

Nos. 16-1650 & 16-1651

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RICHARD FIELDS,
PLAINTIFF-APPELLANT,

v.

CITY OF PHILADELPHIA, *et ano*,
DEFENDANTS-APPELLEES.

AMANDA GERACI,
PLAINTIFF-APPELLANT,

v.

CITY OF PHILADELPHIA, *et al.*,
DEFENDANTS-APPELLEES.

On Appeal from the Memorandum and Order Granting Partial Summary Judgment
Dated February 19, 2016, at
United States District Court for the Eastern District of Pennsylvania
Case Nos. 14-cv-4424 & 14-cv-5264

The Honorable Mark A. Kearney, United States District Court Judge

**BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION
IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Electronic Frontier Foundation states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST¹

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 26,000 members. EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law to technology.

¹ Pursuant to Federal Rule of Appellate Procedure Rule 29(c), EFF certifies that no person or entity, other than *Amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. All parties consent to the filing of this brief.

INTRODUCTION

Powered by 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 police misconduct. Bystander recordings often contribute to the democratic process by informing the debate on important public policy issues. But the full benefit of such recordings is only possible if making them is constitutionally protected. Thus, this Court should hold that the First Amendment protects not only the sharing, but also the recording of still images, moving images, and audio, particularly of on-duty police officers in public places, as in the cases here. This is because photography and videography are inherently expressive activities, and because recording police officers in particular is a protected form of information gathering about a matter of profound public concern: how government officials exercise their extraordinary powers.

ARGUMENT

I. PEOPLE USE THEIR CELL PHONES AND OTHER POWERFUL TECHNOLOGIES TO RECORD AND SHARE PHOTOS AND VIDEOS

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

As Chief Justice Roberts wrote, 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.” *Riley v. California*, 134 S. Ct. 2473, 2484 (2014).

In 2014, 90% of American adults owned a cell phone,² including 64% who owned a “smartphone” that provides Internet access.³ Around the world, there are more than seven billion mobile phone subscriptions, including more than three billion for smartphones.⁴ The number of active mobile communications devices now exceeds the number of people on Earth.⁵ Smartphone owners use their devices for a multitude of activities, including following breaking news (68%) and learning

² Pew Research Center, “Mobile Technology Fact Sheet” (Dec. 27, 2013), <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/>.

³ 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/>.

⁴ Ericsson, “Mobility Report” (Feb. 2016), <http://www.ericsson.com/res/docs/2016/mobility-report/ericsson-mobility-report-feb-2016-interim.pdf>.

⁵ 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>.

about community events (56%).⁶

Additionally, 60% of smartphone owners used their devices to take a picture or video in the previous month,⁷ while 60% of photographers use their cell phone as their primary photo-taking device.⁸ Such usage is fueled by rapid technological innovation that has yielded sophisticated cell phones that come with advanced cameras and Internet access.⁹ The latest iPhone model (the 7) has a 12 megapixel rear-facing camera, a seven megapixel front-facing camera, and 4K video resolution.¹⁰ Even “flip phones” that lack Internet access commonly come with a built-in camera.¹¹

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

Sixty-seven percent of smartphone owners use their devices to share photos or videos with others and 35% do so frequently.¹² People often share these images by means of easy-to-use mobile “apps” (*i.e.*, applications) that provide access to

⁶ Pew 2015.

⁷ Pew 2015.

⁸ “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>.

⁹ “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/>.

¹⁰ Apple, “This is 7,” <https://www.apple.com/iphone-7/>.

¹¹ “Top 10 Best Flip Phones 2016,” *PhoneRated*, <http://www.phonerated.com/top-rated-best-overall-flip-phones-global>.

¹² Pew 2015.

social media, including general-purpose social media platforms like Facebook and Twitter.

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.¹³ Facebook users may share information as narrowly or as broadly as they wish, by limiting the audience for a particular post to only their “friends” (or a subset of friends) or by making a post visible to the general public.¹⁴ Facebook has 1.7 billion monthly active users, including nearly 1.6 billion who are active through their mobile devices.¹⁵ Every day, Facebook users post more than 300 million photographs¹⁶

¹³ Facebook, “What’s the difference between following someone and adding a friend?”, <https://www.facebook.com/help/255620881144653?sr=2&query=follow%20my%20friend>.

¹⁴ Facebook, “What is public information?”, <https://www.facebook.com/help/203805466323736>.

¹⁵ Facebook, “Company Info,” <https://newsroom.fb.com/company-info/>.

