No. 17-___

IN THE

Supreme Court of the United States

WENDEE LONG,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals

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PETITION FOR A WRIT OF CERTIORARI

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December 12, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Texas's wiretap statute, like its federal counterpart and numerous other states', criminalizes the recording of communications if the speaker has a legitimate expectation of privacy under the Fourth Amendment. This Court has held that, in making that determination, courts are to consider "people, not places," *Katz v. United States*, 389 U.S. 347, 361 (1967), and "the totality of the circumstances." *Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015). But in this case, in considering whether an adult male high-school basketball coach had a legitimate expectation of privacy when he was coaching teenage girls in a public-school locker room, the Texas Court of Criminal Appeals fixated solely on the coach's location. Did the Court of Criminal Appeals thus decide an important question of federal law in a way that conflicts with the relevant decisions of this Court?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Wendee Long respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

OPINIONS BELOW

The Texas Court of Criminal Appeals's June 28, 2017, opinion affirming Long's conviction is published at — S.W.3d —, PD-0984-15, 2017 WL 2799973, *21, and included as Appendix E. The Texas Court of Criminal Appeals's September 13, 2017, order denying Long's motion for rehearing is unpublished but included as Appendix H.

JURISDICTION

The Texas Court of Criminal Appeals, the highest court of Texas in which a decision could be had, affirmed Long's conviction for unlawful interception of oral communications because it held the complainant had a legitimate expectation of privacy under the Fourth Amendment to the Constitution of the United States. *Long v. State*, — S.W.3d —, PD-0984-15, 2017 WL 2799973, *21 (Tex. Crim. App. 2017); Appendix E. This Court thus has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and

the persons or things to be seized." U.S. Const. amend IV.

STATEMENT OF THE CASE

A. The undisputed facts

The facts of this case are largely undisputed. Lelon Townsend was hired in 2011 to coach the Argyle High School girls' basketball team. *Long v. State*, 469 S.W.3d 304, 306 (Tex. App.—El Paso 2015); Appendix C. Reports of him "berating and belittling" players began surfacing soon after, and Wendee Long—a member of the school board, the mother of a girl who quit the team, and the principal of a middle school in another district—grew increasingly concerned. *Id.*

At the end of the season, the Argyle girls' basketball team traveled to Sanger for the district title. *Id*. Long's daughter attended the game as a spectator, and, with the assistance of a Sanger student, entered the visiting locker room before halftime and taped a recording iPhone to the inside of a locker. *Id*. The iPhone captured audio and video recordings of Townsend's halftime and post-game tirades. *Id*.

Long mailed the recordings to the other members of the Argyle School Board. *Id*. A few days later, however, the superintendent of the Argyle Independent School District turned over the recordings to the police, and the State of Texas then filed an indictment alleging that, by unlawfully intercepting an oral communication, Long violated the state wiretap statute. Tex. Pen. Code § 16.02.

B. Long's trial and the intermediate court of appeals's reversal

Long pleaded not guilty. And at every opportunity during her September 2013 jury trial—in a motion for

a directed verdict, in a motion for a judgment of acquittal, and finally in a motion for new trial—she argued that, as a matter of law, she had committed no crime, because Coach Townsend did not have a legitimate expectation of privacy in his locker-room speeches to his team. *See Long*, 469 S.W.3d at 307. The district court denied the motions, though, and the jury found Long guilty. Appendix A. Long then agreed to a plea bargain by which she would be sentenced to five years' confinement, probated for three years, and fined $1,268. RR6[1]: 7.

Before the intermediate Texas court of appeals, Long again urged that, to have been guilty of unlawfully intercepting or disclosing an oral communication, the State was required to prove that Coach Townsend had a legitimate expectation of privacy under the Fourth Amendment to the United States Constitution. Appendix B; *see Katz v. United States*, 389 U.S. 347 (1967) (establishing reasonable-expectation-of-privacy test). Because Coach Townsend did not, Long committed no crime and the trial court thus erred in overruling her motions for a directed verdict, a judgment of acquittal, and a new trial. Appendix B. Additionally, the evidence was legally insufficient to support the verdict. Appendix B. The court of appeals agreed and entered a judgment of acquittal. *Long*, 469 S.W.3d at 314.

