an agent." *Monell v. Dept. of Social Services*, 436 U.S. at 690, n. 55.

claim. (Doc. 155). Corbin now moves for judgment notwithstanding the verdict (more commonly called "judgment as a matter of law") pursuant to Federal Rule of Civil Procedure 50(b) on his claim (Doc. 158), and defendant moves for judgment as a matter of law on Enoch's claim or, in the alternative, for remittitur or a new trial pursuant to Rule 59 (Doc. 163).

III. Legal Standard

Pursuant to Federal Rule of Civil Procedure 50: once "a party has been fully heard on an issue during a jury trial" and the court concludes that "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may . . . grant a motion for judgment as a matter of law against the party" on that issue. In evaluating a Rule 50 motion, the Court is not permitted to "reweigh the evidence or assess the credibility of witnesses." *Sykes v. Anderson*, 625 F.3d 294, 305 (6th Cir. 2010) (quoting *Radvansky v. City of Olmsted Falls*, 496 F.3d 609, 614 (6th Cir. 2007)). A Rule 50 motion may be granted "only if in viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion, in favor of the moving party." *Id.* (quoting *Radvansky*, 496 F.3d at 614); *Seales v. City of Detroit*, 959 F.3d 235, 240 (6th Cir. 2020).

IV. Analysis

A. Plaintiff Corbin's Motion for Judgment as a Matter of Law Must be Denied

Because the Sixth Circuit had already determined that the officers had probable cause to arrest Corbin,[2] he could proceed with his First Amendment retaliatory arrest claim only if he "presented sufficient 'objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.'" *Enoch v. Hamilton County Sheriff's Office*, 818 F. App'x at 406 (quoting *Nieves v. Bartlett*, — U.S. —, 139 S.Ct. 1715, 1727 (2019)). Once Corbin offered such evidence, he would prevail on his claim only if he also proved by a preponderance of the evidence that: (1) he engaged in constitutionally protected activity; (2) "he suffered an adverse action likely to chill a person of ordinary firmness from continuing to engage in protected" activity; and (3) the protected activity was "a substantial or motivating factor in the decision to take the adverse action." *Wood v. Eubanks*, 25 F.4th 414, 428 (6th Cir. 2022) (quoting *Westmoreland v. Sutherland*, 662 F.3d 714, 718 (6th Cir. 2011)); *Richmond Newspapers, Inc. v. Virginia* 448 U.S. 555 (1980).

Because the parties agreed that officers arrested Corbin and seized his recording device, the Court instructed the jury that Corbin had established the

2. *Enoch v. Hamilton County Sheriff's Office*, 818 F. App'x at 405-406.

required adverse action. Thus, to prevail on his Rule 50 motion for judgment as a matter of law, Corbin must establish that, viewing the evidence in the light most favorable to defendant, reasonable jurors could come to only one conclusion, i.e., that: (1) similarly situated individuals not engaged in the same sort of protected activity were not arrested; (2) Corbin engaged in constitutionally protected activity; and (3) the protected activity was a substantial or motivating factor in Corbin's arrest and seizure of his device. Corbin has not met this burden.

First, while video evidence clearly shows several other individuals using recording devices in the hallway, only plaintiff Corbin recorded Kimball Perry at close range and then followed Perry down the hallway recording him. Perry complained to officers, and the officers questioned and arrested only Corbin and Enoch (who followed Perry and Corbin down the hallway at a distance). Indeed, the parties presented multiple videos of the incident because several people continued recording as deputies questioned and arrested Enoch and Corbin. Thus, reasonable jurors could conclude that officers singled out Corbin for arrest because he recorded Perry at close range and then followed Perry down the hallway videotaping him.

Second, viewing the evidence in the light most favorable to defendant, reasonable jurors could conclude that Corbin was not engaged in constitutionally protected activity. Video evidence shows Corbin recording and photographing Kimball Perry exclusively. Court personnel testified that Corbin also had been admonished

for recording Perry inside the courtroom shortly before the hallway incident. In addition, Corbin testified that he and Perry had an antagonistic relationship, and he wanted Perry to feel the discomfort of being recorded.

Finally, even if Corbin were engaged in protected activity, reasonable jurors could conclude that it was not the motivating factor in Corbin's arrest. Corbin states, as evidenced in the videos admitted into evidence, that he protested Deputy Hogan's admonition against using a camera in the hallway by walking away and attempting to photograph the courtroom sign regarding camera use. However, Deputy Hogan testified that he reported to a "trouble run" in the courthouse hallway, indicating disruptive behavior. Deputy Hogan's arrest report, admitted into evidence as plaintiffs' exhibit nine, identifies Kimball Perry as the "victim" and states, "After leaving room 560 I saw Mr. Corbin filming Mr. Perry inches from his face. Mr. Corbin was told repeatedly to stop and refused to do so. After a brief verbal confrontation Mr. Corbin attempted to continue filming. He was then place[d] into custody for disorderly conduct." (Plaintiffs' Exhibit 9). Viewing this evidence in the light most favorable to defendant, reasonable jurors could conclude that protected activity was not a substantial or motivating factor in Corbin's arrest. Accordingly, Corbin's motion for judgment as a matter of law must be denied.

B. Defendant's Motion for Judgment as a Matter of Law on Plaintiff Enoch's Claim Must be Denied

Defendant Hamilton County Sheriff moves for judgment as a matter of law on plaintiff Enoch's claim. In support of the motion, defendant contends that: (1) Enoch failed to satisfy the *Nieves* exception because others recording in the hallway did not follow Kimball Perry down the hallway so were not similarly situated; (2) Enoch failed to establish that her constitutionally protected activity was a substantial or motivating factor for her arrest; (3) Enoch was arrested pursuant to a valid time, place, and manner restriction, as a matter of law; and (4) Enoch failed to establish that the Sheriff failed to adequately train the arresting officers or that her injury resulted from a Sheriff 's office policy, practice or procedure.

