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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICUS CURIAE* THE EQUAL PROTECTION PROJECT IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Equal Protection Project (EPP) of the Legal Insurrection Foundation (LIF),[2] a Rhode Island tax-exempt 501(c)(3), is devoted to the fair treatment of all persons without regard to race or ethnicity. Our guiding principle is that there is no "good" form of racism. The remedy for racism never is more racism.

Since its establishment last year, EPP has filed more than twenty civil rights complaints, in various fora, against governmental or federally funded entities that have engaged in racially discriminatory conduct in various forms. EPP also has noted the increasingly apparent stratagem of such entities to hide their insidious – and unconstitutional – activities, policies, and procedures from interested parties and the public at large.

EPP's strong interest in this case results from our deep and growing knowledge, as we report on our organizational website,[3] that entities engaging in racially discriminatory and other unlawful conduct – which we are centrally committed to revealing and combatting – frequently attempt to obfuscate the true discriminatory purpose of

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1. This brief conforms to the Court's Rule 37, in that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus Curiae* the Equal Protection Project of the Legal Insurrection Foundation funded its preparation or submission. All parties have been notified of EPP's intention to file this brief within the timeline set forth in Rule 37.2.

2. https://legalinsurrectionfoundation.org/.

3. https://equalprotect.org/.

such conduct. For example, EPP has documented that many institutions of higher education, even after this Court's *Students for Fair Admissions* opinion,[4] continue to discriminate surreptitiously in several significant ways, including by playing word games that substitute overt racial or ethnic categories with nobler sounding – but, ultimately, equally discriminatory – language such as "first generation," "historically underrepresented group," or "marginalized populations."[5]

Moreover, the increasingly apparent determination of some educational institutions to surreptitiously evade the anti-discriminatory mandate of our Constitution as articulated by this Court, for example, in *Students for Fair Admissions*, is not limited to higher education, nor even to discrimination based solely on race, ethnicity, or national origin. As EPP has spotlighted, elementary and secondary school boards and districts, often operating in concert with teachers' unions, frequently have hidden their unlawful discriminatory animus in other areas entirely out of the sight of parents and the public at large. This chicanery has resulted, for example, in arbitrary denial of parental records requests concerning discriminatory curricula such as "critical race theory"

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4. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

5. *See Six Ways Higher Ed Will Attempt To Evade The Supreme Court's Affirmative Action Ruling*, *https://legalinsurrection.com/2023/07/six-ways-higher-ed-will-attempt-to-evade-the-supreme-courts-affirmative-action-ruling/*; *see also Supreme Court struck down affirmative action, but that won't stop Harvard*, William A. Jacobson & Kemberlee A. Kaye, Fox News, *available at https://www.foxnews.com/opinion/supreme-court-struck-down-affirmative-action-wont-stop-harvard.*

and radical "gender" indoctrination,[6] in lawsuits against parents accused of wrongfully attempting to unmask this information about their children's education,[7] and in outrageously secretive administrative actions including within our public elementary schools.[8]

The First Amendment operates as a vital aperture through which concerned Americans can view – and, importantly, document – the increasingly hidden and opaque operations of our public and public-supported educational systems. Indeed, it is becoming increasingly apparent that only through the light and lens guaranteed by our First Amendment can Americans, including EPP, effectively monitor and prevent unlawful discriminatory conduct within our schools.

This reality explains our vital interest in the instant case. Indeed, if the Court of Appeals' cramped and artificial formulation of the First Amendment here is permitted to

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6. *See Rhode Island Mom Involved In Critical Race Public Records Fight And Targeted By NEA Gets High-Powered Legal Help, https://legalinsurrection.com/2021/07/rhode-island-mom-involved-in-critical-race-public-records-fight-and-targeted-by-nea-gets-high-powered-legal-help/.*

7. *See Teachers Union Sues Mom Nicole Solas To Prevent School District From Releasing Critical Race Teaching Records, https://legalinsurrection.com/2021/08/teachers-union-sues-mom-nicole-solas-to-prevent-school-district-from-releasing-critical-race-teaching-records/.*

8. *See RI Teachers Union Is Trying To Get Me Kicked Off Twitter, After Suing Me For Seeking CRT Records, https://legalinsurrection.com/2021/11/ri-teachers-union-is-trying-to-get-me-kicked-off-twitter-after-suing-me-for-seeking-crt-records/.*

stand, then this case effectively will encourage more of the evasive and surreptitiously discriminatory conduct that EPP continues regularly to discover, illuminate, and combat.

