

FIRST AMENDMENT AUDITS: A SOCIO-POLITICAL MOVEMENT

*Anna Thérèse Beavers**

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* Anna Beavers is a Juris Doctor Candidate in the Class of 2024 at the University of Mississippi School of Law where she serves as Executive Editor for Volume 93 of the *Mississippi Law Journal* and is a member of the Moot Court Board.

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INTRODUCTION

“Liberty then I would say . . . is unobstructed action according to our will; but rightful liberty is unobstructed action according to our will, within the limits drawn around us by the equal rights of others.”¹

–Thomas Jefferson

A growing form of activism,² First Amendment audits are “[t]he practice of exercising one’s constitutional right to record video for the purpose of educating anyone who attempts to infringe that right and commending those who respect it.”³ Typically, audits take place on government property, such as public libraries, city halls,

¹ Thomas Jefferson, *Thomas Jefferson to Isaac H. Tiffany, 4 April 1819, Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/03-14-02-0191> [<https://perma.cc/M7WW-W3NB>].

² See, e.g., Sean T. Leavey, “We’re Just Here Working on a Story:” *First Amendment Auditors, Political Culture, and the Mediated Public Sphere*, 56 COMM’N & DEMOCRACY 71, 73, 78 (2022) (noting that First Amendment audits have “gained popularity through the mid-to-late 2010s and into the 2020s”).

³ FIRSTAMENDMENTAUDITING.COM, <https://www.firstamendmentauditing.com/> [<https://perma.cc/7YQZ-97ME>] (last updated June 13, 2023).

courthouses, post offices, and police department parking lots.⁴ With video camera or smartphone in hand, individuals film inside government buildings or on government property to test how public officials respond.⁵

First Amendment auditors are highly knowledgeable of the Constitution, local laws and ordinances, and even criminal procedure.⁶ As such, they carefully select the time and place of their audits. The hope of some is to prompt a negative encounter with law enforcement, potentially resulting in a wrongful arrest and the violation of their First and Fourth Amendment rights.⁷ Eric Daigle, writing for *Police Magazine*, notes that “the recording is not usually passive, meaning the auditor often takes an active role in engaging with the public safety personnel, challenging them on applicable laws and, in some cases, attempting to escalate the situation in order to garner support from their audience or followers.”⁸ However, auditors are not a monolith. The tone and behavior employed by different auditors varies, with some appearing more

⁴ See *Reducing Risk from First Amendment Audits*, VT. LEAGUE OF CITIES & TOWNS (Apr. 12, 2022), <https://www.vlct.org/resource/reducing-risk-first-amendment-audits#:~:text=A%20%E2%80%9CFirst%20Amendment%20audit%E2%80%9D%20is,record%20in%20public%20is%20> [<https://perma.cc/QYV5-FRUY>] (describing a First Amendment audit as “normally conducted by one or two people who intend to record their interactions with government officials – most often employees at a city/town hall or a police department – to ensure that the First Amendment right to record in public is preserved”). The number of reported First Amendment audits at public libraries increased during the first half of 2021. Cass Balzer, *Uptick in First Amendment Audits: Public Libraries in the Northeast Report Recent Rise of Encounters*, AM. LIBRS. MAG. (Aug. 26, 2021), <https://americanlibrariesmagazine.org/2021/08/26/uptick-in-first-amendment-audits/> [<https://perma.cc/HZ9E-49QD>] (noting that, although the audits are in the same format, “libraries report more aggressive, targeted, and organized operations” than before).

⁵ For a periodically updated list of prominent First Amendment auditors, see *YouTube Channels of First Amendment Auditors*, FIRSTAMENDMENTAUDITING.COM, <https://www.firstamendmentauditing.com/channels> [<https://perma.cc/55CM-WL3K>] (last updated June 13, 2023).

⁶ See *infra* Part II.B.

⁷ See Lata Nott, *First Amendment Audits: Definition, Examples and More*, FREEDOM F., <https://www.freedomforum.org/first-amendment-audits/> [<https://perma.cc/868D-PACD>] (last visited Oct. 6, 2023) (“[A]uditors compete with each other for views and money, which further incentivizes them to engage in highly confrontational behavior to provoke an even greater negative response from town officials and employees.”).

⁸ Eric Daigle, *Point of Law: First Amendment Audits and the Law*, POLICE MAG. (Jun. 15, 2022), <https://www.policemag.com/638903/point-of-law-first-amendment-audits-and-the-law> [<https://perma.cc/P2HE-U7JC>].

aggressive and confrontational while others take a subtler approach.⁹

Generally, a First Amendment audit begins when a public employee confronts the auditor and orders them to stop recording, demands to see press identification, or asks them to leave. Public officials often respond to the auditor's noncompliance by calling the police,¹⁰ but auditors do not balk when threatened with law enforcement because, to many, an impactful audit depends upon resistance from public officials.

Prominent auditors capture the entire encounter on video – from arrival on scene to their eventual departure or arrest – and share the recordings across social media platforms, garnering significant amounts of views and even earning money through paid advertisements.¹¹ The videos often include sensationalized captions, patriotic imagery, and dramatic audio, with some edited to emphasize the tensest moments of the encounter.

Analyzing audits through the lens of communication and political culture, Sean T. Leavey notes that First Amendment auditors share their recordings across social media “to educate and inspire viewers, provide evidence for policy changes, and shame departments into encouraging reforms to individual behaviors and

⁹ Kristi Nickodem & Kristina Wilson, *Respond to First Amendment Audits: Is Filming Protected by the First Amendment?*, UNIV. OF N.C. (Nov. 14, 2022), <https://canons.sog.unc.edu/2022/11/responding-to-first-amendment-audits-is-filming-protected-by-the-first-amendment/> [<https://perma.cc/6RD2-AD3H>]. See also Constitution Cowboy (@concowboy357), *About*, YOUTUBE, <https://www.youtube.com/@concowboy357/about> [<https://perma.cc/AYJ8-H6FU>] (last visited Nov. 29, 2022) (“While my methods may be forward & harsh at times [,] I assure you that it doesn’t amount to 25% of what I endured at the hands of the same people who swore to protect us and that is unacceptable.”).

¹⁰ Leavey, *supra* note 2, at 72 (“Auditors enter a space openly filming, and when challenged, commonly adopt the language of the ‘free press,’ by claiming that the audit is research for a ‘story’ on the given building, institution, or other relevant feature of the site that could be investigated by a reporter.”).

¹¹ See e.g., Long Island Audit (@LongIslandAudit), YOUTUBE, <https://www.youtube.com/c/longislandaudit> [<https://perma.cc/97HG-JSV4>] (last visited Sep. 1, 2022); NY State Audit (@nystateaudit), YOUTUBE, <https://www.youtube.com/channel/UC-JdnHMXAijgwyfa5OnLiZA> [<https://perma.cc/2B B3-TK2C>] (last visited Oct. 15, 2022); Accountability For All (@AccountabilityForAll), YOUTUBE, <https://www.youtube.com/c/AccountabilityForAll> [<https://perma.cc/FG6A-E2CJ>] (last visited Oct. 15, 2022). See also Leavey, *supra* note 2, at 78 (noting that “over one hundred YouTube channels have been started dedicated to the practice of First Amendment auditing”).

institutional culture.”¹² In his article, Leavey argues that, as a social movement and media sensation, First Amendment audits emerged from “the cultural contexts of US law, political history, digital media activism, and American Revolutionary founding mythologies.”¹³ As such, the audits may be viewed as a socio-political movement with specific policy objectives and a personal demonstration of dissatisfaction with the status quo.

I. BACKGROUND

A. *The Origins of Auditing*

Constitutional audits began as early as the 1980’s with Diop Kamau, a California police sergeant.¹⁴ Kamau founded PoliceAbuse.com, which tracks and documents overreach by authorities and “employ[s] undercover operatives armed with hidden cameras to audit police departments.”¹⁵ Over one-hundred cities have invited Kamau’s group to conduct audits of their departments.¹⁶ In California, the audits resulted in legislation making falsified police reports a felony.¹⁷

While First Amendment audits generally target non-law enforcement public servants, they often implicate police by design as the goal is to document overreach by authority and educate the public about constitutional rights. However, unlike Kamau’s audits, First Amendment auditors do not film with hidden cameras because the intention is to test the right to record in public spaces.

¹² Leavey, *supra* note 2. Leavey is an adjunct professor at La Roche University and Rutgers University School of Communication and Information, teaching at the undergraduate and master’s levels in communication, leadership, media studies, and journalism departments. See Sean Leavey, LINKEDIN, [linkedin.com/in/sean-leavey-403278ba/](https://www.linkedin.com/in/sean-leavey-403278ba/) [https://perma.cc/7MZE-UQZM] (last visited Nov. 20, 2022).

¹³ Leavey, *supra* note 2, at 72.

¹⁴ See Sam Bishop, *How a Team of YouTubers Went to War with a Texas Police Chief*, DAILY DOT, <https://www.dailydot.com/debug/youtube-leon-valley/> [https://perma.cc/UV5H-N5AP] (last updated July 22, 2021, 8:23 AM).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See CAL. PENAL CODE § 118.1(a); see also *Sgt. Don Jackson Policeabuse.Com Founder*, POLICE ABUSE, https://web.archive.org/web/20211018233119/https://policeabuse.com/index.php?option=com_content&view=article&id=34 [https://perma.cc/X2T2-2BX4] (last visited Dec. 16, 2022). Kamau legally changed his name from Don Jackson to Diop Kamau, meaning “Quiet Soldier” in 1994. *Id.*

Nonetheless, First Amendment audits have also resulted in legislation and policy changes.¹⁸

First Amendment audits are a controversial practice. Not only do opponents aptly argue that the conduct is instigative,¹⁹ but auditors also appear to reject any reasonable restrictions on the freedoms of speech and press that the subjects of their audits attempt to enforce, and which American jurisprudence suggests may be appropriate. For this reason, understanding the constitutional basis for First Amendment audits is critical to analyzing the legality.

B. Sean Paul Reyes as “the Long Island Auditor”

Sean Paul Reyes, who calls himself the “Long Island Auditor,” is a prominent constitutional activist with over 581,000 subscribers to his YouTube channel, Long Island Audit.²⁰ He also shares videos and clips from the audits to his Facebook and Instagram accounts.²¹ Typically fifteen to forty-five minutes long, each video begins with a brief montage of the audit’s most noteworthy moments followed by the account’s signature dramatic introduction audio as the “Long Island Audit” logo appears atop the text of the Constitution.²²

One of Reyes’s more recent audits racked up over 163,000 views on YouTube within ten hours of its posting.²³ In this video, Reyes attempted to film inside his local voting precinct, a public school in Medford, New York.²⁴ Reyes addressed his viewers, informing them that he was there to vote and “peacefully exercise

¹⁸ See *infra* Part VI.C.