First, as explained above and at length in prior Court orders, where probable cause to arrest exists, a plaintiff may proceed with a retaliatory arrest claim only if she presents objective evidence that similarly situated individuals not engaged in the same sort of protected speech were not arrested. *Nieves*, 139 S.Ct. at 1727. In this case, the parties stipulated that others were also recording in the courthouse hallway, but only Corbin and Enoch were arrested. Defendant contends that the other photographers and videographers were not similarly situated to Corbin and Enoch because only Corbin and Enoch "decided to pursue Mr. Perry down a side hallway." (Doc. 163 at PAGEID 2799). However, while the video

evidence showed Corbin intentionally targeting Kimball Perry with his recording device, Enoch followed both Corbin and Perry only from a distance. Indeed, Enoch testified that, unlike Corbin, she was not previously acquainted with Kimball Perry. She was in the courthouse that day to gather information about the Hunter criminal proceedings for her graduate school program and with the hope of writing a news article. She saw Corbin recording Perry, and she followed behind because she believed he must be somehow relevant to the court proceeding. Viewing this evidence in the light most favorable to Enoch, the non-moving party, reasonable jurors could conclude that Enoch was similarly situated to the others in the hallway who recorded all hallway activities (including Perry's departure and Enoch's arrest) without being questioned or arrested.

Second, defendant contends that Enoch failed to present evidence that her constitutionally protected activity was a substantial or motivating factor for her arrest. (Doc. 163 at PAGEID 2799). However, in sharp contrast to Corbin's arrest report discussed above, Enoch's arrest report lists only the arresting officer, Deputy Nobles, as the "victim." (Plaintiffs' Exhibit 11). Indeed, Deputy Nobles explained the reason for Enoch's arrest as follows:

> I responded to a trouble run outside of room 560. Upon arrival, Deputies Hogan and Ferguson were already questioning an Avery Corban [sic]. I asked if anybody else was taking pictures or had any recordings and Deputy Hogan

> pointed to Venessa [sic] Enoch. I approached her and asked if she had taken any pictures, her response was "why are you asking me this?" I advised her that she was identified as taking pictures. I then asked if she could show me if she had taken any pictures, her respons [sic] was "no". I then asked her name and she refused to give it to me. I told her I was going to take her into custody, and she needed to put here [sic] hands behind her back, she refused. I again told her to put her hands behind her back because I needed to identify her and explain the courthouse rules to her. At first she didn't want to place her hands behind her back. Once I placed her first hand in a hand cuff, Deputy Horton had her other hand in his own cuff. Ms. Enoch had both sets of hand cuffs on and behind her back. Ms. Enoch was then taken to room 260[.] Ms. Enoch was transported along with Avery Corbin with out incident. Ms. Enoch was then charged with Disorderly Conduct ORC 2917.11 and Failure to identiy [sic] self to Law Enforcement. ORC 2921.29

(*Id.*). In addition, Nobles' testimony and the video evidence recorded by others in the hallway confirmed that Nobles questioned Enoch only about any photos she may have taken. He did not question her concerning Perry or any interactions she may have had with him. Viewing the evidence in the light most favorable to Enoch, reasonable jurors could conclude that her protected activity was a substantial or motivating factor for her arrest.

Third, defendant contends that officers arrested Enoch pursuant to a valid time, place, and manner restriction, as a matter of law. (Doc. 163 at PageID 2801). "[W]hile trial-related newsgathering may be subjected to reasonable restrictions and limitations . . . [t]he Deputies could not constitutionally prevent Enoch . . . from or punish [her] for gathering news about matters of public importance when [her] actions violated neither rules nor laws." *Enoch v. Hogan*, 728 F. App'x 448, 456 (6th Cir. 2018). The parties here offered evidence relating to the courthouse recording rules, the way the deputies were trained regarding those rules, and the Sheriff's enforcement of those rules. In addition, the jurors viewed multiple videos of the hallway events and saw others recording at the same place during the same time who were neither questioned nor arrested. Viewing that evidence in the light most favorable to Enoch, the non-moving party, a jury could reasonably conclude that Enoch was not arrested pursuant to a valid time, place, and manner restriction.

Finally, defendant contends that Enoch failed to establish that the Sheriff failed to adequately train the arresting deputies or that her injury resulted from a Sheriff's office policy, practice or procedure. (Doc. 163 at PAGEID 2803-07). Again, the parties offered evidence relating to the courthouse recording rules, the way the deputies were trained regarding those rules, and the Sheriff's enforcement of and policies regarding those rules. The jury heard former Sheriff Jim Neil's deposition testimony, testimony from the arresting deputies, and testimony from the Lieutenant in charge of court services at the time. Based on that evidence, the

jurors reasonably concluded that the Sheriff 's employees were "acting pursuant to a County policy, practice or custom when they violated Plaintiff Vanessa Enoch's First Amendment rights." (Doc. 155 at PAGEID 2376). Accordingly, defendant's motion for judgment as a matter of law must be denied.

C. Defendant's Motion to Alter the Judgment or for a New Trial

Alternatively, defendant moves for a new trial or to alter the judgment to remit the damage award to plaintiff Enoch pursuant to Federal Rule of Civil Procedure 59. Rule 59(a)(1)(A) permits a court to grant a new trial on one or more issues decided by a jury "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Defendant moves for a new trial "for the same reasons stated above in the Sheriff 's Motion for Judgment as a Matter of Law pursuant to Rule 50(b)." (Doc. 163 at PAGEID 2809). The Court denies defendant's motion for new trial for the reasons set forth above in denying defendant's motion for judgment as a matter of law.

Defendant's motion to alter the judgment to remit the jury's damage award is governed by Rule 59(e). A trial court may remit a jury's damages award "only when, after reviewing all the evidence in the light most favorable to the prevailing party, it is convinced that the verdict is clearly excessive, resulted from passion, bias or prejudice; or is so excessive or inadequate as to shock the conscience of the court." *Corbin v. Steak n Shake, Inc.*, 861 F. App'x 639, 645 (6th Cir. 2021) (quoting *American Trim, LLC v.*

Oracle Corp., 383 F.3d 462, 475 (6th Cir. 2004)). "If there is any credible evidence to support a verdict, it should not be set aside." *Id.* (quoting *American Trim*, 383 F.3d at 475).

