No. 16-648

In the Supreme Court of the United States

HARRY PIPER,

Petitioner,

v.

LUNA LOCKWOOD,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR PETITIONER

TEAM N
Brittany Ehardt
Nicholas Schilling
Jeffrey Schmidt

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QUESTIONS PRESENTED

1. Whether a court, in determining the reasonableness of a use of force by an officer during an arrest, should consider only the facts and circumstances at the moment of the use of force or should instead also consider the relevant facts and circumstances leading up to the moment of the use of force.
2. Whether individuals, including those with no formal affiliation to the press, have a First Amendment right to record police officers acting in public.

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The opinion of the United States District Court is an unpublished opinion but described in the Record. R. at 2–5. The opinion of the United States Court of Appeals for the Thirteenth Circuit is also unreported but described in the Record. R. at 5–16.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. I.

The First Amendment to the United States Constitution provides that:

> 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; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. IV.

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Craven Gen. Stat. § 15A-287

Craven Gen. Stat. § 15A-287 prescribes that a person is subject to prosecution for eavesdropping if he or she records a conversation without the consent of all parties involved. The statute broadly defines "conversation" to include "any oral communication between two or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation." A violation of the Act is a class one misdemeanor, which carries a maximum fine of $500 and a maximum jail time of one week.

STATEMENT OF THE CASE

I. Craven Gen. Stat. § 15A-287

Craven Gen. Stat. § 15A-287 ("Craven Statute" or "Statute") renders it illegal for an individual to record a conversation without the consent of each person involved. R. at 3. The Statute defines "conversation" broadly to include "any oral communication between two or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation." R. at 4. A violation of the Statute constitutes a class one misdemeanor, which carries a maximum fine of $500 and a maximum jail time of one week. *Id.*

II. Present Controversy

Diagon Park in St. Mungo, Craven is the site for a new group of government buildings and other developments. R. at 2. Over the course of approximately eight months, an encampment had grown on the land. *Id.* The encampment contained environmentalists who opposed the development of the park along with a sizeable group of homeless people who made the encampment their home. *Id.* On January 20, 2014, the police attempted to clear the park so that a fence could be constructed to keep trespassers out and construction could begin on the government buildings. *Id.* Despite orders from police to leave the park, many activists and homeless people refused to comply and, instead, remained. R. at 3.

Luna Lockwood is a member of the environmentalist group and lives in a house near the park. *Id.* She anticipated the police action and, therefore, was present at the park "in order to record what transpired on her video camera that recorded both audio and video." *Id.* While the

police were attempting to clear the park, Lockwood began recording interactions between the police officers and members of the encampment. *Id.* Lockwood's actions were observed by an officer who informed Lockwood that she was in violation of Craven Gen. Stat. § 15A-287 for recording a conversation without the consent of everyone involved. *Id.* The officer told her to stop recording and to delete any footage she had already taken. *Id.* Lockwood stopped recording; however, as soon as the officer walked away, she ducked behind some bushes and continued to illegally record conversations notwithstanding the officer's warning. *Id.* Meanwhile, Harry Piper, a member of the Craven Police Department, was working undercover in the park dressed in plain clothes. *Id.* Officer Piper had observed the entire interaction between Lockwood and the officer, as well as Lockwood's subsequent defiance of the officer's warning to stop recording and to delete the footage. *Id.* After recording a heated exchange between police officers and people in the park, Lockwood left her secluded hiding spot and walked home. *Id.* Officer Piper pursued Lockwood as she began to leave the scene but was unable to catch up to her by the time she entered her home nearby. *Id.*

Officer Piper approached the front door of the house and knocked. *Id.* He could also see Lockwood through a window. *Id.* Officer Piper called out to Lockwood and identified himself as a police officer. *Id.* He also held up his police badge so that Lockwood could see he was, in fact, a police officer. *Id.* Officer Piper then ordered Lockwood to open her door, and she refused claiming he did not look like a police officer. *Id.* This refusal to comply led to Officer Piper kicking in the front door. *Id.* Lockwood then grabbed her video camera containing the unlawfully gained footage as she ran from the living room. *Id.* Officer Piper again identified himself as a police officer and informed Lockwood that she was under arrest. *Id.* Officer Piper located Lockwood hiding behind a door in a bedroom and, as he entered the bedroom, he saw her moving

her head quickly and looking around the room. *Id.* Officer Piper ordered her to turn around and put her hands on her head. *Id.* Lockwood did not comply with Officer Piper's order and just continued to scream for help and for him to leave. *Id.* She then reached for a backpack on the bed. *Id.* In response, Officer Piper removed a baton from his waist band and struck Lockwood on the leg to prevent her from accessing the backpack. *Id.* Lockwood fell to the ground and dropped the video camera, which was then taken by Officer Piper as she reached out to grab it. *Id.* While Lockwood was on the ground, Officer Piper placed his hand on her back and ordered her to stay down and not move. *Id.* Once again, Lockwood refused to comply and, instead, began to struggle with Officer Piper to get back up. *Id.* Officer Piper then struck Lockwood on the head with the baton and she was knocked unconscious. *Id.* Lockwood was taken to the hospital and she suffered some brain damage that affects her motor skills and speaking ability. *Id.* She is now engaged in physical therapy and claims to suffer from post-traumatic stress disorder. *Id.* Lockwood's video camera was subsequently returned to her; however, the recording, which was obtained in violation of the Craven statute, was deleted. *Id.*

III. Procedural History

Lockwood was charged with violating Craven Gen. Stat. § 15A-287. R. at 4. The charges were later dismissed by the trial court without objection from the prosecutor because "the city wanted to conclude this matter." *Id.* After these charges were dropped, Lockwood filed suit in federal court against Officer Piper under 42 U.S.C. § 1983 on three claims. *Id.* First, she claimed he violated her Fourth Amendment right to be free from unreasonable searches when he entered her home. *Id.* Second, she claimed he violated her Fourth Amendment right to be free from excessive use of force. *Id.* Third, she claimed her First Amendment right to gather news and to

receive information and ideas was violated and that Craven Gen. Stat. § 15A-285 is unconstitutional. *Id.*

The district court granted partial summary judgment to Lockwood on the first claim alleging that the warrantless entry violated her Fourth Amendment rights. *Id.* The court agreed with Lockwood that Officer Piper could not claim that exigent circumstances were present since he created the exigency and that warrantless entry, which was conducted to preserve evidence, could not be justified. R. at 4–5. The court also declined Officer Piper's claim of qualified immunity. *Id.* A bench trial thereafter awarded damages to Lockwood representing damages to her home along with compensation for the unjustified warrantless entry into her home. *Id.* The district court granted summary judgment to Officer Piper on the second and third claims by concluding there were no constitutional violations involved. The court held that Officer Piper's use of force was reasonable under the Fourth Amendment and was not excessive since he "could have reasonably feared for his safety in the moment that he used force." *Id.* The court also held that Lockwood's arrest due to her violation of Craven Gen. Stat. § 15A-287 "did not contravene her First Amendment right to gather news and receive information and ideas" and, therefore, the statute is constitutional. *Id.*

Lockwood appealed the district court's grant of summary judgment in favor of Officer Piper for the second and third claims to the U.S. Court of Appeals for the Thirteenth Circuit. *Id.* The Thirteenth Circuit reversed the decision of the district court on both issues. R. at 12. The court held that "in determining whether a use of force was excessive, a court should consider not only the facts and circumstances at the very moment of the use of force, but also the relevant facts and circumstances leading up to the use of force." *Id.* Applying this standard, the court held that Officer Piper's use of force was excessive under the totality of the circumstances. *Id.* The court

also held that "citizens have a right to record police in public." *Id.* Officer Piper subsequently appealed the decision of the Thirteenth Circuit to this Court, which granted certiorari. R. at 17.