¹⁹ See Sgt. A. Merica, *Wanna-be “Journalist” Drives Around NY, CT Looking for Cops to Incite – Then Begging Audience for Money (Op-Ed)*, LAW ENFORCEMENT TODAY (Aug. 1, 2021), <https://web.archive.org/web/20211015143025/https://lawenforcementtoday.com/wanna-be-journalist-drives-around-ny-ct-looking-for-cops-to-incite-then-begging-audience-for-money-op-ed/> [https://perma.cc/6SZ9-SMQN].

²⁰ Long Island Audit, *supra* note 11.

²¹ Long Island Audit Inc., FACEBOOK, <https://www.facebook.com/longislandaudit> [https://perma.cc/WL8H-4Z9P] (last visited Nov. 17, 2022); Long Island Audit (@longislandaudit), INSTAGRAM, <https://www.instagram.com/longislandaudit/> [https://perma.cc/AB62-9YAW] (last visited Nov. 17, 2022).

²² See, e.g., Long Island Audit, *Unhinged Tyrant Security Guards Make up Law to Prevent Journalist From Voting! Educated by Police!*, YOUTUBE (Nov. 17, 2022), <https://www.youtube.com/watch?v=R4iGzJ7w0KY> [https://perma.cc/K738-4S8J].

²³ *Id.*

²⁴ *Id.*

[his] First Amendment right to film in public and publicly accessible areas to promote transparency and accountability within our government and to ensure that our public servants respect our rights and treat us with respect.”²⁵

Almost immediately upon entering the school, poll workers confronted Reyes, demanded he put away his phone, and claimed it was illegal to film at the voting site, but Reyes refused.²⁶ An argument ensued, and Reyes asserted that he has “a right of freedom of press,” stating that he was a journalist there to document the experience.²⁷ Multiple individuals working the polls, including security personnel, continuously told Reyes that it was illegal for him to film inside the building and attempted to escort him outside.²⁸

A police officer arrived on scene and met Reyes and the security personnel outside the school.²⁹ The officer informed everyone that Reyes was allowed to film in the parking lot because it is public property, but the officer called his own supervisor to the scene to determine the legality of filming inside the voting precinct.³⁰ When the supervisor arrived, he informed all parties that Reyes could film inside the voting precinct. To the dismay of the poll workers, an officer escorted Reyes inside to vote as he filmed the entire process.³¹

Operating primarily in Connecticut and New York State, Reyes has conducted audits at numerous public locations, including the Danbury Public Library, the New Rochelle City Hall, the Connecticut State Police headquarters, a U.S. Social Security Administration office, and Bradley International Airport.³² When confronted by public officials for filming in government buildings, Reyes often states that he is there to conduct a public records request or, like in the audit described above, asserts that he is a

²⁵ Long Island Audit, *supra* note 22.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² See Long Island Audit, *Documents Concerning Long Island Audit*, <https://longislandaudit.com/news-and-documents/> [<https://perma.cc/K738-4S8J>] (last updated Nov. 7, 2022) [hereinafter *Documents*].

journalist collecting information for a story. Unbeknownst to the official, their interaction *is* the story. Similar language referencing record requests, journalism, and the “free press” is employed by other prominent auditors as well.³³

Some of Reyes’s audits have resulted in litigation. He has been charged with criminal conduct, such as trespassing on government property, and he has initiated civil suits against public officials for violation of his First and Fourth Amendment rights, among other claims.³⁴ On his website, Reyes states,

I strongly believe in exercising our First Amendment rights in a respectful manner. We are striving for real transparency and accountability from public officials. Law enforcement officers took an oath to our constitution, and the majority of them take it very seriously. Local officials, police, security, correction officers, and many other forms of authority from all over the country support my mission.³⁵

II. SOURCES OF LEGAL PROTECTION

The First Amendment to the U.S. Constitution guarantees “the freedom of speech, or of the press.”³⁶ Auditors’ foundational claim that they have a right to record public officials in publicly accessible areas requires an analysis of how this conduct fits within the freedom of speech and freedom of the press clauses, if at all. Although the Supreme Court has not yet addressed the issue, seven circuits have held that recording, in some form or another, is protected under the First Amendment.³⁷ There are two principle theories for categorizing the right to record: first, speech creation – a non-expressive activity “inextricably bound up with expression, and therefore, . . . subject to relatively limited restrictions”; and

³³ See Leavey, *supra* note 2, at 72 (“Auditors enter a space openly filming, and when challenged, commonly adopt the language of the ‘free press,’ by claiming that the audit is research for a ‘story’ . . .”).

³⁴ *Documents*, *supra* note 32.

³⁵ Long Island Audit, <https://longislandaudit.com> [<https://perma.cc/2GZ8-AVPN>] (last visited Sep. 1, 2022).

³⁶ U.S. CONST. amend. I.

³⁷ See cases cited *infra* note 64.

second, as a form of information gathering, subject to broader restrictions.³⁸

The conduct of auditors can be interpreted – and indeed, auditors assert – as testing both the right to free speech and freedom of the press.³⁹ Notably, auditors appear to advance an absolute First Amendment right to freedoms of expression and the press, ignoring any limitations public officials may seek to impose.⁴⁰ So while auditors may correctly assert the existence of a right to film, document, or express their views in publicly accessible areas, their approach categorically ignores the nuances of First Amendment jurisprudence and the government’s ability to impose certain regulations and restrictions. Since the First Amendment’s enactment, courts have set out certain limitations on the freedoms of speech and press.

First Amendment audits rely on the existence of a constitutionally protected right to record rooted in the free speech and press clauses, but this may be a fallacious presumption. Unlike the filming of police encounters, there is little case law on the right to record public officials generally or the right to record within

³⁸ Jared Mullen, Note, *Information Gathering or Speech Creation: How to Think About a First Amendment Right to Record*, 28 WM. & MARY BILL RTS. J. 803, 804 (2020). The lack of clarity on the scope and nature of the right to record “has particular importance when confronting the question of reasonable regulations of recording public officials, especially in the context of non-law enforcement officials because different analytical frameworks would impart relatively broader or narrower discretion on [the] government to regulate recording.” *Id.* at 803.

³⁹ See, e.g., Long Island Audit, *supra* note 35; Constitution Cowboy (@concowboy357), YOUTUBE, <https://www.youtube.com/channel/UC1PLHwrId-FxOZ0CVm9P5ow/featured> [<https://perma.cc/VAQ3-HWB7>] (with over 16,300 subscribers); Big Nick South Florida Accountability (@bignicksouthfloridaaccount4976), YOUTUBE, <https://www.youtube.com/channel/UCIRZHvYZbwq87pHfH4GzB9A> [<https://perma.cc/A54L-CGF4>] (with over 211,000 subscribers).

⁴⁰ See G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299 (1996) for an intellectual history of free speech theory and the progression toward absolutism. See also Leavey, *supra* note 2, at 72 (“Self-proclaimed First Amendment auditors have been produced through and uphold popular cultural historical memory and perception, specifically, the ‘essentialist’ position, in which the constitutional political structure of the US as produced by the American Revolution is thought of as infallible and guaranteed to preserve ‘liberty’ and stave off ‘tyranny.’ This essentialism is at the foundation of First Amendment fundamentalist absolutism, which has been a core component of American libertarianism and radical populism entrenched in US culture since the mid-to-late 20th century” (footnotes omitted)).

public buildings. Therefore, the applicability of case law addressing the conduct of auditors is limited. Nonetheless, to properly analyze the legality of First Amendment audits, it is important to consider the source of their protections. This may flow from the First Amendment's freedom of speech or freedom of the press guarantees, or a fusion of the two manifested as the right to record.

A. *Freedom of Speech*

Political speech sits at the core of the First Amendment, and proponents of First Amendment audits argue that the videos illuminate issues of public concern by exposing unlawful practices by law enforcement and other government officials.⁴¹ However, audits often capture mundane activities at local government buildings and do not involve matters of public concern. Rather, the auditors create controversial – or “newsworthy” – situations through their own conduct.

Nonetheless, scholars have argued that recording is a form of expression, or at least serves as a precursor to expression so as to constitute speech entitled to First Amendment protections.⁴² The Supreme Court has addressed the extent to which First Amendment protections extend beyond the speech itself to encompass the “speech process” more broadly.⁴³ The initial point in the speech process “is the act of creating speech itself,” and some have argued that recording is properly characterized as speech

⁴¹ Nickodem & Wilson, *supra* note 9 (“[V]ideo recordings can provide a powerful medium for exposing corrupt or unlawful behavior.”).

⁴² See *Turner v. Driver*, 848 F.3d 678, 688-89 (5th Cir. 2017) (“[T]he Supreme Court has long recognized that the First Amendment protects film. A corollary to this principle is that the First Amendment protects the act of making film, as ‘there is no fixed First Amendment line between the act of creating speech and the speech itself.’” (internal citation omitted) (quoting *Am. C. L. Union of Ill. v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012))). See also Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991, 996 (2016).

⁴³ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 352-53 (2010) (invalidating a law restricting corporate-funded independent expenditures for speech expressly advocating for or against a political candidate); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991) (invalidating a law establishing a financial disincentive to create or publish particular content).

creation.⁴⁴ Supreme Court precedent supports this notion; the Court has held that other measures – including funding as a means to create and promote speech – are part of the speech process protected by the First Amendment.⁴⁵

Still, some federal courts have not recognized the right to record as constitutionally protected and have rejected claims that government interference with recording raises freedom of speech concerns.⁴⁶

Nonetheless, even absent a conceptualization of recording as part of the speech process, audits may properly be categorized as an exercise of speech when recognized as a demonstration of beliefs intended to signal a particular message. Scott Skinner-Thompson argues that audits themselves can serve as “in-the-moment statement[s] of resistance and critique of the government officials’ actions.”⁴⁷ Therefore, auditors may have “[a]n intent to convey a particularized message . . . [that] would be understood by those who viewed it.”⁴⁸ Thus, audits may constitute expressive conduct covered by the First Amendment’s freedom of speech guarantee.

B. Freedom of the Press

Auditors often assert the right to freedom of the press when told they cannot record on public property. Sometimes government officials then demand to see press identification, which the auditors assert is not necessary to exercise freedom of the press. In one video posted by Reyes in August 2021, local officials at the city hall in New Rochelle, New York requested to see press identification after asking Reyes to stop filming in the building.⁴⁹ One official said, “If

⁴⁴ Clay Calvert, *The Right to Record Images of Police in Public Places: Should Intent, Viewpoint, or Journalistic Status Determine First Amendment Protection?*, 64 UCLA L. REV. DISCOURSE 230, 241 (2016); accord Marceau & Chen, *supra* note 42; see also Turner, 848 F.3d at 688-89.

