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STATEMENT OF INTEREST

Amicus curiae Electronic Frontier Foundation is a member-supported, non-profit civil liberties organization that works to protect free speech and privacy in the digital world. Founded in 1990, EFF has over 35,000 members. EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law to technology.

INTRODUCTION

Today, powered by modern cameras, smartphones, and social media “apps,” ordinary people can quickly, easily, and inexpensively record and share all manner of compelling and newsworthy scenes, including those involving first responders. While the Plaintiff in this case is a professional journalist, the resolution of this case will impact the vast number of ordinary citizens who wish to use their digital tools to gather and publish the news. Bystander recordings often contribute to the democratic process by informing the debate on important public policy issues, such as the quality of government’s response to medical emergencies.

But the full benefit of such recordings—whether photos, videos, or audio—is only possible if *making* them is constitutionally protected. The First Amendment clearly protects the right to record the police. *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017). Similarly, this Court should hold that the First Amendment protects not only the sharing, but also the recording of first responders—particularly, of emergency medical services (EMS) personnel. This is because photography and videography are inherently expressive activities. Moreover, recording first responders is a protected form of information gathering about matters of important public concern: unfolding national and local crises, the conduct of those whom the government holds out to the public as trusted helpers in times of great need, and factors that affect the success of these professionals.

ARGUMENT

I. PEOPLE USE POWERFUL TECHNOLOGIES TO RECORD AND SHARE PHOTOS AND VIDEOS

A. Cell Phones Are Ubiquitous and People Use Them to Record Photos and Videos

Mr. Adelman is a professional journalist who used a modern digital camera to record the scene at issue in this case. However, protecting the right to capture images and audio of EMS personnel cannot be limited to those using stand-alone cameras or those who may be considered professional journalists or photographers. Today the widespread adoption of both digital cameras and cell phones means that the right extends not just to a select few individuals, but to every individual who possesses a device capable of taking photos or videos. As the First Circuit explained when upholding the First Amendment right to record the police, “The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper.” *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011).

As Chief Justice Roberts wrote, cell phones in particular 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.” *Riley v. California*, 134 S. Ct. 2473, 2484 (2014). In 2014, 90% of American adults owned a cell phone,¹ including 64% who owned a “smartphone” that provides Internet access.² The number of active mobile communications devices now

¹ Pew Research Center, *Mobile Technology Fact Sheet* (Dec. 27, 2013), <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/>.

² Pew Research Center, *U.S. Smartphone Use in 2015* (April 1, 2015) (“Pew 2015”), <http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/>.

exceeds the number of people on Earth.³ Smartphone owners use their devices for a multitude of activities, including following breaking news (68%) and learning about community events (56%).⁴

Additionally, 60% of smartphone owners used their devices to take a picture or video in the previous month,⁵ while 60% of photographers use their cell phone as their primary photo-taking device.⁶ Such usage is fueled by rapid technological innovation that has yielded sophisticated cell phones that come with advanced cameras and Internet access.⁷ Even “flip phones” that lack Internet access commonly come with a built-in camera.⁸

B. People Share Photos and Videos Using General-Purpose Social Media Apps

The ease by which individuals can take photos and videos while going about their everyday lives is complemented by the ease by which they can share these photos and videos with others. Sixty-seven percent of smartphone owners use their devices to share photos or videos with others and 35% do so frequently.⁹ People often share these images by means of easy-to-use mobile “apps” (*i.e.*, applications) that provide access to social media, including general-purpose social media platforms like Facebook and Twitter.

³ Zachary Davies Boren, *Active Mobile Users Outnumber Humans for the First Time*, Intl. Bus. Times (Oct. 7, 2014), <http://www.ibtimes.co.uk/there-are-more-gadgets-there-are-people-world-1468947>.

⁴ Pew 2015.

⁵ Pew 2015 (within attached PDF of complete report).

⁶ *Press release: Shutterfly research reveals Americans are taking more photos but failing to share memories* (Nov. 13, 2014), <http://ir.shutterfly.com/releasedetail.cfm?releaseid=882839>.

⁷ *The Evolution of Cell Phone Design Between 1983-2009*, Webdesigner Depot (May 22, 2009), <http://www.webdesignerdepot.com/2009/05/the-evolution-of-cell-phone-design-between-1983-2009/>.

⁸ *Top 10 Best Flip Phones 2016*, PhoneRated, <http://www.phonerated.com/top-rated-best-overall-flip-phones-global>.

⁹ Pew 2015.

