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

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Brief for the Respondent

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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 United States District Court for the District of Craven granted partial summary judgment for Lockwood on her claim that Piper's warrantless entry violated her Fourth Amendment right to be free from unreasonable searches and ruled as a matter of law that Piper was not entitled to qualified immunity. R. at 2. However, the District Court Granted summary judgment to Piper on the remaining two claims. R. at 2. The United States Court of Appeals for the Thirteenth Circuit reversed the District Court's grant of summary judgment to Piper on both issues. R. at 2.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. IV

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. I

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.

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

Statement of the Facts

Over a period of approximately eight months, an encampment of people had grown at Diagon Park in St. Mungo, Craven, on land that is a site for a group of new government buildings and other development. R. at 2. Environmentalists were attempting to preserve one of the largest open spaces in the town, as were community activists who had developed a community garden in the park. R. at 2. Members of the group had formed an encampment there to prevent the planned construction. R. at 2. Over time, a sizable group of homeless people had joined the encampment, establishing it as their home. R. at 2. Shortly after dawn on January 20, 2014, the police began clearing the park so that construction workers could erect a fence to keep out trespassers and construction could begin. R. at 2. During the attempt to clear people from the park, a number of activists and homeless people refused to comply with police orders to leave the park. R. at 3.

Luna Lockwood (Respondent) was a member of the environmentalist group and lived in a house near the park. R. at 3. She anticipated police action and was present in order to record what transpired at the park on her video camera, which recorded both video and audio. R. at 3. When the resistance grew stronger, Lockwood recorded an officer using harsh language and a racial epithet to a homeless man. R. at 3. Lockwood immediately stopped recording when she was yelled at by an Officer to cease recording and erase the video for violating Craven Gen. Stat. § 15A-287, which makes it illegal for someone to record a conversation without the consent of all those involved. R. at 3.

Officer Harry Piper, dressed in plain clothes, was spying on Lockwood's activities from a

nearby hillside. R. at 3. Piper had been in the encampment until shortly before the police had begun clearing the park and was working undercover to monitor the group's actions. R. at 3. He observed Lockwood stop recording when the officer yelled at her and after that officer walked away, he saw Lockwood move behind a cluster of bushes and resume filming. R. at 3. Lockwood left the park and stopped filming after she filmed a particularly heated and epithet-filled encounter between the police and those in the park. R. at 3. Piper immediately pursued her, although he was a substantial distance behind her when she reached and entered her nearby home. R. at 3. Piper saw nothing to indicate to him that Lockwood had noticed him watching or pursuing her. R. at 3.

Piper knocked on Lockwood's front door and identified himself as a Police officer, holding up a badge and ordering Lockwood to open the door. R. at 3. Piper could see Lockwood through a window, standing some distance back from the door. R. at 3. Lockwood asked where Piper's uniform was and stated that he looked more like a homeless person than a police officer. R. at 3. Piper again ordered her to open the door but she refused, referencing recent robberies in Craven by men posing as police officers. R. at 3.

Piper then kicked the front door down (which had not been secured by a deadbolt), causing minor damage to the door jam. R. at 3. Lockwood then ran to the back of the house, grabbing her video camera from the as she exited the living room. R. at 3. Piper reiterated that he was a police officer and stated that Lockwood was under arrest. R. at 3. Piper found Lockwood hiding behind the door in the bedroom and she screamed for help and for him to leave. R. at 3. As Piper entered the room he observed Lockwood moving her head quickly and looking around the bedroom. R. at 3. Piper ordered her to turn around and put her hands on her head. R. at 3. Lockwood continued to scream for help and for him to leave, and she did not comply with his

orders. R. at 3. When Lockwood reached for a backpack, which was lying on the bed in the room, Piper grabbed a baton from the back of his waistband and hit Lockwood on her leg. R. at 3. Lockwood fell to the floor dropping the video camera, which she had been holding. R. at 3. Piper seized the camera before she could grab it and put his hand on her back, ordering her to stay down and not move. R. at 3. Lockwood continued to struggle to get back up, at which point, Officer Piper struck her on the head with his baton. R. at 3.

Lockwood was knocked unconscious by the second blow and hospitalized. R. at 3. The blow caused brain damage, which affects Lockwood's motor skills and ability to speak. R. at 3. Lockwood also claimed that she suffered injuries causing post-traumatic stress disorder. R. at 3.

Lockwood was charged with a violation of Craven Gen. Stat § 15A-287. R. at 4. Since the police wanted to conclude the matter, the trial court dismissed the charges without objection by the prosecutor. R. at 4. The police, however, copied the hard drive on the recording device and deleted the recording of the police action, which contained both video and audio, and returned the recording device to Lockwood. R. at 4. Officials have refused to give a copy of the recording to Lockwood or to disseminate it to the public. R. at 4.

Procedural History

Lockwood was charged with violating Craven Gen. Stat. § 15A-287 by recording a conversation without all involved person's consent. R. at 4. The Craven statute prescribes that a person is subject to prosecution for eavesdropping if he or she records a conversation without the consent of all parties involved. R. at 4. 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 the circumstances justifying that expectation." R. at 4.

Ms. Lockwood brought suit against Officer Piper under 42 U.S.C.§ 1983 for three claims. R. at 4. First, Piper's warrantless entry into her home breached her Fourth Amendment right to be free from unreasonable searches. R. at 4. Second, Piper's use of force against her constituted excessive force in violation of her Fourth Amendment right to be free from excessive force by law enforcement officials. R. at 4. And Third, that her arrest and the seizure of her recording of the police action contravened her First Amendment right to gather news and to receive information and ideas. R. at 4.

The district court granted partial summary judgment for Lockwood on her claim that the warrantless entry violated her Fourth Amendment rights. R. at 4. The district court granted Officer Piper summary judgment for the second and third claims against him. R. at 4. Officer Piper did not subsequently challenge the district court's grant of partial summary judgment for Lockwood that the warrantless entry violated her Fourth Amendment rights. R. at 10.

On appeal to the Thirteenth Circuit Court of Appeal, the Thirteenth Circuit 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. R. at 12. Accordingly, the Thirteenth Circuit held that Piper's use of force was excessive under the totality of the circumstances, and thus unreasonable as a matter of law because his Fourth Amendment violation of entering the home without a warrant recklessly provoked the need for force. R. at 12. Finally, the Thirteenth Circuit held that citizens have a First Amendment right to record police in public. R. at 12. Officer Piper (Petitioner) petitioned for certiorari to this Honorable Court, appealing the rulings of the Thirteenth Circuit on Lockwood's second and third claims. R. at 17. Piper's petition for certiorari was granted. R. at 17.

SUMMARY OF THE ARGUMENT

The Court of Appeal's decision to deny Petitioner summary judgment should be affirmed because the court correctly determined that a reviewing court should consider all relevant facts and circumstances leading up to an officer's use of force when assessing whether such force was excessive. Adoption of a broad reading of "totality of the circumstances" comports with this Court's jurisprudence. Moreover, such an approach is needed to provide a principled basis for excessive force adjudications and remedies for individuals whose constitutional rights are violated. Under a broad interpretation, courts have found that the totality of the circumstances encompasses facts and circumstances leading up to an officer's use of force, including pre-seizure conduct of the officer. In contrast, courts that adopt a narrow interpretation focus on the reasonableness of an officer's actions based only on the circumstances that exist precisely "at the moment" the officers employ force and completely ignore all pre-seizure conduct by the officer.