⁴⁵ See *Citizens United*, 588 U.S. at 336.

⁴⁶ Marceau & Chen, *supra* note 42, at 1014 (“The principal objection to the claim that recording is a type of constitutionally protected expression is that the act of capturing images is a form of conduct rather than speech.”).

⁴⁷ Scott Skinner-Thompson, *Recording as Heckling*, 108 GEO. L.J. 125, 133 (2019). Skinner-Thompson is a professor at the University of Colorado Law School. *Id.* at 125.

⁴⁸ *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

⁴⁹ Long Island Audit, *How Many Tyrants Does It Take to Violate a Journalist’s Rights? Six. | IA Fail | Lawsuit Incoming!*, YOUTUBE (Aug. 8, 2021), https://www.youtube.com/watch?v=SZ4_4zMrhRk [https://perma.cc/X4VP-52L5].

you don't provide us with ID, although it is a public space, this is a government building . . . so you have to have a reason and purpose for being here, or at least provide ID when asked."⁵⁰ Reyes refused to provide identification or disclose his purpose for being in the building and the local officials called the police.⁵¹

In this encounter, the official rightfully acknowledged that Reyes was on public property, but insisted that, because it was a government building, Reyes was subject to regulations, including providing press identification.

This idea of the public as the press is central to First Amendment audits, where self-proclaimed journalists, armed with nothing more than a cellphone or video camera, seek to lay bare what they consider issues of public concern. However, the relatively limited body of doctrine on freedom of the press makes this analysis challenging. Supreme Court precedent acknowledges the special role of the press but seems to decline conferring special rights.⁵²

In *Branzburg v. Hayes*, the Supreme Court held that freedom of the press protections extend beyond the traditional press to reach the "lonely pamphleteer."⁵³ The *Branzburg* Court noted that freedom of the press "is not confined to newspapers and periodicals," but rather "comprehends every sort of publication which affords a vehicle of information and opinion."⁵⁴

The line between the press and public is further obscured by the availability of smartphones and access to the internet.⁵⁵ Individuals use social media platforms and other publication mediums to reach audiences of all sizes. The First Circuit embraced

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See, e.g., *Branzburg v. Hayes*, 408 U.S. 665 (1972); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980); *Miami Herald Pub. Co., Div. of Knight Newspapers v. Tornillo*, 418 U.S. 241 (1974).

⁵³ *Branzburg*, 408 U.S. at 703-04 ("We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.").

⁵⁴ *Id.* at 704 (internal quotations omitted).

⁵⁵ See generally Carol M. Bast, *Tipping the Scales in Favor of Civilian Taping of Encounters with Police Officers*, 5 U. DENV. CRIM. L. REV. 61, 98 (2015).

this principle in the seminal right-to-record case *Glik v. Cunniffe*, holding that individuals have the same clearly established right to collect and disseminate information as the press.⁵⁶

First Amendment auditors seek to test this constitutional interpretation, as self-proclaimed journalists – unaffiliated with any institution of the press – assert a First Amendment right to collect information. The efficacy of this claim is assessed in Part V.B.

C. An Extrapolated Right to Record

Unlike freedom of speech and freedom of the press, the right to record is not explicitly enumerated in the First Amendment, though some circuits have recognized the right as constitutionally protected.⁵⁷ In fact, most courts have held that the First Amendment protects recording “when used to ‘gather information about what public officials do on public property’ and when the recording has a communicative or expressive purpose.”⁵⁸ However, like all First Amendment rights, it is not unlimited. In fact, as a small manifestation of speech and press rights, it may be subject to broader restrictions.

Nonetheless, there is a trend among the circuits of recognizing the right to record.⁵⁹ Following the high-profile killing of George Floyd in 2020 and the wave of subsequent protests, fear and distrust in law enforcement soared.⁶⁰ The sentiment surrounding

⁵⁶ *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011).

⁵⁷ Seven circuits have recognized the right to film as constitutionally protected. *See* cases cited *infra* note 61. In doing so, some circuits have recognized only the right to record law enforcement as constitutionally protected, while others have recognized the right more broadly to include filming public officials generally. *Id.*

⁵⁸ Justin Welply, Comment, *When, Where, and Why the First Amendment Protects the Right to Record Police Communications: A Substantial Interference Guideline for Determining the Scope of the Right to Record and for Revamping Restrictive State Wiretapping Laws*, 57 ST. LOUIS L.J. 1085, 1100 (2013) (footnotes omitted) (quoting *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000)).

⁵⁹ *See* cases cited *infra* note 65.

⁶⁰ *Trust in America: Do Americans Trust the Police?*, PEW RSCH. CTR. (Jan. 5, 2022), <https://www.pewresearch.org/2022/01/05/trust-in-america-do-americans-trust-the-police/> [<https://perma.cc/GA3L-WMR2>] (“The relationship between the public and police across the United States was brought into sharp focus over the course of 2020 and 2021 following the high-profile killings of several Black Americans by police, including George Floyd and Breonna Taylor, and the worldwide protests that followed.”).

this case and other instances of police brutality bolsters the allure of filming police encounters today. Courts and legislatures recognize the public's interest in this activity and its First Amendment underpinnings.⁶¹

Indeed, in September of 2022, a federal judge granted a preliminary injunction against a law seeking to limit the right to record police in Arizona, blocking the law from going into effect that month as planned.⁶² The law makes it “unlawful for a person to knowingly make a video recording of law enforcement activity if the person making the video recording is within eight feet of where the person knows or reasonably should know that law enforcement activity is occurring.”⁶³

The injunction exemplifies the judiciary's wariness of efforts to restrict and regulate the freedom to record law enforcement activity. Further, seven circuits have recognized a constitutionally protected right to film the police while performing their duties in public,⁶⁴ though the U.S. Supreme Court has not yet addressed the issue.⁶⁵

Despite a trend towards greater protection of the right to film *police*, the right is not absolute and, importantly, derives from issues unique to law enforcement that are inapplicable to the

⁶¹ See *e.g.*, COLO. REV. STAT. § 16-3-311(1) (2023) (codifying the right to record); HAW. REV. STAT. § 711-1111(1)(d) (2023) (codifying the right to record); N.Y. CIV. RTS LAW § 79-p(2) (McKinney 2023) (codifying the right to record).

⁶² Sue Morrow, *Injunction Blocks Arizona Law That Limited Recording Police Officers*, NAT'L PRESS PHOTOGRAPHERS ASS'N (Sep. 10, 2022), <https://nppa.org/news/injunction-blocks-arizona-law-limited-recording-police-officers> [https://perma.cc/MP6J-XNMH].

⁶³ ARIZ. REV. STAT. ANN § 13-3732 (2022). Some opponents of audits and the filming of public officials argue the recordings violate state wiretapping statutes that prohibit such activity, bringing into the fold considerations of individual privacy rights. See generally, Jesse Harlan Alderman, *Before You Press Record: Unanswered Questions Surrounding the First Amendment Right to Film Public Police Activity*, 22 N. ILL. U. L. REV. 485, 488 (2013).

⁶⁴ See *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011); *Fields v. City of Philadelphia*, 862 F.3d 353, 356 (3d Cir. 2017); *Turner v. Driver*, 848 F.3d 678, 689-90 (5th Cir. 2017); *Am. C. L. Union of Ill. v. Alvarez*, 679 F.3d 583, 600 (7th Cir. 2012); *Askins v. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018); *Irizarry v. Yehia*, 38 F.4th 1282, 1289 (10th Cir. 2022); *Toole v. City of Atlanta*, 798 F. App'x 381, 388 (11th Cir. 2019).

⁶⁵ *Pigford v. Perdue*, 950 F.3d 886 (2020), *cert. denied* *Frasier v. Evans*, 142 S. Ct. 427 (mem.) (2021) (denying petition for writ of certiorari on the issue of whether the right to record police officers carrying out their duties in public has been clearly established).

filming of other public officials, as will be explored in Part V.⁶⁶ Nonetheless, First Amendment audits are rooted in a First Amendment interpretation that guarantees the right to film public officials in public spaces.⁶⁷

The extent to which the right to record exists beyond the narrow scope of filming law enforcement is unclear.⁶⁸ Because of its distinct relevance to the current political landscape, legal scholarship largely addresses recording in the specific context of law enforcement activity. Moreover, most right-to-record cases focalize police encounters; the opinions often mention other public officials only in dicta or use narrow language which may allow broader inferences. For example, *Glik v. Cunniffe* involved a bystander who filmed several police officers arresting a young man in Boston.⁶⁹ The court affirmed the lower court's finding that the police violated the bystander's First and Fourth Amendment rights when they arrested him for filming the officers.⁷⁰

The First Circuit in *Glik* addressed the narrow issue of whether there is "a constitutionally protected right to videotape police carrying out their duties in public."⁷¹ The court held that "[b]asic First Amendment principles, along with case law from [the first] and other circuits, answer that question unambiguously in the

⁶⁶ See discussion *infra* Part V.C.2.

⁶⁷ See, e.g., Government Accountability, *About*, YOUTUBE, <https://www.youtube.com/@GovernmentAccountability/about> [<https://perma.cc/MP6J-XNMH>] (last visited Nov. 26, 2022) ("I've been working over a year as a gonzo journalist trying to spread the message that We The People have the right, and the duty to keep a close, watchful eye on our government, and its employees. Please share this channel, and it's [sic] content so more citizens realize the importance of documenting their interactions with government employees using cameras, recording their phone conversations (with notice), and pulling records to check their work.").

⁶⁸ This Article does not explore the constitutional implications of bystanders captured in First Amendment audit videos, but Scott Skinner-Thompson contends that "the privacy harms caused by citizen recordings impose corollary costs on First Amendment values" because "[p]rivacy in public may also be critical to the cultivation of ideas and serve as an incubator for future speech." Skinner-Thompson, *supra* note 47, at 129. Ring doorbell cameras and police body camera footage exemplify this issue. See generally Solon Barocas & Karen Levy, *Privacy Dependencies*, 95 WASH. L. REV. 555 (2020); Ryan G. Bishop, *The Walls Have Ears. . . And Eyes. . . And Noses: Home Smart Devices and the Fourth Amendment*, 61 ARIZ. L. REV. 667 (2019).

⁶⁹ *Glik*, 655 F.3d at 79 (affirming the lower court's finding of First and Fourth Amendment violations).

