Pitta v. Medeiros Backgrounder

Executive Summary

Parents have a fundamental right to control and direct the education and upbringing of their children. But more than that, they have a responsibility to ensure that their children receive an adequate education. Scott and Roxanne Pitta were exercising that right and fulfilling that responsibility when they engaged in a series of online discussions with school officials over the needs of their child, J.J. The Pittas and school employees, however, disagreed over J.J.'s needs, and as part of that disagreement, the Pittas requested permission to video-record their online meetings with the school employees.

School administrators, however, refused. Although they would permit an *audio* recording, they insisted that school policy prohibits *video*-recording these meetings. And that was a problem, because the Pittas wanted to preserve evidence that some of the school employees took *their* side in the dispute over J.J.'s education.

The Constitution generally protects a person's right to video record government officials while doing their duties. In fact, most federal courts have ruled that the act of making a video recording of a government employee doing his or her job is protected by the First Amendment. But when the Pittas went to court to challenge the Bridgewater-Raynham Regional School District's no-video-recoding policy, the court announced a different rule: citizens only have the right to record government officials if those officials are in "indisputably public places," and only when the recording would serve the public interests.

That rule is troubling. The Pittas' meetings with government officials took place in their own home—where surely they have the right to film government employees. And restricting the right to record to instances when the recording would be in the public interests would essentially require people to predict the future; nobody knows when a video recording might become an important document to share with others.

As part of the Goldwater Institute's work defending the right of parents to oversee the education and upbringing of their children, the Goldwater Institute is appealing the Pittas' case to the U.S. Supreme Court.

Background

Scott and Roxanne Pitta are the parents of J.J., a child with a learning disability. J.J. attends school in the Bridgewater Raynham Regional School District and receives an individual education plan, or IEP, under the federal Individuals with Disabilities Education Act. That law requires public schools to take certain steps to ensure that a disabled child receives an education tailored to his or her individualized needs. A child's IEP is created by the members of a child's "team," who meet regularly to assess and discuss the needs of the child. That team generally includes the school employees who interact with the child, the school special education professional, and the child's parents.

This case begins and ends with a series of three virtual IEP Team meetings that occurred between the Pittas and School District officials through the online platform "Google Meet." On February 15, 2022, and again on March 8, 2022, they met to discuss J.J.'s IEP. No one recorded those meetings; instead, school employees drafted written meeting minutes of their own, which summarized the conversations.

But these minutes omitted crucial statements. At both the February 15 and March 8 meetings, school employees asserted that J.J. no longer required an IEP. The Pittas firmly disagreed. And at both meetings, some school employees made statements supporting the Pittas' position that J.J. *is* still entitled to an IEP. Specifically, they admitted during the meetings that they had no data on which to base their view that J.J. no longer requires an IEP, and indicated that teachers who had reached the conclusion that an IEP *was* still necessary had been instructed by their District superiors to "double check" their evaluations.

The official minutes of the meetings omitted these statements from the official minutes—statements important to helping the Pittas make their case that J.J. should still be given an IEP. The Pittas noticed this omission, and asked that the minutes be amended to accurately reflect those statements, but the school refused. Because of that refusal, Scott informed the school that intended to video-recording the meetings, instead.

When the IEP team met again on September 20, 2022, Scott again requested that the meeting be video recorded because he did not trust that the school's own minutes would accurately reflect the relevant statements. The school officials again refused. They offered to *audio*-record the meeting, but Scott found this offer unsatisfactory, because only a video recording would indicate who was speaking. The school, however, continued to insist that video recording would be "invasive" and was prohibited under the District's policy.

When at the beginning of the September 20, 2022 meeting, Scott announced that he was video recording through Google Meet's built-in function, special education administrator Dina Medeiros threatened to terminate the meeting unless he ceased recording. Scott refused. So, Medeiros terminated the meeting.

Scott sued the school district and the district's special education administration for violating his First Amendment right to free speech. The District Court dismissed the case, and the First Circuit Court of Appeals agreed.

First, the court held that the First Amendment only protects video recording "of government officials performing their duties only in indisputably public places in full view of the public,"[1] and the meeting did not occur in a public place. Second, it said that allowing video recording would hinder the IEP Team members in performing their duties, because it would "risk … suppressing the sensitive, confidential, and honest conversations necessary when discussing or developing a child's IEP."[2] Also, the court said that the right to record is "linked to the right of the

[1] *Pitta v. Medeiros*, 90 F.4th 11, 22 (1st Cir. 2024).
[2] *Id*. at 22.

public to receive this information."[3] In other words, video-recording is only a "corollary" to public discussion of social or political matters.[4] Thus the First Amendment only protects video-recording "when the act of filming would … serve public interests."[5]

The court never explained why *audio*-recording would not disrupt the IEP discussions, but *video*-recording would. Nor did it address the fact that people have a greater First Amendment right to record things that occur *in their own homes* than in public.

Legal Analysis

That's important because with the proliferation of video-recording technology, video recording of government employees has become commonplace—and courts nationwide have held that such recordings are protected by the First Amendment. That Amendment protects not just "speech," but also conduct that is inherently expressive—conduct that itself expresses a message, or conduct that cannot be separated from the communication of a message.[6]

But courts are divided on these questions. The Third,[7] Seventh,[8] Ninth,[9] and Tenth[10] Circuits have all held that video recording is *inherently* expressive, and therefore entitled to full First Amendment protection, but the Fourth,[11] Fifth,[12] Eighth,[13] Eleventh,[14] and D.C. Circuits[15] have held that it is not inherently expressive, and is therefore constitutionally protected only in certain circumstances.

