UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

IN THE MATTER OF THE SEARCH OF INFORMATION ASSOCIATED WITH SPECIFIED E-MAIL ACCOUNTS	Case No. 18-MJ-723 (PK)

UNOPPOSED BRIEF OF AMICI CURIAE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND 21 MEDIA ORGANIZATIONS[*] IN SUPPORT OF MICROSOFT'S OBJECTIONS TO ORDER DENYING MOTION TO MODIFY SECRECY ORDER

[*] A full list of the amici can be found in Appendix A.

CORPORATE DISCLOSURE STATEMENT

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

ALM Media, LLC is privately owned, and no publicly held corporation owns 10% or more of its stock.

The American Society of Magazine Editors is a trade association with no parent corporation and no stock.

Association of Alternative Newsmedia has no parent corporation and does not issue any stock.

First Look Media Works, Inc. is a nonprofit non-stock corporation organized under the laws of Delaware. No publicly-held corporation holds an interest of 10% or more in First Look Media Works, Inc.

Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. BlackRock, Inc., a publicly traded company, owns 10 percent or more of Gannett's stock.

The International Documentary Association is a not-for-profit organization with no parent corporation and no stock.

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MPA - The Association of Magazine Media has no parent companies, and no publicly held company owns more than 10% of its stock.

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The News Leaders Association has no parent corporation and does not issue any stock.

News Media Alliance is a nonprofit, non-stock corporation organized under the laws of the commonwealth of Virginia. It has no parent company.

The News Guild - CWA is an unincorporated association. It has no parent and issues no stock.

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POLITICO LLC's parent corporation is Capitol News Company. No publicly held corporation owns 10% or more of POLITICO LLC's stock.

Reveal from The Center for Investigative Reporting is a California non-profit public benefit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

The Society of Environmental Journalists is a 501(c)(3) non-profit educational organization. It has no parent corporation and issues no stock.

Society of Professional Journalists is a non-stock corporation with no parent company.

Tribune Publishing Company is a publicly held corporation. Merrick Media, LLC, Merrick Venture Management, LLC and Michael W. Ferro, Jr., together own over 10% of

Tribune Publishing Company's common stock. Nant Capital LLC, Dr. Patrick Soon-Shiong and California Capital Equity, LLC together own over 10% of Tribune Publishing Company's stock.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

STATEMENT OF INTEREST[1]

Amici curiae are the Reporters Committee for Freedom of the Press (the Reporters Committee), ALM Media, LLC, American Society of Magazine Editors, Association of Alternative Newsmedia, First Look Media Works, Inc., Gannett Co., Inc., International Documentary Association, Investigative Studios, The McClatchy Company, MediaNews Group Inc., MPA - The Association of Magazine Media, National Press Photographers Association, The News Leaders Association, News Media Alliance, The NewsGuild - CWA, Online News Association, POLITICO LLC, Reveal from The Center for Investigative Reporting, Society of Environmental Journalists, Society of Professional Journalists, Tribune Publishing Company, and Tully Center for Free Speech. The Reporters Committee is an unincorporated non-profit association of reporters and editors that was founded by leading journalists and media lawyers in 1970 in response to an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. The other amici are news media companies and press advocacy organizations dedicated to protecting the rights of journalists and the news media.

As advocates for the news media, amici have a strong interest in ensuring that the government's use of surveillance tools, particularly when accompanied by non-disclosure orders such as the one at issue here, is consistent with the First Amendment. Amici likewise have an

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[1] No party's counsel authored this brief in whole or in part, and no party, party's counsel, or any person other than amici or their counsel contributed money that was intended to fund preparing or submitting this brief. The parties have consented to the filing of this brief.

interest in preventing concern over covert government surveillance from translating into a chill on newsgathering.

INTRODUCTION AND SUMMARY OF ARGUMENT

The advent of "cloud computing"—the use of remote servers, often administered by a third-party provider, to provide computing services—has fundamentally changed the way news organizations manage information. For example, it was common practice in the early days of email to print out a message and physically file it to conserve what was then scarce and expensive electronic storage space (both on one's computer at home and on the server of one's email provider). Today, the extraordinary reduction in the cost of computer memory, coupled with dramatic increases in the speed of data processing and transmission (along with revolutionary data analysis tools), have moved email and other electronic communications to a virtual electronic repository. These technological advancements mean that essentially everything is now stored off-site, often with third-party cloud providers such as Microsoft. For news organizations, this means that newsgathering records, journalistic work product, reporter-source communications, and general business records are likewise no longer in the newsroom. They are online, in the cloud.