SUMMARY OF ARGUMENT

As Petitioner has pointed out, the opinion of the Court of Appeals below both exacerbated an existing and irreconcilable split among the Circuit Courts of Appeals and was contrary to this Court's First Amendment teachings. That said, however, EPP is even more concerned that the opinion below likely will encourage public and public-supported school administrators to hide discriminatory policies and practices, as well as objectionable curricula.

The Court of Appeals below held – erroneously in our view – that the First Amendment did not protect a parent's right to record a video conference with school administrators concerning the vital educational needs of Petitioner's child ostensibly because the right to create such recordings is limited to governmental conduct that takes place "in public" and, even then, only if recording such conduct would serve "public interests." *Pitta v. Medeiros*, 90 F.4th 11, 22 (2024). Petitioner correctly notes that other Circuit Courts of Appeals have held that video recording is "inherently expressive" and therefore deserving of far broader First Amendment protection. Brief for Petitioner at 4, *Pitta v. Medeiros*, No. 23-1090 (Apr. 3, 2024) (hereinafter "Petitioner's Brief"). Resolution of such circuits splits is, of course, a paramount role of this Court.

Moreover, and a point not squarely addressed by the Court of Appeals, we believe the decision below is contrary to this Court's teachings and direction with respect to First Amendment jurisprudence in this vital area. Specifically, although this Court has not articulated the First Amendment's precise reach with respect to video recording of governmental conduct out of view of the general public, the Court nevertheless has explained that "the creation . . . of information [is] speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). *See also Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 793 n.1 (2011) ("Whether government regulation applies to creating, distributing, or consuming speech makes no difference."); and *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 582 (1983) (holding that a tax on ink and paper "burdens rights protected by the First Amendment"). Unfortunately, some Circuit Courts of Appeals appear to be ignoring these teachings, and this Court therefore should take the opportunity here to clearly articulate that the First Amendment's creative right extends to recording video conferences involving governmental or official conduct of any type in any place or forum at which the recorder lawfully is present.

Moreover, we are concerned that the Court of Appeals' decision below would, if permitted to stand, effectively greenlight the insidious efforts of some school administrators to hide unlawfully discriminatory policies and procedures from public view and knowledge. This is not hyperbolic speculation. Educational secrecy and deliberate movement underground of discriminatory policies and procedures already has become a significant problem, for example, in EPP's home state of Rhode

Island, where parents who have inquired into secretive school policies have been sued, charged with outrageous financial bills simply for requesting school records that are statutorily mandated to be open to the public, and harassed at both public and secretive meetings of school administrators. As usual, the First Amendment serves the American people as a vital tool to expose, document, and fight such unlawful governmental conduct. Indeed, this Court should review this case because such secretive and manipulative practices are anathema to the open public (and publicly supported) educational system that American parents and students have enjoyed for many generations.

ARGUMENT

I. The Court of Appeals' decision below conflicts not only with those of other Circuit Courts of Appeals but also with the First Amendment teachings of this Court.

The Court of Appeals held below that Petitioner had no First Amendment right to record a video conference with school administrators that was critical to his child's health and welfare because the right to create First Amendment-protected works applies only when the governmental conduct to be recorded "indisputably" occurs "in public places in full view of the public, and even then, only when the act of filming . . . would serve public interests." *Pitta*, 90 F.4th at 22. As Petitioner correctly notes, the opinion below is similar to those reached by the "Fourth, Fifth, Eighth, Eleventh, and D.C. Circuits." Petitioner's Brief at 20.

Importantly, as Petitioner also explains, the opinion below "stands in stark contrast" with the holdings of the Third, Seventh, Ninth, and Tenth Circuit Courts of Appeals, each of which has held that video recording is "inherently expressive" and deserving of First Amendment protection far broader than the strict limits imposed by their sister appellate courts, now including the First Circuit Court of Appeals here. *Id.* at 15-19 (citing cases).[9]

Moreover, the opinion below is contrary to fundamental teachings of this Court with respect to the First Amendment's creative right, including the right to record video. This Court has explained that "the creation . . . of information [is] speech within the meaning of the First Amendment." *Sorrell*, 564 U.S. at 570. *See also Brown*, 564 U.S. at 793 n.1 ("Whether government regulation applies to creating, distributing, or consuming speech makes no difference."); and *Minneapolis Star & Tribune Co.*, 460 U.S. at 582 (holding that a tax on ink and paper "burdens rights protected by the First Amendment").

