

No. 15-12345

IN THE
Supreme Court of the United States

OCTOBER 2015

HUEY LYTTLE,

Petitioner,

v.

SYDNEY CAGNEY AND ROBERT LACEY,

Respondents.

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

BRIEF FOR THE RESPONDENTS

WHITNEY HILL
Counsel for Respondents

QUESTIONS PRESENTED

- I. Is there an unrestricted right to record police under the First Amendment?
- II. Does the doctrine of qualified immunity protect the police officers' conduct?

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OPINIONS BELOW

The opinion of the United States District Court for the District of New Normal has not been reported but appears in the record. R. 26-31. The opinion of the United States Court of Appeals for the Fourteenth Circuit is also unreported but appears in the record. R. 34-36.

STATEMENT OF JURISDICTION

The court of appeals issued its opinion and judgment on June 5, 2015. R. 36. Petitioner filed his petition for writ of certiorari on July 5, 2015. R. 37. This Court granted the petition on October 15, 2015. R. 38. This Court's jurisdiction rests on 28 U.S.C. § 1254(1) (2012).

STANDARD OF REVIEW

A district court's fact findings and the reasonable inferences to be drawn from them are reviewed for clear error. Its legal conclusions are reviewed *de novo*.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

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. I

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

On the morning of August 18, 2013, a string of residential break-ins occurred in Thisis, New Normal. R. 13. Police Sergeant Sydney Cagney and Officer Robert Lacey were on duty stationed on a corner near the area where the break-ins had occurred to observe for suspicious criminal activity and look for the suspects. R. 13. Sergeant Cagney received a description of the suspects: three men around the age of 20-25, one with long brown hair, and the others with short blonde hair. R. 13.

Approximately four hours after arriving at their post, Sergeant Cagney and Officer Lacey observed three men on bicycles who resembled the suspects. R. 13, 15. Sergeant Cagney believed the men could have been the suspects of the break-ins. R. 13. Officer Lacey observed one of the men's bicycles did not appear to be in compliance with the New Normal Vehicle Code. R. 15. Sergeant Cagney and Officer Lacey initiated a traffic stop. R. 14-15. Officer Lacey noticed one of the men, Huey Lyttle, Petitioner in this case, was recording the encounter with his cellular phone. R. 15. Due to inherent safety concerns during traffic stops and because the men were potential suspects, Sergeant Cagney asked Mr. Lyttle to stop recording. R. 14. Mr. Lyttle complied. R. 14. After approximately 10-15 minutes of questioning, Sergeant Cagney determined the men's alibis were legitimate. R. 14. Sergeant Cagney issued a civil infraction to the man whose bicycle did not comply with the New Normal Vehicle Code, and all three men were allowed to leave. R. 11, 14.

Upon returning home, Mr. Lyttle discovered his GoPro camera had captured a video recording of the interaction with Sergeant Cagney and Officer Lacey. R. 11. On August 20, 2013, Mr. Lyttle posted the footage on his website. R. 11. Local media then linked to the video.

R. 11. On August 25, 2013, the Head of the Thisis Police Department, Jim Walsh, became aware of the news stories online, accompanied by Mr. Lyttle's video recording, which denigrated the entire department. R. 14. Chief Walsh instructed Sergeant Cagney and Officer Lacey to obtain and execute a warrant for the retrieval of any materials related to Mr. Lyttle's filming, recording, and dissemination of the video recording. R. 14. Sergeant Cagney and Officer Lacey, accompanied by two additional officers, arrived at Mr. Lyttle's residence. R. 14. Approximately one hour later, Officer Lacey placed Mr. Lyttle under arrest and charged him with one count of violating New Normal Statute § 943.03. R. 14. Pursuant to the warrant, Sergeant Cagney and Officer Lacey removed one computer hard drive and two GoPro cameras from Mr. Lyttle's bedroom. R. 14.