Both Facebook and Twitter allow users to upload photos and videos previously taken with a smartphone, or to take photos and videos within the apps themselves and post them instantly, making the capture-and-publish process exceedingly fluid. Users may also link to photos and videos hosted on other websites.

When two people agree to be Facebook “friends,” information posted by one automatically appears in the “news feed” of the other, and vice versa.¹⁰ Facebook has 1.94 billion monthly active users¹¹, including nearly 1.6 billion who are active through their mobile devices.¹² Every day, Facebook users post more than 300 million photographs¹³ and view more than 32 billion videos.¹⁴

Twitter is a social media platform that allows users to read and write “tweets,” which are messages no longer than 140 characters.¹⁵ Users may choose to “follow” others and thus receive others’ tweets in their “timeline.”¹⁶ Twitter has over 310 million monthly active users, 82% of whom access Twitter with their mobile devices.¹⁷ Twitter users send more than 300 million tweets each day.¹⁸

Facebook and Twitter also facilitate the cross-posting of content on multiple social media

¹⁰ Facebook, “What’s the difference between following someone and adding a friend?”, <https://www.facebook.com/help/255620881144653?sr=2&query=follow%20my%20friend>.

¹¹ Facebook, “Company Info,” <https://newsroom.fb.com/company-info/>.

¹² Facebook, “Company Info,” <https://newsroom.fb.com/company-info/>.

¹³ Zephoria Digital Marketing, “The Top 20 Valuable Facebook Statistics – Updated May 2017,” <https://zephoria.com/top-15-valuable-facebook-statistics/>.

¹⁴ Mediakix, “The Top 13 Facebook Live Statistics You should Know,” <http://mediakix.com/2017/03/facebook-live-statistics-video-streaming-to-know/#gs.=Gh1sK0>.

¹⁵ Twitter, “New user FAQs,” <https://support.twitter.com/articles/13920#>.

¹⁶ Twitter, “About your Twitter timeline,” <https://support.twitter.com/articles/164083#>.

¹⁷ Twitter, “Twitter usage,” <https://about.twitter.com/company>.

¹⁸ Internet Live Stats “Twitter Usage Statistics,” <http://www.internetlivestats.com/twitter-statistics/>.

platforms. By clicking the Facebook and Twitter buttons embedded in a video on YouTube, a viewer can share the video with all of their friends and followers on both Facebook and Twitter.¹⁹

C. There Are Social Media Apps Dedicated to Sharing Photos and Videos

Some social media apps focus specifically on sharing photos and videos, such as YouTube, Instagram, and Snapchat. As with Facebook and Twitter, users can upload photos and videos from their smartphone's internal storage to these apps, or (particularly with Instagram and Snapchat) take photos and videos within the apps themselves and then instantly share those images.

YouTube allows users to post, watch, comment on, and share videos. Individuals and large production companies alike create content for YouTube. It has over one billion users, who watch hundreds of millions of hours of video every day, with over half of those views coming from mobile devices.²⁰

Instagram allows users to share photos and videos with "followers" or the general public.²¹ It has over 500 million monthly users, who upload over 95 million photos every day.²²

Snapchat has over 166 million daily users who send and watch over 10 billion videos per day.²³ Snapchat enables users to share photos and videos that automatically disappear after one to ten seconds.²⁴ Snapchat also provides less ephemeral ways to share images. Users can post

¹⁹ YouTube, "Options for sharing YouTube videos," <https://support.google.com/youtube/answer/57741?hl=en>.

²⁰ YouTube, "YouTube statistics," <https://www.youtube.com/yt/press/statistics.html>.

²¹ Instagram, "FAQ," <https://www.instagram.com/about/faq/>.

²² Instagram, "Instagram stats," <https://www.instagram.com/press/>.

²³ Snapchat, "Advertising on Snapchat," <https://www.snapchat.com/ads/audiences>.

²⁴ Snapchat, "Snaps," <https://support.snapchat.com/en-US/about/snaps>.

images to their “Story,” which are viewable by any of their friends for 24 hours.²⁵ Alternatively, users can post images to “Live Stories,” which are compilations curated by Snapchat and available to the general public.²⁶ In addition, recipients can save Snapchat images.²⁷

Many other social media platforms enable people to share their photos and videos. Flickr enables users to upload preexisting photos or take in-app photos, and has 112 million photographers.²⁸ Shutterfly, which has about 3 million users, also enables the sharing of uploaded photos.²⁹

Some technologies allow users to record and share images simultaneously. When this is done with video, it is called “live streaming.” Facebook Live enables users to show viewers exactly what they are observing in real time.³⁰ So does Periscope, which is accessible via the Twitter app or as a stand-alone app. Ten million people have Periscope accounts, and people watch a total of 40 years of Periscope live broadcasts every day.³¹

II. PEOPLE RECORD AND SHARE NEWSWORTHY PHOTOS AND VIDEOS ABOUT EMS PERSONNEL

Due to the nature of their work, EMS personnel and other first responders—including police and fire department officials—are present at individuals’ and the nation’s moments of

²⁵ Snapchat, “Snapchat Stories,” <https://support.snapchat.com/en-US/about/stories>.