⁷⁰ *Id.*

⁷¹ *Id.* at 82.

affirmative.”⁷² Expanding on this understanding, the court went on to note that the “[t]he filming of government officials engaged in their duties in a public place, *including* police officers performing their responsibilities, fits comfortably within [First Amendment] principles.”⁷³ Though specifically addressing police encounters, the language suggests the right to record extends beyond the filming of law enforcement to reach all public officials “engaged in their duties in a public place.”⁷⁴

Other circuits addressing the narrow issue of the right to record law enforcement have similarly “not articulated any principle that would prevent further expansion of the holdings” to include recording other public officials.⁷⁵ The Ninth Circuit held that the First Amendment “protects the right to photograph and record matters of public interest” which *includes* “the right to record law enforcement officers engaged in the exercise of their official duties in public places.”⁷⁶ These narrow holdings with suggestively broad application leave us with an undefined scope of the right to record.

Nonetheless, the difference between filming police encounters and filming day-to-day activities within government buildings is a critical consideration when assessing the legality of First Amendment audits and evaluating any constitutional protections. These distinctions are explored in depth in Part V.

1. Rationale

The Seventh Circuit, addressing the right to record police officers, provided a substantive discussion of free speech and

⁷² *Glik*, 655 F.3d at 82 (“It is firmly established that the First Amendment’s aegis extends further than the text’s proscription on laws ‘abridging the freedom of speech, or of the press,’ and encompasses a range of conduct related to the gathering and dissemination of information.”).

⁷³ *Id.* (emphasis added).

⁷⁴ *Id.* at 82, 85 (“[A] citizen’s right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment.”).

⁷⁵ Nicholas J. Jacques, Note, *Information Gathering in the Era of Mobile Technology: Towards a Liberal Right to Record*, 102 CORNELL L. REV. 783, 785 (2017).

⁷⁶ *Askins v. U.S. Dep’t of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018).

recording in *ACLU v. Alvarez*.⁷⁷ Underscoring the proposition that recording is a mode of speech,⁷⁸ the court concluded that a statute which “interferes with the gathering and dissemination of information about government officials performing their duties in public,” burdens speech and press rights.⁷⁹ The court noted that audio or visual recording is “a medium of expression—the use of a common instrument of communication—and thus an integral step in the speech process.”⁸⁰ This framework supports a theory of recording, and not just the actual communicative act, as speech itself entitled to First Amendment protections.

In the recent landmark Tenth Circuit case *Irizarry v. Yehia*, YouTube journalist and blogger Abade Irizarry filmed a DUI traffic stop in Colorado with his cell phone and camera for use on his social media channel.⁸¹ Officer Yehia arrived on the scene and intentionally positioned himself in front of Mr. Irizarry to obstruct the camera view.⁸² Mr. Irizarry and his companions began to loudly criticize Officer Yehia who responded by shining a bright flashlight into the cameras, saturating the sensors.⁸³ Mr. Irizarry sued Officer Yehia, claiming that the officer violated his First Amendment right to freedom of the press.⁸⁴

On appeal, the Tenth Circuit recognized a First Amendment right to film the police performing their duties in public.⁸⁵ The court found that “Mr. Irizarry was engaged in protected First

⁷⁷ See *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) (addressing whether the First Amendment protects individuals from prosecution under the Illinois eavesdropping statute when they openly record police officers performing their duties in public).

⁷⁸ *Id.* at 597 (“Audio and audiovisual recording are communication technologies, and as such, they enable speech. Criminalizing all nonconsensual audio recording necessarily limits the information that might later be published or broadcast . . . and thus burdens First Amendment rights.”).

⁷⁹ *Id.* at 600 (noting that the eavesdropping statute is subject to strict scrutiny because of its burden on speech and press rights safeguarded by the First Amendment).

⁸⁰ *Id.*

⁸¹ *Irizarry v. Yehia*, 38 F.4th 1282, 1285 (10th Cir. 2022) (“Mr. Irizarry is a ‘YouTube journalist and blogger’ who ‘regularly publishes stories about police brutality and conduct or misconduct.’” (citations omitted)).

⁸² *Id.* at 1286.

⁸³ *Id.*

⁸⁴ *Id.* at 1287.

⁸⁵ *Id.* at 1288, 1294 (noting that, “[a]lthough neither the Supreme Court nor the Tenth Circuit [had] recognized a First Amendment right to record the police performing their duties in public,” the right existed and was clearly established when the incident occurred).

Amendment activity when he filmed the traffic stop,” saying, “[w]e recognize this right based on (a) core First Amendment principles and (b) relevant precedents from this and other circuits.”⁸⁶ The court held that the “right to film police falls squarely within the First Amendment’s core purposes to protect free and robust discussion of public affairs, hold government officials accountable, and check abuse of power.”⁸⁷

The language of the holding in *Irizarry* and other right-to-record cases is reminiscent, in part, of the marketplace of ideas — the cornerstone principle underpinning First Amendment protection of various forms of expression. Though perhaps more importantly, the language also evokes the watchdog role of the press by indicating that filming may serve as a check on public officials’ conduct and a method to curtail government overreach — notably common objectives of First Amendment audits.

2. Limitations

The right to record law enforcement — and public officials more generally — is not without limitations. Importantly, the right is not explicitly guaranteed by the First Amendment and must be read into the text of the speech and press clauses. While some circuits have extrapolated this right from those clauses, the courts’ holdings most often address the narrow issue of the right to record *law enforcement* activities.

In finding that the First Amendment protects the right to record “government officials in public spaces,”⁸⁸ including filming and audio recording police carrying out their duties in public, the First Circuit noted this right only exists so long as the officer cannot “reasonably conclude that the filming itself is interfering, or is about to interfere, with his [or her] duties.”⁸⁹ Moreover, the court noted that this right is “subject to reasonable time, place, and

⁸⁶ *Irizarry*, 38 F.4th at 1289. The court cited previous rulings in six other circuits: the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits. *Id.* at 1290-92.

⁸⁷ *Id.* at 1295.

⁸⁸ *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011).

⁸⁹ *Gericke v. Begin*, 753 F.3d 1, 7-8 (1st Cir. 2014).

manner restrictions”⁹⁰ – a content-neutral regulation subject to a heightened form of intermediate scrutiny. The Fifth and Eleventh Circuits have also found that the right to film police is subject to reasonable time, place, and manner restrictions.⁹¹ These limitations will be further explored in Part IV.A.

Despite ambiguity surrounding the right to record non-law enforcement government officials, the Eleventh Circuit has recognized the right to record in a circumstance more closely resembling First Amendment audits. In *Blackston v. Alabama*, the Eleventh Circuit sustained the plaintiffs’ claim that an Alabama advisory committee deprived them of their right to free speech by attempting to prohibit them from tape recording a public meeting.⁹² The plaintiffs sued, inter alia, the committee chairman for disallowing them the right to tape record the meeting.⁹³ Although the chairman did not deny the plaintiffs access to the meeting and did not prohibit them from communicating what they observed to others, the court found that the prohibition against recording did impact their ability to “obtain access to and present information.”⁹⁴ Thus, the court recognized that the actions touched on “expressive conduct protected by the Free Speech Clause of the First Amendment.”⁹⁵

The court further recognized that, while there is minimal authority on the subject, the chairman’s actions “may be regarded as a ‘time, place, and manner’ restriction on expressive conduct.”⁹⁶ The court noted that “[r]egulations enacted for the purpose of restraining speech on the basis of its content presumptively violate

⁹⁰ *Glik*, 655 F.3d at 84. *But see* *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994) (holding that regulations which suppress or restrict speech based on its content are subject to strict scrutiny).

⁹¹ *See* *Turner v. Driver*, 848 F.3d 678, 690 (5th Cir. 2017); *Toole v. City of Atlanta*, 798 F. App’x 381, 387-88 (11th Cir. 2019); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

⁹² *Blackston v. Alabama*, 30 F.3d 117, 120-21 (11th Cir. 1994) (reversing the judgment of the district court with respect to the free speech claim and affirming the dismissal of the action as to all other defendants).

⁹³ *Id.*

⁹⁴ *Id.* at 117, 120.

⁹⁵ *Id.* at 120.

⁹⁶ *Id.*

the First Amendment” and are subject to strict scrutiny.⁹⁷ Therefore, the court reversed the holding of the district court, finding that the plaintiffs stated a claim with respect to their allegations of a First Amendment violation because “it [was] *not* ‘clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.’”⁹⁸

The court’s reasoning in *Blackston* alludes to a First Amendment interpretation that protects the entire speech process, including necessary precursors to the speech itself. This postulation supports arguments affirming the constitutional protection of First Amendment audits, as explored in Part V.A.

III. THE PROBLEM WITH A FIRST AMENDMENT ABSOLUTIST APPROACH

First Amendment auditors seemingly embrace an absolutist approach to free speech and press. While often correct in claiming that their conduct is constitutionally protected, they seem to either ignore or lack awareness of the limitations to speech and press that courts have consistently recognized as appropriate. Moreover, auditors’ conduct is not protected if and when their behavior, apart from the exercise of speech or press rights, violates valid laws.

A. Legal Doctrines for Regulating First Amendment Audits

The Supreme Court has long recognized that, “despite the First Amendment’s seemingly absolutist language of ‘no law,’ there are multiple categories of speech that simply receive no constitutional protection,”⁹⁹ and even more that receive reduced protection. Contrary to Justice Black’s “no law” interpretation of the First Amendment,¹⁰⁰ content-neutral laws regulating speech are subject to intermediate scrutiny and will prevail if they satisfy

⁹⁷ *Blackstone*, 30 F.3d at 120.

⁹⁸ *Id.* at 121 (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

⁹⁹ Clay Calvert, *The First Amendment Right to Record Images of Police in Public Places: The Unreasonable Slipperiness of Reasonableness & Possible Paths Forward*, 3 TEX. A&M L. REV. 131, 159 (2015).

¹⁰⁰ *Mishkin v. New York*, 383 U.S. 502, 518 (1966) (Black, J., dissenting) (“I think the Founders of our Nation in adopting the First Amendment meant precisely that the Federal Government should pass ‘no law’ regulating speech and press but should confine its legislation to the regulation of conduct.”).

the time, place, and manner test. Moreover, the government has broader authority to regulate speech on government property under the public forum doctrine.

1. Public Forum Doctrine

As an “in-the-moment statement[] of resistance,”¹⁰¹ audits are a form of expression or speech akin to protests and therefore subject to similar protections *and* regulations. While auditors aptly urge that their conduct involves constitutionally protected activities, freedom of speech jurisprudence and Supreme Court precedent make clear that the extent of First Amendment protection often depends on the type of government property involved.