SUMMARY OF THE ARGUMENT

As to the first issue, the reasonableness analysis in a use of force case should be evaluated on the immediate facts and circumstances at the moment of the use of force. This narrow approach is the proper method to analyze the Fourth Amendment's reasonableness standard due to the Court's approach in *Graham*, implications of that approach, the plain meaning of the text of the Fourth Amendment, and public policy concerns.

First, evidence of a prior constitutional violation should have no impact on the analysis of whether an officer's use of force is reasonable because the narrow approach is the proper approach in light of the Supreme Court's approach in *Graham v. Connor*, which places emphasis on the "*at the moment*," "*on the scene*" analysis for officers during rapidly evolving situations.

Second, the plain meaning of the Fourth Amendment dictates a narrow approach that considers the facts and circumstances at the moment of the use of force. As shown by the plain meaning of the Fourth Amendment text, the seizure itself is all that is constitutionally relevant to the reasonableness inquiry. Anything that happens beforehand, therefore, is not relevant to the reasonableness inquiry.

Third, public policy favors a narrow reading of the "totality of the circumstances" when considering the reasonableness of an officer's use of force during an arrest. Narrowing the totality of the circumstances to immediate facts and circumstances prior to the use of force strikes a balance between individual rights and officers' actions in in the face of the changing nature of the circumstances.

For these reasons, the reasonableness analysis in a use of force case should be evaluated on the immediate facts and circumstances at the moment of the use of force. As applied to this case, Officer Piper's use of force was, therefore, reasonable under the three non-exclusive factors the Court articulated in *Graham* since two of the three factors—whether the suspect appeared to cause an immediate threat to the officer and whether the suspect was actively resisting arrest—strongly favor Officer Piper.

As to the second issue, Respondent's nonconsensual recording of a police officer's public conversation is not protected by the First Amendment. Individuals, including those with no formal affiliation to the press, do not have a First Amendment right to record a police officer's public conversation. As such, Craven Gen. Stat. § 15A-287 is constitutional for the following reasons.

First, recording an individual's conversation is not expressive conduct and thus Respondent's conduct is beyond the scope of First Amendment protections. This is because the surreptitious recording of a police officer fails to evince an intent to convey a message and, even if such an intent were present, it fails to communicate a message that could be reasonably received or understood by an observer.

Second, even if it could be said that Respondent's conduct is expressive and within the purview of the First Amendment, the Statute is content neutral and survives intermediate scrutiny. This is because the Statute advances a compelling government interest in conversational privacy, pursues that interest through narrowly tailored means, and leaves open ample alternative channels for transcribing the events, such as those that occurred at Diagon Park.

Third, even if Respondent's activity is characterized as information gathering, that First Amendment right is not unlimited, but is subject to time, place, or manner restrictions. The Craven Statute, as applied, represents a reasonable and viewpoint neutral restriction of speech in a

nonpublic forum. Alternatively, the Statute is a content neutral regulation of speech in a traditional public forum that survives intermediate scrutiny.

For these reasons, Respondent's nonconsensual recording of a police officer's public conversation is not protected by the First Amendment.

ARGUMENT

I. THE REASONABLENESS ANALYSIS IN A USE OF FORCE CASE SHOULD BE EVALUATED ON THE IMMEDIATE FACTS AND CIRCUMSTANCES AT THE MOMENT OF THE USE OF FORCE.

The Court of Appeals' decision to deny Petitioner's summary judgment should be reversed because the court incorrectly determined that a reviewing court should consider all relevant facts and circumstances leading up to an officer's use of force when assessing whether force was excessive. Currently, a circuit split exists as to whether "totality of the circumstances" includes an analysis of every fact leading up to the use of force or whether it includes the facts and circumstances at the moment of the use of force. This court should adopt a narrow reading of "totality of the circumstances" to determine the outcome of excessive force claims.

A. The Scope of the "Totality of the Circumstances" is Narrow and Includes Facts and Circumstances Immediately Prior to and At the Moment of the Use of Force.

The Fourth Amendment guarantees "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . ." U.S. CONST. amend. IV. An individual invokes the protection of the Fourth Amendment when they claim that law enforcement officers used excessive force in the course of an arrest, investigatory stop, or seizure. *Graham v. Connor*, 490 U.S. 386, 387 (1989). In *Graham* the Supreme Court "ma[d]e explicit what was implicit in *Garner's* analysis and h[e]ld that all claims that law enforcement officers

have used excessive force . . . should be analyzed under the Fourth Amendment and its "reasonableness" standard." *Id.* at 395. The inquiry is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397.

When determining whether excessive force was used, courts may look at "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. The answers to those questions help determine whether "the totality of the circumstances justifie[s] a particular sort of seizure." *Id*. (citing *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985)).

Courts are split on the interpretation of the "totality of the circumstances." The United States Courts of Appeals for the Second, Fourth, Fifth, Sixth, and Eighth Circuits examine the circumstances that existed at the moment of the use of force. *See Salim v. Proulx,* 93 F.3d 86, 92 (2d Cir. 1996); *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991); *Rockwell v. Brown*, 664 F.3d 985 (5th Cir. 2011); *Dickerson v. McClellan*, 101 F.3d 1151, 1162 (6th Cir. 1996); *Schulz v. Long*, 44 F.3d 643, 648 (8th Cir. 1995). In contrast, the First, Third, Seventh, Ninth, and Tenth Circuits, take a broad view, and examine all of the circumstances leading up to the action in question. *See Young v. City of Providence*, 404 F.3d 3, 22 (1st Cir. 2005); *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999); *Deering v. Reich*, 183 F.3d 645, 649 (7th Cir. 1999); *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002); *Hastings v. Barnes*, 252 F. App'x 197, 203 (10th Cir. 2007).

Ultimately, the narrow approach is the proper method to analyze the Fourth Amendment's reasonableness standard due to the Court's approach in *Graham*, implications of that approach, the plain meaning of the text of the Fourth Amendment, and public policy concerns.