¹⁶ Facebook for Developers, “Capturing Growth: Photo Apps and Open Graph” (July 17, 2012), <https://developers.facebook.com/blog/post/2012/07/17/capturing-growth--photo-apps-and-open-graph/>.

and view more than 8 billion videos.¹⁷

Twitter is a social media platform that allows users to read and write “tweets,” which are messages no longer than 140 characters.¹⁸ Users may choose to “follow” others and thus receive others’ tweets in their “timeline.”¹⁹ Twitter has over 310 million monthly active users, 82% of whom access Twitter with their mobile devices.²⁰ Twitter users send more than 300 million tweets each day.²¹

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, a viewer can share the video with all of their friends and followers on both Facebook and Twitter.²²

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

¹⁷ Jessica Guynn, “Facebook now averages 8 billion daily video views,” *USA Today* (Nov. 4, 2015), <http://www.usatoday.com/story/tech/2015/11/04/facebook-video-views-8-billion-average/75182406/>.

¹⁸ Twitter, “New user FAQs,” <https://support.twitter.com/articles/13920#>.

¹⁹ Twitter, “About your Twitter timeline,” <https://support.twitter.com/articles/164083#>.

²⁰ Twitter, “Twitter usage,” <https://about.twitter.com/company>.

²¹ Twitter, “Twitter turns six” (March 21, 2012), <https://blog.twitter.com/2012/twitter-turns-six>.

²² YouTube, “Options for sharing YouTube videos,” <https://support.google.com/youtuube/answer/57741?hl=en>.

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.²³

Instagram allows users to share photos and videos with "followers" or the general public.²⁴ It has over 500 million monthly users, who upload over 95 million photos every day.²⁵

Snapchat has over 100 million daily users who send and watch over 10 billion videos per day.²⁶ Snapchat enables users to share photos and videos that automatically disappear after one to ten seconds.²⁷ 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.²⁸ Alternatively, users can post images to "Live Stories," which are compilations curated by Snapchat and

²³ YouTube, "YouTube statistics," <https://www.youtube.com/yt/press/statistics.html>.

²⁴ Instagram, "FAQ," <https://www.instagram.com/about/faq/>.

²⁵ Instagram, "Instagram stats," <https://www.instagram.com/press/>.

²⁶ Snapchat, "Advertising on Snapchat," <https://www.snapchat.com/ads>.

²⁷ Snapchat, "Snaps," <https://support.snapchat.com/en-US/about/snaps>.

²⁸ Snapchat, "Snapchat Stories," <https://support.snapchat.com/en-US/about/stories>.

available to the general public.²⁹ In addition, recipients can save Snapchat images by taking a screenshot, by using a second device to record the first device, or by using a special app designed to record Snapchat images.³⁰

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.³¹ Shutterfly, which has about 3 million users, also enables the sharing of uploaded photos.³²

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.³³ 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.³⁴

²⁹ Snapchat, “Snapchat Live Stories,” <https://support.snapchat.com/en-US/about/live-stories>.

³⁰ “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/>.

³¹ Jeff Bonforte, “Thank You, Flickr Community!” (June 10, 2015), <http://blog.flickr.net/en/2015/06/10/thank-you-flickr-community/>.

³² 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>.

³³ Facebook, “Facebook Live,” <https://live.fb.com/>.

³⁴ Periscope, “Periscope, by the numbers” (Aug. 12, 2015),

II. PEOPLE RECORD AND SHARE NEWSWORTHY PHOTOS AND VIDEOS

Millions of people use new technologies to record and share photos and videos of all kinds. People often act as citizen journalists, reporting breaking news to a global audience. Twelve percent of social media users have themselves recorded a news event and posted that recording on social media.³⁵ Of the most watched news videos on YouTube, 39% were recorded and shared by ordinary people.³⁶ Citizen journalists have been especially effective in documenting police misconduct, the political process, and mass shootings. These images often spread rapidly, or “go viral,” across social media and/or are picked up by traditional news outlets.

A. Police Shootings and Other Police Misconduct

Bystanders recording fatal police shootings on their cell phones have repeatedly ensured that these troubling episodes receive the public attention that they deserve. They also have greatly contributed to the quality of public discussion about police use of force and continuing racial disparities in our criminal justice

<https://medium.com/periscope/periscope-by-the-numbers-6b23dc6a1704#.9ja29il34>.

³⁵ Pew Research Center, “The Audience for Digital News Videos” (March 26, 2014), <http://www.journalism.org/2014/03/26/the-audience-for-digital-news-videos/#fnref-42098-6>.

³⁶ Pew Research Center, “YouTube & News” (July 16, 2012), <http://www.journalism.org/2012/07/16/youtube-news/>.

system.