In this case, defendant contends that the jury's award of $35,000 in compensatory damages should be remitted to a nominal amount because Enoch suffered no physical or monetary damages as a result of her arrest, because her liberty was restrained for only 90 minutes, and because Enoch alone testified to the emotional injuries she suffered. (Doc. 163 at PAGEID 2808-09). However, "[a] plaintiff 's own testimony may be sufficient to demonstrate emotional distress, *Lentz v. City of Cleveland*, 694 F. Supp. 2d 758, 769 (N.D. Ohio 2010), but if a plaintiff relies exclusively on her own testimony, that testimony must include 'specific and definite evidence of her emotional distress,' and not simply conclusory statements." *EEOC v. East Columbus Host, LLC*, No. 2:14-cv-1696, 2016 WL 4594727, at *7 (S.D. Ohio Sept. 2, 2016) (quoting *Betts v. Costco Wholesale Corp.*, 558 F.3d 461, 472 (6th Cir. 2009)); *see Lentz*, 694 F. Supp. 2d at 770 (reducing jury award for emotional distress to $200,000 because plaintiff suffered no monetary damages and the emotional harm was temporary in nature and did not produce physical manifestations); *see also Giles v. Gen. Elec. Co.*, 245 F.3d 474, 488 (5th Cir. 2001) (reducing emotional distress damages jury award to $150,000 where plaintiff relied "primarily on his own testimony to support his contention of emotional distress").

In this case, Enoch testified that her grandmother and mother raised her in a strict household which valued

rule-following and regular church attendance. She was a good student and was never subjected to disciplinary action in school at any level. Prior to the events at issue in this case, she had never been handcuffed, searched, or arrested. Enoch served as the first female deacon at her church. She obtained a bachelor's degree from The Ohio State University, a Master of Business Administration from Xavier University, and Doctor of Philosophy in public policy and interdisciplinary studies from Union Institute and University. As part of her doctoral studies, she engaged in a case study of black female judges removed from the bench, including Tracie Hunter. She attended the June 25, 2014 hearing to gather information, including interviewing and photographing various participants. In the courthouse hallway, a sheriff 's deputy told her to stop taking pictures so she put her iPad (the device she used to take photographs) down immediately. A deputy asked her to show him the videos she had taken. She informed him that she had no videos, but she did not want to open her iPad because it contained interviews she believed to be confidential. The deputy told her to open the iPad or be arrested so she opened the iPad. Seeing hallway photographs on her iPad, she was handcuffed, searched, and arrested. Many people in the hallway both witnessed and recorded these events. Several such video recordings were entered into evidence at trial. She can be heard on one of the videos asking, "I'm being arrested?! What law was I violating?!" Several television news channels broadcast the recordings, and those recordings are still available online. The Sheriff 's Office published a press release concerning her arrest. (Plaintiff 's Exh. 12).

Enoch further testified that, once arrested, deputies took her and Corbin to a Sheriff's Department inside the courthouse. Deputies handcuffed her to a bench for approximately 90 minutes, during which she was extremely distraught and in "hysterics." In addition, she had an urgent need to use the lavatory, but she was not permitted to do so, even after a female deputy returned to the room. On August 1, 2014, a Hamilton County Municipal Court Judge dismissed the charges against her. (Plaintiff's Exh. 13).

Enoch stated under oath that, other than the deaths of her husband and grandmother, the arrest was the most traumatic experience she had ever had. She sought counseling, and the stress of these events caused her to gain 100 pounds and lose her hair. The pastor at her church asked her to explain her arrest in front of the congregation, and she was embarrassed for her daughters (aged 13 and 19 at the time) to see her handcuffed and arrested. She testified that her emotional harm is exacerbated by the fact that the videos are still available online (even though she has asked each of the television stations to remove them) and that she continues to fear that the videos will appear every time she applies for a job, etc. The Court concludes that Enoch's testimony is sufficiently specific and definite to support the jury's $35,000 award for compensatory damages.

IT IS THEREFORE ORDERED THAT:

1. Plaintiff Avery Corbin's motion for judgment notwithstanding the verdict (Doc. 158) is DENIED;

2. Defendant's motion for judgment as a matter of law (Doc. 163) is DENIED; and

3. Defendant must file any response to plaintiff Enoch's motion for attorney fees (Doc. 162) no later than **TWENTY-ONE DAYS FROM THE DATE OF THIS ORDER**.

Date: June 9, 2022

/s/
Karen L. Litkovitz
United States Magistrate Judge

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED MARCH 23, 2018

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-3571

VANESSA ENOCH; AVERY CORBIN,

Plaintiffs-Appellees,

v.

DEPUTY SHERIFF HOGAN; DEPUTY SHERIFF NOBLES, BADGE NO. 1266,

Defendants-Appellants,

HAMILTON COUNTY SHERIFF'S OFFICE; JIM NEIL, COUNTY SHERIFF,

Defendants.

Filed March 23, 2018

OPINION

Not Recommended for Full-Text Publication

On Appeal from the United States District Court
for the Southern District of Ohio

Before: GILMAN, SUTTON, and STRANCH, *Circuit Judges.*

Appendix E

JANE B. STRANCH, *Circuit Judge*. This interlocutory appeal of an order denying qualified immunity to Deputy Sheriffs Hogan and Nobles arises from the denial of their Rule 12(c) motion for judgment on the pleadings. The complaint filed by Vanessa Enoch and Avery Corbin alleges that they were taking photographs and making video recordings at an impromptu press conference in a courthouse hallway when Defendants violated their clearly established constitutional rights by stopping, searching, and arresting them based on their race. Accepting as true the factual allegations in their complaint, Enoch and Corbin have plausibly alleged violations of their clearly established First and Fourth Amendment rights. We therefore AFFIRM the decision of the district court to deny qualified immunity to the Deputies at this stage of the case.

I. BACKGROUND

The following facts are alleged in the operative complaint, Plaintiffs' First Amended Complaint. In June 2014, Vanessa Enoch and Avery Corbin attended a pretrial hearing at the Hamilton County Courthouse in the case of *State v. Hunter*, the criminal prosecution of a local judge. Enoch was researching and reporting on the case for a small local paper; Corbin had a personal interest in the proceedings because he had previously worked with Judge Hunter as a bailiff. The Complaint does not allege that the Plaintiffs knew one another or that they interacted during or after the hearing. The hearing also attracted other members of the press and public.