However, these new "virtual newsrooms" permit the government to covertly seek the compelled disclosure of communications content and accompanying "metadata" (data about data, such as the sender and recipient of an email) without notice to the affected member of the news media. *See, e.g.*, D. Victoria Baranetsky, *Data Journalism and the Law*, Colum. J. Rev. (Sept. 19, 2018), http://perma.cc/RAM4-FPT9 ("[N]ewsrooms use online applications and social media platforms rather than notebooks and pens that are kept in their offices, and the government can more easily subpoena digital materials from third parties than work products from a newsroom."). Under the Stored Communications Act (SCA), 18 U.S.C. §§ 2701-2712, the

government may obtain electronically stored emails, documents, text messages, browsing histories, metadata, and more from cloud-service providers like Microsoft pursuant to a warrant, court order, or subpoena. *See* 18 U.S.C. § 2703(b)-(c). Not only can the government do so without notifying the targeted customer, *see id.* § 2703(b), but it frequently seeks and obtains non-disclosure orders authorized under § 2705(b) to bar the provider itself from notifying anyone about the government's search.

Amici agree with Microsoft that such non-disclosure orders, including the one here, are content-based prior restraints on speech that "bear[] a heavy presumption against [their] constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Non-disclosure orders barring speech about invasive government searches under the SCA are particularly fraught, as the Supreme Court has consistently held that the free discussion of governmental affairs is the core expressive activity that the First Amendment is intended to protect. *See, e.g.*, *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Accordingly, a § 2705(b) non-disclosure order must be narrowly tailored to serve a compelling government interest, and it must be the least restrictive way to do so. *See United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000).

Amici urge this Court to hold the government to an exacting test for issuing and maintaining a non-disclosure order (that is, truly "strict" strict scrutiny). Non-disclosure orders leave news organizations and other cloud-service customers in the dark about government access to their sensitive data. Preventing providers from informing even the affected customer, without the rigorous showing required by the First Amendment, threatens the press's vital function as a check on government for three interrelated reasons. First, § 2703 searches can expose increasing amounts of sensitive newsgathering data, like the identity of confidential sources, yet non-

disclosure orders prevent affected media from contesting the searches. Second, widespread use of these orders chills communications between journalists and their sources. And finally, this chilling effect impedes newsgathering, keeps important stories from being told, and ultimately hinders free, informed discussion of governmental affairs. Thus, the press needs timely notice of SCA content or metadata searches in order to challenge an improper warrant, court order, or subpoena, assert First Amendment rights and privileges, and take necessary steps to protect sources.

ARGUMENT

I. Searches under § 2703 expose large amounts of sensitive newsgathering data, and accompanying non-disclosure orders leave affected media without the notice necessary to challenge them.

The technological advancements that underpin cloud computing—cheaper memory, faster processors, quicker transmission, and better data analysis tools—also mean that individuals and entities are producing much *more* information, which is, in turn, stored longer and can be analyzed in ways that are fundamentally more revelatory of human activity than in the pre-cloud era. Members of the news media regularly rely on cloud-based computer services provided by companies like Microsoft to process large amounts of data associated with newsgathering activities, from tracking research for upcoming stories to preserving emails exchanged among editorial staff.

Some of the most sensitive data housed in media organizations' cloud-computer storage includes communications with sources whose participation depends on strict confidentiality. *See* Br. Amici Curiae of Reporters Comm. et al. in Support of Resp't at 4, *United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018) (No. 17-2), https://bit.ly/34d4qcb. Like many email users, reporters store years of emails, and their various attachments, in cloud-based email accounts. The identity of numerous confidential sources could thus be revealed through the government's

access to those accounts. The records could also reveal to the government potential leads and thoughts on future stories.

Furthermore, confidential sources themselves may have their own email accounts and records targeted by the government. Those records may include communications from journalists, journalistic work product, and clues to the identities of other sources. Similar concerns also apply where the government seeks only metadata and not the communications' content. Metadata identifies information like the sender and recipient computers, their locations, and the time of transmission. Such data can be just as sensitive as content, and its disclosure just as damaging to the reporter-source relationship.