1. Evidence of a prior constitutional violation should have no impact on the analysis of whether an officer's use of force is reasonable because the narrow approach is the proper approach in light of *Graham v. Connor.*

Although the time frame for the "totality of the circumstances" analysis is disputed among circuit courts, the proper approach is to consider the facts and circumstances at the moment of the use of force. In *Graham*, the Court provided several factors that could be used to determine if excessive force was used. These include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 397. The Court goes on to explain that "[t]he reasonableness should be assessed from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396. This is because "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396–97. This explanation shows that a narrow approach is proper.

In *Salim v. Proulx*, the Second Circuit adopted the narrow interpretation of "totality of the circumstances." 93 F.3d 86 (2d Cir. 1996). In *Salim*, an officer, while working in plainclothes serving arrest warrants, attempted to apprehend a suspect who had escaped from a juvenile detention center. *Id.* at 88. The officer left his service revolver and radio in his car, armed himself only with his personal handgun, and carried no handcuffs or other disabling devices. *Id*. The officer located and chased the suspect, eventually catching him. *Id.* They fell to the ground struggling. *Id*. Next, a group of five or six children between the ages of eight and twelve arrived and began to hit and kick the officer in order to free the suspect. *Id*. Eventually, the officer's gun

was taken out of his pocket. *Id*. "The officer saw the barrel of his gun in [the suspect's] hand and he instinctively grabbed the handle and pulled the trigger." *Id*. The suspect was fatally shot. *Id*.

On appeal, the Second Circuit considered the question of whether the officer was "liable for using excessive force because he created a situation in which the use of deadly force became necessary." *Id.* at 92. The plaintiff argued that the officer violated police procedure by "failing to carry a radio or call for back-up, and also for failing to disengage when the other children entered the fray." *Id*. The court disagreed, holding that the officer's "actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force." *Id*. "The reasonableness inquiry depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ [ ] force." *Id*. Based on that approach, the court determined that the officer did not use excessive force when he shot the victim because at that moment, the victim was actively resisting arrest, the victim was in a position where he "might gain control of the officer's weapon," and the officer was being attacked by more than five people. *Id.* at 91–92.

Similarly, in *Greenidge v. Ruffin*, the Fourth Circuit interpreted the reasonableness standard to include the facts and circumstances *at the moment force was used.* 927 F.2d 789, 792 (4th Cir. 1991). In *Greenidge*, Officer Ruffin witnessed a woman, believed to be a prostitute, enter into a vehicle with a man. *Id.* at 790. Ruffin and three plainclothes officers in unmarked cars, followed the vehicle until it stopped. *Id.* Once Officer Ruffin observed an illegal sex act, she opened the door, with her police badge hanging from her neck, and identified herself as a police officer. *Id.* Neither passenger obeyed the orders to place their hands in view. *Id.* Greenidge reached for a long cylindrical object from behind the seat and at this moment, Officer Ruffin believed that Greenidge was reaching for a shotgun, thus, she fired her weapon at him. *Id.*

The district court excluded evidence of the officer's actions leading up to the time immediately before the arrest and the jury returned a verdict in favor of Officer Ruffin, finding no constitutional violation due to excessive force. *Id.* at 791. Greenidge argued that the officer's violation of standard police procedure for night time prostitution arrests "are probative to the reasonableness inquiry because the [officer] recklessly created a dangerous situation during the arrest." *Id.* The Fourth Circuit relied on the standard explained in *Graham.* In *Graham*, the Supreme Court urged that the "reasonableness of [an officer's] particular use of force [must be judged] from the perspective of a reasonable officer on the scene." *Id.* at 790 (citing *Graham*, 490 U.S. at 396). Additionally, the Fourth Circuit relied on the Supreme Court's explanation that the reasonableness meant "standard of reasonableness at the moment" because of the need to account for rapidly evolving situations. *Id.* at 792 (citing *Graham*, 490 U.S. at 396). Ultimately, the Fourth Circuit affirmed the district court's narrow totality of the circumstances approach, which was derived from *Graham*, and affirmed the ruling for the officer.

The Fifth Circuit was even more explicit in limiting pre-seizure conduct in *Rockwell v. Brown*, 664 F.3d 985 (5th Cir. 2011). In that case, a mother called 911 for assistance in getting her son to a mental health facility during a mental health crisis. *Id.* at 989. After making repeated unsuccessful attempts to convince the son to come out of his bedroom, the police decided to breach the door. *Id.* Once inside the bedroom, the officers found the son holding two eight-inch serrated knives. *Id.* at 989. He rushed towards the police officers, a struggle ensued, and the officers fired their weapons and killed him. *Id.*

The court was asked to examine the circumstances surrounding a forced entry, which may have led to a fatal shooting, in evaluating the reasonableness of the officers' use of deadly force. *Id*. at 992. The court refused, stating that at the moment of the shooting, the suspect "was engaged

in an armed struggle with the officers, and therefore each of the officers had a reasonable belief that [the suspect] posed an imminent risk of serious harm to the officers. We need not look at any other moment in time." *Id*. at 993; *see also Thompson v. Mercer*, 762 F.3d 433, 439-40 (5th Cir. 2014) (refusing to consider the argument that the officers created the need for the use of force). Further, the plaintiffs argued "that the lower court gave too little weight to the minor nature of the crime the suspect had allegedly committed—misdemeanor assault by threat—and the fact that [the suspect] was not attempting to evade arrest by flight." *Rockwell*, 664 F.3d at 992. The court dealt with that argument by simply stating that no court has required all of the *Graham* factors to be present for an officer's actions to be reasonable. *Id*. ("[I]t is sufficient that the officer reasonably believed that the suspect posed a threat to the safety of the officer or others."). Ultimately, the Fifth Circuit held that the officers' use of force was not excessive. *Id.* at 997.

The Sixth Circuit utilizes a segmenting approach in order to faithfully execute the reasonableness analysis required by the Fourth Amendment in excessive force cases. In *Dickerson v. McClellan*, Officer McClellan responded to a call put out by the dispatched which said "shots fired, in progress." 101 F.3d 1151, 1154 (6th Cir. 1996). Once backup assistance arrived, the officers approach the front door of Dickerson's residence and although they were unable to see anyone inside, they could hear one man yelling in a threatening tone. *Id.* The officers did not knock or announce their presence and entered the home through an unlocked door where Dickerson eventually spotted an officer. *Id.* Dickerson threatened the officer and exited the house in the direction of Officer McClellan, while pointing a handgun at the officer. *Id.* at 1155. At this moment, Officer McClellan fired at Dickerson, killing him. *Id.*

