What to do When First Amendment Auditors Come to Town

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Introduction

On November 3, 2020, two men wearing tactical vests and armed with a handgun stood outside a ballot box and filmed voters dropping off ballots in front of the Arapahoe County administration building in Littleton, Colorado. Alarmed county staff approached the men and asked them what they were doing while others called the police. In response to the county staff's questioning, the men identified themselves as "First Amendment auditors," and upon further questioning by police officers, the men conveyed that they had the legal right to film people outside a government building, and further that they possessed the right to carry firearms under Colorado's open carry law. The men recorded their encounter with police and County staff. Ultimately the police decided not to cite or otherwise detain the two individuals because they did not actively prevent any voters from delivering their ballots.[1]

Instances of the above, known colloquially as "First Amendment audits," are an increasingly prevalent phenomena that involves members of the public who call themselves citizen journalists and/or First Amendment auditors and who typically attempt to provoke a response or otherwise test local government officials. The practice refers to individuals who travel to publicly-accessible areas on public property, including within local or municipal offices, and then film their encounters with public employees. The self-proclaimed goal of these auditors is to test whether the government is abiding by the strictures of the First Amendment by leaving them be; if an official detains, cites, harasses, or otherwise restricts or arrests the auditor, the local entity is deemed to have "failed" the audit. These filmed encounters usually wind up on social media including YouTube and Facebook with the stated goal being to raise awareness about violations of the law and holding the government accountable, while concurrently encouraging members of the public to express their disdain for the public employees who have been filmed.

Because auditors often behave provocatively and seek confrontation not only with police but also try to engage with municipal employees at all levels, and because the ramifications of a "failed" audit can result in unwanted social media attention, negative press coverage, and even civil liability, municipalities in recent years have sought guidance in enacting both constitutionally permissible and practical rules to mitigate against the undesired consequences of these encounters.

This paper will (i) provide a brief overview of the history and practice of First Amendment auditing, (ii) examine whether and to what extent filming activity by First Amendment auditors is protected by the First Amendment, (iii) discuss what restrictions may

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[1] "Men filming voters in Littleton were 'first amendment auditors,' police say." The Littleton Independent (Nov. 3, 2020). Accessible at: https://littletonindependent.net/stories/men-filming-voters-in-littleton-were-first-amendment-auditors-police-say,315954.

be imposed by localities seeking to regulate auditor activity, (iv) briefly review a few sample regulations currently employed by existing jurisdictions to address the issue, and (v) provide practical advice regarding both implementing said regulations as well as training employees and staff in the best practices for handling a First Amendment audit.

I. What are First Amendment Auditors?

First Amendment auditing can arguably trace its roots back to the beating of Rodney King in 1991. George Holliday, a Los Angeles plumber, had then recently obtained a new Sony handheld camcorder. Upon being awakened in the morning by the sounds of sirens and helicopters, he grabbed his camcorder and went onto his balcony to film the fateful encounter between four police officers and Mr. King; the shocking footage was later sent to a local news station. Following acquittal of the officers on charges of use of excessive force, the 1992 Los Angeles riots erupted bringing to the forefront of the public mind important and longstanding racial, governmental, and social issues.

Since the beating of Rodney King, the proliferation of consumer-grade recording technology has only multiplied the number of persons who can video government misconduct exponentially; indeed, the ubiquity of cell phones and their video capability has practically transformed every single member of the public into an auditor who can capture instances of government abuse into videographic form—often instantly uploaded into the cloud or livestreamed. The permanent and sometimes powerful nature of these recordings is lauded by proponents of First Amendment auditors, who argue that First Amendment auditors play a pivotal role in keeping the government accountable and transparent to the public. A recent example of such accountability includes the recording of the murder of George Floyd in 2020 by four police officers in Minneapolis; the footage of the killing subsequently launched global protests against historic racism and police brutality, including the Black Lives Matter movement.