The public forum doctrine – a “judicial classification of a particular piece of property for First Amendment purposes” – aids in this determination.¹⁰² There are two veins of public forum theory: first, the traditional public forum including public streets, parks, and sidewalks; and second, all other publicly owned property. As Justice Roberts famously said over eighty years ago, traditional public forums are areas which have “immemorially been held in trust for the use of the public and, time out of mind have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”¹⁰³ Under the *Schneider* theory of the public forum, a regulation will be struck down if it censors “the exercise of the right of speech and assembly in appropriate public places.”¹⁰⁴

Outside the public forum, any regulations on speech must simply be reasonable and viewpoint-neutral.¹⁰⁵ The Ninth Circuit laid out a three-factor test to determine whether an area constitutes a traditional public forum:

¹⁰¹ Skinner-Thompson, *supra* note 47.

¹⁰² Michael J. Friedman, *Dazed and Confused: Explaining Judicial Determinations of Traditional Public Forum Status*, 82 TUL. L. REV. 929, 930 (2008).

¹⁰³ *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 515-16 (1939) (“The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation be abridged or denied.”).

¹⁰⁴ *Schneider v. State*, 308 U.S. 147, 162 (1939); *accord Hague*, 307 U.S. at 516.

¹⁰⁵ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

1) the actual use and purposes of the property, particularly status as public thoroughfare and availability of free public access to the area[;] 2) the area's physical characteristics, including its location and the existence of clear boundaries delimiting the area[;] and 3) traditional or historic use of both the property in question and other similar properties.¹⁰⁶

In addition to public property that has been “held in trust for the use of the public,” the government may designate other public spaces as forums open to the public.¹⁰⁷ In all of these spaces, regulations abridging the freedom of speech must be “reasonable in light of the use to which the building and grounds are dedicated” and there must be no content- or viewpoint-based discrimination within the traditional forum.¹⁰⁸

First Amendment audits rest on the premise that the right to access government property confers the right to exercise speech and press freedoms on that property. However, the Supreme Court in *Greer v. Spock* rejected “the principle that whenever members of the public are permitted to freely visit a place owned or operated by the Government, then that place becomes a ‘public forum’ for purposes of the First Amendment.”¹⁰⁹ The *Greer* Court noted that the purpose of the government property at issue – a military installation – was not to provide a public forum, and therefore upheld the challenged speech regulation.¹¹⁰

When assessing the legality of audits, courts must consider the nature of the location and its potential status as a public forum. The Supreme Court has held that a polling place,¹¹¹ an airport

¹⁰⁶ *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1100-01 (9th Cir. 2003) (citations omitted) (“We consider the uses and purposes of a property because by informing us of the compatibility of expressive activity with other uses of the property, they enable us to evaluate the societal costs of allowing versus restricting speech.”).

¹⁰⁷ *Hague*, 307 U.S. at 515 (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”).

¹⁰⁸ *U.S. v. Grace*, 461 U.S. 171, 178 (1983) (holding that, although the property at issue was publicly owned, it had not been “traditionally held open for the use of the public for expressive activities”).

¹⁰⁹ *Greer v. Spock*, 424 U.S. 828, 836 (1976).

¹¹⁰ *Id.* at 838.

¹¹¹ *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1886 (2018) (holding that the interior of a polling place, “at least on Election Day,” qualifies as a nonpublic forum).

terminal,¹¹² and the sidewalk outside a post office do not constitute the traditional public forum.¹¹³ Thus, the typical locations of audits – post offices, city halls, public libraries, and other government buildings – likely do not constitute the traditional public forum. However, depending on the nature of the location, certain government buildings targeted by auditors may properly be categorized as the traditional public forum under the three-factor test.

2. Time, Place, and Manner Test

Most federal courts of appeal that have recognized a constitutionally protected right to record have noted that the government can impose reasonable restrictions, but not all have elaborated on what restrictions might be appropriate.¹¹⁴ Essential to this analysis is whether the right is rooted in freedom of the press, freedom of speech, or both. The two principal theories for categorizing the right to record – first, as speech creation, either on its face or as a necessary precursor, and second, as a form of information gathering – invite different levels of judicial scrutiny.¹¹⁵ The former is subject to relatively limited restrictions, while the latter is subject to much broader restrictions.¹¹⁶

The Supreme Court proffered the time, place, and manner test for content-neutral speech regulations under which courts apply a

¹¹² *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 683 (1992).

¹¹³ *United States v. Kokinda*, 497 U.S. 720, 727, 737 (1990).

¹¹⁴ *Mullen*, *supra* note 38. But see *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011); *Gericke v. Begin*, 753 F.3d 1, 7-8 (1st Cir. 2014) for a discussion of the First Circuit's elaboration of reasonable restrictions.

¹¹⁵ *Mullen*, *supra* note 38.

¹¹⁶ *See generally* *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937) (holding that the publisher of a newspaper has no special privilege); *Branzburg v. Hayes*, 408 U.S. 665, 684 (citing *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965)) (“It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”); *New York Times Co. v. United States*, 403 U.S. 713, 728-730 (1971) (Stewart, J., concurring); *Trib. Rev. Publ'g Co. v. Thomas*, 254 F.2d 883 (3d Cir. 1958); *In re United Press Ass'ns. V. Valente*, 123 N.E.2d 777, 778 (1954).

heightened form of intermediate scrutiny.¹¹⁷ The test requires that any law limiting speech be justified without reference to the content of the speech, be “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”¹¹⁸ If a regulation prohibiting First Amendment audits survives the time, place, and manner test, then it will be upheld, and an auditor will not succeed on a First or Fourth Amendment claim.

B. When Do First Amendment Audits Cross the Line?

Aside from the act of recording, auditors may engage in behavior that is a prima facie violation of state or federal law. Pertinent laws include state and federal wiretapping statutes and breach of peace laws. The Federal Wiretap Act prohibits the interception and disclosure of any wire, oral, or electronic communication.¹¹⁹ There are ample instances of individuals prosecuted under state wiretapping laws for filming police conduct.¹²⁰

However, arguably the most significant issue arising from First Amendment audits is if and when the conduct constitutes interference with public officials’ ability to execute their duties. Auditors and their supporters contend that filming on public property is a constitutional right, the exercise of which does not inherently interfere with or even necessitate the involvement of public officials. Rather, auditors would argue it is only when a

¹¹⁷ See *McCullen v. Coakley*, 573 U.S. 464, 477 (2014) (invalidating state law prohibiting abortion opponents from engaging in sidewalk counseling to arriving patients because the Commonwealth had other approaches that did not exclude individuals from public ways); *Frisby v. Shultz*, 487 U.S. 474, 482 (1988) (upholding a prohibition against picketing because of the substantial state interest). Examples of time, place, and manner restrictions include limits on noise level or number of protesters at a given forum, prohibiting early-morning or late-night demonstrations, and restricting the size of signs on government property. Kevin Francis O’Neill, *Time Place and Manner Restrictions*, THE FREE SPEECH CTR. (July 30, 2023), <https://firstamendment.mtsu.edu/article/time-place-and-manner-restrictions> [https://perma.cc/CF2X-GV22].

¹¹⁸ *Frisby*, 487 U.S. at 481 (citing *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

¹¹⁹ 18 U.S.C. § 2511(1)(a).

¹²⁰ See, e.g., *Commonwealth v. Hyde*, 750 N.E.2d 963 (Mass. 2001); *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014).

government employee attempts to infringe any First Amendment right that they may be implicated in their official capacity.

Still, some state laws aim to restrict filming police officers as they perform official duties.¹²¹ Section 38.15 of the Texas Penal Code states that an individual commits an offense if, with criminal negligence, he or she “interrupts, disrupts, impedes, or otherwise interferes with” a peace officer’s ability to carry out his duties,¹²² but the statute provides a defense if the alleged interference consists of speech only.¹²³ Though laws like this may be more difficult to apply to First Amendment audits, the rationale behind such regulations is relevant: prevent interference with public servants’ ability to perform their duties.

Moreover, when the goal of an auditor is to prompt a negative encounter, assessing the audit’s legality requires a more nuanced analysis. Unlike other examples of recording as an exercise of First Amendment freedoms, audits depend upon the response of government officials to the act of recording itself. Because of this, auditors’ conduct, under the guise of First Amendment expression, may be considered intentional provocation of government employees.

Such is the case for First Amendment auditor Zhoie Perez, who received criticism for filming outside a synagogue in early 2019.¹²⁴ A security guard shot Perez after she did not respond to his questions regarding why she was filming the institution.¹²⁵ Some questioned the wisdom of auditing this location at a time when the United States witnessed a notable increase in anti-Semitic hate crimes.¹²⁶ One reporter noted that “while many agree that the

¹²¹ See, e.g., COLO. REV. STAT. § 16-3-311 (2023); HAW. REV. STAT. § 711-1111(1)(d) (2023); N.Y. CIV. RIGHTS LAW § 79-p (McKinney 2023).

¹²² TEX. PENAL CODE ANN. § 38.15(a) (West 2023).

¹²³ TEX. PENAL CODE ANN. § 38.15(d) (West 2023).

¹²⁴ Lukas Mikelionis, *Online Activists’ First Amendment Audits – Patriotism or Provocation?*, FOX NEWS (Feb. 16, 2019, 5:23 AM), <https://www.foxnews.com/us/youtuber-shot-by-synagogue-guard-is-part-of-first-amendment-audit-online-movement-testing-authorities> [https://perma.cc/T6WG-K2VN].

¹²⁵ *Id.*

¹²⁶ *Id.* In 2018, a gunman took the lives of eleven people at the Tree of Life Synagogue in Pittsburgh – the deadliest attack on Jews in American history. *Antisemitism and Hate Crimes*, RELIGIOUS ACTION CTR. OF REFORM JUDAISM (Oct. 25, 2023, 7:43 PM), <https://rac.org/issues/antisemitism-and-hate-crimes> [https://perma.cc/CF2X-GV22].

auditing practice is an interesting modern way to make some law enforcement officials accountable, some have questioned whether auditors aren't responsible for provoking officers into conversation just for the sake of extra views on YouTube."¹²⁷

Even run-of-the-mill audits may be viewed as public disturbances. Although auditors outwardly assert that their goal is to test the right to record in public spaces and even "commend[] those who respect it,"¹²⁸ there is an unspoken objective to create a notable encounter in a bid to wrangle more viewers and subscribers online.¹²⁹ To this end, the auditors cause a scene in government buildings and, in doing so, inhibit the public's ability to conduct business. Auditors enter government buildings hoping to encounter – or generate – a problem, taking the time and energy of public servants at a cost to individuals legitimately needing their service.

Despite the practice's shortfalls, however, First Amendment audits can be viewed as a socio-political movement that surmounts any inconvenience or disturbance it may cause. That is, audits serve as a demonstration of fundamental constitutional rights and an effort to safeguard those rights from slow but steady government overreach.