The district court held that the officers' unannounced entry into the home was "objectively unreasonable" in light of the Fourth Amendment, thus, holding that the victim's constitutional

rights were violated. On appeal, the plaintiffs argued that *all of the circumstances preceding the shooting*, including the entry, should be considered when determining liability for excessive force. *Id.* at 1160. More specifically, the plaintiffs argued that the officers "should be held accountable for creating the need to use excessive force by their unreasonable unannounced entry." *Id.* The officers' response gets to the heart of the reality of the situation: "whether a police officer who is negligent in performing some aspect of his pre-investigation 'must allow an armed assailant to chase him out of the house and kill him because he created the emergency to which he had to react lethally.'" *Id.* at 1161. Yet again, the Sixth Circuit focused on the Supreme Court's instruction in *Graham* that the test for objective reasonableness for excessive use of force requires the fact finder to focus whether a reasonable officer on the scene, acting at that moment, was objectively reasonable. *Id.* at 1162 (*see Graham v. Connor*, 490 U.S. 386, 396 (1989)). The Sixth Circuit maintained its approach and segmented the issues for individual analysis, using the narrow totality of the circumstances approach, and only looking at the moments preceding the shooting. *Id.*

Finally, the Eighth Circuit also excludes pre-seizure evidence due to the Supreme Court's decision in *Graham*. *Schulz v. Long*, 44 F.3d 643, 648 (8th Cir. 1995). In *Schulz*, the suspect's parents called officers in order to have the suspect taken to a hospital to treat his schizophrenia. *Id.* at 645. When Officers Vanalmsick and Long arrived at the residence they found that the suspect had barricaded himself in the basement. *Id* at 646. The officers attempted to negotiate for several minutes, and throughout the negotiations the suspect had picked up and laid down a hatchet several times. *Id.* Officer Vanalmsick was able to grab the hatchet and toss it up the stairs, a move to which the suspect reacted to by throwing bricks at the officers. *Id.* When the suspect paused, Officer Vanalmsick attempted to get through the barricade but got stuck, at which time the suspect grabbed a double-bladed ax and began approaching the officer. *Id.* Officer Long warned the

suspect to drop the ax or he would shoot him, but the suspect continued to charge Officer Vanalmsick, at which time Officer Long fatally shot the suspect. *Id.*

On appeal, the suspect's family argued that the district court erred in granting motions in *limine* in favor of Officers Vanalmsick and Long to exclude evidence that the officers, through their actions, created the need for the use of force. *Id* at 648. Before determining the Officers' level of reasonableness in their use of force, the Eighth Circuit noted that the reasonableness standard under *Graham* only applies at the moment of force. *Id.* The Eighth Circuit stated that in *Graham,* the Court used the words "at the moment" and "split-second judgment," finding that the reasonableness standard only extended to the facts the officer knows at the precise moment the officer effectuates a seizure. *Id.* The Eighth Circuit held that to evaluate Officers Vanalmsick's and Long's use of force, it was irrelevant that they had created the need to use force through their actions prior to the moment of seizure. *Id* at 649. The court affirmed the district court's grant of judgement as a matter of law to the officers because there was no Fourth Amendment violation under these circumstances.

Ultimately, the Second, Fourth, Fifth, Sixth, and Eighth Circuits properly adopted a narrow understanding of the "totality of circumstances" to assess reasonableness in an excessive force claim. This interpretation is correctly based on the emphasis the Supreme Court places on the "*at the moment*," "*on the scene*" analysis for officers during rapidly evolving situations. *See Graham v. Connor*, 490 U.S. 386, 396 (1989).

2. The plain meaning of the Fourth Amendment dictates a narrow approach that considers the facts and circumstances at the moment of the use of force.

The district court's language also comports with the language of the Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. As the Seventh Circuit Court of Appeals recognized, "[t]he Fourth Amendment prohibits unreasonable seizures, not unreasonable or ill-advised conduct in general." *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992). Thus, the seizure itself is all that is constitutionally relevant to the reasonableness inquiry. Anything happening beforehand is not.

For these reasons, the narrow approach that limits the totality of the circumstances to only the immediate facts and circumstances at the moment the use of force is used is the proper method to analyze the Fourth Amendment's reasonableness standard. The narrow approach is the proper approach in view of *Graham v. Connor*, and it is supported by the plain meaning of the text of the Fourth Amendment.

B. Public Policy Favors a Narrow Reading of the "Totality of the Circumstances" when Considering the Reasonableness of an Officer's Use of Force During an Arrest.

1. Narrowing the totality of the circumstances to immediate facts and circumstances prior to the use of force strikes a balance between individual rights and officers' actions in in the face of the changing nature of the circumstances.

The narrow, segmented approach to the totality of the circumstances analysis, not only allows for the vindication of victims' constitutional rights, but also acknowledges the reality of rapidly changing circumstances during police action. The narrow approach calls for the facts and circumstances *at the moment* of the use of force to be examined to determine whether the force was excessive. This *does not mean* that all police officers' missteps or illegal actions prior to the use of force, will be disregarded as reasonable. It solely means that the analysis for whether a police officer's actions are reasonable should be considered only in the moment that they are used.

The officer can still be held responsible for a constitutional violation that occurred prior to the moment of the use of force.

For example, in *Dickerson v. McClellan*, the plaintiff brought two Fourth Amendment claims for the improper entry into the home and for the excessive use of force when the officer fired shots. 101 F.3d 1151, 1153 (6th Cir. 1996). The district court held that the officers' unannounced entry into the home was "objectively unreasonable" in light of the Fourth Amendment, thus, *holding that the victim's constitutional rights were violated*. *Id.* at 1160. Although these circumstances were not included in the analysis of excessive force claim, for the shooting that took place, the victim was still able to obtain a favorable ruling and vindicate the violation of his constitutional rights. *Id.* at 1162.

This approach, while vindicating individual rights, also recognizes the reality of police situations. Officers are frequently involved in rapidly-evolving situations and must make split-second decisions. Many situations can escalate or abate quickly, thus officers need to adjust tactics accordingly. If pre-seizure conduct is included in the analysis, we risk locking police officers into a certain course of action and ignoring the need to accommodate changing circumstances. In life or death situations, should we actually expect the police to enquire which, if any, of their previous actions created the situation and if they are justified by using force? "Detached reflection cannot be demanded in the presence of an uplifted knife." *Brown v. United States*, 256 U.S. 335, 343 (1921).

C. As Applied to This Case, Officer Piper's Use of Force was Reasonable When Considering the Facts and Circumstances at the Moment of the Use of Force.

This Court in *Graham* articulated three non-exclusive factors that would weigh in the determination of the reasonableness of a use of force when considering the facts and circumstances at the moment of the force: whether the crime was severe, whether the suspect appeared to cause

an immediate threat to the officer, whether the suspect was actively resisting or evading arrest. *Graham*, 490 U.S. at 396. Courts do not need to examine all three factors in the analysis.

The first consideration, the severity of the crime at issue, weighs against Officer Piper. Ms. Lockwood's crime of recording an officer without consent or knowledge was a non-violent misdemeanor and therefore not a high level of severity. This is similar to the situation in *Rockwell.* There, the crime that the suspect allegedly committed was a misdemeanor assault by threat. Ultimately, the court did not take issue with this because not all of the *Graham* factors need to be present for an officer's action to be considered reasonable. *Rockwell*, 664 F.3d at 992.