B. PROCEDURAL BACKGROUND

Mr. Lyttle brought a civil action under 42 U.S.C. § 1983 against Sergeant Cagney and Officer Lacey asserting two violations of his First Amendment rights. R. 2. Sergeant Cagney and Officer Lacey moved for summary judgment asserting there were no genuine issues of material fact, Mr. Lyttle was not entitled to a Constitutional right to record the interaction as no such unrestricted right exists under the First Amendment, and Sergeant Cagney and Officer Lacey were protected under qualified immunity. R. 17-19. The New Normal District Court granted the motion for summary judgment, finding the right to record may be limited by police officers if the purposes for such limitation are objectively reasonable. R. 31. Mr. Lyttle appealed the judgment of the district court. R. 32. The Fourteenth Circuit Court of Appeals affirmed the judgment of the district court, finding there is not an unrestricted right to record police activity, and, furthermore, Sergeant Cagney and Officer Lacey are entitled to qualified immunity. R. 36. This Court granted certiorari. R. 38.

SUMMARY OF THE ARGUMENT

I.

There is not an unrestricted right to record police activity under the First Amendment. The right to record police activity is subject to reasonable time, place, and manner restrictions. Due to inherent safety concerns involved in traffic stops, a higher degree of restriction by the officer is allowed when the restriction is content neutral, narrowly tailored, and allows alternative means of communicating the content of expression. Sergeant Cagney's restriction of Mr. Lyttle's recording was narrowly tailored to the context of the traffic stop and was content neutral because the restriction was requested due to safety concerns, not to limit the content of the recording. Mr. Lyttle also had other options of communicating the content of expression, such as writing about the incident in his blog. Therefore, Sergeant Cagney's restriction of Mr. Lyttle's recording qualified as a reasonable time, place, and manner restriction.

II.

Qualified immunity applies when a right was violated and that right was clearly established at the time of the incident. The lower courts properly found Sergeant Cagney's restriction did not violate Mr. Lyttle's First Amendment rights. However, even if this Court finds Mr. Lyttle had a right to record his interaction with the police, the right to record was not clearly established at the time of the incident. The split among the circuits regarding the recording of police activity, coupled with the fact this question has not been decided by this Court or the Fourteenth Circuit prior to this case, proves the right to record police activity under the same or similar circumstances was not clearly established in this jurisdiction at the time of the incident. Therefore, Sergeant Cagney and Officer Lacey are protected by qualified immunity, and the lower courts properly granted their motion for summary judgment.

ARGUMENT

I. THE LOWER COURTS PROPERLY FOUND SERGEANT CAGNEY AND OFFICER LACEY WERE ENTITLED TO SUBJECT MR. LYTTLE'S RECORDING TO REASONABLE TIME, PLACE, AND MANNER RESTRICTIONS.

The First Amendment to the Constitution provides protection for freedom of speech and freedom of the press. *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011). The freedom of the press encompasses the gathering of news. *Id.* This protection is not limited to professional journalists and news reporters; it extends to private individuals who gather news from any source by means within the law. *Id.* at 82-83. Individuals have a right to record government officials, including police officers, performing their official duties. *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). However, this right is not unrestricted. *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010).

The courts recognize that recording police activity in a public forum will generally fall within the protection of the First Amendment. *See Glik*, 655 F.3d at 84; *Kelly*, 622 F.3d at 262. However, even in a public forum restrictions may be imposed. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). In order to determine if an imposed restriction qualifies as an allowed restriction, the court evaluates three elements: whether the restriction is content-neutral or content-based; whether the restriction is narrowly tailored to serve a significant government interest; and whether there are alternative means for communicating the content of expression that was restricted. *Am. Civ. Liberties Union v. Alvarez*, 679 F.3d 583, 605 (7th Cir. 2012); *Clark*, 468 U.S. at 293.

A. SERGEANT CAGNEY'S RESTRICTION WAS CONTENT NEUTRAL BECAUSE IT WAS NOT RELATED TO THE CONTENT OF EXPRESSION.

A First Amendment restriction may be either content-neutral or content-based. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1987). For a restriction to qualify

as a reasonable time, place, and manner restriction, it must first be classified as content neutral. *Alvarez*, 679 F.3d at 605. If the restriction does not target any particular message, idea, or subject matter, or if the restriction serves a purpose unrelated to the content of expression, it is classified as content neutral. *See id.* at 603 (eavesdropping statute not targeted at any particular message, idea, or subject matter held content neutral); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (sound-amplification guideline not based on type of music held content neutral). Content neutral restrictions are those justified without reference to the content of expression; however, restrictions justified with reference to the content of expression are content based. *Boos v. Barry*, 485 U.S. 312, 320 (1988) (display clause limiting speech criticizing foreign governments justified by direct impact of speech on public held content based). If the restriction is employed because of an agreement or disagreement with the message the speech conveys, it is classified as content based. *Alvarez*, 679 F.3d at 603 (laws that distinguish favored speech from disfavored speech based on views expressed held content based).