As such, courts that adopt a narrow approach fail to consider unconstitutional conduct of officers, which comprises part of the totality of the circumstances that leads to the need for force. Moreover, courts that have adopted a narrow approach typically consider only pre-seizure conduct of victims of officer force that portrays them in a way such that the officer's use of force appears reasonably justified, whereas courts completely ignore the officer's pre-seizure conduct. Adopting such an approach produces inequitable results.

Public policy dictates that all facts and circumstances leading up to the use of force be considered. This will allow for a more complete picture from which the court can come to a principled conclusion. Furthermore, it will encourage police officers to act constitutionally in carrying out their duties and discourage them from placing themselves in unnecessary and potentially dangerous situations. Lastly, it will incentivize officers to use force as a last resort

instead of force being a first choice. Therefore, Respondent respectfully urges this court to adopt a broad approach consistent with its prior holdings that reasonableness in excessive force cases must consider the totality of the circumstances leading up to an officer's use of force.

The Court of Appeals also correctly held that citizen recording of police acting in public falls within the realm of First Amendment protection because citizens have a constitutional right to gather news and disseminate information about government officials performing their duties in public, and police behavior is a matter of great public concern. To restrict recording of police officers performing their duties in public is to restrict a medium of expression. It is an unconstitutional restriction on activity that occurs early on in the speech process. Namely, by restricting the act of recording, it prevents later dissemination—a protected First Amendment right. Additionally, the act of recording itself is protected First Amendment activity. That is, the act of recording is expressive conduct that indicates disagreement with police misconduct.

Both the First Amendment and public policy dictate that a safeguard in a free society is the public's right to monitor the actions of law enforcement in public. Protection of private citizens' abilities to scrutinize actions of government officials lies at the heart of the First Amendment. Recording public police action is a means of ensuring governmental accountability and discourages police misconduct. The government's interest in protecting conversational privacy simply does not exist when officers are performing their duties in public. Neither the officers nor individuals communicating with the officers in public where their conversations are audible to bystanders and passersby can claim any reasonable expectation of privacy.

Therefore, Respondent respectfully requests this Court to adopt a rule consistent with those circuits, which uphold First Amendment protection for private citizens recording police officers acting in public in the course of their duties.

ARGUMENT

I. THE REASONABLENESS ANALYSIS IN A USE OF FORCE CASE MANDATES CONSIDERATION OF THE TOTALITY OF THE CIRCUMSTANCES LEADING UP TO A USE OF FORCE SO AS TO INCLUDE REVIEW OF UNCONSTITUTIONAL POLICE CONDUCT THAT UNREASONABLY GAVE RISE TO THE NECESSITY FOR A USE OF FORCE.

The Court of Appeal's decision to deny Petitioner summary judgment should be affirmed because the court correctly determined that a reviewing court should consider all relevant facts and circumstances leading up to an officer's use of force when assessing whether such force was excessive. Adoption of a broad reading of "totality of the circumstances" comports with this Court's jurisprudence. Moreover, such an approach is needed to provide a principled basis for excessive force adjudications and remedies for individuals whose constitutional rights are violated. In contrast, narrowing the reasonableness analysis to include only facts and circumstances at the precise moment an officer employs force in effecting an arrest is inconsistent with this Court's emphasis on considering the totality of the circumstances in evaluating reasonableness under the Fourth Amendment, and leads to demonstrably unworkable and inconsistent results.

Unfortunately, incidents of police provocation, including constitutional violations of individual rights, have caused police officers to use what would have otherwise been avoidable force. Despite the prevalence with which courts are confronted with these incidents, the courts of appeal remain deeply divided over whether an officer's unconstitutional pre-seizure conduct may be considered in determining whether a use of force was excessive, and thus, unreasonable under the Fourth Amendment. Under a broad interpretation, courts have found that the totality of the circumstances encompasses facts and circumstances leading up to an officer's use of force, including pre-seizure conduct of the officer. In contrast, courts that adopt a narrow interpretation

focus on the reasonableness of an officer's actions based only on the circumstances that exist precisely "at the moment" the officers employ force and completely ignore all pre-seizure conduct by the officer.

While a decision in this case will ultimately depend upon this Court's interpretation, clarification, and application of its own precedent, Respondent respectfully urges this court to adopt a broad approach consistent with its prior holdings that reasonableness in excessive force cases must consider the totality of the circumstances leading up to a use of force.

A. The Scope of the "Totality of the Circumstances" is Comprehensive and Includes Facts and Circumstances Leading Up to a Police Officer's Use of Force During an Arrest

The Fourth Amendment is not an empty vessel, but rather serves the fundamental purpose of "safeguard[ing] the privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Mun. Ct.*, 387 U.S. 523, 528 (1967). The Fourth Amendment provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. Const. amend. IV. Excessive force claims implicate an individual's Forth Amendment right against unreasonable seizures. *Graham v. Connor*, 490 U.S. 386, 394 (1989). Accordingly, the constitutionality of an officer's use of force during an investigation or arrest is analyzed under the Fourth Amendment's "objective reasonableness" standard. *Id.* at 388. The reasonableness inquiry as to whether this constitutional right was violated requires carefully balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985). In general, a seizure occurs where there is governmental termination of freedom of movement through some intentional application of physical force or there is a submission to a show of authority. *California v. Hodari D.*, 499 U.S. 621, 625-26 (1991); *Brower v. County of*

Inyo, 489 U.S. 593, 596-97 (1989). While the Court has long recognized that making "an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it," officers may not apply more force than is "objectively reasonable" and necessary under the circumstances in making an arrest. *Graham*, 490 U.S. at 396-97.

This Court has consistently held that reviewing courts must look to the "totality of the circumstances" when evaluating the reasonableness of a police officer's use of force, and reasonableness should not be reduce to an "easy-to-apply legal test" divorced from the "factbound morass" of individual cases. *Graham*, 490 U.S. at 395 (citing *Garner*, 471 U.S. at 8-9; *Scott v. Harris*, 550 U.S. 372, 383, 386 (2007). In *Tennessee v. Garner*, the Court declared that whether a seizure is reasonable, and thus, constitutional under the Fourth Amendment, "depends on not only *when* a seizure is made but also on *how* it is carried out." 471 U.S. at 8 (citing *United States v. Ortiz*, 422 U.S. 891, 895 (1975); *Terry v. Ohio*, 392 U.S. 1, 28-29 (1968) (emphasis in original). That is, after conducting a review of its prior cases, the Court held that its own precedent mandated that it was essential for a reviewing court to evaluate the reasonableness of the *manner* in which a seizure was conducted, and not limit the inquiry to the actual seizure itself. *Id.* Therefore, the primary question in excessive force cases is "whether the totality of the circumstances justified a particular sort of search or seizure." *Id.* at 9.