Today First Amendment auditing can be described as a form of citizen journalism or citizen activism that seeks to test and thereby protect certain constitutional rights, including the right to be physically present in a public space and the right to photograph or video record government officials on government property in action (or inaction). As their name implies, auditors cite to the First Amendment as providing the constitutional bulwark supporting these rights; other implicated constitutional rights include the Fourth and Fifth Amendments, or even the Second Amendment, such as when auditors enter public spaces armed. The typical auditor practice involves travelling to spaces open to the public—including local governmental offices such as city clerk offices, post offices, police stations, and libraries—and then openly filming or photographing those environs and any persons within them. Auditors often refuse to self-identify or explain what they are doing, and auditors frequently intend to provoke a police response in order to record instances of police or governmental wrongdoing, or otherwise depict public employees in an unfavorable light.[2]

That auditors frequently seek to incite confrontation or aggression through harassing or argumentative behavior stems from another motivation besides the asserted protection of individual liberties: namely, to obtain popularity and money flowing from social media

[2] See Cardine, Sara. "1st Amendment auditors make police walk the line between enforcement, constitutionality." Los Angeles Times (July 16, 2022).

views.[3] As reported by an increasing number of news organizations, the rising popularity of First Amendment auditor videos has led to a "ruthless competition" among auditors, thereby leading to attempts to create more dramatic videos in order to attract more clicks, subscribers, and advertising revenue for the video uploaders.[4] A vivid or violent interaction between an auditor and government officials can result in a video generating millions of views on YouTube and also thousands of donations to the auditor, which have led some auditors to describe auditing as their "form of business".[5]

These dramatic interactions between auditors and government personnel may result in drastic consequences for a local municipality. Indeed, if a particularly evocative interaction makes it onto social media, it can result in hordes of auditors and "cop-watchers" descending onto a local city—which is what occurred following an arrest of an auditor for allegedly trespassing in a government building in Leon Valley, Texas. The resulting video generated social media attention and thus led to more auditors arriving days later. The ensuing confrontations led to arrests, including one incident in which an individual tried to bait law enforcement by carrying fake rubber guns into another government building.[6] The resulting arrests of the various protestors and auditors have led to multiple lawsuits against the City of Leon Valley and its officers via 42 U.S.C. § 1983 actions.[7] This problem of confronting potentially disruptive individuals is further compounded with the increasing frequency of school shootings and other terrorism-related events in recent years, which may lead to tensions between public employees who are seeking to protect the health, safety and welfare of the public, and First Amendment auditors who refuse to self-identify and/or behave provocatively.[8]

II. Is Video Recording Speech?

A threshold question to the potential regulation of any First Amendment auditor activity, which at its core involves filming publicly accessible spaces on government property and/or filming public employees in the course of their duties, is whether filming counts as speech, and therefore, does the First Amendment apply?

The majority view and the modern trend among Circuit Courts of Appeal including the Ninth Circuit is that filming is speech, or, at a minimum, necessary predicate activity to speech and therefore is protected activity under the First Amendment.[9] The minority and

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[3] Epstein, Kayla and Selk, Avi. "What is 'auditing,' and why did a YouTuber get shot for doing it?" Washington Post (Feb. 15, 2019).

[4] Sommer, Will. "The Insane New Path to YouTube Fame: Taunt Cops and Film It." The Daily Beast (Jan. 24, 2019) (discussing First Amendment auditor activity in Texas, including Leon Valley).

[5] *Ibid*.

[6] *Ibid*. (describing the Leon Valley incidents). For additional examples, see "Viral video of Ohio police causes outrage, crashes phone line." WKBN, 2 News and Living Dayton, (Mar. 14, 2018).

[7] See, e.g., *Miller et al. v. Salvaggio et al*. (W.D. Texas April 7, 2022), 2022 WL 1050314 (granting municipal defendants' motion to dismiss).

[8] See Thomas, Judy. "They roam public buildings, making videos. Terrorism experts say they may be dangerous." Kansas City Star (Jan. 22, 2019).

[9] See, e.g., *Animal Legal Defense Fund v. Wasden* (9th Cir. 2018) 878 F.3d 1184, 1203;

outdated view is that filming is mere conduct and therefore is not entitled to the full panoply of protections afforded by the First Amendment.[10]

A. Majority View: Recording is Speech

The majority of jurisdictions that have considered the question have found that the First Amendment fully protects the right to photograph and the right to record matters of public interest.