Sergeant Cagney's restriction was content neutral. Sergeant Cagney did not restrict the recording because of the content being recorded. R. 14. The restriction did not target any particular message, idea, or subject matter. *See Boos*, 485 U.S. at 320. It may appear the restriction was content based because it was related in a general way to the content of expression: the entirety of the interaction between Sergeant Cagney, Officer Lacey, Mr. Lyttle, and Mr. Lyttle's two companions. However, the content of expression being recorded during the traffic stop was the conversations between the officers and the men. Sergeant Cagney's restriction was not related to the conversations he and Officer Lacey were having with Mr. Lyttle and his two companions. R. 14. Sergeant Cagney's restriction was related to the safety concerns inherent in the traffic stop. R. 14. Therefore, Sergeant Cagney's restriction was content neutral because the

justification for the restriction was made without reference to the content of expression. *See Boos*, 485 U.S. at 320.

B. SERGEANT CAGNEY’S RESTRICTION WAS NARROWLY TAILORED TO SERVE THE SIGNIFICANT GOVERNMENT INTEREST OF REDUCING THE RISK OF DANGER INHERENT IN TRAFFIC STOPS.

A content neutral restriction must also be narrowly tailored to serve a significant government interest to qualify as a reasonable time, place, and manner restriction. *Perry*, 460 U.S. at 45. The state and federal governments have a significant interest in keeping their citizens safe, police officers and civilians alike. *See Arizona v. Johnson*, 555 U.S. 323, 330 (2009). Police officers routinely encounter potentially dangerous circumstances in the course of their official duties. This Court has recognized traffic stops in particular as inherently dangerous situations “especially fraught with danger” to police officers. *Id.* This Court has explained the government’s interest in officer safety is “legitimate and weighty.” *Id.* at 331. This Court has stressed the risk of harm to all parties involved is minimized when the police officers “routinely exercise unquestioned command” of the encounter. *Id.*

This complaint arose when Sergeant Cagney requested that Mr. Lyttle stop recording during the traffic stop. R. 2. Sergeant Cagney and Officer Lacey executed a valid traffic stop, evidenced by the uncontested civil infraction issued by Sergeant Cagney for the bicycle which did not conform to the New Normal Vehicle Code. R. 15. Mr. Lyttle seized partial control from Sergeant Cagney and Officer Lacey when he began recording during the traffic stop. The lower courts properly found that Mr. Lyttle’s recording interrupted Sergeant Cagney’s and Officer Lacey’s efforts to perform their official duties, served as a distraction, and therefore increased the potential danger to the officers, the men involved in the traffic stop, and bystanders. R. 29, 35-36. For Sergeant Cagney and Officer Lacey to regain unquestioned command of the

situation, it was vital Mr. Lyttle cease his recording. Therefore, the restriction was necessary to serve a significant interest of the state: keeping its citizens safe during a police interaction. *See Arizona*, 555 U.S. at 331.

The facts surrounding this incident are not completely synonymous with those of a traditional traffic stop: Mr. Lyttle and his two companions were not in an automobile, and therefore Sergeant Cagney and Officer Lacey were able to fully observe the three men and the items they openly possessed. R. 2. However, Sergeant Cagney and Officer Lacey believed the men were potential criminal suspects of the break-ins earlier that day. R. 15. Even though Sergeant Cagney and Officer Lacey could fully observe the men and the items they openly possessed, the traffic stop occurred several hours after the break-ins. R. 15. This would have given the men ample time to stash their tools and stolen items had they been the perpetrators. Furthermore, Sergeant Cagney and Officer Lacey did not conduct a search of Mr. Lyttle or his companions. Therefore, Sergeant Cagney and Officer Lacey did not know whether or not any or all of the men had concealed weapons. This uncertainty, coupled with the fact the men were potential criminal suspects, raised the necessity of Sergeant Cagney and Officer Lacey to command unquestioned control over the situation. *See Kelly*, 622 F.3d at 262-63. Sergeant Cagney employed the most diplomatic course available to reestablish unquestioned command by requesting that Mr. Lyttle stop recording. R. 15. After Mr. Lyttle complied, neither Sergeant Cagney nor Officer Lacey pursued the subject further and allowed the men to leave after issuing the infraction for the noncompliant bicycle. R. 15. Therefore, Sergeant Cagney's restriction was narrowly tailored to the context of the traffic stop to serve the significant government interest of keeping officers and civilians safe during traffic stops. *See Arizona*, 555 U.S. at 331.