²⁶ Snapchat, “Snapchat Live Stories,” <https://support.snapchat.com/en-US/about/live-stories>.

²⁷ *Top 6 Apps to Save Snapchat Videos, Images & Stories*, Gadget Raid (Feb. 19, 2016), <http://www.gadgetraid.com/2016/02/save-snapchat-images-photos-videos/>.

²⁸ Jeff Bonforte, *Thank You, Flickr Community!* (June 10, 2015), <http://blog.flickr.net/en/2015/06/10/thank-you-flickr-community/>.

²⁹ Zacks Equity Research, *Is Shutterfly Poised to Grow with Continued Innovations?*, Yahoo! Finance (Aug. 25, 2014), <http://finance.yahoo.com/news/shutterfly-poised-grow-continued-innovations-182322839.html>.

³⁰ Facebook, “Facebook Live,” <https://live.fb.com/>.

³¹ Periscope, “Periscope, by the numbers” (Aug. 12, 2015), <https://medium.com/periscope/periscope-by-the-numbers-6b23dc6a1704#.9ja29il34>.

great distress. As a result, recordings of them at work have shed light on issues of national, and even international, importance. For example, recordings by ordinary people have informed and enriched the public's understanding of the crisis underlying a photo or video, helped identify first responder misconduct and lapses in protocol, and alerted the public to issues that undercut or enhance the effectiveness of the emergency response system.

A. Recordings of EMS Personnel Shed Light on Emergencies

Civilian recordings of first responders played a critical role in helping the public understand the tragic events of September 11, 2001. A civilian who was filming firemen responding to a gas leak caught what some consider to be the only video recording of the first airplane hitting the Twin Towers.³² In following the firefighters into the North Tower, he created what turned out to be some of the most comprehensive on-site footage of the events that day.³³ His footage played an important investigatory and cultural role in the nation's recovery and response: the FBI and New York Fire Department studied it, and journalists relied on it heavily when reporting to the public.³⁴ His recording included footage of 90 firefighters who later died in the towers, and as a result, the families of the deceased were able to obtain invaluable recordings of their loved one's final acts of valor.³⁵ The footage was eventually culled into an Emmy-winning documentary described by one critic as "the closest we may ever come to experience it

³² *Update of '9/11' documentary revisits firefighters ten years later*, PRI's The World (Sept. 8, 2011), <https://www.pri.org/stories/2011-09-08/update-911-documentary-revisits-firefighters-ten-years-later>.

³³ David Friend, *Bond of Brothers*, Vanity Fair (March 2002), <http://www.vanityfair.com/news/2002/03/jules-gedeon-naudet-world-trade-center-film>.

³⁴ *See, e.g.*, Noel Holston, *Documenting 9/11*, Peabody Awards, <http://www.peabodyawards.com/stories/story/documenting-9-11>; Bill Carter, *CBS to Broadcast Videotape Shot Inside Towers During Trade Center Attack*, New York Times (Feb. 6, 2002), <http://www.nytimes.com/2002/02/06/nyregion/cbs-to-broadcast-videotape-shot-inside-towers-during-trade-center-attack.html>.

³⁵ Carter, *supra* note 33.

at first hand.”³⁶ The camera used to capture the footage now sits in the Smithsonian Institution.³⁷

As the nation memorialized the day of monumental tragedy, the *New York Times* reported the rise of a “democratic aesthetic” that relied heavily on images captured not by professional photographers, but by civilians who happened to be present. Images taken by bystanders were some of the “most meaningful,” and exhibitions seeking to capture the events of the day showcased not smooth and professionally captured images, but “shaky video” recorded by bystanders.³⁸

Bystander recordings of first responders at work have also shed light on the nationwide heroin epidemic and the resources available to those struggling with addiction. One bystander’s cellphone recording showed a woman overdosing on a public sidewalk and first responders’ attempts to revive her. An NBC article, reporting on the heroin epidemic and trying to draw attention to a local, underused program created to help people combat opiate addiction, embedded the cellphone video and wrote that it “show[ed] the raw reality of the heroin epidemic.”³⁹ The program’s founder said, “The video is reality. That’s what’s out on the streets of all of our municipalities.”⁴⁰

³⁶ Lisa O’Carroll, *9/11 makers ‘refused to film the dying’*, *The Guardian* (Sept. 12, 2002), <https://www.theguardian.com/media/2002/sep/12/september112001.usnews>; Carter, *supra* note 33.