On July 5, 2016, a bystander recorded Baton Rouge police officers tackling Alton Sterling, holding him to the ground, and holding a gun above his chest. In the video, multiple gunshots can be heard.³⁷ Later that day, Chris LeDay shared this recording with his 20,000 followers across Facebook, Instagram, and Twitter, at which point the recording went viral.³⁸ The next day, the U.S. Department of Justice's Civil Rights Division opened an investigation into the shooting.³⁹

On July 6, a police officer in Falcon Heights, Minnesota, fatally shot Philando Castile during a traffic stop. Diamond Reynolds, his girlfriend who was in the car, live-streamed the immediate aftermath of the shooting with Facebook Live. The recording includes Castile's dying moments, statements by Reynolds and the officer about the events leading to the shooting, and the emotional agitation

³⁷ Damien Cave & Rochelle Oliver, "The Raw Videos That Have Sparked Outrage Over Police Treatment of Blacks," *N.Y. Times* (Oct. 4, 2016), <http://www.nytimes.com/interactive/2015/07/30/us/police-videos-race.html>.

³⁸ Peter Holley, "'Super-fishy': Man who posted video of Alton Sterling killing claims employer still refusing to let him work," *Wash. Post* (July 24, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/07/13/man-who-posted-video-of-alton-sterling-killing-claims-he-was-targeted-by-vengeful-police/?utm_term=.fac1153726e5.

³⁹ Richard Fausset, Richard Pérez Peña, & Campbell Robertson, "Alton Sterling Shooting in Baton Rouge Prompts Justice Dept. Investigation," *N.Y. Times* (July 6, 2016), <http://www.nytimes.com/2016/07/06/us/alton-sterling-baton-rouge-shooting.html>.

of both Reynolds and the officer.⁴⁰ The next day, traditional news media republished the recording to a broader audience.⁴¹ After watching the video, Minnesota Governor Mark Dayton asked: “Would this have happened if the driver were white, if the passenger were white? I don’t think it would have.”⁴²

July 2016 was not unusual: other examples abound where bystander videos alerted the public to police use of deadly force. In July 2014 in New York City, a bystander recorded Eric Garner screaming “I can’t breathe” as police officers killed him with a chokehold during an arrest for selling loose cigarettes.⁴³ In February 2015 in Pasco, Washington, a bystander recorded police fatally shooting Antonio Zambrano-Montes, a Hispanic man, as he fled with his hands in the air.⁴⁴ In April 2015, following a traffic stop of Walter Scott in North Charleston, South

⁴⁰ “Facebook Live video of Falcon Heights shooting in Minnesota of Philando Castille” (July 6, 2016), https://www.youtube.com/watch?v=Ia5_q7hZN5Y.

⁴¹ “New police shooting caught on camera,” *ABC News* (July 7, 2016), <https://www.youtube.com/watch?v=p5Pt1nkw3Mk>.

⁴² Matt Furber & Richard Pérez Peña, “After Philando Castile’s Killing, Obama Calls Police Shooting ‘an American Issue,’” *N.Y. Times* (July 7, 2016), <http://www.nytimes.com/2016/07/08/us/philando-castile-falcon-heights-shooting.html>.

⁴³ “Original Eric Garner fatal arrest video,” *N.Y. Daily News* (July 17, 2014), <https://www.youtube.com/watch?v=LfXqYwyzQpM>; Benjamin Mueller & Ashley Southall, “25,000 March in New York to Protest Police Violence,” *N.Y. Times* (Dec. 13, 2014), <http://www.nytimes.com/2014/12/14/nyregion/in-new-york-thousands-march-in-continuing-protests-over-garner-case.html>.

⁴⁴ Julie Turkewitz & Richard A. Oppel Jr., “Killing in Washington State Offers ‘Ferguson’ Moment for Hispanics,” *N.Y. Times* (Feb. 16, 2015), <http://www.nytimes.com/2015/02/17/us/killing-in-washington-state-offers-ferguson-moment-for-hispanics.html>.

Carolina, a bystander recorded a police officer fatally shooting Scott in the back as he attempted to flee the scene.⁴⁵

Police body cameras and squad car cameras are no substitute for civilian recordings. Police departments sometimes withhold from the public their recordings of fatal police shootings. For example, Chicago officials refused for 13 months to release a squad car video recording of a police officer fatally shooting Laquan McDonald.⁴⁶ Additionally, bystanders often record valuable information that officers with body cameras cannot record. An officer engaged in a physical altercation may be moving about so much that the body camera recording is blurry or chaotic, and an officer's body camera generally does not record what the officer is doing.⁴⁷

People have also recorded the protests that erupted after police shootings. For example, following the fatal police shooting of Michael Brown in August 2014, protestors in Ferguson, Missouri, used Vine—a social media app that limited

⁴⁵ Michael S. Schmidt & Matt Apuzzo, "South Carolina Officer Is Charged With Murder of Walter Scott," *N.Y. Times* (April 7, 2015), <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html>.

⁴⁶ Kyung Lah, "Laquan McDonald shooting: Why did it take 13 months to release video?," *CNN* (Dec. 2, 2015), <http://www.cnn.com/2015/12/01/us/chicago-police-shooting-explainer/>.