C. The Texas Court of Criminal Appeals's strained affirmance of Long's conviction

The State then appealed to the Texas Court of Criminal Appeals. But the State didn't argue that,

[1] "RR6" refers to the sixth volume of the reporter's record of Long's trial. All other volumes will be referenced in the same manner.

under the Fourth Amendment, Coach Townsend had a legitimate expectation of privacy in his locker-room halftime speech to a high-school girls basketball team. The State abandoned that seemingly hopeless argument. The State resigned itself to arguing that the Fourth Amendment and *Katz* had no place in the analysis. *Long*, 2017 WL 2799973 at *4.

The Court of Criminal Appeals rejected the State's argument. *Id.* at *9. Texas's wiretap statute is modeled after the federal wiretap statute. *Id.* at *8 ("Our legislature adopted essentially the same definition of 'oral communication' used in the federal wiretap statute despite acknowledging the authority and ability to draft a more restrictive definition. This supports the conclusion that our legislature intended the definition of 'oral communication' be read consistently with the almost identical definition of 'oral communication' in the federal wiretap statute."); *see* 18 U.S.C. § 2511. And plainly, the Texas legislature, like the United States Congress, "meant to incorporate the expectation-of-privacy standard" in criminalizing the interception of oral communications. *Id.* at *9. But, sua sponte, the court then considered whether Coach Townsend had a legitimate expectation of privacy. *Id*. at *10. And, over the dissent of three judges, *id.* at *21, and though the court recognized that the Fourth Amendment protects "people, not places," *id*. at *11 (quoting *Katz*, 389 U.S. at 361), the court held that Coach Townsend had a reasonable expectation of privacy solely because he was in a locker room. *Id*. at *21; *see id.* at *23 (Richardson, J., dissenting).

Long filed a motion for rehearing complaining that the court's sua sponte consideration was "acutely unfair." Appendix G (citing *McWilliams v. Dunn*, 137

S. Ct. 1790, 1807 (2017) (Alito, J., dissenting) (describing as "acutely unfair" the Court's disposition based on an issue on which review was not granted)). If the court wished to consider an unraised issue, it should have ordered supplemental briefing. *Id.* The court denied the motion on September 13, 2017. Appendix H.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

Today, nearly everyone, nearly always, carries small, powerful, cameras, capable of transmitting photo and video recordings nearly instantly. *See, e.g., Riley v. California*, 134 S. Ct. 2473, 2484, 2490 (2014) ("modern cell phones . . . are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."). And we embrace that capability. The photo- and video-sharing application Snapchat, alone, counts 178 million daily users. Alex Heath, *The risks and potential upsides of Snapchat's big redesign*, Business Insider (Dec. 3, 2017, 8:00 AM), http://www.businessinsider.com/what-snapchats-big-redesign-means-for-its-future-2017-12.

With this profound transformation, so, too, have changed our expectations of privacy. *See Matter of Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.*, 829 F.3d 197, 201 (2d Cir. 2016) (recognizing "evolving expectations of privacy" in light of technological advancements). The Texas criminal code, like the United States Code, seems to accommodate this, criminalizing the interception of communications only if the speaker has a legitimate expectation of privacy under this Court's traditional Fourth Amendment analysis. *See, e.g.,*

Long, 2017 WL 2799973 at *9 (utilizing *Katz*'s reasonable-expectation-of-privacy test to determine whether speaker had justifiable expectation communication would not be intercepted); *United States v. Peoples*, 250 F.3d 630, 637 (8th Cir. 2001) (same); *United States v. Dunbar*, 553 F.3d 48, 57 (1st Cir. 2009) (same). Indeed, this Court's *Katz* test works precisely because it requires consideration of the totality of the circumstances.

It doesn't work when it's misapplied. The Court of Criminal Appeals, in considering whether Coach Townsend had a reasonable expectation of privacy when coaching teenage girls in a public-school locker room, acknowledged "*Katz* makes clear that the legal question is answered by considering the circumstances in which Coach Townsend gave his speech." *Long*, 2017 WL 2799973 at *12. But the court then determined that Coach Townsend had a reasonable expectation of privacy simply because he was in a locker room. *Id.* at *14-19.