³⁷ Smithsonian Institution, *September 11: Bearing Witness to History*, <http://amhistory.si.edu/september11/collection/record.asp?ID=65>.

³⁸ Sarah Boxer, *EYEWITNESSES: One Camera, Then Thousands, Indelibly Etching a Day of Loss*, *New York Times* (Sept. 11, 2012), <http://www.nytimes.com/2002/09/11/us/eyewitnesses-one-camera-then-thousands-indelibly-etching-a-day-of-loss.html>.

³⁹ Aundrea Cline-Thomas & Dan Stamm, *Raw Video Shows Heroin Antidote Saving Mother’s Life*, *NBC 10 Philadelphia* (Feb. 12, 2016), <http://www.nbcphiladelphia.com/news/health/Heroin-Overdose-West-Deptford-Narcan-Antidote-Saving-Lives-368592941.html>.

⁴⁰ *Id.*

Civilian recordings of EMS personnel have also called attention to their acts of heroism, and provided important evidence in legal proceedings. A bystander video showed an EMS worker wrestle a knife from a man accused of attempting to murder his daughter-in-law.⁴¹ Another bystander video, showing a man being treated by paramedics after being repeatedly hit with a Taser by police officers, was presented as evidence at the trial of the officers who were charged with the man's death.⁴² After a highway trooper pulled over an ambulance carrying a patient, a bystander's cellphone video captured images and audio of the trooper shouting aggressively at the paramedic and putting him in a chokehold. The video garnered six million views⁴³ and significant public attention,⁴⁴ and the state Public Safety Department Commission subsequently suspended the trooper.⁴⁵

B. Some Recordings of EMS Personnel Reveal Their Misconduct

Civilian recordings have documented unprofessional behavior of EMS personnel and other first responders. Because first responders occupy a special position of trust with respect to the public, breaches of this trust are of significant public concern.

When a police chokehold brought Eric Garner to the ground, a woman pulled out her

⁴¹ Manuel Gamiz Jr., *Cellphone video captures emotions, heroics, tragedy of west Allentown stabbing*, The Morning Call (Feb. 23, 2017), <http://www.mcall.com/news/breaking/mc-allentown-paramedics-stabbing-attempted-homicide-20170223-story.html>.

⁴² Tom Regan, *Jury in Taser murder trial views cellphone video*, WSB-TV 2 Atlanta (Dec. 7, 2016), <http://www.wsbtv.com/news/local/jury-in-taser-murder-trial-views-cellphone-video/474094198>.

⁴³ *Oklahoma Highway Patrol fight with EMT* (uploaded May 26, 2009), <https://www.youtube.com/watch?v=KluItc365hU>.

⁴⁴ *Paramedic: Officer Was In "State of Rage"*, CBS News (June 16, 2009), <http://www.cbsnews.com/news/paramedic-officer-was-in-state-of-rage/>.

⁴⁵ *Trooper suspended 5 days for scuffle with paramedic*, CNN (July 23, 2009), http://www.cnn.com/2009/US/07/23/oklahoma.trooper.suspended/index.html?_s=PM:US#cnnSTCText.

cellphone and video-recorded the ambulance crew's arrival and response to Mr. Garner's condition. News articles published that video in their analysis of the factors that contributed to Mr. Garner's death.⁴⁶ The video showed EMS personnel breaching agency protocols and moving without urgency.⁴⁷ The video prompted further investigation, suspension of the EMS workers involved, and debate about larger issues: proper emergency protocol, EMS workers' intimidation by law enforcement when working in the same setting,⁴⁸ and a growing national awareness of first responders' disparate treatment of minorities.⁴⁹

On another occasion, an ambulance driver was recorded texting and using apps on his phone while driving a patient to the hospital.⁵⁰ The woman who recorded him on her cellphone stated she did so to alert others to his dangerous conduct and to make EMS services safer in the future. When shown the video, the city's fire commissioner stated that he was "disgusted."⁵¹ He

⁴⁶ Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, New York Times (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html>.