Several years later in *Graham v. Connor*, the Court reaffirmed *Garner's* balancing approach to the reasonableness inquiry and incorporated its "totality of the circumstances" test into its standard for evaluating reasonableness of officers' uses of force. 490 U.S. at 396. There, the Court appropriately noted that the "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 suggests that the realities police officers face in stressful situations would be considered as part of the "totality of the circumstances," but it did not mean courts should neglect objective consideration of officer conduct leading up to the use of force. The Court cautioned that the "reasonableness" test "is not capable of precise definition or mechanical application." *Id.* at 396 (internal quotations omitted). Rather, the Court pointed out that careful attention must be given to "the facts and circumstances of each particular case" including the severity of the crime, whether the suspect poses an immediate threat to officer or public safety, and whether the suspect is actively resisting or attempting to evade arrest by flight. *Id.* at 396.

Accordingly, consistent with this Court's teachings in *Garner* and *Graham* that seizures be justified by the "totality of the circumstances," a number of circuits have adopted a broad approach that holds facts and circumstances leading up to an officer's use of force, including pre-seizure conduct are relevant to the reasonableness determination. Specifically, the First, Third, Ninth, and Tenth Circuits endorse this expansive time frame.[1] *See, e.g., Young v. City of Providence*, 404 F.3d 4, 22 (1st Cir. 2005) (holding that the circuit's rule "is that once it is clear that a seizure has occurred, 'the court should examine the actions of the government officials leading up to the seizure'" and declaring that this rule is most consistent with the Supreme Court's mandate that courts consider the totality of the circumstances) (quoting *St. Hilaire v. City of Laconia*, 71 F.3d 20, 26 (1st Cir. 1995); *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002) (considering an officer's pre-seizure conduct in determining whether the officer's use of

[1] The Seventh Circuit's interpretation has been inconsistent, but has become more aligned with the expansive model. In earlier cases the court adopted a "segmented approach," whereby it separated each potential Fourth Amendment violation into segments and considered only the officer's conduct at the moment the seizure was made in its reasonableness inquiry. *See Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) ("pre-seizure conduct is not subject to Fourth Amendment scrutiny."). However, although not always consistent, the court has more recently aligned itself with those circuits that adopt a broad reasonableness analysis. *See Deering v. Reich*, 183 F.3d 645, 649 (7th Cir. 1999) ("[t]he totality of the circumstances cannot be limited to the precise moment when [the officer] discharged his weapon.").

force was reasonable under the totality of the circumstances); *Hastings v. Barnes*, 252 F. App'x 197, 203 (10th Cir. 2007).

The flagship case for this expansive model is the Third Circuit's opinion in *Abraham v. Raso*, which provides perhaps the most well reasoned argument in support of a broad reading of "totality of the circumstances." That case stands for the proposition that all facts contributing to a use of force are relevant. 183 F.3d 279 (3d Cir. 1999). In that case, the court explicitly disagreed with circuits that adopt the moment of force theory and ignore facts and circumstances leading up to a seizure. *Id.* at 291. The court declared that it did not "see how [circuits that adopt the moment of force theory] can reconcile the Supreme Court's rule requiring examination of the 'totality of the circumstances' with a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished." *Id.* The court reasoned that it is unclear what, if any, circumstances remain for consideration if all events leading up to seizures are excluded. *Id.* Indeed, "[h]ow is the reasonableness of a bullet striking someone to be assessed if not by examining preceding events?" *Id.* In other words, considering only the end result—the seizure—divorces the incident in question from the causal occurrences that gave rise to and supply the context for a use of force in effecting actual seizure. While, the court properly noted that some events may be too attenuated to a use of force, what makes these prior incidents irrelevant are "ordinary ideas of causation." *Id.* at 292.

In contrast, other circuits including the Second, Fourth, Fifth, Sixth, and Eighth Circuits have held that pre-seizure conduct, including provocations by police creating the need for force, are irrelevant, and thus, excluded from analysis of whether the force employed exceeded constitutional limits. *See, e.g., Schulz v. Long*, 44 F.3d 643, 648 (8th Cir. 1995) ("we scrutinize only the seizure itself, not the events leading to the seizure."); *Salim v. Proulx*, 93 F.3d 86, 92

(2d Cir. 1996) (limiting the reasonableness inquiry to only those facts and circumstances that existed at the moment the officer made the "split-second decision" to use force); *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) (holding that events preceding the seizure were irrelevant and not probative of the reasonableness of the officer's decision to use force); *Livermore ex rel Rohm v. Lubelan*, 476 F.3d 397, 406 (6th Cir. 2007) (employing a segmented approach to determine reasonableness in excessive force cases and rejecting consideration of whether officers unreasonably created the need for force).

Despite the Court's emphasis on the "totality of the circumstances" in both *Garner* and *Graham* and the directive against a "mechanical application" of the reasonableness test, these circuits have nevertheless adopted bright-line rules that exclude pre-seizure police conduct from review in excessive force cases. This is directly at odds with the Court's indication that the "reasonableness" test is incapable of "precise definition." These cases erroneously rely on the Court's "reasonableness at the moment" language in *Graham*, accounting "for the fact that police officers are often forced to make split-second judgments." 490 U.S. at 396-97. Read in the context of the entire opinion, this language was not intended to narrow the scope of the "totality" inquiry to exclude pre-seizure conduct, but rather to "distinguish between judging an officer's actions from his perspective at the time of the incident and judging them later on the basis of 20/20 hindsight." Jeremy R. Lacks, *The Lone American Dictatorship: How Court Doctrine and Police Culture Limit Judicial Oversight of the Police Use of Deadly Force*, 64 N.Y.U. Ann. Surv. Am. L. 391, 429 (2008). In other words, what the Court sought to prevent was Monday morning quarterbacking in reviewing officer conduct without proper deference to the stressful situations they face, not precluding objective review of the circumstances leading to the force.

A more expansive reasonableness analysis that includes pre-seizure conduct in excessive force cases is consistent with and more faithful to this Court's emphasis on the totality of the circumstances. Although the Court has not offered specific guidance as to whether a temporal limit exists that would foreclose consideration of facts and circumstances leading up to a use of force, a "frozen" in time approach based on *Graham's* "at the moment" language is contrary to the meaning of "totality of the circumstances." As previously set forth, the Court in both *Garner* and *Graham* endorsed the totality of the circumstances test as part of its reasonableness inquiry in excessive force cases. In particular, *Garner* specifically held that both the reasonableness of when a seizure is made and how it is carried out must be considered. 471 U.S. at 8. In that case, the Court reviewed its prior history of cases where it "balanced the extent of the intrusion against the need for it" and concluded that in arriving at its decision in those cases the Court examined "the reasonableness of the *manner* in which a search or seizure is conducted." *Id.* at 7-8.