An adult male coach does not necessarily have the same expectation of privacy in a girls' locker room as a teenage girl undressing. The totality of the circumstances, not just the physical space, must be considered. And because this misapplication of *Katz*, if condoned, threatens untold millions with, like Long, being branded as felons, Long urges this Court to grant certiorari, reverse the Court of Criminal Appeals's judgment, and remand this case to that court to properly consider whether Coach Townsend had a legitimate expectation of privacy. *See Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980) (reviewing Kentucky state courts' determination that defendant did not have a reasonable expectation of privacy); Sup. Ct. R. 10(c) (in considering whether to grant a petition for certiorari,

this Court will consider whether a state court has decided an important question of federal law in a way that conflicts with relevant decisions of this Court).

II. DETERMINING UNDER *KATZ* WHETHER A PERSON HAD A REASONABLE EXPECTATION OF PRIVACY

Texas is one of the 49 states to have enacted anti-wiretapping statutes modeled on the federal Wiretap Act. *See* Travis S. Triano*, Who Watches the Watchmen? Big Brother's Use of Wiretap Statutes to Place Civilians in Timeout*, 34 Cardozo L. Rev. 389, 394 (2012). The Texas statutes, like their federal counterparts, criminalize the unlawful interception of "oral communication[s]," defined as "communication[s] uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation." *See* Tex. Pen. Code § 16.02; Tex. Code Crim. Proc. art. 18.20 § 1(2); 18 U.S.C. § 2510(2); *see also Alameda v. State*, 235 S.W.3d 218, 220, 222 (Tex. Crim. App. 2007) (recognizing similarity between state and federal statutes). In considering whether a communication is an "oral communication," Texas courts, like federal courts, consider whether the speaker had a legitimate expectation of privacy under the Fourth Amendment, applying the test first articulated by this Court in *Katz*. *See Long*, 2017 WL 2799973 at *9. Thus, for Long to have been guilty of unlawfully intercepting or disclosing Coach Townsend's tirades, the State was required to prove that Coach Townsend had (1) a subjective expectation of privacy (2) that society is willing to recognize as reasonable. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

In making such a determination, this Court has made clear that the focus is on "people, not places." *Id*.

"[A] given 'area'" cannot itself provide an individual with a reasonable expectation of privacy. *Id.* at 351. For example, the legitimacy of certain privacy expectations may depend upon the individual's legal relationship with the State. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873, 875 (1987)). Or on the content of the speech. *Dorris v. Absher*, 179 F.3d 420 (6th Cir. 1999) (County employees whose office conversations were tape-recorded by office director had both subjective and objectively reasonable expectation of privacy in conversations given frank nature of conversations, in which employees harshly criticized director, and given that conversations, which occurred in single-room office that could not be accessed without employees' knowledge, took place only when no one else was present and stopped when telephone was being used or when someone turned onto gravel road that was only entrance to office.); *see also Long*, 2017 WL 2799973 at *23 (Richardson, J., dissenting) ("The content of [Coach Townsend's] communication is a very significant part of the 'circumstances' surrounding the communication) (Appendix F). Or the manner of speaking. *See Matter of John Doe Trader No. One*, 894 F.2d 240, 245 (7th Cir. 1990) ("Thus, given this background, we are not prepared to conclude that Doe's expectation of privacy in these recorded statements was objectively reasonable. Doe exposed his discussions to those around him and took the risk that his statements would be overheard and recorded. The environment of the trading floor, the presence of the agent and other traders all indicate that a reasonable expectation of privacy did not exist."). One party can have a reasonable expectation of privacy in a certain space, while the party to whom he is speaking cannot. *See Huff v. Spaw*, 794 F.3d 543, 550 (6th Cir. 2015) ("It

is essential to consider the two-part *Katz* test with respect to James Huff and Bertha Huff separately."). In short, what matters is the totality of the circumstances. *See Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015) (citing *Samson v. California*, 547 U.S. 843 (2006); *Vernonia School Dist. 47J*, 515 U.S. 646); *see also O'Connor v. Ortega*, 480 U.S. 709, 718 (1987) (given the great variety of work environments in the public sector, whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis); *Savoy v. United States*, 604 F.3d 929, 935 (6th Cir. 2010) (considering "the totality of the circumstances" when determining whether individual had a reasonable expectation of privacy); *United States v. Castellanos*, 716 F.3d 828, 846 (4th Cir. 2013) (same); *United States v. Stallings*, 28 F.3d 58, 61 n.4 (8th Cir. 1994) (same); *United States v. Aldred*, 19 Fed. Appx. 553, 554 (9th Cir. 2001) (same). "[E]ven in his own home," a person does not have a reasonable expectation of privacy in something he "knowingly exposes to the public." *Katz*, 389 U.S. at 351.