⁴⁷ For instance, the video showed that EMS personnel did not immediately put Garner on a stretcher, did not provide him CPR, and carried away the bag of oxygen equipment which could have helped him. Baker *supra* note 45; Andrew Siff, *4 EMS Workers Suspended Without Pay in Chokehold Arrest*, NBC 4 New York (July 21, 2014), <http://www.nbcnewyork.com/news/local/Staten-Island-Chokehold-Arrest-Death-Staten-Island-Eric-Garner-Video-NYPD-267913291.html>; John Annese, *EMTs and paramedics who responded to Eric Garner have been suspended without pay by hospital*, SILive.com (July 21, 2014), http://www.silive.com/news/index.ssf/2014/07/emts_and_paramedics_who_respon.html.

⁴⁸ Benjamin Mueller, *Medical Workers Face Scrutiny After Man's Death in Police Custody*, New York Times (July 21, 2014), https://www.nytimes.com/2014/07/22/nyregion/medical-workers-face-scrutiny-after-mans-death-in-police-custody.html?_r=2; Nathan Stanaway, *What EMS providers can learn from Eric Garner's death*, EMS1.com (Jan. 27, 2015), <https://www.ems1.com/fatal-incidents/articles/2093131-What-EMS-providers-can-learn-from-Eric-Garners-death/>.

⁴⁹ Siff *supra* note 46.

⁵⁰ Chad Pradelli, *Philly Mom: Ambulance Driver Texting While Driving Son*, ABC 6 Philadelphia (Sept. 8, 2015), <http://6abc.com/news/philly-mom-ambulance-driver-texting-while-driving-son/974663/>.

⁵¹ *Id.*

reiterated that such behavior was against department policy and stated action would be taken.⁵²

In another bystander video, first responders handle an unconscious woman roughly. One first responder nudges the woman with his foot, while the other uses his personal cellphone to take pictures of her.⁵³ Following the video's release, a city spokesman announced the city had launched an investigation.⁵⁴

Civilian videos have also documented EMS workers stealing pain medications in the course of assisting a debilitated individual,⁵⁵ EMS workers falsely reporting what procedures they carried out on patients who were unconscious,⁵⁶ and EMS workers mistreating individuals inside ambulances.⁵⁷

C. Recordings of EMS Personnel Shed Light on EMS Policies

Civilian recordings of EMS personnel have contributed to public conversations about EMS policies, including the tools available to EMS personnel and the fatigue sometimes caused by lengthy EMS work shifts.

In reporting on the heroin epidemic, news outlets have used bystander videos to alert the public to the importance of a drug, Narcan, that first responders use to revive overdose victims.

⁵² *Id.*

⁵³ Andrew Knittle, *Photos Lead to Discipline, New Policies in Okla.*, Firehouse (Mar. 9, 2012), <http://www.firehouse.com/news/10654106/photos-lead-to-discipline-new-policies-in-okla>.

⁵⁴ *Id.*

⁵⁵ Kristin Haubrich, *EMT Pleads Guilty To Stealing Pain Meds From Patient*, KKTU 11 Colorado Springs (Mar. 5, 2015), <http://www.kktv.com/home/headlines/Caught-on-Camera-EMT-Allegedly-Steals-Pain-Meds-From-Patient-291489631.html>.

⁵⁶ Martin Wainwright, *Paramedic jailed for lying about failure to resuscitate 30-stone man*, The Guardian (March 5, 2010), <https://www.theguardian.com/uk/2010/mar/05/paramedic-jailed-resuscitate-30-stone>.

⁵⁷ Katie Davis, *NBC 10 I-Team Exclusive: Alleged ambulance assault caught on camera*, NBC 10 Cranston (Aug. 18, 2016), <http://turnto10.com/i-team/nbc-10-i-team-exclusive-alleged-ambulance-assault-caught-on-camera>.

In one bystander video, a woman lies motionless on a sidewalk for minutes and then regains consciousness mere seconds after first responders administer Narcan.⁵⁸ A newscast played the video for viewers and then the anchor said, “The woman in that video was having a heroin overdose. Tonight, she’s alive because of Narcan . . . It’s a drug you may have heard about, but have probably never seen it at work.”⁵⁹

Civilian recordings have also shed light on challenging EMS working conditions. Cellphone video of EMS workers sleeping on the job have sparked discussion about issues such as EMS worker fatigue and long working hours. One civilian’s photos of sleeping paramedics prompted an internal investigation, with officials saying the pictures were “concerning.”⁶⁰ Other cellphone videos of EMS workers sleeping in the presence of patients have contributed to a broader discussion about the deficiencies within the local ambulance service.⁶¹

III. THE FIRST AMENDMENT PROTECTS THE RIGHT TO RECORD AND SHARE IMAGES AND AUDIO OF EMS PERSONNEL

Individuals have the unambiguous right under the First Amendment to record—whether still images, moving images, or audio—EMS workers and other first responders exercising their official duties.