The Ninth Circuit squarely addressed the question in *Animal Legal Defense Fund v. Wasden* ("Wasden"), which concerned an animal rights advocacy organization's challenge against Idaho's "Ag-Gag" statute criminalizing a person from entering a private agricultural production facility and making an audio or visual recording of the facilities' operations without the owner's consent.[11] Idaho's statute was in response to a secretly-filmed expose going viral on the internet, depicting Idaho dairy workers torturing and otherwise mistreating cows.[12] At issue in the challenge was whether the Recordings Clause of the Idaho statute regulated speech and therefore was protected by the First Amendment.

The Ninth Circuit held that the statute prohibiting audio and visual recordings directly regulated speech and was a "classic" example of an impermissible content-based restriction.[13] Idaho's arguments seeking to distinguish the act of recording as mere conduct and not speech were "easily" disposed of, because such arguments were "akin to saying that even though a book is protected by the First Amendment, the process of writing the book is not."[14] In other words, those steps integral in the speech-making process were entitled to equivalent protection as the speech (here, the film or photograph) itself.[15] Thus the act of recording or creating the video could not be disaggregated from the video; they concerned the same expressive activity. The Ninth Circuit also emphasized that the act of recording a video was expressive in of itself, explaining that:

> [D]ecisions about content, composition, lighting, volume, and angles, among others, are expressive in the same way as the written word or a musical score.[16]

The decision in *Wasden* followed several other similar decisions by the Ninth Circuit, all of which refused to create a distinction between what some have urged is "pure" speech—such as an essay or a piece of art—from the process of creating them—such as writing or

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see also *Glik v. Cunniffe*, 655 F.3d 78, 79–81 (1st Cir. 2011); *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3rd Cir. 2017); *Blackston v. Alabama*, 30 F.3d 117, 120 (11th Cir. 1994); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

10 See, e.g., *Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 182 (3d Cir. 1999) (dicta); *D'Amario v. Providence Civic Ctr. Auth.*, 639 F. Supp. 1538, 1544 (D.R.I. 1986), aff'd, 815 F.2d 692 (1st Cir. 1987).

11 *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018).

12 *Id*. at 1189.

13 *Id*. at 1203.

14 *Ibid*.

15 *Ibid*.

16 *Ibid*.

painting.[17] And, a subsequent decision in *Askins v. U.S. Department of Homeland Security* reaffirmed and reiterated the logic of *Wasden*.[18] There, in an action by border policy advocates against the Department of Homeland Security, the Ninth Circuit overturned the lower court ruling and found that the advocates had stated a valid First Amendment claim. These auditors were taking photographs from public lands and recording activities occurring at the port of entry; they were then detained and their photographs were destroyed.[19] The Ninth Circuit held that the First Amendment's scope of protection included the right to record law enforcement officers engaged in the exercise of their official duties in public places.[20]

The majority of other Circuit Courts of Appeal who have considered the issue have endorsed or adopted the same position as the Ninth Circuit, including the First Circuit[21], Third Circuit[22], Seventh Circuit[23], and Eleventh Circuit.[24] And, although the Supreme Court has not expressly considered the issue, recent Supreme Court jurisprudence espouses similar logic as adopted by the majority view.[25]

B. Minority View: Recording is Conduct

Although the modern trend and the majority of jurisdictions including the Ninth Circuit see filming as speech protected under the First Amendment, a few courts outside California have recognized the argument that the act of taping or video recording amounts to

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17 *Ibid*.; *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (reversing summary judgment in suit involving arrest of citizen filming public protest march, as there was a "First Amendment right to film matters of public interest"); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010) (determining that the tattooing ***process*** is purely expressive activity protected by the First Amendment).

18 *Askins v. U.S. Department of Homeland Security*, 899 F.3d 1035, 1044 (9th Cir. 2018).

19 *Id*. at 1045.

20 *Id*. at 1044.

21 *Glik v. Cunniffe*, 655 F.3d 78, 79–81 (1st Cir. 2011) (Holding that there exists a constitutionally protected right to videotape police officers in public and stating that "[g]athering 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.' ").

22 *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3rd Cir. 2017) ("Recording police activity in public falls squarely within the First Amendment right of access to information. As no doubt the press has this right, so does the public.").

23 *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) ("The act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech.").

24 *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) ("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.").

25 See *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 336 (2010) (iterating that various laws enacted to control or suppress speech may "operate at different points in the speech process," but are all still nevertheless invalid, including laws impounding proceeds on receipts or royalties, requiring costs after speech occurs, or requiring a permit at the outset).

mere conduct and lacks the "expressive" attribute necessary to fall under the First Amendment's protective umbrella.