While it is true that recording police officers in the course of their official duties is not always subject to reasonable time, place, and manner restrictions, the cases in which courts have allowed such unrestricted recordings were those filmed by bystanders to the police encounter, not individuals involved in the encounter. *See Glik*, 655 F.3d at 84. *But see Kelly*, 622 F.3d at 261-62. In *Glik*, the plaintiff used his cellular phone to record the police arresting a third party in Boston Common. 655 F.3d at 79-80. The plaintiff was standing approximately ten away from the police officers when he was recording the encounter. *Id.* at 80. The plaintiff did not approach the officers and did not communicate with them except for responding when addressed. *Id.* The court held a bystander's recording of an arrest that did not interfere with the officers' performance of official duties was not subject to limitation. *Id.* at 84. In *Kelly*, the plaintiff was riding as a passenger in an automobile when the driver was stopped by a police officer for a moving violation. 622 F.3d at 251. The plaintiff recorded the traffic stop using a hand-held video camera which he held in his lap. *Id.* The court explained the cases which established the right to record police encounters were "insufficiently analogous" to the facts of *Kelly* as those cases did not concern recordings by individuals involved in a traffic stop. *Id.* at 261-63. The court found the right to record police officers during a traffic stop was not clearly established at the time of the incident. *Id.* at 263.

As discussed above, the encounter giving rise to this case did not have all the elements of a traditional traffic stop. R. 2. Even though Mr. Lyttle was not a party to a traditional traffic stop, he was not a bystander. Mr. Lyttle was involved in the encounter with Sergeant Cagney and Officer Lacey. R. 11. Mr. Lyttle was identified as a potential suspect to the break-ins earlier that day. R. 8. Sergeant Cagney and Officer Lacey questioned Mr. Lyttle to establish his whereabouts at the time of the prior break-ins. R. 14. Even though Mr. Lyttle was not in an

automobile at the time of the encounter as expected in a traditional stop, he was an involved party and not a bystander. R. 11. Therefore, Sergeant Cagney and Officer Lacey were entitled to reasonably restrict Mr. Lyttle's recording regardless of whether the encounter is classified as a traffic stop or not. As discussed above, Sergeant Cagney's restriction was narrowly tailored to the context of the encounter to serve the significant government interest in officer and civilian safety. *See Arizona*, 555 U.S. at 331.

C. SERGEANT CAGNEY'S RESTRICTION ALLOWED FOR ALTERNATIVE MEANS OF COMMUNICATING THE CONTENT OF EXPRESSION THAT HE RESTRICTED.

In addition to being narrowly tailored, a content neutral restriction must allow for alternative means of communicating the content of expression that was restricted to qualify as a reasonable time, place, and manner restriction. *See Ward*, 491 U.S. at 791; *Perry*, 460 U.S. at 45. Although Mr. Lyttle's recording of the encounter was restricted and subject to confiscation under the warrant, he had numerous other options to communicate the content of expression. Mr. Lyttle was not restricted from writing a blog, disseminating writings, recording and posting a video speaking about the encounter, or otherwise producing or publishing media recounting the events of the encounter. Therefore, Sergeant Cagney's restriction allowed for alternative means of communicating the content of expression he restricted. *See Whiteland Woods, L.P. v. Township of W. Whiteland*, 193 F.3d 177, 183-84 (3d Cir. 1999) (upholding ban on video recording when alternative methods of compiling accurate record were not prohibited).

Sergeant Cagney's restriction of Mr. Lyttle's recording was content neutral, narrowly tailored to serve a significant government interest, and allowed for alternative means of communicating the content of expression. As such, this Court should affirm the lower courts' holding that Sergeant Cagney's restriction qualified as a reasonable time, place, and manner restriction and therefore did not violate Mr. Lyttle's First Amendment rights.

II. THE LOWER COURT PROPERLY FOUND SERGEANT CAGNEY AND OFFICER LACEY WERE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE UNRESTRICTED RIGHT TO RECORD POLICE ACTIVITY WAS NOT CLEARLY ESTABLISHED.

