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## STATEMENT OF INTEREST

*Amici Curiae* are digital civil liberties and free press organizations that promote the First Amendment right of ordinary users of technology and professional journalists alike to gather information about newsworthy events. As such, *amici* have a strong interest in this Court affirming that the First Amendment right to record not only includes recording police, but also other first responders, particularly emergency medical services personnel.

The **Electronic Frontier Foundation** (EFF) 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 37,000 members. EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law to technology.

The **Freedom of the Press Foundation** (FPF) is a non-profit organization that supports and defends public-interest journalism focused on transparency and accountability. The organization works to preserve and strengthen legal rights guaranteed to the press through a variety of avenues, including public advocacy, legal advocacy, promotion of digital security tools, and crowd-funding. FPF also files and litigates open government requests to shine a light on government policies, and it supports robust First Amendment protections to ensure the public's right to know what their governing bodies do.

The **National Press Photographers Association** (NPPA) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 6,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted and defended the rights of photographers and journalists, including intellectual property rights and freedom of the press in all its forms, especially as it relates to visual journalism.

The **PEN American Center** (PEN America) is a non-profit association of writers that includes novelists, journalists, editors, poets, essayists, playwrights, publishers, translators, agents, and other professionals. PEN America stands at the intersection of literature and human rights to protect open expression in the United States and worldwide. PEN America has approximately 5,000 members and is affiliated with PEN International, the global writers' organization with over 100 Centers in Europe, Asia, Africa, Australia, and the Americas.

The **Radio and Television Digital News Association** (RTDNA) is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators, and students in radio, television, cable, and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

**Reporters Without Borders/Reporters Sans Frontières** (RSF) is an international non-profit, non-governmental organization that promotes and defends freedom of information and freedom of the press. RSF has members in the United States and across the world. Members include journalists, lawyers and citizens who are strong believers in defending freedom of expression. RSF has a long and active history of involvement in issues concerning the free expression rights of journalists and the media, and in the promotion and protection of independent news reporting and access to information.

The **Society of Professional Journalists** (SPJ) is the nation's most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry through the daily work of its nearly 7,500 members; works to inspire and educate current and future journalists through professional

development; and protects First Amendment guarantees of freedom of speech and press through its advocacy efforts.

The **Texas Association of Broadcasters** (TAB) is a non-profit organization that represents more than 1,200 free, over-the-air television and radio broadcast stations licensed by the Federal Communications Commission to serve communities throughout Texas. Founded in 1951, TAB advocates on the industry's behalf before state and federal policymakers on issues ranging from open government and media law to various regulatory matters. TAB also provides numerous direct services to member stations, including the publication of guide-books on legal issues involving newsrooms, advertising and regulatory compliance.

The **Texas Press Association** (TPA) is a non-profit industry association representing nearly 450 daily and weekly newspapers across the state of Texas, each of which upholds a strong tradition of journalistic integrity and community service. TPA, founded in 1880, performs numerous services on behalf of its members, including sponsoring and promoting legislation and taking legal action to protect First Amendment freedoms and open government.

## INTRODUCTION

Today, powered by modern cameras, smartphones, and social media applications, or “apps,” people can quickly, easily, and inexpensively record and share all manner of compelling and newsworthy scenes, including those involving first responders. While the Plaintiff is a professional journalist, the resolution of this case will impact the vast number of ordinary citizens who wish to use digital tools to gather and publish 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 obtaining 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); *Fields v. City of Phila.*, 862 F.3d 353 (3d Cir. 2017). This First Amendment right also includes the recording of first responders—particularly, of emergency medical services (“EMS”) personnel—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 the circumstances 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. But 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 to record extends not just to select 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, 89% of American adults owned a cell phone,<sup>1</sup> including 59% who owned a “smartphone” that provides Internet access.<sup>2</sup> The number of active mobile communications devices now

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<sup>1</sup> *Mobile Fact Sheet*, Pew Research Center (Jan. 12, 2017), <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/>.

<sup>2</sup> Aaron Smith, *U.S. Smartphone Use in 2015*, Pew Research Center 2 (Apr. 1, 2015), [http://www.pewinternet.org/files/2015/03/PI\\_Smartphones\\_0401151.pdf](http://www.pewinternet.org/files/2015/03/PI_Smartphones_0401151.pdf).