For example, in *D'Amario v. Providence Civic Ctr. Auth*. the District Court for Rhode Island dismissed a complaint by a freelance commercial photojournalist who was prohibited from taking photos at a concert hosted at a public civic center, finding that their First Amendment rights were not directly implicated because recording "does not partake of the attributes of expression; it is conduct, pure and simple."[26] And, an older decision in the Third Circuit specifically found that a prohibition on members of the public from videotaping public meetings was permissible where spectators were allowed to take physical notes and other forms of audio recording, as a ban on filming does not directly implicate the First Amendment where alternate forms of recording the public proceedings were permitted.[27] And, finally, a somewhat more recent decision by the District Court in New Jersey recognized the existence of the argument that the act of photographing, in the abstract, is not sufficiently expressive and therefore not within the scope of First Amendment protection even when the subject of the photography is a public servant, but ultimately the Court declined to rule on the issue.[28]

Notwithstanding the existence of limited authority to the contrary, practitioners are advised that most (if not all) courts, including the Ninth Circuit, will likely continue to find that video recording is a form of expression entitled to protection under the First Amendment.

III. Regulating Speech on Government Premises

In assessing municipal regulations and policies under the First Amendment it is essential to understand the First Amendment jurisprudence at play. In order to assess the scope of the First Amendment's limitation on governmental authority,[29] it requires an examination of the forum classification doctrine that the Supreme Court has created for reviewing regulations of expressive conduct in a public space.[30]

The forum classification doctrine is a system of categorizing spaces, and then determining the rules accorded to the specified category. Forum classification is crucial because the level of scrutiny and the leeway afforded to the government differ based upon the type of forum being regulated.[31] Thus, the classification of the forum at issue is key to

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[26] *D'Amario v. Providence Civic Ctr. Auth*., 639 F. Supp. 1538, 1544 (D.R.I. 1986), aff'd, 815 F.2d 692 (1st Cir. 1987).

[27] *Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 182 (3d Cir. 1999) (Recording of planning commission meeting was not an "expressive" activity fall under First Amendment protection; rather, "the alleged constitutional violation consisted of a restriction on [Plaintiff's] right to receive and record information", which instead was a restriction on a right of access).

[28] *Pomykacz v. Borough of W. Wildwood*, 438 F. Supp. 2d 504, 513 (D.N.J. 2006).

[29] *Lovell v. Griffin*, 303 U.S. 444, 450 (1938).

[30] See e.g., *Askins v. U.S. Department of Homeland Security*, 899 F.3d 1035, 1044 (9th Cir. 2018) (employing forum classification system to review government's restrictions on individuals' right to take photographs in a public space).

[31] *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992); *see also PMG Int'l Div., LLC. v. Rumsfeld*, 303 F.3d 1163 (9th Cir. 2002); *Hopper v. City of Pasco*, 241

assessing the likelihood that a municipality's limitation on a person's right to record in a public space can withstand a First Amendment challenge.

A. Types of Fora

Courts first examine whether a public forum is at issue. A traditional public forum is a place such as a park, public street or sidewalk, where people have traditionally been able to express ideas and opinions in public to the public. Even if a forum is not a traditional public forum, the courts next look to whether the government has opened a nonpublic forum to expressive activity and if so whether it has done so in a manner to create a designated public forum or a limited public forum. The terms under which these fora may constitutionally operate differ significantly, meaning that forum classification may be the deciding factor as to whether the government's restrictions on a forum survive scrutiny under the First Amendment.

A designated public forum is created when the government intentionally opens (or "designates") non-traditional areas for First Amendment activity pursuant to policy or practice.[32] Examples of situations where courts have found a designated public forum include: state university meeting facilities where the university has an express policy of opening the facilities to registered student groups; school board meetings where the state statute provides for open meetings; a municipal auditorium and a city-leased theater where the city dedicates the property to expressive activity; and the interior of a city hall where the city opens the building to display art and does not consistently enforce any restrictions.[33]

When the government opens a nonpublic forum for expressive activity, instead of creating a designated public forum, it may instead create a limited public forum. To establish a limited public forum when the government opens a nonpublic forum to First Amendment activity, it must have a clear and evenhandedly enforced policy that states the restrictions on the forum such as limiting it to certain activities or topics.[34] Examples of situations where courts have found a limited public forum include: public library meeting rooms where policy limits it to certain uses, and public school property where policy limits use to particular groups.[35] The government is not required to indefinitely keep a designated public forum or a limited public forum open, but so long as it remains open, the forum must comply with the requisite standards for its classification.[36] In short, with a limited public forum the government deliberately opens the forum only for limited uses and topics with clear written limitations. Finally, in certain limited circumstances, government-owned and controlled

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F.3d 1067, 1076 (9th Cir. 2001).

