No. 23-1090

IN THE

Supreme Court of the United States

SCOTT D. PITTA,

PETITIONER,

V.

DINA MEDEIROS, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF SPECIAL EDUCATION FOR THE BRIDGEWATER RAYNHAM REGIONAL SCHOOL DISTRICT, ET AL.,

RESPONDENTS.

On petition for certiorari from the United States Court of Appeals for the First Circuit

BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTORARI

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INTEREST OF THE AMICUS CURIAE[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

The Liberty Justice Center litigates cases to protect free speech, to maintain government transparency, and to defend parents' right to direct their children's education. The Liberty Justice Center's First Amendment cases include, e.g., *Janus v. AFSCME,* 138 S. Ct. 2448 (2018); *McDonald v. Lawson,* 94 F.4th 864 (9th Cir. 2024).

The Liberty Justice Center's government transparency cases include *McCaleb v. Long,* No. 3-22-cv-00439 (M.D. Tenn. filed June 13, 2022) and *Hart v. Facebook,* No. 23-15858, 2024 WL 1693355 (9th Cir. April 19, 2024).

The Liberty Justice Center's parental rights cases include *Scherer v. Gladstone School District,* No. 3:2024-cv-00344 (D. Or. filed Feb. 26, 2024); and *California v. Chino Valley Unified School District*, No. CIVSB23317301 (Ca. Sup. Ct. filed Aug. 28, 2023). The Liberty Justice Center has also provided legal consultations to other school districts and parents interested

[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission. Counsel for all parties were advised of *Amicus*'s intention to file this brief at least ten days prior to filing.

in expanding and protecting parental notification rights.

SUMMARY OF ARGUMENT & INTRODUCTION

This Court should grant the petition for certiorari and ultimately reverse the holding of the First Circuit because the act of recording is inherently expressive activity protected by the First Amendment. And the First Amendment most obviously and importantly protects the recording of public employees performing public functions in particular.

Further, the Court should also grant the petition to clarify and strengthen parental rights in education, an issue that is likely to only become more salient.

ARGUMENT

I. Video recording from one's home, announced in advance, is inherently expressive speech protected by the First Amendment.

This Court should take this case to affirm the principle adopted by several appellate courts that video recording is inherently expressive speech protected by the First Amendment, particularly where, as here, the recording is a) of government employees performing official duties, and b) made in the recording citizen's own home.

A. The act of recording is First Amendment-protected expressive activity.

"This Court has held that the *creation* and dissemination of information are speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc,* 564 U.S.552, 570 (2011) (emphasis added). "Whether government regulation applies to creating, distributing, or consuming speech makes no difference." *Brown v. Entm't Merchants Ass'n,* 564 U.S. 786, 793 n.1 (2011).

Thus, several federal appellate courts have held that "the act of recording is itself an inherently expressive activity." *Animal Legal Defense Fund v. Wasden,* 878 F.3d 1187, 1203 (9th Cir. 2018); *see also Fields v. City of Philadelphia,* 862 F.3d 353 (3d Cir. 2017), *Brown v. Kemp,* 86 F.4th 745 (7th Cir. 2023), *Irizarry v. Yehia,* 38 F.4th 1282 (10th Cir. 2022). This makes sense: "[t]he 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." *ACLU of Ill. v. Alvarez,* 679 F.3d 583, 595 (7th Cir. 2012). And if "the creation of speech did not warrant protection under the First Amendment, the government could bypass the Constitution by 'simply proceed[ing] upstream and dam[ming] the source of speech.'" *Western Watersheds Project v. Michael,* 869 F.3d 1189, 1196 (10th Cir. 2017), quoting *Buehrle v. City of Key West,* 813 F.3d 973, 977 (11th Cir. 2015).

As Petitioner has observed, other courts of appeals have not gone as far (see Pet. 19-22), and the First Circuit in its prior cases has read some of those cases to

limit the right to record to "public officials . . . on public property." *Project Veritas Action Fund v. Rollins,* 982 F.3d 813, 832 (1st Cir. 2020)[2] (quoting *Smith v. City of Cumming,* 212 F.3d 1332, 1333 (11th Cir. 2000)). But most of those cases simply declined to reach the issue and did not affirmatively rule against Petitioner's position. For example, *Ness v. City of Bloomington* expressly refused to address the contention that the ordinance challenged there was unconstitutional on its face, having already found it unconstitutional as applied to the plaintiff; it did not foreclose deeming it facially unconstitutional in the future. 11 F.4th 914, 924 (8th Cir. 2021). Similarly, *Sharpe v. Winterville Police Department* observes that the First Amendment applies in the context of recording "matters of public interest like police encounters," but it does not say that First Amendment protection is *limited* to such recordings. 59 F.4th 674, 681 (4th Cir. 2023). *Turner v. Driver* acknowledges "the First Amendment's protection of the broader right to film" alongside the specific issue in that case, "the particular right to film the police." 848 F.3d 678, 689 (5th Cir. 2017). And *Smith v. City of Cumming* likewise never says that the right to record begins and ends with recording government conduct. 212 F.3d 1332 (11th Cir. 2000). Only the First and D.C. Circuits have explicitly restricted the First Amendment right to record in that way.