After the hearing ended, Enoch and Corbin allege that they left the courtroom and went into the hallway, where approximately twenty people gathered to record "an 'impromptu' press conference." They joined this group, using their mobile devices to "take[e] snapshots and otherwise record[ ] Judge Tracie Hunter, and her lawyer, and events occurring in the public hallway."

According to the Complaint, the Deputy Sheriffs Hogan and Nobles singled Enoch and Corbin out from the group in the hallway "in substantial part" because of their race. When Enoch left to locate a restroom, one or both of the Deputies stopped her, demanded the password for her iPad under threat of arrest, searched it, and shortly thereafter forcibly handcuffed and arrested her. The Deputies also ordered Corbin to cease recording under threat of arrest, searched his iPad, and forcibly handcuffed and arrested him. Of the entire group in the hallway, only Enoch and Corbin, both of whom are black, were treated this way. The Complaint declares that "[n]one of the estimated 16-18 white individuals in the hallway using their news cameras, cell phones or other electronic recording devices were stopped, detained, searched, handcuffed and arrested by Defendants nor did any of them have their mobile devices searched or seized."

The Complaint alleges that, as the Deputies took Enoch to the sheriff 's office, they told her "that they did not know at that time" why she was being arrested and that "they would figure it out when they got downstairs to the office." Enoch and Corbin were detained in the sheriff 's office for almost ninety minutes, uncomfortably

handcuffed in a manner that caused significant pain. Enoch's repeated requests to use a restroom were denied.

According to the Complaint, Deputies Hogan and Nobles then charged Enoch with disorderly conduct under Ohio Rev. Code § 2917.11, stating in the citation that she yelled at a deputy while court was in session and that she refused to identify herself when asked. Approximately five days later, Enoch was served with a second citation, in which the Deputies charged her with failing to disclose information under Ohio Rev. Code § 2921.29, on the basis that she had refused to identify herself. The Deputies also charged Corbin with disorderly conduct under § 2917.11. Enoch and Corbin aver that the allegations in all three citations were false. All charges were subsequently dismissed. Enoch alleges that she lost her job as a result of being arrested and charged.

Enoch and Corbin filed this § 1983 suit against Deputies Hogan and Nobles, the Hamilton County Sheriff 's Office, and County Sheriff Jim Neil, along with four other employees of the Sheriff 's Office who have since been dismissed from the case. The Complaint alleges violations of the Plaintiffs' constitutional rights under the First and Fourth Amendments, as incorporated through the Fourteenth Amendment, as well as of state tort law. The Defendants filed a motion for judgment on the pleadings under Rule 12(c), claiming qualified immunity among other defenses. The district court concluded that the Defendants were not entitled to qualified immunity as a matter of law at this stage of the case. Deputy Sheriffs Hogan and Nobles appealed.

Appendix E

II. ANALYSIS

A. Jurisdiction

Although appellate courts may generally review only "final decisions" of district courts, 28 U.S.C. § 1291, we recognize an exception to this rule for orders denying qualified immunity. Though such denials do not conclude proceedings in the district court, they are nonetheless immediately appealable. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). "[T]his exception is a narrow one. A denial of a claim of qualified immunity is immediately appealable only if the appeal is premised not on a factual dispute, but rather on 'neat abstract issues of law.'" *Phillips v. Roane County*, 534 F.3d 531, 538 (6th Cir. 2008) (quoting *Johnson v. Jones*, 515 U.S. 304, 317 (1995)). Such an abstract legal issue is generally presented when the parties' only dispute on appeal is "whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions." *Mitchell*, 472 U.S. at 528.

As a preliminary matter, Enoch and Corbin argue that we lack jurisdiction over this appeal because the Deputies' arguments turn on disputed facts. *See Johnson*, 515 U.S. at 319-20; *McKenna v. City of Royal Oak*, 469 F.3d 559, 561 (6th Cir. 2006). They rely on qualified immunity cases arising at the summary judgment stage. "Although an officer's entitlement to qualified immunity is a threshold question to be resolved at the earliest possible point, that point is usually summary judgment and not dismissal under Rule 12." *Courtright v. City of Battle Creek*, 839 F.3d 513, 518 (6th Cir. 2016) (quoting *Wesley v. Campbell*, 779 F.3d 421, 433-34 (6th Cir. 2015)). In this case, the

Deputies raised qualified immunity in their motion for judgment on the pleadings under Rule 12(c).

We review a judgment on the pleadings "using the same de novo standard of review employed for a motion to dismiss under Rule 12(b)(6)." *Tucker v. Middleburg-Legacy Place, L.L.C.*, 539 F.3d 545, 549 (6th Cir. 2008). In conducting our review, we accept the opposing party's factual allegations and draw all reasonable inferences in their favor, "[b]ut we 'need not accept as true legal conclusions or unwarranted factual inferences.'" *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581-82 (6th Cir. 2007) (quoting *Mixon v. Ohio*, 193 F.3d 389, 400 (6th Cir. 1999)); *see also Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011) (synthesizing the requirements laid out in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), regarding survival of a motion to dismiss under Rule 12(b)(6)). Judgment on the pleadings should be granted only if, subject to these conditions, "no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." *Tucker*, 539 F.3d at 549 (quoting *JPMorgan Chase Bank*, 510 F.3d at 582).

Because "there cannot be any disputed questions of fact" in our review of this Rule 12(c) motion and, at this stage, "our review solely involves applying principles of law to a given and assumed set of facts," this case falls outside the parameters of *Johnson*, and we may properly exercise jurisdiction. *Barnes v. Winchell*, 105 F.3d 1111, 1114 (6th Cir. 1997). We therefore turn to the substance of Defendants' qualified immunity arguments.

B. Qualified Immunity

"Qualified immunity protects government officials performing discretionary functions unless their conduct violates a clearly established statutory or constitutional right of which a reasonable person in the official's position would have known." *Boler v. Earley*, 865 F.3d 391, 416 (6th Cir. 2017) (quoting *Silberstein v. City of Dayton*, 440 F.3d 306, 311 (6th Cir. 2006)). To defeat a claim of qualified immunity, the plaintiff must show (1) that the official's conduct violated a constitutional right, and (2) that the right was clearly established at the time of the violation. *Id.* Combining the test for qualified immunity with the standard for a 12(c) motion, the Deputies are entitled to qualified immunity if, accepting all the factual allegations in the Complaint as true and drawing all reasonable inferences in Plaintiffs' favor, Enoch and Corbin have not plausibly alleged that the Deputies' actions violated their clearly established First and Fourth Amendment rights.