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

Additionally, 60% of smartphone owners used their devices to take a picture or video in one poll's study period in 2014,<sup>5</sup> while 60% of photographers use their cell phone as their primary photo-taking device.<sup>6</sup> Rapid technological innovation has fueled this usage and yielded sophisticated cell phones that come equipped with advanced cameras and Internet access.<sup>7</sup> Even "flip phones" that lack Internet access commonly come with a built-in camera.<sup>8</sup>

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

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

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<sup>3</sup> Zachary Davies Boren, *Active Mobile Users Outnumber Humans for the First Time*, Int'l Bus. Times (Oct. 8, 2014), <http://www.ibtimes.co.uk/there-are-more-gadgets-there-are-people-world-1468947>.

<sup>4</sup> Smith, *supra* note 2 at 24.

<sup>5</sup> *Id.* at 36.

<sup>6</sup> Nicole Stier, *Press Release: Shutterfly Research Reveals Americans Are Taking More Photos But Failing To Share Memories*, Shutterfly (Nov. 13, 2014), <http://ir.shutterfly.com/releasedetail.cfm?releaseid=882839>.

<sup>7</sup> *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/>.

<sup>8</sup> *Top 10 Best Flip Phones 2017*, PhoneRated, <http://www.phonerated.com/top-rated-best-overall-flip-phones-global>.

<sup>9</sup> Smith, *supra* note 2 at 6.

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.<sup>10</sup> Facebook has 2.01 billion monthly active users and 1.32 daily active users,<sup>11</sup> including 1.15 billion who are active through their mobile devices on a daily basis.<sup>12</sup> Every day, Facebook users upload more than 300 million photographs<sup>13</sup> and view more than 32 billion videos.<sup>14</sup>

Twitter is a social media platform that allows users to read and write “tweets,” messages no longer than 140 characters.<sup>15</sup> Users may choose to “follow” others and thus receive others’ tweets in their “timeline.”<sup>16</sup> Twitter has over 328 million monthly active users,<sup>17</sup> 80% of whom

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<sup>10</sup> *What does it mean to follow someone or a Page?*, Facebook, <https://www.facebook.com/help/279614732052951?helpref=related>.

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

<sup>12</sup> Ben Popper and Nikki Erlick, *Facebook is closing in on 2 billion monthly users*, The Verge (Feb. 1, 2017), <https://www.theverge.com/2017/2/1/14474534/facebook-earnings-q4-fourth-quarter-2016>.

<sup>13</sup> *The Top 20 Valuable Facebook Statistics – Updated August 2017*, Zephoria Digital Marketing (Aug. 1, 2017), <https://zephoria.com/top-15-valuable-facebook-statistics/>.

<sup>14</sup> *The Top 13 Facebook Live Statistics You Should Know*, Mediakix (May 5, 2017), <http://mediakix.com/2017/03/facebook-live-statistics-video-streaming-to-know/#gs.=Gh1sK0>.

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

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

<sup>17</sup> *Selected Company Metrics and Financials, Second Quarter 2017*, Twitter, <https://investor.twitterinc.com/results.cfm>.

access Twitter with their mobile devices.<sup>18</sup> Twitter users send almost 500 million tweets each day.<sup>19</sup>

Facebook and Twitter also facilitate the cross-posting of content on multiple social media platforms. By clicking the Facebook and Twitter buttons embedded in a video on YouTube, viewers can share the video with all of their friends and followers on both Facebook and Twitter.<sup>20</sup>

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

Some social media apps, such as YouTube, Instagram, and Snapchat, focus specifically on sharing photos and videos. 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.<sup>21</sup>

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<sup>18</sup> *44 Twitter Statistics for 2016*, Brandwatch (May 17, 2016), <https://www.brandwatch.com/blog/44-twitter-stats-2016/>.

<sup>19</sup> *Twitter Usage Statistics*, Internet Live Stats, <http://www.internetlivestats.com/twitter-statistics/>.

<sup>20</sup> *Share videos and channels*, YouTube, <https://support.google.com/youtube/answer/57741?hl=en>.

<sup>21</sup> *Statistics*, YouTube, <https://www.youtube.com/yt/press/statistics.html>.