A. The First Amendment Protects Photos and Videos Because They Are Inherently Expressive Mediums of Communication

Photos and videos are inherently expressive mediums of communication entitled to First

⁵⁸ Aundrea Cline-Thomas & Dan Stamm, *Raw Video Shows Heroin Antidote Saving Mother’s Life*, NBC 10 Philadelphia (Feb. 12, 2016), <http://www.nbcphiladelphia.com/news/health/Heroin-Overdose-West-Deptford-Narcan-Antidote-Saving-Lives-368592941.html>.

⁵⁹ *Id.* at 29 seconds.

⁶⁰ *Fla. man catches medics sleeping in ambulance*, EMS1.com (Mar. 12, 2015), <https://www.ems1.com/investigation/articles/2135020-Fla-man-catches-medics-sleeping-in-ambulance/>.

⁶¹ Sarah Simmons, *DC paramedic accused of sleeping while on duty*, Fox 5 D.C. (Sept. 10, 2015), <http://www.fox5dc.com/news/local-news/18789084-story>.

Amendment protection—regardless of whether the capturer intended to convey a clear message, whether a photo or video actually does convey a clear message, whether the capturer intended to publish it, or whether it was in fact published. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 568 (1995) (holding that mediums with “inherent expressiveness” are protected by the First Amendment). *See also Int’l Women’s Day March Planning Comm. v. City of San Antonio*, 619 F.3d 346, 354 (5th Cir. 2010).

The Supreme Court made it clear that visual, audio, and audiovisual mediums are all protected by the First Amendment. In *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952), the Court stated, “It cannot be doubted that motion pictures are a significant medium for the communication of ideas,” and thus held that “expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments.” *See also Films, Inc. v. Dep’t of Educ. Of State of Ohio, Div. of Film Censorship*, 346 U.S. 587, 589 (1954) (Douglas, J., concurring) (“Motion pictures are of course a different medium of expression than the public speech, the radio, the stage, the novel, or the magazine. But the First Amendment draws no distinction between the various methods of communications.”). In *Kaplan v. California*, 413 U.S. 115, 119–20 (1973), the Court similarly held that the First Amendment applies to “moving pictures, to photographs, and to words in books As with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection.” In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981), the Court held, “Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee.” *See also Turner*, 848 F.3d at 688 (“the Supreme Court has long recognized that the First

Amendment protects film”); *Esperanza Peace & Justice Center v. City of San Antonio*, 316 F.Supp.2d 433, 454 (W.D. Texas 2001).⁶²

Because cell phones and other mobile devices, and the photo and video apps they contain, are Internet-connected, it is further indisputable that modern photography and videography involve mediums of expression protected by the First Amendment. The Supreme Court explained in *Reno v. ACLU*, 521 U.S. 844, 870 (1997), that the Internet is a “dynamic, multifaceted category of communication” where anyone “can become a town crier with a voice that resonates farther than it could from any soapbox.” Therefore, the Court held that the Internet deserves full First Amendment protection, stating that there is “no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.” *Id.*

Importantly, the First Amendment protects photos and videos because they are inherently expressive, regardless of whether a specific message is ascribed to a particular photo or video. As the Supreme Court explained with respect to the inherently expressive medium of parades, “a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a particularized message, would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.” *Hurley*, 515 U.S. at 569.⁶³

Nor must a particular photo or video be disseminated to receive First Amendment

⁶² Other mediums of communication are also inherently expressive and likewise enjoy First Amendment protection. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music); *Hurley*, 515 U.S. at 568 (parades); *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009) (monuments).

⁶³ Not to the contrary is *Kleinman v. City of San Marcos*, 597 F.3d 323 (5th Cir. 2010), which upheld the application of a ban on “junked cars” to a novelty shop’s advertising display comprising a wrecked car decorated with cacti, bright colors, and the words “make love not war.” The *Kleinman* court applied the test for expressive conduct, but Adelman’s photography is inherently expressive.

protection—a photo or video is itself expressive. Publishing it would add to the First Amendment protection (because the rights of viewers would also be implicated⁶⁴), but this is not required. Similarly, live performances are protected mediums of expression, not because there must be an audience, but because they are always expressive.⁶⁵ As the Seventh Circuit explained in the context of recording the police, “Audio and audiovisual recording are communication technologies, and as such, they enable speech. Criminalizing all nonconsensual audio recording necessarily limits the information *that might later be published or broadcast*—whether to the general public or to a single family member or friend—and thus burdens First Amendment rights.” *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012) (emphasis added).