This holding implies that in assessing the reasonableness of a seizure, facts and circumstances leading to the seizure, including pre-seizure conduct is relevant to the inquiry. For example, under *Garner*, if an officer entered a private home to make an arrest, the reasonableness of that seizure would include *how* that seizure was made. Namely, whether the officer had a warrant to enter and make the arrest, and if not, whether exigent circumstances were present that made the warrantless arrest (the seizure) in the home reasonable. *See e.g. Ortiz*, 422 U.S. at 896-99 (noting that officers were lawfully given discretion to consider a number of factors in deciding which cars to stop and search at traffic checkpoints, but holding that the "absence of probable cause makes the search" unreasonable and invalid); *Cowles v. Peterson*, 344 F. Supp.2d 472, 481 (E.D. Va. 2004) (holding that "the illegal seizure of an individual taints any search in 'temporal and causal' connection to the seizure" and that an officer who engaged in

an unconstitutional seizure could not subsequently engage in a constitutionally reasonable search). Therefore, to consider the manner in which a seizure is carried out, including the use of force during the seizure, the totality of circumstances leading up to *how* the officer came to the point of seizure must be examined.

1. THE PLAIN MEANING OF THE TOTALITY OF CIRCUMSTANCES DICTATES A BROAD APPROACH THAT CONSIDERS ALL RELEVANT FACTS AND CIRCUMSTANCES IN EXCESSIVE FORCE CASES.

The totality of the circumstances is an encompassing analysis that does not limit the temporal focus of the reasonableness inquiry. The term "totality" has a clear, unambiguous meaning and certainly means more rather than fewer facts and events should be available to a court engaged in an excessive force reasonableness inquiry. Indeed, the Third Circuit has expressly recognized that "[t]otality is an encompassing word" and implies that all factors bearing on an officer's use of force should be considered in an excessive force "reasonableness" analysis. *Abraham*, 183 F.3d at 291 (3d Cir. 1999). The dictionary defines "totality" as "an aggregate amount;" "the whole or entire amount of something." *Merriam-Webster Dictionary* (online version 2017). Black's Law Dictionary defines the "totality of the circumstances test" to require "focusing on the entire situation…and not on any one specific factor." *Black's Law Dictionary* (10th ed. 2014).

A broad approach to the "totality of the circumstances" also comports with opinions of legal scholars and policing experts regarding the proper way to evaluate the use of force. Experts have agreed that "[i]t is important to look at events which transpired before the final act or acts of force to determine reasonableness in either an escape or threat situation…In many police-citizen encounters, officers can escalate the probability of a serious threat by their demeanor or actions." Geoffrey P. Alpert & William C. Smith, *How Reasonable Is the Reasonable Man?: Police and Excessive Force*, 85 J. Crim. L. & Criminology 481, 491 (1994). Other commentators

have taken note of the wide variance in the approaches taken by the circuit courts and have concluded that the broader expansive approach to the totality of the circumstances, which includes pre-seizure conduct is more consistent with the "spirit" of *Garner* and *Graham* than the "moment of threat" test. Lacks, *The Lone American Dictatorship*, at 428; Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of the Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 Colum. Hum. Rts. L. Rev. 261, 267-70, 287 (2003) ("the efforts of other courts to draw fine lines around the moment of seizure, and to exclude as irrelevant other factors, break down in the absence of any principled justification for where the lines ought to be drawn.").

Thus, the plain meaning of "totality of the circumstances" dictates that all the facts and circumstances should be considered. In the context of an excessive force case, this means consideration of all the facts and circumstances available to the officer at the time force was used, as well as facts and circumstances that lead to the officer's use of force. To be sure, it is difficult to imagine how a court could adhere to the rule announced in *Garner* requiring consideration of "how" a seizure is carried out without considering the events leading up to the seizure itself.

2. THIS COURT HAS NOT NARROWED ITS TOTALITY OF THE CIRCUMSTANCES TEST NOR HAS IT ADOPTED THE "MOMENT OF THREAT" TEST.

Although *Graham* insisted that reasonableness of a use of force "be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," it did not foreclose the events that a court may consider in its analysis. *Graham*, 490 U.S. at 396. Specifically, *Graham* did not narrow the totality of the circumstances test by imposing a limitation on the temporal focus of the reasonableness inquiry. *See Id.* at 396-97. Rather, more recent Supreme Court Jurisprudence has confirmed consideration of the "totality" of facts,

holding that each case requires the reviewing court to "slosh [its] way through the factbound morass of 'reasonableness.'" *Scott*, 550 U.S. at 383.

The "Moment of Threat" test is contrary to this Court's Fourth Amendment jurisprudence that commands consideration of the totality of the circumstances when analyzing a use of force by an officer during an arrest. Circuits that adopt rigid rules excluding pre-seizure conduct cannot be reconciled with this Court's emphasis on the totality of the circumstances and its holding in *Garner* that the manner of how seizure was effected be considered. Rather, those circuits are nothing more than lonely waves in a sea of contrary authority. In contrast, a broad approach that considers all relevant facts and circumstances leading up to an officer's use of force fits cleanly within this Court's prior holdings and is the logical application of a "totality" analysis.

To properly understand and evaluate the reasonableness of an officer's use of force, all relevant facts and events must be admitted to allow the court an opportunity to evaluate the circumstances in a realistic context that gave rise to the situation and render a principled decision. There can be no principled basis for per se exclusion of relevant information including the context and causes prior to the moment force is employed under a "totality of the circumstances" test. To eliminate such a wide collection of interactions between police-citizen encounters is contrary to and negates the very purpose of a broad, fact-intensive inquiry unconstrained by "rigid preconditions." *See id.* 394-95. The plain meaning of "totality" demands a broad approach, and principles of justice require it.

B. A Broader Reading of "Totality of the Circumstances" Produces More Just and Equitable Results.

1. THE "MOMENT OF THREAT" TEST IGNORES OFFICER MISCONDUCT INCLUDING CONSTITUTIONAL VIOLATIONS THAT CREATE THE VERY THREAT LEADING TO A USE OF FORCE.

Confining the analysis to the final "frozen" in time moment when force is used prevents courts from considering evidence of officer misconduct and violations of constitutional rights, which leads to illogical and prejudicial results. Therefore, the totality of the circumstances in the excessive force reasonableness analysis must include all relevant facts leading up to an officer's use of force so as to account for police conduct that unreasonably creates the situation giving rise to the need for force. Both the Ninth and Tenth Circuits have considered officer misconduct that gave rise to a situation where force was necessary. In *Billington v. Smith*, the court held that where an officer intentionally or recklessly provoked a violent confrontation and the provocation is an independent Fourth Amendment violation, the officer may subsequently be held liable for his otherwise defensive use of deadly force. 292 F.3d at 1189. Similarly, in *Hastings v. Barnes*, the court held that the use of force reasonableness inquiry depends not only whether the officer was in danger at the time force was used, but also whether the officer's own reckless or deliberate conduct during the seizure unreasonably created the need to use force. 252 F. App'x at 203.