The factual allegations in the Complaint boil down to this: Plaintiffs Enoch and Corbin, both of whom are black, joined a sizable group of people recording newsworthy events in a courthouse hallway. No rule forbade them from doing so. Deputies Hogan and Nobles, "apparently motivated in substantial part by race," singled out Enoch and Corbin, searched their belongings, and forcibly arrested them. None of the white individuals who were recording the same events in the same group were treated similarly. During transit to the County Sheriff 's Office, the Deputies admitted to Enoch that they "did not know" why she was being arrested. They then issued citations to both Enoch and Corbin, falsely alleging violations of two Ohio laws.

Appendix E

1. Fourth Amendment

We consider first whether Enoch and Corbin have plausibly alleged a violation of their clearly established Fourth Amendment rights with regard to their claims of unreasonable search and seizure, false arrest, and malicious prosecution.

The Deputy Sheriffs raise only one defense to all of these claims—that they were enforcing a courthouse rule. According to the Deputies, Enoch and Corbin violated Local Rule 33(D)(6) of the Hamilton County Court of Common Pleas by recording in the courthouse hallway without having previously secured permission to do so.[1]

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1. The Hamilton County Court of Common Pleas Local Rule 33(D)(6), titled "Cell Phones, Cameras, Pagers, Laptop Computers, and Other Electronic Devices," is available at https://hamiltoncountycourts.org/index.php/common-pleas-local-rule-33. The rule provides, in its entirety:

> a. Unless otherwise permitted in accordance with Rule 30 of these Local Rules, the operation of any cellular or portable telephone, camera (still or video), pager, beeper, computer, radio, or other sound or image recording or transmission device is prohibited in any courtroom or hearing room, jury room, judge's chambers or ancillary area (to be determined in the sole discretion of the Court) without the express permission of the Court. All such devices must be turned off in the above-listed areas at all times.
>
> b. Duly licensed attorneys and their paralegals/assistants appearing in court, courthouse employees, public safety officers, authorized contractors and vendors, court staff, and any others authorized by the Court are exempt from the prohibition set forth above

> unless ordered by the Court.
>
> c. Any person or persons violating this Rule are subject to sanctions for contempt and or criminal prosecution, and may be ejected from any restricted area described above or from the courthouse, and any item or device operated in violation of this Rule may be confiscated by court staff or courthouse security personnel and held until the offending person(s) leave(s) the courthouse. In no event shall the Court or any court or security personnel be liable for damage to any device confiscated and/or held in accordance with this Rule.

The cross-referenced Rule 30, titled "Media Coverage of Court Proceedings," is available at https://hamiltoncountycourts.org/index.php/common-pleas-local-rule-30. Subsection (A) provides:

> Requests for permission to broadcast, televise, photograph, or otherwise record proceedings in the courtroom shall be made in writing to the Judge or the Judge's designated courtroom employee. Such a request shall be made on the appropriate application form available through the Court Administrator. Such applications should be made as far in advance as is reasonably possible but in no event later than 30 minutes prior to the courtroom session to be recorded. The Judge involved may waive the advance notice provision for good cause. All applications shall become part of the record of the proceedings.

The remaining subsections of Rule 30 are not relevant to this case. They cover the judge's response to recording requests; arrangements to pool resources, including by sharing a single video camera and using the court's audio system; and specific prohibitions on filming confidential communications, objecting witnesses, and jurors.

The Deputies argue that because they were entitled to take action upon witnessing a violation of courthouse rules, the searches, arrests, and prosecutions were all lawful and constitutional.

Because Local Rule 33(D)(6) is not mentioned in the Complaint, we may consider this additional argument only to the extent that it challenges the Complaint's "legal conclusions or unwarranted factual inferences." *See JPMorgan Chase Bank*, 510 F.3d at 582 (quoting *Mixon*, 193 F.3d at 400). By its text, Local Rule 33(D)(6) prohibits recording "in any courtroom or hearing room, jury room, judge's chambers or ancillary area (to be determined in the sole discretion of the Court) without the express permission of the Court." The scope of Rule 33 does not present a purely legal question because the text of the rule is not dispositive. The enumerated list of covered areas does not include hallways, nor are hallways necessarily an "ancillary area." The invocation of "the sole discretion of the Court" further muddies the waters because it appears that judges must make periodic determinations as to what constitutes an ancillary area—and perhaps, as the magistrate judge tentatively opined, as to what constitutes any of the areas in the list. Whether such judicial determinations were made and what areas of the courthouse they covered at what times are factual, not legal, questions. Enoch and Corbin plausibly alleged the relevant factual information by stating in their Complaint that "[d]uring that pretrial hearing, the presiding judge specifically restricted all court attendees from using their electronic devices inside the courtroom during the official court proceedings. At that time, the presiding judge issued

no such prohibition as to use of electronic devices in the hallways of the courthouse."

We must accept Enoch and Corbin's factual allegation as true. *JPMorgan Chase Bank*, 510 F.3d at 581. Our Fourth Amendment analysis proceeds on the assumption that Enoch and Corbin were searched, arrested, and prosecuted because of their race and despite violating neither Local Rule 33(D)(6) nor the Ohio statutes referenced in their citations.

We analyze the Deputies' interactions with Enoch and Corbin under the standard for brief, investigative stops that was laid out in *Terry v. Ohio*, 392 U.S. 1 (1968). The *Terry* standard, however, does not govern the entirety of the interactions. Even assuming for the sake of argument that the initial stops of Enoch and Corbin were brief and investigative in nature, probable cause was required for the arrests and prosecutions that followed those stops. *See Sykes v. Anderson*, 625 F.3d 294, 305, 308 (6th Cir. 2010). *Terry* is nonetheless a useful beginning point for our analysis because the level of suspicion required for a *Terry* stop is "'obviously less' than is necessary for probable cause." *Navarette v. California*, 134 S. Ct. 1683, 1687 (2014) (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). Thus, if the Deputies cannot satisfy the *Terry* standard, they necessarily cannot satisfy the probable cause standard that governs the remainder of their actions.