IV. EXPLORING THE EFFICACY OF LEGAL FRAMEWORKS FOR CONCEPTUALIZING FIRST AMENDMENT AUDITS

A. *Audits as an Exercise of Free Speech*

Auditors have a strong claim that their conduct constitutes an exercise of free speech. Not only do courts give significant weight to the "expressive dimension" of recording in right-to-record cases,¹³⁰ but the recording itself serves as a precursor to speech and may well

¹²⁷ Mikelionis, *supra* note 124.

¹²⁸ FIRSTAMENDMENTAUDITING.COM, <https://www.firstamendmentauditing.com/> [<https://perma.cc/K9VX-4T98>] (last updated June 13, 2023).

¹²⁹ See *infra* Part VI.A.

¹³⁰ Skinner-Thompson, *supra* note 47, at 144-45, 164 ("In short, although courts have gestured to theoretical limitations on the right to record in the form of content-neutral time, place, and manner restrictions, they have rarely upheld any restrictions. Put differently, though the outcomes of [relevant] cases may have been correct because ambient or bystander privacy harms were not vociferously raised, the gestalt of this jurisprudence risks the impression that the right to record activity in public space and government actors is not susceptible to meaningful constitutional limitation.").

be considered part of the “speech process.”¹³¹ Moreover, First Amendment audits, in many ways, represent an unconventional means to assert, test, and safeguard First Amendment rights from perceived infringement.

Although auditors do not explicitly claim to be sharing any specific opinion through their audits, the conduct is inherently expressive. The audits themselves, while testing officials’ response to the exercise of First Amendment rights, represent a critique of government overreach and a check on institutional power. Auditors, through their conduct, send a message that they will not tolerate even a slight overreach. Further, the audits can be viewed as an attempt to reclaim power. Thus, auditors have a strong argument that their conduct is expressive and therefore protected under the First Amendment’s freedom of speech guarantee.

In addition to the expressive dimension of recording, the conduct itself is a necessary precursor to speech and thus constitutes the creation of speech. Although not every court has recognized recording as a protected First Amendment activity, precedent in many circuits suggests freedom of speech reaches all parts of the speech process, including speech creation.¹³² Video recordings of First Amendment audits are the first step in the auditor’s process of sharing their message. Auditors often address their audience while recording and use the context of the audit to facilitate a conversation about whatever issues arise. Once the video is recorded, the auditors may offer additional speech in the form of captions, text, imagery, and voiceover commentary added to the video before posting. The speech process encompasses each of these stages, from the beginning of the audit to the dissemination of the final product.

U.S. common law has recognized the importance of respecting and safeguarding First Amendment principles through the use of the overbreadth doctrine, which reflects the judiciary’s perennial apprehension toward any effort to restrict free speech.¹³³ To challenge a law as unconstitutional, litigants generally must

¹³¹ Marceau & Chen, *supra* note 42, at 1047.

¹³² Blackston v. Alabama, 30 F.3d 117, 120 (11th Cir. 1994).

¹³³ See generally Richard Parker, *Overbreadth*, The First Amendment Encyclopedia, THE FREE SPEECH CTR. (Aug. 11, 2023), <https://www.mtsu.edu/first-amendment/article/1005/overbreadth> [<https://perma.cc/2W78-DBMP>].

demonstrate either an applied or facial challenge.¹³⁴ That is, that the law is unconstitutional as applied to themselves or that there are no circumstances in which the law would be constitutional.¹³⁵ But the overbreadth doctrine, which generally arises in the context of First Amendment challenges, provides an exception to this general rule.¹³⁶

The Supreme Court has held that general limitations on third-party standing might not apply if a law regulating speech sweeps too broadly so as to prohibit protected speech.¹³⁷ Such a regulation is unconstitutional “if it regulates a substantial amount of constitutionally protected expression.”¹³⁸ The Supreme Court in *Thornhill v. Alabama*, a leading case on the overbreadth doctrine, held that “where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression.”¹³⁹ The Court therefore found that the petitioner could challenge the sweeping regulations of a state law restricting speech despite a lack of traditional standing – that is, a personal injury in fact to their own legal interests.¹⁴⁰

Both First Amendment audits and the overbreadth doctrine are rooted in the premise that laws which unconstitutionally restrict First Amendment rights must be challenged. However, rather than attempting to circumvent traditional standing requirements via the overbreadth doctrine, auditors instead intentionally generate constitutional violation claims. While some may argue that this artificiality undermines the process, their

¹³⁴ Constitution Annotated, *Art III, S2, C1, 6, 6.6 Overbreadth Doctrine*, LIBR. OF CONG., https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-6-6/ALDE_00013008/ [<https://perma.cc/4B5L-DQJN>] (last visited Nov. 18, 2022) (citing *Clements v. Fashing*, 457 U.S. 957, 966 n.3 (1982) (“A litigant has standing to challenge the constitutionality of a statute only insofar as it adversely affects his own rights.”)).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Parker*, *supra* note 133.

¹³⁸ *Id.*

¹³⁹ *Thornhill v. Alabama*, 310 U.S. 88, 96-98 (1940) (citations omitted) (rejecting the state’s argument “that petitioner may not complain of the deprivation of any rights but his own”).

¹⁴⁰ *Id.* at 96.

conduct serves the same objectives and may yield the same results as the overbreadth doctrine.

Proponents of First Amendment audits have a strong argument that the practice is entitled to First Amendment protections as both an example of the speech process and an expressive activity. The government may nonetheless impose reasonable regulations that restrict this First Amendment exercise to varying degrees depending on the nature of the public property involved.

B. Audits as an Exercise of Free Press

First Amendment auditors test how public officials respond to recordings with the intent to share their findings with the public. They may also conduct proper public records requests during the process. This legitimate purpose supports the claim that First Amendment audits are protected under freedom of the press. Moreover, many First Amendment auditors identify as independent or “citizen” journalists.¹⁴¹ Under the broad application of *Branzburg* employed by courts in subsequent cases, auditors may be properly classified as journalists, though this is a relatively immaterial finding because the press generally is not entitled to special rights.¹⁴² Still, auditors claim one of their overarching goals is to collect information for dissemination to the public – conduct that fits comfortably within the purview of the press.

Scholars argue that First Amendment interests ranging from “the watchdog role of the press to discovery of truth under the marketplace of ideas theory” are furthered by the right to record issues of public concern.¹⁴³ Audits fulfill both of these roles by demonstrating that the public is prepared to hold government

¹⁴¹ Long Island Audit, *Security Guards Illegally Detain Journalist Over a Camera! Get Educated by Federal Law Enforcement!*, YOUTUBE (Nov. 13, 2022), https://www.youtube.com/watch?v=q_QGu6Bpqeo [<https://perma.cc/2DJ7-BJG5>].

¹⁴² See Cornell Law School, *First Amendment*, Overview, LEGAL INFO. INST. (Dec. 2022), https://www.law.cornell.edu/wex/first_amendment#:~:text=It%20allows%20an%20individual%20to,afforded%20to%20citizens%20in%20general [<https://perma.cc/JZ37-9K2Z>].

¹⁴³ Calvert, *supra* note 99, at 131 (advocating for a form of judicial review akin to strict scrutiny).

employees accountable and by revealing the treatment and status of certain First Amendment rights.

The Government Accountability YouTube channel is dedicated to First Amendment audits and proclaims that, “We The People have the right, and the duty to keep a close, watchful eye on our government, and its employees.”¹⁴⁴ The channel emphasizes the importance of documenting interactions with government employees using cameras and other recording devices as well as requesting body-camera footage from law enforcement and pulling records or reports by and on government officials.¹⁴⁵

Under the generally accepted conception of the press, and by auditors’ own identification, First Amendment audits may properly be categorized as an exercise of the First Amendment’s freedom of press guarantee. This is not to discount, however, the absence of special rights conferred on the press and the government’s authority to regulate First Amendment activity on public property.

C. The Nature and Nuances of Audits as a Challenge to First Amendment Protections

The analysis of First Amendment audits is further complicated by the inherent complexities triggered by competing motives and purposes underpinning the practice. Although audits may appear expressive, a freedom of expression claim is undermined if the conduct is nothing more than theatrics undertaken to boost social media followings and increase viewership. Additionally, the motives and nature of the audits must be considered when analyzing application of the First Amendment’s free press guarantee.

1. Expressive Conduct or Manipulative Theatrics?

Despite arguments that First Amendment audits serve as a statement of resistance and represent a critique of official conduct, the analysis must recognize that auditors are content creators, many of whom make money by providing entertainment to their viewers. Thus, at their core, the audits may actually represent a theatrical presentation rather than an act of true expression.

¹⁴⁴ Government Accountability, *supra* note 67.

¹⁴⁵ *Id.*

Without resistance from government officials, auditors would have no story to tell or expressive conduct in which to engage. Rather, it appears that much of the encounter is artificially generated and planned beforehand.

2. First Amendment Audits Are Critically Different Than Filming Police Encounters.

The purpose and justification for video recording police encounters is significantly greater than that of arbitrarily recording within public buildings — a clear potential danger is attached to the former but not the latter. Therefore, audits as an act of free press can and should be subject to broader restrictions and regulations. In *Glik v. Cunniffe*, the First Circuit noted that, “[i]n our society, police officers are expected to endure significant burden caused by citizens exercise of their First Amendment rights.”¹⁴⁶ However, the same cannot be said for other public servants.

Similar to First Amendment audits, there is a relatively new phenomenon of “copwatching,” which involves “organized community groups that patrol neighborhoods in order to watch and record police conduct.”¹⁴⁷ Copwatching organizations, like auditors, also seek to educate the public about their rights.¹⁴⁸ However, they fulfill broader and more urgent purposes, including, “reduc[ing] police violence . . . documenting incidents . . . [and] provid[ing] support to victims.”¹⁴⁹

Nonetheless, many auditors revere copwatching and incorporate elements of the practice into their audits or promote

¹⁴⁶ *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011).

¹⁴⁷ Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 923-24 (2015). Berkeley Copwatch claims to be the original copwatch group, beginning in 1990, with similar organizations emerging across the country since then. *Mission*, BERKELEY COPWATCH, <https://www.berkeleycopwatch.org/about> [https://perma.cc/RS6E-7RZT] (last visited Nov. 15, 2023).

¹⁴⁸ BERKELEY COPWATCH, *supra* note 147.

¹⁴⁹ *Id.*

copwatching principles on their platforms.¹⁵⁰ Copwatching can be contrasted with First Amendment audits, however, because the former addresses a public concern, while the latter *creates* a public concern. Unlike those who film law enforcement activities, auditors bootstrap a story for their videos that would not exist otherwise; thus, audits operate antithetically to copwatching in some ways.