Without meaningful oversight and restrictions on the government's power to seek such information, "freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). Non-disclosure orders, however, prevent media clients from protecting their data from unjustified intrusion. In the pre-cloud era, investigators physically searched the newsroom and its local computers. The news organization would necessarily have notice of the search and could assert various constitutional claims under the First and Fourth Amendments, and any applicable legal privileges. It could take steps to protect sources' identities—possibly gleaned from the records or communications obtained—and inform sources of the search so that they too could vindicate their rights. Now, however, the government can seek information from the cloud-service provider without such notice to the news organization. The Justice Department even has the ability to enforce theoretically indefinite non-disclosure orders against the provider, meaning that an affected customer may never find out that their communications and metadata had been seized. *See* 18 U.S.C. § 2705(b). Absent some notice to the cloud-service customers, such as the type of notice advocated by Microsoft in this case, it is impossible for the press

(especially when the press entity is the enterprise customer) to make timely and meaningful challenges to a content or data seizure, assert important privileges, or take steps to protect sources.

This problem is not merely hypothetical. Reporter-source communications have been the target of secret government surveillance, directed at news organizations and journalists, in recent years. For example, in 2013, the government surreptitiously acquired both work and personal telephone records for more than 100 Associated Press (AP) reporters while investigating unauthorized disclosures of classified information. *See Gov't Obtains Wide AP Phone Records in Probe*, Associated Press (May 13, 2013), https://perma.cc/K3EZ-AXV6. That same year, reports surfaced that the government had obtained an SCA warrant to seize the contents of Fox News reporter James Rosen's emails from his personal account in connection with another leak investigation. *See* Ann E. Marimow, *Justice Department's Scrutiny of Fox News reporter James Rosen in Leak Case Draws Fire*, Wash. Post. (May 20, 2013), https://perma.cc/L3G4-F5VA. Rosen was unaware of the existence of the warrant until it was reported in the Washington Post. Ryan Lizza, *How Prosecutors Fought to Keep Rosen's Warrant Secret*, New Yorker (May 24, 2013), https://perma.cc/EH2R-V5JJ.

Indeed, the Department of Justice itself has recognized the constitutional perils of the government's position here. In the wake of public backlash over the AP records seizure and the Rosen email warrant, the Department extended internal policies governing subpoenas to the media and their third-party telephone providers (news media guidelines) to cover newsgathering records held by all third parties, whether sought through subpoena, search warrant, or court

order.[2] *See* 28 C.F.R. § 50.10; *DOJ Issues New Guidelines on Reporter Subpoenas Following Dialogue with Reporters Committee and Other News Media Representatives,* Reporters Comm. for Freedom of the Press (Jan. 14, 2015), https://bit.ly/31sOssS. The revised news media guidelines require the government, in most cases, to first pursue "negotiations with the affected member of the news media" and provide them with "appropriate notice" before seeking their data or metadata through legal process. 28 C.F.R. § 50.10(a)(3).

Notwithstanding the updated guidelines' commitment to "strike[] the appropriate balance" between law enforcement interests and "safeguard[] the essential role of a free press in fostering government accountability and an open society," Dep't of Justice, Report on Review of News Media Policies 1 (2013), https://bit.ly/1TTieSt, they only reach so far. For example, the Attorney General retains some discretion in deciding whether advance notice is appropriate. *See* 28 C.F.R. § 50.10(a)(4), (e); *see also, e.g.*, Adam Goldman et al., *Ex-Senate Aide Charged in Leak Case Where Times Reporter's Records Were Seized*, N.Y. Times (June 7, 2018), https://perma.cc/2B25-V2M7 (reporting that a *New York Times* national security reporter was notified only in February 2018 that her phone and email records had been seized at some point the previous year). Furthermore, the news media guidelines do not apply when the government seeks the records of persons other than reporters, such as those it believes to be media sources. *See* 28 C.F.R. § 50.10(a)(2) (addressing only circumstances where law enforcement "seek[s] information from, or records of" the news media). Where the government seizure of a non-

[2] While the SCA's text and structure do not clearly answer whether all forms of process—warrants, court orders, and subpoenas—are properly subject to § 2705(b) non-disclosure orders, the Justice Department has sought them for all of these tools. *See* Memorandum for Heads of Department Law Enforcement Components, et al., from Rod J. Rosenstein, Deputy Att'y Gen., "Policy Regarding Applications for Protective Orders Pursuant to 18 U.S.C. § 2705(b)" (Oct. 19, 2017), https://bit.ly/2Wbwiuu.

media target's records reveal other media contacts, however, the principles animating the news media guidelines necessitate that the affected journalists be notified of that seizure so they may challenge it or take other appropriate steps to protect confidential information. Thus, these regulatory protections are no substitute for robust enforcement of the First Amendment rights Microsoft seeks to vindicate by notifying its customer of the warrant here.

II. Failure to rigorously apply First Amendment principles to § 2705(b) non-disclosure orders will increase their use and chill relationships between journalists and sources.