[32] *See Cornelius v. NAACP Leg. Def. Fund,* 473 U.S. 788, 800, 803 (1985); *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45-46 (1983).

[33] *Widmar v. Vincent*, 454 U.S. 263, 267 (1981); *Madison Joint Sch. Dist. v. Wisconsin Emp't Relations Comm'n*, 429 U.S. 167, 174 (1976); *Southeastern Promotions, Ltd v. Conrad*, 420 U.S. 546, 555 (1975); *Hopper*, 241 F.3d at 1075-6.

[34] *Hills v. Scottsdale Unified Sch. Dist.,* 329 F.3d 1044, 1049 (9th Cir. 2003).

[35] *Faith Center Church v. Glover*, 480 F.3d 891, 908 (9th Cir. 2007) (abrogated on other grounds by *Winter v. Natural Res. Def. Coun.*, 129 S.Ct. 365 (2008)); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102, 106 (2001); *Arizona Life Coalition v. Paisley*, 515 F.3d 956, 969 (9th Cir. 2008).

[36] *Perry*, 460 U.S. at 46.

property falls outside the scope of the Free Speech Clause and the forum classification doctrine. These are instances where the government has not opened a forum to general discourse, but rather, engages in its own speech—government speech—wherein it is entitled to "speak for itself" and "select the views it wants to express."[37] Examples of government speech include city's acceptance of privately funded monument for its public park[38] and a state's specialty license plates program.[39]

B. Standard Of Review

The classification of the forum can be pivotal in determining whether government policies or regulations pass constitutional muster. This is because in a traditional public forum and a designated public forum restrictions are subject to an exacting review standard—strict scrutiny—where content-based restrictions are constitutional only if they are the least restrictive means for achieving a compelling government interest.[40] Content-neutral restrictions in a traditional public forum and a designated public forum are subject to the time, place, and manner standard where they must be narrowly tailored to serve a significant government interest and must leave open ample alternatives for communication.[41] Thus, in these two fora, First Amendment activities generally may not be prohibited. By contrast, in a nonpublic forum or limited public forum, the government is given more leeway and its regulations need only be reasonable and viewpoint neutral to pass constitutional muster.[42] Only viewpoint neutrality—not content-neutrality—is required for regulations of a nonpublic or limited public forum.[43] For a regulation to be content-neutral the government must not make any distinctions based on the topic of the speech. By contrast, viewpoint neutrality allows the government to distinguish based on the topic but it may not favor one view over another view on the same topic such as allowing speech in favor of government policies but prohibiting speech that is critical of government policies.

Given the different standards of review, it is crucial to determine whether a non-traditional public forum that has been opened to expressive activity is operating as a designated public forum or a limited public forum. In making this classification, courts typically examine the terms on which the forum operates,[44] critically examining the actions and policies of affiliated government actors.

The more consistently enforced and selective restrictions are, the more likely the forum will be deemed a limited public forum.[45] By contrast, where restrictions are not

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37 *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009).

38 *Id.*

39 *Walker v. Texas Div., Sons of Confederate Veterans, Inc.,* 135 S. Ct. 2239, 2245–2246 (2015).

40 *Perry*, 460 U.S. at 46; *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ*., 196 F.3d 958, 965 (9th Cir. 1999).

41 *Perry*, 460 U.S. at 46.

42 *Id*.

43 *Id*.

44 *Hopper*, 241 F.3d at 1074–75.

45 *Id.* at 1076–78; *Cornelius,* 473 U.S. at 804–05; s*ee also Perry*, 460 U.S. at 47; *Lehman v. Shaker Heights*, 418 U.S. 298, 302–04 (1974); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 976 (9th Cir. 1998), *cert. denied*, 526 U.S. 1131 (1999).

enforced, or if exceptions are haphazardly permitted, the forum is more likely to be deemed a designated public forum.[46]

A table summarizing the standard of review for evaluating government restrictions on First Amendment activity within different types of fora is presented below.