The second and third considerations, whether the suspect appeared to cause an immediate threat to the officer, and whether the suspect was actively resisting arrest, favor Officer Piper. Officer Piper's argument is even stronger than the officer's argument in *Rockwell.* There, the suspect posed an imminent threat to the officers as he rushed towards them with two eight-inch serrate knives in his hand. *Rockwell*, 664 F.3d at 989. The court determined the officers did not use excessive force when they fired their weapons and killed him because they faced a serious risk of harm, despite having possibly entered the room improperly. In the case at bar, Officer Piper was involved in a tense and rapidly evolving set of circumstances. The reasonableness of his actions should be judged from the perspective of a reasonable officer on the scene. At the moment that Officer Piper struck Lockwood, she was "reach[ing] for her backpack which was lying on the bed in the room." R. at 3. Next, when Officer Piper placed his hand on Lockwood's back, ordered her to stay down and not to move, she did not comply and "started struggling to get back up" and not knowing what she was trying to reach for in the backpack, he struck her on the head with his baton. R. at 3. Officer Piper feared for his safety just like the officer in *Rockwell.* Additionally, Lockwood was resisting arrest which supports the third factor. R. at 3. Based on the facts and the

Graham factors, Officer Piper did not use excessive force when he struck Lockwood with the baton. Finally, it is important to note, that a law enforcement officer who faces "danger of serious physical harm to the officer or others" does not need to use the least intrusive means to subdue a suspect. *Illinois v. Lafayette*, 462 U.S. 640, 647–48 (1983). Thus, Officer Piper's decision to strike Ms. Lockwood with the baton, the second time, was not excessive force.

Ultimately, *Graham v. Connor* provides the standard to analyze excessive force claims in context of the Fourth Amendment. Based on the underlying reasons the Court provided in *Graham,* to acknowledge the reality of officers' need to make split-second decisions in rapidly evolving circumstances and the text of the Fourth Amendment, the narrow view of the totality of the circumstances is proper. Finally, the narrow view promotes good public policy: it balances an individual's ability to vindicate their constitutional rights while also acknowledging the reality that law enforcement officers must make split-second decision in the face of rapidly evolving circumstances on a daily basis.

II. RESPONDENT'S NONCONSENSUAL RECORDING OF A POLICE OFFICER'S PUBLIC CONVERSATION IS NOT PROTECTED BY THE FIRST AMENDMENT.

Individuals, including those with no formal affiliation to the press, do not have a First Amendment right to record a police officer's public conversation. As such, Craven Gen. Stat. § 15A-287 ("Craven Statute" or "Statute"), which prescribes that a person may be subject to prosecution for eavesdropping if he or she records a conversation without the consent of all involved parties, is constitutional. R. at 4. The Craven Statute is constitutional for the following reasons.

First, recording an individual's conversation is not expressive conduct and thus Respondent's conduct is beyond the scope of First Amendment protections.

Second, even if it could be said that Respondent's conduct is expressive and within the purview of the First Amendment, the Statute is content neutral and survives intermediate scrutiny. Intermediate scrutiny requires a content neutral restriction of speech or expressive conduct to advance a government interest, pursue that interest through narrow tailoring, and leave open ample alternative channels for expression.

Third, even if Respondent's activity is characterized as information gathering, that First Amendment right is not unlimited, but is subject to time, place, or manner restrictions. The Craven Statute, as applied, represents a reasonable and viewpoint neutral restriction of speech in a nonpublic forum. Alternatively, the Statute is a content neutral regulation of speech in a traditional public forum that survives intermediate scrutiny.

A. Recording a Police Officer's Public Conversation is Not Expressive Conduct and Thus Falls Outside the Scope of First Amendment Protections.

The First Amendment's speech protection may extend to expressive conduct. *See generally Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). In *Spence v. Washington*, this Court developed a two-pronged test for identifying whether conduct is sufficiently expressive to justify First Amendment protection. 418 U.S. 405 (1974). The test's first part considered whether the individual performing the act intended to convey a particular message by the act. The test's second part analyzed whether the expression is reasonably understood by others. In other words, in determining whether particular conduct possesses communicative elements sufficient to implicate the First Amendment, this Court looks to whether "'[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" *Texas v. Johnson*, 491 U.S.

397, 404 (1989) (quoting *United States v. O'Brien*, 391 U.S. 367, 410-11 (1968)) (alternations in original). Respondent's audio-visual recording of a police officer's public conversation is devoid of any communicative elements because the Respondent did not possess an intent to convey a particular message through the act of *recording* and because viewers of Respondent's recording activity would be unlikely to derive any message from that conduct.

The Court has recognized expressive conduct in a number of circumstances in which an individual's conduct was "akin to 'pure speech.'" *Tinker*, 393 U.S. at 506. For example, in *Tinker*, the Court found that student's wearing black armbands as part of a day of protest against the Vietnam War was expressive conduct. 393 U.S. at 505. Furthermore, in *Texas v. Johnson*, the Court held that a citizen's burning of the American flag outside of a political convention qualified as expressive conduct. 491 U.S. at 405.

Multiple courts have affirmed the perspective that recording a video is not expressive conduct. In *Kelly v. Borough of Carlisle*, the Court of Appeals for the Third Circuit determined that video recording lacked sufficient communicative elements to trigger the protections of the First Amendment. 622 F.3d 248 (3d. Cir. 2010). In *Kelly*, the plaintiff surreptitiously videotaped a police officer during a traffic stop. *Id*. at 251. The Third Circuit suggested that a citizen may offer evidence that recording is linked to speech about public affairs; however, the act of recording "is not sufficiently expressive or communicative and therefore not within the scope of First Amendment protection" notwithstanding that the subject is a public servant. *Id*. at 261 (citing *Pomykacz v. Borough of West Wildwood,* 438 F. Supp. 2d 504, 513 n.14 (D.N.J. 2006)).

Additionally, the First Circuit affirmed a finding that capturing an image is information gathering and "does not partake of the attributes of expression." *D'Amario v. Providence Civic Ctr. Auth*., 639 F. Supp. 1538, 1541 (D.R.I. 1986): *aff'd* without opinion, 815 F.2d 692 (1st Cir.

1987). In *D'Amario v. Providence Civic Ctr. Auth.*, a freelance commercial photojournalist filed suit against a public civic center and concert promoters, alleging that preventing his ability to take photographs at concerts at the civic center infringed his First Amendment rights. *D'Amario*, 639 F. Supp. 1538. The district court rejected this notion, ruling that the act of capturing or recording images was not expression, holding that such activity "does not partake of the attributes of expression; it is [non-expressive] conduct, pure and simple." *Id.* at 1541.