The D.C. Circuit notably cited *no* authority for its conclusory statement that "filmmaking . . . is not itself a communicative activity." *Price v. Garland,* 45 F.4th

[2] In the case for which review is sought here, the First Circuit frequently relied on *Project Veritas*. *See* Pet. App. 15-19.

1059, 1070 (D.C. Cir. 2022). Addressing several of the cases Petitioner raises here, the D.C. Circuit concluded that "these cases do not speak of a sweeping right to record in public, but of a narrower right 'to gather information about what public officials do on public property.'" *Id.* at 1071 (quoting *Smith,* 212 F.3d at 1333). But a right to the free dissemination of speech presupposes a right to create that speech in the first place. *See ACLU of Ill.,* 679 F.3d at 595; *Western Watersheds Project,* 869 F.3d at 1196.

The First Circuit likewise held that "a First Amendment right to record government officials performing their duties" exists "only when those duties have been performed in public spaces." Pet. App. 18 (emphasis in original). But that makes no sense if the right to record government officials is based on the use of that recording to inform the public, as implied in *Ness,* 11 F.4th at 924 ("Ness seeks to photograph and video record a matter of public interest"); *Sharpe,* 59 F.4th at 681 (First Amendment right to record recognized "particularly when the information involves matters of public interest like police encounters"); and *Turner,* 848 F.3d at 689 ("the principles underlying the First Amendment support the particular right to film the police" because it "contributes to the public's ability to hold the police accountable").

And of course government officials' conduct could be a matter of public interest—even especially so—when it occurs on private property. For example, a video of police raiding of a private residence and shooting the owner's dog without provocation would be of public interest; police encounters in general are a "matter[] of public interest" and such a video would

help the public "make informed decisions about police policy." *Sharpe,* 59 F.4th at 681; *Turner,* 848 F.3d at 689.

This analysis reinforces the need for this Court to grant certiorari and reverse the First Circuit, which is out of line with most courts that have considered the First Amendment's protection for recording and insufficiently protecting free-speech rights as a result.

B. Recordings of public employees performing their government functions are unambiguously protected speech, and serve public transparency interests.

A second reason to support recording rights where, as here, one of the parties to the conversation is a government employee performing official government functions, is that such rights comport with federal and state public policy favoring government transparency. After all, "'a major purpose' of the First Amendment 'was to protect the free discussion of governmental affairs.'" *Ariz. Free Enter. Club's Freedom PAC v. Bennett,* 564 U.S. 721, 755 (2011) (quoting *Buckley v. Valeo,* 424 U.S. 1, 14 (1976)).

This commitment to transparency is reflected in Freedom of Information Acts and Open Meetings Acts across the country. *See, e.g.,* 5 ILCS 140/1 ("it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees"); NY CLS Pub O § 84 ("a free society is maintained when government is

responsive and responsible to the public, and when the public is aware of governmental actions"); Tex. Gov't Code § 552.001(a) ("each person is entitled . . . to complete information about the affairs of government and the official acts of public officials and employees").

This case arises out of Massachusetts, where, "[a]fter notifying the chair of the public body, any person may make a video or audio recording of an open session of a meeting of a public body, or may transmit the meeting through any medium." ALM GL ch. 30A, § 20(f). So anyone may record a public meeting, even if the issues discussed do not affect them personally. Yet the First Circuit takes the position that a citizen may not record a conversation with government employees performing a government function, even when that conversation pertains to the citizen's family. That can't be right.

These government transparency laws are a closer match for this case than the First Circuit's *reductio ad absurdum* example of a member of a jury recording his fellow jurors during deliberations. Pet. App. 20 n.9. The First Circuit's argument that the public does not have access to the specific type of meeting at issue here (Pet. App. 20) is slightly more on the mark, but fails to address either the fact that the school keeps official minutes of those meetings, or the contention that those official minutes contain material errors – which is the reason Petitioner wanted to record the meeting in the first place. *See* Pet. 3 n.1. Minutes of a meeting such as this would be analogous to the minutes of an executive session, which under Massachusetts law "may be withheld from disclosure . . . as long as publication

may defeat the lawful purposes of the executive session." ALM GL ch. 30A, § 22(f). There is a purpose to protecting the privacy rights of a minor with special educational needs, to be sure; but that purpose does not and cannot extend to protecting *the school* from a parent disturbed by the school's Orwellian rewrite of its official minutes to disfavor the parent's preferred course of action with respect to his child.

Federal appellate courts have agreed that "[f]ilming . . . public officials as they perform their official duties acts as 'a watchdog of government activity' and furthers debate on matters of public concern." *Irizarry,* 38 F.4th at 1289, quoting *Leathers v. Medlock,* 499 U.S. 439, 447 (1991).