Forum Classification	Standard of Review
Traditional or Designated public forum	1. Viewpoint based restrictions are prohibited. 2. Content-based restrictions are subject to strict scrutiny. The government must show that the regulation is necessary to serve a compelling government interest and narrowly tailored. 3. Restrictions on the time, place, and manner of speech are permissible, so long as these restrictions are (i) content-neutral, (ii) narrowly tailored to serve a significant government interest, and (iii) leave open ample alternative channels of communications.
Limited or Non-public forum	1. Viewpoint based restrictions are prohibited. 2. Restrictions on protected speech or expression are permissible so long as they are (i) viewpoint neutral, and (ii) reasonable in light of the purpose served by the forum.

C. Reviewing and Classifying Public Property

On a practical level, conducting a review of the public property managed by a municipality under the federal court's classification doctrine may seem a confusing task to local officials, particularly since a municipality may have a variety of property interests and responsibilities; these interests may comprise different forms of property management activities, including where the municipality leases office suites from private landlords or possesses lesser forms of property interests.

Nevertheless, some pragmatic guidance is offered to assist in the performance of this review: first, municipalities should consider that they may have defined what "Public Property" consists of under its own Municipal Code, which should therefore be initially consulted. Second, for those areas under the municipality's control, the entity should review what oversight authority the entity has, including the power to create rules of conduct. Finally, in classifying public property, the municipality should start the inquiry by looking to whether the space has been opened up to the public at large and/or has a history of being used for expressive kinds of activity. The factual history as to how the property has been used over the years will be highly relevant to the assessment, as well as any existing written policies, as courts have found both written policies and historical practices as relevant in

[46] *Hills,* 329 F.3d at 1049.

discerning a locality's intent as to whether it opened up a space for public expression.[47] In such an assessment, common sense should not be left at the door; simply because a municipality may permit a member of the public to have a meeting with public employees within an office or behind a planning counter does not constitute "opening up" a space to public expression.[48]

For example, even though spaces such as City Hall and government offices may be publicly accessible, that alone does not automatically render it a public forum under First Amendment jurisprudence.[49] Rather, if a municipality controls buildings "operated[] for the purpose of conducting the business of the… municipal[ity]" and there is also "no suggestion that the [building] has been 'opened for use by the public as a place for expressive activity' ", then access alone by the public does not necessarily render the location a public forum or a limited public forum.[50]

When moving forward to characterize different locales and buildings, consider whether a government entity would be required to allow traditional speech in the location; for example, could protestors gather in an employee's office and demonstrate? This should provide a useful rule of thumb when starting a review of properties under a municipality's control.

D. Related Issues to Regulating First Amendment Auditor Activity

Aside from the forum classification analysis, other related issues regularly arise and are implicated when considering the nature and extent a municipality may limit First Amendment auditor activity on its property. These include (1) the ability to prevent or control "loitering" on government property, (2) the rights of other private citizens on government property who are being recorded and who are attempting to conduct business that may be more "private" in nature, and (3) "sensitive" locations on government property. These issues are briefly addressed below.

1. Loitering

A similar line of regulations that attempt to prevent "loitering" have already been subject to extensive judicial review and therefore provide elucidation as to the ability of municipalities to regulate auditor conduct on similar grounds, *i.e.*, whether it is permissible to preclude an auditor from sitting around in various public settings and filming individuals. Although helpful, this line of cases tend to demonstrate the difficulties with controlling such

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47 *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc*., 473 U.S. 788, 802 (1985) (examining government practices and policies to determine government charity drive is not a public forum).

48 *Id*., 473 U.S. at 805–806 (emphasizing the importance of allowing the government "wide discretion" in controlling its work space and refusing to find that rules permitting limited expression as opening up the space); *see also Helms v. Zubaty*, 495 F.3d 252, 257 (6th Cir. 2007) (county's "open-door policy" was not evidence to create a public forum for expressive activity in the reception area outside of county offices).

49 *Sammartano v. First Judicial District Court, in and for County of Carson City*, 303 F.3d 959, 966 (9th Cir. 2002) (abrogated on other grounds).