Instagram allows users to share photos and videos with “followers” or the general public.<sup>22</sup> It has over 700 million monthly users.<sup>23</sup>

Snapchat has over 173 million daily users.<sup>24</sup> Snapchat enables users to share photos and videos that automatically disappear after one to ten seconds.<sup>25</sup> Snapchat also provides less ephemeral ways to share images. Users can post images to their “Story,” which are viewable by any of their friends for 24 hours.<sup>26</sup> Alternatively, users can post images to “Live Stories,” which are compilations curated by Snapchat and available to the general public.<sup>27</sup> In addition, recipients can save Snapchat images.<sup>28</sup>

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.<sup>29</sup> Shutterfly, which has about 3 million users, also enables the sharing of uploaded photos.<sup>30</sup>

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

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<sup>22</sup> *Controlling Your Visibility*, Instagram, [https://help.instagram.com/116024195217477/?ref=hc\\_fnav](https://help.instagram.com/116024195217477/?ref=hc_fnav).

<sup>23</sup> *Our Story*, Instagram, <https://instagram-press.com/our-story/>.

<sup>24</sup> *Snap Inc. Reports Second Quarter 2017 Results*, Snap Inc. (Aug. 10, 2017), <https://investor.snap.com/news-releases/2017/08-10-2017-210950357>.

<sup>25</sup> *Snaps*, Snapchat, <https://support.snapchat.com/en-US/about/snaps>.

<sup>26</sup> *Stories*, Snapchat, <https://support.snapchat.com/en-US/about/stories>.

<sup>27</sup> *Our Story*, Snapchat, <https://support.snapchat.com/en-US/article/live-story>.

<sup>28</sup> *Top 6 Apps to Save Snapchat Videos, Images & Stories*, Gadget Raid, <http://www.gadgetraid.com/2016/02/save-snapchat-images-photos-videos/>.

<sup>29</sup> Jeff Bonforte, *Thank You, Flickr Community!* (June 10, 2015), <http://blog.flickr.net/en/2015/06/10/thank-you-flickr-community/>.

<sup>30</sup> 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>.

exactly what they are observing in real time.<sup>31</sup> 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.<sup>32</sup>

## **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 moments of great distress for both individuals and the nation. As a result, recordings of first responders at work have shed light on issues of national, and even international, importance. 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.<sup>33</sup> 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.<sup>34</sup>

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<sup>31</sup> *Facebook Live*, Facebook, <https://live.fb.com/>.

<sup>32</sup> *Periscope, by the numbers*, Periscope (Aug. 12, 2015), <https://medium.com/periscope/periscope-by-the-numbers-6b23dc6a1704#.9ja29il34>.

<sup>33</sup> *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>.

<sup>34</sup> David Friend, *Bond of Brothers*, Vanity Fair (March 2002), <http://www.vanityfair.com/news/2002/03/jules-gedeon-naudet-world-trade-center-film>.

His footage played an important investigatory and cultural role in the nation's recovery and response: the FBI and the New York Fire Department studied it, and journalists relied on it heavily when reporting to the public.<sup>35</sup> 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 ones' final acts of valor.<sup>36</sup> The footage was eventually culled into an Emmy-winning documentary described by one critic as "the closest we may ever come to experience it at first hand."<sup>37</sup> The camera used to capture the footage now sits in the Smithsonian Institution.<sup>38</sup>

As the nation memorialized that 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 citizens who just 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.<sup>39</sup>

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<sup>35</sup> 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>.

<sup>36</sup> Carter, *supra* note 34.

<sup>37</sup> 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>.

<sup>38</sup> National Museum of American History, Smithsonian Institution, *September 11: Bearing Witness to History*, <http://amhistory.si.edu/september11/collection/record.asp?ID=65>.

<sup>39</sup> 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>.

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 an underused, local 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 . . . ." <sup>40</sup> The local program's founder said, "The video is reality. That's what's out on the streets of all of our municipalities." <sup>41</sup>

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. <sup>42</sup> 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. <sup>43</sup> After an Oklahoma 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

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<sup>40</sup> 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>.

<sup>41</sup> *Id.*

<sup>42</sup> 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>.