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9. Petitioner also explains that the Texas Court of Criminal Appeals – the court of last resort in Texas for criminal cases – is in conflict with the U.S. Court of Appeals for the Fifth Circuit, with the Criminal Court of Appeals holding "that a person's purposeful creation of photographs and visual recordings is entitled to the same First Amendment protection as the photographs and visual recordings themselves," while the Fifth Circuit, like the court below here, holds that "the right to record . . . is specifically linked to 'the free discussion of governmental affairs.'" *Id.* at 21-22 (citing *Ex parte Thompson*, 442 S.W.3d 325, 337 (Tex. Crim. App. 2014) and *Turner v. Driver*, 848 F.3d 678, 689 (5th Cir. 2017)). This split of opinion also supports the Court's grant of certiorari.

The decision below also conflicts with a fundamental purpose of the First Amendment, which we believe is the direction in which this Court's jurisprudence is moving and should continue to develop: The First Amendment protects the American people's "search for truth." And a fulsome search for truth frequently requires the ability to document and preserve information uncovered in the course of this search. *See* Brief for Cato Institute as *Amicus Curiae* Supporting Appellants at 5-6, *Fields v. City of Philadelphia*, Nos. 16-1650 & 16-1651 (3d Cir. Oct. 31, 2016) (citing *Cohen v. Cal.*, 403 U.S. 15, 23-24 (1971)). "Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." *Sorrell*, 564 U.S. at 570. *See also* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 373 (Jan. 2011) ("On analysis, . . .the claim that image capture falls outside the First Amendment because it collects rather than disseminates information runs aground."). As Professor Kreimer[10] explains, the act of video recording is, *per se*, deserving of First Amendment protection:

> [T]he modern process of image capture is an essential element in producing, and ultimately disseminating, photos, videos, and montages which modern First Amendment doctrine solidly recognizes as protected media of communication. The increasing integration of image capture with communication devices

10. Seth Kreimer is the Kenneth W. Gemmill Professor of Law at the University of Pennsylvania Law School. *Kreimer*, 159 U. Pa. L. Rev. at 335 n.1.

> ranging from cell phones to iPhones to PDAs makes it clear that contemporary image capture is part of a broader digital ecology of communication. One might try to dissect the medium into its component acts of image acquisition, recording, and dissemination and conclude that recording is an unprotected 'act' without an audience. But this maneuver is as inappropriate as maintaining that the purchase of stationery or the application of ink to paper are 'acts' and therefore outside of the aegis of the First Amendment. . . . Supreme Court majorities have regularly invoked the First Amendment to invalidate regulations that impose burdens on 'actions' *without audiences* where the targets are essential preconditions to communication.

Kreimer, 159 U. Pa. L. Rev. at 381, 384 (emphasis added).

Unfortunately, some of the Circuit Courts of Appeals are moving in an entirely different direction, cramping the vital role of the First Amendment in our societal search for truth. We strongly urge this Court to take this opportunity to clarify that the right to record video – in this case during a non-public administrative meeting with Petitioner – extends to all governmental conduct that occurs within the lawful presence of the recorder. Doing so will facilitate that most important of societal values: Truth.

II. The Court should review this case for the independently important reason that school boards and administrators across the country are increasingly preventing parents of school children from accessing critical information about school policies and practices.

In addition to the vital reasons discussed above, this Court should review this case because the Court of Appeals' opinion below effectively will facilitate and energize the insidious movement of school boards and administrators to keep critical educational information from parents.

As EPP has learned first-hand in its home state of Rhode Island, parents who desire even basic information about the public-school education their children are receiving frequently are thwarted and, indeed, harassed, by school administrators, many of whom seem to prefer performing their public duties under a shroud of secrecy far from the prying eyes of their constituents.

In 2021, for example, Rhode Island parent Nicole Solas requested information regarding the curriculum for her child's kindergarten class but was stonewalled by school administrators.[11] Here is how Ms. Solas described her experience:

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11. *See I'm A Mom Seeking Records Of Critical Race and Gender Curriculum, Now The School Committee May Sue To Stop Me (Update)*, *https://legalinsurrection.com/2021/06/im-a-mom-seeking-records-of-critical-race-and-gender-curriculum-now-the-school-committee-may-sue-to-stop-me/.*

> I . . . asked to see the elementary school curriculum. I asked the principal, the school committee, the superintendent, the director of curriculum, and even the legal department at the Rhode Island Department of Education to allow me to view the curriculum. The school's Director of Curriculum told me she was unavailable and never responded when I said I could view the curriculum on any day and time. Then a school committee member directed me to file an Access to Public Records Act (APRA)[12] request on the school district website to obtain the curriculum. After thirty days, I received an incomplete curriculum and filed an APRA complaint with the Attorney General.
>
> * * *
>
> At this point I had reason to believe that the school district was hiding information and deliberately stonewalling me. I started using the APRA request google link on the school district's website to request public documents that might answer my questions about CRT, gender theory, and other concerns. When I requested the emails of a school committee member the estimate of what they would charge me came back as $9,570. Who can afford that?[13]