Moreover, police encounters typically take place and are recorded outside, on public streets and sidewalks, where there is a stronger argument that the individual is within the “public forum.”¹⁵¹ In contrast, audits typically take place in government buildings and are naturally subject to greater regulation.

3. Bootstrapping a Story

Detractors argue that auditors do not conduct objective reporting but rather seek to embarrass or shame the government.¹⁵² Moreover, a peek behind the smokescreens and clickbait titles reveals that auditors are, in fact, bootstrapping a story to their conduct when there otherwise would be no information to gather or story to tell. Without a dramatic and entertaining encounter with local officials, the auditors would have no noteworthy video to share or story to tell – at least not one that would generate the same level of attention and fascination. This paradox undermines the claim that First Amendment audits serve a press function.

¹⁵⁰ See generally Robert Klmko, Cop-watchers are now YouTube celebrities. They’ve changed how police work, *The Washington Post* (Aug. 7, 2023), <https://www.washingtonpost.com/national-security/2023/08/07/cop-watchers-auditors-youtube-police/> [<https://perma.cc/X5TQ-87JW>]; Freedom 2 Film (@Freedom2Film574), *About*, YOUTUBE (Feb. 24, 2007), <https://www.youtube.com/@Freedom2Film574/about> [<https://perma.cc/JA64-86Q9>]; Constitution Cowboy, *supra* note 9; Government Accountability, *supra* note 67.

¹⁵¹ See *supra* Part IV.A.1.

¹⁵² See, e.g., Hunter Kelly, *Demonetize and Regulate 1st Amendment Auditors on YouTube*, Change.org (May 31, 2022), <https://www.change.org/p/demonitize-and-regulate-1st-amendment-auditors-on-youtube> [<https://perma.cc/9EYY-ENBJ>] (arguing that YouTube should bar First Amendment Auditors from profiting off of their videos because their actions constitute “harassment” which YouTube does not tolerate); Nott, *supra* note 7 (“Critics of First Amendment audits have argued that audits use tactics like intimidation and harassment to provoke public officials or employees into violating the First Amendment.”).

V. ASSESSING THE VIRTUE OF FIRST AMENDMENT AUDITS

First Amendment auditors like Reyes often receive backlash from those who find their activities obnoxious, instigative, or inflammatory. An op-ed posted in *Law Enforcement Today* sharply criticized Reyes and similar activists as “punks,” accusing Reyes of “finding ways to incite police into confronting him.”¹⁵³ Indeed, one video posted to the “NY State Audit” YouTube channel captured an officer’s exasperation by this practice.¹⁵⁴ The officer can be heard telling the auditor, “Is this your goal? Is your goal to . . . be contacted by the police and have us handcuff you and do all that?”¹⁵⁵

While auditors maintain that their goal is to test knowledge of the Constitution and even commend those who respect the right to record,¹⁵⁶ they are less likely to share videos of positive encounters, which lack the same sensational appeal.¹⁵⁷ However, while auditors may achieve self-serving goals of internet fame and occasional litigation payouts, they also generate warranted skepticism of the government and illuminate issues of public concern.

As Leavey opined, “[t]he broad appeal of First Amendment auditing is an expression of shared American political cultural values.”¹⁵⁸ It is clear in the context of police brutality and the Black Lives Matter movement that video recordings are a powerful tool

¹⁵³ Sgt. A. Merica, *supra* note 19.

¹⁵⁴ NY State Audit, *Recording The Police – First Amendment Audit*, YOUTUBE (Oct. 13, 2022), <https://www.youtube.com/shorts/re8kHC5JW80> [<https://perma.cc/2A6B-VU7X>].

¹⁵⁵ *Id.*

¹⁵⁶ See *supra* note 3 and accompanying text.

¹⁵⁷ See *Reducing Risk from First Amendment Audits*, VT. LEAGUE OF CITIES & TOWNS (Apr. 12, 2022), <https://www.vlct.org/resource/reducing-risk-first-amendment-audits#:~:text=A%20%20E2%80%9CFirst%20Amendment%20audit%20%20E2%80%9D%20is,record%20in%20public%20is%20preserved> [<https://perma.cc/5T5P-9K7J>] (“A First Amendment audit that goes well is rarely seen in public and is a boon to the municipality for being cognizant of, and supporting, First Amendment rights. Any lack of controversy or perceived overreach by a government official is not newsworthy and is generally not posted.”).

¹⁵⁸ Leavey, *supra* note 2, at 82.

for exposing the corrupt and unlawful practices of government officials.¹⁵⁹

A. *Self-Serving Interests in Conflict with Promotion of First Amendment Values?*

1. Internet Fame

Some people have criticized First Amendment audits, claiming the auditors are motivated by profit and growing their online following.¹⁶⁰ Many prominent auditors profit from posting their videos online and may become minor internet celebrities as their online following grows.

On his webpage, Reyes asks people to send him money via a donation page¹⁶¹ and includes a link to an online store where he sells “Long Island Audit” apparel, raising questions for some as to the legitimacy of his motives and activities.¹⁶² Reyes has also raised over \$49,000 from his GoFundMe page, where he tells fans that their donations will help cover the legal fees he incurs from “unlawful arrests and violations of [his] rights.”¹⁶³

Profiting from this fame, as Reyes has done, is not uncommon. The individual behind the YouTube channel “Accountability For All” shares a link to his PayPal and CashApp accounts so followers

¹⁵⁹ Rashwan Ray, *Black Lives Matter at 10 Years: 8 Ways the Movement Has Been Highly Effective*, BROOKINGS INST. (Oct. 12, 2022), <https://www.brookings.edu/articles/black-lives-matter-at-10-years-what-impact-has-it-had-on-policing/#:~:text=This%20attitudinal%20shift%20created%20a,bans%20on%20no%2Dknock%20warrants> [https://perma.cc/E9TH-YMUG], (“Black Lives Matter helped usher in a series of policy and organizational changes to policing that include implicit bias trainings, body-worn cameras, and bans on no-knock warrants.”).

¹⁶⁰ See Kelly, *supra* note 152.

¹⁶¹ Leavey, *supra* note 2, at 82.

¹⁶² Long Island Audit, *supra* note 11.

¹⁶³ Sean Paul Reyes, *Support the Fight Against Tyranny & Corruption!*, GOFUNDME, https://www.gofundme.com/f/help-long-island-audit-travel-to-educate-tyrants?utm_campaign=p_cf+share-flow-1&utm_medium=copy_link&utm_source=customer [https://perma.cc/BH2V-K7H7] (last visited Nov. 17, 2022).

can send him money to “CONTINUE THE BATTLE FOR FREEDOM EVERY DAY BY PRACTICING OUR RIGHTS”¹⁶⁴

2. Litigation Jackpots

As previously mentioned, many First Amendment auditors are motivated by the potential for litigation. While litigation may bolster the auditor’s illustration of the underlying constitutional issues at play, it also – and maybe more importantly – can be a source of major profit.

In *Dunn v. City of Fort Valley*, deputies with the Fort Valley Police Department arrested Kennon Dunn, a self-described citizen-journalist,¹⁶⁵ after he took pictures and recorded videos while executing a public records request in the Marshallville City Hall.¹⁶⁶ Dunn brought a First Amendment claim against the City of Fort Valley and several officers, which the defendants sought to dismiss.¹⁶⁷ The court denied the defendants’ motion to dismiss, finding Dunn’s conduct protected under the First Amendment.¹⁶⁸ Dunn subsequently settled with Marshallville and Macon County, Georgia for \$95,000.¹⁶⁹

In November 2017, Terrell Clayton, a First Amendment auditor who runs the YouTube channel “News Now Colorado,”¹⁷⁰

¹⁶⁴ Accountability For All (@AccountabilityForAll), YOUTUBE, *About*, <https://www.youtube.com/c/AccountabilityForAll/about> [https://perma.cc/E75T-34PT] (last visited Oct. 15, 2022). The individual behind this account calls himself the “police paparazzi” and is a de facto First Amendment auditor who posts video recordings of his encounters with police and other public officials. *Id.*

¹⁶⁵ *Dunn v. City of Fort Valley*, 464 F. Supp. 3d 1347, 1354 (M.D. Ga. 2020). Dunn distributes his news and broadcast videos online to the more than 8,000 followers of his YouTube channel; the broadcasts focus on issues of government accountability and “educating the public on civic engagement and constitutional rights.” *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* (denying defendants’ motion to dismiss).

¹⁶⁸ *Id.* (noting that it should not be considered unusual for citizens to take pictures of public officials on public property).

¹⁶⁹ Greg Land, *Citizen Journalist Settles Arrest Claims with Macon County, Marshallville for \$95K*, THE DAILY REP. (Aug. 27, 2021, 2:42 PM), <https://www.law.com/dailyreportonline/2021/08/27/citizen-journalist-settles-video-arrest-claims-with-macon-county-marshallville-for-95k/?sreturn=20230929185736#:~:text=Citizen%20journalist%20Kennon%20Dunn%20was,city%20and%20county%20total%20%2495%2C000> [https://perma.cc/68FR-4ES5].

¹⁷⁰ FreedomBurgerTV, YOUTUBE, <https://www.youtube.com/channel/UCmQIIF7oc5d4MFoqCLYWxrA> [https://perma.cc/N8EE-2JYH] (last visited Nov. 14, 2022).

conducted an audit outside the Colorado Springs police station.¹⁷¹ Officers approached Clayton, demanded identification, and told him he was “‘acting suspicious’ by recording the police station.”¹⁷² The officers took Clayton’s camera and detained him in the backseat of a patrol car.¹⁷³ Clayton subsequently sued the city and settled the case for \$41,000.¹⁷⁴

The self-serving interests of auditors are relevant to an assessment of the practice’s legality because these interests may undermine claims that First Amendment audits serve as a form of expression or a press function. An argument that First Amendment audits act as a statement of resistance or a means to collect and disseminate information about the government is weakened if and when the intent behind the audit is purely financial gain. The intent to profit and the intent to facilitate discussions on issues of public concern, however, can overlap and this likely is the case for many First Amendment auditors.

B. Audits Promote a Healthy Skepticism of Government

Despite the presence of self-serving interests, the audits themselves serve as a check on government power and conduct. Discussing the right to record, Professor Scott Skinner Thompson argues that the right to record is important because it offers five benefits to society:

- (1) [it] creates a record of an activity and is a form of information gathering, which
- (2) enables future dissemination and critique of the recorded activity and
- (3) facilitates a diversity of views. *Inherently*, recording the police and other government officials
- (4) serves as an in-the-moment statement

¹⁷¹ Carlos Miller, *Colorado Man Detained for Recording Police Station Awarded \$41,000 Settlement*, PINAC NEWS (Jun. 1, 2018), <https://pinacnews.com/index.php/2018/06/01/colorado-man-detained-for-recording-police-station-awarded-41000-settlement/> [<https://perma.cc/8W2E-DRSV>].