The doctrine of qualified immunity protects government officials, including police officers, from liability for civil damages by entitling the official to immunity from suit, provided the official's conduct did not violate a clearly established constitutional right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The qualified immunity defense is recognized to protect police officers who are required to exercise their discretion and advance the public interest in encouraging the “vigorous exercise” of official authority. *Harlow*, 457 U.S. at 807. Qualified immunity is applied to allow for reasonable mistakes in judgment by protecting a police officer unless it is obvious that any competent officer would have known the actions taken were unlawful. *Crawford v. Geiger*, ___F. Supp. 3d___, No. 3:13CV1833, 2015 U.S. Dist. LEXIS 126538, *15 (N.D. Ohio, 2015). Qualified immunity is only withheld when a police officer is “plainly incompetent” or “knowingly violates the law.” *Id.* Defendants do not have the burden of proving they are entitled to qualified immunity; rather, the plaintiff bears the burden of proof to show the defendants are not entitled to qualified immunity. *Id.*

To defeat a claim of qualified immunity, the plaintiff must prove two elements: a constitutional right was violated, and that right was clearly established at the time of the incident. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011); *Crawford*, 2015 U.S. Dist. LEXIS 126538 at *15. The plaintiff fails to carry the burden if either element is not proven. *Crawford*, 2015 U.S. Dist. LEXIS 126538 at *15-16. This Court has established that lower courts have discretion to decide which of the two factors to evaluate first. *Pearson v. Callahan*, 555 U.S. 223, 242 (2009).

A. THE UNRESTRICTED RIGHT TO RECORD POLICE ACTIVITY WAS NOT CLEARLY ESTABLISHED AT THE TIME OF THE INCIDENT.

Qualified immunity applies when the right allegedly violated was “clearly established” at the time of the incident. *Ashcroft*, 563 U.S. at 741. A police officer violates a clearly established right when the “contours of a right” are sufficiently clear so that every reasonable officer would have known her conduct violated that right at the time of the incident. *Id.* To defeat qualified immunity, the contours of the right allegedly violated must have been “so conclusively drawn” at the time of the incident as to leave no doubt that the police officer’s action was unconstitutional. *Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999). This Court has repeatedly told courts that clearly established law is not to be defined at a “high level of generality.” *Ashcroft*, 536 U.S. at 742. The plaintiff must prove the right was clearly established in a “particularized sense” such that a reasonable officer in the same situation would know that her action violated that right. *See Crawford*, 2015 U.S. Lexis 126538 at *16. Therefore, to carry his burden in this case, Mr. Lyttle must prove the unrestricted right to record police activity by a party involved in a traffic stop was clearly established at the time of the incident. This Court has held a case that is factually analogous is not required; however, the existing precedent must have placed the constitutional question beyond debate. *Ashcroft*, 563 U.S. at 741.

Mr. Lyttle cannot meet this burden. In this case, there is no factually analogous precedent from this Court or the Fourteenth Circuit. R. 30. Existing precedent from various other jurisdictions is split. For example, in its 2000 decision of *Smith*, the Eleventh Circuit held the right to record police activity was subject to reasonable time, place, and manner restrictions. *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). Similarly, in its 2010 decision of *Kelly*, the Third Circuit held the recording of a traffic stop by an involved party was subject to reasonable time, place, and manner restrictions. *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262

(3d Cir. 2010). However, in its 2011 decision of *Glik*, the First Circuit distinguished *Kelly* and held that although the right to record police activity is subject to reasonable time, place, and manner restrictions, the recording of police activity by a bystander was not reasonably subject to restriction. *Glik v. Cunniffe*, 655 F.3d 78, 84-85 (1st Cir. 2011). These cases prove that so far as a right to record police activity is recognized, the courts agree that the right is subject to reasonable time, place, and manner restrictions, and whether such restriction is reasonable is contingent on the specific facts of the case. *See id.*; *Kelly*, 622 F.3d at 262; *Smith*, 212 F.3d at 1333. Although the absence of factually analogous precedent does not prevent the denial of qualified immunity, in this case the question of whether recording police activity during a traffic stop is reasonably subject to restriction is so unsettled that no reasonable police officer in this jurisdiction would have known her restriction of Mr. Lyttle's recording could have violated a protected First Amendment right. *See Edwards*, 178 F.3d at 250-51.