The Ninth an Tenth Circuit decisions, which correctly consider pre-seizure conduct by officers, including their violations of constitutional rights are consistent with other Fourth Amendment principles. For example, under the police-created exigency doctrine, where police create the exigency by "engaging in or threatening to engage in conduct that violates the Fourth Amendment," warrantless entry to prevent the destruction of evidence under the exigency exception to the warrant requirement will be unreasonable, and thus, unconstitutional. *Kentucky v. King*, 563 U.S. 452, 462 (2011). Relatedly, the Court has held that officers may seize evidence in plain view so long as they have not violated the Fourth Amendment in arriving at the place where the officer observes the evidence. *See Horton v. California*, 496 U.S. 128, 136-140 (1990)

("[i]t is . . . an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed."). While the officer's subjective intent may be irrelevant, the "Fourth Amendment requires . . . that the steps preceding the seizure be lawful" under an objective analysis. *King*, 563 U.S. at 463. Applied to excessive force cases, these principles require that an officer constitutionally "arrive[] at the place" where force is used. *See Horton*, 496 U.S. at 136-140.

Accordingly, officers who create the threat that subsequently gives rise to the need for force through their reckless and deliberate conduct, which is also an independent Fourth Amendment violation should not later be able to claim they reasonably used force in self-defense. This principle is also consistent with the general rule of self-defense that forecloses an individual from prevailing on a claim of self-defense when their actions provoked the threat to which they then responded in defense. *See* 13 Am. Jur. 3d Proof of Facts § 2 (1991) ("An important qualification on the right of self-defense is the general rule that one who provokes or initiates a conflict may not thereafter avoid liability by reliance on a plea of self-defense."). Therefore, it cannot be that an officer can violate an individual's constitutional rights and recklessly create a threat or altercation only to "constitutionally shoot his way out of it" when his subsequent use of deadly force becomes the "moment of threat," and there is a bar to consideration of the previous misconduct. *See Billington*, 292 F.3d at 1186. Rather, logic and fairness as well as Fourth Amendment jurisprudence dictates that an officer's unconstitutional and reckless conduct that ultimately provoked the need for force should be considered as part of the totality of the circumstances in assessing reasonableness in excessive force cases.

2. THE "MOMENT OF THREAT" TEST IS UNJUST AND INEQUITABLE AS APPLIED BECAUSE PRE-SEIZURE CONDUCT OF VICTIMS IS CONSIDERED, WHILE PRE-SEIZURE CONDUCT OF OFFICERS IS NOT.

A court that adopts the "moment of threat" test will commonly consider the prior actions of a victim of officer force—at least, if those actions can be cited to justify an officer's use of force, but does not consider the officer's pre-seizure conduct that may have given rise to the need for force. *See Rockwell v. Brown*, 664 F.3d 985 (5th Cir. 2011). In *Rockwell v. Brown*, the court found the officer's use of force reasonable, considering only pre-seizure acts of the victim and only to the extent those facts portrayed the victim of police use of force in a bad light and promoted the officers' use of force as reasonable. 664 F.3d at 992. Yet, the court ignored the officers' conduct towards a mentally disturbed teen that arguably gave rise to the need for force, holding the court "need not look at any other moment in time" preceding the use of force. *Id.* at 993. By considering only the acts of the victim of a use of force under the three factors set forth in *Graham*, but completely ignoring pre-seizure conduct of officers insulates officers from being held liable for their objectively unreasonable conduct that incidentally and unreasonably created the circumstances for the need for force. This simply cannot be squared with principles of equity.

3. NARROWING THE TOTALITY OF THE CIRCUMSTANCES TO THE PRECISE MOMENT WHEN AN OFFICER USES FORCE PRODUCES INCONSISTENT AD HOC DECISIONS.

The notion that "bad facts make bad law" is clearly demonstrated in circuits that adopt the narrow at the moment approach, but have inconsistently applied the doctrine. For example, the Fourth Circuit traditionally limits its reasonableness analysis to the facts that exist at the moment an officer decides to use force and officer conduct leading up to the employed force are irrelevant and inadmissible. In *Greenidge*, the court found that evidence that an officer recklessly created the dangerous condition that led to the shooting of plaintiff by failing to adhere to police procedures for nighttime prostitution arrests was inadmissible and properly excluded. 927 F.2d at

792. *See also Elliott v. Leavitt*, 99 F.3d 640, 642 (4th Cir. 1996) (holding that the court's focus should be "on the circumstances at the moment force was used.").

However, in *Rowland v. Perry*, where a police officer used force against a developmentally disabled person who picked up a five-dollar bill dropped by another individual, the court refused to limit the analysis to the officer's "segmented view of the sequence of events." 41 F.3d 167, 173-74 (4th Cir. 1994). The court reasoned that to do so would separate the plaintiff's resistance "from the rest of the story," in which case the officer's force could arguably be seen as reasonable. *Id.* Instead, the court declared that such a "segmented approach "seems to miss the forest for the trees" and the more appropriate objective analysis of reasonableness of force is "to view it in full context, with an eye toward the proportionality of the force in light of all the circumstances." *Id.* at 173. Furthermore, the court recognized that "[a]rtificial divisions in the sequence of events do not aid a court's evaluation of objective reasonableness." *Id.*

Similarly, the Sixth and Seventh Circuits, which have mostly adopted "segmented" approaches to the use of force reasonableness inquiry, have also been inconsistent depending on the facts of particular cases. For instance, in its earlier cases the Seventh Circuit considered only the officer's conduct at the moment the seizure was made in its reasonableness inquiry. *See Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) ("pre-seizure conduct is not subject to Fourth Amendment scrutiny."). Relatedly, in *Plakas v. Drinski*, the court separated the case into segments and considered each separate stage of events to determine whether police action at a particular stage was reasonable. 19 F.3d 1143 (7th Cir. 1994).

Yet, the court did not strictly adhere to this rule in *Deering v. Reich*, which analyzed the case under the "totality of the circumstances" standard—a standard never referred to in *Plakas*. 183 F.3d 645 (7th Cir. 1999). There, the court concluded that "[t]he totality of the circumstances

cannot be limited to the precise moment when [the officer] discharged his weapon." *Id.* at 649. Rather, the court held "all of the facts that occurred around the time of the shooting are relevant." *Id.* at 652. Likewise, the Sixth Circuit has been inconsistent with its application of its "segmented" approach. In *Dickerson v. McClellan*, the court rejected plaintiff's claim that officers created the need for excessive force through their unreasonable and unannounced entry, and instead held that the unannounced entry was a separate claim from the shooting. 101 F.3d 1151 (6th Cir. 1996). In that case, the court concluded the scope of review of an excessive force claim is limited to that of the moment of the shooting. *Id*. In contrast, the court in *Whitlow v. City of Louisville*, found that the moments leading up to an officer's use of force are important in determining whether the force exceeded constitutional limits. 39 F. App'x 297, 306 (6th Cir. 2002).

This demonstrated inconsistency is the result of the court's adoption a rigid per se rule that excludes pre-seizure conduct. These circuits are prime examples of how courts struggle and wrestle with their blanket rule that precludes consideration of officer conduct leading up to a use of force in cases with facts that necessitate a contrary result. This is precisely the conflict the Third Circuit identified in *Abraham*. Namely, that courts which exclude relevant pre-seizure conduct are "left without any principled way of explaining when 'pre-seizure' events start and, consequently, will not have any defensible justification for why conduct prior to that chosen moment should be excluded." *Abraham*, 183 F.3d at 291-92. That is, the effort of these courts to attempt to draw precise lines around the moment a seizure occurs thereby excluding other relevant facts that give context to the force at issue simply crumble absent any principled justification for where these lines should be drawn. By dividing an incident into isolated segments or limiting analysis factors to those at the moment force is used results in arbitrary, ad

hoc line-drawing that lacks the doctrinal justification that a "totality" analysis and causation standard provides.