B. The First Amendment Protects the Process of Photographing and Video-Recording EMS Personnel

“Speech” is a process that contains a continuum of protected events. As the Supreme Court explained in *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.” Thus, the process of making photos and videos is itself protected by the First Amendment, either as an integral component of inherently expressive mediums of communication, or as a distinct form of information-gathering that is protected as a necessary precondition to publishing photos and videos.

⁶⁴ See *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972) (discussing the First Amendment right to receive information and ideas); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (freedom of speech “necessarily protects” the right to receive information and ideas). See also *Moore v. City of Kilgore, Tex.*, 877 F.2d 364 (5th Cir. 1989) (“Freedom of speech presupposes both a willing speaker and a willing listener. A listener’s interest enjoys protection just as the speaker’s interest finds refuge behind the shield of the First Amendment.”).

⁶⁵ See Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 377 (2011) (“It is simply not the case ... that an external audience is or should be a necessary condition of First Amendment protection.”).

1. Recording Images and Audio is an Integral Component of Inherently Expressive Mediums of Communication

“[T]he First Amendment protects the *act* of making film, as ‘there is no fixed First Amendment line between the act of creating speech and the speech itself.’” *Turner*, 848 F.3d at 689 (emphasis added) (quoting *Alvarez*, 679 F.3d at 596). In holding that there is a First Amendment right to record the police, the Fifth Circuit explained:

[T]he Supreme Court has never “drawn a distinction between the process of creating a form of *pure* speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded. Although writing and painting can be reduced to their constituent acts, and thus described as conduct, we have not attempted to disconnect the end product from the act of creation.

Id. (quoting *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2010) (emphasis in original)). The Fifth Circuit understood that protecting the act of recording is a necessary component of protecting photos and videos themselves: “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[.]” *Id.* at 689 n.41 (quoting *Alvarez*, 679 F.3d at 595) (emphasis in original). *Accord Glik*, 655 F.3d at 82.

Illustrative is *U.S. v. Stevens*, 559 U.S. 460 (2010), in which the Supreme Court ruled unconstitutional a federal statute that outlawed not only the possession or sale of photos and videos of animal cruelty, but also their creation. In holding that the entire statute was substantially overbroad under the First Amendment, *id.* at 482, the Court recognized that the act of *creating* a “speech” end product deserves as much protection as the end product itself.

Thus, the process of making a photo or video is protected by the First Amendment as an integral component of these inherently expressive mediums of communication. In short, photography and videography are inherently expressive activities.

2. Recording EMS Personnel and Other First Responders Is Protected Information-Gathering About Matters of Public Concern

Gathering information, such as taking photos or videos, is a necessary antecedent to the end products of “speech”—the ultimate packaging and dissemination of that information, that is, the photos and videos themselves and their publication—and therefore is protected by the First Amendment.

In *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), the Supreme Court stated, “Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.” *See also Turner*, 848 F.3d at 688. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the Supreme Court, citing *Branzburg*, ruled in favor of the newspaper petitioner and held that criminal trials must be open to the public. The Court stated, “The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.” *Id.* at 576–77. *See also In re Hearst Newspapers, LLC*, 641 F.3d 168, 175 (5th Cir. 2011) (“the press and public have a First Amendment right of access to sentencing hearings”); *U.S. v. CBS*, 497 F.2d 102, 106 (5th Cir. 1974) (First Amendment protects sketching in courtrooms); *U.S. v. Cabra*, 622 F.2d 182, 184 (5th Cir. 1980) (First Amendment protects note-taking in courtrooms). Similarly, in *Board of Education v. Pico*, 457 U.S. 853, 867 (1982), in striking down the removal of books from a public school library, the Supreme Court emphasized that under the First Amendment, “the right to receive ideas is a necessary predicate to the *recipient’s* meaningful exercise of his own rights of speech, press, and political freedom.” (Emphasis in original).

Recording EMS personnel and other first responders specifically is information gathering protected by the First Amendment because it pertains to matters of public concern: national and

local crises and the emergency professionals who help individuals in their times of greatest need—and who are often government officials or are overseen by the government.