Moreover, absent declared expressive intent, there is no authority to hold that "a citizen observing or recording police without criticism or challenge is engaging in the expressive conduct necessary for First Amendment Protection." *Fields v. City of Philadelphia*, 166 F.Supp. 3d 528, 539 (E.D.Pa. 2016). In *Fields*, the district court upheld the arrests of multiple citizens for violation of a law prohibiting recording of police officers. In upholding the law, the court observed that absent "some element of expressive conduct or criticism of police officers," the simple act of recording police, without otherwise declared expressive intent, is devoid of any First Amendment protection. 166 F. Supp. at 537.

In its opinion, the Thirteenth Circuit incorrectly relied upon the Seventh Circuit's decision in *ACLU of Ill v. Alvarez*. In *Alvarez*, the Seventh Circuit utilized campaign-finance precedent to incorrectly decide that a First Amendment right to record police activities exists. *ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012). The Seventh Circuit held that a prohibition of recordings of police officers was directly analogous to restrictions on political speech resulting from limits on contributions and expenditures in politics. 679 F.3d at 596 (noting that the *Buckley v. Valeo* court found that restricting money spent on political speech "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.") (quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976)).

Without more, Respondent's use of a camera to record police activity is devoid of any expressive elements requiring First Amendment protection. Any argument that Respondent's recording activity was expressive conduct, as defined by this Court, is undermined by Respondent's decision to record the police activity while hiding behind bushes. R. at 3. Recording from a hidden position evinces both Respondent's lack of intent to convey a particularized message and eliminates any chance that her action would be observed by others, let alone interpreted as conduct meant to convey a message. Therefore, recording the police in secret lacks communicative elements and thus does not require First Amendment protection.

Even if the Respondent were to openly record the police officer's conversation, the action of holding up a video camera to record is not associated with any particularized message. In this way, recording is distinguishable from admittedly expressive conduct such as a burning a flag or wearing a black armband, which communicate a particular message. Moreover, the act of recording is not converted into expressive conduct simply because the subject of the recording is a public servant. Recording the activities of a public servant without expressive or communicative elements do not fall within the scope of First Amendment protections.

Finally, the Seventh Circuit's analysis is inapposite to this case because *Buckley v. Valeo* recognized that contributing money to a political money was inherently expressive conduct. 424 U.S. at 21 (noting that political communication includes "the symbolic expression of support [for a candidate or campaign] evinced by a contribution"). Unlike the restriction of actual expressive conduct present in *Buckley*, the Craven Statute merely limits non-expressive conduct.

In light of precedents defining expressive conduct, this Court should find that Respondent's surreptitious recording of a police officer failed to evince an intent to convey a message and, even if such an intent were present, failed to communicate a message that could be reasonably received

or understood by an observer. Because recording is not expressive conduct, Respondent's actions are not afforded First Amendment protections.

B. Even if Recording a Police Officer's Public Conversation is Expressive Conduct, the Statute is Constitutional Because it is Content Neutral and Survives Intermediate Scrutiny.

Even if this Court were to find that recording the police is expressive conduct, the Craven Statute is a content neutral restriction and survives intermediate scrutiny. A content neutral regulation is one in which the restriction is justified without reference to the content of the regulated speech or the communicative impact of the expressive conduct. *See e.g.*, *Consolidated Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 536 (1980); *see also Johnson*, 491 U.S. 397 (1989); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (recognizing a content neutral regulation burdening speech is permissible so long as the restriction is "justified without reference to the content of the regulated speech").

The Court applies intermediate scrutiny to content neutral restrictions of expressive conduct. Intermediate scrutiny requires that the restriction serve a substantial government interest; be narrowly tailored to serve the government interest; and leave open ample alternative channels for communicating the information. *See generally Frisby v. Shultz*, 487 U.S. 474 (1988); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

1. The Craven statute is content neutral.

The principal inquiry in determining content neutrality is whether the "regulation is based on the content of speech," as opposed to being "applicable to all speech irrespective of content." *Consolidated Edison Co.*, 447 U.S. 530, 536 (1980). In the context of expressive conduct, this inquiry is reformulated to ask whether the law's application "depend[s] on the likely communicative impact" of the speech. *Johnson*, 491 U.S. at 411. *See also Turner Broad. Sys.,*

Inc., v. FCC, 512 U.S. 622, 642 (1994) (framing the analysis as "whether the government has adopted a regulation of speech because of disagreement with the message [that speech] conveys.") (quoting *Ward*, 491 U.S. at 791). The central consideration is the government's purpose; a "regulation that serves purposes unrelated to the content of the expression is deemed neutral" notwithstanding any incidental effects on "some speakers or messages but not others." *Ward*, 491 U.S. at 791.

The Craven Statute protects against the recording of all conversations in public without the consent from the parties being recorded without reference to the content of the conversations. R. at 3. The Statute does not bar the recording of certain conversations based on their content, or message, while allowing the recording of others. Therefore, as the Thirteenth Circuit correctly concluded, the Court should apply intermediate scrutiny to its analysis of whether the Statute permissibly restricts expressive conduct.

2. The Statute advances substantial government interests.

The first prong of intermediate scrutiny considers whether the restriction on expressive conduct serves a substantial government interest. *Frisby*, 487 U.S. 474 (1988). The Statute advances the substantial government interest of protecting conversational privacy. This Court has previously recognized that the right to conversational privacy outweighs the right to record police officers. *Bartnicki v. Vopper*, 532 U.S. 514, 532 (2001); *see also Alvarez*, 679 F.3d at 605 (finding that an individual's privacy interest is one of the most important interests that a state protects). Privacy of communication is a substantial governmental interest because "the fear of public disclosure of private conversations might well have a chilling effect on private speech." *Bartnicki*, 532 U.S. at 533. As the Court acknowledged in *Bartnicki*, the threat of widespread dissemination of police officers' conversations under the guise of police accountability can create a "powerful

disincentive to speak privately." *Id*. at 537. By minimizing this threat, the right to conversational privacy encourages the uninhibited exchange of information. *Id*. at 532.

In *Bartnicki*, although this Court validated the importance of the right to protect an individual's privacy. *Id.* at 530. While recognizing that the government has a strong interest in encouraging the uninhibited exchange of ideas among private parties, this Court reasoned "[i]n a democratic society, privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger . . . can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas." *Id.* at 533. In *Bartnicki*, an anonymous source provided a respondent with a conversation he obtained through an illegal wiretap, and the respondent gave the tape of the conversation to a co-respondent radio station. *Id.* at 521. The government prosecuted the station under the federal wiretap statute because the station knew or should have known that the source obtained the information through illegal means. *Id.* at 519. This Court held that the application of the law was in violation of the First Amendment, explaining that had the respondents themselves wiretapped the private conversation, then they should have been liable without protection from the First Amendment. *Id.* at 529-31.