C. Public Policy Favors a Broad Reading of the Totality of Circumstances When Considering the Reasonableness of an Officer's Use of Force During an Arrest.

There is a pressing need to rein in overly aggressive practices of police officers and ignoring police misconduct encourages similar future behavior. In other words, exclusively focusing on the instant when force is applied provides law enforcement with little incentive to avoid its use. If police know their conduct leading up to an application of force will be among the "totality of the circumstances" considered in an excessive force adjudication, they are more likely to adopt "de-escalation" techniques as a first-line strategy for resolving conflict. *See* Barbara E. Armacost, *Organizational Culture and Police Misconduct,* 72 Geo. Wash. L. Rev. 453, 456-64 (2004) ("As long as the focus is on whether the circumstances justified the use of force at the moment it was applied, officers have no legal incentive to step back and ask themselves whether they could have avoided the entire situation without a violent confrontation."). Moreover, considering pre-seizure conduct by police in a use of force reasonableness analysis will deter unconstitutional police conduct and discourages police from placing themselves in unreasonable and unnecessary dangerous situations. In the interest of promoting police accountability and responsibility this Court should adopt an encompassing totality of the circumstances approach that will consider officer misconduct and unconstitutional actions as part of the totality of the circumstances analysis in excessive force cases.

D. As Applied to this Case, Officer Piper's Use of Force was Unreasonable When Considering the Totality of the Circumstance Leading Up to the Use of Force.

In the instant case, applying a "totality of the circumstances" Fourth Amendment analysis, one can only conclude that Officer Piper's actions in recklessly or intentionally

provoking the need for force by entering Lockwood's home without a warrant was excessive and unreasonable under the Fourth Amendment. It was conceded by Piper in not appealing the district court's summary judgment in favor of Lockwood that the warrantless entry of Lockwood's home was a violation of Lockwood's Fourth Amendment right to be free from unreasonable searches and seizures. Thus, Piper must also concede that he either recklessly or intentionally provoked the need for force because of his unconstitutional warrantless entry of Lockwood's home, which constituted and independent Fourth Amendment violation.

Piper cannot now be heard to complain that he should not be held liable for his otherwise defensive use of force. *See*, *e.g. Billington*, 292 F.3d 1177. Namely, it was his unconstitutional entry that unreasonably gave rise for the need for force when he later felt threatened by Lockwood while inside her home. Indeed, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573, 585 (1980). This Court has firmly and unambiguously held that "the principles reflected in the [Fourth] Amendment 'reached farther than the concrete form' of the specific cases that gave it birth, and 'apply to *all* invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life.'" *Id.* 445 at 585 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886) (emphasis added). Lockwood did not want to nor was obligated to allow Officer Piper into her house out of fear from recent burglaries where the intruders posed as police officers. Officer Piper breaking Lockwood's door down to illegally gain entry into her home certainly should be considered alongside Lockwood's subsequent flight and struggle with Officer Piper. For it is impossible to have a complete picture of why force was needed if only the moment of force is considered or if only Lockwood's actions are considered, while Piper's unlawful pre-seizure conduct is ignored.

Accordingly, determining whether the use of force by Piper was defensive or was a violation of Lockwood's Fourth Amendment rights requires a totality of the circumstances analysis. Otherwise, no claim of defensive force could ever be challenged or scrutinized by the courts because there would be no way to balance the rights of the citizen against the Government's interest without knowing the facts that led up to the use of force in the first place. Here, Officer Piper's warrantless entry without justifying exigent circumstances was an independent Fourth Amendment violation that unreasonably provoked the need for force, and thus, his subsequent use of force was unreasonable and unconstitutional.

II. PRIVATE CITIZENS HAVE A FIRST AMENDMENT RIGHT TO RECORD POLICE OFFICERS PERFORMING THEIR DUTIES IN PUBLIC WHERE THERE IS NO REASONABLE EXPECTATION OF PRIVACY.

The Thirteenth Circuit Court of Appeals correctly held that citizen recording of police acting in public falls within the realm of First Amendment protection because citizens have a constitutional right to gather news and disseminate information about government officials performing their duties in public, and police behavior is a matter of great public concern. Both the First Amendment and public policy dictate that a safeguard in a free society is the public's right to monitor the actions of law enforcement in public. Protection of private citizen's abilities to scrutinize actions of government officials lies at the heart of the First Amendment.

Going back to Rodney King in the early 1990's and today's Black Lives Matter movement, the police have no principled reason to expect that their public conduct is immune to public review. Police are endowed with vast discretion and police abuse of authority carries with it the potential for great harm. Protection of private citizens' recording of police carrying out their duties in public spaces helps to ensure police accountability to the public they serve. When

police act in public they have no expectation of privacy and their actions cannot be free from public scrutiny.

While First Amendment protections certainly are not without limits, peaceful citizen recording of police conduct occurring in the public sphere where there is no expectation of privacy is constitutionally protected and does not interfere with police duties. Therefore, Respondent respectfully requests this Court to adopt a rule consistent with those circuits, which uphold First Amendment protection for private citizens recording police officers acting in public in the course of their duties.

A. Restricting Citizen Recording of Police Officers Acting in Public Violates an Individual's First Amendment Right to Gather and Disseminate Information about Government Officials Performing Their Duties in Public.

The First Amendment states "Congress shall make no law . . . abridging the freedom of speech, or of the press." Where a speech restriction does not restrict messages, ideas, or subject matter, the restriction is content-neutral and subject to intermediate scrutiny. *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002); *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). To survive intermediate scrutiny, a speech restriction (1) must serve "an important public-interest justification for the challenged regulation;" and (2) there must be "a reasonably close fit between the law's means and its ends." *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 605 (7th Cir. 2012). It is firmly established that a "major purpose of the First Amendment was to protect the free discussion of governmental affairs." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755 (2011) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (2003) (internal quotations omitted); *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Accordingly, the Court has emphasized a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 753-54. (internal

quotations omitted). Therefore, the First Amendment freedom of speech and press protections embraces "the liberty to discuss publicly and truthfully matters of public concern without previous restraint of fear or subsequent punishment." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 767 (1978).

Recognizing individuals' newsgathering rights and the right to receive information and ideas under the First Amendment is consistent with and supported by this Court's jurisprudence. The Court has recognized that "the First Amendment goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First Nat'l Bank of Bos.*, 435 U.S. at 783. *See also Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (It is . . . well-established that the Constitution protects the right to receive information and ideas."). Consequently, "[t]here is an undoubted right to gather news 'from any source by means within the law'" in order to protect the public's "stock of information." *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (quoting *Branzburg v. Hays*, 408 U.S. 665, 681-82 (1972)).