III. THE COURT OF CRIMINAL APPEALS CARED ONLY ABOUT THE PHYSICAL SPACE

The Court of Criminal Appeals paid lip service to these principles. The court acknowledged the Fourth Amendment protects "people, not places," and that "*Katz* makes clear that the legal question is answered by considering the circumstances in which Coach Townsend gave his speech." *Id.* at *11-12. But putting great weight into Justice Harlan's recognition that, determining whether a person has a reasonable expectation of privacy "still require[s] reference to a 'place,'" *Long*, 2017 WL 2799973 at *11 (citing *Katz*, 389 U.S. at 361)), the court fixated on the fact that Coach

Townsend spoke in a locker room, not the actual circumstances of his speeches. *See id.* at *22 (Richardson, J., dissenting) ("the majority places great weight on the fact that Coach Townsend gave his speech to the players in a locker room, emphasizing that locker rooms are private, that Coach Townsend was "legitimately present" in the locker room, and that access to the locker room was restricted.").

The bulk of the court's analysis was devoted to two subjects: whether locker rooms are the equivalent of classrooms, and "historical notions of privacy in locker rooms." *Id.* at *14-19. As to the first, the intermediate court of appeals, in holding that Coach Townsend did not have a reasonable expectation of privacy, noted "[i]t is widely accepted that a public school teacher has no reasonable expectation of privacy in a classroom setting." *Long*, 469 S.W.3d at 308–09 (citing *Roberts v. Houston Indep. Sch. Dist.*, 788 S.W.2d 107 (Tex. App.–Houston [1st Dist.] 1990, writ denied); *Plock v. Bd. of Educ. of Freeport Sch. Dist. No*. 145, 545 F.Supp.2d 755 (N.D.Ill.2007); *Evens v. Super. Ct. of L.A. County*, 77 Cal.App.4th 320, 91 Cal.Rptr.2d 497 (1999)). The court reasoned "a public high school coach—like a public high school teacher—is an educator." *Id.* at 310. "[A] coach provides instruction to help his players reach a certain performance standard in a chosen activity. . . . [and] teaches his players to develop self-discipline, an admirable trait and one necessary for success in most endeavors in life, including academics." *Id.* at 310-11. Coach Townsend, like a teacher, "was providing instructional communications." *Long*, 469 S.W.3d at 313. Indeed, at Long's trial, Townsend acknowledged his role as an educator, and the locker room as his classroom. *Id.* at 311. The court concluded that "[t]hat the instructional communications took

place in a visiting locker room is inconsequential. . . ." *Id.*

The Court of Criminal Appeals rejected the court of appeals's conclusion by distinguishing the physical space. "A Locker Room Is Not a Classroom," the court concluded, because the classrooms in the cases cited by the intermediate court of appeals "were public with no stated restrictions upon access at the time of the communications in question." *Long*, 2017 WL 2799973 at *14-16. The Court concluded that whether Coach Townsend was "teaching" was irrelevant. *Id.* at *16. "[A]n otherwise private environment does not become public simply because the teacher is 'teaching.'" *Id.*

It's not irrelevant. Maybe, in *Katz*, "the content of the communications itself played no role in [this] Court's analysis." *Id.* at *12. But, again, as the Court of Criminal Appeals acknowledged, but then ignored, this Court has made clear that whether a person has a reasonable expectation of privacy is determined by the totality of the circumstances. *See, e.g., Grady*, 135 S. Ct. at 1371; *Samson*, 547 U.S. 843. That Coach Townsend was teaching students is, at least, a consideration. *See Dorris*, 179 F.3d 420 (6th Cir. 1999) (considering content of speech in determining whether speaker had reasonable expectation of privacy); *Medical Lab. Mgmt. Consultants v. Am. Broad. Co., Inc.*, 306 F.3d 806, 814 (9th Cir. 2002) (same); *Aldrich v. Ruano*, 952 F. Supp.2d 295, 302–03 (D. Mass. 2013) (same), *aff'd*, 554 Fed. Appx. 28 (1st Cir. 2014); *see also Long*, 2017 WL 2799973 at *23 (Richardson, J., dissenting) ("The content of his communication is a very significant part of the "circumstances" surrounding the communication."). In *Goodwin v. Moyer*, 549 F.Supp.2d 621 (M.D.Pa.2006), for example, the court held school bus drivers, like teachers, enjoyed a

diminished expectation of privacy because society retains an interest in ensuring that the children and the bus driver alike are protected from "misdeeds" against each other. Similarly, the Wisconsin Supreme Court held in *State v. Duchow* that a verbally abusive school bus driver "had no reasonable expectation in the privacy of his threats and abuse . . . on the school bus" because it "was public property, *being operated for a public purpose*." 310 Wis.2d 1, 26 (2008) (emphasis added). And in this case, as the dissenting Court of Criminal Appeals judges explained:

> This case does not involve the invasion of Coach Townsend's "innermost secrets." He did not "utter words into the mouthpiece" of a telephone. Rather, at the time that Coach Townsend was uttering the words that were recorded, *he was on the job*. [. . . .] Nothing about what was said or how it was said gave any indication that Coach Townsend intended the communication to be private. No game strategy was discussed; no team secrets were revealed.

Long, PD-0984-15, 2017 WL 2799973 at *23 (Richardson, J., dissenting) (emphasis added).

What's more, in so fixating on the physical space, the Court of Criminal Appeals ignored that Long's daughter's video recording shows the only visible set of doors to the "private" locker room *was wide open*. *See id.* at *22 (Richardson, J., dissenting). "[S]tatements that [a man] exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited." *Katz*, 389 U.S. at 361 (Harlan, J., concurring); *see also Matter of John Doe Trader No. One*, 894 F.2d at 245 ("Doe exposed his discussions to those around him and took

the risk that his statements would be overheard and recorded. The environment of the trading floor, the presence of the agent and other traders all indicate that a reasonable expectation of privacy did not exist."). Even were the physical space all-controlling, then, the locker room here was not "an otherwise private area." *Cf. Long*, 2017 WL 2799973 at *14. Like the teacher in *Roberts*, 788 S.W.2d at 111, Coach Townsend "was videotaped in a public classroom, in full view of [his] students, faculty members, and administrators." *Long,* 469 S.W.3d at 309.

The Court of Criminal Appeals's discussion of "historical notions of privacy" in locker rooms similarly ignored the circumstances of this case. The court identified seven cases that guided its conclusion that Coach Townsend had a reasonable expectation of privacy. *Long*, 2017 WL 2799973 at *17-19. In *Vernonia School Dist. 47J*, 515 U.S. at 658, this Court recognized students had an expectation of privacy in bathrooms because of their privacy interests in their "excretory function." In *Brannum v. Overton County School Board*, 516 F.3d 489, 496 (6th Cir. 2008), the Sixth Circuit held students had an expectation of privacy in locker rooms because of their privacy interests in their "unclothed bodies." And five federal district courts have found people had reasonable expectations of privacy in spaces they used to change clothes. *Jones v. Houston Cmty. Coll. Sys.*, 816 F. Supp.2d 418, 434 (S.D. Tex. 2011) ("[Plaintiffs] alleged that they routinely used Room 136 to change clothes and that they locked the door when they did so. Allegations of intimate activities and corresponding efforts to maintain privacy are sufficient to show a subjective expectation of privacy."); *Carter v. Cnty. of Los Angeles*, 770 F.Supp.2d 1042, 1049 (C.D.Cal.2011) ("Here, Plaintiffs undeniably manifested a belief that their actions

were executed in private: they performed various grooming, cleaning, and changing acts reserved for private places."); *Trujillo v. City of Ontario*, 428 F.Supp.2d 1094, 1102 (C.D.Cal.2006) ("Here, Plaintiffs have presented sufficient evidence that they performed activities such as changing clothes and showering in the locker room and had a subjective expectation of privacy to be free from covert video surveillance."); *DeVittorio v. Hall*, 589 F.Supp.2d 247, 257 (S.D.N.Y.2008) ("[G]iven the fact that the room is used for private functions, such as changing clothes, plaintiffs do have a reasonable expectation of privacy from covert video surveillance while in the locker room."); *Avila v. Valentin-Maldonado*, CIV. 06-1285 (RLA), 2008 WL 747076, *12 (D.P.R. 2008) ("However, defendants do concede that some employees would use the room to put on their uniform shirts, uniform belts and gear.").