An interest in private conversation for public employees was vindicated by this Court in *City of Ontario v. Quon*. In *Quon*, the court held that individuals do not lose their right of privacy "merely because they work for the government . . . " 560 U.S. 746, 756 (2010) (finding that public employees enjoyed the same Fourth Amendment rights to privacy as any other person). This is even true when a public employee, such as a police officer, works in public. *See Bartnicki*, 532 U.S. at 540 (Breyer, J., concurring). In the concurring opinion in *Bartnicki*, Justice Breyer

explained that, although the First Amendment protects the right to publish some personal information, it does not require public figures to give up their right of private communication. *Id*.

The protection of a police officer's conversational privacy also protects the individuals with whom a police officer converses. In *Alvarez*, the Seventh Circuit acknowledged the importance of the right of conversational privacy. 679 F.3d at 605. However, the court did not protect police officers' privacy right in public. *Id.* at 606-07. As Judge Posner explained in his dissent, the Seventh Circuit ignored the fact that there are circumstances in which police officers must discuss matters of national security, receive information from private citizens on the street, or converse with informants in public parks. *Alvarez*, 679 F.3d at 614 (Posner, J., dissenting). Therefore, a complete rejection of a right to conversational privacy for police officers is overly broad and may inhibit the proper functioning of the police's law enforcement obligations.

Here, the Thirteenth Circuit erred in finding that the Craven Statute did not substantially further the important governmental interest of protecting the privacy of conversations. *See Alvarez*, 679 F.3d at 605. Moreover, the Thirteenth Circuit, which heavily relied on *Alvarez*, found that conversational privacy was not an important interest. R. at 10. However, in *Alvarez*, the Seventh Circuit recognized that the protection of privacy was a substantial governmental interest and found the law in question overbroad. *See* 679 F.3d at 605–06. Protecting conversational privacy, even for public servants, is a substantial government interest. *See Bartnicki*, 532 U.S. 532; *Quon*, 560 U.S. 746. That interest undergirds the Craven Statute. R. at 10. With the ubiquity of phones equipped to record the audio and video of conversations, individuals could rightly fear that their conversations could be recorded; the resultant feat of repercussion could chill speech. Thus, the Statute provides citizens with the comfort of knowing that their conversations cannot be recorded without their consent.

3. The Statute is narrowly tailored.

The second prong of intermediate scrutiny considers whether the restriction on speech is narrowly tailored to the government's interest. Within this inquiry, courts analyze whether the law advances the government interest in the sense that removing the restriction would materially interfere with the government interest. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Ward*, 491 U.S. at 800 (narrow tailoring requires that the means chosen to pursue the government interest "are not substantially broader than necessary to achieve the government's interest"). Also, the law must not burden a substantial amount of speech that does not implicate the government's interest. However, the narrow tailoring prong of intermediate scrutiny does not require the law to pursue the least restrictive means nor does it necessitate that the law avoid underinclusivity. *See id*.; *see also Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

The Craven Statute directly advances the goal of conversational privacy and does not burden more speech than is necessary. A prohibition on recording conversations without all parties' consent serves to assure citizens that they may speak freely without fear of a third party recording conversations without consent. This assurance extends to citizens interacting with police officers in public, citizens who "may be very averse to the conversation[] being broadcast on the evening news or blogged throughout the world." *Alvarez*, 679 F.3d at 611 (Posner, J., dissenting). Further, the statute appropriately balances the needs of protecting conversational privacy and the right to eavesdrop. The government's legitimate interests in preserving the confidential nature of all communications, regardless of their subject matter, would be less effectively met, if met at all, in the absence of the Statute's prohibition against recording conversations without the consent of those communicating.

4. The Statute leaves ample alternative channels for expressive conduct.

The final prong of intermediate scrutiny addresses the availability of alternative channels for the expressive conduct implicated by the statutory restriction. The Craven Statute limits only recording without all parties' consent. The Statute leaves open ample alternative channels to gather information because it does not constrain all forms of receiving or transcribing non-consensual communication.

The Statute does not prevent citizens from observing police activities, discussing those observations, detailing in written form the observed activities, or disseminating information on police activities to a larger audience. Indeed, Respondent was "free to seek news from any source by means within the law." *Branzburg v. Hayes*, 408 U.S. 665, 681-82 (1972). That Respondent could not utilize one medium of gathering information—namely recording police activity from her position behind a bush—does not diminish the free discussion of governmental affairs. Many other methods were available to Respondent's gathering of news on the events of January 20, 2014, such as recording and interviewing people who consented to such action or writing a detailed account of the events. While Respondent's video recording may be her preferred method of gathering information, the First Amendment does not grant her a right to her preferred method of gathering news.

Under the circumstances, the Craven Statute's content neutral prohibition of recording the conversations of others without their consent survives intermediate scrutiny because the Statute advances a compelling government interest in conversational privacy, pursues that interest through narrowly tailored means, and leaves open ample alternative channels for transcribing the events at Diagon Park.

C. Respondent's Conduct is Information Gathering and, As Applied, the Statute Serves as a Time, Manner, or Place Restriction.

Even if Respondent's conduct may be characterized as information gathering, such activity is still subject to restriction. Particularly, the government may impose time, manner, or place restrictions on speech in nonpublic and traditional public fora subject to varying degrees of judicial scrutiny. The Craven Statute satisfies both the reasonable and viewpoint neutral standard for nonpublic fora and, as discussed *infra* II.B, intermediate scrutiny for content neutral regulations in traditional public fora.

1. Respondent's conduct may be information gathering.

Recording the police is more aptly analyzed under a First Amendment right to receive information. In *Kelly v. Borough of Carlisle Kelly*, the Third Circuit noted that the facts of that case—in which a township refused to allow the plaintiff to video record planning commission meetings—lent themselves to a "'right to receive and record information,' not 'speech or otherwise expressive activity.'" 622 F.3d at 262 (quoting *Whiteland Woods, L.P. v. Township of West Whiteland*, 193 F.3d 177, 180 (3d Cir. 1999)). This Court should find that a right to record should be analyzed as a right to access information, not a right to expressive conduct. The right to access information is far from absolute.

The "right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). *See Alvarez*, 679 F.3d 583, 605 (7th Cir. 2012) ("Under this Court's speech forum doctrine, a regulatory measure may be permissible as a time, place, or manner restriction."); *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011) ("To be sure, the right to film is not without limitations. It may be subject to reasonable, time, place, and manner restrictions."); *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010) ("[E]ven insofar as it is clearly established, the right to record matters of public concern is not absolute; it is subject to reasonable time, place, and manner restrictions."); *Smith v. City of Cumming*, 212 F.3d 1332,

1333 (11th Cir. 2000) ("[W]e agree with the Smiths that they had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct.").

Neither the press nor individuals with journalistic characteristics may claim exemption to laws of general applicability, even when the laws result in an incidental burden on news gathering. *See, e.g., Branzburg*, 408 U.S. at 682 ("It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (noting the "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."); *Food Lion v. Capital Cities/ABC*, 984 F. Supp. 923, 929 (M.D.N.C. 1997) ("[T]he press is not free to violate laws of general applicability in order to reach its ultimate goals").