The right to gather and disseminate information about government officials performing their duties in public serves a cardinal First Amendment interest because it "furthers the societal interest in the 'free flow of commercial information'" and promotes the "free discussion of governmental affairs." *First Nat'l Bank of Bos.*, 435 U.S. at 783 (quoting *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976); *Mills*, 384 U.S. at 218. Thus, a number of circuit and district courts have held that individuals have a right to record matters of public interest. *See Smith v. Cumming*, 2121 F.3d 1332, 1333 (11th Cir. 2000) (holding that "[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public

interest."); *Fordyce v. Seattle*, 55 F.3d 436 (9th Cir. 1995) (recognizing a "First Amendment right to film matters of public interest"); *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011) (finding that filming of government officials in public spaces is a matter of public interest and is protected by the First Amendment).

Citizens' First Amendment right to gather and receive information and ideas and the right to record matters of public interest applies to government officials, including police officers performing their duties in public. This right is grounded in the aforementioned Supreme Court jurisprudence that recognizes individuals' right to gather and disseminate information about government officials. A number of circuit courts have correctly found a First Amendment right to record public police activity. For instance, in *Glik v. Cunniffe*, the First Circuit held that filming police officers performing their duties in public is an established First Amendment right. 655 F.3d 78. There, a citizen used his cell phone to record video and audio of police officers arresting an individual on the Boston Common, the nation's oldest public park. *Id.* at 82. The court relied on Supreme Court precedent in its reasoning that "[g]athering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs." *Id.* Moreover, the court's decision in *Glick* was premised on its own precedent in *Iacobucci v. Boulder*, which established an individual's First Amendment right to videotape public officials engaged in conversation in a public area of a public building. 193 F.3d 14 (1st Cir. 1999) (stating that because the journalist's activities "were peaceful, not performed in derogation of any law, and done in the exercise of his First Amendment rights, [the officer] lacked the authority to stop them.").

Likewise, in *Am. Civil Liberties Union of Ill. v. Alvarez*, the Seventh Circuit Court of Appeals struck down a state anti-eavesdropping statute that prohibited audiovisual recording of police acting in public. 679 F.3d 583 (7th Cir. 2012). In that case, the court declared that "[a]udio recording is entitled to First Amendment protection" reasoning that it is "corollary of the right to disseminate the resulting recording" and also to receive such information, which facilitates engagement in matters of public interest and democratic importance. *Id.* at 595-96. Similarly, the Eleventh Circuit held in *Smith v. City of Cumming* that individuals had a First Amendment right to photograph or videotape police conduct, but noted that this was subject to reasonable time, manner, and place restrictions. 212 F.3d 1332, 1333 (11th Cir. 2000). The court based its conclusion on the principle that First Amendment protection extends to gathering information about the conduct of public officials occurring on public property, including recording matters of public interest. *Id. See also Garcia v. Montgomery County, Maryland*, 145 F. Supp.3d 492, 508 (D. Md. 2015) (holding that the First Amendment protected video recording of police activity in public if it is peacefully done without interfering with the performance of police duties).

First Amendment speech and press rights protect the act of making a recording, because such an act is antecedent and incidental to the right to disseminate the resulting recording. As the Seventh Circuit Court of Appeals correctly points out, "the right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected." *Alvarez*, 679 F.3d at 595 (emphasis in original). Specifically, to restrict the act of recording of governmental officials operating in public is to restrict a "medium of expression," which the Court has recognized "inevitably affects communication itself." *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994). In other words, the act of recording is inextricably intertwined with the protected act of dissemination and operates at the

front end of the speech process by employing use of a common instrument of communication, namely audiovisual recording. *See Alvarez*, 679 F.3d at 596. *See also Citizens United v. FEC*, 558 U.S. 310, 336 (2010) ("Laws enacted to control or suppress speech may operate at different points in the speech process.").

Furthermore, merely because an individual's activity constitutes conduct, it is not necessarily foreclosed from First Amendment protection. For instance, the Court has long held that campaign contributions are protected First Amendment activity because such conduct facilitates the resulting speech. *See Citizens United*, 558 U.S. at 339. In *Citizens United*, the Court invalidated a federal statutory ban on corporate and union spending for political speech and held that the government cannot "repress speech by silencing certain voices at any of the various points in the speech process." *Id.*

Relatedly, in *Buckley v. Valeo*, the court concluded that restricting the act of spending money on campaign contributions "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.") 424 U.S. at 19 (1979). Likewise, restricting the recording of police officers is a restriction at an early point in the speech process, which necessarily limits use of communication technologies that enable speech. In particular, preventing all non-consensual recordings of police officers limits information that might later be disseminated. Such limitation would be dangerous and contrary to the First Amendment as "the State could effectively control or suppress speech by the simple expedient of *restricting an early step in the speech process* rather than the *end result*." *See Alvarez*, 679 F.3d at 597 (emphasis added).

Not only is the conduct of recording necessary to the function of dissemination of information, the conduct of recording alone is in fact expressive. As Jesse Alderman rightly

points out, recording a police officer sends a message—that the recorder disapproves of misconduct—and expresses favor for accountability. Jesse Harlan Alderman, *Before You Press Record: Unanswered Questions Surrounding the First Amendment Right to Film Public Police Activity*, 33 N. Ill. U. L. Rev. 485, 510 (2013) (citing *O'Brien v. United States*, 391 U.S. 367, 377 (1968). Thus, not only is the act of recording an early point in the speech process, but the act alone is also expressive conduct protected under the First Amendment.

B. The Government Does Not Have an Interest in Protecting Conversational Privacy When Police Officers are Performing Their Duties in Public and Police-Citizen Communication is Audible to Individuals that Witness the Events.

There is no reasonable right to privacy in the contents of a conversation between a citizen and a police officer who is carrying out his duties in public spaces. Even in his dissent in *Alvarez*, Judge Posner acknowledged that police officers do not have an expectation of privacy carrying out their duties in public. *Alvarez*, 679 F.3d at 613 (Posner, J., dissenting). Recognizing such a constitutional privacy interest would be contrary to the Court's unambiguous pronouncement in *Katz v. United States*, that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." 389 U.S. 347, 351-52 (1967).

Moreover, it is not only that officers have a diminished expectation of privacy acting in public, but also that citizens communicating with officers in public likewise lack a reasonable expectation of privacy. That is, an individual communicating with an officer in his official capacity can reasonably expect that the contents of the conversation may be disclosed publicly by the officer at some point or in some manner. *Id.* at 351-52. Additionally, the fact that the communication between the officer and citizen is occurring in public and may be overheard by bystanders destroys any reasonable expectation of privacy. *See Alvarez*, 679 F.3d at 605-06

(concluding privacy interests are not at issue and there is no reasonable expectation of privacy when the recording of police officers performing their duties takes place in public places and the communication is at a volume audible to bystanders). Therefore, the government does not have an interest in protecting conversational privacy when police officers are performing their duties in public and are interacting with individuals in public places where their communications are audible to persons witnessing the event.