50 *Id*.

activity because filming or photographing falls more squarely within the protections of the First Amendment.

"Loitering" is typically defined as staying in one location without an intended purpose. The seminal case on this issue is the Supreme Court's decision in *City of Chicago v. Morales*.[51] There, several individuals were charged with violating Chicago's gang loitering ordinance, which required a police officer, when observing a person whom he reasonably believed to be a gang member loitering in a public place with more than one persons, to order them to disperse. Despite the somewhat targeted nature of the ordinance, the Supreme Court struck down the statute under the "vagueness" doctrine, explaining that the term "loiter" as used in the ordinance—"to remain in any one place with no apparent purpose"—was unconstitutionally vague.[52] As the Court explained, this is because it is difficult to imagine how any citizen of the City of Chicago standing in a public place with a group of people would know if he or she had an "apparent purpose".[53]

The *City of Chicago* decision demonstrates the inherent difficulties when attempting to regulate auditor activity via loitering: if a regulation attempts to preclude "loitering", it may fail due to the difficulties in defining the conduct.

2. Private Citizens on Public Property

Another issue arises when other private citizens, conducting business on government property, feel uncomfortable when being videotaped by others. Such persons may resort to asking government employees to intervene, or desist from coming onto public property altogether.

Such problems are not easily resolved as, generally speaking, it is legal to video record a private citizen so long as they do not have a reasonable expectation of privacy.[54] Persons in public places are typically found not to possess such a reasonable expectation from being video recorded.[55] However, assessment of the factual setting is critical here as visiting a mental health or a juvenile probation facility may indeed carry with it an expectation of privacy.

3. Sensitive Government Locations

Another topic worth clarification concerns "sensitive" areas of government buildings that a municipality may wish to allow the public some form of limited access.

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51 527 U.S. 41 (1999).

52 *Id*. at 42.

53 *Id*.

54 For example, under California's Constitution which provides an inalienable right to privacy to individuals (Cal. Const. Art. 1, § 1), the right only protects an individual's "reasonable" expectation of privacy. *Ibarra v. Superior Court* (App. 2 Dist. 2013) 158 Cal.Rptr.3d 751.

55 See, e.g., *Vo v. City of Garden Grove* (App. 4 Dist. 2004) 9 Cal.Rptr.3d 257 (City ordinance requiring CyberCafe owners to maintain video surveillance did not violate privacy rights where, among other things, customers had no reasonable expectation of privacy in light of wide use of surveillance equipment in public places).

With respect to barring or restricting access, the Supreme Court has unequivocally recognized that municipalities may of course wholly prevent any public right of access to certain locations or areas, because similar to a private owner of property, the government also has the power "to preserve the property under its control for the use to which it is lawfully dedicated."[56] Although not dependent on having a characteristic relating to public safety, classical examples of such property over which the government can fully restrict access to include critical infrastructure such as water storage facilities, electric plants, airports, and public utilities.

With respect to limited access, the forum classification doctrine discussed above for potentially "sensitive" locations would apply. The government should therefore consider if it wants to clearly define and mark which areas are public priority and which are off limits to members of the public.

IV. Example Existing Regulations

Several localities have adopted ordinances that are specifically designed to address First Amendment auditor and similar activity. These ordinances and other practical considerations are discussed below.

A. City of Portland's Regulations—PCC § 3.18.020.

Prior to 2017 the City of Portland experienced an upward trend of public frustration against government officials, with these angry outbursts frequently occurring in city office buildings. The Portland City Council accordingly determined that there was a need to codify a set of rules of conduct which would inform the visitors on city property about the expectations and acceptable behavior permitted. Thus, in 2017 Portland passed PCC section 3.18.020 to address the increasingly disruptive behavior.

Portland's "Rules of Conduct" as codified under PCC section 3.18.020 are designed to apply to the nonpublic forums generally on city property and attempt to expressly regulate behavior and conduct rather than speech or other expressive activities. Key to the City's ordinance was first differentiating between areas designated for or allowing public expression versus areas which do not allow as such. From there, the City adopts viewpoint neutral ordinances aimed at regulating conduct. For example, subsection (B)(4) states that:

> No person shall engage in activity that disrupts or interferes with: the normal operation or administration of City business at City Property; lawful use by City employees and authorized users at City Property; or City permitted activities.