⁴⁷ Timothy Williams, James Thomas, Samuel Jacoby & Damien Cave, "Police Body Cameras: What Do You See?," *N.Y. Times* (April 1, 2016), <http://www.nytimes.com/interactive/2016/04/01/us/police-bodycam-video.html>.

videos to six-second loops—to chronicle the tense aftermath.⁴⁸ In July 2016, DeRay Mckesson, a Black Lives Matter activist, live-streamed on Periscope his own arrest during a protest against the Sterling shooting.⁴⁹

Bystander videos have also exposed to public scrutiny many non-fatal episodes of police excessive force. The 1991 recording of Los Angeles police officers beating Rodney King may be the first time a bystander’s video of police misconduct was broadcast to a wide audience.⁵⁰ Additional examples include the following:

- In 2011, police employed by the University of California at Davis discharged pepper spray directly into the faces of nonviolent student protesters.⁵¹
- In June 2015, outside a pool party in suburban McKinney, Texas, a police officer pointed a gun at black teenagers in bathing suits, then shoved a black

⁴⁸ Colin Daileida, “We know about Ferguson’s police brutality because of Vine,” *Mashable* (Oct. 27, 2016), http://mashable.com/2016/10/27/vine-police-brutality-protests-ferguson/?utm_cid=mash-com-Tw-main-link#SsoOKYD8qOqW.

⁴⁹ DeRay Mckesson, “#BatonRouge. Protest.,” <https://www.periscope.tv/deray/1DXxyZjvrWVKM>; Yamiche Alcindor, “DeRay Mckesson, Arrested While Protesting in Baton Rouge, Is Released,” *N.Y. Times* (July 10, 2016), <http://www.nytimes.com/2016/07/11/us/deray-mckesson-arrested-in-baton-rouge-protest.html>.

⁵⁰ George Holliday, “Rodney King beating video” (1991), <https://www.youtube.com/watch?v=SdZ5xuZOlbk>.

⁵¹ “UC Davis protesters pepper sprayed” (Nov. 18, 2011), <https://www.youtube.com/watch?v=6AdDLhPwpp4>; Philip Kennicott, “UC Davis pepper-spraying raises questions about role of police,” *Wash. Post* (Nov. 20, 2011), https://www.washingtonpost.com/lifestyle/style/uc-davis-pepper-spraying-raises-questions-about-role-of-police/2011/11/20/gIQAOr8dfN_story.html.

girl's face into the ground.⁵²

- In October 2015, when a black student at the Spring Valley High School in Columbia, South Carolina, refused to leave her seat, a police officer flipped the student onto the ground and dragged her across the floor.⁵³

Finally, cell phone recordings of police have shed light on many additional types of alleged police misconduct, including: militarization of police at protests;⁵⁴ interrogation without a *Miranda* warning;⁵⁵ verbal abuse, such as swearing and calling a civilian a “smartass”;⁵⁶ allowing bystanders to verbally abuse a suspect,⁵⁷ and threatening to “come up” with a reason to arrest a civilian.⁵⁸

⁵² Carol Cole-Frowe & Richard Fausset, “Jarring Image of Police’s Use of Force at Texas Pool Party,” *N.Y. Times* (June 8, 2015), <http://www.nytimes.com/2015/06/09/us/mckinney-tex-pool-party-dispute-leads-to-police-officer-suspension.html>.

⁵³ Richard Fausset & Ashley Southall, “Video Shows Officer Flipping Student in South Carolina, Prompting Inquiry,” *N.Y. Times* (Oct. 26, 2015), <http://www.nytimes.com/2015/10/27/us/officers-classroom-fight-with-student-is-caught-on-video.html>.

⁵⁴ Robert Mackey, “Images of Militarized Police in Baton Rouge Draw Global Attention,” *The Intercept* (July 11, 2016), <https://theintercept.com/2016/07/11/images-militarized-police-baton-rouge-draw-global-attention/>.

⁵⁵ Jim Dwyer, “A Switch Is Flipped, and Justice Listens In,” *N.Y. Times* (Dec. 8, 2007), <http://www.nytimes.com/2007/12/08/nyregion/08about.html>.

⁵⁶ Jeanne Meserve & Mike Ahlers, “Passenger says TSA agents harassed him,” *CNN* (June 20, 2009), http://www.cnn.com/2009/US/06/20/tsa.lawsuit/index.html?eref=rss_us#cnnSTCTex.

⁵⁷ “Video Shows Cops Letting Onlookers Taunt Suspect,” *CBS Chicago* (March 23, 2011), <http://chicago.cbslocal.com/2011/03/23/video-shows-cops-letting-onlookers-taunt-suspect/>.

⁵⁸ Patrick O’Connell & Georgina Gustin, “Officer in trouble over motorist’s video

B. The Political Process

Bystander videos also play a critical role in informing the American public about the political process, including information about law-making, campaigns, and voting.