The courts that have not adopted as expansive a view of the First Amendment's protection of the act of recording (Pet. 19-22) do at least agree that the public interest in analogous cases commands First Amendment protection. *See, e.g., Gilk v. Cunniffe,* 655 F.3d 78, 82 (1st Cir. 2011) (right to gather information about government officials "serves a carinal First Amendment interest in protecting and promoting the free discussion of governmental affairs"); *Sharpe,* 59 F.4th at 681-82 (First Amendment protects livestreaming police officers during a traffic stop); *Turner,* 848 F.3d at 689-90 (same); *Ness,* 11 F.4th at 924 (ordinance prohibiting recording of children unconstitutional as applied to individual who sought to record purported violations of city permits); *Smith,* 212 F.3d at 1333 (discussing a right to videotape police activities).

In other words, even if this Court agrees with the courts that have held that the act of recording is *not* itself inherently expressive, the First Circuit is still out of line, and this Court should still take this case in order to draw the line: at the very least, a recording of public employees doing their jobs *must* be protected speech.

C. Recordings made in one's home are protected speech.

A further reason to grant certiorari is that, post COVID-19, more and more citizen/government interactions are taking place online, over Zoom and similar services, with the citizen communicating "face to face," but from their private residence. This Court will not be able to evade indefinitely the First Amendment concerns raised by this development.

After all, the traditional public forum analysis – indeed, *any* established forum analysis – fails to account for this new paradigm. A forum analysis presumes that speech occurs in one physical location. But now, while the government employee may be speaking from his office, a citizen can simultaneously engage in expressive activity – the act of recording – from his own home.

The argument that the First Circuit must necessarily make, then, is that, in Massachusetts, a citizen could record a meeting that physically took place in a public forum, but *not* one taking place *in his own home.* That can't be right.

II. This case presents an ideal vehicle to establish ground rules for parental rights in education.

It cannot have escaped this Court's notice that a massive sociological upheaval has been underway in this nation's schools since COVID-19 forced students into remote learning systems and parents got a firsthand look at what their children were being taught on controversial issues relating to race, gender, and sexuality. *See, e.g.,* Rachel Keith, *Some call it 'teaching history,' others call it 'indoctrination,' and the fight is far from over,* WHQR (Oct. 4, 2021)[3] (parent quotations include "Teachers should not use their platform and access to kids to teach them political ideologies," "Start teaching them things like science, math, and reading and writing, not to teach things like this critical race theory," "our schools [might] abuse the teaching of civics and history by using that time to teach social-emotional learning"); Kaylee McGhee White, *Americans know public schools are indoctrinating their children,* WASHINGTON EXAMINER (Aug. 19, 2022)[4], citing *Schools and gender identity, for Washington Examiner; YouGov Poll: August 12-15, 2022,* YOUGOV (Aug. 19, 2022)[5] (majority of respondents favor a nuanced view of U.S. history rather than "critical race theory and toxic racialism," but believe that

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[3] https://www.whqr.org/local/2021-10-04/indoctrination

[4] https://www.washingtonexaminer.com/news/2873751/americans-know-public-schools-are-indoctrinating-their-children/

[5] https://today.yougov.com/politics/articles/43476-schools-gender-identity-washington-examiner-yougov?redirect_from=%2Ftopics%2Fpolitics%2Farticles-reports%2F2022%2F08%2F19%2Fschools-gender-identity-washington-examiner-yougov

schools are "teaching students what to believe regarding race;" and "teaching students to adopt certain views on sexuality and gender," despite a majority of respondents opposing teaching such concepts until high school). *See also* Kali Fontanilla, *I'm a teacher; here's how my school tried to indoctrinate children,* ORANGE COUNTY REGISTER (Feb. 14, 2022)[6]; Betsy McCaughey, *How public schools brainwash young kids with harmful transgender ideology,* NEW YORK POST (Dec. 22, 2021)[7]; Stanley Kurtz, *Stopping K-12 indoctrination is a right,* ETHICS & PUBLIC POLICY CENTER (July 6, 2021)[8]

Amicus is involved in one such case, *California v. Chino Valley Unified School District,* No. CIVSB2317301, Ca. Sup. Ct. There, the California government is trying to prohibit schools from informing parents that their children may be transgender – a condition that the government acknowledges comes with an increased chance of psychological harassment and abuse, and extremely high risk of suicide thoughts and attempts. In other words, California is trying to prevent schools from informing parents that their children may be at increased risk of harassment, abuse, and suicide.

The time is ripe for this Court to weigh in on the issue of parental rights in education.

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[6] https://www.ocregister.com/2022/02/14/im-a-teacher-heres-how-my-school-tried-to-indoctrinate-children/

[7] https://nypost.com/2021/12/22/how-public-schools-brainwash-young-kids-with-harmful-transgender-ideology/

[8] https://eppc.org/publication/stopping-k-12-indoctrination-is-right/

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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