<sup>43</sup> 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>.

million views<sup>44</sup> and significant public attention,<sup>45</sup> and the state Public Safety Department Commission subsequently suspended the trooper.<sup>46</sup>

**B. Some Recordings of EMS Personnel Reveal Their Misconduct.**

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

When a police chokehold brought Eric Garner to the ground, a woman pulled out her cellphone and recorded on video the ambulance crew's arrival and response to Mr. Garner's condition. News articles published that video in their analyses of the factors that contributed to Mr. Garner's death.<sup>47</sup> The video showed EMS personnel breaching agency protocols and moving without urgency.<sup>48</sup> The video prompted further investigation, suspension of the EMS workers involved, and debate about larger issues: proper emergency protocol, the intimidation of EMS

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<sup>44</sup> *Oklahoma Highway Patrol fight with EMT*, YouTube (May 26, 2009), <https://www.youtube.com/watch?v=KluItc365hU>.

<sup>45</sup> *Paramedic: Officer Was In "State of Rage"*, CBS News (June 16, 2009), <http://www.cbsnews.com/news/paramedic-officer-was-in-state-of-rage/>.

<sup>46</sup> *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](http://www.cnn.com/2009/US/07/23/oklahoma.trooper.suspended/index.html?_s=PM:US#cnnSTCText).

<sup>47</sup> 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>.

<sup>48</sup> 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. *Id.*; 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 22, 2014), [http://www.silive.com/news/index.ssf/2014/07/emts\\_and\\_paramedics\\_who\\_respon.html](http://www.silive.com/news/index.ssf/2014/07/emts_and_paramedics_who_respon.html).

workers by law enforcement when working in the same setting,<sup>49</sup> and a growing national awareness of some first responders' disparate treatment of minorities.<sup>50</sup>

On another occasion, an ambulance driver was recorded texting and using apps on his phone while driving a patient to the hospital.<sup>51</sup> 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."<sup>52</sup> He reiterated that such behavior was against department policy and stated that action would be taken.<sup>53</sup>

In another bystander video, first responders handled an unconscious woman roughly. One first responder nudged the woman with his foot while the other used his personal cellphone to take pictures of her.<sup>54</sup> Following the video's release, a city spokesman announced the city had launched an investigation.<sup>55</sup>

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<sup>49</sup> 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](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/>.

<sup>50</sup> Siff, *supra* note 47.

<sup>51</sup> 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/>.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> 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>.

<sup>55</sup> *Id.*

Civilian videos have also documented EMS workers stealing pain medications in the course of assisting a debilitated individual;<sup>56</sup> EMS workers falsely reporting what procedures they performed on unconscious patients;<sup>57</sup> and EMS workers mistreating individuals inside ambulances.<sup>58</sup>

### **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 that lengthy EMS work shifts sometimes cause.

In reporting on the heroin epidemic, news outlets have used bystander videos to alert the public to the importance of Narcan, a drug that first responders use to revive overdose victims. In one bystander video, a woman lies motionless on a sidewalk for minutes and then regains consciousness mere seconds after first responders administer Narcan.<sup>59</sup> 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.”<sup>60</sup>

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<sup>56</sup> Kristin Haubrich, *EMT Pleads Guilty To Stealing Pain Meds From Patient*, KKTV 11 Colorado Springs (Mar. 5, 2015), <http://www.kktv.com/home/headlines/Caught-on-Camera-EMT-Allegedly-Steals-Pain-Meds-From-Patient-291489631.html>.

<sup>57</sup> 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>.

<sup>58</sup> 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>.

<sup>59</sup> 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>.

<sup>60</sup> *Id.* at 29 seconds.

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."<sup>61</sup> 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.<sup>62</sup>

### **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 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 & Bisexual Grp. 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).

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<sup>61</sup> *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/>.

<sup>62</sup> Sarah Simmons, *EXCLUSIVE: DC paramedic accused of sleeping while on duty*, Fox 5 D.C. (Sept. 10, 2015), <http://www.fox5dc.com/news/local-news/18789084-story>.

The Supreme Court has 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 *Superior Films, Inc. v. Dep’t of Educ.*, 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 communicating ideas.”). 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 Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433, 454 (W.D. Texas 2001).<sup>63</sup>

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

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<sup>63</sup> 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 v. Summum*, 555 U.S. 460, 470 (2009) (monuments).