Moreover, precedent establishes that when gathering news, neither the press nor individuals are entitled to gather news through the most effective means. In *Zemel v. Rusk*, the Court sustained the government's refusal to validate a citizen's passports to Cuba, despite his argument that the denial would restrict the "free flow of information concerning that country." 381 U.S. at 16-17. With technological advances, the distinction between journalists and private citizens blurs. Therefore, the precedent concerning journalists' right to gather information also applies to citizens' right to gather information. *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring) ("The Constitution does no more than assure the public and the press equal access . . . ."); *see also Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (Advances in technology "make clear why the news-gathering protections of the First Amendment cannot turn on professional credentials or status.").

In light of these precedents, even if this Court recognizes a right for Respondent to gather information, that right is subject to time, place, and manner restrictions.

2. The right to gather information on government property is subject to time, place, and manner restrictions.

The right to gather information on government property may be limited. In a non-public forum, government restrictions need only be reasonable and viewpoint neutral. Nonpublic fora are those government-owned spaces that the government has not opened up for speech. Furthermore, in traditional public fora, the government may enforce reasonable, content neutral "time, place, and manner regulations as long as the restrictions" satisfy intermediate scrutiny. *See ISKCON v. Lee*, 505 U.S. 672 (1992); *United States v. Grace*, 461 U.S. 171, 177 (1983) (quoting *Perry Education Assn. v. Perry Local Educator's Assn.*, 460 U.S. 37, 45 (1983)).

To determine whether government property is a public forum, courts must look at whether the government had the intention to provide public access to the government-owned location. *Perry Education Assn.*, 460 U.S. at 46. In *Perry Education Association*, this Court held that the government can restrict news gathering in public property when such property is a not a public forum. 460 U.S. at 48. There, the city granted access to a teacher's union to review correspondence and communications of the public schools' teachers. *Id.* at 40. However, the city denied that information to a rival union, and that rival union sued the city arguing that the information was public; therefore, all unions had the First Amendment right to access such information. *Id.* This Court found that the government did not intend to make the information accessible to the public; thus the property was not a public forum and the city could restrict the right to gather information. *Id.* at 44, 46.

Even when the public has some access to that property, the government has the right to limit the manner of how the public gathers information in that location. In *United States v. Kerley*,

a criminal defendant challenged a ban of recording his trial under the First Amendment. 753 F.2d at 618. The Seventh Circuit held that although the public could enter and take notes in the court room, a recording ban was not in violation of the First Amendment because a court room was a limited public forum and people had other means to gather information. *Id.* at 622. Courts have routinely upheld filming restrictions that completely banned types of recording at public events on government property as constitutional. *See, e.g.*, *Houchins v. KQED, Inc.*, 438 U.S. 1, 4–5 (1978) (upholding restriction on filming during media tours of jail); *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 610 (1978) (upholding ban on filming of trial); *Mocek v. City of Albuquerque*, 813 F.3d 912, 920 (10th Cir. 2015) (upholding ban on filming at airport security checkpoint); *PG Publ'g Co. v. Aichele*, 705 F.3d 91, 99 (3d Cir. 2013) (upholding ban on photography in polling places); *Whiteland Woods, LP v. Township of West Whiteland*, 193 F.3d 177, 184 (3d Cir. 1999) (upholding ban on filming of planning commission meeting); *United States v. Edwards*, 785 F.2d 1293, 1296 (5th Cir. 1986) (upholding ban on filming of criminal trial); *United States v. Kerley*, 753 F.2d 617, 620 (7th Cir. 1985) (upholding ban on cameras in federal courtrooms); *United States v. Yonkers Bd. of Educ.*, 747 F.2d 111, 114 (2d Cir. 1984) (upholding ban on audiotape recording of civil trial).

Contrastingly, in *Glik*, the First Circuit found that the public had the right to record in Boston Common because that location historically served as a public forum. *See* 655 F.3d at 84 (explaining that the right to gather information may still be subject to time and manner restrictions); *see also Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 13 (1986) (holding that people have right of access to criminal trial hearings because criminal trials are traditionally open to the public). This analysis was in error because the First Circuit failed to recognize that the First Amendment right to gather information is not equivalent to a right to record a public event; further,

the court did not acknowledge that, even in public spaces, the government may still enforce time, place, or manner regulations.

Here, Respondent had no First Amendment right to audio record the police information because Diagon Park was not a public forum. *See Perry*, 460 U.S. at 46; *Kerley*, 753 F.2d at 620. The Thirteenth Circuit erroneously relied on *Perry*'s dicta, in which the Court stated that the government's speech restrictions are heavily circumscribed in streets and parks. *See* R. at 11 (citing *Perry*, 460 U.S. at 45). However, the Thirteenth Circuit ignores the two main facts: that the government may still have time, place, and manner restrictions, and that Diagon Park was not a public forum. *See Perry*, 460 U.S. at 46. St. Mungo clearly did not intend for Diagon Park to be accessible to the public. R. at 2. As *Perry* explained, one must look at the government's intention when analyzing whether a public place is intended to be a public forum. 460 U.S. at 46. Here, St. Mungo intended to use Diagon Park for government buildings and not as a park with access to the public. R. at 2. In fact, the police officers were removing the campers and the public from the park with the intention to remove all trespassers and fence the park from all public access. R. at 2–3. This is similar to *Perry*, in which the government limited the group of people that could access its public information. *See Perry*, 460 U.S. at 40. This situation is distinguishable from the circumstances in *Glik*, in which the park in question was the Boston Common, a significant historical place for public gathering that the government intended to keep open to the public. *See Glik*, 655 F.3d at 84. Here, Diagon Park was not intended for gatherings at all. *See id.* Given that the city did not intend the place to be a public forum, it had the power to enforce a place and manner restriction in Diagon Park. *See Perry*, 460 U.S. at 48.

As applied to nonpublic fora, the Craven Statute is both reasonable and viewpoint neutral. The Statute is a reasonable means of closing the area to public access and also furthers the

protection of conversational privacy. The enforcement of the Statute demonstrates the government's intention to close Diagon Park to the public. R. at 2–3. Further, the common public meaning of the Statute demonstrates that the speech restriction does not differentiate between competing viewpoints.

Even if this Court were to determine that, at the time of the police action, Diagon Park was a traditional public forum, the government may still implement content neutral speech restrictions that satisfy intermediate scrutiny. As discussed *supra* II.B., the Craven Statute is content neutral. Furthermore, the Statute satisfies the three prongs of intermediate scrutiny: the Statute advances a substantial government interest, is narrowly tailored to that interest, and provides ample alternative channels for similar conduct.

CONCLUSION

For the foregoing reasons, Petitioner Piper respectfully requests that the Court reverse the decision of the United States Court of Appeals for the Thirteenth Circuit.