When Democratic members of the U.S. House of Representatives staged a sit-in on the House floor in June 2016 to promote gun-control legislation, the Republican House leadership ended the session, which shut down the official cameras that C-SPAN uses to broadcast House proceedings. In response, sit-in participants used Facebook Live and Periscope to live-stream what turned out to be a newsworthy event, and C-SPAN rebroadcast those images in real-time.⁵⁹

People also use mobile devices and social media to document and publicize the words of candidates for elected office. During a presidential campaign event in August 2015, former Secretary of State Hillary Clinton met behind closed doors for 15 minutes with Black Lives Matter activists. The activists recorded and published the conversation, which allows voters to decide whether they are

in St. George,” *St. Louis Post-Dispatch* (Sept. 11, 2007), http://www.stltoday.com/news/local/crime-and-courts/officer-in-trouble-over-motorist-s-video-in-st-george/article_f360a76e-0af8-11e1-9a1c-0019bb30f31a.html.

⁵⁹ “Coverage of House Democratic Gun Legislation Sit-In,” *C-SPAN* (June 22, 2016), <https://www.c-span.org/video/?411638-101/coverage-house-democratic-gun-legislation-sitin-part-1>; <https://www.c-span.org/video/?411699-1/coverage-house-democratic-gun-legislation-sitin-part-2>.

satisfied with Secretary Clinton's answers to the activists' questions.⁶⁰ In 2006, while giving a re-election speech, U.S. Senator George Allen used the word "macaca," an ethnic slur, to describe an Indian-American volunteer for his opponent's campaign.⁶¹ In 2008, while addressing a San Francisco fundraiser for his presidential campaign, then-U.S. Senator Barack Obama said that people in Pennsylvania small towns are "bitter" about the lack of jobs and thus "cling to guns or religion."⁶² In 2012, while addressing a fundraiser for his presidential campaign, former Governor Mitt Romney said that the "47% of the people" who will vote for President Obama "no matter what" are "dependent upon government" and "believe they are victims."⁶³

People also record and share images of the voting process. For example, on Election Day in November 2008, a viral YouTube video showed two individuals standing immediately outside the entrance of a polling place in Philadelphia, one

⁶⁰ "Full Video: Hillary Clinton meets Black Lives Matter," *MSNBC* (Aug. 20, 2015), <http://www.msnbc.com/rachel-maddow-show/watch/full-video-clinton-meets-black-lives-matter-509555267594>.

⁶¹ "George Allen introduces Macaca" (Aug. 15, 2006), <https://www.youtube.com/watch?v=r90z0PMnKwI>.

⁶² "Barack Obama's small town guns and religion comments" (April 11, 2008), <https://www.youtube.com/watch?v=DTxXUufI3jA>.

⁶³ David Corn, "Secret Video: Romney Tells Millionaire Donors What He REALLY Thinks of Obama Voters," *Mother Jones* (Sept. 17, 2012), <http://www.motherjones.com/politics/2012/09/secret-video-romney-private-fundraiser>.

brandishing a nightstick, raising concerns about voter intimidation.⁶⁴

C. Mass Shootings

Bystander-recorded images of mass shootings are instrumental in providing valuable eyewitness information about these tragic events as they unfold. In some cases, they have also provided police with critical evidence.

Immediately after the deadly explosions at the Boston Marathon in 2013, runner David Green used his cell phone to photograph the chaotic scene. His picture happened to include a clear image of a man wearing a white hat. When police later released blurry images of the two suspects, one wearing a white hat, Green realized he had a better image and shared it with police. This helped police identify the suspect as Dzhokhor Tsarnaev and led to his apprehension.⁶⁵

During a June 2015 prayer meeting at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina, parishioner Tywanza Sanders used Snapchat to share a recording of the prayer meeting. The video shows a solitary white face at the end of the meeting table. An hour later, this guest murdered nine of his hosts. News media published the chilling image of the

⁶⁴ Stephen Robert Morse, “The New Black Panthers and Me,” *Mother Jones* (Sept. 21, 2009), <http://www.motherjones.com/mojo/2009/09/new-black-panthers-election>.