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.<sup>64</sup>

Nor must a particular photo or video be disseminated to receive First Amendment protection—a photo or video is itself expressive. Publishing would augment the First Amendment protection (because publishing would also implicate the rights of viewers<sup>65</sup>), but this is not required. Similarly, live performances are protected mediums of expression, not because

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<sup>64</sup> Not to the contrary is *Kleinman v. City of San Marcos*, 597 F.3d 323, 324, 328-29 (5th Cir. 2010), which upheld the application of a ban on “junked vehicles” to a novelty shop’s advertising display of 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 Mr. Adelman’s photography is inherently expressive.

<sup>65</sup> 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*, 877 F.2d 364, 370 (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.”).

there must be an audience, but because they are always expressive.<sup>66</sup> 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 Ill. 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. Federal Election Commission*, 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.

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

Recording video is inherently expressive. “[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).

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<sup>66</sup> 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.”).

In holding that there is a First Amendment right to record police activity, 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)). The Fifth Circuit understood that protecting the act of recording is a necessary component of protecting photos and videos: “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). *See also Glik*, 655 F.3d at 82; *Fields*, 862 F.3d at 359-60.

Also illustrative is *United States 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 implicitly 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, 580 (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, 172 (5th Cir. 2011) (“the press and public have a First Amendment right of access to sentencing hearings”); *United States v. Columbia Broad. Sys., Inc.*, 497 F.2d 102, 106 (5th Cir. 1974) (First Amendment protects sketching in courtrooms). Similarly, 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.” *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982).

Recording EMS personnel and other first responders 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 are often government officials or employees 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”). *Id.* at 689. Recording serves identical functions in the context of EMS personnel and other first responders.<sup>67</sup> Indeed, some police officers serve as EMS personnel.<sup>68</sup> Moreover, those whom EMS personnel treat 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. These individuals often have a lessened ability to recognize or speak to breaches of protocol or abuses of power, 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 photographed by Mr. Adelman. “[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 Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). *See also Turner*, 848 F.3d at 688; *Fields*, 862 F.3d at 359. A ruling against Mr. Adelman would thus undermine one of the “major purpose[s]” of the First Amendment, namely, “to protect the free discussion of governmental affairs.” *Mills v. Alabama*, 384 U.S. 214, 218 (1966). *See also Turner*, 848 F.3d at 689; *Richmond Newspapers*,

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<sup>67</sup> *See supra* Part II.

<sup>68</sup> Eric Levy, *Indianapolis police officers starting to be cross-trained as EMTs*, FOX 59 Indianapolis (Aug. 8, 2014), <http://fox59.com/2014/08/08/indianapolis-police-officers-starting-to-be-cross-trained-as-emts/>.

448 U.S. at 575 (explaining that one of the “core purpose[s]” of the First Amendment is to facilitate “communication on matters relating to the functioning of government”).

Recordings made by first responders themselves (such as dashboard cameras or body cameras) are inadequate substitutes for bystander recordings. In many of the incidents discussed above, EMS cameras were not present or were not turned on. Additionally, even where first responder cameras do catch newsworthy incidents, the recordings are often released only at the discretion of the 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 in San Francisco. A responding fire truck accidentally killed a girl who survived the crash. A recording from a first responder’s helmet camera showed the girl visible in the grass while she was still alive 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 cameras at emergency scenes.<sup>69</sup> A firefighters’ association and the girl’s family criticized this blow to transparency.<sup>70</sup>

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

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<sup>69</sup> Sudhin Thanawala, *Firefighter’s Helmet Cam Video Shows Aftermath of Asiana Crash*, NBC Bay Area (Jan. 16, 2014), <http://www.nbcbayarea.com/news/local/Firefighter-Helmet-Cam-Video-Shows-Aftermath-of-Asiana-Crash-240373811.html>.

<sup>70</sup> 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>.

opposition and often wields a more effective power of suppression.” *Bellotti*, 435 U.S. at 777 n.11 (quoting T. Emerson, *Toward a General Theory of the First Amendment* 9 (1966)); *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 government services provided to individuals in their moments of greatest vulnerability.

### **CONCLUSION**

For all of these reasons, *Amici Curiae* respectfully ask 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.

September 18, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 18, 2017, I served a true and accurate copy of the foregoing document on all counsel of record via filing of the same with the Court's CM/ECF system.

*/s/ Thomas S. Leatherbury*

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Thomas S. Leatherbury