Although courts in public proceeding cases have identified government interests that occasionally weigh against videotaping, these cases are inapposite because these cases do not involve restrictions on expressive activity in a "traditional public forum" such as on the street or in a public park. *See Rice v. Kemper*, 374 F.3d 675, 678 (8th Cir. 2004) (holding no right to videotape an execution); *United States v. Kerley*, 753 F.2d 617, 621 (7th Cir. 1985) (recognizing the exclusion of cameras from the federal courtroom is constitutional). Courts that have upheld prohibitions against recording public proceedings have found that such restrictions do not substantially interfere with the public's ability to otherwise obtain information regarding the proceedings. *See, e.g.*, *Kerley*, 753 F.2d at 621-22. However, simply put, the governmental interests and concerns identified in these public proceeding cases do not exist on the streets and other unconfined areas that "have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). As such, communication between police and citizens occurring in traditional public places implicates neither expectations of privacy nor governmental concerns present in public proceeding cases.

C. Restricting Citizen Recording of Police Acting in Public Does Not Serve the Public Interest, But Instead Limits Governmental Accountability by Restricting the Free Flow of Information that is of Great Public Concern.

Citizens have a First Amendment right to record public police activity because the behavior of police is a matter of great public concern. Police officers are vested with the power to use force and deprive individuals of their freedom. While police generally act or at least attempt to act lawfully, situations where police abuse their vested authority carries a significant potential for harm. Indeed, the Court has noted that "[f]reedom of expression has particular significance with respect to government" especially law enforcement officials "who are granted substantial discretion that may be misused to deprive individuals of their liberties." *First Nat'l Bank*, 435 U.S. at 777 n. 11; *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035-36 (1991).

As a result, the Court has consistently emphasized the "paramount public interest in a free flow of information to the people concerning public officials, their servants." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964). Governmental accountability mandates uninhibited, truthful public discussion about those executing the government's laws and exercising its powers. *See First Nat'l Bank*, 435 U.S. at 767 ("The freedom of speech and press "embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."). Therefore, the free flow of information that concerns government misconduct or wrongdoing receives special protection as a core value of the First Amendment. *Gentile*, 501 U.S. at 1034-35 (noting heightened protection for "dissemination of information relating to alleged government misconduct" and recognizing the public's interest in responsible exercise of police discretion).

Ensuring the public's right to gather information will aid in uncovering abuse and may have a salutary effect on the functioning of government. *See Glik*, 655 F.3d at 82. Moreover, citizen recording of public police conduct ensures police accountability and encourages police to behave professionally and constitutionally when exercising their authority in public. Today's

modern technology has lead to a substantial portion of our news coming from bystanders with a cell phone or digital recording device and then dissemination of the captured material through social media. Furthermore, digital recordings have become essential evidence admissible in trials and have been utilized in a way to keep police honest. To be sure, it is a natural inclination to believe a police officer's testimony about events rather than that of the suspect he is pursuing. Thus, citizen recording of police behavior not only provides incentives for officers to tell the truth, but also allows for misconduct to be exposed.

This is certainly not to say that recording of police is without appropriate limits. For example, individuals cannot intrude into private places in derogation of other laws intended to protect privacy interests such as trespassing and property laws. *See Glik*, 655 F.3d at 83 (quoting *Iacobucci*, 193 F.3d at 18) (the exercise of First Amendment rights must be "peaceful [and] not performed in derogation of any law."). These already established legal limits adequately serve governmental interests. Limitations on gathering and disseminating information concerning public police conduct, which is of great public concern, are contrary to the First Amendment and are not the proper vehicle for protecting governmental interests that can be accomplished by less restrictive means.

The fact that the person recording public police conduct is a private citizen is insignificant. As the Court has noted, the First Amendment Right to gather news is "not one that inures solely to the benefit of the news media; rather, the public's right of access to information is coextensive with that of the press. *Id.* at 83-84 (citing *Houchins*, 438 U.S. at 16 (Stewart, J., concurring) (the Constitution "assure[s] the public and the press equal access once government has opened its doors."). Because modern electronics capable of capturing video have become important instruments in how we receive news and information, the lines between private

citizens and credentialed news reporters have become exceedingly difficult to draw. Today our society is just as likely to receive news captured by bystanders through social media sites, as it is to consume the news obtained by a traditional film crew. Therefore, "[s]uch developments make clear why the news-gathering protections of the First Amendment cannot turn on professional credentials or status." *Id.* at 84.

Courts that have found a First Amendment right to record police action in public ground their decisions on Supreme Court precedent that grants First Amendment protection to newsgathering and dissemination of information as well as precedent from other circuits which have found a First Amendment right to record matters of public interest. Not only does a blanket restriction against citizens recording public police conduct infringe upon the First Amendment right to gather and disseminate news, the act of recording itself is expressive conduct subject to protection. *See Alvarez*, 679 F.3d at 595; *Citizens United*, 558 U.S. at 339; Alderman, *Before You Press Record: Unanswered Questions Surrounding the First Amendment Right to Film Public Police Activity*, 33 N. Ill. U. L. Rev. 485, 510 (2013). As the Court has noted, "[i]n the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon . . . [governmental power and authority] lie in an enlightened citizenry—in an informed and critical public opinion which can here protect the values of democratic government." *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., Concurring). Therefore, the free flow of information, including recording and dissemination of information regarding public officials performing their duties in public is essential to an enlightened citizenry that can critically hold the government accountable for its actions.

D. As Applied to this Case, the Craven Statute is Unconstitutional.

Craven Gen. Stat. § 15A-287 violates Lockwood's 1st Amendment right to record police officers in public because the statue restricts more speech than is necessary to protect privacy interests, and is therefore unconstitutional as drafted. Police officers as governmental officials performing their duties in a public area, where their actions were perceivable to everyone who passed by, cannot reasonably claim an expectation of privacy and thus, harm from being recorded. Since Lockwood recorded the public police activity in a peaceful way from a distance so as not to interfere with the officers' performance of their duties, these actions cannot constitutionally be subject to limitation.

Additionally, the statute infringes upon a medium of expression, and thus, restricts an integral step in the speech process. Furthermore, the statute is overly broad in prohibiting *all* recordings of non-consenting persons. Such a far-reaching rule would mean that any time an individual makes a public video of himself, for example, he would have to chase down all passersby that entered the background of his video before he could lawfully share the video on social networking sites. This is illogical and has no place in our modern technological world. Specific to recordings of public police activity, absent the raw video of bystanders that have witnessed police brutality and misconduct, we would have been robbed of our opportunity to uncover serious injustices that have recently occurred in our society. Therefore, as applied in the present case, the Craven statute interferes with an individual's First Amendment right to gather and disseminate information concerning government officials performing their duties in public, and is overly broad in its endeavor to serve the governmental interest in protecting conversational privacy, which necessarily renders the statute unconstitutional. A contrary holding would simply be divorced from the technological realities of our society.

CONCLUSION

For the aforementioned reasons, Respondent respectfully requests that this Honorable Court affirm the decision of the Court of Appeals denying summary judgment to Officer Piper on both the First and Fourth Amendment claims.

Respectfully submitted,

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