Similarly, subsection (B)(3) prevents access by persons to "secured areas" of the public, which are defined as those areas closed off to the public and further defined elsewhere in the ordinance. And Portland's ordinance empowers its employees who are designated as a "Person-in-Charge" of the city property to give reasonable directions—defined as being otherwise reasonably related to the protection of the health, welfare, or safety of persons, or

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[56] *Perry*, 460 U.S. at 46.

prevention of damage to property, or to preserve the peace or prevent the disruption of City operations—to persons on city property.[57]

The focus of these rules was to ensure the non-disruption or non-interference of the City's business needs, while simultaneously empowering designated personnel within the City to manage and challenge misbehavior. Thus, employees would know which persons they should call or seek help from when confronted by individuals who might be disrupting city functions, such as overly provocative auditors.

B. Municipal Association of South Carolina's Model Policy

The Municipal Association of South Carolina ("MASC") has also promulgated a limited model policy expressly designed to address public access to, and video and audio record on, municipal properties.[58] This policy, like the Portland ordinance, defines and creates different areas on the property open to public, including "limited access areas" which are generally not open to nor occupied by the public. Included within such a definition are employee offices and employee workspaces.

And, like the Portland ordinance, MASC's model policy also is designed to try to differentiate between "conduct" rather than activities that are more squarely considered expression. For example, the model policy prohibits the disruption or interference with the normal operation or administration of municipal business, or the obstruction or blocking of rights of way, and the municipality is empowered to create minimum standing or separation areas in order to prevent the recording of private, personal, confidential, or sensitive information.

Of note, neither of these policies have been subject to a legal challenge; however, both jurisdictions report that the policies have been effective in regulating auditors within their communities.

V. Practice Pointers When Confronted by a First Amendment Auditor.

In drafting or analyzing the legal adequacy of a filming or photographic ordinance (or one regulating activities frequently observed in First Amendment audits, including speech and provocation), attorneys should begin with the assumption that this activity implicates the full protection of the First Amendment. From there, the analysis should focus on the forum being regulated. If the forum is a public one (as it will be in the majority of situations), the critical point is to tailor the ordinance to the specific conduct and government interest(s) the regulation is addressing. For a public forum, municipalities will also need to draft content-neutral regulations except in the rare instances where the regulation is supported by a compelling governmental interest.

While not exhaustive, the following is a list of tips a practitioner should consider for assessing the legal soundness of a First Amendment auditor or similar regulation concerning the filming or videotaping of persons on government property (and similar activities, such as

[57] PCC § 3.18.020(b)(5).
[58] The Model Policy is accessible at: https://www.masc.sc/policy-regarding-public-access-and-video-and-audio-recording-municipality-property.

confronting a municipal employee), as well as advice on instructing public employees on the appropriate manner of behavior:

1. Consider creating guidelines for the government's property to establish the nature of the public forum involved. In other words, define what areas are open to the general public versus areas only open to employees, like personal offices, workstations, waiting rooms, secure locations, and so on.

2. Consider adopting guidelines for conduct that regulate only "time, place, and manner"—and not the content.

3. Craft the guidelines to address and protect cognizable and practical interests the municipality wants to protect—for example, preventing interference with the ability to do the public's work, or protecting against the invasion of privacy rights protected by law, like minors or health care.

4. Ensure that the guidelines call out the nature of the public property in a way that is visible or accessible to both the public and municipal personnel.

5. Ensure that employees are educated in the guidelines.

6. Ensure that the rules in the guidelines are applied in an even-handed manner and are not only employed against specific persons or speech.

7. Provide contact information to municipal personnel to ensure they know who to contact when situations develop.

In addition, municipalities should endeavor to ensure that employees specifically are trained in the following to facilitate a constructive or even positive encounter with First Amendment auditors:

(a) Employees should know the general legal authority and understand what conduct is or is not generally permissible.

(b) Employees should endeavor to stay calm and rational during an audit.

(c) Employees should deflect or defuse inflammatory statements and not get angry.

(d) If regulations apply to specific behavior or to the forum that a person is in, employees should clearly articulate them and direct the person to the rules.

(e) Employees should always assume an audit video will end up on YouTube or other social media platforms.

(f) Employees should have information on-hand to reach local counsel should the need arise.