The dangers of the government's position here—insisting on complete secrecy from providers as it seeks potentially large troves of sensitive customer data, without setting forth the type of exacting proof the First Amendment demands in this context to meet the burden of strict scrutiny review—extend beyond the problems of any single data demand. Relaxing the government's burden will encourage it to seek more of these overly strict non-disclosure orders, shroud even more government surveillance in secrecy, and increase fears of investigatory overreach. Sources will assume their communications with journalists will not be kept confidential. And journalists will be powerless to reassure sources otherwise, as non-disclosure orders both leave news organizations in the dark about the government's actions and prevent them from interposing legitimate challenges to those actions. Fear of such unchecked, covert government access will have a demonstrable chilling effect on communications between journalists and their sources. As a consequence, the flow of vital information to the public will be substantially impaired.

Members of the press have confirmed the chill on newsgathering related to fears of surveillance under the SCA and other authorities. As former *Washington Post* national security reporter Rajiv Chandrasekaran put it: "[O]ne of the most pernicious effects" of government surveillance "is the chilling effect created across [would-be sources in the] government on

matters that are less sensitive but certainly in the public interest as a check on government and elected officials." Leonard Downie, Jr. & Sara Rafsky, *The Obama Administration and the Press: Leak Investigations and Surveillance in Post-9/11 America*, Comm. to Protect Journalists 3 (Oct. 10, 2013), https://perma.cc/GR88-C8FG. Pulitzer Prize-winning journalist Matt Apuzzo explained that after news broke of the government seizing his AP records, sources unconnected to the leak story, but nevertheless on the other end of those phone logs, advised him they could no longer talk to him. Michael Barbaro, *The Daily: Cracking Down on Leaks*, N.Y. Times (June 18, 2018), https://perma.cc/7ZP5-C2BL. And AP president Gary Pruitt noted that the mass phone-records seizure made official sources "reluctant to talk to [the AP]" for "fear that they w[ould] be monitored by the government." Aamer Madhani & Kevin Johnson, *Journalism Advocates Call Leak Investigations Chilling*, USA Today (May 21, 2013), https://perma.cc/KZ85-ESWE.

Reports and studies have confirmed the impact of government surveillance on newsgathering. In 2014, a study by Human Rights Watch and the American Civil Liberties Union found that increased government surveillance cuts "away at the ability of government officials to remain anonymous in their interactions with the press, as any interaction—any email, any phone call—risks leaving a digital trace that could subsequently be used against them." G. Alex Sinha, *With Liberty to Monitor All*, Human Rights Watch 1, 3 (2014), https://perma.cc/6L9T-NZHK. Another 2014 report by the Privacy and Civil Liberties Oversight Board found that reporters and their sources had shifted their behavior in response to reports of expansive foreign intelligence metadata collection, even though it was unclear if their individual records were being scrutinized. *See* Privacy and Civil Liberties Oversight Bd., Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the

Operations of the Foreign Intelligence Surveillance Court 163-64 (2014), https://bit.ly/1SRiPke. It concluded that "such a shift in behavior is entirely predictable and rational," and that the results of this "chilling effect"—including "greater hindrances to political activism and a less robust press"—"are real and will be detrimental to the nation." *Id.* at 164. And still another report found that aggressive leak prosecutions and revelations of broad foreign intelligence surveillance programs under the Obama administration deterred sources from speaking to journalists. Downie & Rafsky, *supra*, at 1. These studies show that knowledge of possible surveillance and the uncertainty as to whether a source's communications have been compromised deters sources with sensitive information from coming forward.

III. The resulting chill on reporter-source relationships impedes newsgathering and the development of an informed citizenry as important stories go unreported.

The upshot of widespread, secret provider searches—unchallenged by customers left none the wiser by non-disclosure orders—and the resulting chilling effect is to undermine reporting on matters on public import. An "informed citizenry" is "vital to the functioning of a democratic society." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The founders of the United States thus believed "that public discussion is a political duty." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government," *Garrison*, 379 U.S. at 74-75, because "a structural necessity in a real democracy" is the right of "citizens to know what their Government is up to," *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-72 (2004) (internal quotation marks omitted). And the press plays a crucial role in this self-governance by "bring[ing] to [the public] in convenient form the facts of [government] operations." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975). Indeed, "[w]e have placed

our faith in knowledge, not in ignorance, and for most, this means reliance on the press." *United States v. Morison*, 844 F.2d 1057, 1081 (4th Cir. 1988) (Wilkinson, J., concurring).