⁶⁵ Carol Druga & Terry Spencer, “Runner, spectator get photos of marathon suspects,” *Associated Press* (April 20, 2013), <http://bigstory.ap.org/article/fla-runner-gets-photo-suspect-fleeing-scene>; Steve Helling, “Boston Marathon Runner: I Photographed Dzhokhar Tsarnaev After the Bombings,” *People* (Sept. 23, 2016), <http://www.people.com/people/article/0,,20693337,00.html>.

perpetrator with the doomed churchgoers, adding powerful visual support to the national conversation about the depravity of his crime.⁶⁶

As the massacre unfolded in San Bernardino, California, in December 2015, Snapchat created a “live story” feed for people in the area to publish their recordings. Users posted videos of emergency personnel arriving with the sound of gunfire in the background, hostages fleeing onto buses, and lockdowns in nearby schools.⁶⁷ Many people followed this breaking news on Snapchat, dramatically showing the powerful synergy between social media and traditional news media.⁶⁸

At the Pulse nightclub in Orlando, Florida, in June 2016, patron Amanda Alvear sent Snapchat images to her friends of people enjoying themselves on the dance floor. Then rapid gunfire erupted in the background. Her friends used another phone to preserve these images. News coverage of the tragedy prominently featured Ms. Alvear’s haunting recording.⁶⁹

⁶⁶ “New video shows church group moments before shooting,” *CNN* (June 18, 2015), <http://www.cnn.com/videos/us/2015/06/18/charleston-church-shooting-snapchat-video-tsr-live-lemon.cnn>.

⁶⁷ “San Bernadino Snapchat Story” (Dec. 3, 2015), <https://vimeo.com/152279815>.

⁶⁸ Nathan McAlone, “These photos show how Snapchat handled its first serious breaking-news event with the San Bernardino mass shooting,” *Business Insider* (Dec. 3, 2015), <http://www.businessinsider.com/snapchat-enters-breaking-news-with-the-san-bernardino-shooting-2015-12>; Mathew Ingram, “Snapchat’s Move Into Real-Time News is Fascinating,” *Fortune* (Dec. 4, 2015), <http://fortune.com/2015/12/04/snapchat-news/>.

⁶⁹ “Victim’s final moments caught in Snapchat,” *CNN* (June 13, 2016), <http://www.cnn.com/videos/us/2016/06/13/orlando-shooting-snapchat-video.cnn>.

In July 2016, at a demonstration against police misconduct in Dallas, Texas, protesters recorded and published images of the chaos that ensued when a lone gunman opened fire and ultimately murdered five police officers. Michael Bautista live-streamed a shoot-out from across the street, and more than five million people watched his recording on his Facebook page.⁷⁰ News media republished many of these bystander recordings.⁷¹ Finally, when the Dallas Police Department published a tweet that erroneously identified protester Mark Hughes as a suspect, eyewitnesses quickly exonerated him by posting on Facebook and Twitter their own images showing him protesting peacefully when the gunshots rang out.⁷²

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

Individuals have the unambiguous right under the First Amendment to record—whether still images, moving images, or audio—police officers exercising their official duties in public, regardless of the intent of the maker at the time of the recording. This is especially important given that modern photo and video

⁷⁰ Kyrie O’Connor, “The camera is new: Live video and #BlackLivesMatter,” *Houston Chronicle* (July 8, 2016), <http://www.houstonchronicle.com/local/gray-matters/article/The-camera-is-new-8347665.php>.

⁷¹ Robert Mackey, “Piecing Together Witness Accounts of the Dallas Attack,” *The Intercept* (July 8, 2016), <https://theintercept.com/2016/07/08/piecing-together-witness-accounts-of-the-dallas-attack/>.

⁷² Will Oremus, “Twitter Exonerated This ‘Suspect’ in the Dallas Shooting. Why Didn’t the Police Clear His Name?,” *Slate* (July 8, 2016), http://www.slate.com/blogs/the_slatest/2016/07/08/twitter_exonerated_suspect_mark_hughes_in_the_dallas_shooting_why_haven.html.

technology is ubiquitous and flourishing.

A. The First Amendment Protects Photos and Videos as Inherently Expressive Mediums of Communication

Photos and videos are inherently expressive mediums of communication worthy of 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. *See 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).

The Supreme Court made 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.” 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 Ben Rich Trading, Inc. v. City of Vineland*, 126 F.3d 155, 160 (3d Cir. 1997) (holding that speech “in the form of film, text, or live presentation” is protected by the First Amendment, *citing Schad*).⁷³

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

⁷³ 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).

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. *See also Tenaflly Eruv Ass’n, Inc. v. Borough of Tenaflly*, 309 F.3d 144, 160 (3d Cir. 2002).

Nor must a particular photo or video be disseminated to receive First Amendment 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 implicated⁷⁴), 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. 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

⁷⁴ *See Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (discussing the First Amendment right to receive information and ideas).

burdens First Amendment rights.” *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012) (emphasis added).

Thus, in holding that certain mediums such as photos and videos fall within the ambit of First Amendment protection because they are inherently expressive, courts have looked to the nature of a particular medium to act as a means of communication—not whether the maker intended to communicate anything specific or whether anything specific was in fact communicated in a particular case.

B. The First Amendment Protects the *Process* of Photography and Videography

“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.