This Court has recognized that if the law at the time of the alleged violation was not clearly established, a police officer could not reasonably be expected to anticipate subsequent legal developments and would therefore be entitled to qualified immunity. *Harlow*, 457 U.S. at 819. However, even precedent in other circuits decided after the incident in this case has not clearly established the law regarding the right to record police activity. *See Crawford*, 2015 U.S. Dist. LEXIS 126538 at *19-21. If the right to record police activity was not clearly established at the time *Crawford* was decided on September 22, 2015, it follows that the right was not clearly established at the time of the incident in this case, which occurred on August 18, 2013. R. 13; *see Crawford*, 2015 U.S. Dist. LEXIS 126538 at *19-21.

Qualified immunity is applied to protect officials who make reasonable but mistaken judgments about legal questions which have not been settled. *See Ashcroft*, 563 U.S. at 743.

Qualified immunity will not extend to protect the clearly incompetent or those who knowingly violate the law. *Crawford*, 2015 U.S. Dist. 126538 at *15. Mr. Lyttle has failed to allege facts and precedent that would indicate Sergeant Cagney's restriction was clearly incompetent. Furthermore, there is nothing in the record to indicate Sergeant Cagney knowingly violated the law. Due to the lack of factually analogous precedent and split in circuit decisions which have addressed the constitutionality of recording police activity, the law was not clearly established at the time of the incident. *See id* at *19-20. Therefore, because Mr. Lyttle cannot meet his burden of proof, Sergeant Cagney and Officer Lacey are entitled to qualified immunity. *See id*.

B. THERE IS NOT AN UNRESTRICTED FIRST AMENDMENT RIGHT TO RECORD POLICE ACTIVITY.

As discussed above, there is not an unrestricted First Amendment right to record police activity; such recordings are subject to reasonable time, place, and manner restrictions. *Kelly*, 622 F.3d at 262. Because Sergeant Cagney's restriction was content neutral, narrowly tailored, and allowed for alternative means of communicating the content of expression, the restriction qualified as a reasonable time, place, and manner restriction. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The district court properly found Sergeant Cagney's restriction of Mr. Lyttle's recording was reasonable and did not violate Mr. Lyttle's First Amendment rights. R. 30. On appeal, the Fourteenth Circuit explained an unrestricted right to record police activity was not recognized in that jurisdiction. R. 36. The appellate court properly affirmed the holding of the district court and also held Sergeant Cagney and Officer Lacey are entitled to qualified immunity. R. 36.

Even if this Court finds Mr. Lyttle had a right to record his interaction with the police, Sergeant Cagney and Officer Lacey are still entitled to qualified immunity because the dispositive question is whether that right was clearly established at the time of the incident. *See*

Crawford, 2015 U.S. Dist. LEXIS 2015 at *15. As discussed above, Mr. Lyttle cannot meet this burden. As such, this Court should affirm the lower court's decision finding Sergeant Cagney and Officer Lacey are entitled to qualified immunity.

CONCLUSION

Sergeant Cagney and Officer Lacey did not violate Mr. Lyttle's First Amendment rights by reasonably restricting his recording and are entitled to qualified immunity. Sergeant Cagney's restriction qualified a reasonable time, place, and manner restriction because it was content neutral, it was narrowly tailored to the context of the traffic stop, and it allowed for alternative means of communicating the content of expression. Sergeant Cagney and Officer Lacey are entitled to qualified immunity because the right of an involved party to record police activity was not clearly established at the time of the incident. Sergeant Cagney was reasonable to believe he had a right to restrict Mr. Lyttle's recording. Therefore, this Court should affirm the lower courts' decisions and hold there is not an unrestricted right to record police activity, Mr. Lyttle's First Amendment rights were not violated, and Sergeant Cagney and Officer Lacey are entitled to qualified immunity.

PRAYER

For these reasons, Respondents pray this Court will affirm the lower courts' decisions finding Respondents were entitled to subject Petitioner's recording to reasonable time, place, and manner restrictions, Respondents did not violate Petitioner's First Amendment rights, and Respondents are entitled to qualified immunity, and grant such other and further relief to which Respondents may be entitled.

CERTIFICATE OF SERVICE

Counsel for Respondents certifies this brief has been prepared and served on all opposing counsel.

Whitney Hill
Counsel for Respondents