Ms. Solas reported that other Rhode Island residents faced similar exorbitant charges for school records and,

12. R.I. Gen. Laws § 38-2 *et seq.*

13. *See supra* n.11.

after sharing information she had learned with other parents, Ms. Solas discovered that the local school board was considering suing her:

> Then, on Friday, May 28, the school committee set an agenda item for a public meeting to discuss 'filing litigation against Nicole Solas to challenge the filing of over 160 APRA requests.'
>
> * * *
>
> My school committee now is considering suing me because I submitted a lot of public records requests to get answers to my questions which the School District would not answer. This same school committee which told me to use a statutorily prescribed process to obtain one piece of information (curriculum) is now having a public meeting to discuss suing me for using the same statutorily prescribed process to obtain other information. The message was clear: ask too many questions about your child's education and we will come after you.[14]

Ms. Solas ultimately was, in fact, sued – but not by the local school board. Rather, it was the teachers' union that filed suit and sought an emergency injunction to prevent the release of school curriculum records to Ms. Solas.[15]

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14. *Id.*

15. *See Teachers Union Sues Mom Nicole Solas To Prevent School District From Releasing Critical Race Teaching Records*, *https://legalinsurrection.com/2021/08/teachers-union-sues-mom-nicole-solas-to-prevent-school-district-from-releasing-critical-race-teaching-records/.*

Unfortunately, EPP is learning that Ms. Solas' case is merely the tip of the iceberg. School boards across the country deliberately – and, we believe, insidiously – are hiding critical educational information from parents of elementary and secondary school children. In Colorado, for example, a court was required to force a school board to release details of secret closed-door meetings;[16] in Maine, a school board was sued by parents alleging that their children secretly were being encouraged to surreptitiously "transition genders"[17]; and in Pennsylvania, yet another school held secret curriculum meetings to discuss changes to their educational programs.[18]

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16. *See Judge: Denver school board must release recording of closed door meeting*, https://www.chalkbeat.org/colorado/2023/6/23/23771523/denver-school-board-open-meetings-violation-police-sros-release-recording-judge-rules/.

17. *See Maine Mom Sues School Board for Hiding Child's 'Gender Transition'*, *https://www.goldwaterinstitute.org/maine-mom-sues-school-board-for-hiding-childs-gender-transition/.*

18. *See PSD board members fume over "secret" curriculum meeting*, *https://buckscountyherald.com/stories/pennridge-school-board-members-fume-over-secret-curriculum-meeting-jordan-adams,26282.* Indeed, such secretive school proceedings have been brought to the attention of several courts. *See, e.g.*, *Parents Protecting Our Children, UA v. Eau Claire Area Sch. Dist.*, 657 F. Supp. 3d 1161, 1169 (W.D. Wis. 2023) ("Plaintiff alleges that ECASD is providing 'psychosocial medical/psychological care through transgender social transition' for which it is intentionally not obtaining parental consent."); *Arnold v. Bd. of Educ. of Escambia Cnty.*, 880 F.2d 305, 309 (11th Cir. 1989) ("plaintiffs allege that the school officials 'coerced these children to refrain from notifying their parents . . .' and 'to maintain the secrecy of their plan' to obtain an abortion"); *John & Jane Parents 1 v. Montgomery Cnty. Bd. Of Educ.*, 78 F.4th 622, 626 (4th Cir. 2023) ("The Montgomery County Board of Education adopted

The Court of Appeals' decision below, if permitted to stand, likely would make things much worse. A rule that blanketly permits school administrators to prohibit video recording of critically important meetings, discussions, and decisions invariably would encourage administrators to adopt such policies, and generally would embolden their ever-growing efforts to hide sometimes unlawful policies, practices, and procedures from interested parents and others. As usual, the First Amendment – as properly construed – offers a vital protection against such secretive governmental conduct by ensuring that interested members of the public have a Constitutional right to document and record such official proceedings. This Court should grant review here for the purpose of ensuring this fundamental freedom.

Guidelines for Gender Identity for 2020–2021 that permit schools to develop gender support plans for students. The Guidelines allow implementation of these plans without the knowledge or consent of the students' parents. They even authorize the schools to withhold information about the plans from parents . . . .").

CONCLUSION

This Honorable Court should grant certiorari to resolve an irreconcilable split among the Circuit Courts of Appeals, to clearly articulate that the First Amendment protects the right to record governmental proceedings, and to prevent the erroneous decision below from encouraging even greater secrecy regarding the education of our young people by sometimes ill-motivated school boards and administrators.

Respectfully submitted,

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