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

“[T]here is no fixed First Amendment line between the act of creating speech and the speech itself.” *Alvarez*, 679 F.3d at 596. Thus, protecting inherently expressive mediums of communication necessarily includes protecting their *production*—that is, the process by which one engages with a particular medium of expression to create an inherently expressive end product. *See Neiderhiser v. Borough of Berwick*, 840 F.2d 213, 218 (3d Cir. 1988) (“the first amendment embraces the production, distribution and exhibition of films and other forms of entertainment,” *citing Joseph Burstyn*).

In *U.S. v. Stevens*, 559 U.S. 460 (2010), 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. Thus, 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.

Similarly, in *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2010), the court stated:

[N]either the Supreme Court nor our court has ever 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 ... The process of expression through a medium has never been thought so distinct from the expression itself ... In other words, we have never seriously questioned that the processes of writing words down on paper, painting a picture, and playing an instrument are purely expressive activities entitled to full First Amendment protection.

Id. at 1061-62 (emphasis in original).

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 the Police Is Protected Information Gathering About a Matter of Public Concern

Supreme Court precedent also shows that *gathering* information is a necessary antecedent to the end products of “speech”—the ultimate packaging and dissemination of that information—and therefore is protected by the First Amendment.

In *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), the 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.” In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the 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 U.S. v. Wecht*, 537 F.3d 222, 239 (3d Cir. 2008) (holding there is a “presumptive First Amendment right of access to the identities of jurors,” *citing Branzburg and Richmond Newspapers*). 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 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 the police specifically is protected information gathering because it is about a matter of profound public concern: how police officers exercise their extraordinary governmental powers.

Were government granted the power to restrict recording, it would control the information ultimately available to the public about its own conduct. “[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 Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). This would 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) (striking down a state law that made it a crime for a newspaper to write and publish an editorial on election day urging people to vote a certain way). *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”).

Thus, the First Amendment protects recording the police as a necessary part of the process of informing the public about the affairs of government.

C. The District Court Erred by Rejecting First Amendment Protection for Plaintiffs’ Recording of Police

In the present cases, the district court erred by holding that Plaintiffs lacked a First Amendment right to record the police. The summary judgment record shows that Fields used his phone to take a photo of about 20 police officers breaking up a house party, and Geraci attempted to use a camera to videotape a police officer arresting a protester. *Fields v. City of Philadelphia*, 166 F. Supp. 3d 528, 531-33 (E.D. Pa. 2016).

The district court’s principal error was to rely on inapposite cases related to “expressive conduct,” such as burning a draft card, *U.S. v. O’Brien*, 391 U.S. 367 (1968), or burning a flag, *Texas v. Johnson*, 491 U.S. 397 (1989). When a person engages in conduct that might or might not have an expressive element, the court as a threshold issue must determine whether there was any expression. If someone burned a flag to stay warm, for example, the conduct would have no expressive

element and the First Amendment would not apply.⁷⁵

But the photography and videography of Fields and Geraci, respectively, are not potential symbolic speech that needs to be deciphered as to whether they are expressive or not. Rather, they are *inherently* expressive activities that are always entitled to First Amendment protection. Photography, unlike fire, does not have a non-expressive purpose. And recording the police in particular is always protected under the First Amendment as information gathering about a matter of profound public concern.

The district court was further wrong to find relevant the lack of evidence that “the officers *understood* [the Plaintiffs] as communicating any idea or message.” *Fields*, 166 F. Supp. 3d at 535 (emphasis in original). This element of the “expressive conduct” test has no bearing in cases like this one that involve inherently expressive mediums of communication. As the Supreme Court held, when it comes to an inherently expressive medium of communication, “[a] succinctly articulable message is not a condition of constitutional protection.” *Hurley*, 515 U.S. at 569.

Thus, the district court erred by holding: “there is no First Amendment right

⁷⁵ Courts apply a two-part test to determine whether conduct is expressive: (1) whether there was “an intent to convey a particularized message,” and (2) whether “the likelihood was great that the message would be understood by those who viewed it.” *Johnson*, 491 U.S. at 404.

under our governing law to observe and record police officers absent some other expressive conduct.” *Fields*, 166 F. Supp. 3d at 533.⁷⁶

The district court then greatly compounded this error by holding that the requisite “other expressive conduct” must be verbal confrontation with police officers while recording an unfolding incident. Specifically, the court rejected First Amendment protection because neither plaintiff “uttered any words to the effect he or she sought to take pictures to oppose police activity,” *id.* at 534; the plaintiffs did not “allege or offer evidence their conduct expressed criticism of police activity,” *id.* at n. 27; “they spoke no words or conduct expressing criticism of the police before or during their image capture,” *id.* at 35; and they were not “confrontational” nor did they communicate “criticism or challenge,” *id.* 539. The district court’s ruling would needlessly escalate conflict between police and civilians during encounters that are already tense and dangerous. No principle of First Amendment law requires such an absurd result.⁷⁷

⁷⁶ The district court erroneously cited in support of its holding this Court’s decision in *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3rd Cir. 2010). But that decision held only that the right to record the police was not clearly established for qualified immunity purposes, and it did not resolve whether such a right exists. After this Court decided *Kelly*, two of its sister circuits acknowledged this right. *See infra* Section III.D.