Yet effective reporting that scrutinizes government affairs depends on journalists' ability to foster and maintain confidential relationships with sources. *See Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) ("[J]ournalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant."); *Introduction to the Reporter's Privilege Compendium*, Reporters Comm. for Freedom of the Press, https://bit.ly/2BVdXJ4 (last visited Oct. 31, 2019) ("[Reporters] must be able to promise confidentiality in order to obtain information on matters of public importance."). When confidential sources no longer come forward for fear of retaliation, criminal prosecution, loss of employment, or even risk to their lives, important stories go unpublished. Widespread use of non-disclosure orders will therefore stifle the vital flow of information to the public, undermining the electorate's ability to make informed decisions and hold elected officials and others accountable. *See, e.g.*, *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000) ("If reporters were routinely required to divulge the identities of their sources, the free flow of newsworthy information would be restrained and the public's understanding of important issues and events would be hampered in ways inconsistent with a healthy republic."); *Zerilli*, 656 F.2d at 711; Alexander M. Bickel, *The Morality of Consent* 84 (1975) ("Forcing reporters to divulge such confidences would dam the flow to the press, and through it to the people, of the most valuable sort of information: not the press release, not the handout, but the firsthand story based on the candid talk of a primary news source.").

Indeed, confidential sources have long been the foundation for crucial reporting on the government. *Washington Post* reporters Bob Woodward and Carl Bernstein relied on

anonymous sources for the numerous articles they wrote following the Watergate break-in. *See, e.g.*, David Von Drehle, *FBI's No. 2 Was 'Deep Throat': Mark Felt Ends 30-Year Mystery of The Post's Watergate Source*, Wash. Post (June 1, 2005), https://perma.cc/229G-LE5E. Confidential sources also led to the *New York Times*'s 2005 report on the NSA's "warrantless wiretapping" program, and its 2007 coverage of the CIA's harsh interrogations of terrorism suspects. *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times (Dec. 16, 2005), https://perma.cc/QP56-C4AL; Scott Shane et al., *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times (Oct. 4, 2007), https://perma.cc/ESP3-RWCG.

Confidential sources have also been integral to consequential stories about non-government entities. In 2016, for instance, a group of more than 350 journalists around the world reported on the "Panama Papers," a cache of documents about offshore financial havens leaked by an anonymous whistleblower. Will Fitzgibbon, *Panama Papers FAQ: All You Need To Know About The 2016 Investigation*, Int'l Consortium of Investigative Journalists (Aug. 21, 2019), https://bit.ly/335gkET. Recently, the International Consortium of Investigative Journalists, the hub of this transnational reporting team, announced that the global tally of fines and taxes resulting from the Panama Papers reporting has totaled over one billion dollars. *See* Douglas Dalby & Amy Wilson-Chapman, *Panama Papers Helps Recover More Than $1.2 Billion Around the World*, Int'l Consortium of Investigative Journalists (Apr. 3, 2019), https://perma.cc/5XY5-AMKM. If not for anonymous sources, these stories and others would not have been possible, and the public would have been ignorant of this essential information.

CONCLUSION

Section 2705(b) non-disclosure orders have a significant impact on newsgathering and impede the fundamental right of the public to receive newsworthy information. For the

foregoing reasons, amici ask this Court to apply the most searching constitutional scrutiny to the government's requested non-disclosure orders.

Dated: November 1, 2019

Respectfully submitted,

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***Pro Hac Vice Applications Will Be Filed Under Separate Cover*

Counsel for Amici[*]

[*] Reveal from The Center for Investigative Reporting and Tribune Publishing Company are represented in this case only by Reporters Committee for Freedom of the Press. The other listed amici organizations are represented by Orrick, Herrington & Sutcliffe LLP.

APPENDIX A

The individual amici are:

- Reporters Committee for Freedom of the Press
- ALM Media, LLC
- American Society of Magazine Editors
- Association of Alternative Newsmedia
- First Look Media Works, Inc.
- Gannett Co., Inc.
- International Documentary Association
- Investigative Studios
- The McClatchy Company
- MediaNews Group Inc.
- MPA - The Association of Magazine Media
- National Press Photographers Association
- The News Leaders Association
- News Media Alliance
- The NewsGuild - CWA
- Online News Association
- POLITICO LLC
- Reveal from The Center for Investigative Reporting
- Society of Environmental Journalists
- Society of Professional Journalists
- Tribune Publishing Company

- Tully Center for Free Speech

CERTIFICATE OF SERVICE

I, Robert M. Loeb, do hereby certify that I have filed the foregoing Brief of Amici Curiae via hand delivery with the Clerk of Court for the United States District Court for the Eastern District of New York using the CM/ECF system on November 1, 2019.

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