To make an investigative stop under *Terry*, a law enforcement officer must have "a particularized and objective basis for suspecting the particular person

stopped of criminal activity." *Id.* (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)). The Complaint alleges that the Deputies stopped and searched Enoch and Corbin because of their race and despite the fact that their behavior was entirely lawful. It has been the law of this circuit for decades that "the reasonable suspicion requirement for an investigative detention cannot be satisfied when the sole factor grounding the suspicion is race." *United States v. Avery*, 137 F.3d 343, 354 (6th Cir. 1997). Enoch and Corbin therefore plausibly allege that they were victims of an unconstitutional search and seizure.

Because individualized suspicion is less demanding than probable cause, *see Navarette*, 134 S. Ct. at 1687, the same race-related facts necessarily do not satisfy the higher probable cause standard. As a general matter, arrest and prosecution without probable cause are unconstitutional. *See Sykes*, 625 F.3d at 305, 308 (explaining that a false arrest claim lies only if "the arresting officer lacked probable cause to arrest the plaintiff " and that the requisite constitutional violation underlying a malicious prosecution claim is "a lack of probable cause for the criminal prosecution"). The Deputies' only response on this point is that they had probable cause to believe that Enoch and Corbin were violating Local Rule 33(D)(6), a new factual allegation that we disregard for the reasons already explained. The Deputies do not advance any other arguments as to why the facts alleged do not suffice to establish the requisite elements of Enoch and Corbin's claims. Enoch and Corbin therefore have plausibly alleged violations of their Fourth Amendment rights.

Those rights were clearly established. "For a right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Holzemer v. City of Memphis*, 621 F.3d 512, 527 (6th Cir. 2010) (quoting *Leonard v. Robinson*, 477 F.3d 347, 355 (6th Cir. 2007)). As of June 2014, the published precedent of this court made clear that an officer may not stop, much less arrest and prosecute, an individual on the basis of her race. We held in *United States v. Johnson*, 620 F.3d 685, 688 n.1, 692-96 (6th Cir. 2010), and again in *United States v. Beauchamp*, 659 F.3d 560, 564, 570-71 (6th Cir. 2011), that officers did not have the requisite reasonable suspicion to conduct an investigative stop of black men who (among other factors) were out late at night in high-crime areas and attempted to avoid interactions with police officers. In the situation at hand, the Deputies had even less reason to suspect Enoch and Corbin of criminal activity. On the facts alleged, there was nothing suspicious about the time, location, or nature of their actions.

Enoch and Corbin have plausibly alleged violations of their clearly established Fourth Amendment rights. The Deputies are not entitled to qualified immunity as a matter of law on these counts of the Complaint.

2. <u>First Amendment</u>

Enoch and Corbin also claim that the Deputies unconstitutionally infringed upon their First Amendment free speech rights. Plaintiffs alleged that they were part of a group of media members and private individuals

recording events of public importance—an "'impromptu' press conference" held by the attorney representing a local judge in criminal proceedings. Enoch is herself a member of the press.

The Deputies raise two defenses to this claimed constitutional violation. First, they argue again that they were enforcing courthouse rules. As explained, we disregard this new factual allegation at this stage of the litigation and accept Enoch and Corbin's allegation that they had violated no rule or law. Second, the Deputies argue that there is no clearly established First Amendment right to record. But that issue is not dispositive in this case. We have long and clearly held that newsgathering "qualif[ies] for First Amendment protection." *Boddie v. Am. Broad. Cos.*, 881 F.2d 267, 271 (6th Cir. 1989) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)). "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg*, 408 U.S. at 681. And while trial-related newsgathering may be subjected to reasonable restrictions and limitations, *see Richmond Newspapers v. Virginia*, 448 U.S. 555, 581 n.18 (1980), this case must proceed under the assumption that no rule was violated here. The Deputies could not constitutionally prevent Enoch and Corbin from or punish them for gathering news about matters of public importance when their actions violated neither rules nor laws. Enoch and Corbin have therefore plausibly alleged a violation of their First Amendment rights.

Those rights were clearly established. Decades ago, the Supreme Court established with clarity that the First

Amendment protects the rights of both the media and the general public to attend and share information about the conduct of trials, "where their presence historically has been thought to enhance the integrity and quality of what takes place." *Id.* at 578. The Court linked the right of access to another fundamental First Amendment right, explaining that "[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily." *Id.* at 576-77. The same logic necessitates finding a constitutional violation in this case, where Enoch and Corbin's access to a press conference held immediately after a hearing was foreclosed on the basis of their race.

The Supreme Court has likewise been clear for more than fifty years that state officials may not enforce rules or regulations that implicate First Amendment rights in a racially discriminatory manner. In a case involving two black protestors who refused to leave a segregated library, the Supreme Court explained:

> A State or its instrumentality may, of course, regulate the use of its libraries or other public facilities. But it must do so in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality to all. . . . [I]t may not invoke regulations as to use—whether they are *ad hoc* or general—as a pretext for pursuing those engaged in lawful, constitutionally protected exercise of their fundamental rights.

Brown v. Louisiana, 383 U.S. 131, 143 (1966). Here too, on the facts alleged, state officials purported to enforce state law in a racially discriminatory manner, stopping and arresting black citizens for engaging in behavior that was both protected by the First Amendment and permitted for their white counterparts.

Based on the Complaint, the Deputy Sheriffs violated Enoch and Corbin's clearly established First Amendment rights. The Deputies are therefore not entitled to qualified immunity as a matter of law on this count of the Complaint.

III. CONCLUSION

Enoch and Corbin have plausibly alleged violations of their clearly established First and Fourth Amendment rights. We therefore **AFFIRM** the district court's denial of qualified immunity and **REMAND** the case to the district court for further proceedings consistent with this opinion.

APPENDIX F — EXCERPTS OF RULE 33

RULE 33. Hamilton County Courthouse

As such, the Hamilton County Courthouse and the allocation of space therein rests within the authority of the Court of Common Pleas.