⁷⁷ *Amicus* agrees with the district court that “[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.” *Fields*, 166 F. Supp. 3d at 536 (quoting *City of Houston, Texas v. Hill*, 482 U.S. 451, 462-63 (1987)). But the First Amendment also protects the right to record

The district court was also wrong to focus on the fact that “Fields and Geraci do not suggest they intended to share their images immediately upon image capture.” *Fields*, 166 F. Supp. 3d at 539. The court misconstrued Professor Kreimer’s article as stating that image capture is only protected if the image was shared or the capturer had an initial intent to share the image. *Id.* To the contrary, Professor Kreimer argues, “It is simply not the case ... that an external audience is or should be a necessary condition of First Amendment protection.” 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).

Finally, the district court’s rule that First Amendment protection for recording the police *only* attaches when an individual expresses a viewpoint that is hostile toward the police amounts to impermissible viewpoint discrimination. *See, e.g., Rosenberger v. University of Virginia*, 515 U.S. 819, 829 (1995). Some people may want to record the police not to criticize them, but to vindicate officers from false accusations of misconduct, or to make an objective record with no preconceived opinion regarding whether the police or the civilians will misbehave. It does not matter what an individual’s motivation is for taking out his cell phone and pressing “record” when observing police activity. Granting First Amendment protection to one viewpoint but not others is itself a violation of the First

police activity without having to say *anything at all* and risk confrontation with the police.

Amendment.

D. This Circuit Should Join Its Sister Circuits in Clearly Protecting the Right to Record the Police

Other circuits have unequivocally upheld a First Amendment right to record on-duty police officers in public.

In *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000), the Eleventh Circuit held that there is “a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct.”

In *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011), the First Circuit held that the First Amendment protects the “right to videotape police carrying out their duties in public.” *Id.* at 82. Simon Glik used his cell phone camera to record several police officers arresting another man on the Boston Common. The First Circuit also held that there is a First Amendment right to film a police officer during a traffic stop. *Gericke v. Begin*, 753 F.3d 1, 10 (1st Cir. 2014).

In *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 586 (7th Cir. 2012), the Seventh Circuit granted a preliminary injunction against enforcement of a state eavesdropping statute as to the ACLU’s program of recording on-duty police officers in public. The court held, “Audio recording is entitled to First Amendment protection.” *Id.* at 597.

These courts relied on the line of cases protecting mediums of expression, *see, e.g., Alvarez*, 679 F.3d at 595-96, as well as the line of cases protecting

information gathering as a necessary predicate to disseminating that information. As the Seventh Circuit stated, “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 595 (emphasis in original). *Accord Glik*, 655 F.3d at 82.

These courts also focused on information gathering about matters of public concern specifically, including about the affairs of government. The Eleventh Circuit stated, “The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.” *City of Cumming*, 212 F.3d at 1333. The Seventh Circuit likewise recognized a First Amendment right to gather “news and information about the affairs of government.” *Alvarez*, 679 F.3d at 597. And the First Circuit stated, “Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting ‘the free discussion of governmental affairs.’” *Glik*, 655 F.3d at 82 (*quoting Mills*, 384 U.S. at 218). The First Circuit specifically noted that the right to gather information is important given the many ways that modern technologies have democratized the gathering and publishing of the news:

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, 655 F.3d at 84.

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 police officers in public, irrespective of any intent or verbalization of the person making the recording, and to further hold that the Plaintiffs in these cases were exercising that right.

Dated: October 31, 2016

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COMBINED CERTIFICATIONS

I hereby certify as follows:

1. That I, Sophia Cope, counsel for *Amicus Curiae*, am a member of the Bar of this Court.

2. That the foregoing brief of *Amicus Curiae* complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief is printed in proportionally spaced 14-point Times New Roman font, using Microsoft® Word for Mac 2011 and there are [6,999] words in the brief according to the word count of the word-processing system used to prepare the brief (excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)). The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and with the type style requirements of Fed. R. App. P. 32(a)(6).

3. That I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit, pursuant to Third Circuit Rule 25.1(b) by using the appellate CM/ECF system on October 31, 2016. All participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

4. That the text of the electronic brief is identical to the text of the seven paper copies mailed to the Court pursuant to Local Rule 31.1(b)(3).

5. That the electronic file of this brief was scanned with Avast antivirus

software version 11.7.45814 and that no virus was detected.

Dated: October 31, 2016

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