In holding that the First Amendment protects the right to record the police in the performance of their official duties, *Turner*, 848 F.3d at 688, the Fifth Circuit explained that recording functions as an accountability mechanism, contributes to the public’s ability to “make informed decisions about police policy,” and often aids police themselves (“for example, a citizen’s recording might corroborate a probable cause finding or might even exonerate an officer charged with wrongdoing”). *Turner*, 848 F.3d at 689. As discussed above in Section II, recording serves identical functions in the context of EMS personnel and other first responders. Indeed, some police officers serve as EMS personnel.⁶⁶ Moreover, those whom EMS personnel serve are often incapacitated, significantly injured, or otherwise in distress. Some of these people in need may be more vulnerable than a citizen during a standard traffic stop. Such individuals often have a lessened ability to recognize or speak to breaches of protocol or abuses of power, and so bystander recordings can speak for them—but only if such recordings are protected by the First Amendment.

Were government granted the power to restrict recording, it would control the information ultimately available to the public about its own conduct, such as that of the Dallas Fire-Rescue workers that Mr. Adelman photographed. “[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.” *First National*

⁶⁶ Eric Levy, *Indianapolis police officers started to be cross trained as EMTs* (Aug. 8, 2014), <http://fox59.com/2014/08/08/indianapolis-police-officers-starting-to-be-cross-trained-as-emts/>; Saginaw Township Police, *Emergency Medical Technicians* (police department with decades-old EMT program), http://saginawtownshippolice.com/divisions/road_patrol/emt.html.

Bank of Boston v. Bellotti, 45 U.S. 765, 783 (1978); *Turner*, 848 F.3d at 688. A ruling against Mr. Adelman would thus undermine one of the “major purposes” of the First Amendment, namely, “to protect the free discussion of governmental affairs.” *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *Turner*, 848 F.3d at 689 (quoting *Mills*). See also *Richmond Newspapers*, 448 U.S. at 575 (explaining that one of the “core purposes” of the First Amendment is to facilitate “communication on matters relating to the functioning of government”).

Recordings made by first responders themselves (such as dash cams or body cams) are inadequate substitutes for bystander recordings. In many of the incidents discussed above, EMS cameras were not present or not turned on. Additionally, even where first responder cameras do catch newsworthy incidents, the recordings are often released only at the discretion of government.

Also, some first responder agencies may eschew cameras to avoid creating unfavorable evidence, as apparently occurred in the wake of the 2014 Asiana Airlines crash. A responding fire truck accidentally killed a girl who survived the crash. A recording from a first responder’s helmet cam showed the still-living girl visible in the grass, and one first responder cautioning another to avoid her. But when the fire truck later killed her, she was less visible because she was covered in flame-retardant foam. Thus, the video raised questions about whether the first responders properly communicated with each other and cared for survivors. Yet immediately after the video’s release, the city’s fire chief banned helmet cams at emergency scenes.⁶⁷ A

⁶⁷ Sudhin Thanawala, *Firefighter’s Helmet Cam Video Shows Aftermath of Asiana Crash*, Associated Press (Jan. 15, 2014), <http://www.nbcbayarea.com/news/local/Firefighter-Helmet-Cam-Video-Shows-Aftermath-of-Asiana-Crash-240373811.html>.

firefighter's association and the girl's family criticized this reduction of transparency.⁶⁸

As the Supreme Court explained, "Freedom of expression has particular significance with respect to government because "[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression." *Bellotti*, 45 U.S. at 777 n.11; *Turner*, 848 F.3d at 689. The First Amendment contemplates disagreements between citizens and their government. Regular people must be allowed to document these disagreements.

Thus, the First Amendment protects the recording of EMS personnel and other first responders as a necessary component of the process of informing the public about the services the government provides individuals in their moments of greatest vulnerability.

CONCLUSION

For all of these reasons, *amicus curiae* EFF respectfully asks this Court to hold that the First Amendment protects the right to record on-duty EMS workers and other first responders, and to further hold that the Plaintiff in this case was exercising that right.

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Respectfully submitted,

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⁶⁸ Jaxon Van Derbeken, *SF Fire Chief Bans Helmet Cameras in Wake of Crash*, S.F. Gate (March 7, 2014), <http://www.sfgate.com/bayarea/article/SF-fire-chief-bans-helmet-cameras-in-wake-of-crash-4741338.php>.

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CERTIFICATE OF SERVICE

The undersigned certifies that, on _____, 2017, the foregoing document was submitted to the clerk of the U.S. District Court, Northern District of Texas, using the electronic case filing system (CM/ECF) of the court. I certify that the document was served on all known counsel of record electronically as authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Thomas S. Leatherbury

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