(A) ACCESS TO DISABLED – It is the intention of the Court that the Courthouse, as far as reasonably possible, be accessible to all persons including those with disabilities. The Court Administrator is hereby designated to consider grievances and is directed wherever reasonable, to take that action necessary to accommodate persons with special needs.

(B) USE OF FACILITIES – Persons, groups or companies wishing to utilize facilities within the Courthouse for any purpose other than ordinary Court business shall first make application in writing to the Court Administrator who shall grant or deny said application based upon the following:

1. The extent to which said activity will interfere with the proper and routine operations of the Court or other agency housed within the Courthouse.

2. The appropriate nature of the activity and its reflection on the solemn purpose of the Court and the justice system.

3. The applicant(s) ability to insure the Court and the County against any damage and/or peril which may result from this activity.

4. The safety and security of the applicant, the public and employees of the County and the Court.

The provisions of the County Commissioners' Policy for all Solicitations, Distributions, and Gatherings dated December 10, 1986, shall be complied with unless otherwise amended or repealed.

(C) SMOKING PROHIBITED

Except within judicial space and where otherwise designated, smoking is prohibited within the Courthouse.

1. Within judicial space which includes the assigned courtroom, chambers and jury room of each judge, activities are within the control of that particular judge. All cigarettes, cigars and smoking devices must be extinguished prior to entering the Courthouse. The Court Administrator shall see that proper signage is posted to inform the public of this regulation.

2. The Court Administrator shall designate on each floor sufficient space to allow those of the public who wish to do so to smoke. Reasonable effort shall be made to contain smoke in this area and to prevent it from migrating to nonsmoking areas. Where possible, smoking areas should be located such that the general public does not have to pass through the smoking area to access other public facilities.

In designating smoking areas, the Court Administrator should take into consideration the requests of the elected officials who occupy facilities on that floor of the Courthouse.

(D) HAMILTON COUNTY COURTHOUSE SECURITY POLICY

In the interest of providing the highest level of security for the persons visiting, required to attend, or employed in the Hamilton County Courthouse, the Court has established the following security policies:

1. Security Policy and Procedure Manual

The Hamilton County Sheriff, with advice and assistance from the Court Administrator, shall develop and present to the Court a proposed written Security Policy and Procedure Manual governing security of the Court and its facilities. The manual shall include a physical security plan including the installation of walk-through metal detectors and x-ray equipment to provide security screening at Courthouse entrances; routine security operations; a special operations plan; a hostage situation response plan; a high risk trial plan; and emergency procedures (fire, bomb, disaster).

2. Court Security Advisory Committee

The Facilities Committee of this Court shall advise the Court on issues of security. This Committee shall review and make recommendations to the Court regarding any

proposed security policy and any amendment or revision to the Security Policy and Procedure Manual and in the performance of this duty shall confer with the following:

a. A designee or representative of each of the Courts housed in the Hamilton County Courthouse;
b. The Hamilton County Sheriff;
c. The Hamilton County Clerk of Courts
d. The President of the Hamilton County Commissioners;
e. A trial lawyer;
f. A citizen representative.

3. Persons Subject to Security Screening

All persons entering the Courthouse shall be subject to security screening. Screening shall occur for each visit to the Courthouse during hours of operation regardless of the purpose. Notwithstanding the above: all elected officials whose offices are maintained in the Courthouse, Court employees, Clerk of Court employees, Law Library staff, Building Superintendent staff, Probation Officers, including those Probation Officers authorized to carry firearms when an official business and uniformed Police Officers (on official business, see Rule 33, Section 5(b) and 5(c)), shall be exempt from security screening. Proper identification (see Rule 33, Section D(13)) must be displayed by the above-exempted group in order to gain access to the Courthouse. Court, Clerk of Court, Law Library, Building Superintendent staff and Probation Officers who require access after operating hours may be granted such general access by the Presiding Judge of the Court of Common Pleas. Similarly, Court, Clerk of

Court, Law Library and Building Superintendent staff who require access through the garage entrance of the Courthouse may be granted such by the Presiding Judge of the Court of Common Pleas. All requests for special access privileges shall be in writing.

4. Uniform Law Enforcement and Security Officers

a. Four (4) uniformed armed Sheriff deputies shall be assigned generally to the Courthouse specifically for the purpose of providing court security. Additional deputies shall be assigned by the Sheriff for the transportation of prisoners within the Courthouse.

b. All security officers, including Sheriff's deputies and the Clerk's criminal bailiffs attending the Municipal Court, assigned to court security shall be certified to carry a firearm with annual recertification. These officers shall receive specific training on Courthouse security and weapon instruction specific to the Court setting.

5. Weapons and Explosives

a. No weapons shall be permitted in the Courthouse except those carried by court security officers or as defined in Section b. below.

b. Law enforcement officers acting within the scope of their employment as a witness or on official business shall be allowed to carry their official side arm within the Courthouse.

(See also Section 3 of this rule)

c. In all cases, law enforcement officers who are parties to a judicial proceeding as a plaintiff, defendant, witness, or interested party outside of the scope of their employment shall not be permitted to carry their official sidearm within the Courthouse. (See also Section 3 of this rule)

d. No person entering or while on Courthouse property shall carry or possess explosives or items intended to be used to fabricate an explosive or incendiary device, either openly or concealed, except for official business.