By holding that video recording is not inherently expressive, and is only protected as a corollary to the right to disseminate information or the right of the public to receive information, the First Circuit's decision in the Pittas' case undermines the Supreme Court's longstanding precedents. For example, the Supreme Court has recognized that the First Amendment protects both the creation and dissemination of visual images and recordings,[16] and that the First

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[3] *Id*. at 23.
[4] *Id*.
[5] *Id*. at 22.
[6] *See, e.g.*, *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018); *Fields v. City of Philadelphia*, 862 F.3d 353, 358 (3d Cir. 2017).
[7] *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017)
[8] *Brown v. Kemp*, 86 F.4th 745 (7th Cir. 2023)
[9] *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018)
[10] *Irizarry v. Yehia*, 38 F.4th 1282, 1285 (10th Cir. 2022)
[11] *Sharpe v. Winterville Police Department*, 59 F.4th 674 (4th Cir.), *cert. denied*, 144 S. Ct. 489 (2023)
[12] *Turner v. Driver*, 848 F.3d 678 (5th Cir. 2017)
[13] *Ness v. City of Bloomington*, 11 F.4th 914 (8th Cir. 2021)
[14] *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000)
[15] *Price v. Garland*, 45 F.4th 1059, 1070 (D.C. Cir. 2022), *cert. denied*, 143 S. Ct. 2432 (2023)
[16] *See, e.g., Brown v. Entertainment Merchants Assn*, 564 U.S.786,792 n.1 (2011) (holding that law that imposed civil fines for the sale or rental of violent video games to minors impermissibly restricted protected speech); *United States v. Stevens*, 559 U.S. 460, 468 (2010) (holding that

Amendment protects the creation of videos (for example, of animal cruelty or the creation of violent video games). It's hard to see how the First Amendment would not also protect the filming of government employees performing their governmental duties—especially when past governmental misconduct is the reason for that recording. Making such a recording sends a message of distrust—and is therefore just as expressive as other acts the Supreme Court has said are protected by the First Amendment, like wearing a black arm band,[17] placing a piece sign on a flag,[18] or even burning a flag.[19]

The decision of the First Circuit is also unworkable. It drew the constitutional boundary at the recording made in a "public place" as opposed to a private place. That makes little sense in an era where online meetings with government employees are ubiquitous. Further, requiring a recording to "serve the public interest" as the First Circuit held it would require an individual to gauge at the time of recording whether a seemingly private event might later be of public interest. The better rule would be to hold that recording a public employee engaged in public duties is inherently protected by the First Amendment, and that—unless some unusual exception applies, as with the confidentiality of the jury room—the citizen has the right to record in any location where she is lawfully present.

In today's world, government interacts daily with citizens online or by phone in myriad ways. These meetings are conducted not only on Google Meet or Zoom, but through services such as DocuSign, a computer system that enables people to virtually sign legal documents in a manner that is legally binding—and, of course, to keep and print copies of those documents. During the Pandemic, many public schools held classes virtually, over Zoom or similar programs; many teachers recorded these online class sessions.[20] Indeed, during the Pandemic, students who were seen online breaking school rules in the home were subjected to discipline.[21]

These developments render the traditional public place/private place distinction largely obsolete, at least with respect to online meetings. And the First Circuit's ruling is even more troubling, given what it might say for future cases. Consider a case in which a police officer searches a home. The homeowner would likely want to record that incident to preserve a record

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statute criminalizing the knowing creation, sale, or possession of certain depictions of animal cruelty punished protected speech);.

[17] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (wearing black armbands to protest the Government's policy in Vietnam "was closely akin to 'pure speech' which, [the Court has] repeatedly held, is entitled to comprehensive protection under the First Amendment.");

[18] *Spence v. Washington*, 418 U.S. 405, 406 (1974) (placing peace signs made of black tape on an American flag and displaying it publicly was "speech").

[19] *Texas v. Johnson*, 491 U.S. 379 (1989)

[20] See Mark Lieberman, Zoom Use Skyrockets During Coronavirus Pandemic, Prompting Wave of Problems for Schools, Education Week (Apr. 3, 2020) ("Teachers liked being able to display two people's screens at the same time, and to save chat transcripts and audio/video recordings for later use.").

[21] *See* Aaron Feis, *Colorado School Calls Sheriff on Boy, 12, Who Showed Toy Gun in Virtual Class*, N.Y. Post, (Sep. 7, 2020) https://nypost.com/2020/09/07/colorado-school-calls-sheriff-on-boy-who-showed-toy-gun-in-virtual-class/

for possible litigation, even aside from any considerations of spurring public discussion. The recording may also be of purely private value, such as making sure the police only seize those items identified in the warrant, or even just knowing how to replace the furniture the officers might move. Meanwhile, the government has virtually no legitimate interest in prohibiting that recording. Yet its decision in the Pittas' case would enable the government to prohibit such a recording.

There's a better way to evaluate whether an individual has a right to record than by looking to the location of the government employee being recorded. Instead, courts should look to whether *the person doing the recording* is lawfully present in the place where the recording occurs. That would lead to more logical and manageable precedent—for example, it would clearly allow individuals to film government officials in their own homes.

Case Logistics

The Goldwater Institute is representing Scott Pitta, a Massachusetts father who wanted to video record a meeting discussing his son's educational needs to ensure that his child receives the education that federal law guarantees.

The Goldwater Institute filed a petition for certiorari with the Supreme Court on April 3, 2024.

The petition asks the Supreme Court to review the First Circuit's decision and ultimately declare that video recording can be—and was here—an inherently expressive activity entitled to the full protection of the First Amendment.

The Legal Team

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