¹⁷² *Id.*

¹⁷³ Andy Koen, *This Case Motivated the ACLU of Colorado to Develop an App to Record the Police*, KOAA NEWS5 S. COLO. (Feb. 17, 2019, 3:23 PM), <https://www.koaa.com/news/2019/02/17/this-case-motivated-the-aclu-of-colorado-to-develop-an-app-to-record-the-police/> [<https://perma.cc/JC6N-Q95M>].

¹⁷⁴ *Id.*

of resistance and critique of the government officials' actions, helping to hold them immediately accountable. It also (5) helps to reclaim public space for the people, pushing back against efforts to police publicly owned land.¹⁷⁵

As Skinner-Thompson notes, audits undoubtedly serve as an information gathering tool, and inextricably intertwined with information gathering is the watchdog role of the press. This idea is most clearly illustrated by the recording of police encounters but can be applied to audits as well. Leavey notes that "First Amendment auditors use[] their knowledge of the law, lack of conflict aversion, and shaming tactics to resist what they have perceived as authoritarian behavior."¹⁷⁶ In addition to revealing unlawful, corrupt, or simply bad behavior by local officials, the mere act of recording serves as a check on government power by deterring such behavior.

To achieve these objectives, auditors target street-level officials, and while each individual encounter alone may seem inconsequential, auditors are able to draw attention to the larger systemic issues underlying the isolated event by sharing the recordings with large online audiences.

So not only do First Amendment audits have the power to hold accountable those individual street-level officials who are the focus of the audits, but the practice represents a broader critique of government authority and overreach. The videos propound a sentiment of suspicion and distrust toward the government and its duty to observe and respect the people's rights.

As the Supreme Court recognized in *Citizens United v. FEC*, the First Amendment is "premised on mistrust of governmental power."¹⁷⁷ By targeting street-level officials, "auditors take on powerful [government] institutions, such as the police and other parts of the security apparatus, subjecting them to sousveillance in

¹⁷⁵ Skinner-Thompson, *supra* note 47 (comparing the inherent First Amendment values of recording and privacy).

¹⁷⁶ Leavey, *supra* note 2, at 76 ("First Amendment auditing, with all of the controversy surrounding it, can be an effective 'check' on the power of government employees in everyday interactions on the street or otherwise.").

¹⁷⁷ *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

the effort to illuminate the curtailing of basic civil rights.”¹⁷⁸ Underpinning all audits is the belief that any government employee, regardless of rank or power, is accountable to “the People,” and must observe and respect constitutional rights.¹⁷⁹

C. Audits Illuminate Issues of Public Concern

In addition to providing a check on government power, First Amendment audits are a means to reveal the unlawful practices, misconduct, and inadequate training of government officials. Despite questionable tactics, audits are purported educational tools and, true to this claim, often do expose gaps in constitutional knowledge afflicting government institutions. The antagonistic approach employed by some auditors also reveals the lack of de-escalation tactics employed by local officials and law enforcement, illuminating the need for improved training.

As such, First Amendment audits can serve as the genesis for positive change in local communities. Following settlement agreements in *Dunn*, Marshallville and Macon County both agreed to institute training and policy changes for their officers and to ensure that Open Records Act requests are handled in accordance with Georgia law.¹⁸⁰

In May 2018, following the city’s settlement agreement with Terrel Clayton,¹⁸¹ the Colorado Springs Police Department issued General Order 1551, which specifies “the relationship between members of the police department and those individuals who wish to document their activity in any form, such as audio or video

¹⁷⁸ Leavey, *supra* note 2, at 83 (“In this function, First Amendment auditors ‘take the temperature’ of our democratic body politic by testing the capacity of those holding state power to understand the First Amendment even in its most basic application, and in turn, disrupt the power of ‘law and order’ discourses and ideological dominance of the juridical system through communicative action.”).

¹⁷⁹ See Leavey, *supra* note 2, at 76 (arguing that the philosophy behind some audits is the understanding that “even those lower on the hierarchy enforce unconstitutional rules and behave in ways unbecoming of public employees”).

¹⁸⁰ Land, *supra* note 169.

¹⁸¹ See *supra* notes 170-174 and accompanying text.

recording.”¹⁸² The order explicitly states that “[r]ecording of police activity is protected under the First Amendment.”¹⁸³

In 2018, in response to First Amendment audits, PoliceOne Academy published guidance for police officers detailing how to respond to First Amendment audits. The guidance is designed to help people learn more about “the public’s constitutionally held right to record public activity and disseminate that information across a variety of platforms for people to view.”¹⁸⁴

In 2017, the Community Oriented Policing Services published a manual in response to the increasing frequency of First Amendment audits which provided training for law enforcement on constitutional rights.¹⁸⁵ The manual advises that recording police activity is protected speech under the First Amendment, though it recognizes the right is not absolute.¹⁸⁶

Even audits by Sean Paul Reyes – a quintessential example of the controversial and provocative First Amendment auditor – have resulted in penalties, suspensions, and mandatory training refreshers for officers involved.¹⁸⁷ Leavey argues that “auditors have hoped to educate officers and viewers to spur change in street-

¹⁸² General Order 1551, COLO. SPRINGS POLICE DEPT. (May 22, 2018), https://coloradosprings.gov/sites/default/files/go_1551_recording_of_police_activity_active_05-22-2018_002.pdf [<https://perma.cc/9GGX-TC2U>].

¹⁸³ *Id.* (citing Letter Re: Christopher Sharp v. Balt. City Police Dep’t, et. al., U.S. Department of Justice Civil Rights Division (May 14, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/05/17/Sharp_ltr_5-14-12.pdf [<https://perma.cc/2CYS-25RM>]) (“Recording of governmental officers engaged in public duties is a form of free speech, through which private individuals may gather and disseminate information of public concern, including the conduct of law enforcement officers.” (internal quotation marks omitted)).

¹⁸⁴ Kevin Baysinger & Michael Thomas, *You’re on Camera: How Police Should Respond to a First Amendment Audit*, POLICE1 ACAD. (May 2, 2018), <https://www.police1.com/police-training/articles/youre-on-camera-how-police-should-respond-to-a-first-amendment-audit-bxahwGYD4uNsVIZM/> [<https://perma.cc/V8EK-8G3P>] (an online resource providing law enforcement with information and resources).

¹⁸⁵ *Public Recording of Police Activities: Instructor’s Guide*, CMTY. ORIENTED POLICING SRVCS., <https://www.theiacp.org/sites/default/files/pdf/PROP%20Instructor’s%20Guide.pdf> [<https://perma.cc/E7GK-7B2V>].

¹⁸⁶ *Id.*

¹⁸⁷ See Julia Perkins, *Four Danbury Police Officers Face Discipline for Library YouTube Incident Following Investigation*, NEWSTIMES, (Aug. 27, 2021, 6:43 PM), <https://www.newstimes.com/local/article/Four-Danbury-police-officers-face-discipline-for-16416928.php> [<https://perma.cc/X4V9-LER5>].

level policework, and inspire confidence among the policed, by broadcasting audits across the social media networks. . . .”¹⁸⁸

Just as any other social movement or form of activism, First Amendment audits have the result – even if not the primary intent – of affecting positive policy and legislative change. First Amendment audits also have the power to bolster civil rights efforts by highlighting issues of public concern that do not involve class dimensions.¹⁸⁹ In doing so, the audits may amplify voices of, and increase general familiarity with, the civil rights movement.¹⁹⁰ Indeed, by publicizing negative encounters with law enforcement outside the context of traditional police brutality and the Black Lives Matter movement, First Amendment auditors can generate greater interest in and sympathy towards these movements.¹⁹¹ Moreover, First Amendment audits provide a lens through which to better understand the “divisive political culture” within the United States and how “constitutional idealism is a shared set of values . . .”¹⁹²

Leavey articulated,

As the US continues to cope with its political cultural fissures, attention to auditors/auditing will not only provide us with techniques for street-level engagements with police and keeping everyday authoritarianism in check, it will also help us with identifying social tensions and anxieties, while encouraging a shared commitment to the US Constitution, which, as a coordinating device for institutional structure and

¹⁸⁸ Leavey, *supra* note 2, at 76-77.

¹⁸⁹ See Leavey, *supra* note 2, at 74, 78 (“[M]ost auditors appear to be working and lower-middle-class men and some middle-middle-class men, who were largely white, with a few Black and Latino practitioners. The mediated public sphere, as composed by social media platforms, provided a space for members of raced, gendered, and classed counterpublics, and other non-bourgeois people, to insert themselves into the discursive field.”).

¹⁹⁰ See Leavey, *supra* note 2, at 74 (arguing that First Amendment audits have the capacity to “amplify the voices on non-bourgeois subjects in the mediated public sphere, demonstrate their power through the circulation of interactions with the police and other street-level bureaucrats, and nudge those with legal or public authority over others to be familiar and fair with the application of civil rights”).

¹⁹¹ See *Id.* (arguing that First Amendment audits are a useful lens through which to “observe and better understand the historical, ideological, and discursive tensions currently affecting the US”).

¹⁹² Leavey, *supra* note 2, at 80.

social contract, could help the nation retain democratic stability into the future.¹⁹³

CONCLUSION

First Amendment audits may properly be viewed as both an exercise of the First Amendment's free speech and free press clauses. The conduct not only constitutes a form of expression akin to traditional protests, but the act of recording also falls within the speech process protected under the First Amendment. With little to no distinction between the traditional press and general public, audits may also be viewed as an exercise of the free press. Nonetheless, application of First Amendment principles is challenged by the complex motives and nuances of audits. Moreover, contrary to auditors' absolutist approach, the government may impose reasonable and content-neutral restrictions on speech under the public forum doctrine.

While First Amendment audits are undoubtedly controversial when viewed as an anti-government socio-political movement, the core of the legal controversy lies with auditors' absolutist approach to the First Amendment. Auditors are indeed correct that their activity falls within the purview of the First Amendment as an exercise of speech and press rights; however, the Supreme Court repeatedly has held that the government may impose reasonable regulations when a First Amendment activity takes place on government property. It is this distinction, which auditors fail to recognize, that misguides the confidence of many and results in a hardline approach that often has little to no legal support.

Regardless of their legal status or complex motives, however, audits have the ability to further legitimate public interests. They can promote a healthy skepticism of government, provide a check on institutional power, and illuminate issues of public concern in a way that reaches beyond the First Amendment and supports socio-political movements across the board.

¹⁹³ *Id.* at 84.