From these cases, the Court of Criminal Appeals concluded that, "[a]t a minimum, every court that has considered the issue of covert video surveillance within a locker room has recognized that those within the locker room have a reasonable expectation of privacy to be free from such surveillance." *Long*, 2017 WL 2799973 at *19. But in all of those cases, those within the locker rooms were within it to undress. That circumstance is not present in this case, where the locker room was shared by a middle-aged man and teenage girls. This case is different, and it's precisely why, "while the location is an important consideration, it is not the sole consideration." *Long*, 2017 WL 2799973 at *23 (Richardson, J., dissenting).

IV. THE COURT OF CRIMINAL APPEALS'S STRAINED AFFIRMATION OF LONG'S CONVICTION IS BIGGER THAN JUST THIS CASE

The Court of Criminal Appeals could not plausibly reject that the definition of "oral communication" embraced the *Katz* test. But then the court didn't really apply the *Katz* test. Most egregiously, in considering whether Coach Townsend had a reasonable expectation of privacy it focused solely on the physical space in which Coach Townsend spoke. But the court's opinion is full of flaws. In glossing over the other half of the *Katz* analysis, for example, the court concluded "[t]here does not appear to be serious dispute that Coach Townsend harbored [a subjective] expectation that his communication was not subject to interception." *Long*, 2017 WL 2799973 at *10. But, of course, there was no dispute at all—the court sua sponte considered whether Coach Townsend had a legitimate expectation of privacy. Again, the State petitioned the court only on the ground that the *Katz* test was inapplicable. And even still, at the conclusion of Long's brief before the Court of Criminal Appeals she explained, as she had before the intermediate court of appeals, that "this is the rare case where the complainant did not even have an actual subjective expectation of privacy." Appendix D (quoting 40 George E. Dix & John M. Schmolesky, Texas Practice: Criminal Practice And Procedure § 8:24 (3d ed. 2011) ("In practice, concern focuses almost exclusively upon the second of the two requirements distinguished by Justice Harlan – the objective requirement that a defendant's expectation of privacy have been reasonable.")). As noted above, the video recording shows that the door was left wide open, and Coach Townsend testified that it was "not uncommon" or "common" for people to hear

him yelling at his students, that "most of the time" he could overhear the opposing team's coach in the neighboring locker room, and that he "wasn't really caring" if an opposing team overheard him. RR4: 166-167. Coach Townsend further admitted that he was "sure [it was] quite possible" someone could have video recorded his halftime lectures before. RR4: 146. As the three dissenting Court of Criminal Appeals judges recognized, the video of the half-time speech "clearly reflects that Coach Townsend had no expectation of privacy in what he was saying to the team." *Long*, 2017 WL 2799973 at *22 (Richardson, J., dissenting).

Through and through, the Court of Criminal Appeals improperly applied *Katz*. But it's not just important to Long. As noted in the introduction, the amount of recorded communications shared each day is staggering. By further example, on New Year's Eve 2016, users of WhatsApp, a popular messaging service owned by Facebook, shared nearly 2.4 *billion* video recordings. David Cohen, *WhatsApp: 63 Billion Messages on New Year's Eve*, Adweek (Jan. 9, 2017), http://www.adweek.com/digital/whatsapp-63-billion-messages-on-new-years-eve/. Whether these recordings constitute criminal interceptions turns, in large part, on whether the subject has a legitimate expectation of privacy under *Katz*.

It's not difficult to imagine the result if courts misapply *Katz* as concerned only with physical locations. If, like the Texas Court of Criminal Appeals, courts forget that the Fourth Amendment protects "people, not places," *Katz*, 389 U.S. at 361, wide swaths of the population—particularly young people, who are "unable to imagine their lives without [social media]"—risk immediate felony liability. Christina Nguyen, *Monitoring Your Teenagers' Online Activity: Why Consent*

or Disclosure Should Be Required, 15 Seattle J. for Soc. Just. 261, 268 (2016).

This Court should not permit the Court of Criminal Appeals's misapplication to stand. Now, more than ever, it's crucial to consider the totality of the circumstances. *See, e.g., Grady*, 135 S. Ct. at 1371.

CONCLUSION

Because, here, the Texas Court of Criminal Appeals improperly fixated on the physical space in which Coach Townsend was recorded, rather than the totality of the circumstances, in conflict with this Court's opinions in *Katz* and its progeny, Long urges this Court to grant this petition, reverse the judgment of the Court of Criminal Appeals, and remand this case to that court to properly consider the totality of the circumstances. *See* Sup. Ct. R. 10(c).

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December 12, 2017