6. Cell Phones, Cameras, Pagers, Laptop Computers, and Other Electronic Devices

a. Unless otherwise permitted in accordance with Rule 30 of these Local Rules, the operation of any cellular or portable telephone, camera (still or video), pager, beeper, computer, radio, or other sound or image recording or transmission device is prohibited in any courtroom or hearing room, jury room, judge's chambers or ancillary area (to be determined in the sole discretion of the Court) without the express permission of the Court. All such devices must be turned off in the above-listed areas at all times.

b. Duly licensed attorneys and their paralegals/assistants appearing in court, courthouse employees, public safety officers, authorized contractors and vendors, court staff, and any others authorized by the Court are exempt from the prohibition set forth above unless ordered by the Court.

c. Any person or persons violating this Rule are subject to sanctions for contempt and or criminal prosecution, and may be ejected from any restricted area described above or from the courthouse, and any item or device operated in violation of this Rule may be confiscated by court staff or courthouse security personnel and held until the offending person(s) leave(s) the courthouse. In no event shall the Court or any court or security personnel be liable for damage to any device confiscated and/or held in accordance with this Rule.
Amended 11/1/2010

7. Prisoner Transport Within The Courthouse

a. Prisoners shall be transported into and within the Courthouse through areas which are not accessible to the public wherever possible. When a separate entrance is not available, and public hallways must be utilized, prisoners shall be handcuffed behind the back and, when appropriate, secured by leg restraints. If prisoners must be transported through hallways and entrances accessible to the public, public movement in the area should be restricted during the time of prisoner transport.

b. Prisoners shall be held in a secured holding area, where practicable, while awaiting court hearings and during any recess.

c. Law enforcement officers transporting prisoners shall accompany prisoners to the courtroom, remain during the hearing or trial and return prisoners to the

secured holding area. Judicial bailiffs shall not have specific responsibility for the transport or custody of prisoners.

8. Duress Alarms for Judges and Court Personnel

All courtrooms and hearing rooms shall be equipped with a duress alarm connected to a central security station located for highest response time from the Hamilton County Sheriff. Duress alarms shall be located on the Judge's bench, in the Judge's chambers, at the work stations of the courtroom bailiff, courtroom clerk, constable or law clerk and at reception stations to court support agency offices. Testing of duress alarms shall be done regularly by the Hamilton County Sheriff.

9. Closed Circuit Video

Closed circuit video surveillance shall be allocated to the four corner entrances, hallways, lobbies, courtrooms (Currently in Municipal Court) and parking areas of the Courthouse. Such closed circuit video surveillance system shall be monitored by trained security staff employed by the Hamilton County Sheriff.

10. Restricted Access to Offices

The general public shall not be permitted, unless otherwise invited, in the area that houses office space for Judges and other court personnel or court support agency.

Appendix F

11. After Hours Security

Restricted access equipment shall be installed at the evening entrance to the Courthouse and at the garage entrance to the Courthouse which shall prohibit entry to any persons after general operating hours other than those persons granted general access authority pursuant to Section 3 above.

12. Incident Reporting

a. Every violation of law that occurs within the Courthouse shall be reported to the Hamilton County Sheriff.

b. When any type of weapon or explosive is confiscated from an individual entering the Courthouse, the Hamilton County Sheriff shall check for any open warrants on the individual who was found in possession of the weapon or explosive.

c. The Hamilton County Sheriff shall report to the Presiding Judge of the Court of Common Pleas, on the appropriate form, any violation of law or security incident that may take place within the Courthouse.

d. The Hamilton County Sheriff shall annually tabulate such incidents and report such to the Presiding Judge of the Court of Common Pleas of Hamilton County, Ohio prior to the last day of January of each year.

13. Training

The Hamilton County Sheriff shall annually hold meetings and review emergency response procedures with the Courts, Court support agency staff, Clerk of Court staff, Law Library staff and Building Superintendent staff to ensure preparedness. Such meetings shall take place within 60 days after delivery of the incident report. The Hamilton County Sheriff, at these meetings, shall review and update the Court and attending staff regarding the Court Security Plan.

14. Proper Identification

All Court employees, Clerk of Court employees, Law Library staff, Building Superintendent staff and Probation Officers working or making appearances in the Courthouse shall be provided with and shall display an identification card which shall contain, at least, a photo of the employee, the employee's name, the employee's job title (i.e.Clerk of Court employee, etc . . .), employing agency (if applicable) and the employee's signature. Also, uniformed Police Officers shall display their badges as identification to gain access to the Courthouse or shall be able to provide any other identification as is available to that individual. The application form for this identification card can be picked up in the Court Administrator's office, Room 205, Courthouse. The application form will include a statement of agreement that the individual will not bring weapons or explosives into the Courthouse and the application form must be signed. Signing the application form will also serve as a release allowing the Court to perform a police

record check. The photograph for the I.D. will be taken in room 205, Courthouse, or other appropriately equipped location and will be affixed to the I.D. A duplicate of each card shall be kept by the Court Administrator's office. All such cards shall be returned and defaced upon the termination of employment.

15. Night Cleaning and Maintenance Staff

All night cleaning and maintenance staff will be required to carry and produce, upon entry to the Courthouse, the same proper identification as indicated in Section 13 above. A police record check will be performed on all night cleaning and maintenance staff. All nighttime staff will be subject to the same regulations as described in this Rule. Access to the Courthouse shall be through the appropriate after hours entrance.

16. Mail and Package Delivery

All U.S. Post Office mail and related packages from the U.S. Post Office or other delivery services (i.e., Federal Express, etc...) will be required to be examined by the Courthouse x-ray equipment prior to being forwarded to the Courthouse for delivery. All larger deliveries (i.e., envelope, stationary, furniture and equipment, etc....) shall be made through the garage entrance of the Courthouse or other appropriate delivery location and will be subject to a hand search by a Hamilton County Sheriff Deputy or a designee (if after hours) and may also be reviewed by a hand-held metal detection device, if appropriate.

Appendix F

17. Local Attorney Exemption

All local attorneys may obtain proper identification from the Clerk of Courts office allowing the attorney to be exempt from security screening, subject to any direction or order by the Sheriff, any Sheriff's deputy, or authorized courthouse security personnel. This identification will be similar to the badge noted in Section 13 of this Rule and will be shown upon entering the Courthouse.

The Court Administrator for the Court of Common Pleas has been designated by the Court as the person to authorize the attorney's badges. The applications for the badges can be picked up in Room 410, Courthouse, between 8:00 a.m. and 4:00 p.m. The completed application shall be returned to Room 410. The Court Administrator will verify the status of attorney's Supreme Court of Ohio registration.

The badge will then be issued by Common Pleas Clerk of Court staff. Attorneys will have photographs taken in Room B-25, Hamilton County Courthouse, between the hours of 8:00 a.m. and 3:30 p.m. A photograph of the attorney, the attorney's name (in large print), the Court Administrator's signature and an authorized date of issuance will appear on the card.

The badge issued to any attorney and the exemption from security screening may be revoked at any time by the Court Administrator or any Judge of this Court.